

FINAL REPORT
OF THE
MALDIVIAN PENAL LAW & SENTENCING
CODIFICATION PROJECT

Volume 2
Official Commentary

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DRAFT CRIMES & SENTENCING CODE

Official Commentary

PART I: GENERAL PART

PRELIMINARY PROVISIONS

CHAPTER 10. PRELIMINARY PROVISIONS

This Chapter outlines the framework for the criminal code. Section 11(a) describes the broad interpretive principles to be employed for understanding the language in the draft Code. Section 11(b) describes the objectives of Islamic law, which are used as the operating mechanism for this Code. Section 12 prevents the promotion of any criminal law outside of this Code. Section 13 establishes the jurisdictional reach of the Code. Section 14 promotes the right of individuals to seek civil remedies outside of the criminal justice system. Section 15 notes the necessary elements for proving guilt. Section 16 requires legislative review of monetary amounts in the Code to insure adequate renewal of previous amounts. Section 17 serves as an index to key terms used in the Code.

SECTION 10 – SHORT TITLE AND EFFECTIVE DATE

Corresponding Current Provision(s): Maldivian Constitution, Ch. 1, Provision 17

Comment:

Generally. Subsections (b) and (c) prevent retroactive application of new standards to offenses committed prior to the enactment of the new code. Which law, current or draft, is applied to a crime depends on the effective date. The effective date is the date when the draft Code passes Parliament. Crimes committed after the effective date will only be covered by the draft Code. Crimes committed before the effective date will have the current law applied to them.

Relation to current Maldivian law. The Maldivian Constitution supports this Section: “No law shall authorize the punishment of a person for an act or omission that did not constitute a criminal offense at the time of the act or omission.” Maldivian Constitution Chapter 1, Provision 17. This corresponds to the fundamental Islamic legal concept of *taklif*, which requires, among other things, “knowledge of the person under legal obligation about the command.”¹

¹ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 295 (Islamic Research Institute Islamabad 1993).

SECTION 11 – PRINCIPLE OF CONSTRUCTION; GENERAL PURPOSES

Corresponding Current Provision(s): Maldivian Constitution, Ch. 1, Provisions 1 and 7, Maldives Penal Code, Provision 28

Comment:

Generally. The default guideline for interpreting elements of the Code is consistency with the purposes of the Code, as described in Subsections (b) and (c) of this Section. One of the general purposes is the protection of individual and public interests arising from Islam and “public norms” regarding right and wrong (Subsection (c)(4)).

Relation to current Maldivian law. The general purpose of the Code is similar to the purpose of Islamic law, that is, to protect “religion, life, lineage, mind, and property.”² This parallels current Maldivian law, which encompasses these purposes by defining the word “hurt” to mean “any injury or loss caused in contravention of the law to a person’s body, his mind, his person, his reputation, his name or his property.” Maldives Penal Code 28(g). The Maldivian Constitution further states: “The Maldives shall be a sovereign independent democratic republic based on the principles of Islam.” Maldivian Constitution, Ch. 1, Provision 1. The Constitution goes on to say: “The religion of the State of the Maldives shall be Islam.” Maldivian Constitution Ch. 1, Provision 7. Therefore, the guiding principles in this Code are based on the Islamic faith, the teachings of Islamic scholars and jurists, and existing Maldivian laws drawn from this system of beliefs.

Section 11(b)(1)’s stated goal of creating “penalties that are proportionate to the blameworthiness of the offender and the seriousness of the offense” is derived from the opinion of Muslim jurists that “the evildoer must be punished in proportion to the evil created; the Qu’ran states that the recompense of an evil is a like evil.”³

Section 11(b)(2) safeguards “guiltless conduct from condemnation,” following Islamic principles governing testimony against adulterous women. Most jurists cite the following Qur’anic passage to support this idea: “Those who accuse believing women, unmindful though innocent, are cursed in this world and the next and shall receive a painful torment.”⁴

In Section 11(b)(3), what is “arbitrary or oppressive” in relation to the treatment of prisoners will be determined on the basis of Maldivian customs and Islamic law.

Under Islamic law, jurists have ruled that the punishment must be proportional to the crime and cannot cause “more pain or injury.” In the traditional system of corporal punishment, adequate expertise was required by the individual administering the punishment so as to avoid torture.⁵ The Caliph Ali visited prisons to insure proper treatment of prisoners, and the jurist Abu Yusuf noted that prisoners must be provided the “basic necessities of life.” Jurists are in agreement that there should be no violation of the integrity of the prisoner’s “beliefs, mind, body

² MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 114 (American Trust Publications 2000).

³ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 98 (American Trust Publications 2000).

⁴ Qur’an 24:23; AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 665 (Nuh Ha Mim Keller trans., Amana Publications 1994).

⁵ Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 232 (M. Cherif Bassiouni, ed. 1982).

and dignity.”⁶ Ibn Qayyīn al-Jawziyya notes that prisoners should not be confined to “narrow places,” but simply prevented from “inflicting harm on others.”⁷

In Section 11(b)(4), the notion of “fair warning” finds support among Islamic jurists who state that “the accused must first be given the opportunity to know the law, and thus . . . no punishment shall be imposed without prior law.” The Qur’an supports this principle: “And nor shall we be punishing until we had sent them an Apostle.”⁸ This passage is interpreted to proclaim that with the Apostle comes the “law,” which people were unfamiliar with prior to his arrival.

Section 11(c)(2)’s concept of deterrence is supported by Islamic law, in that, as Mohamed El-Awa states, “vindication of the values . . . demands that the law deter the individual offender and teach fellow Muslims the penalty for wrongdoing.”⁹

In Section 11(c)(3), the term “confinement” is meant to encompass both imprisonment and/or banishment. In Islamic law, prevention of “recurrence of serious criminal behavior” is accompanied by punishment in order to help the offender “repent his wrongs.”¹⁰ The purpose of rehabilitation is not squarely addressed by the current Maldives Penal Code. However, rehabilitation comports with preventing recidivism by changing the criminal’s behavior and encouraging him to refrain from criminal activity.

SECTION 12 – NON-STATUTORY CRIMES ABOLISHED

Corresponding Current Provision(s): None

Comment:

Generally. This Section adopts the principle that only offenses that are defined by statute as criminal can be punished. No person’s conduct can be prosecuted as a crime unless this Code or a statute of the Maldives has criminalized it. The purpose of this Section is to establish this Code as a comprehensive and easily referenced source of law. The Code allows for the public to have fair notice of the laws which apply to them and to be confident that the laws will be applied uniformly regardless of the judge presiding over the case. This ensures that the public is better able to understand criminal statutes and thus abide by the law. In addition, although this Code is comprehensive, the Parliament has the power to add crimes to the Code through the legislative process.

Relation to current Maldivian law. This Code seeks to build upon the current Maldives Penal Code and to establish a comprehensive and easily referenced source of law. Codification is a trend in all jurisdictions today, including Islamic countries such as Egypt, Malaysia, the

⁶ Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 235 (M. Cherif Bassiouni, ed. 1982).

⁷ Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 236 (M. Cherif Bassiouni, ed. 1982).

⁸ Qur’an 17:15; M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 25 (M. Cherif Bassiouni, ed. 1982)

⁹ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 31 (American Trust Publications 2000).

¹⁰ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 96 (American Trust Publications 2000).

United Arab Emirates, Pakistan, and others. The goal is to centralize the grounds of penal liability in code form, consistent with the requirements of a modern state.

SECTION 13 – JURISDICTION

Corresponding Current Provision(s): Maldives Penal Code Provision 2, 3 and 5

Comment:

Generally. This Section outlines the jurisdiction of the new Code. This Section addresses both conduct within the Maldives and conduct of Maldivian citizens outside of the country. Subsection (a)(1) details the basic territorial jurisdiction of this Code for both substantive and inchoate offenses. Subsection (a)(2) provides for passive personal jurisdiction, namely that this Code applies to all offenses resulting in harm to the citizens, agents, or property of the Maldives, irrespective of the crime’s location. Subsection (a)(3) extends jurisdiction to all offenses committed in cooperation with a Maldivian citizen or resident irrespective of location or other concerns. Subsection (a)(4) recognizes universal jurisdiction over gross violations of international law as is the obligation of many nations, including the Maldives. Finally, Subsection (a)(5) establishes jurisdiction over vessels or aircraft flagged or registered in the Maldives.

Subsection (b) specifies that jurisdiction is not an element of any offense. Although proper jurisdiction is required for a valid conviction, the prosecution need not prove jurisdiction to a practical certainty nor does any culpability requirement attach to purely jurisdictional concerns.

Subsection (c), like Section 14 (Civil Rights to Recovery Preserved), ensures that this Code is not construed to effect the process of civil suits and judgments.

Subsection (d) precludes a defendant’s challenge to the State’s decision not to extradite him to another jurisdiction. Even if other countries also have jurisdiction over a particular defendant, the jurisdiction of the Maldives is not threatened.

Subsection (f) extends the jurisdiction of the Maldives to include its “exclusive economic zone” which is defined under international law or under particular treaties.

Relation to current Maldivian law. Subsection (a) follows the language in Provision 2 and 3 of the current Maldives Penal Code, which place liability on every person subject to Maldivian law, whether they are inside or outside of Maldivian territory. (Maldives Penal Code Provision 3).

Subsection (a)(2) follows the language in the current Maldives Penal Code, Provision 5, but omits the phrase, “or to do everything that is possible to expel him from the Maldives where it is expedient for the purposes of preserving the interests of the Maldivian people or a section thereof.” Maldives Penal Code, Provision 5. This language is unnecessary because Chapter 90, governing offense grades and their implications, provides a classification of all criminal offenses into grades for purposes of determining the extent of liability and punishment. In addition, sentencing guidelines provisions determine which specific punishments may be applied.

Subsection (a)(3) follows the language in the current Maldives Penal Code, Provision 3 and the current “Law Governing Maldivians Who Travel Abroad.”

Subsection (c) allows for the court to exercise its discretion in handling cases relating to noncompliance with legal rulings or protocol.

Current Maldivian law includes the “Law on Uninhabited Islands.” This draft Code does not distinguish between inhabited and uninhabited islands for purposes of consistency and simplicity.

SECTION 14 – CIVIL RIGHTS TO RECOVERY PRESERVED

Corresponding Current Provision(s): None

Comment:

Generally. This Section distinguishes between civil remedies and criminal punishment for criminal conduct. Regardless of the outcome or progress of a criminal prosecution pursued by the State under this Code, the victims of the crime may still pursue civil remedies.

Relation to Maldivian law. Civil remedies and criminal punishment are not separated in current Maldivian law. However, Islamic law does separate remedies; punishment is categorized into that deserving either physical retaliation or monetary compensation.¹¹ This roughly corresponds to the distinction between criminal and civil remedies, respectively. Monetary remedies for the crime of homicide would be civil and civil prosecution would be victim-driven. Physical punishment, for instance prison terms, for commission of homicide would be State-driven prosecutions because of the threat they pose to the peace and order of the Maldives. Civil remedies continue to exist for these and other offenses, irrespective of whether the State initiates a prosecution of them under the Code and irrespective of the outcome of any prosecution. The judge would retain the discretion to require monetary compensation as part of the punishment, similar to Islamic law.

SECTION 15 – BURDENS OF PROOF; REBUTTABLE PRESUMPTIONS

Corresponding Current Provision(s): None

Comment:

Generally. This Section explains the burden that each party carries in a criminal prosecution and establishes the basic tenet that all defendants will be presumed innocent until the offense they have been charged with has been proven by the prosecution. The prosecution must prove each element of an offense to a practical certainty, with the exception of special requirements stipulated for offenses relating to unlawful sexual intercourse. These special requirements are outlined in Section 411(a)(2). No requirement of proof beyond those defined in this Code may be imposed. “Practical certainty” means the highest standard of proof, which requires that the court be virtually certain of the proposition’s truth.

When a Section of this Code establishes a rebuttable presumption for an item for which the prosecution bears the burden of persuasion under Section 15(b)(2), the Court shall presume that the prosecution has established the item if the facts giving rise to the presumption are proven

¹¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 586-7 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“whenever someone who is entitled to exact retaliation decides instead to forgive the offender and take an indemnity from him, then retaliation is no longer call[ed] for and the deserving person is entitled to indemnity.”).

to a practical certainty. It should be noted that, the “exceptions” noted in Section 15(b)(2)(B) refer to exceptions mentioned in the specific offenses part of the Code. However, the defendant will then have the opportunity to rebut that presumption by a preponderance of the evidence. When a Section of the Code establishes a rebuttable presumption for an element for which the defendant bears the burden of persuasion under Section 15(b)(3), the Court shall presume that the defendant has established the element if the facts giving rise to the presumption are proven by a preponderance of the evidence. The prosecution will then have the opportunity to rebut the presumption.

For example, under Section 53(b)(2), the Court shall presume that the defendant has established that he satisfies the requirements of the general defense of immaturity in Section 53(a) if his age, the fact giving rise to the presumption, is proven by a preponderance of the evidence. The prosecution then has the opportunity to rebut the presumption that the defendant satisfies the requirements of Section 53(a).

Relation to current Maldivian law. Section 15(a) is derived from the consistent view of Muslim jurists that all elements of a crime must be proved in order to obtain a conviction. In support of this important principle, many jurists cite the prophetic tradition, “[a]void condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs, it is better that he errs in favor of innocence than in favor of guilt.” Additionally, they cite a Prophetic tradition that encourages avoiding “circumstantial evidence in *Hudud*.”¹² Finally, it is a “well-established principle in *Qisas* crimes that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded.”¹³ This “presumption of innocence applies to lesser *Ta’zir* offenses as well.”¹⁴

Section 15(b)(2) is supported by the message sent by Caliph Umar ibn al-Khattab to one of his judicial appointments, Abu Musa al-Ash'ari: “The burden of proof is on the accuser, and he who denies the accusation should be asked to take the oath.”¹⁵ Jurists also cite the Prophetic tradition that “the burden of proof is on the proponent; an oath is incumbent on him who denies.”¹⁶ Section 15(b)(2) is also consistent with the general requirement of Islamic law that the accuser meet a burden of persuasion that, if met, then shifts to the accused.¹⁷

¹² M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 26 (M. Cherif Bassiouni, ed. 1982).

¹³ M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 26 (M. Cherif Bassiouni, ed. 1982).

¹⁴ Ibid.

¹⁵ M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 32 (M. Cherif Bassiouni, ed. 1982).

¹⁶ Ma’amoun M. Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 110 (M. Cherif Bassiouni, ed. 1982).

¹⁷ Ahmad ibn Malik, *Kitab Ahkam al Khilafat*, in M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 29 (M. Cherif Bassiouni, ed. 1982)(This is supported by statements attributed to Caliph Umar ibn al-Khattab: “In Islam no one can be imprisoned without due course of justice.” The contemporary Muslim scholar, Abu ‘Ala Mawdudi has explained this statement as follows:

The words here clearly indicate that justice means due process of law. What has been prohibited and condemned is that a man be arrested and imprisoned without proof of his guilt in an open court and without providing him an opportunity to defend himself against those charges. If the Government suspects that a particular individual has committed a crime or he is likely to commit an offense in the near future then they

SECTION 16 – MANDATORY LEGISLATIVE REVIEW OF MONETARY AMOUNTS

Current Corresponding Provision(s): None

Comment:

Generally. This Section takes into account that due to factors like inflation, the value of a particular monetary sum will not be the same over time. Hence, this Section requires Parliament to review the monetary amounts periodically.

Relation to current Maldivian law. None.

SECTION 17 – DEFINITIONS

Current Corresponding Provision(s): Maldives Penal Code, Provision 28

Comment:

Generally. This Section collects defined terms used in Chapter 10 and provides cross-references to the Sections in which they are defined. Furthermore, this Section provides a full list of all terms defined anywhere in the Code, with a cross-reference indicating where the definition may be found. In addition, this Section provides definitions for terms used frequently throughout the Code.

Relation to current Maldivian law. Many of the definitions found in Provision 28 of the current Maldives Penal Code are represented here. Definitions such as those found in the Maldives Penal Code Provisions 28(b), 28(e), 28(i), 28(j), 28(n), 28(o), 28(t), 28(v), and 89 are not defined in this Code and should be given their regular, everyday meaning. For discussion of the relationship between Chapter 10's other defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

should give reasons of their suspicion before a court of law and the culprit or the suspect should be allowed to produce his defense in an open court so that the court may decide whether the suspicion against him is based on sound grounds or not.

REQUIREMENTS OF OFFENSE LIABILITY

CHAPTER 20. BASIC REQUIREMENTS OF OFFENSE LIABILITY AND DEFENSES RELATED TO THE OFFENSE

This Chapter outlines the basic requirements for liability and the necessary elements of an offense. Section 22 describes the relationship between conduct and result, which bears relation to Islamic law. Section 24 outlines the possible mental attitudes a person may have in relation to a particular crime. These are based on modern constructions and have been adopted by Muslim countries.¹⁸ Sections 25, 26, 27, and 28 outline factors that can negate culpability.

SECTION 20 – BASIS OF LIABILITY

Corresponding Current Provision(s): None

Comment:

Generally. Section 20 establishes the basic requirements for liability for an offense under the draft Code. The principle underlying this Section is that no one may be prosecuted for a crime if they have not fulfilled all the elements of the offense as defined in the criminal code or if they are eligible for an exception, defense, or bar to liability provided for in the code. This Section operates so as to bar criminal prosecution for conduct that is not explicitly prohibited by the criminal code, as well as to bar acquittal for reasons not explicitly provided for in the code. Section 20(a) provides that an actor may be liable for an offense only if all of the elements of the offense are satisfied, except where a provision in Chapter 30 operates to impute a missing element.

The following example illustrates a situation where all elements of the offense are not satisfied:

Example 1: X causes the death of Y, but does so without recklessness. Section 111 (manslaughter) contains two elements: the result that another has died, and the culpability requirement of recklessness. X would be precluded from liability for Y's death by Section 20(a) because he does not satisfy the culpability element of the offense.

The following example illustrates a situation where some elements of an offense are imputed:

Example 2: X, who is voluntarily intoxicated, causes the death of B by engaging in substantially risky activity, although X was unaware of the risk because of the intoxication. In these circumstances, the element of recklessness may be imputed under Section 31 (Voluntary Intoxication). Since the absent element of recklessness would be imputed by Section 31, X may be liable for B's death according to Section 220(a).

¹⁸ IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 98 (Advanced Legal Studies Institute 2000).

Section 20(b) provides that a person will not be liable for an offense if they are exempted from liability by a provision in Chapter 80 (Inchoate Offenses) or a specific exception in an offense definition in Part II of the draft Code. Sections 84 and 85 provide general exceptions to certain types of liability for victims and, in certain circumstances, for persons who renounce their intent to commit a crime before it has been committed.

The following example illustrates an exception to liability under Chapter 80:

Example 3: C purchases a club for D so as to aid D in assaulting an unknown person, and D subsequently uses the club to assault C. Section 84 exempts victims from liability for conspiracy offenses under Section 81. Since C is the victim of D's crime, he would be exempted from liability for conspiracy to commit assault. As such, he would be precluded from liability under Section 20(b).

Additionally, Section 20(b) provides that a person is not liable for an offense if they satisfy a bar to liability contained in the provision. These bars to liability are specific to the offense.

The following example illustrates a bar to liability contained in a provision:

Example 4: E is a doctor providing life-sustaining medical care to F, a terminally ill patient. F and his family ask E to stop providing the medical care. E withdraws the care, and F subsequently dies. Under Section 113(b)(1), E has committed an offense by knowingly aiding F in causing his own death. However, Section 113(b)(2) exempts E since he is a medical professional respecting the wishes of the patient and his family in withholding a life-sustaining procedure. Thus, conviction of E would be precluded under Section 20(b).

Section 20(c) provides that any defense provided in the General Part will preclude liability even though all of an offense's elements are satisfied or imputed. Such defenses—found in Chapters 20, 40, 50, 60, and 80—differ from the exceptions covered by Section 20(b) in that they present non-specific defenses (and thus apply to *any* offense, rather than to a particular offense or group of offenses).

The following example illustrates a defense in Chapter 20(c):

Example 5: F touches G, but G has consented to the touching. Consent, under Section 27, is a defense to liability. Since F has satisfied one of the defenses in Chapter 20, he is precluded from liability by Section 20(c).

The following example illustrates a general defense in Chapter 40:

Example 6: H attacks J with a knife. J, in fear of his life, defends himself and shoots H with a gun. Under the justification defense provided in Section 45 (Defense of Person), J is precluded from liability.

Relation to current Maldivian law. The principles expressed in Section 20 codify the current understanding of the basis of criminal liability and summarize the structure of this Code. For discussion of the concepts in Subsection (a), please reference the commentary for Sections

21 through 27. For discussion of the concepts in Subsection (c), please reference the commentary for Chapters 40 (Justification Defenses), 50 (Excuse Defenses) and 60 (Nonexculpatory Defenses).

SECTION 21 – OFFENSE ELEMENTS DEFINED

Corresponding Current Provision(s): None

Comment:

Generally. Section 21 categorizes and defines offense elements in terms of conduct, circumstances, results, and culpability requirements. Defining offense elements in this manner enables a systematic and clear approach to offense definition. Specifically, the offense element definitions aid in defining culpability requirements, which can be more precisely elaborated by reference to their application to each type of offense element. Although every offense defined in the Special Part will have some of these elements, not every offense will have all of these elements. For example, Section 112 (Negligent Homicide) contains result elements and culpability requirements but does not contain conduct or circumstance elements.

Offense elements may appear not only in the offense definition itself, but also in the provisions that define the offense grade or otherwise specify a specific level of liability that will attach to the offense. For example, although the offense definition in Section 120 (Assault) does not contain circumstance or result elements, the grading section differentiates the various grades of assault based on results (e.g. causing serious injury or bodily injury) and circumstances (e.g. the victim is a minor).

Section 21(b) specifically defines each element. Section 21(b)(1) defines a “conduct element” as that part of an offense definition that requires a person’s act or failure to act. Examples of such elements are touching a person (Section 120 (Assault)), confining or restricting another’s movement for a period of time (Section 140 (Unlawful Restraint)), and taking or exerting unauthorized control over the property of another (Section 211 (Theft by Taking or Disposition)). Conduct can be distinguished from result elements in that a specific harm need not result. For example, a person commits the offense of assault if they touch a person without their consent, regardless of what type of harm results from the touching.

Section 21(b)(2) defines a “result element” as that part of an offense definition that requires any change of circumstances caused by the person’s conduct. Unlike a conduct element, a result element is related to a specific result, regardless of the type of conduct that brings about that result. For example, knowingly “damaging the property of another” (Section 220 (Criminal Property Destruction)) is a result element because the element is fulfilled so long as property is damaged, regardless of the conduct that causes the damage.

Section 21(b)(3) defines a “circumstance element” as that part of an offense definition that requires an objective element other than a conduct or result element. Many offenses will have one or more circumstance elements that define the requisite conditions for a given act and result to generate criminal liability. For example, in Section 221 (Endangering Property), the circumstance element is that the property threatened with a substantial risk of destruction is a structure that is either inhabited or of public utility. Often, circumstance elements are used in grading provisions. For example, the grade of Section 230 (Criminal Trespass) depends on

whether the place entered or remained in is a dwelling, secured building or inhabited structure, or otherwise.

Section 21(b)(4) defines “objective elements, which include the conduct, results, and circumstances of a criminal act. The only elements of a crime which are not objective elements are any requisite culpability requirements.

Relation to current Maldivian law. All Maldivian crimes contain conduct, result, circumstance, or culpability requirement elements. Accordingly, Section 21 merely attaches names to existing elements of Maldivian offenses.

SECTION 22 – CAUSAL RELATIONSHIP BETWEEN CONDUCT AND RESULT

Corresponding Current Provision(s): Maldives Penal Code, Provision 10 and 11

Comment:

Generally. Section 22 sets forth the requirements for determining when a person’s conduct causes a result.

Section 22(a) sets forth the two basic tests for when a person’s conduct causes a result. Section 22(a)(1) defines the “but-for” causation test: that the result would not have occurred but for the conduct.

The following example illustrates a situation where the but-for causation test would be satisfied:

Example 1: A puts fatal poison in B’s cola drink. B dies from the toxicity of the poison. The but-for causality test in Section 22(1) is satisfied—B would not have died but for A putting poison in his drink.

The following example illustrates a situation where the but-for causation test would not be satisfied:

Example 2: Company X produces cola drink. They produce a fatally tainted batch, which causes certain death in ten minutes, even in the case of minimal consumption. C purchases the tainted cola, pours a glass of it, and takes a sip. He puts the glass down, at which time D, in an attempt to kill C, pours into C’s glass of cola some poison, which takes several hours to take effect. C takes another sip, and dies. So long as it is determined that C’s imminent death was unpreventable once he drank the tainted cola, the but-for causality test in Section 22(a)(1) would not be satisfied, because C died from the tainted cola, not D’s poison. Therefore, D is not guilty of any homicide offense since his actions did not cause C’s death; however, he is guilty of attempted murder.

Section 22(a)(2) defines the proximate causation test. This test requires that the prohibited result must not be so far removed from the defendant’s conduct that imposing liability would be unjust. This requirement is imposed so that people are not liable for exceptional or unusual accidents that may occur. Proximate causation turns heavily on the foreseeability of the result. If a result was somewhat foreseeable in a course of conduct by a reasonable person, the proximate causation test is likely to be met. However, if a result is almost completely

unforeseeable, the proximate causation test may not be met. This test applies to result elements appearing in both the offense definition and grades.

The following examples illustrate situations where the proximate causation test would be satisfied:

Example 3: E intends to cause property damage to the exterior wall of a government power facility by using an explosive device. Unbeknownst to E, a tank of heating oil is located next to the wall on the interior of the building. The explosive device detonates, causing the heating oil to catch fire, substantially impairing the function of the power facility. While E did not intend to substantially impair the function of the power facility, it was a foreseeable result of using an explosive device. As such, under Section 22(a)(2), he would be liable for proximately causing property damage that substantially impairs a government facility, an aggravating circumstance increasing the grade of his offense pursuant to Section 220.

Example 4: F intends to assault G by hitting him with a club. F hits G in the head with the club, applying enough force so that G would be injured, but not killed. G, however, has a weak skull, and the relatively mild blow from F causes G to die. F would be liable for G's death under Section 22(a)(2) because although F did not expect G to die, that death would result from being hit on the head by a club is sufficiently foreseeable.

The following example illustrates a situation where the proximate causation test would not be satisfied:

Example 5: H intends to assault J by throwing a coconut at him. H throws the coconut, which misses J, but hits a nearby car. Unbeknownst to H, the car has been rigged with a crude explosive device. The impact of the coconut causes the device to explode, spraying shrapnel which kills J. H would not be liable for the causing the death of J under Section 22(a)(2), because the result (death by shrapnel) is not foreseeable and is so far removed from the conduct (throwing a coconut) that holding H liable would be unjust since the actor had no reason to imagine that his conduct would cause such a result.

Section 22(b) provides that in cases where more than one person contributes to a result and each person's conduct alone would have caused the result, each person is considered to have caused the result. This Subsection prevents equally blameworthy persons from escaping liability due to the fortuity that someone else independently caused the prohibited result.

The following example illustrates a situation where more than one person contributes to a result and both would be liable:

Example 6: K and L intend to assault M by throwing rocks at him. K throws a large rock at M's head, causing fatal injuries to M's brain. L then throws a rock which also hits M's head and causes fatal injuries to M's brain. M dies as a result of the injuries. Under Section 22(b), both K and L would be liable for M's death, even though K's rock would have caused M's death without L's involvement.

The following example illustrates a situation where more than one person contributes to a result and only one would be liable:

Example 7: N shoves O against a wall, causing O minor injuries that would not be foreseeably fatal. A few hours later, P beats O on his head with a club in a manner sufficient to kill him. However, N’s minor injuries cause O to die faster than he otherwise would have. Under Section 22(b), P would be liable for O’s death, but N would not, because N’s conduct alone would not have caused O to die.

Relation to current Maldivian law. The principles expressed in Section 22 do not appear in this specific context in Maldivian law. However, the “but-for causation test” is an important and intuitive component of many criminal laws and is consistent with general principles of fairness that dictate that one only be held responsible for results that he has directly caused. A similar construction exists in certain Muslim countries, for instance, Pakistan.¹⁹

“Proximate causation” is a concept with support in Islamic law, which holds a person responsible for the result of their actions whenever it is “possible to trace its source back to the act which leads up to it” and does not “require that the act of the assailant be the only cause that brings about the result.”²⁰ For example, Mohamed S. El-Awa differentiates between accidents (i.e. results that are not proximately caused by conduct because they are far removed from the actor’s conduct) and deliberate action.²¹ Ahmad Ibn Naqib Al-Misri also differentiates between acts intended to cause an injury but that unintentionally cause death, and those that are intended to cause death.²²

In addition, Section 22(b) is similar to provisions 10 and 11 of the current Maldives Penal Code, with the exception that it does not grant judges complete discretion to punish similarly situated offenders differently. However, judges retain this discretionary authority under this Code if the offender’s conduct would not have caused the punishable result. Where each offender’s conduct would have independently caused the punishable result, it is necessary to punish both offenders in order to prevent either guilty person from escaping punishment.

SECTION 23 – REQUIREMENT OF AN ACT; POSSESSION LIABILITY; OMISSION LIABILITY

Corresponding Current Provision(s): Maldives Penal Code, Provision 9

Comment:

Generally. Section 23 sets forth the minimum conduct requirements to impose criminal liability. Section 23(a) sets the requirement that an act, unlawful possession, or punishable omission must occur in order to impose criminal liability. This Section is necessary to prohibit

¹⁹ IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 82 (Advanced Legal Studies Institute 2000).

²⁰ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 172-73 (M. Cherif Bassiouni, ed. 1982).

²¹ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 73 (American Trust Publications 2000).

²² AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 584-585 (Nuh Ha Mim Keller trans., Amana Publications 1994).

punishment of “mere thoughts” unaccompanied by a physical act. It also provides that a failure to act cannot give rise to liability unless a duty is legally created.

The following example illustrates a situation where an act occurs:

Example 1: X intentionally crosses onto B’s farm and takes B’s cow off his property. Sections 210 and 230 punish theft and trespass, respectively. X would be liable for the theft of B’s cow and the trespass onto B’s property under Section 23 because he has engaged in conduct that would constitute an act.

The following example illustrates a situation where an act does not occur:

Example 2: C contemplates stealing D’s cow, and mentions to his friend E that he would like to steal D’s cow. However, C abandons his plans and does not take any steps to actually steal the cow. As such, C would not be liable for theft or trespass because he has not actually engaged in an act.

The following example illustrates a situation where an omission occurs without incurring liability:

Example 3: F contemplates stealing G’s cow, and mentions to his friend H that he would like to steal G’s cow. F does in fact steal G’s cow, and H does nothing to stop him (nor to aid him). Since there is no duty imposed by law on H to prevent the theft of G’s property, H cannot be liable for failure to prevent the theft.

Section 23(b) discusses what would constitute an “unlawful possession” that would give rise to criminal liability. Section 23(b) applies to offenses which impose criminal liability, or increase the grade of an offense, for the possession of certain prohibited objects. Section 23(b)(1) and (2) each define a different situation in which a possession would be unlawful, both cases require knowing possession. Section 23(b)(1) notes that possession is unlawful when a person knowingly procured or received the thing possessed. This means that a person who does not intend to receive a prohibited object, but knowingly receives it and fails to abandon it or turn it over to the proper authorities will incur criminal liability for his possession. Section 23(b)(2) states that a person voluntarily possesses an object when he knowingly controls it. Again, this means that someone who unintentionally but knowingly comes into control of a prohibited object and fails to abandon control of the object will incur criminal liability.

The following example illustrates a situation where voluntary possession occurs:

Example 4: J gives to K a backpack for safekeeping. K decides to open the backpack and finds a prohibited weapon inside. K keeps the backpack and fails to inform the authorities. Under Section 23(b), K could be liable for the prohibited weapon because, while he did not intend to receive or control a prohibited weapon, he did so knowingly.

The following example illustrates a situation where voluntary possession does not occur:

Example 5: L gives to M a sealed box which, unbeknownst to M, contains a prohibited weapon. M does not open the box, and never becomes aware that a prohibited weapon is

contained therein. Under Section 23(b), M cannot be liable for the prohibited weapon because while he has received it, he has not received it knowingly.

Section 23(c) notes that in order to incur liability for an omission, the omission must be a failure to act when a duty to act exists. Note that Subsection (c)(2) only holds someone liable where that person has a statutory duty to act. This creates an exception to the general rule that omissions do not create liability, with the exception predicated on the notion that people who are under a duty to protect others should be punished criminally for failing to meet those duties. Note also that such a duty is created when one who otherwise has no duty begins voluntarily assisting someone; therefore, once a volunteer takes steps to begin assisting someone, they must follow through with the assistance as long as it poses no danger to themselves.

Example 6: X is a firefighter. A statute establishes a duty for firefighters to intervene to protect lives or property from fires. X fails to do so and incurs criminal liability for failing to act in light of that duty.

Relation to current Maldivian law. An act requirement is implied in Provision 9 of the Maldives Penal Code, “where such offence is completed or attempted to be completed by one act or several acts, all such acts shall be constituted as one offence.” Maldives Penal Code, Provision 9. Furthermore, the act requirement of Section 23 is supported by principles of Islamic law, which indicate that punishment of a general omission is unsupportable. With regard to a situation in which it would be possible for someone to save another person’s life, but that person fails to do so, Ibn Duyan states: “He is not responsible for him since he did not destroy him and was not the cause of his death, just as though he did not know him.”²³ Thus, unless the law positively imposes a punishment for failure to act, an omission should generally not be treated as giving rise to criminal liability. It should be noted that in cases where a dependent relationship exists (i.e. physician and patient) or where an individual voluntarily begins to aid another, a duty is created. For example, Ibn al-Qasim is quoted as saying: “If someone falls into a well and asks you to lower a rope for him and you try to pull him up, but when it proves too much for you, you let him go and the man dies, then you are liable for his death.”²⁴

SECTION 24 – CULPABILITY REQUIREMENTS

Corresponding Current Provision(s): None

Comment:

Generally. Section 24 defines four culpability requirements—purpose, knowledge, recklessness, and negligence—and governs their application to objective elements. The culpability requirements do not exist in the abstract; they apply to the objective elements of an offense definition. For example, in the definition of serious assault, a person acts recklessly with

²³ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYNAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 43 (George M. Barood, trans. Dar al-Salam, 1958).

²⁴ Shihab ad-Din al-Qarafi quotes Ibn al-Qasim. Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 184 (M. Cherif Bassiouni, ed. 1982).

respect to causing a particular result, namely causing serious bodily injury, rather than acting recklessly in general.

Section 24(a) specifies that some level of culpability is normally required as to each objective element of an offense, and Section 24(b) requires that such culpability exist at the time of that objective element. For example, Section 112 (Negligent Homicide) has only one objective element (causing the death of another), and it is explicitly assigned a culpability level (negligence), which must exist at the time the death is caused, even if the culpability level has changed by the time death actually occurs.

Many offenses, however, will impute the culpability requirement for some objective element, as explained in Sections 24(h) and 24(j). For example, Section 230 (Criminal Trespass) provides a culpability requirement of knowledge that one has no authority or license to enter a place, but does not specify whether a person must negligently, recklessly, knowingly, or purposefully enter or remain in the place. Thus, a culpability requirement of recklessness is imputed under Section 24(h).

Section 24(c)(1) defines “purpose” with respect to conduct and result elements, and Section 24(c)(2) defines “purpose” with respect to circumstance elements. Section 24(c)(3) clarifies that conditional purpose satisfies the purpose requirement unless the condition eliminates the harm or wrong sought to be prevented by the offense. This conditional-intent provision makes clear that a person whose intent is predicated on some factual situation (for example, the thief who intends to steal from the premises, but only if he finds something valuable therein) will satisfy a culpability requirement of purpose.

Section 24(d)(1) defines “knowledge” with respect to a conduct element, Section 24(d)(2) defines “knowledge” with respect to a circumstance element, and Section 24(d)(3) defines “knowledge” with respect to a result element. Knowledge requires a significantly higher certainty than the subsequent concept of recklessness; rather than a substantial risk, knowledge requires that an element be probable (circumstance) or even practically certain (result). Knowledge differs from purpose in that the person acting knowingly may be practically certain that his actions will have a certain result, but he may not actually intend that result to occur.

Section 24(e) defines recklessness as to all objective elements. Recklessness is distinguished from the subsequent concept of negligence in that recklessness involves a conscious disregard of a substantial risk whereas negligence involves a failure to be aware of a substantial risk. Thus the key distinction is awareness of the risk. If the person is aware of the risk that a particular result will occur due to his conduct, for example, then he is reckless if he ignores that risk and continues with the conduct. If he fails to be aware of the risk, he is negligent.

Section 24(f) defines “negligence” as to all objective elements. Section 24(f)(2) requires that the departure from the standard of care must be “gross.” This requirement distinguishes criminal negligence from ordinary negligence and ensures that an actor’s failure to be aware of something is sufficiently blameworthy to warrant the criminal law’s condemnation. By comparison, ordinary negligence would simply be conduct that a reasonable person would not undertake given existing circumstances.

Section 24(g) specifies that proof of a more culpable mental state will satisfy an offense’s requirement of a less serious one. For example, proof of purpose or knowledge will suffice when the offense requires only recklessness as to an objective element. Without this defined hierarchy of criminal mental states, applying offense definitions would either lead to absurd results or the

Code would be required to define multiple culpability requirements for each objective element, thus becoming awkward and unwieldy.

Section 24(h) establishes recklessness as the “read-in” default culpability requirement for offense elements that otherwise have no specified culpability requirement. Setting a default culpability level keeps offense definitions readable and ensures that strict liability is avoided where it is not intended. Recklessness is set as the default level because it is the minimum level of culpability normally considered appropriate for criminal liability.

Section 24(i)(2) requires a clear indication of legislative purpose to impose strict liability to ensure that strict liability is limited to situations for which it is specifically intended and is not allowed in situations in which recklessness is to be “read in” under Section 24(h). Strict liability punishes actions regardless of the mens rea of the actor. Therefore, strict liability punishes not only actors who did not intend to commit an offense, but also those whose conduct was not even negligent as to possibly causing an offense. For this reason, strict liability offenses should be limited since it goes against most theories of criminal law to punish people for reasonable actions.

The requirement of clearly indicating an intent to create a strict liability offense can be satisfied by employing the phrase “in fact” in place of a culpability requirement for a specific element of an offense. Section 24(i) makes clear that it applies only to those objective elements for which a culpability requirement is not stated, rather than to entire offenses. Otherwise, any offense satisfying the criteria for strict liability might be read to impose strict liability as to all elements, even those for which a culpability requirement is stated

Relation to current Maldivian Law. Current Maldivian law does not contain a codified, hierarchical scheme of standard defined culpability terms. However, adding such a scheme will preserve the notions of culpable states of minds that appear throughout current Maldivian law. Additionally, it allows for consistent application of culpability requirements through the exclusive use of the four defined culpability terms of purpose, knowledge, recklessness, and negligence. These four culpability requirements are standard for a modern code. This Section provides a consistent and precise structure for defining the culpability requirements for each offense.

Islamic law, like this Code, recognizes gradations with regard to an actor’s intent, and can be divided into general intent, specific intent, and mistake.²⁵ Islamic law classifies “negligence” under its broad category of mistake.²⁶ In addition, homicide and assault offenses under Islamic law are categorized according to levels of culpability, namely intent, quasi-intent, and mistake.²⁷ This Code includes an additional level of culpability to provide greater distinction between the types of culpability that already exist within Islamic law.

SECTION 25 – IGNORANCE OR MISTAKE NEGATING REQUIRED CULPABILITY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 23 and 24

²⁵ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 177 (M. Cherif Bassiouni, ed. 1982).

²⁶ IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 102 (Advanced Legal Studies Institute 2000).

²⁷ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 481 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Comment:

Generally. Section 25 provides that ignorance or mistake as to a matter of fact or law is admissible to negate culpability for an offense. However, this does not mean that ignorance or mistake is necessarily or generally a defense to an offense; rather, these circumstances will be quite limited. Specifically, the mistake must negate the culpability level for an offense.

The following example illustrates a situation where a mistake negates a culpability requirement:

Example 1: A prepares dinner for his friend B using some vegetables he picked from his garden. Unbeknownst to A, the vegetables have been sprayed with an insecticide that is particularly fatal when consumed. A does not wash the vegetables and serves them to B, who consumes them and dies as a result. A's ignorance as to the fact of the lethality of the vegetables would be a defense to murder under Section 25 because it negates the culpability requirement of "knowingly" causing the death of another.

The following example illustrates a situation where ignorance does not negate a culpability requirement:

Example 2: C alters a piece of art so that it purports to be an original when in fact it is a copy. C does not know that this is an offense punishable by law. Section 310 makes it an offense to alter an object so that it purports to have an authorship which it does not. Knowledge of the illegality of C's conduct is not part of the offense definition in Section 310, so C's ignorance does not negate the level of culpability for the offense. Under Section 25, C would not have a defense to liability.

The following example illustrates a situation where a mistake does not negate a culpability requirement:

Example 3: D serves seafood from an area commonly known to be affected by red tide poisoning to his friend, E. Although D is aware that the fish is commonly affected with red tide poisoning, he does not actually know if the specific fish he is using is so affected. The fish is in fact affected, and E dies as a result of consuming it. While D did not serve the affected fish knowingly, he was aware of a substantial risk and ignored it, making him reckless. D would not have a defense under Section 25 to reckless homicide because his ignorance would not negate the recklessness of his conduct.

Relation to current Maldivian law. This Section replaces Provisions 23 and 24 of the Maldives Penal Code. In addition, Islamic law recognizes that a mistake as to law or fact may or may not be exculpatory. Al-Misri, for example, holds that intentional crimes ("purely intentional") should be differentiated from those that are mistaken ("honest mistake") and from those that are mistaken, but intentional ("mistake made in a deliberate injury").²⁸ The factor in

²⁸ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 584-585 (Nuh Ha Mim Keller trans., Amana Publications 1994).

both the Code and existing Maldivian law that determines culpability is the state of mind of the accused.

SECTION 26 – MENTAL DISEASE OR DEFECT NEGATING REQUIRED CULPABILITY

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. Section 26 recognizes that a mental disease or defect may negate an offense's culpability requirement. This Section provides a definition of mental disease or defect to clarify the limits of its application. Section 26 makes clear that evidence of mental disease or defect may be relevant in contexts other than those covered by the draft Code's excuse defense for insanity and nonexculpatory defense for persons unfit to stand trial. See draft Sections 52 (Insanity) and 62 (Unfitness to Plead, Stand Trial, or Be Sentenced) and corresponding commentary. For example, the insanity defense provides a freestanding excuse when a person satisfies all culpability requirements of the offense itself but merits exoneration because he could not control his conduct nor understand the criminal nature of his act. Section 26, on the other hand, would apply in cases where the person's mental incapacity prevented him from satisfying the offense's elements in the first place, such as where an offense requires knowledge and the person's mental incapacity prevented him from "knowing" something a person of normal mental capabilities would know. In such a case, the admissibility of evidence related to the defendant's mental disease or defect should not rest on his ability to present sufficient evidence to properly raise an insanity excuse under Section 52. This distinction is necessary since someone's mental disability may allow him to understand the gravity of his actions, but it may prevent him from meeting a culpability requirement such as acting purposefully or even knowingly.

The following examples illustrate situations where mental disease or defects negates a culpability requirement:

Example 1: A has a severe mental disease. Because of this mental disorder, A enters the house of B, thinking that it is his own house. A's mental disease negates the culpability level of knowledge required for trespass under Section 232. Thus, A has the right under Section 26 to bring in evidence to show that his mental disease negated the culpability requirement of knowledge.

Example 2: C has a mental defect that reduces his ability to weigh risk. He invites D onto a boat that bears a substantial risk of sinking. The boat sinks, and D dies as a result. C's mental defect may negate the awareness of risk necessary to show recklessness required for manslaughter under Section 112. As such, C has the right under Section 26 to bring in evidence to show that his mental defect negated the culpability requirement of recklessness.

The following example illustrates a situation where mental disease or defect does not negate a culpability requirement:

Example 3: E is severely depressed. E then decides to kill F and does so purposely. E's mental disease does not negate the culpability requirement of purpose required for murder under Section 110. As such, E may not bring in evidence of his mental defect under Section 26 because it is irrelevant as to whether or not he purposely killed F.

Relation to current Maldivian Law. This Section draws on Provision 24 of the Maldives Penal Code, which provides in part, a defense for a person who, “by reason of being in a certain state of mind, is incapable of knowing the nature of the act or that it may be contrary to law”.²⁹ Section 26 clarifies this defense so that it applies specifically to the relationship between mental defect and culpability requirements.

Exempting insane persons from criminal liability is strongly supported by Islamic law. According to a well-known *hadith*, insane persons lack legal capacity. In addition, in cases of homicide and assault, according to Al-Misri, retaliation may not be applied to insane persons “under any circumstances.”³⁰ Similarly, Ibn-Duyan argues the law “does not permit punishment of one who is not command of his mental faculties.”³¹

SECTION 27 – CONSENT

Corresponding Current Provision(s): None

Comment:

Generally. Section 27 establishes rules governing when the consent of one who would otherwise be the victim of an offense will preclude criminal liability. Section 27(a) defines the general rule, Section 27(b) provides special rules for offenses involving bodily injury, and Section 27(c) defines the circumstances under which a person's agreement will not constitute valid legal consent.

Section 27(a) provides that a victim's consent will preclude liability, as a general matter, if it negates either an offense element or the harm or wrong at which the offense is aimed. For example, several offense definitions in the draft Code explicitly include the absence of a person's consent as an offense element. The draft Code treats an offense definition's requirement of the absence of consent as a circumstance element for which the prosecution bears the burden of persuasion. Because the absence of consent is an element, the draft Code's culpability rules apply to that issue.

Section 27(a) also provides a defense for situations where consent does not negate an explicit offense element, but nevertheless “precludes the infliction of the harm or wrong sought to be prohibited” by an offense. For example, draft Section 220 (Criminal Property Damage) criminalizes damaging the property of “another.” Although a victim's consent does not negate the offense's requirement that the property involved belong to “another,” it does negate the harm at which the offense is aimed.

²⁹ Maldives Penal Code Section 24.

³⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 583 (Nuh Ha Mim Keller trans., Amana Publications 1994).

³¹ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 43-44 (George M. Barood, trans. Dar al-Salam, 1958).

Section 27(b) creates special rules for consent to bodily injury in recognition that, in limited circumstances, consent to such injury should preclude criminal liability, even though it does not negate either an offense element or the harm the offense seeks to punish. Section 27(b)'s rules operate independently of Section 27(a)'s general rules regarding consent. A consent defense exists if either Section 27(a) or 27(b) is satisfied; it is not necessary to satisfy both 27(a) and 27(b).

Section 27(b)(1) provides that consent to bodily injury is a defense where the bodily injury is not "serious." Therefore, consent does not preclude liability for offenses involving serious bodily injury. This is because the state has an interest in preventing serious bodily injury despite the victim's consent. Section 27(b)(2) recognizes consent as a defense where the bodily harm caused or threatened occurs in a lawful sport or athletic contest. This subsection recognizes that athletic contests often result in injuries due to the nature of the sport in which the victim voluntarily participates rather than bad intentions of the athlete causing the injury.

Section 27(c) recognizes that a person's agreement will not always constitute valid legal consent (for example, where the person is incompetent or the "consent" is coerced) and ensures that the draft Code is both clear in explaining when consent precludes liability and consistent in its treatment of consent from one offense to another. Section 27(c) recognizes four sets of circumstances under which a victim's assent will not constitute effective consent.

Section 27(c)(1) provides that a person's agreement will not provide a defense where he is legally incapable of authorizing the conduct constituting the offense. For example, permission to operate a motor vehicle by someone who merely knows the owner, but is not the owner himself, will not preclude liability for Unauthorized Use of Property (*see* Section 217) because the person giving consent for use of the motor vehicle is not legally capable of providing consent to using the vehicle.

An actor's mistake as to consent will ordinarily be immaterial where consent provides a defense only because it precludes the infliction of the harm sought to be prohibited, under Section 27(a)(2). Where the absence of consent is an offense element as to which culpability is required, however, a mistake as to consent may negate that requirement.

For example, lack of consent is a required element of the Unauthorized Use of Property offense, and recklessness is the read-in culpability requirement as to lack of consent. Although assent from a non-owner cannot constitute consent under Subsection (c)(1), a mistaken belief that he was the owner could negate that recklessness requirement. A mistake as to consent may similarly negate offense elements other than the absence of "consent" *per se*, such as whether the actor had authority or was acting against another's will.

On the other hand, the victim's consent to damage inflicted on his own property is a defense since the consent precludes the harm targeted by Section 220 (Criminal Property Damage), as explained earlier. However, a mistake as to whether the victim consented to that damage is immaterial.

Section 27(c)(2) makes clear that consent will not preclude liability where the victim lacks the mental capacity to consent or is otherwise incompetent.

Section 27(c)(3) provides that assent does not constitute effective consent where it is given by one whose improvident consent the law seeks to protect against. For example, a minor's consent to sexual intercourse will not preclude liability for sexual assault against a minor precisely because that offense aims to prevent such improvident consent. Finally, Section 27(c)(4) provides that consent is not a defense where it is induced by force, duress, or deception.

Relation to current Maldivian law. The existing Maldives Penal Code does not contain a provision generally addressing consent as a defense to offenses in general. Including draft Section 27 in the Code will allow for consistent application of consent as a defense. Additionally, Islamic law recognizes consent as a defense to certain offenses, such as theft.³² This Section is generally consistent with this approach and, thus, consent will not constitute a defense to the more serious grades of homicide and assault

SECTION 28 – CUSTOMARY LICENSE; DE MINIMIS INFRACTION; CONDUCT NOT ENVISAGED BY LEGISLATURE AS PROHIBITED BY THE OFFENSE

Corresponding Current Provision(s): None

Comment:

Generally. This Section sets out “defenses” — modifications of the meaning of the underlying offense definitions — for persons whose conduct was within a customary license, was too insignificant to merit criminal punishment, or did not cause the harm contemplated by the offense’s existence. These provisions enable the court to dismiss prosecutions on these bases, creating an additional safeguard beyond reliance on prosecutorial discretion. Section 28’s defenses are consistent with the rule of construction that a statute should not be interpreted to produce an absurd result.

Section 28(a) provides that conduct may be exempt from liability if it is within a “customary license or tolerance.” For example, where a landowner had previously allowed his neighbors to use his yard as a shortcut, even though the yard was posted against trespassing, Section 28(a) would provide a defense to the neighbors if the landowner unexpectedly decided to accuse them of trespassing. Section 28(a)’s defense is not available, however, where a license has been “expressly negated by the person whose interest was infringed” or is inconsistent with the relevant offense.

Section 28(b) recognizes a defense for conduct that, although technically constituting an offense, is too trivial to warrant a criminal conviction. Section 28(c) provides a defense where one did not actually cause the harm or wrong at which the offense is aimed. Both of these Sections prevent criminal prosecutions where it would be inappropriate to inflict the condemnation of criminal punishment.

Section 28(d) places an important limitation on the defenses to ensure that they are not abused. The draft Section provides that the court may not dismiss a charge on the basis of a defense set forth in Section 28 without filing a written statement of its reasons for doing so.

Relation to current Maldivian law. Current Maldivian law does not address the content of Section 28. In general, discretion by prosecutors and the court prevents imposing criminal punishment for conduct which does not warrant criminal condemnation. However, codifying the situations in which conduct is not worthy of criminal condemnation and providing that the court shall dismiss offenses based on such conduct will ensure, in a uniform and consistent manner, that criminal punishment is preserved for the situations in which it is appropriate.

³² IBRAHIM IBN MUHAMMAD IBN SALIM IBN DU'YAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 100-101 (George M. Barood, trans. Dar al-Salam, 1958)(Ibn Duyan explains that it must be made clear that property was taken without the victim’s consent before punishment can be imposed.).

Additionally, the grounds for dismissal listed in this Section are consistent with defenses under Islamic law. For example, Islamic law provides for a de minimis defense to theft (*nisab*). In addition, Muslim jurists have long recognized that where results in certain individual cases constitute technical infringements of the law, those results are contrary to the overriding purposes of the law as a whole and the case should therefore be overturned (*maqasid al-shari'ah*).

SECTION 29 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 20 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 20's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 30. IMPUTATION OF OFFENSE ELEMENTS

This Chapter outlines the various ways in which culpability may be imputed to the defendant. It defines the required culpability level as well as the imputation of culpability for actions not taken directly by the defendant, but for which the law holds the defendant responsible.

SECTION 30 – ACCOUNTABILITY FOR THE CONDUCT OF ANOTHER

Corresponding Current Provision(s): Maldives Penal Code, Provisions 11

Comment:

Generally. This Section sets out the circumstances according to which one person may be held accountable for the conduct of another person.

Sections 30(a)(1), (2), and (3) define three standards for liability. Section 30(a)(1) applies where the defendant causes another person, who serves only as an innocent instrument, to commit the conduct constituting the offense. Section 30(a)(2) applies where the Code explicitly makes the defendant accountable for the conduct of another. Section 30(a)(3) makes the defendant accountable if he is the accomplice of another person in the commission of an offense.

The imputation of one person's conduct to another person does not alter the culpability level required by the offense. Rather, the person held accountable for another's conduct must satisfy the same culpability level for the underlying offense. This is made clear in Section 30(a)(1) and Section 30(b). This is because the Code seeks to punish the offender's criminal intent, as well as his criminal actions.

Section 30(b) defines the elements required for accomplice liability. Significantly, accomplice liability only attaches to an accomplice in the "commission of the offense," thus the underlying offense must have been completed. Complicity does not apply to inchoate offenses.

Section 30(c) specifically precludes accomplice liability in certain cases. Section 30(c)(1) prevents liability when a person aids a crime in which he himself is a victim. Section 30(c)(2) prevents liability for conduct that technically aids in the offense but is inevitably incidental to its commission. In other words, the accomplice knowingly aided the offense in such a way that was sure to be insignificant or of minor help in its commission. Section 30(c)(3) precludes accomplice liability in cases where the accomplice renounces his part in the commission of the offense. Not only must he terminate his assistance, but he must seek to either purge his assistance of all the value it has or will have to the commission of the offense, or actively foil the commission of the offense. This is meant to provide an incentive for those involved in crimes to have a change of heart and seek to block the commission of the offense. This Section is similar to Section 85 (Defense for Renunciation Preventing Commission of the Offense).

A person who is legally accountable for the conduct of another because he satisfies the requirements of Section 30(b) is liable for the underlying offense, but the grade of the offense for which he is liable may be adjusted under Section 30(d) depending on the extent of his involvement. This provides an incentive for accomplices to play less active roles in crimes. Full liability is imposed for an accomplice who acts as an organizer or leader, as defined in Section 30(d)(4)(A). Liability for a "participant," as defined in Section 30(d)(4)(C) for the purposes of

this Section, is one grade level lower than that of the underlying offense. Liability for an accomplice whose role is that of a minor participant, as defined in Section 30(d)(4)(B), is two grade levels lower than that of the underlying offense. Under the definition of a minor participant in Section 30(d)(4)(B), a minor participant provides minimal assistance or assistance that is incidental to or not necessary for the commission of the offense. Whether assistance is minimal, incidental to, or not necessary for the commission of the offense is a question of fact. An example of assistance that would likely be necessary for the commission of an offense, rendering the accomplice more than a minor participant, is supplying a dangerous weapon to be used in an Aggravated Assault under Section 120(c)(2), especially if weapons are otherwise unavailable.

The Subsections on accomplice liability must be read in conjunction with the provisions on inchoate liability in Chapter 80. Under Section 30(e), a person who would have been accountable for the conduct of another if the other had committed the offense is guilty of an attempt to commit the offense. Liability for an inchoate offense is appropriate for an accomplice where he satisfies the requirements of Section 30(a), but the person for whose conduct he would have been accountable does not commit the offense. Section 86 imposes reduced liability in recognition of the fact that the harm of the substantive offense does not occur in such situations.

Section 30(f) applies “whether or not the offense is attempted or committed by the other person,” thus clarifying that one is subject to liability for an unsuccessful attempt to aid another in the commission of an offense. Under Section 30(f), a person who attempts to aid another is liable at one grade level lower than he would have been had his attempt to aid succeeded. Section 30(f) recognizes that inchoate efforts toward an offense should not be sanctioned as severely as completed efforts. Section 30(f) therefore reduces the liability for attempted complicity relative to actual complicity. In cases under this Subsection, an accomplice may also be liable under draft Section 81 (Criminal Solicitation) and draft Section 82 (Criminal Conspiracy).

Section 30(g) provides that a person who may have been legally incapable of committing an offense himself may still be convicted of the offense based on his accountability for the conduct of another who commits the offense.

Example 1: A non-Muslim is legally incapable of committing the crime in Section 616 (Failing to Fast During Ramadan; Consuming Pork or Alcohol). However, he may still be liable for complicity if he knowingly aids and facilitates another, a Muslim, in the commission of the crime.

Section 30(b) requires the accomplice have the culpability required by the underlying offense. Thus, the accomplice would still be able to assert any defense which negates his culpability as to the offense, as well as any general defense for which he qualifies under Chapters 40, 50, or 60. This Section limits a person’s legal incapacity—for example, diplomatic immunity—to his own conduct only; he cannot seek to involve others in criminal activity without incurring liability.

Section 30(h) makes clear that the accomplice may be liable even if the principal is not held liable for the underlying offense. This ensures that the prosecution of accomplices is not hampered by the results of another trial. This Section still requires proof of the commission of the offense and the defendant’s complicity. It is simply designed to insulate the prosecution of an accomplice from any procedural, evidentiary, or other mistakes that invalidates only the prosecution of the principal.

Relation to current Maldivian law. Provision 11 of the Maldives Penal Code provides that, when an offense is committed by several people committing several acts, each person who commits the offense or part of the offense with the intention to commit the offense is liable for that offense. Draft Sections 30(a) and 30(b) are consistent with this concept in that they hold a person liable for aiding another in committing an offense with the purpose of promoting or facilitating the commission of an offense. However, in the draft Code, although a person must have the purpose of promoting or facilitating commission of the offense, the required culpability as to the objective elements of the offense is not elevated to purpose. As to the underlying offense, the accomplice must act only with the culpability required for the commission of the offense. It is not clear under the existing code whether or not the person committing part of the offense must act with intent with respect to all objective elements of the offense.

Current Maldives Penal Code Provision 11 allows a judge to vary punishment based on the extent of an individual's involvement when the offense is committed by several people committing several acts. Similarly, draft Section 30(d) allows for mitigation based on the extent of an accomplice's involvement in the commission of an offense. The draft Section provides guidance as to what mitigation is appropriate for what type of involvement in the offense.

Current provisions 12, 13, and 14 also address accomplice liability. Existing provision 12 creates an offense of abetment when a person takes part in committing an offense by advising, instigating, conspiring, or aiding. Current provision 13 defines aiding in the commission of an offense. Under current provision 14, a person is liable under provisions 12 and 13, rather than liable for the underlying offense, if he aids or abets the offense but does not commit an act constituting the offense or facilitate the principal offender's escape. Under current provision 14, a person who commits an act constituting the offense or facilitates the principal offender's escape is liable for the underlying offense instead of violations of provisions 12 and 13. However, draft Section 30 holds an accomplice liable for the underlying offense, rather than a separate offense, based on the conduct of the principal offender, if the accomplice satisfies the requirements of Section 30(b). An accomplice with lesser involvement, although still liable for the underlying offense rather than a separate offense, may receive the mitigation provided in draft Subsection (d) and have his liability reduced by one or two grades. Therefore, the draft Code always holds the accomplice liable for the underlying violation, but offers some mitigation in grading. This allows the Code to operate similarly to current Maldivian law, yet offers simpler application.

In addition, there is general support for this Section in Islamic law, because Islamic law classifies an accomplice in the same terms as the one actually carrying out the act.³³ Muslim jurists have generally held an entire conspiring group equally responsible for the actions of one member.³⁴

³³ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 480 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) ("Jurists applying *hadd* to the person who does not act directly consider the term 'murderer' applicable to him metaphorically.").

³⁴ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 484 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) ("majority of the jurists of the provinces said that the group is to be executed for one person, whatever the number of the group.").

SECTION 31 – VOLUNTARY INTOXICATION

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. This Section governs the imputation of culpability to a person who engages in offense conduct after voluntarily becoming intoxicated. For conduct performed under the influence of *involuntary* intoxication, see draft Section 54 and corresponding commentary.

Section 31(a) allows defendants to introduce evidence indicating that they lacked an offense definition's required culpability because of their intoxication. However, Section 31(b) allows for the imputation of culpability to an actor who engages in offense conduct while he is voluntarily intoxicated. Therefore, even if the evidence of intoxication does negate the culpability element required by the offense definition, the defendant may still be liable for the offense because the required culpability element that was negated by his intoxication will be imputed to him if he voluntarily intoxicated himself. So if a person is voluntarily intoxicated, Section 31 will truly negate the culpability requirement only if the culpability requirement is acting knowingly or purposely.

Section 31 treats voluntary intoxication as a basis for imputation, and not as a special defense; its special relevance is that it will *inculpate*, rather than exculpate, defendants in certain cases since the actor may have only acted negligently, but because he voluntarily intoxicated himself, he is treated as if he acted recklessly. Under Section 31(b), intoxication may be used to hold a defendant accountable *as if* he were culpably aware of a risk, whether or not it can be proved that he had a mental state of recklessness. Where the imputation rule does not apply, and where the person does not otherwise satisfy the culpability requirements of the offense, there would be no liability—as would be true in any case where the defendant lacked the culpability required by the offense.

Example 1: A gets drunk voluntarily and decides to drive home. While negligently driving home at a speed just over the speed limit, he strikes B, a pedestrian, who is seriously injured. Since A was voluntarily drunk, the culpability requirement of recklessness is imputed to him. Therefore, he is liable for Serious Assault under Section 120(b)(1), even though his actual actions were only negligent.

Example 2: The same scenario as in Example 1 except that in this case, A got drunk after drinking juice that he did not realize had been spiked with alcohol. Since he was not voluntarily drunk, there is no imputation of recklessness. And since his actions were merely negligent, he is not guilty of an assault offense under Section 120.

Under Section 31(b), when voluntary intoxication prevents an actor from being aware of a risk, he is nonetheless treated as being aware of the risk because of his culpability in becoming intoxicated. Although his awareness of risk is imputed, the prosecution must still show that his disregard of that risk is worthy of criminal condemnation because it grossly deviates from the standard of acceptable conduct. Allowing an actor's culpability in becoming intoxicated to serve as the basis for imputing his culpability as to the offense conduct, although arguably harsh, is more desirable than allowing a voluntarily intoxicated actor to avoid liability. The harshness of imputing culpability for offense conduct based on culpability in becoming intoxicated is

mitigated by the fact that only awareness of risk is imputed as described above and by the requirement in Section 31(c)(1) that an actor must be reckless as to becoming intoxicated (instead of merely negligent).

Under Section 31(c)(1), a person must knowingly introduce the intoxicating substances into his body and be reckless as to the intoxication resulting from the introduction of those substances in order to be considered voluntarily intoxicated. Additionally, under Section 31(c)(2) an actor who has a reaction that is grossly in excess of that which he could have reasonably expected is not considered to be voluntarily intoxicated despite the fact that the intoxication was self-induced.

If a person acted only negligently in becoming intoxicated, he is not considered to be voluntarily intoxicated as defined in Section 31(c), and so he will not be treated as being aware of a risk under Section 31(b). At that point, the inquiry is whether or not his intoxication prevented him from forming the requisite culpability for the offense.³⁵

Relation to current Maldivian law. Under provision 24 of the current Maldives Penal Code, a person is liable for his offense, despite being in “a certain state of mind” that prevents him from knowing the nature of his act or that it is contrary to law, if he has created “that state of mind on his own volition or with his consent or by doing an act with knowledge that it will or may be likely to cause that state of mind.” It follows that existing Maldivian law would impose liability on a person who voluntarily intoxicates himself and then commits an offense, even though his intoxication prevented him from being culpable for the offense.

The framework for liability in the General Part of the draft Code provides two ways in which a person’s intoxication could prevent him from being liable for his offense. First, a person who commits an offense must satisfy all the elements of the offense definition, including the culpability requirements. Intoxication could preclude liability here if it prevents a person from acting with the culpability required by the offense definition. Additionally, intoxication can prevent liability through an excuse defense even if all objective elements and culpability requirements are satisfied, if the person’s intoxication prevents him from perceiving the nature of his conduct, appreciating the wrongfulness of his conduct, or controlling his conduct. The draft Code adopts this approach in the case of involuntary intoxication. See draft Section 54 (Involuntary Intoxication) and accompanying commentary.

Current Provision 24 is more similar to the excuse defense defined in draft Section 54. Because the framework of the existing code would also allow intoxication to exculpate an actor because he had not satisfied the culpability level required by the offense definition, it is necessary to include a provision such as draft Section 31 that imputes culpability to a person who commits an offense after voluntarily intoxicating himself in order to hold the person liable for causing the state of mind that prevented him from acting with the culpability required for the offense.

³⁵ Note that a person could be liable for an offense, regardless of his intoxication, if he possessed the culpability required by the offense *when he became intoxicated*. Consider, for example, a person who intentionally becomes intoxicated knowing that he will assault his spouse when drunk. Although the person may ultimately become so intoxicated that he may not be contemporaneously aware of, or intend, his actions in beating his spouse, the person’s earlier culpability at the time he became intoxicated could support liability for the assault. In such a case, the prosecution could argue that the person had the requisite culpability for the assault at the time he became intoxicated, and that his conduct in becoming intoxicated was part of the conduct that caused the prohibited result of bodily harm.

Additionally, there is support in Islamic law for this Section, because most Muslim jurists are of the opinion that if intoxication is “by choice” then the accused is liable for all his acts.³⁶

SECTION 32 – DIVERGENCE BETWEEN CONSEQUENCES INTENDED OR RISKED AND ACTUAL CONSEQUENCES

Corresponding Current Provision(s): None

Comment:

Generally. Section 32 addresses the “transferred intent” situation where a person intends, foresees, or risks a result that would be an offense, but actually causes or risks another result that is also an offense. In such a case, liability may be imposed for the unintended offense that actually occurs through imputation of culpability. Where a person causes *both* the intended result *and* another result that is also an offense, he may be held liable for both offenses subject to Section 94, which governs prosecution for multiple offenses. Where the intended result does not occur, the person may be held liable for attempting to commit the intended offense as well as for committing the unintended offense, also subject to Section 94.

The following example illustrates when a person may be liable for both an attempt to commit the intended offense as well as for committing the unintended offense.

Example 1: A plans to injure B by hitting him with a club. He finds B in an expensive glassware shop and tries to hit him with the club. He misses and instead destroys all of the glassware in the shop. He is liable for the attempted assault of B. He is further liable for criminal property damage since swinging a club inside a glassware shop is reckless.

Section 32(1) uses the term “consequence” instead of “result” because in some cases, unintended circumstances may create liability for another offense.

Relation to current Maldivian law. Current Maldivian law is silent on this matter. Because the draft Code requires that a person must satisfy all elements, including culpability requirements, of an offense definition or have those elements imputed to him before he is liable for his offense, it is necessary to include a Section, such as draft Section 32, that explicitly provides for the imputation of culpability when the consequences that occur differ from the consequences risked or intended. Additionally, the concept of “honest mistake” in Islamic law provides general support for this Section. Al-Misri states that the criterion for an honest mistake is “that the act is intended but not its object.”³⁷

³⁶ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 185 (M. Cherif Bassiouni, ed. 1982) (There are three different opinions on this matter. First, that an intoxicated person is not liable regardless of whether the intoxication is voluntary or not. Second, the intoxicated person is liable only if the intoxication is involuntary (the opinion used in this Section). Finally, that no form of intoxication, voluntary or involuntary, excuses one from liability).

³⁷ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 584-585 (Nuh Ha Mim Keller trans., Amana Publications 1994).

SECTION 33 – MISTAKEN BELIEF CONSISTENT WITH A DIFFERENT OFFENSE

Corresponding Current Provision(s): None

Comment:

Generally. This Section addresses situations where a person has a mistaken belief that negates the culpability required for the offense, but is not entitled to a defense under draft Section 25 because even under his mistaken view, he was committing another offense. In such cases, culpability as to the committed offense will be imputed based on the person's culpability as to the intended offense.

Section 33 clearly provides that mistake or ignorance is not a defense if the defendant who *did* commit the lesser offense mistakenly thought he was committing a similar or more serious offense. In other words, the defendant's culpability as to the greater offense will be imputed to make him liable for the lesser offense. Where the defendant would be guilty of another offense of a *lower* grade had the situation been as he supposed, attempt liability for the less serious offense may be appropriate under draft Section 80 (Criminal Attempt). See draft Section 80 and corresponding commentary.

The following example illustrates how a person's culpability may be imputed based on his mistaken belief of committing an offense of a higher grade:

Example 2: C has sexual intercourse with D without D's consent, believing D is less than 10 years old, a Class B felony. However, D is actually 12 years old, a Class C felony. C's knowledge as to D's age, although mistaken, is imputed in his prosecution for the Class C felony. C may not bring forth evidence of his mistake since he is barred from the defense provided in Section 25.

The following example illustrates what happens when a person acts based on his mistaken belief of committing an offense of a lower grade:

Example 3: C places D in a shed as a prank and ties the door closed with string, believing that D will be able to break the string and escape within a few minutes. However, D is unable to break the string and remains trapped in the shed for two days. The grade of the Unlawful Restraint that C believed he was committing under Section 140(c)(3) is merely a Class 1 misdemeanor. Since that is a lesser offense than the harm actually caused (see Section 140(c)(2)) his culpability is not imputed to the greater harm (restraint for two days instead of a few minutes) and he is not liable for a Class D felony. However, C is still liable for committing the lesser offense.

Relation to current Maldivian law. Current Maldivian law does not specifically address the situation dealt with in draft Section 33. However, since the draft Code requires that a person must satisfy all elements, including culpability requirements, of an offense definition or have those elements imputed to him before he is liable for an offense, it is necessary to include draft Section 33 to impute culpability in the situations described above. Otherwise, someone might not be punished for their criminal intent even if they cause harm, simply because the results of their actions did not rise to the level they had expected.

Additionally, there is general support for the concept of mistaken belief in Islamic law. For example, Ahmed Fathi Bahnassi cites the example of a man who sleeps with a woman he thinks to be his wife, but is not. Because he made a mistake as to the woman's identity, he would not be punished for adultery.³⁸

SECTION 34 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 30 and provides cross-references to the Section in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 30's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

³⁸ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 182 (M. Cherif Bassiouni, ed. 1982).

GENERAL DEFENSES

CHAPTER 40 – JUSTIFICATION DEFENSES

This Chapter discusses defenses to prosecution that apply when the action producing the offense is justified. This various Sections of this Chapter outline the different types of justifications, including self-defense, actions committed by individuals in positions authorizing such conduct and undertaking actions which prevent a greater harm from taking place.

SECTION 40 – GENERAL PROVISIONS GOVERNING JUSTIFICATION DEFENSES

Corresponding Current Provision(s): None

Comment:

Generally. This Section sets out several general rules applicable to justification defenses. Section 40(a) defines the terms “justification defense” and “justification.”

Justifications differ from excuses – which are covered in Chapter 50 – in that they relate to specific conduct, not specific persons, although sometimes only particular persons are authorized to perform the justified conduct. In other words, conduct is justified whereas a person is excused. For example, self-defense is justified and involuntary intoxication would be excuse. Justification defenses prevent liability for conduct that is socially acceptable, and often desirable, because the conduct furthers a greater societal interest or avoids a harm that outweighs the harm sought to be prohibited by the draft Code. Section 40(b) notes that justified conduct, beyond merely being non-criminal, merits heightened legal status: a person may not lawfully seek to impede another’s justified conduct.

Section 40(c) and 40(d) address situations where an actor causes the circumstances that give rise to the justification for his conduct. As opposed to the general statement of Section 40(c), Section 40(d)(1) applies to situations in which the actor caused the circumstances giving rise to the justification for his conduct with the culpability required for the offense for which he is seeking the justification defense. An example of such a situation is an actor who kills another person after recklessly provoking that person to attack him with deadly force. Because the actor caused the circumstances that would give rise to a justification (Defense of Person under Section 45) with the culpability required for reckless killing under Section 111(a), he would be liable for that offense, barring the application of a general defense under Section 40(d)(2).

Section 40(f) creates a rule mandating the supremacy of more specific justifications over more general ones. This is because the more specific justifications set out full legislative determinations regarding liability for specific forms of conduct. To allow a more general provision to supersede or complement the more specific provision would enable circumvention of the particular requirements that have been determined to be necessary to justify such conduct. Therefore, general justifications (namely Sections 41 (Lesser Evils) and 42 (Execution of Public Duty)) apply only where the legislature has not provided a more specific justification with particular determinations regarding the conduct in question.

Example 1: A strikes B for verbally accosting C in a loud and offensive manner. If A seeks to use a justification defense, he cannot attempt to claim a justification defense of

Lesser Evils under Section 41, since the facts involved suggest that the proper defense to assert would be Defense of Person under Section 45. The Section 41 defense would not be allowed since it would make the Section 45 defense moot if an actor were merely allowed to claim the more general Lesser Evil defense rather than meet the required elements of the Defense of Person section.

At the same time, Section 40(e) makes clear that conduct may relate to several justification rules at once. For example, an aggressor's conduct may threaten both a person's life and his property. Where this is the case, the actor may act according to the allowances of any relevant justification—in this example, defense of person and defense of property. If the defense of person provision authorizes deadly force, the person may employ such force even though the defense of property provision standing alone would not allow it.

Relation to current Maldivian law. There is no general concept of justifications in current Maldivian law. However, one specific example of a justification in current law is Provision 25, which is discussed below in the commentary to Section 45. Including general provisions on justification defenses will ensure consistent and principled application of specific justification defenses.

Islamic law does conceive of justifications as described in some Sections of this Chapter. These will be addressed in reference to specific Sections in this Chapter, as applicable.

SECTION 41 – LESSER EVILS

Corresponding Current Provision(s): None

Comment:

Generally. This Section ensures that conduct will not give rise to criminal liability where such conduct is objectively necessary to avoid a threatened harm greater than that caused by the conduct itself. For example, an ambulance driver is justified in exceeding the speed limit or passing through a traffic light in order to rush a critically wounded person to the hospital in time to save his life. Similarly, property may justifiably be destroyed to prevent the spread of a fire. Note that, according to the definition of “necessary” in Section 41(b), the person's conduct must be necessary both in the timing and in the amount of harm caused to be considered justified under this defense.

The following example illustrates when conduct is necessary under Section 41(b):

Example 1: A sees B in the control room of a major power plant. B is about to push a button that would shut down the power plant. B is clearly not authorized to be in the control room or shut down the plant. A shouts for B to stop, but B ignores him. A rushes into the room and shoves B to the ground, preventing him from pushing the button. A's conduct was necessary in that it was both necessary at that point in time and the minimum conduct necessary to prevent the harm.

The following examples illustrate when conduct is not necessary under Section 41(b):

Example 2: Under the same circumstances as in Example 1, A instead pulls out a knife and stabs B repeatedly, inflicting fatal wounds. A's conduct was not necessary because a lesser amount of force would have been sufficient to prevent the harm.

Example 3: Rather than seeing B about to push the button, A overhears B tell a friend the previous day that he intends to shut down the power plant. A immediately attacks B and hospitalizes him, thus preventing the harm. However, A's conduct was not necessary in that it was not immediately necessary at that time since B was not to attempt to shut down the plant until the next day.

Under Section 40(f), the use of this general justification defense is precluded when another justification defense in this Chapter more specifically addresses the situation. In such a case, the actor cannot rely on the lesser evils defense to avoid the more specific requirements imposed on his conduct by the justification defense that specifically addresses the situation. See Example 1 under Section 40.

Relation to current Maldivian law. No such concept appears to exist in current Maldivian law, at least to the extent that such law is codified. However, Islamic law recognizes the doctrine of the lesser of two evils, which is generally considered part of a broader concept of necessity which permits violation of the law to prevent an inescapable evil from occurring.³⁹ Jurists often cite the following Qur'anic verse in support: "He (God) has explained to you in detail what is forbidden to you - except under compulsion of necessity."⁴⁰ Ibn Duyan writes of the concept of lesser evils, indicating that such a justification may be a defense to the *hudud*. For instance, Ibn Duyan suggests that the preservation of one's own life is important enough to allow for the commission of the lesser evil of fornication or adultery.⁴¹

SECTION 42 – EXECUTION OF PUBLIC DUTY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 40 and 87(b)

Comment:

Generally. This Section creates a justification for conduct normally prohibited by this Code, but which is explicitly permitted or required by a governmental institution with the lawful power to authorize the conduct. If a person has been specifically authorized to engage in conduct that is necessary to protect or further a societal interest, he may act defensively or affirmatively to further the public interest.

Section 42(a) justifies conduct, in certain circumstances, for people whose powers and duties are authorized by law. Section 42(b) provides a defense for conduct authorized by laws governing the execution of legal process. Section 42(c) justifies conduct sanctioned by a court or

³⁹ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 192 (M. Cherif Bassiouni, ed. 1982) ("Necessity is a state that makes a person violate the law in spite of himself to prevent an inescapable evil befalling him, even though it is in his power not to violate the law and all the evil to befall him or someone else.").

⁴⁰ Qur'an 6:119.

⁴¹ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DU'YAN, *CRIME AND PUNISHMENT UNDER HANBALI LAW* 48 (George M. Barood, trans. Dar al-Salam, 1958) (Ibn Duyan relates the story of Umar forgiving a woman for committing fornication with a herder who refused to give her a drink unless she did).

tribunal. Section 42(d) provides justifications for conduct performed in the context of the armed forces or during the lawful prosecution of war. Finally, Section 42(e) is a catchall provision justifying conduct authorized by other laws imposing public duties.

Like the lesser evils defense defined in Section 41, the execution of public duty justification is not available, according to Section 40(f), if another justification defense in this Chapter more specifically addresses the situation. For example, the requirements of Sections 43 (Law Enforcement Authority) or Sections 44 (Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others) must be followed if they more specifically address the situation.

Relation to current Maldivian law. There is no explicit justification provided for the execution of public duties in current Maldivian law. However, provision 40 of the current Maldives Penal Code can be construed as concurring with this Section in that it criminalizes conspiracy to prevent or restrain the due discharge of public duties. Similarly, provision 87(b) of the current code creates an offense committed by those who refuse to assist a public official in the execution of his public duty. Given these provisions of the current law, it follows that Section 42 of the draft Code comports with current Maldivian law. To hold otherwise would be incompatible with current law. For example, without the draft Section, individuals who assisted public officials in their public duties would be held liable for conduct performed while furnishing such assistance.

Islamic law allows the governing authority to exercise powers which would be forbidden to individual members of society.⁴² In general, there is no liability for persons executing public duties in regard to the punishment of *hadd* offenses, the punishment of homicide and assault, or the exercise of police powers generally.⁴³

SECTION 43 – LAW ENFORCEMENT AUTHORITY

Corresponding Current Provision(s): Maldives Penal Code, Provision 40 and 87(b)

Comment:

Generally. This Section creates a justification for conduct—specifically, the use of force—necessary to bring a person into lawful custody, or to prevent a person’s escape from custody. Additionally, a person’s conduct is justified if it is necessary to prevent a suicide. No special statutory authorization is required under this Section if the conduct is necessary for the prevention of suicide or crime. Note that the definition of necessary given in Section 41(b) applies to the term necessary as used throughout this Chapter, so under this Section the person’s conduct must be necessary both in terms of timing and the amount of harm inflicted.

Section 43(b) imposes a special requirement on the use of force that risks death or serious bodily injury. In addition to the person’s use of such force being necessary to execute a lawful arrest, prevent escape from custody, or prevent a suicide, the use of force in those situations must also be necessary to prevent a risk of death or serious bodily injury to others.

⁴² AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 647 (Nuh Ha Mim Keller trans., Amana Publications 1994); *see also* JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 109, 282 (Dar ul-Ishraq, 2001).

⁴³ Note however, that corporal punishment that is carried out in a negligent manner can subject the executioner or “maimer” to tort liability for mistaken killing or injury. IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER II, at 503 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Relation to current Maldivian law. For references to both current Maldivian law and Islamic law, see the commentary to the previous section.

SECTION 44 – CONDUCT OF PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS

Corresponding Current Provision(s): None

Comment:

Generally. This Section creates a justification for the use of force by those charged with a special responsibility for others. This conduct—including parents’ or teachers’ authority to protect or discipline children, wardens’ authority to impose order on a prison population, and medical professionals’ need to administer care or restrain those posing a danger to others or themselves—might not otherwise fall within the scope of the justifications set out in this Chapter.

Each part of the Section specifies the categories of persons to whom it applies and the range of conduct allowed. For example, Section 44(a)(1) specifies that the justifiable conduct of a parent, guardian, teacher or other person entrusted with a child’s care can only be applied to the minor in the actor’s care. One cannot, for example, justifiably assault a third party whose conduct the actor believes is contrary to the welfare of the minor. Section 44(a)(3) further limits when conduct is justified by prohibiting those persons specified by Section 44(a) from engaging in conduct which creates a substantial risk of causing death, serious bodily injury, extreme or unnecessary pain or mental distress, or extreme or unnecessary humiliation.

Similarly, justified conduct under Section 44(b) can only be applied to the patient being treated. In order to save a patient’s life, a medical professional or someone assisting him cannot, for example, justifiably remove a third-party’s kidney and implant it in the patient without the third-party’s consent. A “licensed medical professional” is any person who possesses medical credentials that satisfy State regulations or that have been conferred by any generally recognized medical organization.

Section 44(c) applies to corrections officers who are responsible for the operation of a correctional institution. Section 44(d) applies to individuals authorized to protect the public order on public or commercial transportation.

Relation to current Maldivian law. Current Maldivian law does not explicitly create this justification. Including a provision such as Section 44 in the Code will ensure that individuals with special responsibility for maintaining order and caring for others will be protected when they engage in socially desirable conduct.

Islamic law allows for certain punishments for which no retaliation is warranted. These include a father disciplining his son and a teacher disciplining his pupil.⁴⁴ This draft Section limits the situations in which force can be used to a greater extent than does Islamic law, such as by requiring that the force used by a parent be necessary to safeguard or promote the welfare of the minor.

⁴⁴ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 43 (George M. Barody, trans. Dar al-Salam, 1958).

SECTION 45 – DEFENSE OF PERSON

Corresponding Current Provision(s): Maldives Penal Code, Provision 25

Comment:

Generally. This Section entitles a person to use force to protect himself or another from physical attack. Section 45(b) limits the circumstances in which an individual may use force risking death or serious bodily injury to those cases in which such force is necessary, as defined in Section 41(b).

The following example illustrates when an individual is permitted to use force risking death or serious bodily injury to defend himself or another person:

Example 1: A is attacked by B, who is wielding a knife. Since a knife is a potentially deadly weapon, A is justified in defending himself by shooting B with a gun and would escape liability for B's death. Section 45 would apply in a similar manner if A came upon B attacking another person, C, with a knife.

Additionally, a person's use of force must not be in excess of what a reasonable person would consider proportionate to the harm threatened to himself or another person. The proportionality requirement is distinct from the necessity requirement found in Section 41(b) in that disproportionate force cannot be used even when it is necessary.

The following example illustrates when an individual's use of force is disproportionate under Section 45(c)(2):

Example 2: D seeks to punch E in the stomach. E is alone and is much smaller and weaker than D, thus his only means of effectively defending himself is a gun in his possession. Although it is necessary to shoot D to prevent bodily injury, it is a disproportionate amount of force and thus is not justified.

Relation to current Maldivian law. Section 45 is similar to Provision 25 of the current Maldives Penal Code. However, Section 45(a) creates the justification for the protection of oneself and all other persons, whereas Provision 25 restricts the use of force to protecting "one's own [life], that of his parents, his children, and that of dependents and relatives whose legal guardianship is attributed to him by religion." Maintenance of this restriction in the draft Code would prohibit individuals from coming to the aid of others whose lives are being threatened unless the threatened individual fits one of the relationship categories defined by Provision 25. Therefore, the draft Code allows people to defend even complete strangers.

Section 45(b) also differs from current Maldivian law in that it creates a justification for force risking death or serious bodily injury, which is not allowed by provision 25. ("An act committed under sudden impulse in defense of 'one's own self' shall not be an offence except where that act results in the death of a person."). The draft Code would allow individuals to use potentially deadly force against their attackers in self-defense, but only if such force is necessary to defend against a threat of death or serious bodily injury.

Islamic law recognizes that force must sometimes be used in legitimate cases of self-defense. That being said, Muslim jurists have also sought to appropriately limit the use of force in such situations. Imam al-Nawawi, for example, suggests that one consider retreating before

using force.⁴⁵ The draft Code does not require retreating since determining whether one should flee or use force is best determined on a case-by-case basis. Therefore, the draft Code comports with Islamic law by providing a justification defense to someone only as long as he uses no more force than is necessary to repel the attack.

SECTION 46 – DEFENSE OF PROPERTY

Corresponding Current Provision(s): None

Comment:

Generally. This Section justifies the use of force by the owner of property, or someone with a special relation to the owner, to protect property from invasion, destruction, or theft. Section 46(b) prohibits the use of force that creates a substantial risk of causing death or serious bodily injury in order to protect property alone. One cannot, for example, justifiably shoot a thief who is in the process of stealing the actor's car, barring circumstances that would bring this example under the scope of another Section of this Chapter.

Relation to current Maldivian law. Current Maldivian law is silent on this matter. However, the concept of defense of property is accepted by scholars of Islamic law. For example, Al-Misri justifies defense of property with the minimum amount of force necessary to ward off the aggressor. This minimum amount of force is subjectively determined by the person defending his property.⁴⁶ Similarly, this opinion is supported by al-Nawawi and Ibn Duyan.⁴⁷ Through the restriction imposed in Section 46(b), the draft Code departs from the view that the use of force risking death or serious bodily injury is justified for the defense of property alone, valuing human life above property. Likewise, Islamic law values human life over property.

⁴⁵ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 109 (George M. Barood, trans. Dar al-Salam, 1958) (“Whoever is threatened with harm, in relation to his life...has the right to repel it by the easiest means possible. Therefore, if it is not repelled except by killing, he is to kill the aggressor and there would be nothing chargeable against him.”); *see also* IMAM NAWAWI, MINHJAT-TALIBIN: A MANUAL OF MOHAMMEDAN LAW ACCORDING TO THE SCHOOL OF SHAFI’I 453 (E.C. Howard, trans. from French edition by A.W.C. van de Berg, Thacker, 1914).

⁴⁶ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 594-595 (Nuh Ha Mim Keller trans., Amana Publications 1994).

⁴⁷ IMAM NAWAWI, MINHJAT-TALIBIN: A MANUAL OF MOHAMMEDAN LAW ACCORDING TO THE SCHOOL OF SHAFI’I 453 (E.C. Howard, trans. from French edition by A.W.C. van de Berg, Thacker, 1914) (“One has a right to resist any attack upon one’s life, property, bodily members, or modesty...”); *See also* IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 19 (George M. Barood, trans. Dar al-Salam, 1958) (“Whoever is threatened with harm, in relation to his life or his property or his harem, has the right to repel it by the easiest means possible.”).

SECTION 47 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 40 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 40's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 50 – EXCUSE DEFENSES

This Chapter discusses defenses to prosecution that apply to situations where the actor is excused from liability. The various Sections of this Chapter outline the different types of excuses, including involuntary acts or omissions, insanity, immaturity, involuntary intoxication, duress, impaired consciousness, ignorance or mistake, and mistake as to justification.

SECTION 50 – GENERAL PROVISIONS GOVERNING EXCUSE DEFENSES

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. This Section sets forth general provisions which apply to all excuse defenses in this Chapter. Under Subsection (b), the excused actor is distinguished from an actor whose conduct is justified. One may legally interfere with the conduct of the excused actor, but not with that of the actor whose conduct is justified. For example, if a person who would be excused for his offense because he is insane is about to harm another person under circumstances that would not give rise to a justification defense under Chapter 40, a passerby may legally restrain the insane man. However, if a person is about to use force against an aggressor under circumstances that satisfy a justification defense such as defense of person (see Section 45), a bystander may not lawfully interfere with the person. This is because it is not the conduct that is excused, but the person performing the conduct; the conduct is still considered improper and undesirable. Furthermore, under Subsection (c), if someone assists an insane person in carrying out the offense, they cannot “share” the excuse of insanity if they themselves are sane.

Under Subsections (d) and (e), a person is excused for his conduct even if he caused the conditions giving rise to an excuse, unless he caused the excusing conditions with the same level of culpability required for the substantive offense with which he is charged. For example, a person may join a gang knowing that it frequently engages in criminal activity. Later, the person may be forced by other gang members at gunpoint to commit a crime he would not otherwise commit. Although the duress excuse might ordinarily apply to someone compelled to commit a crime at gunpoint, this person knew about the gang’s criminal tendencies and the likelihood that he would be forced into criminal activity. Because he recklessly caused the excusing condition, he could be liable for an offense requiring a culpability level of recklessness. Under Section 24(g), proof of recklessness also satisfies culpability requirements of negligence, so he could also be held liable if he is compelled by other gang members to commit an offense requiring negligence. However, Section 50(e)(2) provides that the person who culpably causes the excusing conditions may also have a defense for that earlier conduct. Therefore, the gang member may have an immaturity defense depending on the age when he joined the gang or a duress defense if he had been compelled to join the gang in the first place by a threat satisfying the requirements of Section 55.

Subsection (f) provides that a mistaken belief as to an excuse, unlike a mistaken belief in a justification, cannot be a defense to criminal liability. Conduct is justified by the circumstances surrounding a person’s conduct, while a person is excused because he suffers from a disability. A person’s erroneous belief that such a disability exists is not relevant to a determination of criminal liability. In contrast, an actor’s erroneous belief that his conduct is

justified does mitigate his blameworthiness and dangerousness in engaging in such conduct; therefore, a mistake regarding a justification may provide an actor with a defense under Section 58.

As with the general defenses provided in Chapters 40 and 60, a defendant bears the burden of proving all elements of an excuse defense. Additionally, unless otherwise provided (as done in Section 57(c)(3)), the standard of proof is a preponderance of the evidence. See Section 15 (Burdens of Proof; Rebuttable Presumptions) and accompanying commentary. Even if an actor does not satisfy the requirements of an excuse defense in this Chapter to the extent necessary to completely avoid liability, his partial satisfaction of an excuse defense may be highly relevant in sentencing.

Relation to current Maldivian law. This Section, particularly Subsections (d) and (e) finds support in the current Maldives Penal Code, Provision 24. Provision 24 states that “Nothing is an offence which is done by a person who at the time of doing it is, by reason of being in a certain state of mind, incapable of knowing the nature of the act or that it may be contrary to law. This provision shall not be applicable to a person who creates that state of mind on his own volition or with his consent or by doing an act with knowledge that it will or may be likely to cause that state of mind.” The essence of this provision is that the defendant is liable for his behavior under a certain state of mind only to the extent that he is responsible for entering into that state of mind. This principle is reflected in Section 50.

Additionally, Islamic law recognizes excuse defenses, especially in cases of diminished capacity resulting from insanity or other mental impairment. For instance, Ibn Duyan notes, “the law does not permit punishment of one who is not in command of his mental faculties because there is no benefit in that.”⁴⁸

SECTION 51 – INVOLUNTARY ACT; INVOLUNTARY OMISSION

Corresponding Current Provision(s): None

Comment:

Generally. This Section excuses actors whose offenses consist of involuntary acts and involuntary omissions. The involuntary act defense in Section 51(a) applies to conduct that is not the product of an actor’s effort or determination, such as reflexive action or convulsion.

Example 1: A man jumps off a ledge onto a person below, killing the person. If he chose to jump, this is a product of his determination, and he can be held liable. However, if an attacker pushes the man off the ledge, then his movement is not the product of his own determination. Thus he cannot be held liable.

Under Subsection (b), a person is excused from liability based on an omission if he could not reasonably be expected under the circumstances to perform the omitted act. For example, a man’s child falls into a deep body of water. Normally, failure to save his child could give rise to

⁴⁸ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 43-44 (George M. Barood, trans. Dar al-Salam, 1958).

omission liability. However, if he is physically restrained at the time and thus physically incapable of performing the omitted act, he will be excused for his omission.

Relation to current Maldivian law. Current Maldivian law is silent on this matter. However, Islamic law supports the notion of exempting involuntary acts or omissions from punishment: “It is essential for the validity of legal responsibility that the act should be within the power of the man so that he may perform it or abstain from it as the case might be.”⁴⁹ In addition, there is a strong public policy reason for allowing an involuntary acts defense. As demonstrated by the examples in the above paragraphs, punishing those who are physically incapable of avoiding a crime would jeopardize the credibility of the criminal justice system.

SECTION 52 – INSANITY

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. This Section excuses actors who are sufficiently mentally ill that they cannot be held liable for their conduct. The defense provided in this section excuses persons who perform conduct constituting an offense under the influence of an uncontrollable mental disease or defect. It is not enough that a person suffers from some sort of mental disease or defect; that disability must have the effect of making it no longer reasonable to expect him to avoid the offense. This required effect is captured by the excusing conditions provided in Sections 52(a)(1), (2), and (3), which encompass both cognitive and control dysfunctions resulting from the person’s mental disease or defect. Significantly, a mental condition characterized by repeated criminal conduct is not excused under this Section.

Those persons who are acquitted due to this defense are automatically committed pursuant to Section 52(c). This automatic civil commitment gives the government time to conduct an examination to determine if civil commitment is appropriate for the protection of such persons and the public, even though they may not be imprisoned for the excused offense. This commitment for examination may last no longer than sixty days.

Relation to current Maldivian law. Provision 24 of the current Maldives Penal Code contains general language that encompasses this Section: “[n]othing is an offence which is done by a person who at the time of doing it is by reason of being in a certain state of mind, is incapable of knowing the nature of the act or that it may be contrary to law.”⁵⁰ There is further support for this in Islamic law. Ibn Duyan notes that “the law does not permit punishment of one who is not in command of his mental faculties because there is no benefit in that.”⁵¹ Imam Nawawi also holds that an insanity defense is available for persons known to be insane.⁵²

Section 52(a) could have also included persons who lack substantial capacity to appreciate the illegality of their conduct. However, because one goal of Islamic criminal law is

⁴⁹ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 258 (Islamic Research Institute Islamabad 1993).

⁵⁰ Maldives Penal Code, Section 24.

⁵¹ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUHAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 43-44 (George M. Baroody, trans. Dar al-Salam, 1958).

⁵² IMAM NAWAWI, MINHJAT-TALIBIN: A MANUAL OF MOHAMMEDAN LAW ACCORDING TO THE SCHOOL OF SHAFI’I 399 (E.C. Howard, trans. from French edition by A.w.c. van de Berg, Thacker, 1914).

to have wrongfulness and illegality mirror one another as closely as possible, this option was omitted.

SECTION 53 – IMMATURITY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 6 and 7

Comment:

Generally. Section 53 excuses actors who, being under the age of 21, are not responsible for their crimes due to their immaturity. Like other disability excuses, immaturity must result in the excusing conditions provided in Section 53(a)(2) in order to excuse an actor. Because immaturity does not interfere with a person’s ability to accurately perceive the physical nature of his conduct in the way that other disabilities can, this aspect is not a part of the excusing conditions for immaturity.

Immaturity also differs from other disabilities because of the presumptions described in Section 53(b). For a person under the age of 14, it will be conclusively presumed that his immaturity had the effect required in Subsection (a)(2). For a person at least 14 years of age, but less than 18 years of age, it is also presumed that his immaturity had the effect required in Subsection (a)(2); however, this presumption is subject to rebuttal. See draft Section 15 and accompanying commentary for the rules regarding rebuttable presumptions. The presumptions described in Subsection (b) do not prevent application of this defense to an individual above the age of 18 who satisfies the requirements of Subsection (a). A person over 18 years of age may still satisfy the requirements of this defense; however, he will not receive the benefit of a presumption in determining whether the requirements of Subsection (a) are satisfied. An person less than 21 years of age, but at least 18 years of age shall be presumed to possess the maturity of an adult, unless this is rebutted by the offender.

Those persons who are excused due to their immaturity under this Section must be transferred to the juvenile justice system under Subsection (c). The juvenile system will take measures to encourage the rehabilitation of the offender and protect the community instead of imposing criminal punishment.

Relation to current Maldivian law. This Section finds support in Provision 6 and 7 of the current Maldives Penal Code as well as Provision 289 of the Rules Relating to the Conduct of Judicial Proceedings. Provision 6 provides that “[w]here a person under 10 years of age is found guilty under this Law, he shall not be subjected to the full punishment prescribed for the relevant offence in this Law. And it is more desired that his act be not regarded in every possible measure as an offence.” Provision 7 states that “except in respect of offences relating to the religion of Islam or homicide, the Judge shall have the discretion to mitigate the punishment in respect of every other offence committed by a person under 16 years of age who is found guilty under this Law.” This draft Section reflects the judgment consistent with the above provisions that actors under ages 14 and 18 are not as culpable as mature actors. The specific ages were altered upon discussion with officials from the Maldivian government and in consideration of Provision 289 in the Rules Relating to the Conduct of Judicial Proceedings. In addition, this draft Section adds Subsection (a), which covers immaturity generally. Lastly, this Section finds

support in Islamic law, which generally considers minors to have a greatly reduced legal capacity.⁵³

Current Maldivian law deals with immaturity as a jurisdictional issue rather than as a consideration of whether a person's immaturity interferes with his functioning in such a way that he should be excused for his offense. This Section maintains the jurisdictional aspect of immaturity through Subsection (c). However, rather than relying only on an offender's age to determine which court should have jurisdiction, this Section attempts to determine the impact of immaturity on an offender's blameworthiness by allowing an excuse defense which takes into consideration the conduct involved, the person's actual maturity, and his actual ability to function within the confines of the law.

In addition, parts of Provision 289 of the Rules Relating to the Conduct of Judicial Proceedings are not included because they are more relevant to sentencing guidelines and the operation of the juvenile court.

SECTION 54 – INVOLUNTARY INTOXICATION

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. This Section excuses actors whose conduct is a result of involuntary intoxication. Like other disability excuses, such as insanity, a person is not excused unless his involuntary intoxication resulted in a lack of substantial capacity to perceive the physical nature and consequences of his offense conduct, to appreciate the wrongfulness of his conduct, or to sufficiently control his conduct. The disturbance must relate to the person's conduct constituting the offense rather than his conduct in general. For example, if an actor is to be excused for assault because involuntary intoxication prevented him from having substantial capacity to control his conduct so as to be justly held accountable for it, he must be unable to control the conduct that is the basis for the charge of assault—it is irrelevant whether he can control his behavior in general.

Section 54(b) describes when intoxication is considered involuntary. See Section 31 and accompanying commentary for the treatment of persons who act under the influence of voluntary intoxication.

Relation to current Maldivian law. Like Section 52 of the draft Code, provision 24 of current Maldives Penal Code contains the following language that encompasses this section: "Nothing is an offence which is done by a person who at the time of doing it is by reason of being in a certain state of mind, is incapable of knowing the nature of the act or that it may be contrary to law."⁵⁴ Islamic law lends more specific support for this section. The Shafi'i jurists, Ibn Shurayh and Ibn Hazm, "invalidate the acts of the drunkard whether or not he had an excuse in becoming drunk and regardless of the substance that intoxicated him . . . no retaliation is due against an intoxicated person for damage he causes while intoxicated, nor are indemnities

⁵³ IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 128 (Advanced Legal Studies Institute 2000).

⁵⁴ Maldives Penal Code, Section 24.

imposed on him, nor is he liable in any other way. He is imprisoned, however, until he desists from further harm and becomes sober.”⁵⁵

In addition, there are counterpart provisions in the Malaysian Penal Code which state: “intoxication shall be a defense to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing.”⁵⁶ The Malaysian Penal Code excuses the intoxicated actor who, as a result of his intoxication, was not aware of the wrongfulness of his act. Instead of requiring that the actor not be aware of the wrongfulness of his act, the draft Code excuses an actor who, through no fault of his own, lacks “substantial capacity” to “appreciate” the wrongfulness of his act. These broad terms allow for more flexibility in capturing the influence of involuntary intoxication.

SECTION 55 – DURESS

Corresponding Current Provision(s): None

Comment:

Generally. This Section excuses the actor who commits an offense because he was compelled to engage in the offense conduct by a threat. Whether the threat is sufficiently serious to excuse an actor is determined by whether a person of reasonable firmness in the person’s situation would have been unable to resist. This standard is objective in that it relies on what a person of reasonable firmness would be able to resist, but the language “in the person’s situation” also allows for some individualization. As for the actor who is responsible for placing himself into the conditions in which duress occurred, see Section 50(e) and accompanying commentary.

It should be noted that Subsection (b) introduces a limitation which prevents the use of this defense in a prosecution for murder (under Section 110). The assumption is that a person of reasonable firmness should always be able to resist taking another person’s life.

Relation to current Maldivian law. The current Maldives Penal Code contains no express language relating to coercion of the kind mentioned in this Section. However, there is support for this Section in the writings of Muslim jurists, including members of the Shafi’i school. They argue that coercion waives many obligations in the law because of the “similarity of the state of the coerced with one who has no will of his own.”⁵⁷ In other words, Shafi’i jurists explain that coercion is an impediment to legal obligation.⁵⁸

Muslims jurists have suggested that “the threat [of coercion] must consist of destroying a man’s life or limb, or causing damage to which a man would not consent in any

⁵⁵ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 188 (M. Cherif Bassiouni, ed. 1982).

⁵⁶ Malaysian Penal Code Section 85 – December 2002 pg. 40.

⁵⁷ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 480 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

⁵⁸ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 371 (Islamic Research Institute Islamabad 1993) (“coercion...is an impediment to legal obligation...for freedom of choice and sound free will are essential to legal obligation.”).

circumstances.”⁵⁹ Although the draft code does not limit the threat to one of physical harm, the requirements suggested by Muslim jurists are not inconsistent with the draft Code’s requirement that a person of reasonable firmness in the person’s situation must have been unable to resist the threat. Judging the sufficiency of the threat by what a person of reasonable firmness in the person’s situation would be unable to resist rather than the type of harm threatened more accurately captures the situations in which it would be unjust to hold a person liable because he could not reasonably be expected to act otherwise. Furthermore, draft Section 55(b) limits the duress excuse by making it unavailable in a prosecution for murder under draft Section 110 instead of placing a limitation on the duress excuse by limiting its application to threats of physical harm. The harm sought to be prohibited by that offense is viewed as being so serious that no threat can excuse it.

In addition, there is a counterpart provision in the Malaysian Penal Code which states: “nothing is an offense which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence.” Malaysia makes an exception where the “person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.”⁶⁰

SECTION 56 – IMPAIRED CONSCIOUSNESS

Corresponding Current Provision(s): Maldives Penal Code, Provision 24

Comment:

Generally. This Section creates an excuse for cases where a person’s consciousness is altered due to a demonstrable physiological disease or defect, rather than a “mental disease or defect” as in insanity, that prevents a person from being blameworthy for his actions. This Section recognizes that there can be physiological causes of the kind of dysfunction that merits an excuse, such as epilepsy, brain tumors, chemical imbalances, etc. that may not qualify as a mental disease or defect and thus may not fall within the scope of the insanity defense provided in Section 52. Additionally, the terms of the involuntary act excuse provided in Section 51 are extremely strict and would cover very few of these cases, as hardly any acts are not “a product of [the person’s] effort or determination.” Section 56 covers acts that involve some cognitive control, and therefore fall outside Section 51, but where there is still sufficient impairment of control that the person should not be held accountable for his acts.

This excuse is subject to Section 50(e) that provides that an actor is liable when he culpably causes the conditions giving rise to the excuse. For example, if a man who knows he suffers from frequent seizures is considered reckless in deciding to drive, he would not be excused for recklessly killing someone while driving, which is manslaughter under draft Section 111(a).

Relation to current Maldivian law. This Section is consistent with current provision 24 of the Maldives Penal Code, which states that “[n]othing is an offence which is done by a person who at the time of doing it is by reason of being in a certain state of mind, is incapable of

⁵⁹ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 366 (Islamic Research Institute Islamabad 1993).

⁶⁰ Malaysian Penal Code, Section 94 (2002) p.44.

knowing the nature of the act or that it may be contrary to law. This provision shall not be applicable to a person who creates that state of mind on his own volition or with his consent or by doing an act with knowledge that it will or may be likely to cause that state of mind.”

In addition, there is a strong public policy reason for allowing an impaired consciousness defense. As demonstrated by the examples of epilepsy, brain tumors, and chemical imbalances given above, punishing those who are physically incapable of avoiding a crime would jeopardize the credibility of the criminal justice system.

SECTION 57 – IGNORANCE OR MISTAKE

Corresponding Current Provision(s): Maldives Penal Code, Provision 20

Comment:

Generally. Section 57 describes the circumstances in which a mistake of law may provide a general mistake defense unrelated to offense elements or to a belief in justification. For mistakes that provide a defense by negating a culpable state of mind required by an offense definition, see Section 25 (Ignorance or Mistake Negating Required Culpability), and accompanying commentary. For a mistake as to whether circumstances exist that would justify otherwise prohibited conduct, see Section 58 (Mistake as to a Justification) and accompanying commentary.

Section 57(a) and 57(b) recognize that, in a jurisdiction that adopts a modern criminal code, criminal liability should be imposed only where a written statement of the law’s commands exists prior to the alleged violation of those commands. It would be unfair to punish citizens for conduct if the government provides inadequate notice of the conduct’s prohibition. The rationale for criminal liability does not apply where the defendant did not know, and could not reasonably have known, that his conduct was criminal. Section 57(a) applies when no statement of the law is made reasonably available. Section 57(b) applies when an existing official statement of the law is inaccurate and a person acts in reasonable reliance on that inaccurate statement.

Section 57(c) creates an excuse defense for a person who honestly and in good faith makes a reasonable mistake as to the legality of his conduct after diligently pursuing all reasonable means to determine the law’s requirements. To prevent abuse of this provision, Section 57(c)(3) provides that the defendant must prove this defense by clear and convincing evidence, a higher evidentiary standard than the preponderance of the evidence standard normally required for a general defense.

Sections 57(a)(2), (b)(2), and (c)(2) each require that the defendant not know that the conduct is criminal in order to prevent exploitation of these provisions by people who were not mistaken as to the illegality of their conduct regardless of the availability or accuracy of published law.

Relation to current Maldivian law. This Section parallels Provision 20 of current Maldivian law, which provides that a person does not commit an offense if he is acting with a good faith belief that he is bound by the law to take such action. In addition, it is a general principle in Islamic law that “if a man does not know the deed which he performs is forbidden,

no punishment should be inflicted on him.”⁶¹ Al-Misri, for example, holds that “[s]omeone who commits fornication is not punished if he says he did not know it was unlawful, provided he is a new Muslim or grew up in a remote wilderness.”⁶² (By “remote wilderness” the jurists refer to areas where Islamic scholars are not present.) Ibn Duyan takes a similar view.⁶³ Section 57 applies this general principle and reflects the idea that a man should not be punished for violating a law of which he cannot reasonably be expected to be aware.

SECTION 58 – MISTAKE AS TO A JUSTIFICATION

Corresponding Current Provision(s): None

Comment:

Generally. Section 58 creates an excuse defense for actors who engage in conduct under the mistaken belief that the conduct is legally justified in their situation. Because justification defenses are defined objectively in Chapter 40, an actor who believes that circumstances exist that would give rise to a justification defense does not receive a justification defense if his conduct is not actually justified under the circumstances as they exist. Instead, he may have an excuse defense under this Section. The rationale behind this excuse is that an actor who reasonably thinks his conduct is justified is not blameworthy for acting in what would be a justified manner under the circumstances as he believes them to be. See commentary accompanying Section 50(f).

Section 58(a) requires that the person’s conduct satisfy the requirements of a justification defense, as defined in Chapter 40, under the circumstances as he believes them to be. Thus this provision does not apply in cases where a person is mistaken about his conduct being justified even if the circumstances were as he supposed. Only mistakes as to the facts of a situation qualify for this defense. If the person is mistaken as to what the law is regarding justification defenses, he would still not fulfill the requirements of a valid justification and would not satisfy the requirements of mistake as to a justification excuse defense (although he could potentially still have an excuse under Section 57).

The following example illustrates when a person’s mistake of fact may permit this defense:

Example 1: A perceives that B is about to shoot him with a gun. In fact, B is holding a water pistol. A shoots B to defend himself against a threat of deadly force. Since A was mistaken about the fact of whether B was about to shoot him, A may receive this defense if he fulfills the requirements of the defense under Subsections (b)(1) and (2).

⁶¹ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 363 (Islamic Research Institute Islamabad 1993).

⁶² AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 610-611 (Nuh Ha Mim Keller trans., Amana Publications 1994).

⁶³ Ibn Duyan recounts the story related by Sa’id ibn al-Musayyib, “adultery in Syria was being discussed when a man said: I committed adultery yesterday. They asked: what are you saying? He replied: I didn’t know that God had prohibited it. Then it was written to ‘Umar regarding it, and he replied that, if he had knowledge that God had prohibited it, then apply the *hadd* against him; if he did not know, then inform him.” IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 49 (George M. Barood, trans. Dar al-Salam, 1958).

The following example illustrates when a person's mistake of law may not receive this defense:

Example 2: C perceives that D is about to slap him. C mistakenly believes that he is justified in shooting D to defend himself contrary to the restrictions on the use of force risking death or serious bodily injury in the defense of person justification. Regardless of this mistake, the law is as written and thus C would not satisfy the requirements of the justification. Therefore, C cannot receive the excuse defense provided in this Section.

The purpose of the requirements in Subsection (b) is to deny the excuse to actors who, despite their mistaken justification, are nonetheless blameworthy with respect to the offense charged.

Subsection (b)(1) and (2) provide two alternative culpability requirements. Subsection (b)(1) permits the defense when the person's mistake is non-negligent. Thus a faultless mistake would always permit this defense. Subsection (b)(2) permits the defense—though the mistake is culpable—when the mistake is less culpable than the culpability required by certain elements of the offense charged. This effectively creates a sliding scale that reduces a person's liability to a lower offense that matches the culpability of his mistake, or eliminates liability if no such lower offense exists.

The following example illustrates the sliding scale effect of Section 58(b)(2):

Example 3: E perceives that F is about to shoot him with a gun. In fact, F is only holding a water pistol made of bright yellow plastic. E purposely shoots F to defend himself against a threat of deadly force. E's mistake was reckless, because F's yellow plastic water pistol clearly was not a real gun. E thus has a defense against the charge of murder despite having purposely killed F. His mistake was less culpable than the purpose or knowledge requirements for the result element of murder (causing death). However, E would still be liable for manslaughter under draft Section 111(a) since that offense definition only requires recklessness as to causing death.

Relation to current Maldivian law. There are no express provisions in the current Maldives Penal Code relating to this Section. However, general support for this Section can be found in Islamic law on the basis of principles mentioned in the commentary to Section 57.

In addition, this Section is a natural corollary to Provision 20 of current Maldivian law, which provides that a person does not commit an offense if he is acting with a good faith belief that he is bound by the law to take such action. Allowing a defense for those who mistakenly and non-culpably think their actions are justified by the law follows from allowing a defense for those who believe their actions are required by law.

SECTION 59 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 50 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between the terms defined in Chapter 50 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 60 – NONEXCULPATORY DEFENSES

This Chapter discusses defenses to prosecution that apply to situations where a specific circumstance unrelated to the crime warrants an excuse for punishment. The various Sections of this Chapter outline the different types of nonexculpatory defenses, including when prosecution is barred because it was not commenced within the appropriate time period; where the defendant is unfit to plead, stand trial, or be sentenced; where the defendant has diplomatic immunity, and where the defendant was previously tried for the same offense or a different offense. The last Section of this Chapter stipulates that prosecution is not barred where the former prosecution was before a court lacking jurisdiction, or was fraudulently procured by defendant, or resulted in a conviction that was held invalid.

SECTION 60 – GENERAL PROVISIONS GOVERNING NONEXCULPATORY DEFENSES

Corresponding Current Provision(s): None

Comment:

Generally. Section 60 describes the rules governing the operation of the nonexculpatory defenses set out in Chapter 60. A defendant who relies on a nonexculpatory defense acknowledges their guilt in committing an offense, but asserts that a specific circumstance unrelated to the crime warrants excuse from punishment. Nonexculpatory defenses further societal interests that are important enough to allow offenders subject to nonexculpatory defenses to avoid liability. The fact that they exist separate from an offender’s blameworthiness and the desirability of his conduct is the key feature of the provisions of this Section.

Section 60(a) defines “nonexculpatory defense.” Section 60(b) provides that unjustified conduct subject to a nonexculpatory defense, such as unjustified conduct by a person who has been granted diplomatic immunity, may be resisted. Section 60(c) provides that a person who assists in the offense for which another person has a nonexculpatory defense does not have a defense based solely on the other person’s nonexculpatory defense. A nonexculpatory defense is exclusive to the person protected by this defense; it does not create a shield for others who cannot claim the nonexculpatory defense for themselves. For example, if a foreign diplomat and a Maldivian citizen commit a crime together, the foreign diplomat may use her nonexculpatory defense, whereas the Maldivian citizen cannot rely on the foreign diplomat’s immunity. Section 60(d) provides that a person who is mistaken as to a nonexculpatory defense—who, for example, thinks he has been granted immunity by the state—is not entitled to that defense of which he is mistaken.

As with the general defenses provided in Chapters 40 and 50, the defendant has the burden to prove all elements of a nonexculpatory defense by preponderance of the evidence, unless otherwise explicitly provided. See Section 15 (Burdens of Proof; Rebuttable Presumptions) and accompanying commentary.

Relation to current Maldivian Law. Section 60 has no directly corresponding provision in the current Maldives Penal Code. However, there is a strong public policy argument for including nonexculpatory defenses in this draft Code. As mentioned above, nonexculpatory defenses further societal interests that are important enough to allow offenders subject to nonexculpatory defenses to avoid liability. For example, prosecuting a defendant who is unfit to stand trial would jeopardize the integrity of the criminal justice system. Nonexculpatory

defenses are separated from excuses because they address neither the offender's blameworthiness nor the impropriety of the defendant's conduct.

SECTION 61 – PROSECUTION BARRED IF NOT COMMENCED WITHIN TIME LIMITATION PERIOD

Corresponding Current Provision(s): None

Comment:

Generally. Section 61 sets a time limitation for commencing prosecutions and provides rules governing the operation of the limitation. Subsection (a) defines the time limits for prosecuting felonies and misdemeanors. Subsection (b) creates an exception for violent crimes as well as for the specific crimes of theft, unlawful sexual intercourse, false accusation of unlawful sexual intercourse, failing to fast during Ramadan, and consuming pork or alcohol. These crimes are defined in Sections 211-216, 411, 612, and 616 respectively and have been isolated because of the harm they cause to greater society.

Time limitations encourage prompt investigation of crimes and prevent stale prosecutions. The time limit of four years for misdemeanors and ten years for felonies were chosen in order to balance prompt and accurate investigations against the goal of prosecuting blameworthy offenders at any time, especially those who have committed serious crimes. It is thought that these time limits provide ample time for the relevant authorities to fully consider a situation and determine whether prosecution is worthwhile. The time limitation for felonies is greater than that of misdemeanors in recognition that being able to prosecute blameworthy offenders is weighed more heavily against prompt and accurate investigations where offenders are charged with an offense that has been deemed serious enough to be graded as a felony.

The value of being able to prosecute, at any time, offenders charged with violent offenses and the above enumerated offenses has been deemed serious enough to outweigh the value of any time limit on prosecution. In addition, the increasing availability and reliability of physical evidence makes prosecuting old cases more feasible. If the passage of time has made evidence unreliable, the defense can point out this weakness and argue that the evidence should be afforded little or no weight. Prosecutorial discretion to decide which cases are worth the investment of resources will prevent old cases with insufficient evidence from being prosecuted.

Relation to Maldivian Law. Section 61 has no directly corresponding provision in current Maldivian law. However, there is a strong public policy argument for setting time limits for commencing prosecutions. The integrity of the criminal justice system would be jeopardized if stale prosecutions of old cases with insufficient evidence were not controlled in some way.

SECTION 62 – UNFITNESS TO PLEAD, STAND TRIAL, OR BE SENTENCED

Corresponding Current Provision(s): None

Comment:

Generally. Section 62 sets the fitness standard under which defendants will not be required to face criminal adjudication. This defense ensures that all criminal defendants will have the mental and physical capacity to aid in their own defense, testify on their own behalf,

confront witnesses, and effectively communicate with counsel. This defense includes but is not limited to criminal defendants who are clinically deemed mentally disabled beyond capacity to understand the nature and consequences of their actions. Mental disability must be ascertained by a certified or otherwise recognized practicing physician. Unlike excuse defenses, the inquiry is not whether the defendant's mental or physical condition at the time of the offense should prevent him from being liable for the offense, but rather whether the defendant's mental or physical condition at the time of prosecution will interfere with fitness to plead, stand trial, or be sentenced.

Section 62(b) stipulates that a person whose trial is delayed or abandoned under this Section shall be automatically committed for an examination to determine whether he is subject to civil commitment. The purpose of this civil commitment is solely to conduct an examination to determine if civil commitment is appropriate for the protection of such persons and the public, even though they may not be imprisoned under the criminal system. Note that this Section operates in the same way as Subsection (c) under Section 52 (Insanity). See commentary accompanying Section 52(c).

Relation to current Maldivian Law. Section 62 has no directly corresponding provision in the current Maldives Penal Code. However, the current law supports the policy that, in order to commit an offense, a person must have a specific mental capacity, namely the ability to understand the nature of his or her act.⁶⁴ Furthermore, Maldivian law protects minors from full punishment for crimes,⁶⁵ reinforcing the policy that, in order to face full prosecution, a defendant must have the full capacity of an adult to understand the nature and consequences of his actions.

This section is also supported by the Islamic legal principle requiring the proper mental and physical condition to stand trial. For example, if a defendant is ill, some jurists postpone execution of *hadd* sentences, even after the defendant has been convicted, until the defendant is physically well.⁶⁶

Subsection (a)(1) is supported by the statement by Abu Bakr al-Sarkashi: "As for the capacity of obligation, it means fitness for bearing the command of obligation. If anyone has this fitness, he will be fit for an obligation being imposed on him; but one who does not have it, will not be fit for bearing an obligation."⁶⁷ Muslim jurists have stated that this capacity for legal obligation is directly connected to the "power of understanding" in an individual.⁶⁸

⁶⁴ Maldives Penal Code § 24. Nothing is an offense which is done by a person who at the time of doing it is by reason of being in a certain state of mind, is incapable of knowing the nature of the act or that it may be contrary to law. This provision shall not be applicable to a person who creates that state of mind on his own volition or with his consent or by doing an act with knowledge that it will or may be likely to cause that state of mind.

⁶⁵ Maldives Penal Code § 6. Where a person under 10 years of age is found guilty under this Law, he shall not be subjected to the full punishment prescribed for the relevant offense in this Law. And it is more desired that his act not be regarded in every possible measure as an offense.

Maldives Penal Code § 7. Except in respect of offenses relating to the religion of Islam or homicide, the Judge shall have the discretion to mitigate the punishment in respect of every other offense committed by a person under 16 years of age who is found guilty under this Law.

⁶⁶ IBN RUSHD, *THE DISTINGUISHED JURIST'S PRIMER II*, at 528 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

⁶⁷ AHMED HASAN, *PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI'AH AND JURIDICAL NORM* 296 (Islamic Research Institute Islamabad 1993)(quoting, AL-SARKASHI, *USUL AL-SARKASHI* (Matabi' Dar al-Kitab al-Arabi 1955).

⁶⁸ AHMED HASAN, *PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI'AH AND JURIDICAL NORM* 295 (Islamic Research Institute Islamabad 1993).

Subsection (a)(2) is supported by the general principle in Islamic law that the defendant must “take personal charge of his defense.”⁶⁹ If this is not possible then the defendant should not stand trial until such time as he is able to do so.

Finally, there is a strong public policy argument for setting a fitness standard under which defendants will not be required to face criminal adjudication time limits for commencing prosecutions. As mentioned in the commentary to Section 60, the integrity of the criminal justice system would be jeopardized if the State prosecuted those unfit to stand trial.

SECTION 63 – DIPLOMATIC IMMUNITY

Corresponding Current Provision(s): Maldives Penal Code, Provision 4

Comment:

Generally. Section 63 protects specific defendants from the requirement to plead, stand trial, or be sentenced. These defendants are generally foreign dignitaries, ambassadors, or representatives of foreign institutions. These defendants must be formally granted immunity by the State.

Relation to current Maldivian Law. Section 63 replaces provision 4 of the current Maldives Penal Code.⁷⁰ Section 63 clarifies that immunity is not automatically granted to persons by virtue of their positions. Instead, a person must be granted immunity by the Maldivian government, either because an international treaty provides it or because the person occupies a position listed in Section 63(b).

SECTION 64 – FORMER PROSECUTION FOR SAME OFFENSE AS A BAR TO PRESENT PROSECUTION

Corresponding Current Provision(s): None

Comment:

Generally. Section 64 sets out the rules governing the effect of former prosecutions on subsequent prosecutions for the same offense. This Section protects a defendant from being tried or punished twice for the same offense.

This bar arises in the narrowest sense of a violation of the *same statute* based upon the *same facts*. A bar arises in four general situations: (a) where the first prosecution results in an acquittal; (b) where the first prosecution results in a conviction; (c) where the first prosecution results in a final order or judgment in favor of the defendant on the merits which is inconsistent with conviction for the offense charged; and, (d) where the first prosecution is improperly terminated after jeopardy has attached.

⁶⁹ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 95 (M. Cherif Bassiouni, ed. 1982).

⁷⁰ “Persons to whom the State has agreed to grant immunity under a foreign treaty; foreign dignitaries of the State; and ambassadors of foreign countries resident in the Maldives shall be exempt from the application of this Law. Representatives of various foreign institutions whom the State has granted immunity in that respect shall further be exempt from the application of this Law.”

Relation to current Maldivian Law. Section 64 has no directly corresponding provision in current Maldivian law. However, Provision 109 of Rules Relating to the Conduct of Judicial Proceedings, Provision does require any retrial or rehearing which imposes a new punishment to “deduct the term of the previous sentence” from the new one. In addition, there is a strong public policy argument for barring subsequent prosecution where the defendant has already been prosecuted. The integrity of the penal system would be jeopardized if individuals were tried numerous times for the same offense.

Note that this draft Section differs from Provision 109 in that the Provision also requires that the matter be sent in writing to the Ministry of Justice. This draft Section considers this requirement unnecessary because it places limitations on subsequent prosecutions.

SECTION 65 – FORMER PROSECUTION FOR DIFFERENT OFFENSE AS A BAR TO PRESENT PROSECUTION

Corresponding Current Provision(s): None

Comment:

Generally. Section 65 sets out rules governing the effect on a criminal prosecution of former prosecutions for a different offense. This Section requires, in certain circumstances, that different crimes arising out of the same conduct be tried together. Like Section 64, this Section protects the defendant by preventing the prosecution from relitigating factual issues decided in the defendant’s favor at a previous trial.

There are five categories of cases in which a former prosecution bars a subsequent prosecution for a different offense: (a) offenses of which defendant could have been convicted on the first prosecution either based on the same conduct or arising from the same criminal episode; (b) offenses based on the same conduct; (c) where the former prosecution resulted in acquittal, final order or judgment for the defendant that necessarily required a determination inconsistent with a fact that must be established to convict of the second offense; and, (d) where the former trial was improperly terminated and the subsequent prosecution is for an offense for which the defendant could have been convicted had the former prosecution not been improperly terminated.

Relation to current Maldivian Law. Section 65 is encompassed in the principles present within current Maldivian law, specifically provisions 109, 111, and 186 of the Rules Relating to the Conduct of Judicial Proceedings. In addition, there is a strong public policy argument for setting rules governing the effect on criminal prosecutions of former prosecutions for different offenses. The integrity of the criminal justice system would be jeopardized if factual issues decided in the defendant’s favor in previous trials were relitigated.

SECTION 66 – PROSECUTION NOT BARRED WHERE FORMER PROSECUTION WAS BEFORE COURT LACKING JURISDICTION OR WAS FRAUDULENTLY PROCURED BY DEFENDANT OR RESULTED IN CONVICTION HELD INVALID

Corresponding Current Provision(s): None

Comment:

Generally. Section 66 identifies various cases where former prosecutions should *not* act as a bar to subsequent prosecutions, including where the original court lacked jurisdiction to hear the case, the defendant obtained the prior prosecution with the intent of avoiding a harsher sentence, or the prior conviction was invalidated on procedural grounds unrelated to the merits.

Relation to current Maldivian Law. Section 66 has no directly corresponding provision in current Maldivian law. In the interest of achieving finality in court proceedings, this draft Code narrows the circumstances in which subsequent prosecutions may be conducted. In addition, this Section is consistent with the procedural rule of Islamic law that judges may reopen proceedings when new information is brought to their attention.⁷¹

SECTION 67 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 60 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between the terms defined in Chapter 60 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

⁷¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 634 (Nuh Ha Mim Keller trans., Amana Publications 1994)(citing o.23.4).

LIABILITY OF CORPORATIONS AND OTHER NON-HUMAN ENTITIES

CHAPTER 70 – LIABILITY OF CORPORATIONS AND OTHER NON-HUMAN ENTITIES

This Chapter sets out the liability for corporations and other non-human entities. Section 70 establishes liability for corporations as well as unincorporated associations. Section 71 establishes liability for individuals acting on behalf of a corporation or association.

SECTION 70 – LIABILITY OF CORPORATION OR UNINCORPORATED ASSOCIATION

Corresponding Current Provision(s): None

Comment:

Generally. Section 70 sets out the circumstances under which a corporation may be held criminally liable for its actions. Liability may be imposed on corporations in certain circumstances to deter their agents from violating the law or failing to perform a legal duty. Unincorporated associations should merit criminal liability to the same extent as corporations, as such associations often resemble corporations in every respect except for the fact they have not formally incorporated. The concerns with deterrence of criminal conduct and punishment of a collective criminal enterprise are present with unincorporated associations no less than with corporations. Corporations incorporated pursuant to laws other than the Companies Act of Maldives are also subject to this Chapter.

Section 70(a)(1) applies to an agent in a position of supervisory or managerial responsibility who, acting within the scope of his corporate authority, commits an offense or authorizes, requests, or commands another corporate agent to commit an offense on behalf of the corporation. In such a scenario, the corporation is liable for that offense.

Section 70(a)(2) applies to any employee or agent of the corporation or association who violates the law while acting within their corporate capacity. 70(a)(2) contains additional requirements for imposing liability on a corporation or association, as compared to 70(a)(1), because 70(a)(2) applies to actions taken by any person authorized to act in behalf of the corporation or association while 70(a)(1) applies only to actions by the board of directors or a high managerial agent.

Liability under Section 70(a)(2) is limited by the due diligence defense in Section 70(b), which prevents liability in situations where a corporate agent attempted in good faith to follow the law, except for strict liability offenses or when the legislative purpose of the statute defining the offense supports imposing liability despite due diligence. Thus, if an employee violates the law while acting in the scope of his employment, the burden shifts to the corporation or association to prove that it diligently made an effort to prevent the employee's criminal behavior. This defense is not available for activity pursuant to Section 70(a)(1) or Section 70(a)(3) because the concern of excessive corporate liability that is present when a corporation or association is held liable for the actions of any corporate agent is not similarly present in the situations covered by 70(a)(1) and 70(a)(3). Section 70(a)(2)(B) imposes liability on a corporation or association when a statutory provision defining an offense requires a corporation or association to discharge a specific duty and the corporation or association fails to take such action.

Section 70(a)(2)(B) is meant to allow the legislature the freedom to designate specific corporate agents liable for enumerated criminal offenses if it chooses to do so. For example, the legislature would be free to assign liability for all corporate accounting irregularities to the Chief Financial Officer rather than to the corporation generally. 70(a)(2)(B) ensures that such a law would not conflict with the code as draft.

Relation to current Maldivian law. Current Maldivian law does not address corporate or non-human liability. There is disagreement as to whether Islamic law traditionally recognized legal rights, responsibilities or personality of non-natural persons such as corporations.⁷² However, the legal personality of the corporation has been recognized by the Islamic Fiqh Academy of the Organization of Islamic Conference (OIC) on the basis of the concept of *sharikah musahamah*.⁷³ Thus, the principles in this section are supported by modern Islamic jurisprudence on corporations.⁷⁴

Furthermore, Islamic legal principles relating to vicarious liability also support this section. For instance it is generally held that “an employer may be civilly liable for the practices of his subordinates.”⁷⁵ This principle can be expanded to cover the corporate setting and criminal liability. In addition, if the law grants corporations legal personality for business purposes, then it should also hold them legally responsible for their actions.

Finally, there is a strong public policy argument for holding corporations criminally liable for their actions. Irresponsible corporations have the capacity to do great harm to society and the environment. Imposing liability on corporations in certain circumstances can deter their agents from violating laws or failing to perform legal duties intended to protect society and the environment. Criminal liability for corporations holds particular importance for the Republic of the Maldives, where much of the economy is dependent on natural resources which could be jeopardized by irresponsible corporate action or inaction.

SECTION 71 – RELATIONSHIP TO CORPORATION OR UNINCORPORATED ASSOCIATION; NO LIMITATION ON INDIVIDUAL LIABILITY OR PUNISHMENT

Corresponding Current Provision(s): None

Comment:

Generally. This Section prevents individuals from escaping liability by virtue of having acted on behalf of a corporation or association and establishes that individuals may be punished fully as individuals even though their liability stems from actions made on behalf of their corporation.

⁷² IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATION: CORPORATIONS 80-81 (International Institute of Islamic Thought 1998).

⁷³ IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATION: CORPORATIONS 122 (International Institute of Islamic Thought 1998)(citing Resolution No. 7/1/65 adopted in the 7th session in May 1992).

⁷⁴ Even those Muslim jurists who disagree with justifying corporate personality on the basis of *sharikat musahamah*, agree that other concepts like *wakalah* (agency) and *inan* (partnerships) can serve to establish this personality. (IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATION: CORPORATIONS 175 (International Institute of Islamic Thought 1998)).

⁷⁵ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 175 (M. Cherif Bassiouni, ed. 1982).

A person may only be accountable for conduct he performs on behalf of a corporation to the same extent he would be liable for performing such conduct on his own behalf. In other words, a person may not be accountable under this Section for an offense that applies only to corporations and not to individuals.

Relation to current Maldivian law. Although current Maldivian law is silent on this matter, a basic principle of Islamic law is that “a person is totally responsible for his actions—a responsibility brought upon him by his reason, his will, inclinations and choice.”⁷⁶ Many jurists base this principle of individual responsibility on Qur’an 2:134 “[U]nto them shall be accounted what they have earned, and unto you, what you have earned.”⁷⁷

In addition, this Section is justified by the same public policy arguments listed in the commentary to the above Section 70. If this draft Code is to deter agents of corporations from acting or failing to act in a way that harms society and the environment, then these agents cannot be allowed to escape liability by virtue of having acted on behalf of a corporation or association. As noted in the introduction to the commentary to this Section, these individuals must be punished fully as individuals even though their liability stems from actions made on behalf of their corporation.

SECTION 72 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 70 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between the terms defined in Chapter 70 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

⁷⁶ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 172 (M. Cherif Bassiouni, ed. 1982).

⁷⁷ Qur’an 2:134 (Muhammad Asad, trans.) .

INCHOATE OFFENSES

CHAPTER 80 – INCHOATE OFFENSES

This Chapter defines the requirements for liability for offenses in their initial or early stage, including criminal attempt, criminal solicitation, and criminal conspiracy. This Chapter also provides defenses to inchoate offenses, including where the defendant is a victim of the offense or his conduct is inevitably incident to its commission and where the defendant, after committing an inchoate offense, voluntarily renounces his criminal purpose and prevents the inchoate offense from becoming a completed offense. Section 87 of this Chapter establishes a separate offense for the possession of instruments of crime.

SECTION 80 – CRIMINAL ATTEMPT

Corresponding Current Provision(s): Maldives Penal Code, Provision 9 and 88(26); Criminal Court Circular 13/SP/2003

Comment:

Generally. Section 80 defines the requirements for liability for an attempt to commit an offense. Liability for attempt is imposed when a person, acting with the culpability required for the underlying offense, purposely engages in conduct constituting a substantial step toward the commission of the offense. Attempts are subject to liability because, like completed offenses, they involve a culpable mental state and dangerous conduct. Yet attempts differ from completed offenses in that, due either to circumstance or the actor's failure to complete the offense, the harm that would otherwise result does not occur, or occurs to a lesser extent.

Subsection (a)(2) includes the phrase "if the circumstances were as he believes them to be." If the defendant perceives circumstances such that he believes he is attempting to commit an offense, he is liable under Section 80. There is no defense of impossibility. For example, a person is liable for an attempt if he thinks he is buying drugs, but in fact he is not. However, if the defendant perceives circumstances such that his conduct would not constitute a substantial step towards the commission of an offense, he should not be liable under Section 80.

The following example illustrates when conduct may be considered a substantial step so as to impose liability for criminal attempt:

Example 1: A intends to kill B. Knowing B's route home after work, A lies in wait for B with a gun on a deserted street. B takes a different route home, and A is apprehended by a police officer that notices him lurking in an alley with a gun. Lying in wait for a contemplated victim constitutes a substantial step when corroborative of the person's purpose to complete the offense. A's waiting along B's known route home with a deadly weapon is corroborative of A's intent to murder B, as is his possession of a gun in circumstances indicative of such intent. Thus A is liable for attempted murder.

Relation to current Maldivian law. Current Maldivian law does not define attempt liability. However, provision 9 of the Maldives Penal Code indicates that attempt liability exists: "[w]here there is an intention *or an attempt* to commit an offence and where such offence is

completed *or attempted to be completed* by one act or several acts, all such acts shall be constituted as one offence” (emphasis added).⁷⁸ Provision 9 thus prohibits punishment for both an attempt and a completed offense. An identical prohibition is found in Section 94 (Prosecution for Multiple Offenses) of the draft Code. In addition, Criminal Court Circular 13/SP/2003 specifically criminalizes attempting to sexually assault another.

Islamic law does not impose attempt liability in the case of *hadd* offenses or intentional homicide and assault. Courts may, however, impose discretionary punishment (*ta'zir*) on persons whose conduct would, in general, conform to criminal attempt as that offense is defined in this Chapter.⁷⁹ Thus, Section 80 is in conformity with Islamic law both in its imposition of liability for criminal attempt and in its reduction by one grade of the punishment for attempt liability (see the comment to Section 86). The requirement of Subsection (a)(1) that the person act “with the culpability required for commission of the offense” ensures that the person is punished only if he has the blameworthy state of mind required for the commission of the underlying offense.

Some modern Muslim commentators have found authority for the “substantial step” requirement of Subsection (a)(2) in Prophetic Hadith.⁸⁰ For example, commentators cite the Prophet’s teaching that “Allah has forgiven the people belonging to my Ummah for the notions coming into their minds unless they utter them or put them into practice.”⁸¹ Mere preparation is not punishable under Section 80 or Islamic law.

Some scholars of Islamic law claim it is improper to punish attempt, because the law does not define attempt liability with sufficient precision.⁸² Subsection (b)(1) addresses this concern by requiring that conduct be “strongly corroborative of the person’s purpose to complete the offense” to constitute a “substantial step” within the meaning of Subsection (a). Also, Subsection (b)(2) describes seven kinds of conduct that are always sufficient to constitute a “substantial step” so long as they are strongly corroborative of the person’s purpose to complete the offense.

The general analysis in this comment in regard to the jurisprudential basis for attempt liability under Islamic law applies to the other inchoate offenses defined in this Chapter.

SECTION 81 – CRIMINAL SOLICITATION

Corresponding Current Provision(s): Maldives Penal Code, Provision 12

⁷⁸ For further express references to attempt liability, see Subsections (2)(a), (2)(b), (2)(c), and (2)(e) of the 1990 Law on the Prevention of Terrorism in the Maldives.

⁷⁹ LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 226 (Majid Khadduri & Herbert J. Liebesny eds., 1955) (*citing*, Ibn Tamiyya and Abu Yusuf); ABDUL QADER ‘OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 45 (International Islamic Publishers, 1991); ABDUL QADER ‘OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 180 (International Islamic Publishers, 1991); *See also*, IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW – ISLAMIC AND WESTERN (1998).

⁸⁰ DR. ANWARULLAH, CRIMINAL LAW OF ISLAM 14-15 (Islamic Da'wah, Centre 1995); *See also* ABDUL QADER ‘OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 44 (International Islamic Publishers, 1991) (endorsing purpose as the proper mens rea for attempt).

⁸¹ *Ibid.*

⁸² IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW – ISLAMIC AND WESTERN (1998) (quoting the Qu’ran: “Nor would We visit with our wrath until we had sent a messenger.”) (sura and verse numbers not provided).

Comment:

Generally. Section 81 provides for liability for a person who solicits another person to commit an offense. The offense of solicitation recognizes that a person who intends to promote or facilitate the commission of an offense, and who is willing to instigate another to act so as to become liable for such offense, demonstrates both culpability and a dangerous inclination toward criminality. The criminal solicitor thus must act with the culpability required for the underlying offense. The independent act of commanding, encouraging, or requesting another person to commit the offense takes the place of the substantial step towards commission of the offense required for attempt liability under Section 80 or the conduct towards the objective of the conspiracy required for conspiracy liability under Section 82. The offense of solicitation also takes into account the additional danger of group criminality that arises when a person solicits another to commit an offense.

Relation to current Maldivian law. Attempt is criminalized in current Maldivian law as evidenced by Provisions 88(26) and 12 of the Maldives Penal Code. Provision 12 of the Maldives Penal Code, governing abetment, criminalizes “advising or instigating in any manner to commit an offence or referring directly or indirectly to any such act,” and resembles draft Section 81 rather closely. There are, however, important differences between existing provision 12 and draft Section 81.

First, Section 81(a)(1)(B) requires that a person act “with the purpose of promoting or facilitating [the] commission [of an offense].” Section 12, on the other hand, does not have a specific culpability requirement. Note that while a person must act with purpose as to promoting or facilitating the commission of the offense, he must only act with the culpability required for the commission of the offense as to the elements of the offense.

Second, Section 81(a)(2) punishes a person if he “commands, encourages, or requests” another to act so as to become liable for an offense; provision 12 punishes a person if he “advises or instigates” another to commit an offense, or if he “refer[s] directly or indirectly to any such [offense].” The word “advise” in provision 12 is somewhat ambiguous; Webster’s Revised Unabridged Dictionary (1996) gives its two primary meanings (in order) as: “[1] to offer advice to; counsel, and [2] to recommend; suggest.” The first meaning of “advise” applies not to this Section, but to Section 30(b)(1) (Accomplice Liability). The second meaning is synonymous with “encourage.” Section 12 is more expansive than this Section because it punishes both direct or indirect references to the commission of an offense. This code does not punish indirect offenses because if such a rule was applied consistently, it would criminalize all discussion of crime, regardless of the speaker’s culpability or dangerousness. For example, if A discusses a crime he reads about in the paper, he should not be punished for such an indirect reference.

The third difference between this Section and provision 12 is that Subsection (b) of this Section punishes uncommunicated solicitations, so long as a defendant’s conduct “is designed to accomplish such communication.” The rationale for punishing unsuccessful solicitations parallels the rationale for punishing attempts; a person’s culpability and dangerousness do not diminish simply because his conduct fails to achieve its intended result.

Additionally, it should be noted that neither this draft Section nor existing provision 12 requires an overt act on the part of the recipient of a criminal solicitation. As with uncommunicated solicitations, a person establishes his culpability and dangerousness once he satisfies the offense requirements in Subsection (a). The acts (or lack thereof) of the recipient are immaterial to his liability under this Section.

Finally, criminal solicitation as defined in this Section would, as in the case of the other inchoate offenses defined in this Chapter, be subject to a court's discretionary punishment (*ta'zir*) under Islamic law. For further analysis of the jurisprudential basis for attempt liability under Islamic law, refer to the commentary to Sections 80 and 86.

SECTION 82 – CRIMINAL CONSPIRACY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 12(b) and 13

Comment:

Generally. Section 82 establishes liability for the offense of conspiracy, which is committed when two or more persons agree to commit an offense and any one of them commits an overt act toward the object offense with the purpose of promoting or facilitating its commission. As with Section 81, this Section requires that a conspirator act with the culpability required for the commission of the underlying offense as well as the purpose of promoting or facilitating commission of the offense. Conspiracy differs from other inchoate offenses in that culpably agreeing to commit an offense, coupled with any conduct towards the objective of the conspiracy, establishes both culpability and dangerousness, regardless of whether the object offense is ever committed. In addition, all of the conspirators are held liable for the conduct of any one of them.

It is important to note the difference between conspiracy and complicity. Complicity is a doctrine of imputation, allowing for the imputation of one person's conduct to another (to satisfy an element of the offense that otherwise would not be satisfied), while conspiracy is an inchoate offense. An accomplice is liable for the underlying offense (through the mechanism of complicity), while a conspirator is liable for an inchoate form of the offense (conspiracy).

Consistent with the universal principle that a person may not be punished for thoughts alone, Section 82 requires more than mere intent to commit a crime; it also requires that one of the conspirators engages in conduct toward the objective of the conspiracy.

Subsection (c) is designed to punish criminal organizations in which many of the participants do not know each other.

The following example illustrates when individuals unknown to each other may be held liable for the same conspiracy:

Example 1: A agrees with B (the ringleader) to commit the offense; then, unbeknownst to A, B agrees with C to commit the same offense. A has not agreed to anything with C. However, if A could reasonably have expected that B would agree with another person to commit the same offense, Subsection (c) dictates that A be deemed to have agreed with C to commit that offense. As a result, A and C are liable as co-conspirators with B.

Subsection (d) simply recognizes that conspiracies cannot last forever. There are three ways a conspiracy may end. First, a conspiracy may achieve its objective. Second, law enforcement may "frustrate" a conspiracy by prosecuting its members or otherwise interfering and foiling the conspiracy. Third, a conspiracy may be abandoned by its members. Subsection (d) makes it clear that once a person has committed an offense under Subsection (a), conspiracy liability exists until either the conspiracy ends or the person withdraws from the conspiracy.

Subsection (e) imposes one of two requirements on a person who wishes to withdraw from a conspiracy. Such a person must inform all of his co-conspirators of his withdrawal, or must inform law enforcement authorities of the existence of the conspiracy and of his participation therein. Ordinarily, the withdrawal of one conspirator will provide law enforcement authorities with enough information to frustrate a conspiracy and prosecute its members. However, there may be cases where, due to the effect of Subsection (c), a person may effectively withdraw from a conspiracy and yet lack sufficient information about co-conspirators and other aspects of the conspiracy to enable law enforcement to frustrate the conspiracy and prosecute its members. Despite these difficulties, the former conspirator's withdrawal should be given full effect in these cases.

Subsection (f) provides that a conspiracy is abandoned as to all conspirators if no overt act towards the objective of the conspiracy has been committed by any conspirator during a period equal to the applicable period of limitations provided in Section 61 (Prosecution Barred if Not Commenced Within Time Limitation Period). Note that Section 61 prescribes a period of limitations for misdemeanors and felonies offenses (4 and 10 years respectively) and that the exception for violent and enumerated crimes does not apply to this Subsection.

Subsection (g) makes it clear that neither withdrawal nor abandonment is a defense to conspiracy, except as provided by Section 85 (Defense for Renunciation Preventing Commission of the Offense). Subsections (e) and (f) are included to describe the concepts of withdrawal and abandonment as they are used in Subsection (d) and not to provide a defense to liability.

Relation to current Maldivian law. Provision 12(b) of the Maldives Penal Code parallels Subsection (a) of this draft Section. Provision 12(b) criminalizes “conspiring to commit an offence and committing an act for the purpose of taking part in the commission of an offence.” First, Provision’s 12(b)’s “conspiring to commit an offence” is equivalent to Subsection (a)(1)’s requirement of an agreement to commit an offence. Second, the phrase “committing an act for the purpose of taking part in the commission of an offence” is virtually identical to the requirements in Subsections (a)(1) and (a)(2) of this draft Section. Finally, the culpability required in both existing Provision 12 and draft Section 82 is a purpose to promote or facilitate the commission of the underlying offense.

This draft Section differs from current Maldivian law in several ways. First, Provision 13 of the Maldives Penal Code does not define substantive conspiracy liability; rather, it states that participation in a conspiracy establishes accomplice liability as a matter of law. In contrast, the draft Code views conspiracy and accomplice liability separately because aiding a crime and conspiring to commit a crime are not necessarily the same thing.⁸³ One could aid another as an accomplice to commit a crime, but if they have not previously conspired to commit the crime in a certain manner, then they are not co-conspirators. For example, if A robs and injures one of the guards in the process, and there is no agreement between A and B about injuring the guard, there is no liability for conspiracy. Alternatively, it is possible to engage in a conspiracy and not amass accomplice liability. For example, A and B agree to break into C’s home. A satisfies the culpability requirements of (a)(1). B goes out and buys tools to be used in breaking into C’s home which constitutes “conduct towards the objective of the conspiracy” by any one of the persons in the conspiracy. This is as far as their plan gets before the police intervene. Here, A is liable for conspiracy but is not an accomplice.

Second, this draft Section differs from Provision 27 of the Maldives Penal Code in that punishment for conspiracy does not differ based on the seriousness of the underlying offense, nor

⁸³ See Section 30(2).

does punishment depend on whether the individual acted toward the objective. However, both Provision 27 and this draft Section reduce liability for inchoate offenses.

Third, this draft Section extends liability to a conspiracy to commit any offense. It therefore obviates the need for specific conspiracy prohibitions such as the one found in the 1990 Law on the Prevention of Terrorism in the Maldives,⁸⁴ except to the extent that such prohibitions impose punishments harsher than those available under Section 82.

No current Maldivian law addresses the topics covered in Subsections (b) through (g). The draft Code includes these Subsections because they are consistent both with Islamic law and with the draft Code's policy of punishing culpable and dangerous conduct. Subsections (b) through (g) are in accord with expansive conspiracy liability, which Islamic law generally endorses.⁸⁵ Most Muslim jurists punish conspiracy as a ta'zir offense.⁸⁶ However, none of the jurists explains in detail the elements of conspiracy or explores the limits of the offense's reach. The jurists say only that a conspiracy requires a criminal "meeting of the minds," that the doctrine of unilateral conspiracy is incompatible with Islamic law.⁸⁷

Subsection (a)(2) is supported by Islamic law in that jurists agree that conspiracy liability should attach only when an agreement is proven.⁸⁸ The draft Code respects this concern. Provided that the other requirements of Subsection (a) are satisfied, Subsection (a)(2) imposes liability for both implicit and explicit agreements to commit an offense, so long as the prosecution proves the existence of an agreement of some kind to a practical certainty.

Subsection (b) defines "objective of a conspiracy," a term used in Subsection (a)(3), to include (in addition to the commission of the object offense) escape from the scene of the offense, distribution of the proceeds of the offense, and measures, other than silence, for concealing the offense or obstructing justice in relation to it. Subsection (b) thus seeks to expand conspiracy liability to reach those persons who participate in these additional activities.

Subsection (c) expands on Islamic law's requirement of a "meeting of the minds" for a punishable agreement in a manner that is consistent with the expansive view taken of conspiracy liability by Islamic law.

SECTION 83 – UNCONVICTABLE CONFEDERATE NO DEFENSE

Corresponding Current Provision(s): None

Comment:

Generally. Section 83 rejects the notion that the liability of a defendant who has committed an offense under Section 81 (Criminal Solicitation) or Section 82 (Criminal Conspiracy) is reduced or precluded by circumstances unique to the person with whom the defendant conspired or whom the defendant solicited. The rationale underlying Section 83 is that the culpability and dangerousness of a person who has committed an offense under Section 81 or Section 82 are unrelated to the liability of another person because the culpability and

⁸⁴ Subsections 6(a) and 6(b) of this Law both include the following sentence: "[t]he punishment for any person found to have participated in the commission or planning of such an act [of terrorism] shall also be the same."

⁸⁵ *Id.* p. 73.

⁸⁶ DR. ANWARULLAH, CRIMINAL LAW OF ISLAM 19 (Islamic Da'wah, Centre 1995) (exception is Hanifa).

⁸⁷ *Id.*

⁸⁸ ABDUL QADER 'OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 57 (International Islamic Publishers, 1991).

dangerousness of a person who commits conspiracy or solicitation stem from the willingness of that person to commit a crime as evidenced by committing conspiracy or solicitation.

Relation to current Maldivian law. Current Maldivian law is silent on the issues addressed by Section 83. However, Islamic law endorses Section 83's rejection of the notion that the liability of a defendant who has committed an offense under Section 81 (Criminal Solicitation) or Section 82 (Criminal Conspiracy) is reduced or precluded by circumstances unique to the person with whom the defendant conspired or whom the defendant solicited.⁸⁹

In addition, as mentioned above, the public policy rationale underlying Section 83 is that the culpability and dangerousness of a person who has committed an offense under Section 81 or Section 82 are unrelated to the liability of another person.

SECTION 84 – DEFENSE FOR VICTIMS AND FOR CONDUCT INEVITABLY INCIDENT

Corresponding Current Provision(s): None

Comment:

Generally. Section 84 provides a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense or his conduct is inevitably incident to its commission.

Subsection (a) protects people who are victims of the underlying offense—for example, a person who agrees to pay money to an extortionist, thereby technically entering into a “conspiracy” with the extortionist.

Subsection (b) covers situations where, because a person's conduct is ancillary to the underlying crime, it is unclear whether the person should be held liable.⁹⁰ For example, it is not clear whether the purchaser should be liable for conspiracy to traffic in stolen goods. Under Subsection (b), the legislature would still be free to decide on a case-by-case basis that such people should be subject to liability by writing the law defining the specific underlying offense to reflect that understanding.

The defense in Subsection (a) has been included because it seems fundamentally unjust to punish the victim of an offense, even if the victim satisfies the technical requirements for liability.

The defense in Subsection (b) has been included because it is not clear that liability is intended for a person whose conduct is ancillary to an underlying offense. Rather than etch a decision on this question into the stone of the draft Code, it is more appropriate to leave this decision to the people of the Maldives, acting through their elected representatives.

Relation to current Maldivian law. Current Maldivian law is silent on the issues addressed by Section 84. However, this Section can be construed as a corollary to Islamic law's requirement of a “meeting of the minds.” More specifically, where a person is a victim of the underlying offense, as in Subsection (a), or a person's conduct is ancillary to the underlying crime, as in Subsection (b), the “meeting of the minds” requirement cannot be said to have been met.

In addition, there is a strong public policy argument for providing a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense or his

⁸⁹ ABDUL QADER 'OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 64 (International Islamic Publishers, 1991).

⁹⁰ See draft Section 30(3).

conduct is inevitably incident to its commission. For example, as mentioned above, this defense would protect a person who agreed to pay money to an extortionist, thereby technically entering into a “conspiracy” with the extortionist. Because the person who pays the extortionist is more of a victim than a co-conspirator of the extortionist, he should not be criminally liable for his actions. This draft Section thus maintains the integrity of the criminal justice system by providing a defense for people who find themselves in such situations.

SECTION 85 – DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE

Corresponding Current Provision(s): None

Comment:

Generally. Section 85 provides a defense for persons who, after committing an inchoate offense, voluntarily renounce their criminal purpose and prevent the inchoate offense from becoming a completed offense. As Subsection (b) makes clear, however, renunciation is not “voluntary” when it is merely a response to a fear of being caught, or a tactical decision to pursue the crime in a different way. Under Subsection (c), the defendant would bear the burden of proving this defense by a preponderance of the evidence.

Relation to current Maldivian law. Current Maldivian law is silent on the issues addressed by Section 85. However, Islamic law supports a broad renunciation defense, whatever the actor’s motive, so long as the offense is not completed and none of the steps accomplished on the way to completion were crimes in and of themselves.⁹¹ This policy reflects an interest in sparing those who renounce by repenting.⁹² Note that unlike Islamic law, Section 85 does not provide a defense to a completed crime if the perpetrator repents, but only to a person who has intentionally left a crime unfinished, since allowing repentance alone as a defense would defeat the purpose of a modern criminal justice system based on culpability.

Under Islamic law, to absolve the actor of liability, renunciation must be voluntary and complete.⁹³ Subsection (a) of draft Section 85 similarly requires that renunciation must be voluntary and complete, and Subsection (b) describes what makes renunciation voluntary and complete.

Although the renunciation defense may not be necessary to provide an incentive for an offender to stop his criminal conduct because inchoate offenses are graded less seriously than completed offenses, it is still desirable to include such a provision because a person who voluntarily and completely renounces before completing the offense no longer evidences a willingness to commit the offense and is therefore no longer blameworthy or dangerous.

SECTION 86 – GRADING OF CRIMINAL ATTEMPT, SOLICITATION, AND CONSPIRACY

Corresponding Current Provision(s): Maldives Penal Code, Provision 9, 10, 11, 12, 13, 14, 52, and 136

⁹¹ DR. ANWARULLAH, CRIMINAL LAW OF ISLAM 14-15 (Islamic Da'wah, Centre 1995).

⁹² ABDUL QADER ‘OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 47 (International Islamic Publishers, 1991) (quoting the Qu’ran 5:34, “Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful.”).

⁹³ ABDUL QADER ‘OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 46 (International Islamic Publishers, 1991).

Comment:

Generally. Unlike other Chapters in the draft code, Chapter 80 grades the offenses defined in several sections in a single section on grading. This format is used mainly for efficiency, but it also highlights what the offenses in Sections 80 through 82 have in common, namely reduced liability in relation to the attempted, or solicited, or conspired to offense.

Section 86 grades all inchoate offenses one grade lower than the offense attempted, solicited, or agreed to. This system relates the seriousness of the inchoate offense to that of the underlying offense, but reduces liability in recognition of the fact that the inchoate offense does not generate the resulting harm with which the underlying offense is concerned. Reduced liability for the incomplete offense also creates an incentive for an offender to stop short of the completed offense and thus promotes public safety.

The sentencing factor addressed in Subsection (b) is intended to punish more seriously crimes that are nearly completed or unsuccessfully completed. The first category of attempts, conspiracies, and solicitations that should be punished more seriously are those in which the conduct performed nearly approaches completion of all the conduct required for the offense. An example of such a nearly-complete offense would be a group of would-be bank robbers who draw up a plan, gather weapons, recruit accomplices, and drive to the scene, only to leave without committing the robbery because several police officers happen to be nearby. In such a case, the offenders have shown that they have made substantial preparations for the offense and did not commit the offense simply for fear of apprehension at that particular time.

The second category of attempts, conspiracies, and solicitations that should be punished more seriously are those in which the offenders complete all the conduct that would be necessary for the completed offense, but where the conduct is unsuccessful. An example of such a case would be an attempted murder, where the offender fires a weapon at a person and misses. In that case, the offender completed all the conduct necessary. Only because the bullet missed did the offender fail to commit murder. Another example would be the commission of an impossible attempt, such as one where the intended victim or accomplice is a police officer, who attempts to catch the offender in a bad act. For instance, if a police officer attempts to catch a thief by placing valuable merchandise in a store window, the officer actually wishes that the merchandise be stolen. Therefore, even if the offender actually takes the items, the offender cannot actually commit theft, because the officer permits the items to be "stolen." Nevertheless, the offender has attempted to commit a theft and has performed all the requisite acts, and so deserves more serious punishment than someone who had merely made preparations to take the items but had not taken them.

Relation to current Maldivian law. Although the conceptual basis of this Section draws largely from current Maldivian law, comparison is difficult because of the difference in structure between the Maldivian provisions and the draft Code. For example, current provisions of Maldivian law often incorporate multiple offenses while the draft Code divides like offenses into separate categories.

In Islamic law, attempt, solicitation, and conspiracy are prescribed a lesser punishment than for the intended offense since such crimes are both less dangerous and less reprehensible than the completed offense.⁹⁴ In the same way that Islamic law punishes attempt under *ta'zir*,

⁹⁴ ABDUL QADER 'OUDAH SHAHEED, CRIMINAL LAW OF ISLAM VOL.II, 72 (International Islamic Publishers, 1991).

even where the conduct attempted would normally be punished as a *hadd* offense, Section 86 stipulates a lesser punishment for attempt than for the completed crime.⁹⁵

The above analysis applies to liability for all other inchoate offenses defined in this Chapter.

SECTION 87 – POSSESSION OF INSTRUMENTS OF CRIME

Corresponding Current Provision(s): Maldives Penal Code, Provision 93

Comment:

Generally. Section 87 establishes a separate offense for the possession of instruments of crime. Subsection (a) defines the offense to prohibit possessing an instrument of crime with the purpose to use it criminally. Subsection (b) defines the term “instrument of crime.” Subsection (c) grades the offense.

This offense is included in Chapter 80 because it relies on an underlying offense—the person must have the purpose to employ the instrument of crime in committing an offense—and, like attempt, solicitation, and conspiracy, a person is still liable for possession of instruments of crime if the underlying offense is not completed. The offense does not seek to prohibit possession itself as much as it seeks to prohibit the harmfulness and dangerousness of another offense indicated by the possession of instruments to be used in such an offense.

Relation to current Maldivian law. This Section provides a general offense of possessing instruments of crime which encompasses the more specific set of circumstances detailed by Provision 93 of the current Maldives Penal Code.

In addition, *Islamic law endorses* preventive detention of a theft suspect arrested in possession of “instrument of crime.”⁹⁶ Section 87 clarifies that the prohibition extends to anything specially made or specially adapted for criminal use or anything commonly used for a criminal purpose and possessed under circumstances strongly corroborative of the defendant’s criminal purpose. Islamic law also *recognizes that possession of an instrument of crime should be punished because it is indicative of the harmfulness and dangerousness of another offense.*⁹⁷

SECTION 88 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 80 and provides cross-references to the Sections in which they are defined.

⁹⁵ AL-MAWARDI, THE ORDINANCES OF GOVERNMENT 257-258 (Wafaa H Wahba trans., Garnet Publishing 2000)(Attempted burglary falls under *ta'zir* and merits a maximum of 10 lashes (out of a possible 75); *See also*, LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 226 (Majid Khadduri & Herbert J. Liebesny eds., 1955) (gives two examples of reduced punishment for attempt: homicide and theft).

⁹⁶ Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 103 (M. Cherif Bassiouni, ed. 1982).

⁹⁷ AL-MAWARDI, THE ORDINANCES OF GOVERNMENT 257-258 (Wafaa H Wahba trans., Garnet Publishing 2000) (providing the example of possession of burglar’s tools as suggesting burglary but not meriting as severe as punishment as more substantial conduct).

Relation to current Maldivian Law. For discussion of the relationship between the terms defined in Chapter 80 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

OFFENSE GRADES AND THEIR IMPLICATIONS

CHAPTER 90 – OFFENSE GRADES AND THEIR IMPLICATIONS

The purpose of Chapter 90 is to provide a coherent framework for the grading and sentencing of offenses. In general, the grading of offenses under the draft Code, as well as the related matters dealt within this Chapter, have their basis in the assumptions underlying the functioning of a modern penal code. This Chapter is not intended to address all issues regarding the sentencing offenders or grading of offenses; some provisions will be addressed in sentencing guidelines in Part III and in the specific offenses themselves. For example, Chapter 90 lays out the grading of offenses and the maximum punishments that can be handed down for each offense, but does not address whether incarceration shall be served under house arrest or in a prison. Such decisions are addressed in the sentencing guidelines in Part III of the draft Code. Moreover, judges will retain some discretion in determining the length and type of sentences given.

In addition, the maximum sentences identified in Chapter 90 are preliminary and will likely need to be revised by the Maldivian government as appropriate. For example, the government is best positioned to assess whether: (1) banishment is equivalent to incarceration, (2) banishment should be available in different situations, or (3) banishment should be for different durations than incarceration. The purpose of this Chapter is to establish punishment grades so that punishments are consistent within and across offenses.

A second point of mention is that this Chapter was drafted in concurrence with the sentencing guidelines in Part III of this Code, which does not permit early release of prisoners nor adopt any system of paroles. Therefore, the terms of imprisonment described in this Chapter represent actual times of imprisonment rather than terms that may eventually be shortened by early release or parole.

Finally, many of the punishments that are available in Islamic law are not included in this grading system. Islamic law punishments that are not included are retaliation and amputation (for theft). These punishments were not included because they do not exist in current Maldivian law and therefore do not reflect prevailing Maldivian norms. It also should be noted that these punishments would not be consistent with the Maldives' international obligations.⁹⁸

The punishment of lashes has been removed from the general grading scheme based on current Maldivian practice. However, lashes are specifically authorized within the Special Part of this draft Code for the crimes of unlawful sexual intercourse (Section 411), false accusation of unlawful sexual intercourse (Section 612), Consumption of Alcohol (Section 616), and Incest (Section 413). The corresponding Section for each of these crimes authorizes a specific number of lashes as an additional punishment for the offense. Note that Section 411(d) defines "lashes" as a means of symbolic punishment of striking an offender's back with a short length of rope in a manner not designed to cause bodily injury. The definition further provides that a single person must inflict all of the lashes prescribed as punishment, and he may only drive the rope using his wrists; he may not use any other part of his arm or movement in his shoulders, hips, back, legs or torso for that purpose. This definition is provided in order to ensure that the punishment is within the bounds of common notions of decency.

⁹⁸ See, for example, the United Nations Declaration of Human Rights.

SECTION 90 – CLASSIFIED OFFENSES

Corresponding Current Provision(s): None

Comment:

Generally. This Section provides a classification of all criminal offenses into grades for purposes of determining the extent of liability.

Criminal offenses are further classified into felonies and misdemeanors. Such a distinction is important “for purposes either (1) of the substantive criminal law, or (2) of criminal procedure, or (3) of legal matters entirely outside the field of criminal law.”⁹⁹

First, within the substantive criminal law, as represented by this Code, some offenses are defined in terms of felonies and misdemeanors. For example, Section 141 (Criminal Coercion), punishes the compulsion of another to commit a felony more greatly than the compulsion of a misdemeanor.

Second, rules of criminal procedure and sentencing may depend on a classification of felony or misdemeanor. Rules of arrest, jurisdiction, indictment, and testimony impeachment may turn on this distinction.¹⁰⁰ Furthermore, the distinction may change the magnitude of the sentence. For example, within Section 95 (General Adjustments to Offense Grade), “commit[ing] a *felony* in an exceptionally brutal or heinous manner” may subject the offender to a penalty one and one half times the maximum otherwise authorized.

Third, the distinction may be relevant, or may become relevant, outside of the criminal sphere. Commonly cited examples predicated on a felony conviction may include the rights to hold public office, to vote, or to work as an attorney.¹⁰¹

Relation to current Maldivian law. The current Maldivian code is ungraded; each offense contains a unique penalty. There are two major, related problems with such a system: inconsistency and difficulty adding new offenses. Inconsistency arises from the difficulty in assessing a single penalty relative to the entire penal code. Without examining each and every provision, it is impossible to know whether a given penalty is proportionately “correct” relative to another penalty. Likewise, without a grading system, one would need to examine the entire penal code before determining the appropriate penalty for a newly enacted offense. Giving each offense a grade systematically “expresses a judgment of degree.”¹⁰² Thus, limiting the possible penalties to a system of five felonies, three misdemeanors, and violations greatly simplifies the Code. Simplification yields greater consistency and proportionality, but this comes at the loss of some flexibility. In such a classification scheme, all offenses must group into a total of nine categories. Such a loss in flexibility, however, is greatly offset in the gains.

SECTION 91 – UNCLASSIFIED OFFENSES

Corresponding Current Provision(s): None

⁹⁹ Wayne R. LaFave, Criminal Law § 1.6(a) (3d ed. 2000).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Paul H. Robinson, Criminal Law § 1.5 (1997).

Comment:

Generally. This provision provides classifications for offenses not included in the Code. While all offenses should be classified (i.e. assigned a felony or misdemeanor grade), the possibility remains of an unclassified (ungraded) offense.

In the case of an unclassified offense that provides a specified term of imprisonment, Section 91(a) provides that the offense may be classified according to that term. If the offense generally declares itself to be a felony or misdemeanor, Section 91(b) provides a default classification.

If the offense provides no guidance as to its penalty, or is an offense of strict liability, Section 91(c) provides that it is to be treated as a violation. The only exception to this is that strict liability offenses can be subject to a grade higher than violation if the prosecution proves negligence as to all elements. Such a system ensures that a disproportionately long sentence is not created where unintended.

Relation to current Maldivian law. Current Maldivian law provides an individual penalty, not classification, for each offense. See the commentary on Section 90 regarding the general benefits of classification.

SECTION 92 – AUTHORIZED TERMS OF IMPRISONMENT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 16 and 60.

Comment:

Generally. This provision establishes the maximum terms of imprisonment for each class of offenses. The durations generally double, except at the ends. A proportionately smaller penalty is thought to be applicable to the least severe offenses for which imprisonment is appropriate (30 days for a Class 3 misdemeanor). Likewise, the maximum penalty is capped at 25 years for the most severe offenses. Imprisonment and banishment are not authorized for offenses classified as violations.

Section 92(j) emphasizes that the terms of imprisonment set by this Section are statutory *maximums*; that is, sentences of lesser terms of imprisonment may be given consistent with an offense's grade. For example, a Class C felony may be punished with a term of imprisonment of 6 years, which is within the range of punishments permitted for that grade. Under Section 92(j), only the most egregious imaginable forms of Class C offenses should receive an 8 year term of imprisonment. However, a Class C felony should not be punished by a term of less than 4 years since that would defeat the legislative purpose of grading the offense a Class C felony rather than a Class D felony.

Section 92(k) further emphasizes that the most severe form of punishment possible, the death penalty, may only be given for the most heinous form of purposeful killing imaginable; in other words, the most heinous crime imaginable. This reflects the seriousness and severity of the death penalty as a form of punishment. Section 1204 contains additional limitations on the imposition of the death penalty under the sentencing guidelines.

Relation to current Maldivian law. The current Maldivian code limits the maximum impossible term of imprisonment to 25 years; that limit is carried forward into this code. Maldives Penal Code, Provision 16. At the minimum, nuisance is the lowest current penalty, at 10 days. Maldives Penal Code, Provision 60. For the purpose, however, of encompassing a full

range of Class 3 Misdemeanors, Section 92(h) sets the maximum penalty at 30 days. This is, of course, a *maximum* penalty; offenders can still be sentenced to fewer than 30 days where the judge determines that a lengthier sentence is not appropriate.

Although current Maldivian law provides an individual penalty, not classification, for each offense, most current penalties fit into the new grading structure. Penalties for individual offenses typically cluster around the ranges of 6 months, 1 year, 2 years, etc. Although there are some changes from the current laws in the length of maximum available sentence, the changes are generally not substantial.

In addition, in contrast to the current Maldives Penal Code, specifically Provisions 28(q) and 41(b), this draft Code does not prescribe the form which imprisonment should take because it is beyond the scope of the penal code. Rather, the form which imprisonment should take is more appropriate for the prison system. For this reason, Section 92 of this draft Code authorizes imprisonment, but does not refer to what form this imprisonment shall take.

Finally, this draft Code addresses punishment in a different manner from the current Maldives Penal Code. Whereas the current Penal Code specifically defines the punishment for each offense, Sections 92, 93, and 94 of this draft Code provide the general parameters of what sort of punishment is authorized by this draft Code. In addition this draft Code provides maximum penalties prescribed for each class of offenses rather than a specific penalty for each offense. The rationale behind this scheme is to provide a more streamlined and consistent punishment scheme.

SECTION 93 – AUTHORIZED FINES

Corresponding Current Provision(s): Maldives Penal Code, Provisions 26

Comment:

Generally. This provision establishes the maximum fine for each class of offenses. The draft maximum fines are bracketed to reflect the fact that the draft proposals are merely tentative. Section 93(c) doubles the maximum authorized fine for corporations since, in most cases, corporations have significantly greater financial resources than do individuals, and greater fines may be appropriate to achieve the goals of punishment when dealing with corporations. Note that Section 220(6) assigns a higher aggravated fine for environmental damages, creating an exception to this Section.

Relation to current Maldivian law. These draft penalties are much higher than those provided by the current Maldives Penal Code. The maximum penalty found in the current code is MVR 15,000.¹⁰³ Maldives Penal Code, Provision 26.

These higher draft penalties, however, reflect the “or” language of the current code. Currently, most offenses may be punished by imprisonment *or* a fine. Setting the penalties sufficiently high makes fines a viable alternative to imprisonment: it gives the penalty “bite.” In addition, the levels of the fines will need to be finalized by the Maldivian government, given the

¹⁰³ “Whoever abets the commission of an offence punishable with death, imprisonment for life or banishment for life under this Law shall be punished with imprisonment or banishment between 5 years and 12 years or shall be subject to a fine between Mrf. 3,000.00 and Mrf. 10,000.00. Where the act of abetment results in grievous hurt being caused to a person, his term of punishment can be extended up to a period of 18 years or the fine may be increased up to an amount of Mrf. 15,000.00.”

government's better understanding of the economic situation of Maldivian citizens. In addition, the draft fines are the *maximum* allowed; they can always be set lower as a judge deems appropriate.

SECTION 94 – PROSECUTION FOR MULTIPLE OFFENSES

Corresponding Current Provision(s): None

Comment:

Generally. Section 94 delineates the situations in which a defendant can and cannot be convicted of more than one offense. In general, the limitation is designed to prohibit an offender from serving multiple sentences for the same crime. Thus, multiple convictions are generally limited to those situations in which there are genuinely two separate crimes, whether arising out of the same act or arising out of separate acts.

Section 94(a) permits conviction for multiple offenses where the offenses are based on the same conduct and this conduct establishes the commission of more than one offense.

Pursuant to Section 94(b)(1)(A)(aa), where the offenses are based on the same harm and one offense is entirely included in the other offense, conviction for both crimes is not permitted. For example, where a defendant is convicted of sexual assault, he cannot also be convicted of assault if the only bodily harm is that of the sexual penetration. This Section does not, however, preclude two prosecutions where a defendant beats a victim and then separately, though in the same course of events, sexually assaults the victim.

Section 94(b)(1)(A)(bb) prohibits conviction of two offenses where one offense arises out of the same act and is graded as a lesser offense and the lesser offense is considered part of the greater offense. For example, a defendant could not be prosecuted for assault and murder where the same act resulted in the death of the victim.

Section 94(b)(1)(C) prevents conviction of multiple offenses where each offense is defined as a continuous course of conduct and the offender is accused based on the same uninterrupted conduct.

Section 94(b)(2) prevents conviction of an inchoate crime where the defendant is also prosecuted for a completed crime arising out of the same act. Under these provisions, for example, a defendant cannot be convicted of assault and attempted assault where both crimes are based on the same act.

Section 94(b)(5) prevents conviction of multiple offenses in cases where the facts required to establish one offense are inconsistent with the facts necessary to establish the other offense.

Relation to current Maldivian law. Current Maldivian law is silent on this matter. However, there is a strong public policy argument for delineating the situations in which a defendant can and cannot be convicted of more than one offense. Limiting such situations is desirable because the integrity of the criminal justice system would be jeopardized if an offender were to serve multiple sentences for the same crime. Thus, multiple convictions are generally limited to those situations in which there are genuinely two separate crimes, whether arising out of the same act or arising out of separate acts.

PART II: THE SPECIAL PART

OFFENSES AGAINST THE PERSON

CHAPTER 110 – HOMICIDE OFFENSES

Sections 110, 111, and 112 reach all homicides, except non-negligent homicides. The harms caused by homicide require no explanation. Offense grades vary with culpability, and range from a Class A felony (for knowing or reckless Murder) to a Class D felony (for Negligent Homicide). The reason for different degrees of culpability for the offense of homicide is to reflect moral distinctions among different types of offenders. Section 113, in accordance with current Maldivian law, punishes causing, aiding, and attempting suicide, but does not punish the heirs or family members of a person who successfully commits suicide. Section 114 punishes concealing a homicide, because such conduct interferes intolerably with law enforcement's efforts to investigate and prosecute homicides.

SECTION 110 – MURDER

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(d)

Comment:

Generally. Section 110 punishes three kinds of homicide as Murder. Subsection (a) punishes homicides committed knowingly. Subsection (b) punishes homicides committed recklessly “under circumstances manifesting an extreme indifference to the value of human life.” Subsection (c) punishes homicides resulting from “the commission, attempt to commit, or flight after commission of any violent offense,” unless the defendant successfully rebuts the presumption of recklessness and extreme indifference. Murder is graded as a Class A felony.

Homicides falling under Subsection (b) should represent a wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. Examples of such behavior include intentionally shooting a firearm into a crowded room, or driving a car at a very high speed in inclement weather while highly intoxicated.

Liability under Subsection (c) is similar, because homicide resulting from “the commission, attempt to commit, or flight after commission of any violent offense” likely demonstrates the required recklessness and extreme indifference. Liability under Subsection (c) is limited to cases involving violent offenses, because violent offenses are – viewed *ex ante* – the most likely to cause death. Subsection (c)'s rebuttable presumption would be unfair if applied to cases of nonviolent offenses where the risk of causing death is much lower. The paradigm case of murder under Subsection (c) is similar to the one described above with respect to Subsection (b), except that under Subsection (c), homicide related to the commission of a violent offense triggers a presumption of recklessness and extreme indifference, which the defendant has a right to rebut by a preponderance of the evidence. For example, a thief fleeing an armed bank robbery in a car might be guilty of murder if he accidentally strikes a pedestrian, killing him. However, the bank robber would be allowed to try to rebut the presumptions of recklessness and extreme

indifference by showing that the armed robbery was not a violent offense (i.e., “an offense likely to cause bodily injury”), because the gun he used to threaten the bank teller was unloaded.

Relation to current Maldivian law. Current Maldivian law does not define liability for murder. Provision 88(a) of the Maldives Penal Code makes it an offense “to disobey an order lawfully issued under judicial or legal authority;” Provision 88(d) adds the following: “[w]here such disobedience result[s] in the death of a person, the offender shall be subjected to punishment prescribed by Islamic Law.”¹⁰⁴ Thus, current Maldivian law incorporates Islamic law by reference. However, current Maldivian law restricts Islamic law by providing for the death penalty only in the case of a homicide which results from an act of terrorism.¹⁰⁵

Liability for Murder under Subsection (a) corresponds roughly with liability under Islamic law for intentional homicide.¹⁰⁶ Ibn Duyan defines intentional homicide as intentionally causing the death of another.¹⁰⁷ El-Awa defines intentional homicide as homicide where the person “intend[s] to kill and employ[s] some means likely to have that result.”¹⁰⁸ Al-Shafi’i divided intentional homicide into two parts: purely intentional and quasi-intentional homicide.¹⁰⁹ Substantively, there is no difference between knowledge and intent in relation to homicide, because the common law notion of intent includes both knowledge and purpose, as defined in the draft Code.

Liability for Murder under Subsections (b) and (c) corresponds roughly with liability for quasi-intentional homicide. As stated above, many Muslim jurists, including Shafi’i define quasi-intentional homicide as unintentionally causing the death of another using means capable of causing a serious injury but not necessarily death. This is consistent with the language of Subsection (b), which defines reckless homicide as occurring “under circumstances manifesting an extreme indifference to the value of human life.” This language refers to homicide that results from conduct that is very likely or practically certain to cause serious bodily injury to the victim, but which the defendant is not certain will kill the victim.

The Shafi’i school of thought punishes purely intentional and quasi-intentional homicides differently. In cases of purely intentional homicide, the victim’s heirs choose between retaliation (*qisas*) and compensation (*diya*);¹¹⁰ in cases of quasi-intentional homicide, the victim’s heirs

¹⁰⁴ The only other reference to homicide in current Maldivian law is in Section 6(a) of the 1990 Law on the Prevention of Terrorism in the Maldives: “[w]hoever commits an act of terrorism which results in the death of any person” This provision refers only to a specific kind of homicide – homicide caused by an act of terrorism, as defined in the statute. This Chapter makes such specific homicide offenses unnecessary by supplying language that punishes all homicides involving at least negligence.

¹⁰⁵ See 1990 Law on the Prevention of Terrorism in the Maldives, Section 6(a) (Whoever commits an act of terrorism which results in the death of any person *shall be punishable by death* or, imprisonment or banishment for life.”) (emphasis added).

¹⁰⁶ See Baroody; see also El-Awa.

¹⁰⁷ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 5 (George M. Baroody, trans. Dar al-Salam, 1958).

¹⁰⁸ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 75 (American Trust Publications 2000).

¹⁰⁹ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 481 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) (Purely intentional homicide requires that the defendant intend to kill and “employ some means likely [to kill]. . . . Quasi-intentional homicide presumes the defendant’s intent is to “strike and not commit homicide” when he uses “some means used intentionally for beating, but not for killing.”).

¹¹⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 586-587 (Nuh Ha Mim Keller trans., Amana Publications 1994).

receive enhanced compensation only.¹¹¹ However, consistent with modern penal practice, the draft Code Section 110(d) grades Murder as a Class A felony. This Section transfers the right to punish persons who commit homicide from the victim's family to the State, consistent with modern practice. Both compensation and penance have been moved from the criminal system to the civil system for greater efficiency.

SECTION 111 – MANSLAUGHTER

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(d)

Comment:

Generally. Subsection (a) punishes recklessly causing the death of another person. This Section is different from Section 110(b), which punishes reckless homicide “under circumstances manifesting an extreme indifference to the value of human life.” Unlike Section 110(b), Subsection (a) punishes reckless homicide in the absence of extreme indifference.

Recklessness sufficient to establish liability under Subsection (a) exists where a person (1) wounds another person in a vital area, such as the head, (2) drives at an excessively high speed, (3) uses fire without proper precautions, or (4) otherwise acts so as to place a person in clear danger of death. The prosecution bears the burden of establishing the defendant’s awareness of the risk of the other person’s death and the magnitude of such risk.

Subsection (b) mitigates homicide that otherwise would be punishable under Section 110 when a defendant can prove by a preponderance of the evidence that he committed a homicide under the influence of extreme mental or emotional disturbance, for which there is a reasonable explanation. “Extreme mental or emotional disturbance” cannot be defined with precision. Such mental or emotional disturbance must rise above the level of everyday stress and aggravation; it must prevent mature and meaningful reflection by a mind capable of comprehending the gravity of the act. The aid of a qualified mental health professional may be necessary to properly evaluate claims under Subsection (b).

Subsection (b) also adds that “the reasonableness of [a person’s explanation] is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believes them to be.” This allows for a closer relation between criminal liability and moral guilt, something advocated by both Islamic law and the draft Code, and therefore requires that the trier of fact consider a defendant’s situation and perspective when determining liability for Manslaughter under Subsection (b).

Provocations constituting “reasonable explanations” under Subsection (b) may sometimes include, but are not limited to, observation by a person of his spouse committing adultery, aggravated assault or battery, mutual combat, commission of a serious crime against a close relative of the defendant, and illegal arrest. When a defendant asserts an unfamiliar “reasonable explanation,” the trier of fact should attempt to analogize the asserted explanation to one of these recognized explanations. *Note also that* Subsection (b) may apply without any provocation at all; a person’s “extreme mental or emotional disturbance” may arise without apparent provocation. For example, a man might kill his own brother under the influence of an extreme

¹¹¹ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 589 (Nuh Ha Mim Keller trans., Amana Publications 1994). *See also*, IBRAHIM IBN MUHAMMAD IBN SALIM IBN DU'YAN, *CRIME AND PUNISHMENT UNDER HANBALI LAW* 5,8 (George M. Baroody, trans. Dar al-Salam, 1958).

mental or emotional disturbance caused by a combination of factors, including child custody problems, the inability to maintain a recently purchased home, and an overwhelming fear of his brother. A person's "extreme mental or emotional disturbance" may also arise without actual involvement by the decedent. For example, after being provoked, the defendant might strike out in a blinding rage and kill an innocent bystander. The guiding question should be whether the defendant's asserted mental or emotional disturbance makes it sufficiently difficult for him to control his actions.

For discussion of the defendant's burden of proof by a preponderance of the evidence, refer to the commentary for draft Section 15(b)(3).

Under Section 111, Manslaughter is graded as a Class B felony. Manslaughter is graded lower than Murder because of the difference between the culpability required for liability under Sections 110 and 111. Under Section 110, liability exists when a person causes the death of another person knowingly, or recklessly with extreme indifference; under Section 111, liability exists where a person causes the death of another person recklessly, or with a higher level of culpability that is mitigated by the influence of his "extreme mental or emotional disturbance for which there is reasonable explanation." For a closer examination of these culpability levels, see Section 24 (Culpability Requirements) and its commentary.

Relation to current Maldivian law. Current Maldivian law does not define liability for manslaughter. Provision 88(a) of the Maldives Penal Code makes it an offense "to disobey an order lawfully issued under judicial or legal authority;" Provision 88(d) adds the following: "[w]here such disobedience result[s] in the death of a person, the offender shall be subjected to punishment prescribed by Islamic Law."¹¹² Thus, current Maldivian law incorporates Islamic law by reference.

Most Muslim jurists would classify Manslaughter under Subsection (a) as quasi-intentional homicide. Muslim jurists define quasi-intentional homicide as unintentionally causing the death of another using means not likely to kill.¹¹³ Cases of quasi-intentional homicide covered by Subsection (a) differ from cases covered by Section 110(b) in that homicide under Section 110(b) must occur "under circumstances manifesting an extreme indifference to the value of human life." Thus, ordinary recklessness suffices to establish liability under Subsection (a). The paradigm case of homicide under both Islamic law and Subsection (a) is one where a person is aware of a substantial risk that his conduct will harm and perhaps cause the death of another person.

Current Maldivian law does not expressly mitigate liability for Murder (as defined in Section 110) committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. However, Subsection (b) is consistent with Islamic law, which does allow mitigation of liability for murder. Ibn Duyan illustrates this by citing instances

¹¹² The only other reference to homicide in current Maldivian law is in Section 6(a) of the 1990 Law on the Prevention of Terrorism in the Maldives: "[w]hoever commits an act of terrorism which results in the death of any person" This provision refers only to a specific kind of homicide – homicide caused by an act of terrorism, as defined in the statute. This Chapter makes such specific homicide offenses unnecessary by supplying language that punishes all homicides involving at least negligence. Although this Code does not punish homicide when the defendant is not negligent, this creates no conflict with Islamic law, because the resulting punishment is no different under Islamic law and this Code. Under Islamic law, a person liable for non-negligent homicide must pay blood-money (diya) to the victim's heirs. Under this Code, non-negligent homicide is merely a civil offense, and the money damages the defendant must pay are the functional equivalent of blood-money.

¹¹³ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 73 (American Trust Publications 2000).

where the Caliphs ‘Ali and ‘Umar both mitigated liability for murder in cases where a husband found his wife sexually engaged with another man, and killed him.¹¹⁴

The mitigation provided by Subsection (b) is desirable because a mentally or emotionally disturbed person is similar to an incompetent person who is excused under Islamic law and the draft Code.¹¹⁵ Both Islamic law and the draft Code excuse incompetent persons, because they lack the moral guilt that both laws seek to punish. To a lesser extent, the same is true of persons who commit homicide and satisfy the requirements of Subsection (b).

SECTION 112 – NEGLIGENT HOMICIDE

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(d)

Comment:

Generally. Section 112 defines the offense of negligent homicide. Although criminal law generally considers recklessness the minimum culpability level for which liability is appropriate, Section 112 departs from that understanding recognizing that the harm involved — the death of a human being — is much graver than that punished by other offenses. Section 112 imposes liability on those who fail to recognize a “substantial and unjustifiable risk” of causing death and whose acts, constituting a “gross deviation” from the reasonable person’s standard of care, result in the death of another person. In other words, the offender is not aware of the substantial risk that he has created, but *should* have been aware of it. This differs from Section 111 (Manslaughter) and is graded lower because the recklessness required for Manslaughter means the offender knew of but consciously disregarded the substantial risk; in the case of Negligent Homicide, the offender was not in fact aware of the risk, though his negligence in failing to recognize it is still blameworthy. For a closer examination of these culpability levels, see Section 24 (Culpability Requirements) and its commentary.

The offender’s negligence, however, must rise to the level of criminal negligence; ordinary tort negligence does not suffice. For example, if a person fires a gun, unreasonably believing it to be unloaded, and kills another, he may be convicted under Section 112. Another common example of negligent homicide is careless driving which causes a death. Other examples include permitting overcrowded conditions in a place of entertainment, delivery of dangerous drugs, and conducting dangerous blasting operations.

Relation to current Maldivian law. Current Maldivian law does not define liability for negligent homicide. Provision 88(a) of the Maldives Penal Code makes it an offense “to disobey an order lawfully issued under judicial or legal authority,” Provision 88(d) adds the following: “[w]here such disobedience result[s] in the death of a person, the offender shall be subjected to

¹¹⁴ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 19 (George M. Barood, trans. Dar al-Salam, 1958) (quoting *al-Qamus al-Muhit*, vol. 4, at 122 (Cairo 1938)).

¹¹⁵ Islamic law excuses mentally incompetent persons, minors, and sleepwalkers. IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 12 (George M. Barood, trans. Dar al-Salam, 1958).

punishment prescribed by Islamic Law.”¹¹⁶ Thus, current Maldivian law incorporates Islamic law by reference.

Muslim jurists do not specifically use the term “negligent homicide” but allude to it in many places. Islamic law “holds a person responsible for the result whenever it is possible to trace its source back to the act which leads to it.”¹¹⁷ Ibn Rushd cites the example of when the Caliph ‘Umar imposed liability where “a person was leading his mare and it trampled upon another.”¹¹⁸ Ibn Duyan comes closest to Section 112’s definition of negligent homicide; he labels as “mistaken (*khata*)” homicide” all cases satisfying the following criteria: “[the defendant] does what is permissible to him to do, (his act) of hitting or aiming at game, or similar to it . . . then killing a person.”¹¹⁹ Section 112’s definition of negligent homicide accords with Ibn Duyan’s notion of mistaken homicide, except that the draft Code, unlike Ibn Duyan, would require monetary compensation for non-negligent homicide to be sought in the civil system as opposed to the criminal system. Similarly, other jurists have cited the fact that someone who negligently leaves an item in the middle of the street “so that it injured another person” is “liable for the injury because the injury occurred as a result of his intentional placing” of the item.¹²⁰

According to both Islamic law and Section 112, the negligence required for liability is lacking in two cases. The first case involves a person who acts so as to create a “substantial and unjustifiable” risk of causing death, but is not culpable with regard to his ignorance of such risk, because his ignorance does not constitute a “gross deviation” from the acceptable standards of conduct for a person in the same situation. The second case involves a person who acts so as to create a “substantial and unjustifiable” risk of causing death, but is not culpable with regard to his creation of such risk, because his ignorance results from a reasonable mistake of fact.¹²¹ The example given by Ibn Duyan is that of the hunter who shoots at what he reasonably believes is a deer, but which in fact is a person dressed in a deer costume.

Sections 112 departs from Islamic law by not providing for compensation or penance as criminal punishment options, placing them in the civil system; punishment is by incarceration or fine only.

SECTION 113 – CAUSING, AIDING, SOLICITING, OR ATTEMPTING SUICIDE

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(31) and 88(32)

¹¹⁶ The only other reference to homicide in current Maldivian law is in Section 6(a) of the 1990 Law on the Prevention of Terrorism in the Maldives: “[w]hoever commits an act of terrorism which results in the death of any person” This provision refers only to a specific kind of homicide – homicide caused by an act of terrorism, as defined in the statute. This Chapter makes such specific homicide offenses unnecessary by supplying language that punishes all homicides involving at least negligence.

¹¹⁷ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 174 (M. Cherif Bassiouni, ed. 1982)

¹¹⁸ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 503 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹¹⁹ IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 10 (George M. Baroody, trans. Dar al-Salam, 1958) (quoting *al-Qamus al-Muhit*, vol. 4, at 122 (Cairo 1938)).

¹²⁰ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 175 (M. Cherif Bassiouni, ed. 1982).

¹²¹ Note the gap between these two cases. The second case – reasonable mistake of fact – also fits the description of the first case, but the first case – lack of a gross deviation from acceptable standards of conduct – does not necessarily involve a reasonable mistake of fact.

Comment:

Generally. Section 113 adopts the premise that suicide is undesirable and should not be facilitated or attempted. Penal law does not punish the individual who successfully commits suicide, because authorizing such punishment would be futile.

Subsection (a) punishes a person who causes another to commit suicide by force, threat of force, or deception.¹²² Cases involving force, threat of force, and deception merit punishment, to the exclusion of all other cases, because they are cases in which the decedent could not have given valid consent.¹²³ Notwithstanding the decedent's presence as an intervening actor, the person's conduct therefore closely resembles direct homicide. Subsection (a)'s knowledge requirement combines with the limitation of liability to cases involving force, threat of force, and deception to exclude from liability all but the most culpable and dangerous conduct. A person is not liable under Subsection (a) unless he uses force, threat of force, or deception; even if he uses such means, he will not be liable unless he is practically certain that his conduct will cause the other person to commit suicide.

Subsection (b)(1)(A) punishes knowingly aiding or soliciting another to commit suicide. Note that liability here depends solely on the defendant's conduct and state of mind; the intentions of the decedent are irrelevant. For example, a person is liable under Subsection (b)(1)(A) if he mixes poison and leaves it where he is practically certain the decedent will find and ingest it (and where the decedent does so). Subsection (b)(1)(A) also reaches suicide pacts if one of the pact members survives. For example, suppose persons A and B wish to commit suicide together by driving off a cliff. They drive off the cliff, but person A, the driver survives. Person A has committed a Class E felony under Subsection (b)(1)(A) for knowingly aiding (and in fact causing) person B's suicide and would also be guilty of attempting suicide.¹²⁴

Subsection (b)(1)(B) allows punishment for attempted suicide, though the drafters feel it especially important in such a case to consider carefully the mental health of the person making such an attempt for any sign that he may not be responsible for his actions. Liability for attempt is imposed when a person, acting with the culpability required for the underlying offense, purposely engages in conduct constituting a substantial step toward the commission of the offense. The grading for (b)(1)(B) is a Class 1 misdemeanor under Subsection (d)(3).¹²⁵

Subsection (b)(2) excepts licensed health-care professionals from liability in two instances. First, under Subsection (b)(2)(A), a licensed health-care professional may withhold a life-sustaining procedure in compliance with the wishes of the patient or the patient's immediate family. This provision strikes a balance between the patient's expressed wish to end his own life, and the State's interest in discouraging people from aiding or soliciting suicide. Subsection (b)(2)(A) includes language allowing a patient's immediate family to consent to assisted suicide, because cases arise where the patient is either unconscious or otherwise incapable of giving valid consent. The definition of a patient's "immediate family" shall be governed by Maldivian law.

¹²² It should be noted that such force, threat of force, or deception need not be directed at the decedent. The defendant is liable under Subsection (1) for causing person B to commit suicide if, for example, he threatens to kill person A unless person B commits suicide.

¹²³ See Section 27(3)(d).

¹²⁴ Note that if person B does not wish to commit suicide, person A is liable for at least Manslaughter (reckless homicide) and probably murder (knowing homicide).

¹²⁵ Since attitudes toward suicide vary from culture to culture, the drafters particularly welcome responses to this Subsection either regarding its substance or grading.

The State may wish to prescribe procedures that licensed health-care professionals, patients, and patients' families must follow in cases under this Subsection.

Subsection (b)(2)(B) provides that a licensed health-care professional may administer, prescribe, or dispense medication or undertake or approve procedures to relieve another person's pain or discomfort, even if doing so may hasten or increase the risk of death. Like Subsection (b)(2)(A), this provision strikes a balance between a patient's expressed consent and the State's interest in discouraging people from aiding or soliciting suicide. Consent in cases under Subsection (b)(2)(B) must be valid under draft Section 27, and must satisfy all other requirements imposed by law.

In Subsection (b)(3)(A), the definition of "overdose" shall be intentional use of a drug or medicine in an amount that is higher than is normally used. Normal usage shall be defined on the basis of specifications on the product label or general industry standards. The term "controlled drug" is defined in Chapter 720. The presumption of attempted suicide probably would be rebutted where a person with Alzheimer's disease forgets his medication schedule and accidentally overdoses or a drug user is tricked into injecting himself with heroin.

The definition of "suicide" in Subsection (c) is designed to exclude merely reckless conduct and conduct that does not constitute a substantial step towards causing one's own death. Thus, a tight-rope walker who dies on the job does not commit suicide, so long as he is less than practically certain that his conduct will cause his own death and is only recklessly indifferent regarding the possibility of death. Also, a soldier does not commit suicide if he knowingly exposes himself to enemy fire, because, strictly speaking, he has not caused his own death.

Section 113 grades the offenses in Subsections (a) and (b) in accordance with the culpability and dangerousness of the conduct involved. Thus, Subsection (d)(1) potentially grades an offense under Subsection (a) as a Class B felony (where the defendant's conduct would have been murder if it had caused the decedent's death directly). Subsection (d)(2) grades the offense in Subsection (b) one grade higher than Subsection (d)(3), in recognition of the greater harm that results when the defendant's conduct causes an actual or attempted suicide.

Relation to current Maldivian law. Current Maldivian law does not fully address the conduct proscribed by Subsections (a) and (b), nor does it define "suicide." Current Maldivian law contains Provision 88(32) which prohibits harming oneself. The draft Code is faithful to this provision to the extent that it prohibits causing serious bodily injury to oneself. However, it departs from current law by not prohibiting the causing of less serious harm to oneself because Subsection (a) of the draft Code is constructed to serve criminal law's goal of only punishing culpable and dangerous conduct. Causing less serious harm to oneself is not considered to be culpable and dangerous conduct.

Current Maldivian law does not require ignominious burial of the decedent or forfeiture of the decedent's assets to the government. The draft Code adopts the same position.

This Chapter is consistent with Islamic legal doctrine. Subsection (b) has been added because, like Islamic law, it balances the interests of individuals and the government. Islamic law discourages suicide, but generally punishes only attempted suicide (as a *ta'zir* offense).¹²⁶ Most jurists cite the following Qur'anic verse to justify punishing suicide: "Do not kill yourselves."¹²⁷

¹²⁶ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* §§ p25.0-25 (Nuh Ha Mim Keller trans., Amana Publications 1994); DR. ANWARULLAH, *CRIMINAL LAW OF ISLAM* (Islamic Da'wah, Centre 1995).

¹²⁷ Qur'an 4:29.

The jurists' opinions concur with the rationales for imposing liability under Subsections (a) and (b).¹²⁸ Imam an-Nawawi supports this position by stating: "An adult whose intelligence is sufficiently developed to allow of his managing his property may legally ask someone to give him a wound. In such a case there is no crime on the part of the person who gives the wound."¹²⁹ Furthermore, contemporary Islamic jurists, like Yusuf Qaradawi, have issued legal opinions stating that although it is not permissible to actively assist in helping someone die, it is permissible to withhold life-sustaining treatment, based on the wishes of the family or patient, since administration of this treatment is not obligatory under Islamic law.

SECTION 114 – CONCEALING A HOMICIDE

Corresponding Current Provision(s): Maldives Penal Code, Provision 70, 71, 76(a) and 83

Comment:

Generally. Section 114 criminalizes concealing the death of a person known to have been killed by another person. Such conduct harms society by interfering with government efforts to investigate, prosecute, and thereby deter homicides. Furthermore, such conduct is clearly blameworthy.

Subsection (a)'s expansive language is designed to punish those who conceal their knowledge of any death caused by a person, whether the result of homicide or suicide. This language also applies to a person who knowingly interferes in a police investigation of a homicide or suicide.

It is possible that a generalized obstruction of justice offense would be more useful than Section 114, so long as its grading depended on the seriousness of the obstructed crime. Please refer to Section 530 and corresponding commentary for further discussion.

Relation to current Maldivian law. Section 114's scope relates directly to Provisions 71 and 72 of the Maldives Penal Code. However, Section 114 is narrower in scope because Provisions 71 and 72 punish concealing of any crime that would be considered a capital offense or receive life imprisonment as a punishment. Further, Provision 76(a) also supports this Section because it reads: "[w]hoever assists an offender who has committed an offence punishable with death shall be punished with exile or imprisonment between 2 years and 4 years or a fine not exceeding Mrf. 2,000.00." Section 114 is narrower than Provision 76(a), because it punishes only knowing concealment of a person's death.¹³⁰ Section 114's prohibition could be construed as an outgrowth of the Maldives Penal Code's general obstruction of justice offense. See Maldives Penal Code, Provision 83.

Islamic law would punish concealing a homicide as a *ta'zir* offense. The drafters are unaware of authorities in Islamic law that are contrary to this provision. Al-Misri

¹²⁸ DR. ANWARULLAH, CRIMINAL LAW OF ISLAM 20 (Islamic Da'wah, Centre 1995) (suicide caused by force, threat of force, or deception), 24-25 (assisted suicide).

¹²⁹ IMAM AN-NAWAWI, MINHJ-AT-TALIBIN: A MANUAL OF MOHAMMEDAN LAW ACCORDING TO THE SCHOOL OF SHAFT'I 411 (E.C. Howard, trans. from French edition by A.w.c. van de Berg, Thacker, 1914).

¹³⁰ On the other hand, Section 114 may be broader than Section 76, because it is not limited to offenses punishable with death.

notes that: “It is a communal obligation to both witness legal events and to testify to having witnessed them.”¹³¹

Section 114’s culpability requirement of knowledge does not conflict with Islamic law’s preference for “intent” as the culpability requirement for offenses against the person, because the draft Code equates “intent” with knowledge.

SECTION 115 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 110 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 110’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

¹³¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 635 (Nuh Ha Mim Keller trans., Amana Publications 1994).

CHAPTER 120 – ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 120 punishes touching without consent or conduct that puts a person in fear of imminent bodily injury. Even if no bodily injury results, touching without consent is punished because it is anti-social and violates a person's right to bodily integrity. While conduct that puts a person in fear of imminent bodily injury does not affect that person's bodily integrity, it is still punished on the grounds that it is anti-social and causes psychological harm to the victim. Like Section 120(a)(2), Sections 121 and 122 prohibit risky conduct and threats that are not only anti-social, but also dangerous and psychologically harmful.

SECTION 120 – ASSAULT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 126, 127, 128, 129, 130 and 88

Comment:

Generally. This provision defines and grades the offense of assault. The draft General Part provides that justifications, excuses, and nonexculpatory defenses are complete defenses barring liability. See draft Sections 40-60 and corresponding commentaries.

Sections 120(a)(1) and (2) are alternative offense definitions. Section 120(a)(1) defines the offense as any touching or injuring of another without consent. A culpability requirement of recklessness is applied due to Section 24(h). The "touching" requirement is satisfied any time the victim is touched by a thing or body part under the defendant's control. An extreme case would be a defendant who operates a wrecking ball and uses it to strike another person; the fact that the defendant was far removed from the actual contact is no obstacle to his liability. It should also be noted that Section 120 imposes liability for all touching, no matter how slight. Imposing liability for a consented-to tap on the shoulder may seem unjust, but the draft Code avoids injustice by grading such non-injurious touching as a Class 3 misdemeanor, the lowest possible grade. It should be noted that this grade also encompasses touching of a more severe nature, such as forceful grabbing, that does not cause injury. Section 120(a)(2) defines the offense as putting another person in fear of imminent bodily injury. For the purpose of this Chapter, "imminent" should be defined as "about to occur." For instance, if a person is in a locked room with another and shouts "I am going to kill you," there is reason to fear imminent bodily injury. However, if the person yells the same thing to another person while being restrained by the police, the imminence requirement has not been satisfied. Thus the prosecution must establish that a reasonable person in the victim's position would have thought that the defendant was about to harm him or her.

Section 120(b)(1) through (b)(3) separate the offense into three offense grades, ranging from a Class D (see aggravating factors for a bump up to class B) felony to a Class 3 misdemeanor. The definition of "bodily injury" is as defined in Section 17; "dangerous weapon" as defined in Section 120(d)(1); and, "serious bodily injury" as defined in Section 17.

Section 120(c) outlines an aggravating factor, saying that the baseline sentence is increased one level if the victim is assaulted in a home where he is a resident or guest.

The grading scale reflects several principles. First, that causing bodily harm is more serious than simple assault, where there is no injury to the victim. And second, that assaulting a victim in a home is more serious than assault committed in public.

Under Section 120(b)(1), a person commits serious assault, the gravest offense under this Chapter (without any aggravating circumstances), if he causes serious bodily injury to another person or commits the offense with a deadly weapon. Note that Section 17 (“bodily injury”) defines bodily injury as substantial physical pain, illness, or any impairment of physical condition and Section 17 (“serious bodily injury”) defines serious bodily injury as bodily injury that creates a substantial risk of death or causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. Thus, Section 120(b)(1) encompasses more injuries and harms than Section 120(b)(2), and only serious injuries merit the higher grade associated with “serious bodily injury.” For example, the loss of part of one’s earlobe constitutes bodily injury but not serious bodily injury. Similarly, “impairment of physical condition,” a phrase used in the definition of “bodily injury,” includes the loss of motor functions, loss of a limb or other appendage, disfigurement, and mental disability. “Permanent disfigurement,” as used in the definition of “serious bodily injury,” is limited to serious scarring and the loss of limbs but does not include minor scars or damage to appendages.

Section 120(c) refers the decision maker to the sentencing guidelines in Part III of this draft Code. The sentencing guidelines list factors which the decision maker may use to increase or decrease the length of the accused’s sentence. Section 120(c) also provides that if an offense under this Section occurs such that the victim is assaulted in a home where he is either a resident or guest, the baseline sentence is aggravated one level. This aggravating factor appears here in the draft Code instead of in the sentencing guidelines because it does not apply to any other offenses other than assault. The sentencing factor in Subsection (c) is primarily aimed at deterring domestic violence. Abuse of a spouse, lover, or a child is a particularly terrible offense, because the abuse is typically part of a long-standing pattern of action and because of the disruption caused to family life. Many abusers will use the home as a sanctuary to protect themselves from legal consequences for their actions. This Subsection clearly states that domestic violence should be taken seriously, not winked at. For this reason, those who commit assault within a residence where they are residents or guests should be punished more severely.

Section 120(d)(1)’s definition of “dangerous weapon” may be satisfied in one of two ways. First, a dangerous weapon is anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for any lawful use it may have. The phrase “readily capable of lethal use” should be understood as excluding all things not easily used as effective weapons. A stick, for example, is not a dangerous weapon, but a sharpened stick is. The phrase “manifestly appropriate for any lawful use it may have” is included to cover cases where a person needs to use something “readily capable of lethal use” in his work. For example, suppose two police officers are involved in a shootout with criminals. Their possession of guns is manifestly appropriate in this instance, so officer A’s reckless shooting that causes bodily injury to officer B is graded as Injurious Assault, not Aggravated Assault. Second, a dangerous weapon is any implement for the infliction of serious bodily injury that serves no common lawful purpose. This language is meant to cover things like blackjacks and brass knuckles, which are not “readily capable of lethal use,” but are certainly capable of inflicting serious bodily injury, and which serve no common lawful purpose. It should be noted that assault with a dangerous weapon is graded higher than assault that causes bodily injury.

Relation to current Maldivian law. Section 120(a) omits as redundant Maldives Penal Code Provision 126's stipulation that assault does not cover "unlawful assembly." Section 120(a)(1) omits the Maldivian law's requirement of acting in anger or animosity and focuses on the result of the defendant's actions because such results are taken as evidence of anger or animosity. This section also omits for the purpose of clarity Maldivian law's differentiation between causing serious bodily harm to organs for which blood money is awarded in Islamic Law and organs for which blood money is not awarded.

Both Maldivian law and Islamic Law punish conduct resulting in serious bodily injury more harshly than simple assault. Thus, the value judgments of the Maldives Penal Code and Islamic Law are adequately captured by higher grading for assault that results in serious bodily injury, obviating the need to differentiate between different bodily organs. See Maldives Penal Code, Sections 127-130. For example, a person who assaults another with a knife and cuts off the other person's arm should be punished to the same degree as a person who assaults another with a knife in such a manner that the other person must undergo surgery to repair his internal organs. Both these cases would be graded as Serious Assault.

SECTION 121 – RECKLESS ENDANGERMENT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 101, 103, 104, 109, 111, 112, 113, 114, 115, 116, 117 and 118

Comment:

Generally. Section 121 defines and grades the offenses of endangerment. Section 121(a) criminalizes recklessly creating a risk of bodily harm. Section 121(b) creates a rebuttable presumption that "substantial risk to another of serious bodily injury or death" is created where a person violates laws and regulations pertaining to the enumerated items or activities, namely explosives or catastrophic agents; machinery, engines, or other mechanical devices; the demolition of any structure; and the keeping or maintaining of animals. Section 121(d) grades the offense from a Class D felony to a Class 1 misdemeanor, depending on the seriousness of the risk created.

Section 121(a) provides a general definition that encompasses the enumerated reckless endangerment provisions of the current Maldives Penal Code. "Substantial risk of bodily injury or death" is defined by the kind of risk a reasonable person would take steps to avoid creating. For example, if a person starts a fire but uses too much wood and fuel and fails to tend it such that the fire grows out of control and presents a harm to others, the person has created a substantial risk of bodily injury or death. Conversely, had the person taken all the necessary precautions, used appropriate amounts of wood and fuel, and watched over the fire, he may not be liable under this section even if people are harmed.

Section 121(d)(1) grades the offense as a Class D felony if it is committed under circumstances manifesting an extreme indifference to the value of human life. "Extreme indifference" here has the same meaning as in Section 110(b).

Relation to current Maldivian law. Section 121(b)'s rebuttable presumption has the same effect as current Maldivian law's enumeration of specific cases of reckless endangerment, namely where a person violates laws and regulations. Maldives Penal Code, Sections 114-118. Note that current Maldivian law permits firecrackers and other dangerous chemicals as long as

one obtains a government permit, but only the government can possess explosives. *See* Law on Items That Are Prohibited to Be Brought to Maldives, 4(75). “Catastrophic agent” is defined in Section 121(c)(1) as a substance that can have disastrous effects if combined with another substance or altered in any way. The “poisonous substances” mentioned in Provision 113 of the current law are incorporated within this definition. “Explosive” is defined in Section 121(c)(2).

This Section also incorporates various examples of reckless endangerment present in current Maldivian law. Provision 101 prohibits acting in a malignant manner that causes the spread of infections or any disease that endangers the public health of society. Provisions 103 and 104 criminalize selling, giving or preparing food or drink that has been altered to or inherently does pose a danger to human life. Provision 109 criminalizes recklessly operating a vehicle so as to endanger human life. Provision 111 criminalizes negligently overloading a vessel in a manner that threatens human life. Provision 112 criminalizes the possession or use of property in a manner endangering human life.

Imposition of penal liability for reckless endangerment is consistent with Islamic law's strong condemnation of homicide (*See* Chapter 110) and assault. Conduct amounting to reckless endangerment creates conditions making homicide or assault likely to occur, and reckless homicide and assault are both punishable under Islamic law.¹³²

SECTION 122 – THREATS; FALSE ALARMS

Corresponding Current Provision(s): None

Comment:

Generally. Section 122 criminalizes two distinct sorts of conduct. First, it holds liable a person who threatens to commit any offense likely to cause bodily injury. Note that the required culpability is recklessness under draft Section 24(h) (Culpability Required When None Stated). Offenses likely to cause bodily injury include assault, sexual assault, and any other crime that may result in physical harm to the victim. Second, Section 122 punishes a person who knowingly misinforms another of the imminence of a situation dangerous to human life, or of the commission of a violent offense. Both kinds of conduct cause psychological harm to victims and may cause victims to engage in risky behavior to avoid the falsely reported danger.

Subsection (b) grades the offense as a Class 1 misdemeanor.

Relation to current Maldivian law. Maldivian law does not currently contain a specific offense for such actions. However, it is consistent with Maldivian law to criminalize threats in addition to reckless endangerment because the former often create the latter situation. Muslim jurists cite the following Prophetic tradition as general support for criminalizing false threats: “Whoever frightens a believer, it is incumbent that God not protect him from the terrors of Judgment Day as a fitting recompense.” Najm al-Din al-Ghazzi further supports this by stating that it is unlawful to “frighten, annoy, or alarm.”¹³³

¹³² IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 481 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹³³ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 763 (Nuh Ha Mim Keller trans., Amanat Publications 1994).

SECTION 123 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 120 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 120's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 130 – SEXUAL ASSAULT

Chapter 130 punishes culpable sexual assault, sexual contact, indecent exposure, and sexual exploitation. These offenses are graded higher than comparable assault offenses, because they cause greater harm to a person's bodily integrity and psyche.

SECTION 130 – GENERAL PROVISIONS RELATING TO SEXUAL ASSAULT OFFENSES

Corresponding Current Provision(s): None

Comment:

Generally. Section 133 provides two general rules that apply to all of the provisions in Chapter 130. Subsection (a) states that minors are unable to give consent to sexual intercourse or sexual contact. However, the subsection also creates an exception where the sexual contact is with the minor's spouse, as long as the minor is more than 14 years old. Section 133(b) clarifies that where an offense requires a victim to be of a certain age, the defendant need only be negligent as to the person's age, unless otherwise expressly provided. In other words, a reasonable mistake as to the victim's age may negate the required culpability for an offense.¹³⁴ See draft Section 26 and corresponding Commentary. (Note that an unreasonable mistake of fact is never a defense.) Section 133(c) provides an exception to any offense in this Chapter for medical examinations or procedures performed by physicians, licensed medical professionals, parents, or legal guardians: (a) for the purpose of providing medical care, and (b) in a manner consistent with accepted medical standards, and (c) for which he has the level of training and expertise required to perform such medical examination or procedure. The second and third parts of this exception require the fact finder to refer to medical standards promulgated by the government, or if no government standards exist, to standards adopted by the medical profession.

The sentencing factor in Subsection (d) is intended to punish especially severely those who use deception in order to achieve sexual gratification. Masquerading as another person or concealing the nature of one's actions can be as terrible a means to accomplish offenses under this section as using violence. While misleading another person about one's income or social status may not be criminal, pretending to be another person (such as someone's lover or spouse) in order to get that person to perform sexual or erotic acts goes beyond the kind of deception commonly encountered and constitutes criminally culpable action. Similarly, deceiving another by pretending to perform a medical procedure or some other innocent act in order to obtain sexual gratification is a gross violation of another's privacy and deserves special punishment. In either of these cases, the sentencing court should aggravate the offender's baseline sentence by one level.

SECTION 131 – SEXUAL ASSAULT

¹³⁴ A reasonable mistake as to age would provide a complete defense only where the defendant reasonably believed the victim to be over [16] years of age. In all other cases, the defendant would still be liable for the grade of the offense that would apply if the victim were the age the defendant reasonably believed the victim to be. For example, an adult defendant who had sexual intercourse with someone he reasonably believed was 12, but who was in fact 8, would be liable for a Class B felony under draft Subsection 131(d)(1).

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 173 Sub-provisions 12 and 13; Maldivian Law No. 9/91 on the Protection of the Rights of Children § 25; and Maldives Penal Code, Provisions 88(5), 88(6), 88(7) and 8/SP/2003

Comment:

Generally. The offense defined by Subsection (a) prohibits a person from engaging in sexual intercourse with another person without the other person’s valid consent. In a given case, valid consent may be lacking for one of two reasons. First, the other person may be incapable of giving valid consent. See draft Section 27(c)(1-3) and Commentary. Second, the defendant’s conduct itself may preclude the other person from giving valid consent. Such is the case when the defendant induces consent through the use of force, threat of force or deception. See Section 27(c)(4) and Commentary.

Subsection (b) creates an exception for individuals in a legal marriage. The assumption here is that sexual intercourse in a marriage is always consensual.

Subsection (c) defines “sexual intercourse.”

Subsection (d) grades the offense defined in Subsection (a). Under Subsection (d)(1)(A), a person commits Rape, a Class B felony and the most egregious offense in this Section, if he is negligent as to the victim being less than 14 years old, see Section 134(a), or if he uses force or threat of force to compel the victim to submit to intercourse. Thus the term “rape” does not apply to lesser offenses, including where the victim is a minor and the defendant is four or more years older.

Under Subsection (d)(1)(B), the force or threat of force used by the defendant need not be directed at the victim personally; the defendant commits Rape even if he uses force or threatens force against a third person. Note also, that unlike in the duress doctrine, there is no requirement that the threat of force be imminent. See Section 55 (Duress).

In Subsection (d)(2)(C), which grades the offense as a Class C felony if the defendant holds a position of custodial authority in relation to the victim, particular attention should be paid to the word “custodial.” Subsection (d)(2)(C) applies to prison guards, but not employers.

The grading in Subsection (d)(2)(A) establishes the rule that assent or acquiescence to sexual intercourse by a minor is invalid. This rule is a response to two realities. First, minors experience greater pressure than adults to assent or acquiesce to sexual intercourse; second, minors lack the emotional maturity that ordinary adults rely upon to cope with this added pressure. As a result, even in cases where consent seems clearly given, the validity of such consent is dubious at best. Subsection (d)(2)(B) applies the same reasoning to those who are unable to understand the nature of the act or to consent to it, such as the mentally handicapped.

It should be noted that the victim of an offense under this Section shall not be held liable for unlawful sexual intercourse (Section 411), whereas the offender would be liable for this offense in addition to unlawful sexual intercourse.

Relation to current Maldivian law. Section 130 replaces Provision 173 of Rules Relating to the Conduct of Judicial Proceedings’ “rape” provision (Rules Relating to the Conduct of Judicial Proceedings, Provision 173 Sub-provision 12)¹³⁵ and its “fornication with a child who has not attained puberty” provision (Rules Relating to the Conduct of Judicial Proceedings,

¹³⁵ “Rape and Assisting in the Commission of Rape.”

Provision 173 Sub-provision 13)¹³⁶ and introduces a grading system to address different incarnations of the offense.

The section also complies with Law No. 9/91 – Law on the Protection of the Rights of Children, which states “No person shall commit an act that is detrimental to the integrity of children, nor shall any person commit an act of sexual abuse, exploitation or oppression against a child.”

Provision 173(5)’s assisted rape provision (Rules Relating to the Conduct of Judicial Proceedings, Sub-provision 12) is not included because Chapter 30, governing accountability for the conduct of another, addresses this crime.¹³⁷ Incest and related offenses against the family are defined in Chapter 410.

Both current Maldivian law¹³⁸ and Islamic law¹³⁹ support Section 130(d)’s grading scheme.

SECTION 132. CRIMINAL SEXUAL CONTACT

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 173

Comment:

Generally. Section 131 creates an offense similar to Section 131’s sexual assault offense, but prohibits improper sexual conduct other than “sexual intercourse” as defined in Subsection 131(c). Subsection (b)’s definition of “sexual contact” is self-explanatory. Language in 132(b)(2) covers situations where the defendant uses a third person as his innocent agent and causes that person to touch another person. An “innocent agent” is a person who lacks the culpability required for an offense, but who is tricked or coerced by another person into committing a crime. For example, if someone substitutes poison for medicine that is supposed to be given to a mother by her son and the son is ignorant of this substitution, the son is an innocent agent.

The grading scheme in Subsection (c) is similar to the grading scheme in Section 130.

Relation to current Maldivian law. Section 132, Criminal Sexual Contact, replaces Provision 173 of the Rules Relating to the Conduct of Judicial Proceedings (“Committing Sexual Misconduct by Force”) This Section provides a more specific definition of sexual misconduct than Provision 173 and introduces a grading system to address different incarnations of the offense. Incest and related offenses against the family are defined in Chapter 410. This is also supported by Islamic law, which prohibits sexual contact outside of a “valid marriage or semblance of marriage,” with or without consent.¹⁴⁰

¹³⁶ “Fornication with a Person with Whom Marriage is Proscribed or with a Child Who Has Not Attained Puberty.”

¹³⁷ “Rape and Assisting in the Commission of Rape.”

¹³⁸ Maldives Penal Code, Rules Relating to the Conduct of Judicial Proceedings (300).

¹³⁹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 595 (Nuh Ha Mim Keller trans., Amanat Publications 1994) (citing Mawardi’s ruling that a perpetrator of rape can be killed).

¹⁴⁰ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 521 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

SECTION 133. INDECENT EXPOSURE

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 173(9)

Comment:

Generally. Section 132(a) imposes liability on any person who exposes himself to others under circumstances likely to cause affront or alarm, for the purposes of achieving sexual arousal or gratifying himself or another person.

Subsection (a)(1)'s language – “expose his genitals” – reaches any exposure, however slight, of a person's genitals. However, language in Subsections (a)(2) and (a)(3) ensures that liability under this Section will not be overbroad. A person may always argue that he lacked the purpose required in Subsection (a)(3). Moreover, many instances of genital exposure do not occur under circumstances likely to cause affront or alarm, as required by Subsection (a)(2). For example, a theatrical performance involving nudity, before which audience members are warned of the nudity, does not satisfy Subsection (a)(2)'s requirement.

Relation to current Maldivian law. This Section parallels the Rules Relating to the Conduct of Judicial Proceedings, Provision 173(9) and also falls within the traditional *hisba* jurisdiction recognized by Islamic Law. *Hisba* traditionally includes cases filed by an individual on behalf of society when an individual feels that great harm has been done to Islam.

SECTION 134 – SEXUAL EXPLOITATION

Corresponding Current Provision(s): None

Comment:

Generally. This Section punishes a person's culpable manipulation of another person's actions for the purpose of producing sexual arousal or gratification. This Section differs from Criminal Sexual Contact (Section 132) because no “sexual contact” takes place here. The key word in Subsection (a)(1) is “causes.” A person causes another person to act within the meaning of this Section if the other person's act is an “involuntary act” under Section 51(a) – i.e., if the other person's act is “not the product of his effort or determination.” See Section 51(a) and Commentary. Note that another person's act is per se involuntary if it is committed under duress within the meaning of Section 55 – i.e., if the other person is compelled to act “by a threat that a person of reasonable firmness in the person's situation would have been unable to resist.” The voluntariness of the victim's act under this Subsection should be determined with regard for the attendant circumstances and the victim's situation.

Subsection (a)(3) precludes liability in cases where the other person knows of the defendant's purpose of producing sexual arousal or gratification, because such knowledge is the hallmark of consensual sexual relations within marriage. In the marital context and given such knowledge, the defendant's conduct causes no harm.

Subsection (b)(2) grades the offense as a Class 2 misdemeanor. Subsection (b)(1) raises the grade of the offense to a Class 1 misdemeanor if the victim is a person less than 14 years old or a legally incompetent person, because such individuals are especially vulnerable to the sexual

exploitation punished by this offense. A defendant who exploits such a vulnerable person inflicts more harm and is more blameworthy than he otherwise would be.

Relation to current Maldivian law. There is no parallel provision in current Maldivian law. However, this Section is a logical extension of Criminal Sexual Conduct and Indecent Exposure in that it addresses a situation where the perpetrator gains sexual pleasure without the consent of the victim. There is support for this section in Islamic law as Muslim jurists have noted that it is unlawful for a man to take sexual pleasure by lustfully staring at a woman for a prolonged period of time.¹⁴¹

SECTION 135. DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 130 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 130's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

¹⁴¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER § m2.3 (Nuh Ha Mim Keller trans., Amana Publications 1994).

CHAPTER 140 – RESTRAINT AND COERCION OFFENSES

This Chapter is designed to define offenses for any situation in which an actor limits the ordinary freedom of movement of another without consent or forces someone, against his will, to perform (or not perform) an act.

Under the draft system of liability for multiple offenses, an additional conviction for any such offense would impose an additional punishment on the offender. Thus, a provision defining the crime of kidnapping, for example, is no longer necessary as that crime is simply a combination of the harm of unlawful restraint with other harms.

SECTION 140 – UNLAWFUL RESTRAINT

Corresponding Current Provision(s): Law on the Prevention of Terrorism in the Maldives 1990, Provision 2(b)

Comment:

Generally. Section 140(a) makes it an offense to restrain someone’s freedom of movement without consent, either by force or otherwise. The key element of the crime is that the restraint must exist for a “substantial period of time.” Whether or not the period of restraint is “substantial” is, in part, dependent upon the circumstances of the event.

The period of time considered substantial should be of such a nature to inconvenience an ordinary person. Many offenses in this code might result in transient restraint of a person; a street corner hold-up detains a person for a matter of seconds or minutes; a bank robbery might detain the employees and customers at a bank for a matter of several minutes. Generally, these incidental infringements on the freedom of movement are understood as necessary to the nature of the offenses and are already incorporated in the harm addressed by the underlying offense. When a person is restrained for an extended period of time, such that the restraint becomes an independently cognizable harm in itself, such conduct gives rise to a charge of unlawful restraint. For instance, while the restraint of people necessary to complete a reasonably fast bank robbery would not give rise to a charge of unlawful restraint, bank robbers who use the bank employees and customers as hostages in a stand-off with police over the course of several hours have committed the offense of unlawful restraint.

Lack of consent is a material element of the offense under 140(a)(1). Since minors are not legally able to give consent, anyone restraining the freedom of movement of a minor (or anyone else unable to give consent), without the consent of the minor’s parent or legal guardian, is guilty of the offense, regardless of the willingness of the minor victim to be restrained.

Section 140(b) defines two terms used in this Section. It is important to understand that the term “restrain,” as defined in Subsection (b)(1), is drafted broadly enough to include forms of restraint other than the direct use of physical force against the victim, including intimidation or confinement. In addition, the term also encompasses the act of having someone restrained by others. Subsection (b)(2)’s definition of “freedom of movement” – the opportunity to travel from one place to another that an ordinary person normally enjoys – does not include situations where one has voluntarily agreed to be restrained for a period of time. For instance, a person on an airplane does not have freedom to move out of the airplane even though the flight may last for many hours. Otherwise, the term “freedom of movement” should be construed expansively.

Section 140(c) provides grading for the offense. Subsection 140(c)(1) makes the offense a Class C felony when the person acts knowingly and restrains another person for the purpose of placing the person in involuntary servitude. Involuntary servitude means any compelled service for which an ordinary person would otherwise expect to be paid. The provision's use of the phrase "for the purpose of placing that person in involuntary servitude" covers any intention to impose such servitude whether or not it ever occurs. Furthermore, it does not matter whether the purpose of involuntary servitude was formed at the time of the initial restraint. Therefore, a person is guilty of a Class C felony if he restrains a person and only later, while still restraining the victim, decides to force that person into involuntary servitude. Section 140(c)(2) makes the offense a Class D felony if the person acts knowingly and restrains the victim for more than one day. The meaning of "more than one day" is for any period exceeding 24 hours. Section 140(c)(3) makes all other offenses under this section Class 1 misdemeanors. Therefore, any unlawful restraint committed recklessly rather than knowingly or intentionally is a Class 1 misdemeanor, regardless of how long the victim is restrained. Note that Section 1104 of the sentencing guidelines provides that if an offender commits an offense against a person who is particularly vulnerable to the harm contemplated by this or any other offense, for example an elderly person, the baseline sentence shall be aggravated one level.

Section 140(c)(4) mitigates the grading of unlawful restraint for parents and legal guardians, as well as those who reasonably believe that they are parents or legal guardians. In these situations, the offense is merely a Class 1 misdemeanor. This is intended to keep interfamilial or custody disputes from resulting in harsh prison sentences. However, to qualify for mitigation, the actor must also reasonably believe that the victim is unable to give consent. So in the situation where a father abducts his 18-year-old daughter, he is still guilty of an offense since an 18-year-old is capable of giving consent.

Relation to current Maldivian law. The only provision that speaks to kidnapping in the current Maldivian law generally prohibits it as a form of terrorism. Law on the Prevention of Terrorism in the Maldives 1990, Provision 2(b).

Islamic law prohibits individuals restraining other members of society against their will, as this right is reserved for the governing authority.¹⁴² Unlawful restraint is also arguably among the harms sought to be prevented by the *hadd* offense of *hiraba*. Imam Khattabi explains that there are no grounds for deprivation of a person's freedom unless ordered by the court.¹⁴³

SECTION 141 – CRIMINAL COERCION

Corresponding Current Provision(s): None

Comment:

Generally. Section 141(a) makes it an offense to threaten certain specific kinds of harm in order to compel a person, against his will, to either take some action or avoid taking some action. This section recognizes that people should generally be free to make their own decisions without interference from other individuals, particularly interference in the form of threats to

¹⁴² JAVED AHMAD GHAMIDI, MIZAN ("Balance") 282 (Dar ul-Ishraq, 2001).

¹⁴³ Cherif Bassiouni, *Sources of Islamic Law and the Protection of Human Rights*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 29 (M. Cherif Bassiouni, ed. 1982).

commit offensive acts, whether those acts be crimes, slanderous accusations, invasions of privacy, or misuse of official power.

The exception in (b) insulates from prosecution appropriate actions that are regularly taken to modify the behavior of others. For instance, a person who knows of criminal behavior is always free to threaten to call the police if the other person does not stop that behavior, because such a response is premised on belief in the truthfulness of the accusation and is closely related to the behavior the person seeks to modify.

Section 141(c) provides grading for the offense. The offense is considered felonious coercion and treated as a Class E felony if the action compelled constitutes a felony or if the harm threatened constitutes a felony. Otherwise the offense is considered simply criminal coercion and treated as a Class 1 misdemeanor. Therefore, if an actor threatened to seriously assault the victim unless he writes a letter for the actor, the offense would be a Class E felony because the threat of serious assault was itself a felony. It would also be a felony if a person threatened to spread lies about the victim unless the victim shoots someone because the action the perpetrator seeks to compel is a felony. However, if the person merely threatened to spread lies about someone unless he writes a letter, then the offense is a Class 1 misdemeanor.

Relation to current Maldivian law. Current Maldivian law is silent on this issue. Islamic law prohibits criminal coercion and punishes the compeller as though he had carried out the offense himself.¹⁴⁴ Therefore, the draft Section increases the penalty from Islamic law if the compelled action is not a crime. However, the draft Section mitigates the Islamic law penalty if the compelled action would normally constitute an offense of a level higher than a Class E felony.

SECTION 142 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 140 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 140's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

¹⁴⁴ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 191 (M. Cherif Bassiouni, ed. 1982); *See also* AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 763 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("to...coerce him to do something he is averse to...is unlawful.").

PROPERTY OFFENSES

CHAPTER 210 – THEFT OFFENSES

Unlike many Western codes, this Code attempts to create separate offenses for distinct harms. The essence of this Chapter is to punish and to deter unlawful taking and misuse of the property of others. Some criminal law systems define what the commentators have called “composite” crimes: crimes that entail more than one type of harm. For instance, many Western codes punish “robbery,” which is theft by force or threat of force, punishing under a single provision both the theft and the illegal use of force. Under this Code, the two harms should be punished as separate crimes, as theft and as assault. In reading and using this Code, the reader is encouraged to look to other provisions of the Code and consider how one action might entail multiple harms and might be punished under multiple provisions of the Code. While some provisions of the current Maldivian law describing certain aggravating factors for punishment have not been completely replicated in this Chapter, the purpose of the drafters is that those provisions will be addressed in the appropriate sections. For instance, those provisions heightening punishments for thefts from a home are found in Chapter 230 (Criminal Intrusion Offenses).

The concern of the drafters with using particular offenses to punish particular harms should be considered when construing the language of this Chapter and the Code generally. For instance, in the event of an especially heinous and brutal robbery which results in serious bodily injury to the victim, the allowance of an adjustment in sentencing under Subsection 95(a) should apply only to the assault charge, not to the theft charge, since the “heinous and brutal” nature of the act was in the assault, not in the wrongful taking.

SECTION 210 – CONSOLIDATION OF THEFT OFFENSES

Corresponding Current Provision(s): Maldives Penal Code, Provisions, 131a, 132, 143, 144, 145 and 148

Comment:

Generally. Subsection (a) of this Section is intended to facilitate the prosecution of the underlying harm of theft: wrongful deprivation of the property of others with the purpose of permanently depriving them of it. The following Sections establish distinct ways of committing theft, but state the elements of a single offense. If a prosecutor misstates the nature of a particular theft in an indictment or other initial proceeding, this Subsection is intended to allow him to alter his theory of the crime without having to withdraw and refile his charges.

Subsection (b) sets out the general grading scheme for all theft offenses. The intent behind this grading scheme is to punish proportionally the culpability of the theft in question. In determining the amount of appropriate punishment, the drafters have used the average income of a Maldivian as a benchmark. This is because a person can expect to inflict economic harm in proportion to the hardship that loss presents, which will naturally relate to the income of the victim. Minimal harm – where only a few days’ wages are stolen – calls for lower grading; tremendous harm – where a person would need years of work to regain what has been stolen – calls for the highest grading.

Subsection (c) protects those who take or use property reasonably believing that they have the right to do so or that they would likely receive permission from the owner for the use or taking. This defense applies to all of Chapter 210, as opposed to Subsections (a) and (b), which apply only to Sections 211 through 216. Disputes over property occur in all societies; those who act reasonably based on their perceived property rights should not be punished because another person was later held to be the rightful owner of a piece of property.

Subsection (c) also protects the person who reasonably believes that the owner of some property would grant him certain permissions to use the property, such as allowing him passage over some piece of land, allowing him to borrow a vehicle such as a boat or a bicycle, or allowing him to use a tool or implement. The trier of fact may rely on any number of sources to determine whether a reasonable person in the defendant's situation would have believed that the owner would not have objected to use of his property, including customs in the community, past grants of permission by the owner to the defendant or to others, the degree of amity between the two parties, and the steps which the owner has taken to secure his property, etc.

The definition of "value" in Subsection (d) is important to the construction of the grading provisions. A default rule that holds a defendant strictly liable for the value of the property he steals would create perverse results and measure the defendant's liability poorly. If a person were to steal a pair of pants, not knowing that a diamond necklace was in the pocket, what might otherwise have been a petty theft would then be punished with the most serious grade. However, if a person discovers that he has stolen property whose current market value is beyond his expectations and then fails to return it, he has manifested a purpose to deprive the owner of property of that value.

Relation to current Maldivian law. One portion of Maldivian law reiterated in this Section is the heightened penalty relating to government property, as discussed above. Other Sections outline the rough penalties for theft generally. Provision 131(a) of the Maldives Penal Code provides a kind of consolidation clause by treating "theft, misappropriation, criminal breach of trust, cheating, and extortion" the same for purposes of sentencing. Provision 132 aggravated the penalty according to the value of the property. The valuation of the property under Provision 148 of the Maldives Penal Code depends only on the current value of the property, but as explained above, such a policy has a perverse effect on punishment for theft.

Subsection (b)'s grading scheme is supported by Islamic law, which prohibits *hadd* punishment for theft of an item valued less than the maintenance of a man for one day.¹⁴⁵

Subsection (c) is supported by Islamic law, which notes that theft consists of taking property when the person taking the property has not been entrusted with the property.¹⁴⁶

In general, however, this Chapter defines theft less broadly than the *hadd* offense of theft (*sariqa*), which also includes offenses that would be in the nature of civil wrongs under the draft Code.

SECTION 211 – THEFT BY TAKING OR DISPOSITION

¹⁴⁵ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 5 (American Trust Publications 2000)(El-Awa cites Ibn al-Qayyim who stated that the traditional value of one-quarter dinar as the minimum value was based on a value sufficient for the daily maintenance of an average man).

¹⁴⁶ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 536 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Corresponding Current Provision(s): Maldives Penal Code, Provisions 131(a), 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147 and 148

Comment:

Generally. The focus of this Section is theft accomplished by a physical taking or by appropriating control over the property. The two parts of the offense have different required *mens reas* or states of mind. First, a person must know that he is taking property of another; second, that person must intend to deprive the other person permanently of his property. It is not necessary under this definition to retain possession of the property; all that is necessary is to intend to deprive the other person of possession. So, a person might take property of another and throw it into the sea, knowing that the owner will never recover the item. It is important in such a case that property damage not be added as an offense. As to a single possessed item, a person can commit property damage or theft, but not both in the same action. The understanding of the drafters is that theft should be the charge whenever a person manifests a purpose to deprive another permanently of his property and the value of the property is completely destroyed. Property damage will be an appropriate charge whenever some value remains in the property, or where the defendant does not meet the culpability requirements for theft, as when the defendant is only reckless as to the damage.

A person exerts unauthorized control over property within the meaning of Subsection (a)(1) when the person seizes control of property in a way that undermines the other person's ownership. Most examples of such control involve real property (rather than personal property) as where a person farms a neighbor's field without the owner's permission.

"Taking" is the more common form of theft under Subsection (a)(1). "Taking" means physically asserting possession over property. One can easily imagine a person taking personal property; he might also take real property by physically excluding the owners. The definition of "property" in Section 17 is very expansive. Other codes distinguish between real and personal, or moveable, property; the drafters find that a broad definition of property is better than making such distinctions, which usually have little practical effect. The nature of property is becoming more ephemeral, as people attach value to items representing rights, interests, and obligations, such as promissory notes, copyrights, usage agreements, and other items that do not resemble the traditional image of property.

The definition of "property of another" in Section 17 protects the property of any person with a potentially greater property right as compared to the lawful owner. This expansive definition of "another" is intended to reach cases where the person having physical possession of the property is not the rightful owner. A person holding a temporary lease of property might be a holder of a greater right. Even where the person holding physical possession of an item has stolen the property from its rightful owner, the drafters think that the Code should still not allow a third person who is not the rightful owner to steal the item from the possessor. For example, if a thief has taken a person's livestock without that person's knowledge and subsequently a second thief steals the livestock, the second thief will still be liable for theft even if he has only deprived a possessor—rather than an owner—of the livestock..

Relation to current Maldivian law. Current Maldivian criminal law does not prescribe a particular definition for theft or attempt to define the nature of property that could be subject to theft. This section describes conduct that lies at the heart of the offense of "theft" as generally used in the current Maldives Penal Code, Sections 131a through 148.

SECTION 212 – THEFT BY DECEPTION

Corresponding Current Provision(s): Maldives Penal Code, Provisions 88(13), 131a, 132, 143 and 144

Comment:

Generally. This Section is concerned with the imposition of penalties for theft performed by means of deception. The deception itself is not the harm redressed by this Section; Chapter 310 addresses deception as an independent evil. In construing this Section and Chapter 310, the difference between the harms caused by theft and deception should be kept in mind.

Committing theft under this Section requires knowledge of the deprivation and intent to deceive. In defining “deceive,” the drafters introduced a method of theft that can be achieved in many ways. Failure to reveal information, except as to legal impediments to clear ownership, see Subsection (b)(1)(D), and failure to correct a false impression created by the person, see Subsection (b)(1)(C), generally are not means of accomplishing theft by deception. Beyond those two cases, a person has no affirmative duty to correct the ignorance or mistake of the other party to a transaction, even if the person knows of the other party’s ignorance. However, affirmative acts that mislead the other party generally constitute theft by deception. The only two exceptions to that proposition are outlined in Subsection (c), which permits misleading statements that lack financial significance and statements unlikely to deceive a reasonable person. The latter are sometimes referred to as “puffery” – i.e., broad, often subjective statements of quality that are not easily verified. For example, stating that one’s product is “the best” is unlikely to deceive a reasonable consumer, and therefore does not constitute theft by deception, even if all agree that the product in question is the worst on the market. In contrast, false statements whose falsity is objectively demonstrable may give rise to a claim of theft by deception.

Subsection (b)(2) defines “financial instrument” broadly to encompass many of the common items used to signify value in commerce and finance. While checks, credit and debit cards, and money orders are the primary targets of this provision, the drafters believe it is likely that new financial instruments will develop in the near future, and they therefore propose a definition broad enough to cover most new instruments without the need for redrafting. Although fraud in connection with stocks, bonds, options, and derivatives is less common, this sweeping definition also covers these cases. Some common financial instruments covered by this section are stocks (Subsection (b)(2)(A)), bonds (Subsection (b)(2)(B)), options (Subsection (b)(2)(C)) and derivatives (Subsection (b)(2)(D)).

Subsection (d) precludes relying on a person’s failure to fulfill a promise as *prima facie* evidence of deception. Many people make promises honestly intending to fulfill them, but fail to do so for other reasons. Failure to fulfill a promise can only illustrate a person’s state of mind at the time when the promise should have been fulfilled. While a failure to perform is certainly important in showing purpose to deceive, by itself it is not sufficient to show intent to deceive.

Several presumptions are required, however, as to intent to deceive. These rebuttable presumptions are discussed in Subsection (e)(1)-(3). Issuing a check without having a corresponding account or without funds, or failing to pay promptly will be grounds for a presumption of purpose to deceive. Similarly, a person’s use of a stolen, revoked, or otherwise unusable credit card provides grounds to presume purpose to deceive. Finally, the failure to

return rented or leased property promptly is grounds for a similar presumption. All these presumptions are subject to rebuttal by the defendant, provided that he can do so by a preponderance of the evidence. The reason for such presumptions is that the excuses for such conduct are likely to be implausible, so implausible that it is appropriate to require the defendant to prove his innocence by a preponderance of the evidence, rather than requiring the prosecution to establish the defendant's purpose to deceive to a practical certainty. Note that Subsection (e)(3) requires the owner to make an effective request for return of the property.

Finally, because of the grave nature of theft by misuse of a credit card, check, or other commonly used financial instrument and because of its effects on the general public's trust in those instruments, there is a special harm caused by abuse of these instruments. Subsection (f) mandates that such an offense must be at least a Class 1 misdemeanor. Subsection (f) does not preclude a higher grade for the offense. The inclusion of the word "common" in "common financial instrument" is meant to exclude exotic financial instruments like intricate interest rate swaps, securitized debts, and other instruments exclusively used in business circles. The definition of "financial instrument" is found in Subsection (b)(2).

Relation to current Maldivian law. While theft by deception is not defined anywhere in current Maldivian law, the theft provisions of the current Code do refer to "deceit," "criminal breach of trust," "misappropriation," and "cheating." The drafters understand these terms to refer to theft by deception, though such terms likely encompass other concepts as well.

The punishment of theft by deception has long historical precedent in Islamic law.¹⁴⁷ Al-Misri points out that if a seller knows of a defect in an article he must disclose it.¹⁴⁸ Islamic law also prohibits deceptive acquisition of property or wealth, which is often construed as a form of theft.¹⁴⁹

SECTION 213. THEFT BY EXTORTION

Corresponding Current Provision(s): Maldives Penal Code, Provisions 88(12), 131a, 132, 135, 138, 139, 140, 141, 142, 143, 145, 147 and 148; Rules Relating to the Conduct of Judicial Proceedings, Provision 72

Comment:

Generally. Theft by extortion requires a culpability level of purpose in taking the other person's property and in making the threat of substantial harm. The phrase "substantial harm" appears frequently in the draft Code. In the context of this Section, "substantial harm" is caused

¹⁴⁷ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 666 (Nuh Ha Mim Keller trans., Amana Publications 1994) (quoting the Qu'ran, "Allah Most High says, 'Consume not one another's property through falsehood. . . .'"); Id. at 667-68 ("Oppression is of three types. The first is consuming property through falsehood. . . ."); id. at 55 (regarding the surreptitious changing of property line markers: "The Prophet said, 'May Allah curse whoever changes the land's property-line markers.'").

¹⁴⁸ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 392 (Nuh Ha Mim Keller trans., Amana Publications 1994) (citing the Prophetic tradition that: "He who cheats us is not one of us.").

¹⁴⁹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 667 (Nuh Ha Mim Keller trans., Amana Publications 1994) (Al-Misri describes three examples of deception: "the cheater or adulterer of trade goods...the person who stints when weighing or measuring out goods...and the merchant who tells the buyer that the merchandise cost more than it did.").

by any act or omission that would exert meaningful coercion on a reasonable person. The person threatened need not be the person coerced, nor need the person threatened be related in any way to the person coerced. Other forms of harm may also constitute “substantial harm.” Economic harm, like theft or property destruction, at least when the property is that of the threatened person or a close friend or family member, should constitute “substantial harm.”

A threat to reveal information that might embarrass a person, damage his reputation, or give grounds to others for legal action can also constitute “substantial harm” within the meaning of Subsection (a)(2), subject to the exception in Subsection (b). Subsection (b)’s exceptions apply only to threats made when the defendant honestly seeks the property as restitution or indemnification (1) for harm done directly related to the circumstances of the taking, or (2) as compensation for debt or property owed pursuant to any lawful transaction. For instance, a person might legally threaten to reveal an unsafe condition at his workplace with the aim of persuading his employers to remove the danger. However, he may not make this threat with the aim of extortion, forcing his employer into paying him money to stay quiet. In the first case, the relief sought is closely related to the legitimate goal of the threat, hence the threat is permissible. In the second case, the payment sought is not in any sense related to a legitimate goal, hence the threat is not permissible. A difficult issue arises if a person threatens to bring suit against another and seeks payment for not bringing the suit, particularly where the nature of the suit might be embarrassing to the defendant. Generally, the drafters feel such cases should be resolved in favor of the would-be plaintiff, to encourage settlement of lawsuits. But in certain cases, especially when the payment demanded far exceeds the likely recovery, a trier of fact may find that the plaintiff has threatened “substantial harm” within the meaning of Subsection (a)(2).

Acts which by themselves would be within the legal power of the person issuing the threat may constitute “substantial harm” within the meaning of the statute if the property sought is not related to the legal right of the person issuing the threat. For example, a banker may threaten to foreclose on the house of a debtor unless payment is made to the bank on the debt. The banker does not commit theft by extortion because the property sought relates to his right to foreclose on the house. However, the same banker may not threaten to foreclose on a home unless the owner pays him a personal bribe. In other words, if the compensation requested is unrelated to the origin of the banker’s right to foreclose on the house, he commits theft by extortion. Similarly, a police officer may legitimately threaten to detain a suspected criminal unless bail is paid, because seeking payment of bail comes from the same authority that permits him to continue to hold the suspect. But the officer is liable for theft by extortion if he requests a bribe before permitting the suspect to leave jail. Seeking payment or benefits beyond one’s legal rights in exchange for not carrying out a threat of substantial harm represents a serious evil.

Note that this Section addresses only theft accomplished by means of extortion. Where a person does not seek property, but instead seeks performance or omission of an act which does not constitute a “service,” the person may engage in conduct similar to the conduct proscribed in this Section, yet commit the offense of criminal coercion listed in Section 141 (thus precluding a prosecution under this Section). This Section only applies where the purpose of the threat is to obtain property, as defined in this Chapter.

Relation to current Maldivian law. The current Maldivian Code mentions “extortion” several times as a punishable offense in the same category as theft, clearly evincing an intent to punish extortion. The draft Section broadens the definition of extortion by including all property extorted, not simply money. The higher sentences demanded for extortion involving threat of force or weapons will be considered in other Sections of the Code.

Islamic law generally supports this Section because extortion is a form of coercion, which removes an individual's consent and intention.¹⁵⁰ Islamic law also considers it unlawful to frighten an individual into doing something averse to them.¹⁵¹

SECTION 214 – THEFT OF SERVICES

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 223

Comment:

Generally. The provision of services is increasingly important to the well-being of a society. When a person defrauds a service provider, the costs of such theft are passed on to society as a whole, the greatest harm being inflicted on those least able to pay for such services. For this reason, theft of services is an important subject for criminalization.

What constitutes a “service” under this Section is very broadly defined to encompass the array of activities that may constitute “service.” Any public utility service, such as electricity, gas, or water, when the service is provided by subscription and not incrementally (as by gas canisters or water bottles) will constitute a service. Any communications program constitutes a service, including access to a communications network, such as telephone, internet, cable, or other means of communication, or receipt of information, as in a financial wire service. Professional, rental, and tourism services can also constitute a “service” under this section, including car rentals, guide services, boat chartering, food service, housekeeping services, use of buses and taxis, rented real estate, hotel accommodations, and museum admissions. Essentially, any service for which one would expect to pay constitutes a service for the purpose of this Section.

The theft of services can be accomplished by two means under this statute. First, a person without legal access to a service might wrongfully gain access to a service to which he is not entitled, similar to where a person who has not paid for electric service creates his own link to standing power lines. A second means of committing theft of services is for a person with access to the service to distribute the service to another person to whom the service ought not go, as where a worker for an electric utility wrongfully creates electric access for a person not a customer of the utility and allows such other person to draw power without paying.

The rebuttable presumption in Subsection (c) provides that the trier of fact shall presume knowing theft of services if a person attempts to leave a facility without paying or fails to pay at the customary time.

Relation to current Maldivian law. Maldivian law only recognizes this special harm in the text of one provision, relating to the theft of electric service. The drafters feel that, despite the lack of mention of such a form of theft, theft of services is likely prosecuted as theft

¹⁵⁰ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 369 (Islamic Research Institute Islamabad 1993) (“this kind of coercion deprives man of the element of consent and vitiates his intention or freedom of choice”).

¹⁵¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 763 (Nuh Ha Mim Keller trans., Amana Publications 1994) (*quoting* Khalil Nahlawi who said: “To make a believer fear...or coerce him to do something he is averse to...is hurting him, and hurting a believer is unlawful.”).

generally under the current Maldivian Code. Carefully defining what constitutes a service, and thus what constitutes theft, will increase the deterrent value of the statute.

SECTION 215. THEFT BY FAILURE TO DELIVER FUNDS ENTRUSTED

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Section 242; Maldives Penal Code, Provisions 131a, 132, 135, 143, 144, 146 and 148

Comment:

Generally. This offense punishes taking of property from a person to whom the defendant owes a duty of care. Where such a duty exists, treating property of another as one's own and failing to render services or payments promised or owed gives rise to liability for theft or for the loss incurred. Essentially, this crime may be committed any time a person takes possession of funds or other property with the understanding that he is to dispose of or otherwise deal with the property in a particular fashion. Liability extends to a broker or banker who agrees to deposit a customer's funds and then misuses the funds. Likewise an employer that disposes of an employee's paycheck or benefits fund in a way contrary to the interests of the employee is liable under this Section.

The key element of the offense is the duty owed by the perpetrator to the owner of the funds or other property. Whether the duty stems from a contractual relationship (such as a mechanic who holds a customer's car overnight while fixing it), or from a fiduciary relationship (such as a broker who disposes of a customer's funds), abuse of the trust inherent in the relationship by misuse of the funds or property should be punished.

The rebuttable presumptions are intended to cover the most common cases. First, under Subsection (b)(1), the trier of fact must presume that a professional in a particular field knows his legal obligations. Without this presumption, the law would reward ignorance and discourage professionals from learning their ethical duties. Subsection (b)(1)'s strong presumption can be rebutted only by a showing that the law itself was ambiguous; even an honest, reasonable mistake is not enough. The second presumption, found in Subsection (b)(2), draws the inference that funds have been misused when a person fails to account for funds with which he has been entrusted or fails to make a required payment upon lawful demand. Since the defendant has typically been in sole possession or control of the funds or property in question, requiring the prosecution to prove to a practical certainty that the funds have not been lost by mistake would seriously impede enforcement of the statute.

The Definitions Section reflects the concerns expressed above. Under Subsection (c)(1), a "financial institution" is "a bank, insurance company, credit union, building and loan association, investment trust, or other place held out to the public as a medium of savings, means of collective investment, or place for the deposit of funds." Under Subsection (c)(2), "financial professional" is "a person employed to keep, manage, audit, or deal in funds or financial instruments, whose position requires professional education." The definition of "financial professional" requires professional education to justify the presumption that financial professionals are aware of their legal obligations. If a person has received advanced education in his field (such as accountancy), it is fair to require that he know his ethical duties as a professional. In other words, a person who keeps the books for his small corner store and lacks professional education should not be held to the same standard as an educated accountant. Under

this Subsection, the “professional education” requirement is satisfied by any post-secondary degree or certification. Under Subsection (c)(3), a “fiduciary” is any person who has “a legal duty to act on behalf of or in the interest of a corporation, person, or organization.” The rationale for holding fiduciaries liable under this Section is that wherever one is placed in such a position of trust, one should be held to that level of trust.

Subsection (d) indicates that any offense categorized within this section shall receive at least a Class 1 misdemeanor classification, regardless of any other factors.

Relation to current Maldivian law. Current Maldivian law refers in several places to criminal abuse of trust; the drafters presume the meaning of that phrase is roughly akin to its meaning in this Section.

Islamic law also punishes similar behavior where there is a breach of trust.¹⁵² Islamic law places liability for the “entrusted funds” with the person commissioned to carry out the delivery.¹⁵³

SECTION 216 – THEFT OF PROPERTY LOST, MISLAID, OR DELIVERED BY MISTAKE

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 71

Comment:

Generally. This statute does not impose a heavy burden on a person who receives or discovers the property of another. The person need only make reasonable efforts, to restore the property to its rightful owner. If no reasonable means are available for returning property to its owner, a person may keep received or discovered property of another. The best example of such a case would be if a person were to find a single currency note on a busy street. Since it would be difficult (if not impossible) to find the rightful owner (i.e., since there are no reasonable measures available to the person), the person may keep the bill without fear of liability. In other cases, reasonable measures may exist to restore received or discovered property, such as posting a sign in the area in which the property is found or giving the property to an employee of the establishment in which it is found. In certain circumstances, especially if the item is distinctive or labeled with the owner’s name or other information, the person may have a duty to attempt to contact the rightful owner and restore the property to him. A trier of fact should consider custom, the circumstances, the value of the property, the uniqueness of the property, the potential number of false claimants, alternative means of restoration, etc. in determining whether a person’s effort is reasonable.

Subsection (a)(2)’s requirement of purpose to deprive another of his property is important. A person may take possession of property by accident or with the purpose of keeping it safe without also having the specific purpose of depriving the owner of his property. The

¹⁵² AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 383 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“It is not valid for the owner of an article that has been put up as collateral to sell it without the permission of the person to whom the collateral has been given. Nor is it valid to sell property belonging to another, unless the seller is the owner’s guardian or authorized representative.”).

¹⁵³ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 423 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“Y’s responsibility in a commission is that of someone who has been given a trust... then he must pay for its loss, as with any trust.”).

reasonable efforts discussed above must also be analyzed to see if they evince a purpose to deprive or instead a good faith effort to restore the property in question to its owner.

The definition of “owner” in Subsection (b) differs from the definition of “another” in “property of another” in Section 17, because there would be no justice in requiring a person who receives or discovers property to return it to someone other than the rightful owner. A person is not the “owner” of property unless he has a legal claim of right.

Relation to current Maldivian law. Rules Relating to the Conduct of Judicial Proceedings, Provision 71 is a similar provision in current Maldivian law. The draft Section departs from current law by requiring a specific culpability level and does not alter punishment on the basis of prior offenses. The draft Code addresses the effect of recidivism in Section 1104 (Aggravation and Mitigation for Prior Criminal History) of the sentencing guidelines.

Islamic law proscribes the keeping of lost property without an honest effort to restore it to its owner.¹⁵⁴ This statute imposes a minimal burden on the finder or receiver and only imposes liability where there is a purpose to deprive, and so should not sweep so broadly as to include innocent people. Instead, it ought to encourage the restoration of lost or wrongly delivered property.

SECTION 217 – UNAUTHORIZED USE OF PROPERTY

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this Section is to punish wrongful use of property that does not rise to the level of theft. The typical case covered by this Section occurs where a person does not intend to deprive another of property permanently, but instead intends only to use property temporarily. A common example is joyriding, where a person takes another’s car, boat, or bicycle for the purpose of using it temporarily and then returning it or abandoning it in a place where it is likely to be found. Temporary use of real estate or temporary use of other property (tools or nets) is subject to liability under this Section. The definition of “temporary use” is largely self-explanatory, but it should be noted that this could cover a period of several months or even some years. The statute also precludes use of property in excess of the rights granted. So, where an owner grants someone authority to use property in a certain way, and the user exceeds the license which the owner has given him, the user can be held liable to the extent that his use was inconsistent with the reasonably anticipated wishes of the owner. For instance, the owner of a car might permit another to borrow his car, but also prohibit off-road driving. The user is liable under this Section if he should have anticipated that the owner would not have permitted his off-road driving.

This Section should not be construed to proscribe all use of property without explicit consent by the owner. Most societies have traditions of permitting property use by trusted friends, relatives, or neighbors under certain circumstances. The trier of fact should consider Maldivian customs, the history of the relationship between the user and owner in relation to the property in question and property in general, the overall relationship between the user and owner,

¹⁵⁴ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 667 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“The category of taking other’s property through falsehood includes such people as . . . the person who picks up lost and found property and does not give notice of having found it. . .”).

the value of the item used, the value of its use, the potential for damage to the item used, and any other relevant factors. This information, in addition to expert testimony, could all be used to establish the “reasonably assessed value” of an item.

The grading for this offense varies with the value of the use itself, not with the value of the item. Thus, where a person uses another’s automobile without consent and contrary to the owner’s reasonably foreseeable conditions of use, the value used to grade the offense is the value of use of the car for the few hours it was used, not the value of the whole car. Otherwise, the grading scheme in Subsection 210(b) applies unchanged.

Relation to current Maldivian law. There is no similar provision in Maldivian law. However, this provision commonly is found in other codes and helps enforce property rights. Primary among property rights is the right to exclude others from use of one’s property; without vigorous enforcement, this right becomes meaningless.

This Section is generally supported by Islamic law which punishes any use of another’s property without permission.¹⁵⁵

SECTION 218. RECEIVING STOLEN PROPERTY

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this Section is to punish and deter people who traffic in stolen goods. This Section differs from Section 211 in that Subsection (a)(1) requires only recklessness as to whether another person is the rightful owner of property, rather than purpose to permanently deprive the owner of possession. For this reason, Subsection (b) prescribes that the offense in this Section is one grade lower than the corresponding theft offense would be in Sections 211 through 216. Otherwise this offense resembles other theft offenses, consisting as it does of retaining property in violation of another’s superior right to the property. Subsection (a)(2) seeks to protect persons with innocent intentions, such as those who receive or retain property for the purpose of returning it to its owner. However, it should be noted that Subsection (a)(1) incorporates a doctrine similar to “willful blindness” by punishing recklessness in relation to whether a property is stolen or not. For example, transporting a briefcase for a known drug dealer, but not opening it is not sufficient to preclude liability.

Relation to current Maldivian law. There is no provision within current Maldivian law relating to this Section. However, Islamic law broadly places responsibility for receipt of stolen goods on the receiver, regardless of whether he knows they were stolen or not.¹⁵⁶ The underlying principle of this Section is compatible with this doctrine.

¹⁵⁵ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 363 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“If circumstances force one to choose between a dead animal and some permissible food belonging to someone else, one is obliged to eat of the dead animal.”).

¹⁵⁶ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 431 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“Anyone who obtains the wrongfully appropriated article from X, or subsequently obtains it from the person who got it from X...is financially responsible to Y for it, no matter whether such a person knows of its having been wrongfully appropriated or not.”).

SECTION 219 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 210 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 210's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 220 – PROPERTY DAMAGE AND DESTRUCTION OFFENSES

Crimes against property can be reduced to either: property damage, endangering property, or threatening to damage property. This Chapter is designed to simplify and reduce all offenses against property to these three essential harms and to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law that are consolidated in it. For each harm, the draft Code defines aggravating factors, with corresponding adjustments to the offense, to maintain a flexible grading system reflecting the perceived severity of the individual crime.

Under the draft system of liability for multiple offenses, an additional conviction for any such offense would impose additional punishment on the offender, rather than being rendered insignificant by inclusion within a concurrent sentence. Thus, a provision defining the crime of arson, for example, is no longer necessary as that crime is simply a combination of the harms of the separate offenses of property damage, endangerment to property, and endangerment of life.

SECTION 220 – CRIMINAL PROPERTY DAMAGE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 59, 110, 114, 115 and 88(19); Law on Public Services, Art. 9

Comment:

Generally. This Section makes it an offense to damage property belonging to another. Property damage can result from either directly damaging another's property or from tampering with property. Section 220(a) includes both harms.

Section 220(a)(2) contemplates the scenario in which an individual does not cause any physical damage to the property tampered with, but indirectly damages other property. For example, if an individual moves a buoy or marker used to delineate a sea route, recklessly disregarding the possibility that a seagoing vessel will be led astray, and the seagoing vessel is led off course and damaged, the actor has committed an offense under 220(a)(2). Note that under 220(a)(2), the property tampered with could be the actor's own or it could belong to someone else. So long as the actor has the requisite mental state and the property ultimately damaged belongs to someone else, the activity falls under 220(a)(2). This rule is subject to the exception in 220(b) discussed below. Under Subsection (a)(2), if an actor tampers with property knowing that his actions will result in damage to property of another, his offense will be increased one grade.

In determining whether the actor possessed the requisite mental state for an offense under this Section, the trier of fact should focus on the actor's mental state as to the result element of damage caused. Returning to the above hypothetical, an actor may knowingly move the buoy but may reasonably be unaware that his actions may result in harm to the seagoing vessel. In that case, he has not acted with recklessness as to the resulting damage and has not committed an offense under Section 220(a).

The exception in Section 220(b) protects property owners who act within their property rights. The exception in 220(b) requires: (1) that the actor act upon his own property, (2) that his actions not exceed his legal rights related to the property, and (3) that the victim of the property damage did not have a legal right to rely on defendant's property or services.

The following example illustrates how the exception in Section 220(b) operates:

Example 1: Greenacre, an unused piece of grassland, is owned by O. Without his knowledge, T, a trespasser, enters Greenacre, builds a small shelter and begins to reside on the property. O then decides to clear his property so that it can be used as an orchard. Not knowing of T's presence, he carefully sets the property on fire to clear it of grass. As a result, T's property is destroyed. In this case, the owner of Greenacre was within his rights to clear his property, and the trespasser had no legal right to reside on the property. Thus, the owner falls under the exception of 220(b) and is not guilty of property damage.

Section 220(c) creates a rebuttable presumption that a person who knowingly uses fire or a catastrophic agent, and damages property of another, was reckless with respect to the other person's property. This presumption reflects the fact that fire and catastrophic agents are inherently dangerous and should be used only with extreme caution. The Code imposes a burden on those that use such agents to exercise adequate caution. However, because this presumption is rebuttable, the actor will be allowed to present evidence showing that he merely acted negligently, or perhaps even acted reasonably, but the property damage resulted anyway. If the actor successfully meets this burden of proof he may avoid liability under this Section.

The grading system in Subsection (d) is designed to operate with respect to two factors: the amount of damage caused and the intent of the actor. The draft grading system reflects a determination that the punishment should be proportionate to the harm caused and that an individual is more culpable when he acts knowingly or purposely than if his behavior is merely reckless in nature. The monetary amounts used in Subsections (d)(1) through (d)(4) are explained extensively in Section 210.

In addition, Subsection (d)(6) reflects the fact that the mere monetary value of a place, artifact or property of environmental significance might not reflect its full value to the community or to society in general; this aggravating factor alters the offense grade to reflect this intangible loss. Subsection (d)(7) defines what constitutes a place of "environmental significance." Note that Section 1105 of the draft Code provides that if a person deprives the government of property or damages property of the government, his baseline sentence is aggravated by one level.

Subsection (e) defines "tampering" as interfering with or otherwise impeding the ordinary function or effect of property. It is possible to tamper with one's own property, as well as with property of another, within the meaning of this definition. For example, tampering occurs if a person drugs a prize horse right before a major horse race, thereby causing the horse to lose the race.

Relation to current Maldivian Law. The current Maldivian code broadly covered property damage with the following language: "Where any loss or injury is caused to a person or to property belonging to a person by reason of any act provided, punishment prescribed in this section may be extended up to 15 years."¹⁵⁷ This Section encompasses the principles of the current Code. Section 220(a)(2) is purposely drafted broadly enough to include Provision 110 of the Maldives Penal Code.¹⁵⁸

¹⁵⁷ Maldives Penal Code, Provision 141.

¹⁵⁸ Provision 110 of the Maldives Penal Code states: "It shall be an offence to use any false light, mark or buoy with the intention to mislead or in circumstances likely for a sea going vessel to be mislead. Person guilty of this offence

The drafters recognize that under traditional Islamic law, a perpetrator's intent is irrelevant because the victim of the property damage is to be compensated whether the property is destroyed intentionally or by mistake.¹⁵⁹ In either case, the usurper's punishment is to restitute the owner the value of his property.¹⁶⁰ Al-Shafi'i holds the usurper liable for the usurped property and requires the usurper to restitute the owner's loss.¹⁶¹ Thus, the owner of the property has the option of proceeding against the offender in a civil action.¹⁶² These standards established by the jurists, however, are more appropriate in a civil law context, where the victim sues the damager of property directly for compensation. The draft Code articulates the obligations that individuals owe to the State, and the Code does not affect the rights of parties in the civil context, as provided in Section 14 (Civil Rights to Recovery Preserved).

SECTION 221 – ENDANGERING PROPERTY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 110, 114 and 115; Law on Public Services, Art. 9

Comment:

Generally. This Section makes it an offense to create a substantial risk of damage to inhabited structures of others and vital public facilities. This Section does not criminalize the endangerment of all types of property; rather, the property must be an "inhabited structure" regularly used by people as defined in Section 221(b) or a vital public facility of particular importance for the health and welfare of Maldivian citizens as defined in Section 221(d).

The use of the term "significant" in Section 221(a) is meant to guide the court in its determination of guilt. In order to be found guilty of the offense, the actor must place a significant portion of the property in danger of destruction. For example, if an individual knowingly breaks the glass window of a home, he may be found guilty for property damage under Section 220, but he has not placed the structure under significant risk of destruction worthy of conviction under Section 221. If an individual knowingly cuts the brake lines of a public bus, but the act is discovered before any significant damage results, the actual damage to the property is relatively minor for the purposes of Section 220. The actor, however, has knowingly created a substantial risk that the vehicle, or a significant portion of it, will be destroyed in an accident. As such, he may be found guilty of property endangerment under Section 221. Note that in this case he may also be guilty of reckless endangerment under Section 121. Section 94 would permit conviction for multiple offenses in this situation.

The definition of an "inhabited structure," as set out in 221(b) is defined broadly enough that it will likely include most buildings and vehicles used for public and commercial

shall be punished with imprisonment of either description not exceeding 3 years or exile not exceeding 3 years or a fine."

¹⁵⁹ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 383 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹⁶⁰ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 384 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹⁶¹ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 385 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹⁶² IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 386 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

transportation. Property that would not be covered by this provision includes, but is not limited to, vehicles for private transportation (such as personal automobiles), storage sheds, and other structures not used by humans. Aside from its application to “public or commercial transportation,” the definition of “inhabited structure” is self-explanatory.

Relation to current Maldivian Law. Because the property included in this Section is limited to that which is of particular importance to ordinary Maldivians, the offense is graded according to the mental state of the offender rather than the value of the property endangered.

This Section is supported generally by the principle in Islamic law known as *maslahah* (considerations of public interest). A contemporary Shafi’i scholar, Taha Jabir Al ‘Alwani, summarizes this notion by stating that: “It is generally held that the principle objective of the Shari’ah and all its commandments is to realize the genuine *maslahah* or benefit of its jurisdiction.”¹⁶³

SECTION 222 – THREATENING CATASTROPHE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 114 and 115

Comment:

Generally. Under this Section, a catastrophe may be threatened either by possessing a catastrophic agent while knowing it will be used to commit a felony, or by threatening to destroy property of great value, destroy five or more inhabited structures, kill five or more persons, or impair a vital public facility.

Under Subsection (a)(1), a person is guilty of an offense if he knowingly possesses a catastrophic agent with either the purpose to use it to commit a felony, or the knowledge that someone else will use it to commit a felony. The principle underlying this Section is that catastrophic agents are so inherently dangerous that mere possession of them should be punished without regard to the actual damage caused or property endangered. Note the knowledge requirement in both Subsections (a)(1)(A) and (a)(1)(B); this requirement means that a delivery person carrying a catastrophic agent who does not know that the catastrophic agent is rigged to explode is not liable if a third person remotely detonates the catastrophic agent.

Under Subsection (a)(2), a person commits an offense if he threatens to cause a catastrophe. Such threats create law enforcement and security costs for the government and negatively affect the economic and social well-being of all Maldivians.

The definition of catastrophe in Section 222(b) is designed to ensure that the offense only includes threats of severe and dramatic violence against many lives or a substantial amount of property. The Section is written broadly enough to hold liable a person threatening catastrophe in any manner including, but not limited to, the use of spoken and written words or other behavior. The threat must seem credible to a reasonable person.

Relation to current Maldivian Law. The current Maldivian Code supports this Section. Provision 114 of the current Maldives Penal Code states: “It is an offence while using, keeping in possession or dealing with fire or combustible matter, any act so negligent to cause danger to the life of a person or any form of injury or loss to another.” Provision 115 expanded this to

¹⁶³ TAHA JABIR AL ‘ALWANI, SOURCE METHODOLOGY IN ISLAMIC JURISPRUDENCE 81 (footnote 21) (International Institute of Islamic Thought 1990).

include “explosive substance.”¹⁶⁴ Hence, the draft Code is consistent with the current one. For the relationship of this Section to Islamic law, see the commentary to Section 221.

SECTION 223 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used throughout Chapter 220 and provides cross-references to the sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 220’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

¹⁶⁴ Maldives Penal Code.

CHAPTER 230 – CRIMINAL INTRUSION OFFENSES

This Chapter recognizes a right to privacy that extends to premises, communications, and information. Section 230 punishes trespassing on the premises of another. Section 231 broadly prohibits eavesdropping on, surveillance of, and interception of another person's electronic or oral communications. Sections 232 and 233 punish unauthorized acquisition, use, and disclosure of information.

The offenses in this Chapter are generally derived from current Maldivian law and the Maldivian Constitution. However, the draft Code does expand the types of property onto which one can trespass. Additionally, the draft Code splits the traditional crime of burglary into trespass and theft for purposes of clarity, flexibility, and prosecutorial accuracy.

SECTION 230 – CRIMINAL TRESPASS

Corresponding Current Provision(s): Maldives Penal Code, Provision 46, 88(3) and 137.

Comment:

Generally. This provision defines, grades, and provides exceptions to the offense of criminal trespass, which criminalizes a person's unlicensed presence on another's property. Subsection (a) defines the offense. Subsection (b) enumerates two exceptions to liability. Subsection (c) grades the offense and Subsection (d) defines the terms used in this Section.

Under Subsection (a), the key inquiry is whether the person is permitted or licensed for *entry*. But even if entry is permitted, the person entering is liable for any other offense subsequently committed on the property.

Section 230(a) uses the phrase "consent or license" to make it clear that either a license (i.e., right) or consent (i.e., permission) is needed to enter or remain in a place.

Subsection (b) defines two exceptions to liability under Subsection (a). Under Subsection (b)(1) it is not an offense to enter or remain on premises "open to the public," so long as the person complies with all lawful conditions imposed on access to the premises. Certain places, such as libraries and stores, are clearly open to the public. To be sure, a locked entrance, a guard who screens visitors, or a visible sign reading "Private Property," "No Public Access," or something similar suffices to indicate that a place is not open to the public. In the absence of such clear signals, however, the test is whether a reasonable person under the circumstances would understand the premises to be closed to the public. Examples of "lawful conditions imposed on access to the premises" include dress requirements (e.g., "no shirt, no shoes, no service") and conduct requirements (e.g., no loud talking in a library). An unlawful condition is one that would subject a person to criminal or civil liability if he complied with it, or that is forbidden by statute or the Maldivian Constitution. For example, a requirement that a patron drink alcohol would be unlawful under Section 616 (Failing to Fast During Ramadan; Consuming Pork or Alcohol); therefore, refusal to comply would not subject a patron to liability for trespass.

Subsection (b)(2) excepts from liability a person who enters or remains in a place under a reasonable belief that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain. Such a person may know his presence is formally unauthorized, but if his belief that he is licensed to enter or remain is objectively

reasonable under the circumstances, then his conduct lacks the culpability and dangerousness this Section seeks to punish. For example, people know that they ordinarily may not enter another's private residence without permission. However, if a person hears a scream for help from within a house, it would be reasonable for him to believe that he may enter even though the owner did not expressly authorize his entry, especially in light of Section 618 (Duty to Aid).

Subsection (c)(1) grades criminal trespass of a dwelling, highly secured premises, or dangerous premises so marked or signed, as a Class E felony, in recognition of the special privacy and security interests at stake in such cases.

Subsection (c)(2) grades criminal trespass as a Class 1 misdemeanor when it occurs in any separately secured building, inhabited structure, storage structure, or any other place enclosed in a way as to manifestly exclude intruders. A "separately secured building" includes any building secured by locks or surrounded by fences or other barriers to entry. (For the definition of "inhabited structure," see Section 221(b) and accompanying commentary.) Where a person has enclosed his property so as to manifestly exclude intruders — for example, by erecting a wall or other barrier around his property — a trespasser's defiance of the person's effort to exclude intruders demonstrates greater blameworthiness than, for example, a person's trespass onto another's open field. Overall the cases covered by Subsection (c)(2) reflect the common understanding that such trespasses involve less serious intrusions than those covered by Subsection (c)(1), but more serious intrusions than all other trespasses, which Subsection (c)(3) grades as Class 3 misdemeanors.

The definition of "dwelling" in Subsection (d)(1) is intentionally expansive. In addition to traditional houses, it includes mobile homes and the sleeper trailers used by truckers. The definition even includes makeshift shelters constructed by the homeless, so long as they qualify as "residences." A shelter is a "residence" within the meaning of this Chapter if a person's shelter and residence therein are sufficiently permanent. Factors indicating permanence include the length of time the person has lived in the shelter, the effort the person has put into constructing the shelter, and the likelihood and length of time that the person will continue to live in the shelter. For example, a tent set up by a person on vacation is not a "residence" and is therefore not a "dwelling." However, the same tent may qualify as a residence and a dwelling if the person has lost his home and intends to live in the tent for a significant length of time.

Subsection (d)(2) defines "highly secured premises" as "any place that is continuously guarded and where display of visible identification is required for entry." Military bases and a company's headquarters are paradigm examples of highly secured premises.

Subsection (d)(3) defines "storage structure" as "any structure, vehicle, vessel, or aircraft that is used primarily for storage or transportation." Structures satisfying this definition include sheds and warehouses. Vehicles satisfying this definition include buses and large trucks. Vessels satisfying this definition include ferries, tankers, and cargo ships. Aircraft satisfying this definition include (fuel) tanker planes and passenger aircraft.

Relation to current Maldivian law. The current Maldivian code most explicitly prohibits trespass in Provision 88(3) which prohibits trespass into a person's house. The current code also prohibits an assembly of three or more people for the purpose of criminal trespass in the context of an unlawful assembly. (Maldives Penal Code, Provision 46). This prohibition is presumably applicable to the lone individual trespasser as well, and the current code implicitly criminalized trespass by forbidding both burglary (Maldives Penal Code, Provision 137) and theft from a

highly secured place (Maldives Penal Code, Provision 138). (Trespass is inherent in both offenses.)

However, the draft Code slightly revises Provision 88(3) in that it broadens the offense to include not only trespass into someone's home, but also onto any other property a person has no license or authority to enter. This change was made to reflect the fact that people may own, and have privacy rights with respect to, a wide variety of different types of property.

In addition, the draft Code revises Provisions 137 and 138 since it does not define "burglary" as a separate offense. Burglary is a combination of trespass and some other offense, usually theft. Under the draft Code, what has historically been prosecuted as "burglary," would instead be prosecuted as two separate offenses. The advantages of breaking the crime into its constituent parts are as follows:

(1) Clarity. Burglary is a composite crime consisting of unlawful entry and an additional offense (usually theft). By breaking the offense into its component parts it is easier to identify each element of the prohibited behavior.

(2) Decreased risk of charging a defendant more than once for the same set of culpable actions. In a criminal code that retains burglary as a separate offense, there is a risk that a person who, for instance, enters a dwelling and steals an item could be charged with theft, criminal trespass, *and* burglary. The draft code eliminates the possibility of this kind of injustice by allowing prosecutions for only theft and criminal trespass.

(3) Flexible grading that corresponds more closely to the severity of the underlying offense. The grading of theft varies with the value of the stolen property. The grading of criminal trespass varies with the type of property entered without license or consent. Because a composite burglary offense would have only one grading scheme, prosecutors and courts necessarily have more grading flexibility when they can separately charge theft and trespassing. This greater grading flexibility generates punishments that better parallel the culpability and dangerousness demonstrated by the defendant's conduct.

This separation of burglary into the underlying offenses of theft and trespass is supported by the understanding of burglary in Islamic law. El-Awa notes that the majority of jurists concur that punishment for theft will only occur when it meets the minimum value and has been taken from a "place of custody" or *hirz*, thereby recognizing both elements of theft and trespass. Islamic law determines *hirz* on the basis of custom; hence the Maldivian definition of private property, and the draft definition of trespass, would control.

SECTION 231 – UNLAWFUL EAVESDROPPING OR SURVEILLANCE

Corresponding Current Provision(s): Maldivian Constitution § 20; Rules Relating to the Conduct of Judicial Proceedings, Provision 67.

Comment:

Generally. This Section defines the offense of unlawful eavesdropping or surveillance, prohibiting (a) installation or use of surveillance/eavesdropping equipment on the property or inside the premises of another, (b) use of such equipment to surveil or eavesdrop on another person in a private place, and (c) use of any device that intercepts, records, amplifies, or

broadcasts any part of an electronic or oral communication. It should be noted that a person must act with the purpose of surveilling or eavesdropping, and without the knowledge or permission of the victim.

A person commits an offense under Subsection 231(a)(1) if, with the purpose of eavesdropping or surveilling, and without the consent of the subject, surveils or eavesdrops on another person in a private place or under circumstances in which the other person has a reasonable expectation of privacy. The requirement that the person act with the purpose of eavesdropping or surveilling may seem redundant, but it protects those who install and maintain surveillance/eavesdropping equipment for perfectly legitimate reasons (e.g., in elevators or banks). Such professional installers know that their actions will facilitate surveillance/eavesdropping, but it is not *their* conscious object to surveil/eavesdrop. The requirement that the subject not consent to the surveillance/eavesdropping is also important. The media often surveil and eavesdrop on celebrities and politicians; when these people consent to the surveillance/eavesdropping, the justification for punishment under this Section disappears. (Such consent may be express or implied.) Note that Subsection (a)(1) criminalizes surveillance/eavesdropping on another in a private place, even if no device is used. Where appropriate, the defendant could be charged under this Section, as well as under Section 230 (Criminal Trespass).

Assuming a purpose to surveil/eavesdrop, and the subject's lack of knowledge and refusal to grant permission, Subsection (a)(2) prohibits use of any device that intercepts, records, amplifies, or broadcasts any part of an electronic or oral communication occurring on the property or inside the premises of another.¹⁶⁵ Subsection (a)(2) will most commonly cover the interception of phone communications through wiretapping. Also, Subsection (a)(2) is intended to criminalize the interception of any part of a communication, whether the part be the contents of the communication or merely data relating to the identity of the sender or receiver.

Subsection (b) provides that if a person is informed that his communication may be intercepted or recorded, he is deemed to have consented to subsequent interception or recording, so long as any subsequent interception, recording, disclosure, or other use of his communication that falls within the scope of the notice. Common cases covered by this Subsection include service calls where the caller is informed that his call may be recorded, and messages left on answering machines. The phrase “within the scope of the notice” is important. Consider the common case of a service call where the caller is informed that his call may be recorded. The notice given in the typical call says that the call is recorded for purposes of quality control. In such a case, it would be an offense to disclose or use information gleaned from the call for any purpose other than quality control.

Subsection (c) provides three further cases in which intercepting or recording a communication is not an offense. Subsection (c)(1) provides that it is not an offense for an employee of a common carrier to intercept or record communications in the ordinary course of the common carrier's business. The key language here is “in the ordinary course of such common carrier's business.” Examples of interception or recording in the ordinary course of business include interception or recording for billing purposes, for internal research purposes, or even pursuant to a criminal subpoena. Other instances of interception or recording generally should be considered outside the ordinary course of business.

¹⁶⁵ The conduct proscribed in these subsections – use of the described device – is not ambiguous. The only possible source of confusion lies in the subsections' use of the terms “private place” and “electronic communication,” both of which are discussed below.

Subsection (c)(2) provides that a person may intercept or record communications that he is a party to, where he acts in good faith against wrongdoing and reasonably believes that the intercepted or recorded communications constitute evidence of an offense. The key word in Subsection (c)(2) is “reasonably.” Under normal circumstances, it is not reasonable for a telemarketer to believe that his customer has committed an offense. On the other hand, it is permissible for a person to record or intercept communications of another person who has announced his intent to commit a crime in the near future, because it is reasonable to believe that communications from the person who has announced his criminal intent constitute evidence of an offense.

Subsection (c)(3) provides that it is not an offense for a law officer authorized by the Minister of Home Affairs or Defense to intercept or record communications.

Subsection (d) defines the term “communication.”

Subsection (e) grades this offense as a Class E felony. This matches the penalty for trespass in a dwelling, highly secured premises, or dangerous premises so marked or signed under Section 230(c)(1). This grading reflects the gravity of an intrusion into privacy, since the right to privacy in communications is protected by the Maldivian Constitution.

Relation to current Maldivian law. This Section implements the guarantee of the Maldivian Constitution § 20 that states:

“Letters, messages, telephonic conversations and such other means of communication shall be inviolable. Such letters, messages, telephonic conversations and other means of communication shall not be intercepted, read, listened to or divulged except as expressly provided by law.”

This Section also slightly revises Provision 67 of the Rules Relating to the Conduct of Judicial Proceedings, which criminalizes unauthorized invasions of privacy by government officials. Unlike Provision 67, liability in the draft Code is not limited to government officials. Any person may be charged under this Section. This change was made because the objective of this Section, and presumably that of the cited Maldivian constitutional provision, is to prevent invasion of privacy regardless of whether the invader is a member of the government.

SECTION 232 – UNLAWFUL ACQUISITION OF INFORMATION

Corresponding Current Provision(s): Maldivian Constitution § 20; Rules Relating to the Conduct of Judicial Proceedings, Provision 67.

Comment:

Generally. This Section defines the offense of accessing, without authorization, private written communications or other information. This offense complements Section 231’s prohibition of unlawful eavesdropping.

Subsection (a) prohibits the acquisition of highly secured or private information knowing that he has no license or authority to do so. The term “information” should be construed expansively to include physical documents, electronic data, and communications of any kind, among other things. Information need not be tangible.

Subsection (b) provides an exception in cases where the unauthorized acquisition of information is intended to expose wrongdoing. The intention must be in good faith, thus the person must actually believe that wrongdoing is occurring. Simply seeking out information in the hopes of discovering wrongdoing is not enough to invoke this exception's protection. The word "wrongdoing" in Subsection (b)(2) only refers to unlawful behavior within the scope of the draft Code.

Subsection (c)(1) defines "highly secured information" as information that is actively secured against unauthorized access. Examples of such measures include encryption, placing the information in a safe or other locked area, and hiding or disguising the information to make it difficult to find. Unlawful acquisition of highly secured information is graded higher, a Class E felony, because it typically involves a greater invasion of privacy.

Subsection (c)(2) defines "private information."

Relation to current Maldivian law. This draft Section implements the right of privacy enshrined in § 20 of the Maldivian Constitution. However, it expands the liability to all persons rather than only governmental actors (as is currently the case in The Rules Relating to the Conduct of Judicial Proceedings, Provision 67). The reason for this expansion is to prohibit this behavior among both governmental and non-governmental actors, which § 20 of the Maldivian Constitution appears to require.

SECTION 233 – UNLAWFUL DISCLOSURE OF INFORMATION

Corresponding Current Provision(s): Maldivian Constitution § 20.

Comment:

Generally. This Section prohibits a person from disclosing or using information if he knows it has been obtained in violation of Sections 231 or 232. It extends the draft Code's protection of private information and communications by assuring that a person who knowingly passes along unlawfully obtained information will not escape liability.

To be guilty under this Section a person must *know* that the information in question was unlawfully obtained. For instance, if unlawfully acquired information is given to a reporter who then publishes it, the reporter is not guilty unless he knew the information was unlawfully obtained. The person who gave the information to the reporter would properly be charged under this Section, so long as he knew the information was unlawfully obtained.

If a person both acquires and discloses information in violation of multiple sections under this Chapter, he may be charged and punished under all sections that apply.

The grading for this Section varies from Section 232. The acquisition of "highly secured information" contains an element of trespass since it is "secured against unauthorized access." Hence, the punishment for acquiring "highly secured information" is graded higher than simply disclosing it because acquisition in this context is a more invasive criminal act.

Relation to current Maldivian law. This Section completes the implementation of the constitutional guarantee of privacy in § 20 of the Maldivian Constitution by criminalizing the disclosure or use of unlawfully-acquired private information.

SECTION 234 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 230 and provides cross-references to the sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 230's defined terms and current Maldivian law, refer to the commentary for the section in which each term is initially defined.

FORGERY AND FRAUDULENT PRACTICES

CHAPTER 310 – FORGERY AND FRAUDULENT OFFENSES

This Chapter punishes culpable fraudulent conduct. The harm in fraud is the defendant's culpable inducement of detrimental reliance on the part of the victim. From the victim's point of view, this Chapter protects his right to assume that the representations of others are truthful and made in good faith.

The draft Code generally follows the elements contained within current law. However, at certain points the draft Code expands the scope of previous law to account for the possibility of new methods and techniques in committing similar harms. This expansion was achieved by specifying the underlying harm that the law intends to prevent rather than specifically enumerating the types of activities sought to be prevented as is done under current law. Support for these changes is found in principles already present in current law and Islamic law.

SECTION 310 – FORGERY AND COUNTERFEITING; SIMULATING OBJECTS OF SPECIAL VALUE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 28(m), 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 107, 125, 88(34) and 88(36); the Draft Law on Copyright and Related Rights, Provision 28; and the Maldives Postal Services Act, Provision 10.

Comment:

Generally. Section 310 criminalizes forgery and simulating objects of special value. These offenses aim to protect the authenticity of documents, other writings, and objects of antiquity or other special value. This offense also covers the production of counterfeit money and other negotiable or valuable instruments. The use of these documents to commit a theft is criminalized in Section 212 (Theft by Deception). Forgery and simulation remains an independent offense, however, recognizing that (1) forged writings are often used to accomplish especially far-reaching fraudulent activities, (2) forged objects and simulated objects of special value may cause losses or injuries that are unquantifiable or of a non-pecuniary nature, and (3) beyond the specific theft achieved or attempted, forgery imposes the additional discrete harm of reducing public confidence in the forged item (for example, counterfeiting, which is one form of the Section 310 offense, tends to undermine trust in paper currency and the monetary system).

The grading of the offense differentiates between the type of object forged or simulated. The rationale behind the grading is that the forgery of certain objects (i.e. money) is likely to cause greater harm than the forgery or simulation of other objects (notices or correspondence.) Additionally, the forgery of valuable or negotiable instruments may be harder to detect, as they represent only value, as opposed to other writings, which may have particular characteristics that make them easy to identify as fakes before they cause further harm.

Subsection (a)(1) is directed specifically at the forgery of writings. This offense is committed whenever one creates or issues an entirely new writing, or executes, authenticates, or transfers an existing writing such that it purports to be the act of another, or purports to be numbered or authenticated in a way that it is not. The alteration of an existing writing that has already been executed or authenticated is covered by Section 311.

Subsection (a)(2) is directed at the simulation of objects of special value. This provision addresses situations where an object is altered such that it falsely purports to be an antiquity. This provision also addresses situations where a painting or cultural writing purports to be written by an author, but it is not. However, this provision does not overlap with Section (a)(1) – a person has either committed forgery or simulated an object of special value.

Subsection (a)(3) is directed at the use of forged writings or simulated objects where the use does not cause a pecuniary loss that would otherwise be punishable under Section 212. This provision could include the use of forged writings or simulated objects that result in reputational harm, the assertion of false scientific theory, or other intangible injuries.

Subsection (b) defines a writing as any symbol of value, right, privilege, or identification, regardless of medium. It is irrelevant whether the writing exists in physical form or electronic form. This may include but is not limited to printing, electronically recorded data, or any other method of recording information, money, coins, stamps, tokens, seals, credit cards, badges, trademarks, digital signatures or other encrypted identifiers or electronic mail routing information.

Subsection (c) provides a grading scheme for Section 310. Subsection (c)(1)(A) punishes as a Class D felony the forgery of any instrument that does or may create, show, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status. Subsection (c)(1)(B) punishes as a Class D felony the forgery of any writing issued or received by the government. Subsection (c)(1)'s range of prohibited forgeries therefore includes, but is not limited to: currency (coin or paper), bonds, stocks and other securities, commercial letters of credit, and other instruments that could be easily exchanged on sight for other valuable instruments or goods.

Subsection (c)(2) notes that all other forgeries and simulations are punished as Class E felonies. This class of writings and objects would include common letters, private notices or articles, and false antiquities, paintings, or other cultural objects.

Relation to current Maldivian Law. This Section finds support in Provision 28 of the Draft Law on Copyright and Related Rights as well as Provisions 28(m), 90, 91, 94, 96, 97, 98, 99, and 105 of the current Maldivian code. Provision 10 of the Maldives Postal Services Act, which makes it an offense to forge a postage stamp, is also codified by this Section of the draft Code. However, the draft Code makes a few significant revisions to these laws.

First, this draft Section eliminates Provision 95 which imposes an affirmative duty on the possessor of counterfeit money to subsequently notify those persons to whom he may have passed the money before himself discovering it was counterfeit. This change recognizes the fact that counterfeit money may pass to many people after it is introduced into the market, and that it is possible for many people to have passed on counterfeit money without knowing it was counterfeit. It is impractical and unfair to require a person, under the threat of criminal prosecution, to investigate and track the subsequent path of counterfeit money; this is a function more suitably performed by law enforcement.

Second, this Section also avoids punishing someone for failing to notify another of a fact that he himself does not know. This revision is supported by the general Islamic principle that “if a man does not know the deed which he performs is forbidden, no punishment should be inflicted on him.”¹⁶⁶

¹⁶⁶ AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 363 (Islamic Research Institute Islamabad 1993).

Third, the draft Code does not encompass Provisions 92 and 93, which punish possession of materials used in the production of counterfeit materials. This change was made because it is more appropriate to incorporate the prohibition of these acts into laws regulating the production of money.

Fourth, additional material on non-counterfeiting forgery, simulation, and use was added because criminalization of non-currency forgery and simulation permits greater reliance on documents and non-currency negotiable instruments. Criminalization of the knowing use of forged documents ensures that persons obtaining those documents to injure or fraudulently obtain benefits are punished the same as those who produce the documents.

Islamic contract law supports this Section in that it prohibits fraudulent sales.¹⁶⁷ However, the State has traditionally exercised its police power under the Qur'anically-mandated *hisba* jurisdiction to prevent fraud and deceptive practices of various kinds in the marketplace.¹⁶⁸ In addition, the offenses defined in this Chapter are generally consistent with the harms sought to be prevented by the *muhtasib* (market inspector who exercises *hisba* jurisdiction).

SECTION 311 – TAMPERING WITH WRITING, RECORD, OR DEVICE

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(35) and 92; and the Maldives Postal Services Act, Provision 11.

Comment:

Generally. This offense criminalizes both tampering with a writing, record, or device and inviting reliance on writings, records, and devices that one knows to have been tampered with. As applied to “writings,” Section 311 also complements draft Section 310, and reaches conduct that is not forgery because the defendant either tampers with or alters a writing already created, executed, or authenticated.

Subsection (a)(1) defines the culpability level for offense. The defendant’s purpose to deceive or conceal wrongdoing is a key element of the offense. One who tampers with a document in good faith, or for purposes other than deceit or concealment of wrongdoing cannot be guilty under Section 311. Furthermore, tampering with a document to conceal acts that are not “wrongdoing” (i.e., a criminal offense) is not punishable under this Section. This exception is included to protect the privacy of persons who are engaging in acts that they may not want publicly known, and to protect commercial negotiations where confidentiality is a key issue.

Subsection (a)(2) defines the conduct for the offense as the alteration, destruction, removal, or concealment of a writing, record, or object. This definition may include situations where a writing, record, or object is partially destroyed, or simply obscured from public detection. The routine filing of documents ordinarily is not punished because it does not constitute alteration, destruction, removal, or concealment, nor is it undertaken for the purpose of deceit or concealing any wrongdoing. The creation, issuance, authentication, or execution of documents is punished under Section 310.

¹⁶⁷ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 503 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) 198-202.

¹⁶⁸ Qur'an 3:104 (jurisdictional basis of *hisba*, providing that the Muslim community enjoins right and forbids wrong); AL-MAWARDI, THE ORDINANCES OF GOVERNMENT 260-80 (Wafaa H Wahba trans., Garnet Publishing 2000).

Subsection 311(a)(3) exists only to note that there are situations where tampering may be authorized. This authorization must be lawful, however, and must not be used to violate other provisions of Maldivian law.

Relation to current Maldivian Law. Section 311 essentially criminalizes tampering with documents whose creation is punished under Section 310. This Section makes a small addition to current law under Provision 92, which is limited to criminalizing activities involved in counterfeiting, by also punishing offenses which are not counterfeiting, but are sufficiently related to it. The reason for this change is that alteration or destruction of non-monetary documents can inflict serious pecuniary and non-pecuniary damages on others, or may allow others to obtain benefits to which they are not entitled. Furthermore, the criminalization of non-currency tampering is important because it allows people to rely on documents without questioning their authenticity.

Provision 11 of the Maldives Postal Services Act, which makes it an offense remove or tamper with a postage stamp, is also codified by this Section of the draft Code.

Support for this change is also found under Islamic law, wherein fraudulent sales are generally prohibited.¹⁶⁹ Further explanation of this support can be found in the commentary to Section 310.

SECTION 312 – IDENTITY FRAUD

Corresponding Current Provision(s): Maldives Penal Code, Provision 79, 88(40), 121(c); Draft Securities Act, Provision 22, 23 and 24.

Comment:

Generally. This offense criminalizes the unauthorized impersonation of others. Impersonation, like other conduct prohibited in Chapter 310, is often used to achieve theft. Section 312 serves three functions that complement Chapter 210's prohibitions against theft.

First, Section 312(a)(1)(A) serves to punish harm to impersonated persons, such as injury to reputation, that theft offenses do not address. Section 312(a)(1)(A) also criminalizes conduct that may not constitute theft, such as an underage person's pretending to be of age (by claiming to be either a real or fictitious adult) for the purpose of voting. Finally, where one impersonates another to steal property whose value is low or difficult to determine, Section 312(a)(1)(A) will allow a prosecution.

Note that it is not a defense to liability under Section 312 that the impersonated person cannot be identified. Representing one's self as a non-existent person, or a person who cannot be identified is as blameworthy as falsely representing one's self as another real person.

Second, Section 312(a)(1)(B) and (C) addresses crimes that are incidental to impersonation, such as the production, sale, or purchase of false identities. This ensures that individuals can be prosecuted for impersonation-related crimes before they actually engage in the impersonation or theft.

Third, Section 312(a)(2)(C) bars a person from representing that he is authorized to exercise official or legislative authority. Subsection (a)(2)(C) addresses cases where people

¹⁶⁹ IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER 503 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) 198-202.

impersonate police officers, public safety officers, or other government officials. This ensures that individuals who falsely assert official authority are punished, even though they may not cause a direct injury to any specific person.

Relation to current Maldivian Law. This Section is based on Provisions 79, 88(34), and 88(40) of current Maldivian Law. There are a few significant revisions however.

First, this Section slightly revises Provision 79 of current Maldivian law by expanding the penalty to all impersonations, not simply cases where the person is fraudulently claiming Islamic legal authority. There is a strong public policy argument behind this expansion, as identity fraud causes serious harm to the individual whose identity is stolen as well as to society at large in that the national economy is jeopardized by such crimes.

Second, this Section expands the offense by punishing based on the resulting harm as opposed to simply cases where the victim is a legal or judicial authority. This change recognizes that identity fraud can adversely affect any member of society. The changes to this Section are broadly supported by the Islamic law which prohibits the “speaking of falsehoods.”¹⁷⁰

Third, this Section on trafficking in stolen identities partially replaces Provision 88(34) of the Maldives Penal Code by expanding punishment for trafficking in identities beyond cases involving false identity cards. This change was incorporated to accommodate the variety of methods that may be employed to steal other’s identities. The conduct prohibited by Provision 88(40) of the Maldives Penal Code is also encompassed by this Section.

In addition, this Section encompasses specific offenses found in other Provisions of current Maldivian law. First, this Section parallels the specific offense of impersonating another in an election mentioned in Provision 121(c) of current law. Second, this Section also includes fraudulent acquisition of a dealer, dealer’s representative, or investment advisor’s license outlined under the Draft Securities Act’s Provisions 23, 24, and 25.

SECTION 313 – DECEPTIVE PRACTICES

Corresponding Current Provision(s): Consumer Protection Act, Provisions 8, 88(14) and 103; Draft Securities Act, Provisions 50, 51, 52 and 53.

Comment:

Generally. This offense criminalizes dishonest dealing in commercial transactions. Section 313 applies to a whole host of dishonest commercial practices. For example, the following practices would be prohibited under Section 313: making a false or misleading written statement to obtain property or credit, to sell securities, or in any advertisement; using a false weight or measure, or any other device for falsely determining or recording any quality or quantity of a commodity to be sold; selling or delivering less than the represented quantity of any commodity or service; taking more than the represented quantity of any commodity or service when the buyer furnishes the weight or measure; or selling adulterated or mislabeled commodities. The language of this offense, however, is not limited to these practices, and involves any practice which involves deception related to commerce. An “established commercial practice” in Subsection (a)(2) is a practice derived from custom or law.

¹⁷⁰ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 113 (American Trust Publications 2000).

The minimum culpability level required for supplying false or misleading information is recklessness. This level was chosen because a person who acts negligently in supplying false information is unaware of the risk that the information is false, and thus should not be held liable. However, to require knowledge would exempt from liability any person who knows of a substantial risk that he is supplying false information and chooses to disregard it.

The information supplied must be materially false or misleading. This requirement ensures that a person does not incur liability for the representation of minor inaccuracies.

The offense is graded a Class 1 misdemeanor in accordance with current Maldivian law's punishment of similar deceptive practices under the Consumer Protection Act, § 8.

Relation to current Maldivian law. This draft Section is similar to several provisions of current Maldivian law.

First, this draft Section is similar to the Consumer Protection Act, § 8. However, there is a difference between the draft law and current law in that § 8 enumerates specific prohibited practices, whereas Section 313 generally criminalizes all deceptive practices. The reason for this change is to account for all practices that may cause similar harm, but which are not currently known or are not enumerated. For instance, this Section incorporates Provision 103 which prohibits adulterating food and drink for the purposes of commercial profit. A broader criminalization more effectively captures all deceptive behavior, which would be unwieldy to capture by enumeration.

Second, this Section also includes Provisions 50 through 53 of the Draft Securities Act, which pertain to deceptive practices in the securities context. These Provisions prohibit fraudulent inducements to invest, manipulation of the stock market, false statements and distribution of misleading documents in this context.

Third, this Section covers aspects of Provision 88(14) of the current Maldives Penal Code but is not broad enough to cover Provision 88(14)'s criminalization of purchasing at unreasonable prices. Purchasing and selling at unreasonable prices may be prosecuted under this Section only if the offender recklessly supplies materially false or misleading information; or knowingly deceives by acting contrary to established commercial practice. Evidentiary reasons make it preferable to limit the offense in this manner.

This Section also has support in Islamic law. If a seller knows of a defect in an article he must disclose it based on the Prophetic tradition that: "He who cheats us is not one of us."¹⁷¹ Islamic law also prohibits "taking people's property through falsehood" and Al-Misri has condemned "the cheater or adulterer of trade goods...the person who stints when weighing or measuring out goods...and the merchant who tells the buyer that the merchandise cost more than it did" as examples of such conduct.¹⁷² The commentary to Section 310 expands on this point.

SECTION 314 – COMMERCIAL BRIBERY AND BREACH OF DUTY TO ACT DISINTERESTEDLY

Corresponding Current Provision(s): None

Comment:

¹⁷¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 392 (Nuh Ha Mim Keller trans., Amana Publications 1994).

¹⁷² AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 667 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Generally. This offense criminalizes bribes designed to induce breaches of professional duties owed by persons in positions of trust. Section 314(a) applies to bribes accepted or sought by persons owing a duty of fidelity to others. This includes, but is not limited to, agents, fiduciaries, and professional advisors. Section 314(b) criminalizes paying, conferring or offering bribes prohibited by Section 314(a). Section 314(c) applies to bribes accepted or sought by individuals who pretend to the public to be disinterested in recommending, valuing, or reviewing commodities or services.

The language of this draft Section is written explicitly to limit the offense to truly blameworthy conduct. Section 314(a) prescribes a culpability requirement of knowledge as to all of the objective elements of the offense. This requirement limits the scope of the offense by preventing an individual who should have known, but didn't, from assuming liability. The individual who isn't aware is not intended to fall within the scope of liability for this Section because he does not satisfy the requisite culpability to be considered blameworthy for the offense. It is the individual who knows of or intends to induce breaches of professional duties owed by persons in positions of special trust that Section 314 seeks to punish.

Section 314(a) requires that the defendant be subject to a duty of fidelity, but includes a list that encompasses a broad range of professional capacities. According to the list provided, commercial bribery covers agents, arbitrators, directors, employees, fiduciaries, partners, professional advisors, and officers. This list is intended to encompass a broad range of professionals, as all are capable of blameworthiness under this Section.

Section 314(b) criminalizes conferring, offering, or agreeing to confer a bribe prohibited by Section 314(a). This Section is similar in scope to 314(a), but applies to the individual on the other end of the bargain.

Section 314(c) addresses an individual who pretends to act disinterestedly in selecting, valuing, or reviewing something, but seeks or accepts a benefit to influence his selection, valuation or review. The section is explicitly limited to an individual who knowingly holds himself out to the public as one who makes "disinterested selection, appraisal or criticism," but who actually is knowingly acting based upon the receipt of a benefit. This sort of dishonesty is blameworthy because it undermines the public's confidence in honest advice, appraisal and criticism. Examples of this type of deception are false restaurant recommendations and misleading appraisals of personal property.

Section 314(d) grades this offense as a Class D felony.

Relation to current Maldivian law. This Section finds support in the Consumer Protection Act, § 2, which provides that no consumer shall be discriminated against in the course of selling goods or services. Commercial bribery and the breach of one's duty to act disinterestedly result in discrimination against consumers because consumers who do not pay bribes are disadvantaged relative to consumers who do pay bribes or arrange for a party to act disinterestedly. As such, this section comports with current Maldivian law.

Islamic law lends further support to this section. Ibn Hajar Haytami lists "taking a bribe for falsehood; or being an intermediary between the persons giving and accepting it" as an offense. In addition, he mentions the example of an official bribe by listing "a judge accepting a gift for having interceded for one of the litigants" as an offense.¹⁷³ El-Awa cites the following Qur'anic verse in support of the prohibition against bribery: "Consume not your property among

¹⁷³ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 988 (Nuh Ha Mim Keller trans., Amana Publications 1994).

yourselves in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other men's property intentionally.”¹⁷⁴

SECTION 315 – RIGGING PUBLICLY EXHIBITED CONTEST OR PUBLIC BID

Corresponding Current Provision(s): Maldives Penal Code, Provision 121(c).

Comment:

Generally. This Section criminalizes conduct that interferes with, and impairs confidence in, government bidding and contests. The purpose of this Section is to protect the integrity of governmental allocation of contracts and to encourage the conservation of public resources, but it applies with equal force to publicly exhibited contests or exhibitions. Contracts obtained by any means other than through independent non-collusive submission of bids or offers by individual contractors and suppliers are inherently deceptive and may lead to both higher costs and poorer quality of work in the execution of contracts.

Section 315(a)(1)'s culpability requirement is high; the defendant must act with the *purpose* of preventing a publicly exhibited contest or exhibition from being conducted in accordance with the rules and usages purporting to govern it. Section 315(a)(1)(A)-(C) detail the ways in which a defendant may go about corrupting a bid – through payment, threat, or interference.

Section 315(a)(2) requires that a defendant knowingly solicit or accept a benefit, and act with the purpose of bribing, threatening, tampering, or otherwise disrupting the legitimate nature of a publicly exhibited contest or exhibition.

A defendant is similarly liable under Section 315(a)(3) if he knows the conduct he is engaged in violates the laws governing a bid or contest. Requiring the State to prove knowledge promotes the legitimacy of the public bidding process by creating liability for individuals who may not have intended to commit the fraud, but become aware that by their conduct they are in fact committing this offense. It is in the interest of society to prevent such individuals from delegitimizing the public bidding process. At the same time, requiring proof of knowledge protects individuals who only recklessly disregard the corrupt implications of their actions.

Section 315(a)(4) explicitly criminalizes corruption in publicly exhibited contests, including sporting events. This Section is designed to discourage gambling fraud and to protect the integrity of legitimate public contests. The term “publicly exhibited contest” includes, but is not limited to, sporting events, art and beauty competitions, lotteries, raffles, and television gaming. Beyond addressing the threat of gambling fraud, this broad definition is necessary to prevent the deception of the public and maintain its confidence in the integrity and legitimacy of public contests. The Section has two parts, requiring that a defendant knowingly participate in a public contest (Section 315(a)(3)(A)) and that the defendant know of the fraudulent nature of the contest (Section 315(a)(4)(A)). By requiring knowledge as to both of these elements, this Subsection assures that an individual acts with sufficient culpability and does not merely happen to be an innocent participant in a fraudulent contest. At the same time, requiring proof of knowledge permits the conviction of those who assist others in deceiving the public by

¹⁷⁴ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 113 (American Trust Publications 2000)(citing Qur'an 2:188).

participating in a rigged contest, even though they may not satisfy the requirements of accomplice liability under draft Section 30.

Section 315(b)'s definition of "benefit" is broad and encompasses more than just money and material goods. Also included in this definition are advantages, such as preference in a contracting scheme, or the opportunity to purchase goods or services at a price lower than normal. Compensation may also be non-pecuniary. For example, a promise to arrange a marriage may be a "benefit," as the term is defined in this Section.

Section 315(c) grades arranging a rigged contest as a Class D felony and participating in a rigged contest as a Class E felony. The difference between the grading of these sets of offenses is derived from the further reaching implications of Subsections 315(a)(1)-(3). These Subsections involve the prevention of fair competition for corporations, and are judged as more heinous offenses. Unlike 315(a)(4), these offenses not only compromise legitimacy and integrity in the eyes of the public, but also have drastic economic implications that directly impacts individuals' livelihoods.

Relation to current Maldivian law. The precedent for this Section, in current Maldivian law, is found in Provision 121(c). This provision criminalizes voting more than once in an election or arranging such behavior. As explained in the commentary to Section 314, the principles contained in this Section are also analogous to those underlying the Consumer Protection Act. Rigging a contest or public bid results in discrimination against other consumers because consumers not benefiting from the rigging are treated unequally in comparison to those who do benefit. As such, the provision embodies the principles underlying the Consumer Protection Act.

Islamic law expressly prohibits bid-rigging (*najsh*).¹⁷⁵

SECTION 316 – DEFRAUDING SECURED CREDITORS

Corresponding Current Provision(s): None.

Comment:

Generally. This offense criminalizes dealing with property for the purpose of hindering a secured creditor's interest therein. The Section will often apply to debtors who fraudulently deal with collateral in their rightful possession. This Section differentiates from Chapters 210 and 220 in that it addresses security interests for those cases in which a requirement of theft or property damage is not satisfied, such as when the debtor does not appropriate or damage the collateral.

Section 316 is comprehensive in criminalizing any effort to defraud secured creditors. This Section covers any property that is subject to a secured interest, and criminalizes dealing with collateral for the purpose of hindering enforcement of a security interest. This Section facilitates broad liability for those who seek to impair security interests. This liability includes, but is not limited to, the transferal, destruction, removal, concealment or encumbrance of collateral.

Section 316(b) grades the offense as a Class 1 misdemeanor.

¹⁷⁵ IBN RUSHD, *THE DISTINGUISHED JURIST'S PRIMER II*, at 200-202 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Relation to current Maldivian law. There is support for this provision in the Consumer Protection Act, Provision 8, which prohibits the sale of goods by misrepresentation. In particular, Provision 8(g) prohibits the sale of goods by advertising that goods were available, when in fact they are not. This provision of the current law is somewhat analogous to defrauding a secured creditor, in that a debtor, who has bought credit from a secured creditor, would be advertising the presence of collateral when in fact it did not exist. While the provisions are not precisely parallel, sufficient similarities exist between the laws that the law simply extends the substance of the protection afforded purchasers to sellers as well.

In addition, there is a strong public policy argument for this Section in that a successful society has need for such a provision because it creates guarantees for lenders that allow the investment necessary for a stable and growing economy.

For Islamic legal support for this Section refer to Islamic legal principles cited in previous sections of this Chapter, specifically Sections 311, 313, and 314.

SECTION 317 – FRAUD IN INSOLVENCY

Corresponding Current Provision(s): None

Comment:

Generally. This offense criminalizes fraudulent conduct by one who knows that certain proceedings for the benefit of creditors, such as a liquidation proceeding or a proceeding seeking the appointment of a receiver, have been or are about to be instituted.

Section 317(a)(1) protects a creditors' interests by prohibiting a debtor's fraudulent conveyance of even unencumbered property, but requires that proceedings for the benefit of creditors be pending or imminent. By requiring the defendant's knowledge as to this objective element, this Section ensures that the defendant's conduct is sufficiently blameworthy to warrant criminal sanctions. Criminalizing the ordinarily legal act of alienating one's own unencumbered property simply because one engages in that act based on what is considered a bad motivation comes close to punishing mere thoughts.

The conduct prohibited by Section 317(a)(2) and 317(a)(3) is detrimental because it interferes with the prompt and fair administration of an insolvent estate. Section 317(a)(2), specifically, prohibits falsifying writings relating to property that one knows is, or is about to be, subject to insolvency proceedings. Section 317(a)(3), specifically, criminalizes misrepresenting or refusing to disclose information legally required to be given to a receiver.

The offense is graded in Section 317(b) as a class 1 misdemeanor. This classification is acceptable because of the fact that Section 317(a) has the exacting standard that knowledge that insolvency proceedings are pending or imminent.

Relation to current Maldivian law. This Section has no counterpart in current Maldivian law. However, this Section is necessary to affect Provisions 75 to 93 of the Maldivian Companies Act, which provides for the winding up of companies. These procedures could not be affected if people are able to interfere with the administration of an insolvent estate. As such, the principles underlying this Section are merely effective or protective of those contained in the Companies Act within the current law.

Furthermore, this Section is supported by Islamic law, wherein fraud by a debtor or other insolvent person is potentially punishable by imprisonment.¹⁷⁶

SECTION 318 – RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

Corresponding Current Provision(s): None

Comment:

Generally. This offense criminalizes receiving deposits and other investments in failing financial institutions. This offense is similar to Section 212, Theft by Deception, insofar as receiving a deposit with knowledge that insolvency is imminent will ordinarily amount to an implicit misrepresentation as to the institution’s ability to pay the depositor on demand. However, Section 318 differs from Section 212 in that it does not require proof that the offender obtained the property by such deception.

The word “investment” in Subsection a(1) should be construed broadly.

Section 318(a)(2) specifically requires that the defendant know that the institution is about to suspend operations or go into receivership or reorganization, rather than requiring mere knowledge of insolvency. Insolvency is a vague term that lacks a specific definition in Maldivian precedent, and 318(a)(2)’s specificity dispels any ambiguity in this regard.

Section 318(a)(3) requires that the defendant be reckless as to the possibility that the person making the payment is unaware of the serious financial difficulties of the institution. This language is included to prevent implicit misrepresentation as to the institution’s ability to meet its deposit obligation, and holds the institution liable in cases where it is reckless as to the possibility that a depositor is unaware of the institution’s “serious financial difficulties.” The phrase “serious financial difficulties” should not be construed to include every business downturn that a financial institution experiences; it should be limited to those difficulties that substantially threaten the survival of the institution in its present form.

Section 318(b) defines “Financial Institution” according to the definition given in Section 215(b)(1).

Section 318(c) grades this offense as a Class 1 misdemeanor.

Relation to current Maldivian law. As with Section 316, this provision substantively reflects the Maldivian Consumer Protection Act. In the case of Section 316, the seller of the services would be a banker providing depositary services. To take deposits when one knows that his ability to provide depositary services is impaired represents a practice prohibited under the Consumer Protection Act, Provision 8 of the current law.

For Islamic Legal support, reference the commentary to previous sections of this Chapter, specifically Sections 311, 313, and 314.

SECTION 319 – SELLING PARTICIPATION IN A PYRAMID SALES SCHEME

Corresponding Current Provision(s): None

¹⁷⁶ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER II, at 350 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994); *See also*, MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 407 (American Trust Publications 2000).

Comment:

Generally. This offense criminalizes selling the right to participate in a pyramid sales scheme. These schemes are criminalized because they are inherently deceptive. When the market inevitably becomes saturated, participants at the end of the chain lose their investment and are led to potential financial ruin.

The language of Section 319(a) explicitly prohibits only the knowing sale of a pyramid scheme, as the attempt or offer to sell are already covered by Section 80, Inchoate offenses.

Section 319(b) defines the term “Pyramid Sales Scheme.” The inducement of others to invest any value in an inevitably fruitless venture that solely benefits those in the planning stage of the venture upon the false pretense of success deserves recognition as a punishable offense.

For example, A sells to B the opportunity to sell item X, a portion of the profit for which will return to A. In addition, A encourages B to sell the same opportunity to C, with a portion of the profit from C returning to both A and B. This chain is encouraged ad infinitum, and those involved in the planning stage create wealth at the expense of those who become involved further down the chain. The individuals at the end of the chain (Z) are defrauded, investing in a market which has already been saturated. Z ends up subsidizing the continuation of a false enterprise, while A (the planner) realizes a great profit and assumes no risk or liability.

Section 319(b)(1) mentions “anything of value” which should be construed broadly to include the societal and cultural context of the Maldives.

Section 319(c) grades the offense as a Class 1 misdemeanor.

Relation to current Maldivian law. This Section has no counterpart in current Maldivian law. However, the sale of participation in a pyramid scheme normally involves “falsely stat[ing] or represent[ing] or express[ing] in a manner that could cause a mistaken belief, the benefits available under a warranty or guarantee of goods.” Such practices are prohibited under the Consumer Protection Act, Provision 8. As such, Section 319 simply codifies this principle with respect to pyramid schemes.

For Islamic Legal support, reference the commentary to previous sections of this Chapter, specifically Sections 311, 313, and 314.

SECTION 320 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 310 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 310’s defined terms and current Maldivian law, refer to the commentary for the section in which each term is initially defined.

OFFENSES AGAINST THE FAMILY

CHAPTER 410 – OFFENSES AGAINST THE FAMILY

This Chapter criminalizes certain conduct within the context of familial and other interpersonal relationships. The Chapter is intended to reflect society's need for social order and the necessity of penalizing conduct harmful to individuals and families. Section 410 penalizes unlawful marriages. Sections 411 and 412 penalize certain sexual conduct. Sections 413 and 415 penalize wrongful acts and omissions with respect to the actor's dependents. Section 414 penalizes manipulation of incompetent persons. Section 416 penalizes abortion.

Certain provisions of current Maldivian law have been deemed inappropriate for inclusion within the criminal code and are not reflected as Sections within this Chapter. In most instances, these provisions are simply beyond the scope of the draft criminal code and would more properly be categorized as civil law. In other instances, the drafters have purposely declined to include a provision from current Maldivian law because of its inherent conflict with other existing law. For example, the Family Law Act 2000 (No.: 4/2000) § 68 specifically prohibits the failure to volunteer information to the proper authorities regarding offenses under the Act. This provision is excluded because Maldivian law as a whole does not involve a general requirement of this type. Other provisions from current Maldivian law which have not been included in this draft Code are addressed by the Commentary under the relevant Sections.

SECTION 410 – UNLAWFUL MARRIAGE

Corresponding Current Provision(s): Family Law Act 2000 (No.: 4/2000) §65, §70.6, §70.7 and § 70.12.

Comment:

Generally. This Section penalizes certain forms of bigamy and polygamy. If an individual knows his or her marriage is unlawful, fornication between the two unlawfully married parties is illegal and subject to punishment under Section 411.

Subsection (a) requires a man to obtain the consent of his existing wife or wives before marrying again and limits the total number of wives to four. If the man is already married, this Section requires that he obtain the consent of his current wives or of a Maldivian court before marrying again. This Subsection also makes it criminal for a man to marry a sister of one or any of his current wives.

Subsection (b) criminalizes bigamy for women as well as the failure to abide by the post-marital waiting period, a concept defined in Subsection (d)(1) as four months and ten days following the death of or divorce from a woman's husband.

Subsection (c) criminalizes marriage to close relatives, a concept defined in Subsection (d)(2) as including parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, aunts, great-aunts, uncles, great-uncles, nephews, nieces, a person who was nursed by the same woman; or a person who by virtue of marriage has become a relation heretofore specified.

Subsection (e) grades the offenses in this Section as Class 1 misdemeanors.

Relation to current Maldivian law. This Section relies upon select provisions of the Family Law Act of 2000 to define criminal offenses related to the institution of marriage. The Family Law Act of 2000, however, is more expansive than the draft Code and prohibits a wide variety of marriage offenses including: marriage between a woman and a non-Muslim; marriage for the purpose of breaking the deadlock after three consecutive divorces from the same person; providing false information during the solemnization or registration of a marriage; divorcing without the court's approval; and many other offenses. The current offenses relating to marriage and divorce have been excluded from the criminal law because under the codification scheme employed these offenses properly fall under civil offenses and will be dealt with in the civil courts. However, they may not serve as the predicate for a prosecution under Section 411.

The current offenses relating to marriage and divorce are the following: Unlawful Intercourse: Maldives Penal Code, Provisions 88(33), Family Law Act 2000 (No.: 4/2000) § 62, § 64, § 66, §67, §70.3, §70.4, §70.8, §70.9, §70.10, §70.11, §70.13, §70.14, §70.15, §70.16, §70.17, §70.19, §70.20, §70.21, §70.22, §70.23, §70.24, §70.25, §70.26, §70.27, §70.28, §70.29, §70.30 and §70.31.

Subsection (a)(1) slightly revises current Maldivian law because it requires the previous wives' consent before a man may marry another spouse. Current Maldivian law (Family Law Act 2000 (No.: 4/2000) § 65) requires a man to gain permission from the court prior to marrying an additional spouse. The draft code reflects the principle embodied in current law which promotes greater transparency in the marital relationship. This principle is supported by Islamic legal principles that allow requiring the first wife's consent within the marriage contract.¹⁷⁷ This follows the practice of other Muslim countries, like Indonesia, which have provisions requiring written consent of the first wife.¹⁷⁸

Subsection (a)(2)'s limitation on the number of wives a man can have is agreed upon by all Islamic legal schools of thought, although the preference is for only one wife.¹⁷⁹ They cite the following Qur'anic verse (4:3) in support: "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one. This limitation is consistent with current law.

Subsection (b) has a stricter limitation on the number of spouses for women than for men, reflecting Family Law Act 2000 (No.: 4/2000) §70. Muslim jurists agree upon Subsection (b).¹⁸⁰ While Islamic law does not proscribe criminal punishments for these matters, the current Maldivian law does as explained above.

SECTION 411 – UNLAWFUL SEXUAL INTERCOURSE

Corresponding Current Provision(s): Maldives Penal Code Provision 88(27); Family Law Act 2000 (No.: 4/2000) § 69; Rules Relating to Conduct of Judicial Proceedings 100 and 173.

¹⁷⁷ Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in THE OXFORD HISTORY OF ISLAM (John Esposito ed., 2000).

¹⁷⁸ <http://www.law.emory.edu/IFL/legal/indonesia.htm>.

¹⁷⁹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 530 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("It is unlawful for a free man to marry more than four women. It is fitter to confine oneself to just one.")

¹⁸⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 516 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Comment:

Generally. This Section criminalizes sexual intercourse which is performed between persons who are not lawfully married where the intercourse is witnessed by four witnesses. The general rationale informing these laws is that such intercourse promotes social disorder. Subsections (a)(1) and (b)(1) employ the phrase “engages in” in order to incorporate the notion of free volition. In other words, a person who has sexual intercourse without knowledge or purpose lacks the requisite intent to commit the offense defined in Section 411.¹⁸¹ Thus, a married man who rapes an unmarried woman has himself committed a class E felony under this Section in addition to the offense of sexual assault under Section 131. The woman, however, would not be guilty of a class 1 misdemeanor under this Section because she has not “engaged” in sexual relations with the married man, but was rather forced to participate. Sexual intercourse has the meaning given in 130(c).

Subsections (a)(2) requires that the intercourse be witnessed by four persons because unless unlawful intercourse is known to members of the community outside the defendant’s family, it is unlikely to harm the social order. The four witnesses requirement may be satisfied by four persons testifying that they witnessed the sexual intercourse between the accused offenders.

Section 411(a) criminalizes intercourse between members of the opposite sex in the cases of adultery and sex outside of marriage. The grading scheme in Subsection (c) punishes married individuals more harshly than other actors and two unmarried actors least harshly of all because adultery is considered more detrimental to the social order than sex outside of marriage. In addition, a married person engaging in intercourse with a person not his spouse is graded more harshly than an unmarried person having intercourse with a person not his spouse because in the first case he is committing a double wrong –both engaging in intercourse outside of wedlock and breaking the bonds of matrimony. The unmarried person having intercourse outside of wedlock, however, is not violating the marital bond and, as a result, is less severely punished.

Section 411(b) criminalizes intercourse between members of the same sex. It should be noted that because the definition of “intercourse” requires “penetration,” Section 411(b) applies to all male-male intercourse and only to those scenarios where female-female intercourse involved “penetration” through the use of other objects.

Section 411(c) provides a grading scale for this offense. This Subsection grades oral intercourse lower than vaginal and anal intercourse. In addition, Subsection (c) provides that if the offense in Subsection (a) is proven with evidence other than the testimony of four witnesses, such as DNA evidence or evidence of pregnancy, the offense is one grade lower than it would otherwise be. For example, if it can be proven with DNA evidence that an unmarried man has fathered a child outside of marriage with an unmarried woman, he would be guilty of a Class 3 misdemeanor. If the same crime could be proven with four witnesses, the unmarried man would be guilty of a Class 2 misdemeanor.

In addition, Subsection (c)(5) authorizes an additional punishment of 100 lashes for the offense. Note that Section 411(d) provides a precise definition of “lashes” in order to ensure that enactment of the punishment does not violate accepted notions of decency. Note that Section 411(d) defines “lashes” as a means of symbolic punishment of striking an offender’s back with a

¹⁸¹ Muslim Jurists agree that where a man rapes a woman, the woman should not be punished. Ibn, Rushd, *The Distinguished Jurist’s Primer*, Vol. II, 530.

short length of rope in a manner not designed to cause bodily injury. The definition further provides that a single person must inflict all of the lashes prescribed as punishment, and he may only drive the rope using his wrists; he may not use any other part of his arm or movement in his shoulders, hips, back, legs or torso for that purpose. Section 411(d) also defines “oral intercourse” as direct contact between the mouth of one person and the genitals of another.

Relation to current Maldivian law. This Section reflects current Maldivian prohibitions on fornication, specifically Rules Relating to the Conduct of Judicial Proceedings, provisions 100 and 173. However, this Section strays from current Maldivian law in several ways, but in conformity with Islamic law.

This Section revises current Maldivian law 88(30) by introducing more stringent evidentiary requirements in order to reflect the notion that unlawful intercourse is harmful to social order only when it is publicly known. Support for Subsection (a)(2) and (b)(2) comes from evidentiary requirements for fornication under Islamic law.¹⁸² Muslim jurists have generally supported the view that information regarding this particular crime should not be made public.¹⁸³ They cite the following Prophetic tradition relating to fornication from Malik’s *Muwatta*: “If you had hidden this crime it would have been better for you.”¹⁸⁴

This Section departs from current law Provision 100 of the Rules Relating to the Conduct of Judicial Proceedings because it does not create a separate offense for a woman who bears an illegitimate child. Instead, the draft Code penalizes the act that created the child, rather than the child’s existence and avoids double punishment for the single act of intercourse. The existence of the child may be a means by which the “publicly known” requirement is satisfied. This change is supported by Islamic law which does not make reference to a separate punishment for bearing an illegitimate child.¹⁸⁵

This Section drops the distinctions between minor and major acts of sexual misconduct detailed in the Rules Relating to the Conduct of Judicial Proceedings. This change allows for a more streamlined offense definition. Support for this streamlined definition is based on Islamic tradition.¹⁸⁶

Finally, several provisions of current Maldivian law that may have previously been categorized as offenses against the family are codified under other Chapters of the draft Code. First, the offense of false allegations of illegitimate sexual intercourse found in the Rules Relating to the Conduct of Judicial Proceedings Provision 257 is criminalized in this draft Code in Section 612 (False Accusation of Unlawful Sexual Intercourse). Second, the behavior prohibited by the Rules Relating to the Conduct of Judicial Proceedings, Provision 173, governing sexual misconduct in public places, may now be prosecuted under this Section as well as Section 133 (Indecent Exposure). This departure from Maldivian current law allows for greater efficiency in categorizing types of harm.

¹⁸² AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 574-75 (Nuh Ha Mim Keller trans., Amana Publications 1994)(“Requires four witnesses.”).

¹⁸³ JAVED AHMAD GHAMIDI, *MIZAN* (“Balance”) 300 (Dar ul-Ishraq, 2001).

¹⁸⁴ JAVED AHMAD GHAMIDI, *MIZAN* (“Balance”) 300 (Dar ul-Ishraq, 2001)(Citing Prophetic traditions suggesting offenders conceal this crime because if it becomes known then it must be punished.).

¹⁸⁵ IBN RUSHD, *THE DISTINGUISHED JURIST’S PRIMER II*, at 530 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

¹⁸⁶ See al-Gazzali’s *al-Wajiz*, an authoritative handbook of Shafi’i law, which straightforwardly proscribes inserting genitals into genitals.

Islamic law, which restricts lawful sexual intercourse to a husband and wife, supports Subsection (a)(1).¹⁸⁷ Islamic law has defined sexual intercourse as the insertion of the penis into the vagina.¹⁸⁸ The following verse of the Qur'an (17:32) is cited in support of this: "Approach not fornication, it is surely an indecency and evil."

Subsection (b)(1) is supported by Muslim jurists who proscribe sodomy based on Qur'anic injunctions and Prophetic tradition.¹⁸⁹ Support for the prohibition of lesbianism exists within Islamic law based on particular Prophetic traditions.¹⁹⁰

The punishments in Subsection (c) accommodate current Maldivian law, Islamic law, and the grading scheme of the draft Code. Some of the prison terms for this Section have been decreased for comparative grading purposes with other parts of the Code. While the punishment of lashes has been removed from the grading scheme of this draft Code, lashes are specifically authorized for this offense.

Grading in Subsections (c)(1)(A)-(C) are consistent with current Maldivian law.

Subsection (c)(2) has been revised and is graded higher than current Maldivian law, which appears to follow the Hanafi school of thought. This change has been made based on recommendations from Maldivian officials that a punishment closer to the Shafi'i school be incorporated.¹⁹¹

SECTION 412 – UNLAWFUL SEXUAL CONTACT

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, provisions 100 and 173.

Comment:

Generally. This Section criminalizes sexual contact that is performed between persons who are not lawfully married and that is publicly known prior to arrest. The general rationale informing these laws is that such contact promotes social disorder. Subsections (a)(1) and (b)(1) employ the phrase "engages in" in order to incorporate the notion of free volition. In other words, a person who has sexual contact without knowledge or purpose lacks the requisite intent to commit the offense defined in Section 411.

Subsection (a) makes it a crime for a person to engage in sexual contact with a person of the opposite sex other than with a person to whom he is married, and, additionally, the sexual contact is or becomes publicly known prior to his arrest. The phrase "prior to arrest" is meant to ensure that an allegation of unlawful sexual relations which would not have otherwise been publicly known but for the prosecution of the offense is insufficient to satisfy this element of the crime.

¹⁸⁷ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 660 (Nuh Ha Mim Keller trans., Amana Publications 1994).

¹⁸⁸ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 638 (Nuh Ha Mim Keller trans., Amana Publications 1994).

¹⁸⁹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 664-665 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("There is consensus among Muslims...that sodomy is an enormity.").

¹⁹⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 665 (Nuh Ha Mim Keller trans., Amana Publications 1994) (Relating the Prophetic tradition: "Lesbianism by women is adultery between them.").

¹⁹¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 664-665 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Subsection (b) makes it a crime for a person to engage in sexual contact with a person of the same sex.

Subsection (c) creates a rebuttable presumption that if a person is alone with another in an enclosed space behind closed doors, the trier of fact shall presume, subject to rebuttal, that he is engaging in sexual contact with the other.

The grading scheme in Subsection (d) punishes married individuals more harshly than other actors and two unmarried actors least harshly of all because unlawful sexual contact between married persons is considered more detrimental to the social order than sexual contact outside of marriage. In addition, a married person engaging in sexual contact with a person not his spouse is graded more harshly than an unmarried person engaging in sexual contact with a person not his spouse because in the first case he is committing a double wrong –both engaging in sexual contact outside of wedlock and breaking the bonds of matrimony. The unmarried person engaging in sexual contact outside of wedlock however is not violating the marital bond and, as a result, is punished less severely. Subsection (d) also punishes male homosexuality the same as female homosexuality.

Relation to current Maldivian law. This Section reflects current Maldivian prohibitions on fornication, specifically Rules Relating to the Conduct of Judicial Proceedings, provisions 100 and 173. The grading scheme entailed in this Section parallels the grading scheme of the above rules, which punish homosexuality less severely than fornication.

For Islamic legal support for this Section, refer to the commentary for Section 411.

SECTION 413 – INCEST

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings 173(6) and 173 (9); Law No. 9/91 – Law on the Protection of the Rights of Children § 25.

Comment:

Generally. This Section prohibits sexual intercourse and sexual contact between close relatives. “Close relative” is defined in Section 410(d)(2). Note that such contact may also fall under Section 131, Sexual Assault, in which case the prosecutor shall proceed under the more appropriate Section. An actor should not be prosecuted under both sections for a single underlying act. Subsection 1 defines the offense in terms of the willingness of the parties. When a party is unwilling or unable to consent, a prosecutor shall use Section 131, Sexual Assault.

Subsection (b) punishes parents and grandparents more harshly than actors bearing other relations to the person with whom they engage in sexual contact. The reason for this distinction is that parents and grandparents have a special duty to their children and grandchildren, so the violation of this relationship is especially damaging to the victim and society.

Note that sexual intercourse and sexual contact have the meanings given in Chapter 130 (Sexual Assault Offenses) and that these definitions include activity both between people of the same sex and between people of the opposite sex. Sexual intercourse is defined in Section 131(c). Sexual contact is defined in Section 132(b).

Subsection (c) introduces a sentencing factor to cover cases where a person who holds a position of special importance within a family abuses that position to commit the offense of Incest. Under Subsection (c), that person’s baseline sentence is aggravated one level so long as

he is not one of the persons mentioned in Subsection (b)(1) – i.e., either a parent, grandparent, or great-grandparent of the close relative.

Relation to current Maldivian law. Current law prohibits sexual contact between parents and children and between persons with whom marriage is proscribed.

Under the Rules Relating to the Conduct of Judicial Proceedings Provisions 173(6) and 173(9), when a parent engages in sexual misconduct with a child, punishment differs slightly depending on whether or not the child has reached puberty. Under the draft Code, Section 131 (Sexual Assault) and this Section work together to grade an actor more harshly when he engages in sexual misconduct with one who has not reached puberty.

Islamic law supports this Section by proscribing marriage to particular kin. Since sexual intercourse is only permitted between married spouses, any sexual intercourse with unmarriageable kin is an offense.¹⁹² It should be noted that this Section considers incest to be between the respective unmarriageable kin through step-relationships as well. This prohibition is consistent with Islamic law.¹⁹³

SECTION 414 – CHILD ABANDONMENT AND PARENTAL DUTY OF CARE

Corresponding Current Provision(s): Law No. 9/91 – Law on the Protection of the Rights of Children §21 and §25.

Comment:

Generally. This Section criminalizes the endangerment of children caused by abandonment and neglect. The offense reflects the duty parents owe to their children.

Subsection (a) defines the offense in terms of a rule and a standard. Subsection (a)(1) makes it an offense for a parent or guardian to abandon a child in circumstances that would unreasonably endanger the child's wellbeing. The rule in this Subsection restricts use of this Section to cases in which the child is under the age of 14 and has been abandoned for at least a day. The standard requires that the prosecution show the child was unreasonably endangered. Both the rule and the standard must be satisfied.

Subsection (a)(2) expands parental duty to include preventative measures and makes it a crime for a parent or guardian to fail to take reasonable measures to prevent the commission of an offense defined in Chapters 110, 120, or 130 against his or her child if he or she knows such an offense is likely to occur. The standard in this Subsection also requires that the prosecution show that the parent or guardian should have taken reasonable measures to prevent the commission of the offense and that the parent or guardian knew that such an offense was likely to occur. Whether a parent or guardian took "reasonable measures" should be ascertained by asking what a reasonable person in the parent, step-parent or guardian's position would do to prevent assault of their child or child in their legal custody. This decision should take into consideration the societal and cultural context as to what action would have been reasonable.

¹⁹² AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 527 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("It is unlawful to marry one's ancestors, descendants, parent's descendants, or first generation of one's grandparent's offspring.").

¹⁹³ YUSUF AL-QARADAWI, *AL-HALAL WAL-HARAM FI'L ISLAM* ("The Lawful and Prohibited in Islam") (American Trust Publications) ((See section on "In-Law Relationships"); see also; Javed Ahmed Ghamidi, *Law of Society*, ISHRAQ, January 2003, at 15-16.

Subsection (a)(3) imposes liability if a parent fails to register his child at the time of birth.

For example, suppose that a father sexually assaults one of his children, that the mother is aware of the assault, and that the mother is an ordinary adult. To avoid liability under Subsection (a), the mother must report the father's offense to law enforcement authorities as soon as practicable, or she must attempt by affirmative action to prevent commission of the offense. However, before assessing liability, this Section requires examining the defendant's particular circumstances, including societal and cultural context, to see what action was reasonable. The mother may avoid liability if: (a) she reasonably believes that the father has not committed an act constituting an offense, or (b) her condition is such that she is unable to oppose the father directly or indirectly by contacting law enforcement authorities. Note that absent the conditions in (b), fear of the reaction of the father, whether violent or not, does not justify a complete failure to act. However, such fear should bear on whether any affirmative measure taken by the mother is deemed reasonable. In cases where the mother asserts the (b) defense, the fact finder should give considerable weight to the testimony of a qualified mental-health professional.

Subsection (b) lists some factors which shall be considered in order to determine whether the actor violated the standard under Subsection (a). Subsection (b)(1) accounts for the fact that certain children under the age of 14, because of their maturity, may not be unreasonably endangered by twenty-four hours of abandonment. Subsections (b)(2) and (3) recognize that economic hardship and other circumstances may prevent well-meaning parents from fulfilling their obligations. The presence of this list does not prevent the fact-finder from considering other factors relevant to whether the child was abandoned under circumstances that unreasonably endanger the child's physical health, safety, or welfare.

Subsection (c) grades the offense as a Class 1 misdemeanor.

Relation to current Maldivian law. Current law prohibits parents who are in disagreement or conflict from acting "in a manner detrimental to the health, education or conduct of the child." (Law No. 9/91 – Law on the Protection of the Rights of Children § 21). Current law also prohibits persons from acting in a way "that is detrimental to the integrity of children" or that exploits or oppresses a child. (Law No. 9/91 – Law on the Protection of the Rights of Children § 25). This Section and Section 414 expand the current law, but abide by the same principles as the current law. Support for this additional construction comes generally from Islamic law which prohibits "neglecting one's dependents."¹⁹⁴

SECTION 415 – NON-SUPPORT

Corresponding Current Provision(s): Family Law Act 2000 (No.: 4/2000) §70.58; Law No. 9/91 – Law on the Protection of the Rights of Children § 21; Rules Relating to the Conduct of Judicial Proceedings, Provision 227.

Comment:

Generally. This Section criminalizes non-support of persons who are considered unable to fend for themselves and to whom one owes an affirmative duty.

¹⁹⁴ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 983 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Subsection (a) limits application of this Section to non-support of minor children, parents over the age of 50, and incapacitated parents and spouses. The non-incapacitated spouse is left off the list of persons to whom one owes support because such a spouse is not considered unable to fend for himself. Non-support of a non-incapacitated spouse would be a civil violation. Subsection (b) provides a definition for incapacitation. Subsection (c) grades the offense as a Class E felony.

Relation to current Maldivian law. Current law requires that men support their parents if they are able, but it does not make this obligation contingent upon their parents' age. Islamic law and Maldivian norms, respectively, support limiting and expanding this legal obligation in the draft Code. Islamic law supports imposing this obligation of parental support on women as well as men, because it states generally that people should support their parents.¹⁹⁵ Maldivian norms, however, suggest that this obligation should be limited to children whose parents are more than 50 years old, because in most families, parents under that age are able to support themselves, while their children are not yet able to support themselves or anyone else.

Current law also prohibits parents who are in disagreement or conflict from acting "in a manner detrimental to the health, education or conduct of the child." (Law No. 9/91 – Law on the Protection of the Rights of Children § 21). This Section and Section 413 expand the current law by providing explanatory details for what constitutes an offence under this Section.

Under Family Law Act 2000 (No.: 4/2000) § 70.34, after a divorce a husband must pay maintenance and also make the arrangements and bear the costs for enabling his wife to reach her place of birth or permanent residence. These costs shall be addressed by the civil law under the draft Code. This reflects the separation of civil and criminal law underlying the codification process.

Subsection (a)(1)(C) is supported by the principle behind Family Law Act 2000 (No.: 4/2000) § 70.38, where a husband cannot eject a wife from their common household against the wife's will during the period of her *iddah*, or if she has been granted custody of their child(ren), until the husband finds the wife another suitable place to live.

There is general support for this Section in Islamic law which makes it obligatory to support one's parents and children.¹⁹⁶

Subsection (b)'s exception is also found in Islamic law under the title "incapacity." Islamic law makes an additional exception for "poverty" which also relates to central premise of Subsection (b).¹⁹⁷

SECTION 416 – ABORTION

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(9); Criminal Court Circular 4/SP/2003.

Comment:

¹⁹⁵ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 547 (Nuh Ha Mim Keller trans., Amana Publications 1994).

¹⁹⁶ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 547 (Nuh Ha Mim Keller trans., Amana Publications 1994).

¹⁹⁷ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 548 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Generally. This Section criminalizes abortion after the first 120 days of the fetus's development, subject to certain exceptions. By only criminalizing actions taken after the first 120 days of pregnancy, this Section reflects the distinction, traditional in Islamic law, that after a certain point the fetus acquires a soul.

Subsection (a) criminalizes performing an abortion on oneself or another party or having another person perform an abortion on oneself. Subsection (a)(1) makes it an offense for a person to perform an abortion on another person. Subsection (a)(2) provides liability for the woman upon whom the abortion is performed if she requests that another person terminate her pregnancy, or if she takes measures to terminate her own pregnancy. Note that she must take these measures with the purpose of terminating her pregnancy; however, it is not necessary that she actually accomplish terminating her pregnancy as long as she uses instruments, drugs, or violence upon herself for that purpose. Additionally, a person who assists another person in the performance of an abortion is liable as an accomplice under Section 30 (Accountability for the Conduct of Another).

Subsection (b) provides an exception for cases in which the pregnancy endangers the mother's life. This reflects the general principle that one must balance the mother's right to life with that of the fetus.

Subsection (c) creates an exception for pregnancy resulting from both sexual assault and incest in order to allow victims of sexual assault to choose not to keep the child of their attacker and in order to prevent birth defects and other congenital disorders that may result from incestuous relationships.

Subsection (d) grades the offense as a Class 1 misdemeanor.

Relation to current Maldivian law. Current law makes a distinction in grading dependent upon whether the fetus has or has not reached the fourth month of its development, on the theory that before the fourth month the fetus has not acquired a soul. Criminal Court Circular 4/SP/2003. The draft Code reflects this distinction in current Maldivian law.

There is general support for this Section in Islamic law. Many Muslim scholars permit aborting the fetus prior to 4 months because the "breath of life" has not been blown into the fetus until that stage.¹⁹⁸

SECTION 417 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 410 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 130's defined terms and current Maldivian Law, refer to the commentary for the Section in which each term is initially defined.

¹⁹⁸ YUSUF AL-QARADAWI, AL-HALAL WAL-HARAM FI'L ISLAM ("The Lawful and Prohibited in Islam") (American Trust Publications).

OFFENSES AGAINST PUBLIC ADMINISTRATION

CHAPTER 510 – BRIBERY AND OFFICIAL MISCONDUCT OFFENSES

Chapter 510 is intended to address crimes against public administration, which are generally considered to cover corrupt practices by and towards the government and public officials. Corruption can occur in two ways. First, corruption occurs when a public official benefits from his position in a way not foreseen by law – in essence, a dishonest way of making money. Second, corruption occurs when a person attempts to “proffer” their wealth to a public official in an attempt to induce them to act illegally or for the benefit of the profferor.

Islamic law generally prohibits bribery in the administrative context. Muslim jurists cite the following verse of the Qur’an (2:188) as a prohibition against dishonest ways of making money: “Consume not your property among yourselves in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other men’s property intentionally.”¹⁹⁹ Ibn Hajar Haytami lists “taking a bribe for falsehood; or being an intermediary between the persons giving and accepting it” as an offense.²⁰⁰ He considers bribery in the judiciary an extremely serious matter.²⁰¹ Other kinds of bribery are cognizable under the executive’s *mazalim* jurisdiction, which covers cases where governors or public officials have violated a citizens rights.²⁰²

The draft Code merges all bribery offenses into one statute for the purpose of efficiency and ease of reference. Prohibitions against corruption eliminate a wide range of harms including undermining of government legitimacy and disruption of the political process.

SECTION 510 – BRIBERY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 77, 80, 81 and 120; Maldives Monetary Act Sec. 10.

Comment:

Generally. The purpose of Section 510 is to criminalize bribery and other corrupt transactions by which a public official or candidate for public office is offered, solicits, or accepts a benefit in exchange for the performance of his function. See Section 315(b) for the definition of “benefit.”

Section 510(a) addresses the receipt of a bribe by a public official or candidate for public office. Prohibited acts include soliciting, accepting, or agreeing to accept a bribe. A bribe is defined as an exchange or draft exchange with two components: (1) the soliciting, accepting, or agreement to accept a benefit not lawfully authorized, and (2) the public official influencing or agreeing to influence the use of official authority, or the exchange of a benefit for the use or

¹⁹⁹ Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study* 113 (American Trust Publications 2000).

²⁰⁰ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 988 (Nuh Ha Mim Keller trans., Amana Publications 1994).

²⁰¹ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 630 (Nuh Ha Mim Keller trans., Amana Publications 1994) (specifically, a judge accepting a “gift” for “interceding” on behalf of a litigant.).

²⁰² AL-MAWARDI, *THE ORDINANCES OF GOVERNMENT* 90 (Wafaa H Wahba trans., Garnet Publishing 2000) (Establishes a high court of appeal that reviews cases where there is official violation of citizen rights.).

omission of use of official authority. Because the prohibited act is soliciting, accepting, or agreeing to accept a bribe, it is no defense to Section 510 that the transaction is not consummated. That is, the failure of a public official to obtain a benefit, the failure of a private citizen to agree to offer the benefit, or the failure of the public official to influence, use, or omit to use official authority does not relieve the public official of criminal liability. The mere solicitation, acceptance, or agreement to accept a benefit for a public official or candidate's influence, use, or omission of official authority is sufficient.

The minimum culpability requirement for these acts is knowledge, and the culpability requirement applies to all elements. This means that a public official or candidate for public office who innocently accepts a present which the giver believes to be a bribe would not be guilty of corruption.

Under the offense definition, a public official or candidate for public office must solicit, accept, or agree to accept a benefit not lawfully authorized. The inclusion of “not lawfully authorized” is intended to except services for which there is an authorized fee. For example, if the lawful cost of a permit is 50 Rufiyaa, a public official or candidate cannot be prosecuted under Section 510 for accepting the 50 Rufiyaa in exchange for issuing the permit. “Benefit” is expansively defined, as will be discussed below in the commentary on Subsection (c). The benefit may be accepted by the public official or candidate directly, or may be accepted by the public official or candidate on behalf of another person. The latter provision is intended to criminalize transactions by which a bribe is given not to the public official or candidate, but to a public official or candidate's family member or friend. It is also possible that a defendant would agree to a bribe for an employer or someone who is using him as an intermediary in an organized crime scheme. In such a case, the duress defense found in Section 55 of this draft Code should be available if the defendant can prove the existence of a serious threat.

The inclusion of “influencing or agreeing to influence” the use or omission of official authority is intended to cover transactions in which a public official (or candidate) uses his position (or future position) to influence a decision.

Example 1: D accepts \$10 from E in exchange for testifying at a trial that he did not see E commit a crime. D has accepted a benefit not lawfully authorized in exchange for agreeing to influence a judge's use of official authority. As such, D would be guilty of accepting a bribe under Section 510(a).

The inclusion of “using or omitting to use” official authority is intended to cover transactions where the public official (or candidate) uses his position (or future position) to make a decision.

Example 2: J, a judge, agrees to accept a gift of fruit from D, a defendant charged with a crime being tried by J, in exchange for J deciding that D is not guilty. J is guilty under Section 510 because he has accepted a bribe not lawfully authorized in exchange for using his official authority to find D not guilty.

Section 510(b) criminalizes offering or giving a bribe. Unlike Section 510(a), all persons, rather than just public officials or candidates, are eligible for prosecution under Section 510(b). Additionally, as with Section 510(a), there is no requirement that the transaction be

consummated. Instead, the only requirement is that a person offer or give a bribe to a public official or candidate for public office.

Example 3: K offers L, a police officer \$50 to overlook his traffic violation and not issue a citation. L refuses to accept the \$50 and issues the citation nevertheless. K has offered a person a benefit in exchange for the omission of official authority. As such, K is guilty of offering a bribe under Section 510(b).

The definition of transactions that qualify as bribes is the same as in Section 510(a), except that the receiving party need not be a public official or candidate. This difference reflects the possibility that the person receiving the bribe may not be a public official or candidate, but rather may be a friend or relative of the public official purporting to influence the use or omission of official authority. It also ensures that all persons attempting to offer bribes are eligible for prosecution, even if the intended recipient of the bribe could not be prosecuted under Section 510(a).

Section 510(c) defines “official authority” as “the performance or non-performance by a public official of a public duty or the use or non-use of state power by a public official to grant or deny a benefit to a person.” The performance of a public duty might include acts like arresting a person who has committed a crime or approving an application for a professional license if the requisite conditions are met. The non-performance of a public duty might include acts such as failing to arrest a person who has committed a crime or denying an application for a professional license. The use and non-use of state power to grant or deny a benefit encompasses situations where it is within the lawful discretion of a public official to make decisions regarding a benefit. For example, a public official who is conducting a bidding process for a public works project might use his power to deny the bid of a construction firm who would have otherwise won or approve the bid of a construction firm who would not have otherwise won. The use of one’s power and office to engage in actions that are illegal or not within the discretion of the public official—is addressed in Section 512 (Official Misconduct).

The offense, as defined in Sections 510(a) and 510(b), applies to bribes accepted or offered to candidates for public office as well as those already holding office as public officials. Public official is defined as “any person in the service or pay of the State or who exercises Official Authority acting in their official capacity.” This would include all employees of the State, as well as private employees under contract to the State to perform State functions. This definition also includes elected officials as well as persons who are delegated official authority but who are not compensated. Any person who has temporarily been delegated official authority would also be covered by this provision. Lastly, the person must have been acting in his official capacity to be considered a public official. Thus, a public official who accepts a bribe or engages in illegal activity outside of his public office does not fall within this definition. This reflects a general understanding that public officials who commit crimes that do not involve the use of their power as a public official should not be punished more severely than any other person.

Subsection (d) establishes a rebuttable presumption that any gift valued at more than 10,000 Rufiyaa given to a public official by certain persons with business under the influence of that official, shall be considered a crime under this Section. The reasoning behind this Subsection is that in the majority of circumstances, a person would have no legitimate grounds to give such a large sum to a public official.

Subsection (e) assigns the same grade for offering and accepting a bribe. The relative severity of punishment (a Class C felony) reflects the principle that the harm caused by corruption extends beyond the parties immediately involved to the polity as a whole. The existence of corruption leads to a general lack of faith and confidence in the government.

Relation to current Maldivian law. Section 510 encompasses a greater range of behavior than that envisioned in Maldives Penal Code Provisions 77, 80, and 81, which only criminalize bribery in the context of criminal prosecutions. Rather, Section 510 encompasses all forms of bribery to all public officials, including those foreseen in the Maldives Monetary Act, Sec. 10. The justification for the more expansive criminalization is that the underlying harm created in the bribing of a public official to aid an offender can also be found in bribing a public official to do a wide variety of things within his office. For example, bribing a public official to release an offender will lead to that public official deciding the fate of the offender in an unjust manner – the public official will decide the case on the basis of the bribe, rather than the merits of the case. Likewise, bribing a public official to grant a building permit will lead to the public official deciding to grant the permit on the basis of the bribe, rather than whether the building is authorized or is of safe and sound structure.

Section 510 also omits certain behavior criminalized by Maldives Penal Code Provision 77, 80 and 81, which cover bribery resulting in illegal acts and acts within the lawful discretion of a public official. Section 510 only criminalizes the latter. Bribery resulting in illegal actions by a public official in their official capacity is criminalized in Section 512.

Section 510 does not directly address the issue of vote-buying that is prohibited in Maldives Penal Code Provision 120 because voters are not public officials as defined by this Section. Rather, Section 540 of this draft Code addresses the issue of vote-buying by criminalizing conduct that harmfully interferes with a witness, voter or other person performing a public duty.

Islamic legal support for this Section is discussed in the introduction to this Chapter.

SECTION 511 – INFLUENCING OFFICIAL CONDUCT

Corresponding Current Provision(s): None

Comment:

Generally. Section 511 criminalizes those who attempt to influence the use of official authority by public officials (or those who will become public officials) by committing or threatening to commit an offense. This provision is similar in many respects to Section 510(b) except that it reflects a nonconsensual transaction rather than a consensual exchange of benefits. A person may be convicted under Section 511 as well as other threat and assault provisions in Chapter 120, as the harm to be prevented by Section 511 is the injury to public institutions, rather than the recipient of the threat.

Subsection (a) prohibits the act of committing or threatening to commit an offense with the purpose of influencing the exercise of official authority by a public official. The offense also applies to offenses or threats made when they are intended to influence the future exercise of authority by a candidate for public office. Nevertheless, the prohibition is not intended to extend to acts resulting in electoral harm. For example, a person who threatens to withhold his or her vote for a public official with the intent of influencing that public official's actions would not be

prosecutable under Section 511. Nor would a person be liable if he threatened to withhold campaign contributions with the purpose of influencing a candidate's future actions as a public official (if he wins the election). Moreover, the offense may be committed or threatened against any person – for example, threats to the family of a public official would fall within 511, as long as they were intended to influence the exercise of authority by a person who is or will become a public official.

In keeping with the definition of “official authority” in Section 510, the use of official authority includes the omission of an act. Thus, a person who threatens a person with violent injury so as to influence a public official not to take action also falls within the definition in subsection (a). Lastly, the intent to influence the use of official authority need not be made explicit. A person may be convicted under Section 511 so long as there is some direct or circumstantial evidence of his subjective purpose to influence the use of official authority.

Subsection (b) provides that the offense is a Class D felony. As with Section 510, the relative severity of punishment for this offense reflects the far ranging harms that result from improperly influencing a public official.

Relation to current Maldivian law. Current Maldivian law does not punish the specific action of making a threat to influence the use of official authority. However, the harm to be prevented is the same as that of bribery, which is currently criminalized in Provisions 77, 80, and 81 of the Maldives Penal Code, as well as Section 10 and 11 of the Maldives Monetary Act.

Coercion is considered a serious matter in both civil and criminal contexts under Islamic law.²⁰³ Islamic legal support for this Section is found in the commentaries to Sections 122, 141, 213, and 221 of the draft Code.

SECTION 512 – OFFICIAL MISCONDUCT

Corresponding Current Provision(s): Maldives Penal Code, Provision 77, 80 and 81

Comment:

Generally. Section 512 criminalizes behavior by public officials acting in their official capacities that is illegal. Generally, Section 512 is not intended to address the harm caused by the illegal behavior, but rather, the harm that results to public administration and government operations from the use of official authority and resources to affect the illegal act. For example, a police officer who, while on duty, assaults a citizen without justification should be charged with official misconduct in addition to assault because of the fear that the assault will create in the public at large. However, a town clerk who, in his free time, robs a store is not acting under the auspices of town power and thus should not be prosecuted under Section 512. To determine whether a public official has acted in his official capacity, factors to consider include whether the action was within the scope of employment, whether the action occurred during working hours, and whether the action took place at or near the location of employment. It is possible that when dealing with higher government officials, it would be sufficient to limit the inquiry to whether the transaction was within the scope of the defendant's employment.

²⁰³ Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 191 (M. Cherif Bassiouni, ed. 1982); *See also* AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 763 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“to...coerce him to do something he is averse to...is unlawful.”).

Subsection (a) provides for two prohibited acts. Subsection (a)(1) punishes a public official who fails to perform a mandatory duty as required by law. In order to be convicted under Subsection (a)(1), the duty must be truly mandatory, that is, the public official must have no discretion as to whether or not to perform it. Thus, a judge could not be found guilty of official misconduct for failing to convict a person, because the judge is granted the discretion to determine guilt or innocence. However, in the case of an official who distributes driving permits and knowingly declines to distribute a permit to a person who has met all the requisite conditions, there is no discretion to not grant the permit, and as such, the official would be guilty of official misconduct. Note that in the prior case of an official who has discretion, if the discretion is exercised as the result of a bribe, the official would be prosecutable under Section 510(a). As noted before, Section 512(a)(1) can only be used to prosecute a public official acting in his official capacity. Thus, if a person seeking a driving permit appeared at a public official's house outside of business hours and requested that he grant a driving permit, the public official would not be criminally liable if he refused to grant the permit until the next business day.

Subsection (a)(2) punishes a public official who, acting in his official capacity, performs an act that is not lawfully authorized. This provision covers acts that either are not lawfully authorized as part of the public official's duties –for example, a fisheries official who grants permits without permission –or are made explicitly illegal in this criminal code – for example, an official in the Ministry of Culture who illegally detains a person. The public official must know that the act is not lawfully authorized. Thus, a public official who is mistaken as to his power and issues permits when he is not authorized to do so could not be prosecuted under this act. However, public officials are treated as other citizens with regards to illegal acts, and their knowledge as to the illegality, unless noted otherwise, is not an element of the crime. In such cases where a public official commits an illegal act in his official capacity, the culpability requirement of knowledge only extends as far as requiring that the official know that they are committing the act. As noted before, Section 512(a)(2) is limited to officials who act in their official capacity. Thus, a Ministry of the Environment official who is found guilty of an illegal marriage cannot be prosecuted under 512(a)(2), as his illegal marriage is not related to his official duties.

Subsection (b) grades the offense as a Class 1 misdemeanor.

Subsection (c) adds a sentencing factor that aggravates the defendant's baseline sentence one level if he commits the offense in exchange for a benefit to himself or to a close relative or friend. This sentencing factor recognizes that a public official's misconduct is more serious when it benefits the official himself or one of his relatives or friends. In such cases, the official's misconduct also probably subjects him to liability for Bribery under Section 510(a).

Relation to current Maldivian law. Current Maldivian law criminalizes similar behavior in Sections 77, 80, and 81 of the Maldives Penal Code. These provisions of the Maldives Penal Code however, only address official misconduct within the context of criminal prosecutions. There is a strong public policy argument for extending this to officials outside of the sphere of criminal prosecution, as official misconduct by other public officials creates the same types of harm. Officials who engage in misconduct are likely to harm the legitimacy of the government, the confidence that citizens have in the political process. In addition, official misconduct is likely to impede the effectiveness of government operations.

Furthermore, there is general support in Islamic law for criminalizing the performance of illegal acts by public officials, particularly in relation to the official conduct of the judiciary.²⁰⁴

SECTION 513 – MISUSE OF GOVERNMENT INFORMATION OR AUTHORITY TO OBTAIN A BENEFIT

Corresponding Current Provision(s): None

Comment:

Generally. Section 513 criminalizes a public official's use of confidential information or his own official authority to obtain a benefit for himself or another. The harm intended to be punished is the damage done to confidence in the government and perceptions of public officials when public officials are allowed to obtain benefits not generally available to the public simply because of their status as a public official. Essentially, Section 513 punishes public officials who are not serving the public, but rather themselves.

Subsection (a)(1) prohibits the act of using confidential information to which the government official had access by virtue of his status as a public official. Confidential information means information that is completely unavailable to members of the public. If the information is provided to the government in confidence but then becomes public because of disclosure external to the government, the information is no longer confidential for the purposes of this Section. The public official must have had access to the information by virtue of his status as a public official and not through other channels. This is to say that a public official who comes about information through social or other non-professional channels and subsequently uses that information to his benefit cannot be prosecuted under Section 513. There is no culpability requirement stated for Subsection (a)(1), as such, per Section 24(h), the culpability requirement is recklessness. This implies that a public official need only have known that there was a high probability that the information he used was confidential, and then used it in disregard of that probability. Subsection (a)(2) requires that the confidential information specified in (a)(1) be used to obtain a benefit for himself or for another person to which he is not entitled. This provision shares language with the provisions for theft and identity fraud, and generally reflects the idea that by misusing the confidential information, the offender is depriving the public of a benefit to which they are generally entitled. In addition, this provision seeks to punish the public official's unjust enrichment of himself. As in Section 510, benefit is defined broadly, and can include both pecuniary and non-pecuniary, as well as material and non-material benefits.

Example 1: A, a government official, becomes privy to confidential information regarding the poor health of company B. A then encourages his friend C to sell all of his stock in company B to avoid a loss. A has used confidential information to which he had access by virtue of his status as a public official for the purpose of obtaining the benefit of an avoided loss for C. As such, he is guilty of misuse of confidential information under Section 513(a).

²⁰⁴ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 630 (Nuh Ha Mim Keller trans., Amana Publications 1994); *See also*, JAVED AHMAD GHAMIDI, MIZAN ("Balance") 103 (Dar ul-Ishraq, 2001).

Subsection (b) prohibits the use of official authority to obtain an illicit benefit. Subsection (b)(1) prohibits a person from using or influencing official authority in his capacity as a public official. Extensive discussion on the use or influence of official authority can be found in the commentary to Section 510. The use or influence of official authority must be done within one's capacity as a public official, because the law need not punish a person who is not a public official, and who influences official authority without committing an offense under Sections 510 or 511.

Subsection (b)(2) requires that the official authority must be used or influenced for the purpose of obtaining a benefit for himself or for another person to which he is not entitled.. This language would also permit prosecution if official authority were used to obtain a benefit for a group of people. However, this provision is not intended to be used to prosecute public officials who are pursuing legitimate public policies that benefit one group of people more than another – the benefit must be one to which the group is not entitled, implying that the benefit is inherently illicit and obtained outside the legitimate political process. As with Subsection (a), the term benefit is defined broadly, and could include both pecuniary and non-pecuniary, material and non-material benefits.

Subsection (c) grades the offense as a Class D felony. The relatively severe punishment for this offense reflects the fact that the harm is not to one specific person but to the public as a whole. Furthermore, severe punishment of this crime is intended to deter public officials in engaging in corrupt behavior.

Relation to current Maldivian law. Current Maldivian law contains no parallel provision. However, there is a strong public policy argument for criminalizing illicit enrichment in the official context, in that it deprives the public of benefits to which they are entitled as a whole. Furthermore, the use of a public official's position to obtain benefits which are not generally shared with the public encourages public officials to make decisions which benefit themselves and not the public at large. Lastly, as mentioned above, in the preamble to Chapter 510, Islamic law condemns those who make money dishonestly, which applies to the behavior addressed in this Chapter.²⁰⁵

SECTION 514 – UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION

Corresponding Current Provision(s): Maldivian Monetary Act, Sec. 11

Comment:

Generally. Section 514 criminalizes the unauthorized disclosure of confidential information by public officials. Subsection (a) defines the prohibited act. Subsection (a)(1) defines the class of persons eligible for the offense as persons who act in knowing violation of a duty imposed on them as public officials. Thus, to be eligible for the offense, the person must have known that the information was confidential and not to be disclosed – mere negligent disclosure cannot be prosecuted under Section 514. Furthermore, only public officials are

²⁰⁵ MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 113 (American Trust Publications 2000).

eligible for prosecution under Section 514, recognizing that persons who are not public officials are under no general duty to keep government information confidential.

Subsection (a)(2) defines the prohibited act as the disclosure of confidential information acquired as a public official. Such disclosure can be to one person, or it can be disclosed in a more general manner. The information must be confidential, that is, as with Section 513(1), information already available to the public is no longer confidential and one cannot be prosecuted for disclosing it. The information need have been acquired as a public official, that is, disclosure of information acquired outside the government, in prior or current social or professional contexts is not criminalized under Section 514.

Subsection (b) grades the offense as a class 1 misdemeanor. Section 514 is graded differently than Section 513 because the confidential information is simply being disclosed, which although harmful, is not being used to deprive the public of a benefit as in Section 513.

Relation to current Maldivian law. The Maldivian Monetary Act punishes disclosure of confidential information by certain government officers. However, there is a strong public policy argument to extend this prohibition to all public officials. Disclosure of confidential information can be harmful to the government as well as to persons who may have initially provided such information. As such, disclosure by any public official is harmful and should be punished.

There is significant support in Islamic law for the preservation of privacy, in particular confidential information. Muslims jurists are in agreement that “revealing of anything whose disclosure is resented” is forbidden.²⁰⁶

SECTION 515 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 510 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 510’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

²⁰⁶ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 740,771 (Nuh Ha Mim Keller trans., Amana Publications 1994).

CHAPTER 520 – PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Chapter 520 criminalizes a broad range of conduct involving perjury and other falsification in official matters. This Chapter defines offenses relating to the giving of false statements, the falsification of documents, false alarms, false reports to law enforcement authorities, and the impersonation of public servants.

Islamic law generally condemns perjury. Muslim jurists cite the following Prophetic tradition to demonstrate the offensive nature of false testimony: “On the Day of Judgment, the feet of the person who bore false witness will not stir from their place before their owner is condemned to hell.” In addition, jurists demonstrate the severity of this offense by noting that it appears in the Qur’an (22:30) alongside idolatry: Shun the abomination of idols, and shun false testimony.²⁰⁷

SECTION 520 – PERJURY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 62, 63, 66, 68 and 69; Rules Relating to the Conduct of Judicial Proceedings, Provision 197(2)

Comment:

Generally. Section 520 defines perjury, the basic false statement offense. Under Subsection (a), three elements must be met in order for the offense of perjury to be committed. An offense is committed when a person makes a false statement that he does not believe to be true during an official proceeding.

A statement is the total impression a person gives with respect to the matter in question. Therefore, the offense of perjury is committed only once when a person repeats the same false statement in the same proceeding.

Subsection (a)(2) states the required culpability as to the falsity of the statement made. The “does not believe to be true” standard falls short of requiring proof of knowledge or belief that the statement is false. This standard stretches beyond a person who makes a statement that he knows is false. Under Subsection (a)(2), a person is sufficiently liable if he makes a statement without addressing in his mind its truth or falsity. For example, a person who makes a false statement under oath in an official proceeding will escape liability if he believes in the truth of what he says. Additionally, a person will not be held liable for false statements which are inadvertent misstatements made as a result of his misunderstanding of the question or a slip of the tongue.

In order to find liability, this false statement must be made under oath or similar affirmation or in swearing or affirming the truth of a statement previously made. See Section 521 for false statements made during investigations while the person is not under oath or in official proceedings.

Subsection (b) provides an exception to liability when the person making the false statement retracts his statement. The purpose of this subsection is to provide an incentive for people to correct falsehoods made in official proceedings. However, it is narrowly drafted so as

²⁰⁷ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 664 (Nuh Ha Mim Keller trans., Amana Publications 1994).

to limit the temptation for people to commit perjury with the belief that they can tell the truth later to escape liability. In order to escape liability a person must retract the false statement in the same proceeding in which it was first made *before* it becomes manifest that the falsification was or would be exposed *and* before the false statement affects the outcome of the proceeding.

Subsection (c) provides that the fact that an oath was administered improperly or that the person making the statement was not competent to make the statement will not relieve a person from liability. Subsection (c) also states that a document that is purported to be made under oath or affirmation and is subsequently presented as being so verified will be considered as under oath. Therefore, a person is not able to claim as a defense that a document containing a false statement was not made under oath if that person presented the document, claiming that it was made under oath. Finally, Subsection (c) ascribes to the principle that a person is liable if he was put on notice that he must tell the truth. He should not escape liability because of technical irregularities in the effectiveness of the oath.

Subsection (d) requires that in order for a person to commit an offense under this Section, the proof presented must exceed the testimony of one person. For example, if a person has lied under oath as to the contents of his safe deposit box at the bank, the testimony of one bank employee would not provide sufficient proof of his guilt. However, sufficient proof would consist of two bank employees testifying that the person has lied, or the prosecution presenting physical evidence (such as the contents of the safe deposit box) in addition to the one employee's testimony.

Subsection (e) grades the offense more severely if the false statement was material. Subsection 6 clarifies that a statement is material if it could have affected the outcome of the proceeding. Subsection 6 also provides a definition for "official proceeding."

Relation to current Maldivian Law. Section 520(a) is parallel to the offense of "giving false oath" found in the Maldives Penal Code provisions 68 and 69. Subsection (a) also codifies the offense of "giving false evidence," as defined in Maldives Penal Code provisions 62 and 63, when that "false evidence" is given under oath and in an official proceeding. The "giving of false evidence" not under oath or in un-official proceedings is criminalized in subsequent sections of this Chapter. With regard to the making of sworn false statements through a writing or document, this Section runs parallel with Maldives Penal Code provision 66.

Maldives Penal Code Provision 62, which criminalizes the making of false statements, sworn or not sworn, in investigations as well as in official proceedings, also provides the basis for this Section. Section 520 of this code limits liability to those false statements made in official proceedings while under oath. The making of false statements while the declarant is not under oath or in an un-official proceeding, such as an investigation, is criminalized in Section 521.

The broad standard for finding culpability as to the falsity of a statement found in the "does not believe to be true" standard is consistent with the culpability level required under Maldives Penal Code Provision 62. The culpability level in both Section 520(a)(2) of the draft code and Maldivian Provision 62 falls short of requiring that a person know the statement is false. The essential difference between a perjury offense and any other offense involving truth and falsity is that in the case of perjury the perpetrator affirmatively swears that the proposition is actually true, not that it is most likely true. For this reason, this draft Code punishes a perjurer not simply when he actually knows his statement to be false, but also when he does not believe in the truth of his statement. However, although 520(1) contains no requirement that the defendant "verify the truth of the statement before it is made" to avoid liability, it is also no

defense to prove reasonable investigation of the truth of the statement (if the court credits the State's evidence over the defendant's).

Section 520(a)(2) does not go as far as the Maldives Penal Code provision 62 in requiring that a person verify the truth of the statement before it is made. Section 520(a)(2) only requires that, to avoid liability, the person making a false statement in an official proceeding while under oath address in his mind the truth or falsity of the statement and make that statement believing it to be true. This is because a witness should not be expected to verify his or her beliefs beyond what is necessary to convince the witness of the truth of a statement. A witness who makes an identification, for instance, should not be compelled to talk to other witnesses to verify if his identification is accurate. Questioning by an attorney should determine how the witness's belief came about and whether the belief is well-grounded in reality. If there are extrinsic proofs of the truth or falsehood of the witness's statements, either party, rather than the witness, should have the responsibility for finding those extrinsic proofs.

Subsection (b) parallels Provision 197(2) of the Rules Relating to the Conduct of Judicial Proceedings. However, Section 520(b) provides an exception if the false statement is retracted in the same proceeding in which it was first made *before* it becomes manifest that the falsification was or would be exposed *and* before the false statement affects the outcome of the proceeding. This exception is included in order to provide an incentive for individuals to retract their false statements.

Islamic law generally punishes false testimony as described in the introduction to this Chapter. Additionally, sworn statements or oaths are punished more severely in Islamic law and have been recorded by Ibn Hajar Haytami in his “List of Enormities.”²⁰⁸ Under Islamic law, both the Maliki and Hanafi schools of thought support the required culpability under Subsection (a)(2).²⁰⁹

SECTION 521 – UNSWORN FALSIFICATION TO AUTHORITIES

Corresponding Current Provisions(s): Maldives Penal Code, Provisions 62, 63, and 67; Rules Relating to the Conduct of Judicial Proceedings, Provision 197(2) and 197(3)

Comment:

Generally. Section 521 criminalizes the knowingly making of false statements, written or oral, to public servants or law enforcement. This includes the making of false statements by persons while they are not under oath. The offenses in Section 521 are class 1 misdemeanors.

Subsection (a) defines the offense for written falsification. In order to find liability under Subsection (a), the person must make a false written statement or omit information necessary to prevent a statement from being misleading with the intent to mislead a public servant or law enforcement official. Subsection (a)(3)(A) contains the “does not believe to be true” standard. See the commentary for Section 520 for a discussion of this standard. Subsection (a)(3)(B) criminalizes the knowing omission of information necessary to prevent a written statement from

²⁰⁸ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 987 (Nuh Ha Mim Keller trans., Amana Publications 1994).

²⁰⁹ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER II, at 489 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994)(“It (*laqhw*) is an oath that is sworn by naming a thing which the person swearing believes to be true, but it turns out to be opposite of what he swore the oath for.”).

being misleading. Under Subsection (a)(1), that omission must be intended to mislead a public servant or law enforcement official.

Subsection (b) defines the offense of verbally making false statements intended to mislead a public servant or law enforcement officer. This offense differs from Section 520 because it covers false statements made during investigations while the person is not under oath or in official proceedings.

Subsection (c) provides an exception to liability if the false statement is not material as defined in 520(f)(2).

Relation to current Maldivian Law. Section 521 is parallel to the Maldives Penal Code provisions 62, 63, 66 and 67. This Section criminalizes conduct covered by the Maldives Penal Code provisions 62 and 63 but not criminalized by the above Section 520 of this draft Code. Maldives Penal Code Provision 62 criminalizes the making of false statements, sworn or not sworn, in investigations as well as in official proceedings. This Section criminalizes the making of false statements while the declarant is not under oath or in an un-official proceeding, such as an investigation. The above Section 520 meanwhile limits liability to those false statements made in official proceedings while under oath.

Subsection (a) runs parallel with Maldives Penal Code Provision 67. In addition, the materiality requirement in Subsection (c) is consistent with the materiality requirement in the Maldives Penal Code Provision 67.

The Islamic legal support for this Section is described in the introduction to this Chapter.

SECTION 522 – FALSE REPORTS TO LAW ENFORCEMENT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 64, 65 and 75

Comment:

Generally. Section 522 criminalizes the giving of false statements to law enforcement authorities. Under Subsection (a), a person commits an offense if he gives false information, knowing it to be false, with the purpose of implicating another in criminal activity. Subsection (b) criminalizes the making of reports to law enforcement authorities relating to offenses that he knows has not occurred or about which he knows he has no information.

The culpability as to the falsity of the statement in Subsection (a) is higher than the “does not believe to be true” standard in Sections 520 and 521 of this Chapter due to the serious nature of this offense. Under Section 24(4)(b), a person acts knowingly with respect to a circumstance element if the person is aware that it is probable that such circumstance exists. Therefore, Subsection (a) requires that a person must be aware that it is probable that the information he is giving is false in order to be found liable rather than merely not believing the information to be true.

The grading scheme in Subsection (c) indicates that falsely incriminating another in criminal activity is considered a more serious offense than giving false information to law enforcement regarding offenses the person knows did not occur or information regarding offenses that he knows he knows nothing about.

The grading of Subsection (a) is determined by the seriousness of the crime of which the defendant falsely incriminates another. If a person falsely incriminates another and the other

person is convicted of a class C felony or higher, the offense is a class E felony. Otherwise, the offense in Subsection (a) is a class 1 misdemeanor.

The making of fictitious reports to law enforcement authorities is deemed a less serious crime than falsely incriminating another and is graded as a class 2 misdemeanor.

Relation to current Maldivian Law. Section 522 reflects the serious nature of falsely incriminating another and parallels Maldives Penal Code Provisions 64,65 and 75. However, the grading scheme in Subsection (c) differs from Maldives Penal Code Provisions 64 and 65. This Section creates a two-tiered grading scheme whereas current Maldivian law, found in Maldives Penal Provision 64, singles out the false incrimination of another in capital offenses. There is a strong public policy argument for adopting a two-tiered grading structure instead. First, very few people are convicted of capital offenses in the Maldives and the sentence is rarely executed. Secondly, false incrimination by one person will rarely be sufficient evidence to convict another of capital punishment. Lastly, the law should deter individuals from falsely incriminating another of other crimes which are not capital offenses but carry a heavy punishment nonetheless, such as rape and serious assault. Therefore it is more appropriate to construct a two tiered grading structure which punishes those who falsely incriminated an innocent person and cause that person to be convicted of a Class C felony or higher more severely than if a person falsely incriminates an innocent person who was convicted of a Class D felony or lower.

The Islamic legal support for this Section is found in the introduction to this Chapter.

SECTION 523 – FALSE ALARMS TO AGENCIES OF PUBLIC SAFETY

Corresponding Current Provision(s): None

Comment:

Generally. Section 523 makes it an offense to knowingly make a false alarm of emergencies such as fire, floods, landslides and sinking ships. Subsection 523(a)(1) requires that the perpetrator knowingly make the false alarm. Thus those who mistakenly report a fire or emergency are excluded from liability. Subsection 523(a)(2) requires that the perpetrator have transmitted the false alarm to an organization dealing with emergencies. Thus, someone who calls in a false alarm to a private individual who is not employed or otherwise affiliated with any organization that handles emergencies, would not be liable under this Section.

Relation to current Maldivian law. This Section has no counterpart in current statutory law, but there are strong public policy arguments for including this Section. False alarms of fires and other emergencies distract precious government resources from emergencies where their services are actually needed. Such false alarms could lead to the loss of life and other severe casualties as well as damage to public and private property. Thus society should deter such behavior by criminalizing knowingly causing false alarms.

Islamic legal support for this Section can be found in the commentary to Section 122.

SECTION 524 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 520 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 520's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 530 – INTERFERENCE WITH GOVERNMENTAL OPERATIONS AND ESCAPE

This Chapter defines offenses that interfere with the operation of government functions. It is important for the criminal law to punish actors who prevent the effective implementation of governmental functions, as this impedes the prosperity of society in general. Acts covered by this Section include resistance or interference with the duties of governmental actors, providing assistance or aid to fugitives, and acts which impede the successful operation of government.

This Chapter is supported by Islamic law which generally encourages actors to respect authority and be law-abiding citizens.²¹⁰ The following Qur’anic precept is used as justification for this: “Obey God and obey the Prophet and those of authority among you.” (Qur’an 4:59).

SECTION 530 – OBSTRUCTING JUSTICE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 32, 33, 35, 41c, 70, 71, 73 and 74

Comment:

Generally. This provision defines the offense of obstructing justice. Subsection (a) criminalizes the conduct of an individual who intends to obstruct justice by knowingly using various means to prevent the apprehension, prosecution or defense of a person. The culpability level required by this Section protects from liability those who unwittingly commit the offense, as in the following example which would be covered by Subsection (a)(1): The police come to the door of a house looking for B, but A answers. A goes inside and tells B that the police are at the front door, and B subsequently flees. If A knows nothing of B’s past crimes, A lacks the requisite purpose and is not guilty of an offense under this Section. In contrast, those who act with the purpose of obstructing justice are both dangerous and blameworthy because they weaken the criminal justice system that protects us all. This Subsection outlines four categories of conduct which satisfy the intended scope Section 530.

Subsection (a)(1) criminalizes the conduct of an actor who obstructs justice by knowingly warning an offender of impending apprehension for a criminal offense, with the intent of hindering apprehension, prosecution or defense. This Subsection requires the apprehension to be “impending” in order to reasonably limit the offense definition. For example, a person who knows of no ongoing investigation would not be liable for warning another that he could be arrested for illegal activity. The purpose of Subsection (a)(1) is to assign liability to those who hinder the legal apprehension or prosecution of offenders. This Subsection provides a disclaimer which protects an individual who alerts an offender of impending discovery or apprehension with the purpose of guiding them towards apprehension. Section 530 does not intend liability for an individual acting under these circumstances, as they are promoting the interest of society in guiding the offender to comply with the law.

Subsection (a)(2) criminalizes acts which intentionally interfere with the collection of evidence, regardless of admissibility or importance. The destruction, alteration, concealment or

²¹⁰ JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 98-99 (Dar ul-Ishraq, 2001); AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 24 (Nuh Ha Mim Keller trans., Amana Publications 1994).

disguise of existing evidence, and the creation of new, false evidence are all covered by this Subsection.

Subsection (a)(3) criminalizes the act of inducing a witness with pertinent information to hide or disappear. These types of actions undermine the ability of the criminal justice system to prosecute criminals, and on a larger scale, undermine the legitimacy of the criminal justice system by preventing its efficient and fair implementation. Bribery, harassment or threats are some ways in which a witness is induced to hide or disappear. Knowledge in the context of this offense is “material” if it is reasonably likely to affect the guilt or innocence of the person targeted for arrest/prosecution. In addition, one cannot induce another to “conceal” himself without an affirmative act. In other words, the mere inability of law enforcement to find the witness does not mean the defendant induced the witness to conceal himself with the purpose of preventing his own apprehension. Lastly, evidence of an *affirmative offer* of a benefit should be required to prove such an inducement.

Subsection (a)(4) criminalizes the acts of an individual who deters a witness from testifying freely, fully, or truthfully. Individuals who act in this manner are assigned liability for the burden they place upon the criminal justice system and the necessary collection of evidence.

Relation to current Maldivian Law. This Section encompasses several provisions of current Maldivian law and summarizes their content into one Section. Provision 32 of the Maldives Penal Code criminalizes those who conceal the existence of a design to commit an unlawful act against the president or State. Provision 33 criminalizes, “all forms of rebellion or insurrection” included within the provisions of Section 32. Provision 35 states that whoever conceals the existence of a design to cause injury to the life of the president or who participates in such a conspiracy in contravention of Law or Shari’ah shall be liable for an offense. Provision 70 addresses the act of concealing evidence of the commission of an offense or prevention of any person from obtaining evidence, or fabricating statements with the intention to conceal or corrupt. Provision 71 states that whoever conceals or does any act to prevent any person from obtaining evidence or misleading in that endeavor is guilty of an offense. Provision 73 states that whoever in protection or defense of an offender conceals, destroys or causes the loss of a document that is required for a judicial proceedings or before a competent official authorized by Law for the purposes of administering justice is guilty of an offense. Provision 74 of the Maldives Penal Code deals with those who conceal “any property or document relating to property or causes its disappearance or destruction, or transfers its ownership to another person knowing that such property maybe forfeited or such forfeiture is likely to occur.” Provision 41c of the Maldives Penal Code provides a definition for “concealment” as the failure to give notice of a known criminal act (under the respective sections) to proper government officials, for example a police officer, an atoll officer, or the minister of justice.

Islamic law supports this Section with its broad condemnation of “sheltering” or “protecting” the “guilty” because such conduct could prevent people from being compensated for the rights that were taken from them.²¹¹

SECTION 531 – FAILURE TO REPORT A VEHICULAR ACCIDENT

²¹¹ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 985 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“sheltering the guilty, meaning to protect them from those who want to obtain their rights from them, guilty meaning those who commit an offense that entails a consequence...”).

Corresponding Current Provision(s): Maldives Penal Code, Provisions 88(17) and 88(18)

Comment:

Generally. This section criminalizes the failure to report a vehicular accident. A person is liable under this offense if he is involved in a vehicular accident on either sea or land and does not report the accident to the appropriate authorities.

Subsection (b) grades the offense as a Class 2 misdemeanor but will be punished one grade higher at a Class 1 misdemeanor if someone sustained serious bodily injury in the accident which was not reported. Serious bodily injury is defined in Section 16(69).

Relation to current Maldivian Law. This Section parallels Provisions 88(17) and 88(18) of the Maldives Penal Code.

SECTION 532 – RESISTING OR OBSTRUCTING A LAW ENFORCEMENT OFFICER OR CUSTODIAL OFFICER

Corresponding Current Provision(s): Maldives Penal Code, Provisions 33, 54, 61, 86, 88(10) and 88(11)

Comment:

Generally. This provision criminalizes resisting, obstructing, or interfering with a law enforcement officer or custodial officer.

Subsection (a) of this offense divides the elements of the offense into two parts. Subsection (a)(1) prevents an individual from knowingly resisting, obstructing or interfering with an authorized act being performed by a person acting within their official capacity. Authorized acts shall be defined by laws and regulations governing an officer's duties and responsibilities. Any disobedience of an authorized order is per se resistance. Knowledge of a person's official capacity is presumed once the official identifies himself. Subsection (a)(2) qualifies the action of Subsection (a)(1) by specifying that the interfering individual must be knowledgeable as to the position of the person with which they are interfering, as a law enforcement officer or a custodial officer. This is intended to protect from liability the actor who is negligent or reckless in this regard. The criminal law does not hold those who are negligent or reckless accountable because they fail to satisfy the requisite mens rea for blameworthiness.

Subsection (b)(1) defines the term "custodial officer" as any person employed to supervise and control inmates incarcerated in, or in the custody of, a correctional institution. This definition includes prison guards, privately hired security personnel and any others serving in the capacity defined. Prison doctors, psychologists, legal staff, cafeteria and sanitation workers are not included in this offense definition. Alternatively, Subsection (b)(2) defines a "custodial officer" as a person employed to supervise and control persons who have been civilly committed or are being detained awaiting civil commitment.

Relation to current Maldivian Law. Several provisions of existing Maldivian Law provide strong support for the criminalization of Resisting or Obstructing a Law Enforcement Officer or Custodial Officer, particularly Provisions 88(10) and 88(11) of the Maldives Penal Code. Provision 88(10) makes it illegal to disobey an order given by a police officer. Provision 88(11) makes it illegal to disobey orders given by Atoll and Island Offices.

Additionally, Provision 33 of the Maldives Penal Code outlaws all forms of rebellion or insurrection against the State, as described in the commentary for Section 530. Provision 34 of the Maldives Penal Code addresses those who threaten or obstruct any person authorized by law in an attempt to prevent or resist persons from committing an act mentioned in Section 50. Provision 61 of the Maldives Penal Code outlaws disobedience to the directive of the Government or any other competent authority. Provision 86(a) of the Maldives Penal Code outlaws the intentional obstruction of the “due discharge of functions by a public servant not by assault,” while Provision 86(b) provides an aggravation for a crime under Provision 86(a) committed by assault.

There is also Islamic legal support for this Section. The act of obstruction is prohibited based on the justification discussed in the commentary to Section 530. Islamic law further prohibits carrying out such an act against a representative of the government. The offense described in this provision is consistent with Islamic law which urges Muslims to be law-abiding citizens.²¹² The following Qur’anic precept is used as justification for this: “Obey God and obey the Prophet and those of authority among you.” (Qur’an 4:59).

SECTION 533 – OBSTRUCTING ADMINISTRATION OF LAW OR OTHER GOVERNMENTAL FUNCTION

Corresponding Current Provision(s): Maldives Penal Code, Provisions 33, 34, 36, 40, 86, 88(11) and 102; Rules Relating to the Conduct of Judicial Proceedings, Provision 243

Comment:

Generally. This provision criminalizes intentionally interfering with governmental functions by physical means, breach of an official duty, or an unlawful act.

Subsection (a)(1) defines the initial act of obstruction, impairment or perversion of the administration of law or other governmental functions. In order to assume liability, a culpability standard of knowing is assigned to the actor being charged under Section 532. This prevents a reckless or negligent actor from being assigned liability.

Subsection (a)(2) elaborates on Subsection (a)(1) by specifying which particular actions of obstruction, impairment or perversion satisfy the standard for the purposes of Section 532. Subsection (a)(2)(A) states that any unlawful act satisfies the act requirement for the purposes of Subsection (a)(1). Unlawful acts include both civil and criminal offenses. “Official duty” means any duty so designated by law. This offense definition includes obstruction by a substantial physical interference such as an unlawful obstacle, or a breach of an official duty that stands as an impediment to the administration of the law. In committing this conduct, it is necessary that the actor satisfy the culpability requirement by being knowledgeable as to the interference, but not necessarily as to the unlawfulness of the act.

Subsection (a)(2)(B) prohibits failing to report income, revenue, or other information for which reporting is required by law to revenue officers or other public officials who collect taxes.

Subsection (a)(2)(C) prohibits failing to pay taxes or duties owed by law.

Subsection (b) grades this offense as a Class 1 misdemeanor.

²¹² JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 98-99 (Dar ul-Ishraq, 2001); AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 24 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Relation to current Maldivian Law. This Section parallels several provisions of current Maldivian law. Provision 86 the current Maldives Penal Code provides the greatest support in that it criminalizes the intentional obstruction of “due discharge of functions by a public servant. . .”

Additionally, Provision 33 of the Maldives Penal Code makes all forms of rebellion or insurrection against the government or authority illegal, as described in Section 530 and 532. Provision 34 outlaws “conspir[ing] to cause injury to the life of the President in contravention of Law or Shari’ah.” Provision 36 outlaws the act of anyone who “causes [harm] to the life of the President in contravention of Law or Shari’ah.” Provision 40 makes it illegal to conspire to prevent or obstruct the duties of a Presidential appointee. Provision 88(11) outlaws disobeying orders given by Atoll and Island Offices.

Subsection (a)(2)(B) is consistent with Provision 243 of the Rules Relating to the Conduct of Judicial Proceedings. Provision 243 criminalizes the battery of a member of the National Security Service and considers such an offense a disruption of public peace. The drafters of this code have accounted for Provision 243 in the “Interference with Governmental Operations” Chapter instead of the “Public Order and Safety” Chapter.

Lastly, conduct prohibited by Provision 102 of the Maldives Penal Code (Disobedient to quarantine rules) is also encompassed by the offense in this Section.

The Islamic legal support for this Section can be found in the commentary to Section 532.

SECTION 534 – OBSTRUCTING SERVICE OF PROCESS

Corresponding Current Provision(s): Maldives Penal Code, Provision 40

Comment:

Generally. This provision criminalizes resisting or obstructing the service and execution of legal processes and court orders.

Subsection (a) criminalizes the act of an individual who knowingly impedes the service of process. This includes the resistance or obstruction of court orders, and the hindrance of the execution of any civil or criminal process. In order to impede, an actor must be proactive in hindering service of process. For example, fleeing a process server who has confronted you constitutes resistance and is an offense under this draft Code. In contrast, avoiding service of process by staying away from home is not resistance or obstruction, unless the person leaves the country or covertly establishes a new residence. However, a person is guilty of under this Section if he commits an offense like fraud in an effort to shield his assets from being seized to satisfy a judgment. Additionally, “authorization” for process and court orders must exist in some statute or statutorily-enabled rule.

Relation to current Maldivian Law. This Section is parallel to Provision 40 of the Maldives Penal Code, which makes it a crime to conspire to prevent or obstruct the duties or exercise of power in the form of discharging the functions of law as laid out in the Constitution of a Presidential appointee. Provision 40 addresses a broader range of criminal activity, but this draft Code provides a more specific definition and limits liability to those who knowingly resist or obstruct the execution of criminal and civil court processes or orders of court. There is a strong public policy argument for limiting liability in this way. Obstructing justice in the manner defined by this Section is a crime which in particular has the capability of undermining the

effectiveness of the criminal justice system by impeding its progress. Thus a more specific definition is desirable.

The Islamic legal support for this Section can be found in the commentary to Section 532.

SECTION 535 – REFUSING TO AID AN OFFICER

Corresponding Current Provision(s): Maldives Penal Code, Provisions 61 and 88(10)

Comment:

Generally. This provision criminalizes knowingly failing to provide reasonable assistance to a law enforcement officer in apprehending a person or preventing an offense.

Subsection (a)(1) defines the initial requirement of the offense, that there actually has to be request made by an officer. In order to be liable for this offense, a person need only be reckless as to whether an officer has made a request. Such a request can be reasonably interpreted from a spoken, written or nonverbal communication intending to transfer information from the officer to the offender. It is important to note that absent a request, there is no general duty to aid a police officer.

Subsection (a)(2)(A) criminalizes the acts of an individual who satisfies Subsection (a)(1) and further knowingly fails to provide reasonable help to a police officer in enacting a legal apprehension. The standard of reasonable aid is important, and does not require that an individual necessarily risk harm or death to themselves. The reasonableness shall be judged in the context of the situation.

Subsection (a)(2)(B) is similar to (a)(2)(A), but criminalizes the conduct of an actor who knowingly fails to provide reasonable help to a person they know to be a police officer in preventing the commission of a crime. Because recklessness is the relevant culpability requirement, it is necessary for the person to be aware of a substantial and unjustifiable risk that it is an offense the officer wants to prevent. Reasonable aid is defined by an aid that does not put the person at risk of serious bodily injury to himself.

For the purposes of this section, law enforcement officer has the same meaning as its definition in Section 521(d). *See* Section 17(“law enforcement officer”). The definition is broad, so as to be inclusive of a broad range of officers. This promotes the general interest of society by making the prevention of criminal conduct a common bond among members of society.

Relation to current Maldivian Law. Support in existing Maldivian law for Section 535 can be found in two Sections of the Maldives Penal Code. Provision 61 outlaws acts of disobedience to governmental directive or competent authority. In a similar regard, Provision 88(10) outlaws disobeying an order given by a police officer. These two Sections are of similar scope and provide strong support for the criminalization of a refusal to aid an officer.

SECTION 536 – CONCEALING OR AIDING A FUGITIVE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 76, 77, 78, 80, 83 and 88(23)

Comment:

Generally. This provision defines an offense criminalizing harboring, aiding, or concealing a fugitive for the purpose of preventing apprehension.

Subsection (a)(1) requires that an offender act with the intent to prevent the apprehension of an offender. In assigning culpability, it is important that the offender satisfy the intent requirement to prevent the assignment of guilt to an individual who unknowingly happens into the circumstances of this offense. An example of this may be the individual who allows a friend to stay at their residence for an extended period, without the knowledge that the individual is staying there with the purpose of avoiding lawful apprehension.

Subsection (a)(2) requires the physical act of harboring, aiding or concealing an offender. This may include, but is not limited to, providing housing, transportation or sustenance to a fugitive (when the person acts with the purpose required in Subsection (a)(1)).

Subsection (a)(3) qualifies Subsections (1) and (2) by providing a disclaimer that protects from liability any individual who would otherwise satisfy the requirements of these Subsections, but because of a close familial relationship is excluded from liability. Explicitly, a spouse, parent, child or sibling is protected from liability under Section 536.

Subsection (b)(1) grades the offense as a Class E felony if the offender being aided or concealed is charged with a felony. It is probable that a felon presents a danger to society by the nature of their criminal classification, and thus justifies the harsher punishment for an individual who aids or conceals them.

Subsection (b)(2) grades an offense as a Class 1 misdemeanor if the offender being aided or concealed is not charged with a felony. Concealing or aiding a fugitive who has been incarcerated for a misdemeanor or less is not as heinous a crime, and does not present the same danger to society that concealing or aiding a felon does.

Relation to current Maldivian Law. Section 536 parallels a number of provisions of current Maldivian law. Provision 76 of the Maldives Penal Code criminalizes giving assistance to an offender for the “purpose of screening him from legal punishment.” The standard for grading an offense under this Section of the Maldives Penal Code is similar in structure to that used in Section 536, as grading for the offense is classified by the severity of the crime attributed to the aided or concealed offender.

Additionally, Provision 77 of the Maldives Penal Code criminalizes the acceptance of bribes, rewards, or gifts. Provision 78 of the Maldives Penal Code makes it a crime to conceal an escapee and not alert the proper authorities and provides a grading scale similar to the one draft in this Section. Unlike Provision 78 however, this draft Section does not require a person to take affirmative action to notify the authorities of a fugitive whereabouts. This is because this draft Code does not generally criminalize omissions but rather focuses on criminalizing affirmative actions.

Tangentially related provisions of current Maldivian law include Provision 80, which makes it illegal for a public servant to intentionally commit an unlawful act for purposes of saving a person from due punishment; Provision 83, which outlaws the general obstruction of a lawful apprehension; and Provision 88(23), which defines the crime of assisting a convict in escaping.

Islamic legal support for this Section is found in the commentary to Section 530.

SECTION 537 – ESCAPE; FAILURE TO REPORT TO A CORRECTIONAL INSTITUTION OR TO REPORT FOR PERIODIC IMPRISONMENT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 39, 83, 84, 88(1), 88(2) and 88; Criminal Court Circular 07/SP/2003

Comment:

Generally. This provision criminalizes escaping from custody, failing to report to a place of detention or for periodic detention, failing to return from release to a place of detention if that is required in the punishment, and failing to abide by the terms of home confinement.

The offense definition for Subsection (a) is two parts. Subsection (a)(1) defines a variety of circumstances under which an offender might be subject to liability under Section 537. Subsection (a)(2) details different types of actions for which a person can be liable for knowingly undertaking.

Subsection (1)(A) defines that under this Section, a person in penal custody pursuant to a conviction or charge for an offense could potentially face liability under this Section. Subsection (a)(1)(B) defines that under this Section, a person in the lawful penal custody of a law enforcement officer could potentially face liability under this Section. Subsection (a)(1)(C) defines that under this Section, a person civilly committed, or detained by the government awaiting civil commitment could potentially face liability under this Section.

Subsection (a)(2)(A) assigns liability to an individual who satisfies the requirement of Subsection (a)(1) and knowingly escapes from the place of detention or from the penal custody of an employee of that institution. Subsection (a)(2)(B) assigns liability to an individual who satisfies the requirement of Subsection (a)(1) and knowingly fails to report to the place of detention or to report for periodic detention at the time required. Subsection (a)(2)(C) assigns liability to an individual who satisfies the requirement of Subsection (a)(1) and knowingly fails to return from furlough or from work or day release. Subsection (a)(2)(D) assigns liability to an individual who satisfies the requirement of Subsection (a)(1) and knowingly fails to abide by the terms of home confinement.

Subsection (b) defines the term “penal custody” and “correctional institution” for the purposes of this Section. Subsection (b)(1) defines penal custody as lawful custody of the State, and an outline is provided in five sub-parts to Subsection (b) to prevent ambiguity as to what is meant to be included. Subsection (b)(1)(A) includes pretrial incarceration or detention following arrest as lawful custody of the State for the purposes of this Section. Subsection (b)(1)(B) includes incarceration or detention under a sentence or commitment to a State or local correctional institution as lawful custody of the State for the purposes of this Section. Subsection (b)(1)(C) includes parole or mandatory supervised release as lawful custody of the State for the purposes of this Section. Subsection (b)(1)(D) includes home detention as lawful custody of the State for the purposes of this Section. Subsection (b)(1)(E) includes probation as lawful custody of the State for the purposes of this Section.

Subsection (b)(2) defines correctional institution as an institution or place for the incarceration or custody of persons. Subsection (b)(2)(A) makes the incarceration or custody of a person serving a sentence for a criminal offense applicable for the purposes of the definition. Subsection (b)(2)(B) makes the incarceration or custody of a person awaiting trial or sentence for a criminal offense applicable for the purposes of the definition. Subsection (b)(2)(C)(aa)-(dd) makes the incarceration or custody of a person under arrest for an offense, a violation of

probation, a violation of parole or a violation of mandatory supervised release applicable for the purposes of the definition. Subsection (b)(2)(D) makes the incarceration or custody of a person awaiting a bail setting hearing or preliminary hearing applicable for the purposes of the definition.

Subsection (c) grades offenses committed under this Section in three separate categories. Subsection (c)(1) grades an offense committed under Subsection (a)(2)(A) as a Class D felony. This is the most serious offense under Section 537 because it involves an individual who has been explicitly prevented from interacting with society. It is probable that this person presents the greatest danger to society, and thus justifies the harsher punishment for an individual who commits this offense.

Subsection (c)(2) grades an offense committed under Subsection (a)(2)(B)-(D) as a Class E felony, if the underlying offense is a felony. This grading is higher in correlation to the seriousness of the offense that the offender has escaped from punishment for. If the underlying offense is a felony, society views this person as a significant risk. This increased risk justifies an upward grading for those who violate this Section under these circumstances.

Subsection (c)(3) grades all other offenses committed under this Section as Class 1 misdemeanors.

Relation to current Maldivian Law. While not directly addressed by existing Maldivian Law, Section 537 finds precedent in five places. Provision 83 of the Maldives Penal Code criminalizes the general obstruction of apprehension. Provision 84 of the Maldives Penal Code outlaws the return from exile. Provision 88(1) and Criminal Court Circular 07/SP/2003 criminalizes the violation of a house arrest. Provision 88(2) makes it a crime to change islands during banishment. Provision 39 of the Maldives Penal Code makes it a crime for an authority figure to negligently allow the escape of an offender. All of these provisions have the same intent at Section 537: criminalizing escaping from custody in general, and specifically for failing to report to a place of detention or for periodic detention, failing to return from release to a place of detention, or failing to abide by the terms of confinement.

However, Section 537 departs from current Maldivian law in that it punishes this offense more severely than does Maldivian Law in Criminal Court Circular 14/SP/2003. This draft Code punishes the offense more severely because both the effectiveness and the credibility of the criminal justice would be severely jeopardized if prisoners routinely escaped or otherwise avoided their sentences. In addition, the grading of this Section is in accord with the grading of other Sections within Chapter 530, all of which address similar behavior which interferes with governmental operations.

SECTION 538 – PERMITTING ESCAPE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 39, 80, 82 and 88(23)

Comment:

Generally. This provision defines an offense for correctional employees who recklessly permit prisoners in their custody to escape.

Subsection (a) defines the offense of Permitting Escape in two parts. The first part, Subsection (a)(1), generally addresses the offense as it concerns an outside party, while the second part, Subsection (a)(2), addresses the action of an individual who does not necessarily

help create the escape, but fails in their official duty to prevent it from happening. Subsection (a)(1) criminalizes the act of causing or facilitating the escape of a prisoner. Offenders punishable under this Subsection have been proactive in permitting the escape of a convict, and are punishable according to the severity of that action. Examples of this might include, but are not limited to, an actor who physically frees an incarcerated inmate, an actor who provides jail cell keys to an inmate, or an actor who pays another individual to allow an inmate to escape.

Subsection (a)(2) criminalizes the act of a correctional officer who permits a prisoner in his custody to escape. This Subsection criminalizes inaction, the failure of a correctional officer to follow through on an affirmative duty to prevent prisoners from escaping from their charge.

Subsection (b) provides a two part definition for the term “correctional employee.” Subsection (b)(1) defines a “correctional employee” as any elected or appointed officer, trustee, or employee of a correctional institution or of the governing authority of the correctional institution. Subsection (b)(2) defines a “correctional employee” as any person who performs services for the correctional institution pursuant to contract with the correctional institution or its governing authority, including a custodial officer.

Subsection (c) grades the offender’s conduct based upon the severity of the offense that the escapee was incarcerated for. The grading in this Section is based upon the danger that the escapee presents to society. By the nature of their criminal classification, a felon most likely presents the greatest danger to society upon escape. It is understandable then, that those who permit felons to escape should be punished more severely. Subsection (c)(a) grades an offense under Section 538 as a Class 1 misdemeanor if detention was based upon a felony.

Subsection (c)(2) grades an offense under Section 538 as a Class 2 misdemeanor if detention was based upon a misdemeanor.

Relation to current Maldivian Law. There are four provisions of existing Maldivian law that provide precedent for this Section. Provision 39 of the Maldives Penal Code makes it a crime for an authority figure to negligently allow the escape of an offender. This Section departs slightly by setting the culpability requirement for the offense as recklessness in Subsection (a)(2) because this draft Code generally reserves negligence for civil rather than criminal provisions.

Provision 80 of the Maldives Penal Code criminalizes the act of a public servant who intentionally commits an unlawful act for purposes of saving a person from due punishment. Provision 82 of the Maldives Penal Code makes it a crime for a public servant to allow an offender to escape. Similar to Section 538, the grading of this offense is on a sliding scale based upon the severity of the offense committed by the escapee. Provision 88(23) outlaws the assistance of a convict in escaping. Section 538 consolidates these existing examples of law. In doing so, they not materially altered, but their scope is expanded in order to account for more varied circumstances.

SECTION 539 – BRINGING OR ALLOWING CONTRABAND INTO A CORRECTIONAL INSTITUTION; POSSESSING CONTRABAND IN A CORRECTIONAL INSTITUTION

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(24)

Comment:

Generally. This provision protects the safety and order of correctional institutions by criminalizing bringing contraband into a correctional institution, placing contraband close

enough to a correctional institution that an inmate may access it, or an inmate possessing contraband.

Subsection (a) defines this offense as an unauthorized, knowledgeable act with an item of contraband. It is important to clarify that an offender only needs to be knowledgeable about bringing the item; he need not know that the item is contraband. This Subsection is defined in three parts

Subsection (a)(1) criminalizes the act of knowingly bringing an item of contraband into a correctional institution without having authorization to do so. This might include, but is not limited to, a friend of an offender who brings a knife or hacksaw to give to them inside of prison, or a family member who brings alcohol to their relative in prison without receiving permission from prison officials. Subsection (a)(2) criminalizes the act of an individual who knowingly places an item of contraband in a location in such proximity to a correctional institution so as to give an inmate access to it without having authorization to do so. Subsection (a)(3) criminalizes the conduct of an actor who knowingly possesses an item of contraband within a correctional institution without having the authorization to do so.

Subsection (b) defines the term “item of contraband” for the purposes of this Section. Eleven explicit categories of contraband are provided to prevent any ambiguity as to the scope of this definition.

Subsection (b)(1) includes a firearm, stun gun or taser as an item of contraband.

Subsection (b)(2) includes firearm ammunition, including anything that could be adapted to be used in firearm.

Subsection (b)(3) includes catastrophic agents. “Catastrophic agent” has the meaning given in Section 121(c)(1). This includes any type of substance, chemical, bacterial or otherwise, that has the capability of causing harm.

Subsection (b)(4) includes controlled substances. The scope of this will depend upon Maldivian Statutory law. “Controlled drug” has the meaning given in Subsection 720(d)(1). SP-A uses the term “controlled substance” in Section 539(b)(5), but does not give a definition.

Subsection (b)(5) includes instruments adapted for the use of controlled substances. This would include needles, pipes or drug paraphernalia. “Instruments of Crime”, as defined in Section 87(2) are also included in the definition of controlled substances. Subsection (b)(6) includes dangerous weapons. This is left broad, and is meant to include anything that could be used as a weapon including altered or misshaped common Chapters such as a shaved toothbrush. “Dangerous weapon” has the meaning given in Section 120(d)(1).

Subsection (b)(7) includes tools lock-picking tools and other items with the capability of defeating security mechanisms. This definition is adaptable and may vary from case to case depending upon the type or kind of security mechanism in question and the innovation of criminality. These items are “instruments of crime” under Section 87(b).

Subsection (b)(8) includes cutting tools such as wire cutters or hacksaws, or any other tool with the capability of cutting through metal.

Subsection (b)(9) includes electronic equipment. This may include communication devices as well as audio or video recording devices and computer equipment. Criminality may vary depending upon the circumstances, and correctional authorities should outline which electronic items are considered contraband in respective correctional facilities.

Subsection (b)(10) includes alcoholic beverages.

Subsection (b)(11) includes any other items that do not fall within the above categories, but have been expressly prohibited by the correctional institution in question.

Subsection (c) grades the offense and provides for an aggravation to the grading depending on the circumstances of commission of the offense. Subsection (c)(1) divides the grading of the offense into three parts, depending upon the contraband involved in its commission.

Subsection (c)(1)(A) defines the offense as a Class D felony if it involves contraband outlined in Subsection (b)(1)-(3). Firearms and catastrophic agents are the items of contraband that have the potential to create the greatest amount of harm, and thus their introduction or allowance is graded the most severely. It is obvious that, for example, if a handgun or anthrax were given to a prisoner it there would be a serious potential for harm to inmates and prison employees alike.

Subsection (c)(1)(B) defines the offense as a Class E felony if it involves contraband outlined in Subsections (b)(4)-(10). The importance of preventing prisoners from obtaining tools to facilitate escape or illegal substances, for example, justify the grading of this Subsection.

Subsection (c)(1)(C) defines the offense as a Class 1 misdemeanor if involves contraband other than that described by Subsection (b)(1)-(11), but within the meaning of (b). The most commonly recognized forms of contraband all are contained in Subsection (1)-(11), classifications which address all of the most egregious forms of contraband. It is important to recognize, though, that items that a particular correctional facility may object to may not be universally recognized. The purpose of the grading of this Subsection is to recognize the criminality of this conduct imposed by correctional facilities, while at the same time recognizing that it falls outside of the bounds of universally recognized contraband and thus deserves a lesser punishment.

Subsection (c)(2) provides an aggravation to the grading if a correctional employee commits the offense. This act is more egregious because it undermines the legitimacy of an official duty, and thus the offense is one grade higher than it otherwise would be.

Relation to current Maldivian Law. Section 539 is similar to Provision 88(24) of the Maldives Penal Code, which makes it a crime for a convict to bring contraband into the jail. However, this Section expands upon Provision 88(24) by including persons who not only bring contraband into a jail, but also those who bring contraband close enough to a jail so that a criminal may have access to it. This expansion is a logical outgrowth of the existing provision in that it stems from the same interest in preventing criminals from obtaining certain objects.

SECTION 540 – INTIMIDATING, IMPROPERLY INFLUENCING, OR RETALIATING AGAINST A PUBLIC OFFICIAL, WITNESS, OR VOTER

Corresponding Current Provision(s): Maldives Penal Code, Provision 121 and 122; Law on General Elections, Provision 26 (Law No: 5/81 AH)

Comment:

Generally. This offense criminalizes performing certain conduct that harmfully interferes with a witness, voter or other person performing a public duty.

Subsection (a) defines the offense in two parts. The first part, Subsection (a)(1), defines the intent required of an actor to satisfy culpability under this Section. The second part, Subsection (a)(2), defines the act requirement of this Section. In order to be guilty of an offense

under Section 540, an individual must satisfy both the intent required in Subsection (a)(1) and the conduct required in Subsection (a)(2).

Subsection (a)(1) defines the offense in terms of the offender's intention and is divided into two parts.

Subsection (a)(1)(A) requires the intent to deter a party or witness from testifying freely, fully or truthfully in any legal proceeding. Any conduct that violates Subsection (a)(1) and that affects a party's or witness' testimony will trigger liability.

Subsection (a)(1)(B) requires the intent to annoy, harass, intimidate, or victimize a witness, voter, or other person because of that person's past, present, or potential future testimony, vote or other act or omission related to performance of duties. Annoyance is defined as non-consensual conversation. For example, if A is talking to a former witness about her experience, A cannot commit an offense if the witness is willing to discuss a topic. However, A would be guilty of an offense if the witness expressly denies consent by stating that she does not want to talk about a topic and A persists in conversing with her on the matter.

Subsection (a)(2) defines the offense in terms of the offender's conduct. Three different sub-parts are provided in order to differentiate the severity of conduct.

Subsection (a)(2)(A) requires that an offender commit, or threaten to commit, any offense likely to cause serious bodily injury, unlawful confinement or restraint, or substantial property damage to another. Such offenses include those codified in Sections 120(c)(1), 140 and 220(d)(4).

Subsection (a)(2)(B) requires that an offender commit or threaten any other offense.

Subsection (a)(2)(C) requires that an offender offers or gives a benefit not authorized by law.

Subsection (a)(2)(D) requires that the offender communicates, directly or indirectly, with a witness, voter, or other person in a manner prohibited by law. For example, if someone were to circumvent court rules by talking to a witness outside of the courtroom, he would be guilty of an offense under this Subsection.

Subsection (b) grades the offense in three subparts, with the grade varying depending upon the severity of the conduct committed, as defined in Subsection (a)(2). It is important to recognize the interest society has in protecting public servants, witnesses, and voters from harm, threat of harm or fear of offensive conduct. Harm or fear could compromise the decision-making of any of these positions, and hurt the interest society has in these positions being freely exercised.

Subsection (b)(1) grades the offense committed in Subsection (a)(2)(A) as a Class D felony. This conduct is the most serious, involving serious damage or harm, and thus is graded higher.

Subsection (b)(2) grades an offense committed in Subsection (a)(2)(B) and (a)(2)(C) as Class E felonies. The threat or commission of criminally offensive conduct justifies the felonious classification of this offense.

Subsection (b)(3) grades all other offenses committed under this Section as Class 1 misdemeanors. This is still a significant offense, but lacks the severity of threatening behavior and thus justifies a lesser sentence.

Relation to current Maldivian Law. This Section expands the offense found in Maldives Penal Code Provision 121, which prohibits the intimidation of voters; and Provision 26(a) of the Law on General Elections, which provides that it is an offense to obstruct or hinder a person from voting. The expansion of these laws is essential because the only way to protect the

legitimacy of a criminal justice system is to prevent the use of improper influence on a witness or public servant. If such actions were allowed, they would completely undermine the justice system.

In addition, honest and reliable testimony is considered crucial to the administration of justice under Islamic law.²¹³ This principle can, consistent with general Islamic legal principles, be extended to all persons associated with court proceedings. Islamic law supports Subsection (a)(1)(A) by prohibiting influence on the performance of judicial duties.²¹⁴ Islamic law also supports Subsection (a)(1)(B) under rules prohibiting aiding a false testimony.²¹⁵ Islamic legal support for Subsection (a)(1)(C) and Subsection (a)(2) is found in the commentary to Section 55 and 141.

SECTION 541 – FAILURE TO APPEAR

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings Provision 20, 24, 116 and 207

Comment:

Generally. This offense applies to a defendant who has been released from custody and later fails to appear in court on the appointed date or violates a condition of his release.

Subsection (a)(1) defines this offense for an individual who has been admitted to bail for appearance before a court or released on personal recognizance in two instances. Subsection (a)(1)(A) criminalizes the failure to appear on a date directed. Subsection (a)(1)(B) criminalizes the violation of a condition of release. Note that only judges have the authority to set court dates or impose conditions of release. Subsection (a)(2) further ensures compliance with court orders and promotes the unobstructed administration of justice by requiring defendants and witness to appear and produce documents as ordered by the court.

Subsection (b) grades the offense on a sliding scale to be one grade lower than that of the underlying offense. A cap is placed preventing this offense from being higher than a Class 1 misdemeanor. While this conduct is considered blameworthy, it is not so egregious as to be considered more serious than the underlying offense or, regardless of the underlying offense, felonious.

Relation to current Maldivian Law. Subsection (a)(1)(A) punishes roughly the same conduct as Provisions 20, 24 and 116 of the Rules Relating to the Conduct of Judicial Proceedings. Subsection (a)(1)(B) punishes conduct not specifically punished under current Maldivian law, but it closely resembles Subsection (a)(1)(A), and is a natural outgrowth of the prohibition on conduct found in the Rules Relating to the Conduct of Judicial Proceedings.

This Section does not punish the conduct currently punished by Rules Relating to the Conduct of Judicial Proceedings Provision 207 or address the case of a defendant who refuses to remain in court to hear its judgment.

²¹³ Ma'amoun M. Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 117-118 (M. Cherif Bassiouni, ed. 1982).

²¹⁴ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 988 (Nuh Ha Mim Keller trans., Amana Publications 1994).

²¹⁵ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 988 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“Aiding and abetting someone making a false claim in court.”).

Under Islamic law procedures for prosecution are considered to be within the “delegated powers” of the State.²¹⁶

SECTION 542 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 530 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between the terms defined in Chapter 530 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

²¹⁶ Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 103 (M. Cherif Bassiouni, ed. 1982) (“sacred law prescribes penalties for criminal acts, it does not specify means used to apprehend the offender and bring him to justice.”).

OFFENSES AGAINST PUBLIC ORDER, SAFETY, AND DECENCY

CHAPTER 610 – PUBLIC ORDER & SAFETY OFFENSES

This Chapter defines offenses which are damaging to public order and safety. The underlying assumption is that the government should play a role in suppressing activities which threaten the safety and general well-being of the general public. Thus, Prostitution, Promoting Prostitution, Obscenity, Abuse of Corpse, and Sale of Human Body Parts are all offenses defined in Chapter 620, governing Public Indecency.

There are also some offenses which may have secondary effects on public safety that are contained in other Chapters of this draft Code. Quarantine, Hazardous Food, Drink, Drug, or Medical Substance offenses are found in Section 121, governing Reckless Endangerment. Importing Weapons is found in Chapter 710, governing Weapons Offenses. Intoxication is found in Chapter 720, governing Drug Offenses. Pedestrian Traffic is addressed by obstruction of government officers, in Section 532 and 533, governing the obstruction of a law enforcement officer and administration of law, respectively.

This Chapter does not criminalize apostasy, or the abandonment of one's religious faith, for several reasons. First, because apostasy is not criminal under current Maldivian law, prevailing Maldivian norms do not appear to require its punishment. Second, there exists disagreement among Muslim jurists as to whether apostasy is a *Hadd* offense.²¹⁷ Third, international resolutions define freedom of religion as including freedom to change one's religion or belief.²¹⁸ Relatedly, this Chapter offers a precise definition for the crime of criticizing Islam for two reasons. First, Muslim jurists generally support free debate within Islamic society.²¹⁹ Second, the social sanction for making comments which disparage Islam should provide sufficient deterrence and reprimand.

SECTION 610 – RIOTING; FORCEFUL OVERTHROW OF THE GOVERNMENT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 29, 46, 48, 49, 50, 51, and 56; Law Relating To The Protection Of Religious Unity Among Maldivian Citizens

Comment:

Generally. This Section defines what constitutes rioting or the forceful overthrow of the government. Subsection (a) defines the offense broadly as any incitement, aiding, or engaging in rioting or the violent overthrow of the government. Subsection (b) exempts peaceful assembly from this offense.

Subsection (c) introduces a grading scale to account for the various levels of seriousness this offense may entail. Thus, it is a more serious offense to organize a riot or scheme to

²¹⁷ JAVED AHMAD GHAMIDI, MIZAN ("Balance") 282 (Dar ul-Ishraq, 2001) ("The verdict (of apostacy)...does not have a general application but is only confined to the people toward whom the Prophet (sws) was directly assigned.").

²¹⁸ Chapter 18 of the United Nations Declaration of Human Rights.

²¹⁹ MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM (Islamic Texts Society, 1997); *See also*, Maulana Wahidudeen Khan, *Freedom of Expression in Islam*, AL-RISALA MONTHLY (Al-Risala Forum International) (<http://www.alrisala.org/Chapters/islam/expression.htm>).

overthrow the government than it is to participate in the same. Likewise, it is a more serious offense to engage in any way in the forceful overthrow of the government than to engage rioting. An example of violent overthrow of the government would be an assembly of armed people storming the parliament with intent to overthrow the government. An example of a riot would be an assembly of people looting businesses, stores, and government offices.

Note that a defendant cannot be charged under both Section 611 and Section 612 because recruitment of mercenaries is a lesser offense and is included in the definition of violent overthrow of the government.

Relation to current Maldivian law. This Section follows several Provisions of the current Maldives Penal Code, namely Provisions 29, 37 and 38 (acts against the State), 46 and 48 (unlawful assembly), 49 (armed unlawful assembly), 50 (use of force or violence), 51 (use of deadly weapon), and 56 (encouraging unlawful assembly).

Some behavior criminalized by the above listed laws is omitted from this Section. First, riots or attempts at violent overthrow that are accompanied by the looting of private or public facilities, behavior addressed by Maldives Penal Code, Provision 59, is addressed in this draft Code by charging the perpetrator with both Rioting and Theft. Second, assembling to commit an offense, addressed by current Maldives Penal Code Provision 46, is addressed in this draft Code by Section 82, governing Conspiracy. Third, there is no specific aggravating factor for carrying arms or using force or violence because defining the offense as the “forceful overthrow” of the government includes any sort of use of violence to achieve revolutionary ends, including the use of weapons (replacing Maldives Penal Code, Provision 49).

In addition, in order to streamline the offense defined by this Section, there is no aggravation for continuing to attend a riot or attempt at violent overthrow after it has been commanded to disperse (Maldives Criminal Code, Provision 53). This has been omitted because of the evidentiary problems entailed in proving such an aggravating factor. Also, while Provision 55 of Maldives Criminal Code Provision makes it illegal to fail to report a riot or violent overthrow, this draft Code does not criminalize such a failure to act. This is because this draft Code does not generally criminalize the failure to act where the defendant does not already possess a duty to do so. Finally, benefiting from an attempted overthrow or riot, addressed by Maldives Criminal Code, Provision 57, is not included in the offense definition because Section 82 of this draft Code, governing conspiracy, addresses situations where several people conspire to commit an offense.

Islamic law discourages change in government by extra-constitutional means.²²⁰ Further support for this Section can be found in the commentary to Chapter 730.

SECTION 611 – RECRUITMENT OF MERCENARIES

Corresponding Current Provision(s): None

Comment:

Generally. This Section defines what constitutes the recruitment of mercenaries. Subsection (a) defines the offense as any recruiting, financing, or training of mercenaries.

²²⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 594 (Nuh Ha Mim Keller trans., Amana Publications 1994)(“It is unlawful to revolt against caliphs and fight them, even if they are corrupt.”).

Subsection (b) provides a comprehensive definition of mercenary. Note that a defendant cannot be charged under both Section 611 and Section 612 because recruitment of mercenaries is a lesser offense and is included in the definition of violent overthrow of the government.

Relation to current Maldivian law. While no provision of current Maldivian law directly addresses the recruitment of mercenaries, several provisions provide support for this Section. First, Maldives Penal Code Provisions 29 and 37 prohibit action against the State. Second, Provision 37 criminalizes acts committed against the Maldives whether those acts were done within the Maldives or outside of the Maldives. Maldivian norms therefore support this prohibition.

Moreover, there are strong public policy argument in favor of including this Section. First, the recruitment, use, financing and training of mercenaries violates principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples.²²¹ In addition, studies show that collaboration between drug traffickers and mercenaries undermine the constitutional order of States.²²²

SECTION 612 – FALSE ACCUSATION OF UNLAWFUL SEXUAL INTERCOURSE

Corresponding Current Provision(s): Maldives Penal Code, Provisions 75, 150 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165 and 166; Rules Relating to the Conduct of Judicial Proceedings, Provision 257

Comment:

Generally. Section 613 criminalizes false accusations of unlawful sexual intercourse. This Section defines such an accusation as the making or repeating of a false statement, representing it to be true and the statement makes an accusation of unlawful sexual intercourse as defined in Section 411 of this draft Code. Please refer to the commentary for Section 410 for discussion of what constitutes unlawful sexual intercourse.

The culpability requirement for this offense is “knowingly” because criminal liability for false accusations should be imposed only for a clearly intended harm. Liability for this offense is limited to false statements. Liability for statements that are true and yet still defamatory is better addressed in the civil system. Please refer to the commentary for Section 13, which expressly provides that this Code does not affect civil suits and judgments.

Subsection (b) grades the offense as a Class D felony in recognition of the harm that such false accusations cause to society.

Relation to current Maldivian Law. This Section follows the language in the Maldives Penal Code, Provisions 150 and 152, Subsection (a)(2), which address the wrongful accusation of unlawful sexual intercourse. This Section also corresponds to the Islamic offense of *Qazf*, found in Rules Relating to the Conduct of Judicial Proceedings, Provision 257.

This Section departs from the greater scope of Provisions 150 through 166 of the current Maldives Penal Code because of a new civil law proposing civil liability for defamation. Allowing individuals to pursue compensation for defamation through civil law adequately

²²¹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989.

²²² International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989.

addresses the social harms caused by the crime. In addition, abolishing the crime of defamation will result in greater consistency within the draft Code in that all offenders will have to pay fines, whereas allowing for both criminal prosecution and civil claims will result in some offenders receiving punishment, some offenders receiving fines, and some receiving both. Moreover, a civil remedy places fewer limits on free speech, which is also of societal interest.

There is general support for this Section in Islamic law. Defamation in the context of false accusations relating to fornication is severely punished in Islamic law.²²³ Moreover, Islamic law encompasses a wide range of actions and speech which constitute defamation. Thus, the broad nature of this Section is encompassed within Islamic law.²²⁴

SECTION 613 – OPERATING A REGULATED BUSINESS OR IMPORTING WITHOUT LICENSE

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(21)

Comment:

Generally. An offense is committed under Subsection (a) when a person operates a business regulated by law without a license or permission from the relevant authorities. It is also an offense to import regulated items without a license or permission from the relevant authorities. Regulated items include firearms, catastrophic agents, controlled drugs, and alcohol. This offense may also apply to other items which are outlawed or restricted by regulatory laws.

Subsection (b) grades the offense at a Class E felony if the imports or sells a firearm, catastrophic agent, or controlled drug. The offense is a Class 1 misdemeanor if the person imports or sells alcohol without a license. Otherwise the offense is a Class 2 misdemeanor.

Relation to current Maldivian law. This section parallels Maldives Penal Code Provision 88(21). However, Section 617 expands the definition of the offense past operating as a tour guide without a license and prohibits the operation of any regulated business without permission from the relevant authorities. There is a strong public policy argument in favor of expanding liability in this manner. It is in society's interests that businesses are operated in a safe and responsible manner so that public health is not put at risk. Public safety concerns also merit that persons involved in importing items, particularly weapons and alcohol, do so in a safe and responsible manner. The issuance of licenses insures that those that are involved in these activities abide by the appropriate regulations. Therefore, criminalizing operating a business and importing without a license deters individuals from undertaking such activities without also abiding by appropriate regulations.

SECTION 614 – ENTERING THE EXCLUSIVE ECONOMIC ZONE

Current Corresponding Provision(s): Maldives Penal Code, Provision 88(37)

Comment:

²²³ Aly Aly Mansour, *Hudud Crimes*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 199 (M. Cherif Bassiouni, ed. 1982).

²²⁴ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 584-585 (Nuh Ha Mim Keller trans., Amanat Publications 1994)(Including slander by “allusion and innuendo” and “in published works”).

Generally. This Section criminalizes entering into the exclusive economic zone of the Maldives without permission, and aggravates the offense (making it a Class 1 instead of a Class 2 Misdemeanor) if the person commits the offense with the purpose of fishing illegally. The exclusive economic zone, as defined by the United Nations Convention on the Law of the Sea, extends 200 miles from the coast of the Maldives and is subject to the legal laws and policies of the Maldives for the purposes of economic exploitation and regulation.

Relation to current Maldivian law. This Section parallels Provision 88(37) of the Maldives Penal Code. In addition, this Section finds support in International resolutions.²²⁵

SECTION 615 – DISORDERLY CONDUCT

Corresponding Current Provision(s): Maldives Penal Code, Provisions 29, 58, 60, 88(28), 88(38), and 88(39)

Comment:

Generally. This Section defines what constitutes disorderly conduct. Subsection (a) includes fighting and other violent behavior; unreasonable noise; obscene language and gestures; soliciting sexual contact; persistently following a person; or creating a hazardous or alarming condition for no legitimate purpose. The goal of the statute is the prevention of harassment or annoyance of others. Because this section is intended to protect the sensibilities of the general public and not those of a law enforcement officer, a private person must initiate the complaint. Subsection (b) grades the offense as a Class 3 misdemeanor.

Relation to current Maldivian law. This Section encompasses several Provisions of the current Maldives Penal Code, namely Provisions 29 (acts against the State), 58 (where two or more persons engage in a fight so as to disturb the public peace), 60 (nuisance to neighbors or persons nearby in a public place), 88(28) (harassing women), 88(38) (disturbing neighbors), 88(39) (using vulgar language) and The Law on Walking on Streets..

In addition, Islamic law generally supports this Section.²²⁶ Specifically, Subsection (a)(1) is supported by Muslim jurists who consider striking another a form of unlawful behavior.²²⁷ Islamic legal support for Subsection (a)(3) is discussed in the commentary to Section 623 and Subsection (a)(e) in the commentary for Section 620.

SECTION 616 – FAILING TO FAST DURING RAMADAN; CONSUMING PORK OR ALCOHOL

Current Corresponding Provision(s): Maldives Penal Code, Provision 88(20)

Comment:

Generally. This Section criminalizes failing to fast during Ramadan and consuming pork or alcohol for those who are Muslim. Those who give up fasting because of medical or health-related reasons are exempted from liability. Section 616(a)(2) also punishes non-Muslims who

²²⁵ United Nations Convention on the Law of the Sea.

²²⁶ JAVED AHMAD GHAMIDI, *The Penal Law of Islam*, RENAISSANCE, Sept. 2002.

²²⁷ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 667 (Nuh Ha Mim Keller trans., Amana Publications 1994).

publicly consume alcohol or pork away from areas licensed to sell the restricted materials. An additional punishment of 40 lashes is authorized for consuming alcohol. Note that Section 411(d) provides a precise definition of “lashes” in order to ensure that the enactment of this punishment falls within the bounds of common notions of decency.

Relation to current Maldivian law. The portion of this Section which criminalizes failing to fast parallels Provision 88(20) of the current Maldives Penal Code.

In addition, there is general support in Islamic law for this Section. Muslim jurists agree that it is unlawful to omit to fast if one has (a) reached the age of majority and (b) is otherwise able to fast during the month of Ramadan.²²⁸

There is also consensus on the fact that alcohol and pork are both prohibited for Muslims under Islamic law. Al-Misri forbids consumption, in large or small quantities, of “any beverage that intoxicates when taken in large quantities.”²²⁹ Ibn Rushd also notes the unanimous opinion of Muslim scholars that “swine-flesh” is prohibited.²³⁰

SECTION 617 – CRITICIZING ISLAM

Corresponding Current Provision(s): Law No. 4/75- Law on Items That Are Prohibited to be Brought into Maldives, Provision 4(i); Law Relating To The Protection Of Religious Unity Among Maldivian Citizens

Comment:

Generally. The purpose of this Section is to criminalize public religious oratory and/or the distribution of materials that are specifically intended to criticize the fundamentals of Islam. Taken together, this Section makes clear that only acts specifically designed to undermine the central place of Islam in Maldivian life, and thus likely to create significant public disturbance, are criminalized under this Section. For example, the distribution of materials decrying Islam as evil in front of a mosque as worshippers enter for services would constitute an offense. However, handing a friend a pamphlet about the health benefits of eating pork would not constitute an offense.

Subsection 617(a)(1) and 617(a)(2) specify the behavior that may trigger liability for this Section. Subsection (a)(1) addresses religious oration that is performed in public or in a public medium. Thus both a speech performed in a public square and a speech videotaped and distributed would trigger liability under this Subsection. The public or in a public medium requirement are included because only public criticism of the fundamentals of Islam are harmful to society. In addition, this offense is not intended to criminalize or discourage private conversations or discussions of Islam. This offense is also not intended to criminalize the ordinary practice of other religions, whether by Maldivians or non-Maldivians, so long as their religious practice does not constitute an offense under Subsections (a)(1) or (a)(2).

Subsection 616(a)(2) addresses the production, sale, or distribution of materials.

²²⁸ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER I, at 331 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

²²⁹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 617 (Nuh Ha Mim Keller trans., Amana Publications 1994).

²³⁰ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER I, at 566 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Subsection (a) also requires that the conduct in Subsections (a)(1) or (a)(2) criticize the fundamentals of Islam as set out in the Maldivian Constitution. This requirement limits liability to only that speech or those materials that insults the basic tenets of Islam, enumerated in the Constitution as the oneness of God, acceptance of Muhammad as His prophet, prayer, fasting, pilgrimage, and charity. In cases where the criticism of Islam is minimal, most likely the defendant will not have satisfied this element of the offense.

Subsection 617(b) exempts those who engage in speech or distribute materials on behalf of the government or a scholarly institution or do so for the purposes of scientific or religious study. For example, someone speaking about the health benefits of drinking red wine would be exempt from liability under this Subsection. Likewise, a professor writing on the history of Islam would also be exempted even if his research uncovered unflattering aspects of Islam's history.

Subsection 617(c) grades the offense as a violation.

Relation to current Maldivian law. This Section parallels the Law Relating To The Protection Of Religious Unity Among Maldivian Citizens as well as Provision 4(i) of Law No. 4/75, which prohibits the production, use, sale, offer, giving, or spreading of anti-Islamic materials. Materials included under this prohibition are diskettes, magazines, newspapers, tapes, drawings, and books. Current law also prohibits the distribution or sale of statues used for worship and prohibits the distribution or sale of pigs.

SECTION 618 – DUTY TO AID

Corresponding Current Provision(s): Act No. 6/68j, Section 3.

Comment:

Generally. The purpose of this statute is to require a person to take reasonable measures to prevent harm to others or to aid those who have suffered harm. The reason for creating this offense is that, often times, the effort required to avoid harm is so minimal, and the harm brought to the person in need so great, that failure to take that effort is inconsistent with normal human concern for another person's well being. In most circumstances, alerting the authorities should satisfy ordinary requirements to act.

Example 1: Working in late in the evening, A hears a cry, then sees B slump over at his desk, apparently unconscious. A is the only other person in the building. A leaves the building without investigating B's condition further, calling for help or attempting to aid B. A should be subject to criminal responsibility for failing to aid B.

Example 2: C, operating a small vessel, sees a larger vessel capsize in heavy seas. C fears to approach the capsized ship in the storm and cannot carry any passengers in his vessel. C radios the national coast guard, informing them of the location and condition of the vessel. C has, by radioing the coast guard, discharged his duty to aid and should not be subject to punishment under this section.

The intent of the section is not to impose heavy requirements on members of the general population. For this reason, the statute permits a person to avoid rendering assistance where doing so would be dangerous or would interfere with his duties. A superior duty should be any duty which a reasonable person might consider to supersede the duty aid; consideration of the extent of the emergency and the likelihood that others might come to the rescue should be taken into consideration. However, a court should not ignore the possibility that a person might be capable of fulfilling both his prior duties and his duty to aid. Any risk of more than minimal danger will allow a person to avoid liability. Exempting a person from civil liability will also encourage would-be rescuers to respond. The phrase “not in a manner inconsistent with any professional duties of care or standards of competence” means that responders such as physicians and other health professionals, especially those who respond as part of their occupations, should not be exempted from ordinary standards of care.

Example 3: D watches as E rides his motorbike down the street far too fast. E strikes an obstacle and flies over the handlebars of his motorbike, striking face first on the pavement. F, a physician, comes around the corner. Both D and F rush to E’s assistance. E has facial fractures and has lost several teeth, with abrasions all over his body. F encourages D to assist him in carrying E to the hospital, rather than waiting for help. In the course of lifting E to his feet, D and F cause E’s head to shift, causing a loud crack. E’s spinal cord is now severed and he will be paralyzed for the rest of his life. D, as a layperson, is immune from civil damages brought by E, but E may seek damages from F, since F is a physician and should have known not to move E without stabilizing his head and spine. Neither person would be subject to criminal charges, since both have attempted to aid E, even though they accidentally harmed him further.

The person in need may be a person currently suffering harm or a person in danger of harm. Regardless, if the person can perceive the harm and perceive that they can render aid or give a warning, a person should take that minimal effort. Any person apparently in need of aid or a warning should be assisted.

The purpose of the rebuttable presumption here is to emphasize that reporting any emergency to the appropriate authority should be the bare minimum of required behavior because alerting authorities is so simple and so likely to bring aid to the affected person. Nevertheless, the trier of fact should not ignore arguments as to whether informing emergency services would have been feasible or helpful to the person in need.

Example 4: A small village on a remote island is raided by a gang of criminals. G is in a small house set far back from the village. G has a radio with which he could call the coast guard in his boat which is on the shore. However, G would have to travel through the village and past the gang of criminals to reach it. G remains in his house until the criminals leave. G should not be subject to the rebuttable presumption or to liability under this section, since his radio was not within his access at the time of the raid.

Example 5: On a remote island, H begins to choke on a piece of food. J, his wife, observes him choking. There is a telephone in the house. H asphyxiates and dies.

J does not call the authorities. If the government brought charge against J, the government could invoke the rebuttable presumption, as she did not call the authorities. However, J could successfully rebut the presumption, arguing that, because of the great distance to the island and the speed with which H died, J did not unreasonably fail to render aid because no effective assistance could have been made. J should not be held liable.

Relation to Current Maldivian Law. This statute has largely adopted the standard of Act No. 6/68j, Section 3.

SECTION 619 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 610 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between the terms defined in Chapter 610 and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

CHAPTER 620 – PUBLIC INDECENCY OFFENSES

The purpose of this Chapter is to establish rules governing certain aspects of public indecency not captured by other Chapters, including prostitution, the distribution of obscene material, abuse of corpse, sale of human body parts, and cruelty to animals.

SECTION 620 – PROSTITUTION

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(25)

Comment:

Generally. Section 620(1) prohibits providing sexual contact or sexual intercourse in exchange for anything of monetary value. This Section, in combination with Section 621, below, criminalizes all acts of prostitution, whether they end in sexual intercourse or just sexual contact, consistent with the criminalization of sexual contact outside of marriage in Section 412. This Section punishes the act, rather than the offer, of prostitution and thus, mere solicitation is not enough to warrant punishment. The harm to society and the individual comes from the act itself. The term “anything of value” expands the definition of prostitution beyond a simple definition of sex in exchange for money to ensure that all exchanges involving sexual contact and some form of payment incur liability. Because this Section seeks to punish the underlying transaction for sexual contact, the form of payment should be irrelevant. Therefore, under this Section, a prostitute would still be liable if he were found to have received food or any other tangible goods in exchange for sexual intercourse. The Section specifically excludes spouses from liability, out of a desire to shield the marital relationship. Thus, a wife who agrees to have sexual intercourse with her husband if he buys food for dinner would not be held liable under this Section.

The required culpability is recklessness as read in through Section 24(8). Thus, if a person ignores a substantial risk that he will receive payment for his sexual acts, he has committed the offense described in this Section. For a more detailed description of the requirements for recklessness, see Section 24 (Culpability Requirements).

It is important to note that the language of the text refers to one exchange or encounter, not individual acts of sexual intercourse or sexual contact. Within a single encounter, a person might commit many different acts of sexual intercourse and sexual contact. Only where multiple, distinct encounters are solicited should multiple prostitution offenses be prosecuted. This is similar to charging a man who steals twenty loaves of bread with one theft offense rather than twenty; to do otherwise would be unduly harsh. Moreover, the prostitution offense does not overlap with the unlawful sexual intercourse offenses outlined in Chapter 410 (Offenses Against the Family). Charges may be brought both for Prostitution and Unlawful Sexual Intercourse. The reason for this is that the act is composed of two separate and distinct harms, that of engaging in an unlawful business, and that of promoting social disorder by engaging in sexual contact outside of a marital relationship.

This draft Code does not have a separate offense for patronizing a prostitute because a person who offers to or does pay someone, who is not his spouse, for sexual intercourse or sexual contact is liable for solicitation under Section 81 of this Code.

Relation to current Maldivian law. Section 620 is in line with Provision 88(26) of current Maldivian law, which prohibits prostitution generally. However, there are a few

differences between this draft Section and current law. First, the draft Code divides the offense into two sections in order to introduce separate offense definitions for prostitutes and those who hire prostitutes. This reflects the idea that both parties are guilty of engaging in criminal behavior. Note that the business of prostitution would be prosecuted under Section 621 rather than under this Section.

Second, the draft Code narrowly defines prostitution as when a person, in exchange with anything of value, has “sexual intercourse” or “sexual contact” with someone other than their spouse while current Maldivian law does not delineate what actions constitute prostitution. However, this is in line with Islamic law, which traditionally has considered prostitution to be a type of adultery or fornication.²³¹ Hence, the draft Code defines the act of prostitution in relation to unlawful sexual contact and intercourse.

This Section is generally supported by Islamic law, which prohibits prostitution under rulings proscribing certain types of marriage.²³² This Section is also in accord with international resolutions on the exploitation and prostitution of women.²³³

SECTION 621 – PROMOTING OR SUPPORTING PROSTITUTION

Corresponding Current Provision(s): None

Comment:

Generally. Section 621 creates criminal liability for those persons who, in exchange for anything of value, promote or support an act or acts of prostitution. This Section refers to persons commonly known as pimps or madams, and proprietors of brothels.

Section 621(a)(1) prohibits a person from compelling, or forcing, a person to engage in an act or acts of prostitution and ensures that a person who forces another to engage in an act or acts of prostitution will face criminal liability along with the prostitute. For example, if a woman owes her landlord money, and he tells her that unless she engages in prostitution he will evict her, he is guilty of compelling her to engage in prostitution. Guilt particularly applies if he pockets the proceeds from the prostitution. The reason for this Section is that the person who arranges or facilitates prostitution commits a greater harm and manifests greater culpability than the prostitute herself. A prostitute generally sells sexual favors out of need; further, the prostitute works at a risk to her own health and safety. Promoters or facilitators of prostitution take none of the risks nor endure any of the trials of prostitutes and often garner greater benefit from the operation. The promoter or facilitator usually runs a far lower risk of arrest than a prostitute, so a greater punishment is necessary to obtain effective deterrence.

This Section stipulates that those who promote or support an act *or* acts of prostitution have committed an offense in order to assign liability for both those who promote prostitution once in their lives and those who make a career out of it. Section 1104 (Aggravations and Mitigations for Prior Criminal History) allows a court to distinguish between repeat offenders

²³¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 986 (Nuh Ha Mim Keller trans., Amana Publications 1994)

²³² YUSUF AL-QARADAWI, AL-HALAL WAL-HARAM FI'L ISLAM (“The Lawful and Prohibited in Islam”)(American Trust Publications).

²³³ Convention on the Elimination of Discrimination Against Women (CEDAW).

who make a habit of promoting prostitution and those who engage in the behavior either occasionally or only once.

The kind of promotion or support of prostitution condemned by this Section should be understood, then, as any activity by a third party that facilitates the meeting of a prostitute and a customer. A person may “compel” acts of prostitution by any threat of substantial harm of any kind, whether financial, physical, emotional, etc.

Note that Section 621(1)(a) may overlap substantially with Section 141 (Coercion). Should the threats of compulsion amount to serious threats of physical harm or other consent-compromising threats, prosecution for Sexual Assault may be appropriate under Section 130. Section 130 may also be applicable where the prostitutes are children. Under Section 94 (Prosecution for Multiple Offenses), a person should be charged with one offense related to the compulsion of sexual intercourse.

Section 621(a)(2) prohibits a person from arranging a customer or client in order for a person to commit prostitution. This ensures that a person who essentially sets up a situation in which a person will commit an act of prostitution is criminally liable. Arranging an act or acts of prostitution might consist of any scheduling of acts of prostitution, soliciting customers or potential prostitutes for acts, or arranging meetings between a known prostitute and a customer. Voluntary compliance of the prostitutes is not a defense under this Section. Because the statute is aimed in part at protecting prostitutes from exploitation, a prostitute should not be prosecuted under this Section for arranging her own meetings with clients.

Section 621(a)(3) prohibits a person from permitting use of a home or another place that he owns be used for prostitution. This provision creates liability for running a brothel or permitting prostitution to be done in one’s own home. The culpability required for guilt under this Subsection is recklessness as to whether the property is being used for prostitution, which means that the defendant must have ignored a known and substantial risk that his property was used for such a purpose. For example, a hotel manager would be culpable under this Subsection if he tolerated a tenant or regular hotel guest who frequently brings in multiple strange male guests and supports herself without employment or other obvious means of support. As explained above, a prostitute should not be prosecuted under this Section for hosting acts of prostitution within her home or other place, provided that she is the only prostitute working out of that home.

The following example illustrates liability under this Section:

Example 1: A has a daughter, B. C, a friend of A, approaches a man and offers him sex with B in exchange for MVR 5000. The man agrees and C takes him to the house of his partner, D, who has agreed to allow them to use his home. A brings B to D’s house against her will and demands that B have sex with the man or else be beaten. She does, and the man pays A, C, and D the agreed fee. A is liable under Subsection (a)(1) for compelling his daughter to engage in prostitution. C is liable under Subsection (a)(2) for arranging a customer. D is liable under Subsection (a)(3) for permitting the use of his home for prostitution.

The following example illustrates a person that would not be liable under this Section:

Example 2: E approaches F and asks where he might procure a prostitute. F responds and says that a brothel is located at a particular address. E proceeds to that address and commits the offense of soliciting a prostitute. F is not liable since he did not compel E to commit a prostitution offense, he did not arrange a prostitute for E (merely told him where E could arrange one himself), and he did not provide a place under his control for prostitution.

Section 621(b)(1) provides for a Class C felony where the offender is supporting prostitution of a person less than 16 years old. Otherwise, in accordance with Section 621(2)(b), the offense is a Class D felony. Section 621 is graded higher than the provisions prohibiting prostitution under the theory that by forcing or encouraging acts of prostitution, and benefiting from those acts without incurring the same risk as the prostitute, the person is exhibiting a higher level of culpability than is the prostitute and therefore deserves a more serious penalty.

Relation to current Maldivian law. Though there is no directly corresponding provision in current Maldivian law, this Section is a natural expansion of Provision 88(26) of current Maldivian law, which prohibits prostitution generally. It is also consistent with prevailing Maldivian norms. This Section is included to ensure that women are not subject to human trafficking and exploited by those seeking to exchange them for payment or housing.

This Section is also in line with Islamic law, which prohibits the sale of sexual favors because it promotes unlawful behavior.²³⁴ Many jurists consider prostitution to carry a penalty for prostitutes even when the sexual act is not committed because it is “disruptive to society” (*fasad fi'l ard*).²³⁵

Furthermore, this Section is designed to protect women and comply with international resolutions against the exploitation of women.²³⁶

SECTION 622 – PRODUCING OR DISTRIBUTING OBSCENE MATERIAL

Corresponding Current Provision(s): Maldives Penal Code, Provision 88(29)

Comment:

Generally. This provision prohibits the production, distribution, or viewing of material with an obscene content or nature. The culpability requirement as to the nature of the material is knowledge, thus a person that is unaware that the material is probably obscene has not committed an offense under this Section. The prosecution must prove that the defendant knew of the obscene nature of the materials in question. This means that the defendant must have had actual knowledge that the materials appeal to the prurient interests and depicts sexual acts in an offensive way. For example, a person that provides a general service by reproducing videotapes, but himself never learns the contents of the tapes he copies, has not committed this offense unless he has some reason to be aware that the tapes are probably obscene. To be liable, it is not necessary that the defendant know that such materials were illegal to produce or distribute, etc. However, he must know the nature of the items. A bookseller would be liable, then, if he

²³⁴ AHMAD IBN NAQIB AL-MISRI, *RELiance OF THE TRAVELER* 390-91 (Nuh Ha Mim Keller trans., Amana Publications 1994).

²³⁵ JAVED AHMAD GHAMIDI, *BURHAN* 81-90 (Dar ul-Ishraq, 2001).

²³⁶ Convention on the Elimination of Discrimination Against Women (CEDAW).

displayed a book for sale knowing that its contents were obscene even if he did not know that it was illegal to sell such materials. .

Under Section 622(a)(1), a person is prohibited from selling, delivering, or providing any obscene material. A person can be found guilty under this Section even where the person does not profit financially from the transaction. Note that the number of materials one sells, delivers, or provides is irrelevant for the purposes of liability. Thus the shop owner who sells one obscene magazine and the individual who gives out obscene pamphlets from his home are both guilty of an offense under this Subsection.

Under Section 622(a)(2), a person is prohibited from presenting an obscene performance. This provision ensures that the responsible parties for any public performance of obscene material can be prosecuted and not just the performers themselves.

Section 622(a)(3) prohibits a person from publishing or making available anything obscene to the public. This Section works in conjunction with 622(a)(1) to ensure that no form of distribution, whether for profit or not, is permitted. Section 622(a)(4) prohibits a person from exhibiting his own body in an obscene manner or committing obscene acts in public. This offense recognizes that such displays cause substantial public disturbances.

Section 622(a)(5) prohibits a person from advertising the availability of obscene material. Section 622(a)(6) prohibits the creating, obtaining, or possessing of obscene materials for a purpose criminalized by this Section. The requirements for possession liability are further outlined in Section 23 (Requirement of an Act; Possession Liability; Omission Liability). Section 622(a)(7) prohibits viewing obscene material with the intent to gain sexual pleasure. To be liable under Subsections (a)(6) or (a)(7) of this Section, the prosecution must not only prove that the person in question knew the materials were obscene, he must prove the person had a criminal purpose or had the intent to gain sexual pleasure.

Section 622(b) provides an exemption from liability for persons who have distributed the material to institutions or individuals who have a scientific justification for the material. For example, a person who is researching the psychological effect of obscene material would not be subject to criminal liability for purchasing such material.

Section 622(c) provides that where a person is found to have items that can be used to make multiple copies of obscene materials, that person shall be presumed to have an intent to unlawfully distribute such materials. This presumption satisfies the intent-to-distribute requirement in Section 622(a)(6) and in most cases will result in liability unless it is successfully rebutted. For a more details description of how rebuttable presumptions operate, see Section 15 (Burdens of Proof; Rebuttable Presumptions).

Section 622(d) provides a definition of “obscene.” Obscene is defined in terms of the contemporary adult standards of the Maldives. This definition allows the definition of obscene material to change over time and ensures that where standards have changed, a person’s liability will change accordingly. The definition also refers to an average person, thus it is not a defense to show that the defendant or some other particular individual or individuals do not find the material in question obscene. Material that “appeals to the prurient interest” is that which only appeals to a person’s desire for sexual gratification. If the interest the materials provokes is artistic or political, for instance, the material does not appeal to prurient interests. An inquiry into what interests the materials appeals to is more factual than legal and requires a careful attention to the effect of the materials on the ordinary viewer (or reader, listener, etc.) rather than just the facial appearance of the materials.

The materials must also “depict or describe sexual acts in a patently offensive way.” This element limits the definition of obscenity strictly to sexual matters. Moreover, the “patently offensive” requirement invokes the reference to “the average person,” meaning that the material must offend an ordinary adult Maldivian. Again, the focus of the inquiry is not simply on the content of the material, but its effect on ordinary Maldivians. The material must both offend and arouse. Knowledge that the material has both effects is an element of the crime.

Section 622(e) establishes the grading scheme for this Section. Under this provision, a person who merely views obscene material is guilty of a lower-grade offense than is a person who distributes or produces obscene material. Section 622(e)(3) provides for an offense one grade higher where the obscene material portrays a minor or of a person of any age who cannot comprehend his acts. Generally, the age of the person depicted is relatively apparent from the appearance of the materials. Proving recklessness as to age should be relatively simple where the person depicted is in fact a minor, except where the nature of the material (e.g., a fuzzy or out of focus picture) makes such a determination impossible. The nature of a person unable to comprehend the nature of their acts will be relatively hard to determine for viewers, but may be known or suspected by those involved in production. An inability to comprehend may come from intoxication, mental illness, or mental retardation. Finally, the harm sought to be prevented in Subsection (e)(3) is the actual exploitation of children and those incapable of comprehending their acts, as opposed to the major harm otherwise prevented by this Section—general offense against public morality. As such, the grading increase in Subsection (e)(3) should not be available except where an actual child or mentally impaired individual is exploited in production. Depiction of a fictional minor or mentally impaired person (e.g., in obscene fictional literature or in obscene films of a mentally capable adult portraying a child or impaired individual) will not permit imposition of an increased sentence under this Subsection.

Relation to current Maldivian law. Provision 88(29) of current Maldivian law prohibits viewing pornography. Section 622 codifies this prohibition but is more comprehensive in that it prohibits the distribution and production of obscene material. These offenses were added in order to fully address all aspects of the problem of pornography. In addition, this Section specifies different types of materials that are considered obscene, so that the law is not limited to magazines or other paper-based products. This change was adopted to account for technological and cultural developments since the Maldivian provision was first adopted. Finally, this Section creates a more severe penalty where a person is involved in the distribution or production of obscene material rather than simply viewing such material. This increased penalty is based on the theory that such a person has caused more harm to society than one individual consumer.

Islamic law supports Subsections (a)(1)-(6) because of their potential to lead to unlawful behavior and disruption of society, both of which have been discussed in sections 620 and 621 of this Chapter. Islamic jurists follow the tradition of the Prophet condemning obscenity: “A believer is not given to reviling, cursing, obscenity or vulgarity.”²³⁷

SECTION 623 – ABUSE OF CORPSE

²³⁷ AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 760 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Corresponding Current Provision(s): Rules Relating to the Conduct of Judicial Proceedings, Provision 284

Comment:

Generally. This Section creates criminal liability for those persons who treat a human corpse in a way that they know would outrage ordinary family sensibilities. The offense covers sexual indecency, physical abuse, mutilation, gross neglect, and other outrageous treatment. The exception for treatment authorized by law excludes from the offense all the lawful acts that may be done to a corpse, such as embalming, autopsy, scientific research, and medical examination. “Ordinary family sensibilities” shall be determined by the judge according to community standards. Note that the statute does not actually require that the deceased have a family or for the particular family members of the deceased to have been offended. That kind of requirement would make the offense vary widely according to the particular sensibilities of the family of the deceased and would prevent the creation of a general standard of conduct upon which all members of the community could rely even if they do not know the family of the deceased. The Section is simply a recognition that generally, a person ought to treat a corpse in a way that would not offend a reasonable family member. For more information on the culpability requirement of knowledge, see Section 24 (Culpability Requirements). Section 623(b) grades the offense as a Class 2 misdemeanor.

Relation to current Maldivian law. Current Maldivian law is silent on this specific issue. However, Provision 284 of the Rules Relating to the Conduct of Judicial Proceedings provides some support for including this Section in the draft Code. Provision 284 holds that where a person kills a child upon giving birth to it out of wedlock and buries the child without following proper religious burial procedures for disposing of the body, the offender is sentenced to banishment for life. Thus current Maldivian law addresses the notion that the abuse of a corpse is offensive to family sensibilities. This draft Section expands this notion to all corpses as well as to actions outside the realm of proper burial procedures. The draft Code takes the view that mutilation and physical and sexual abuse of the dead is as offensive and disrespectful as improper burial.

In addition, there is a strong public policy argument holding those who treat a human corpse in an offensive way criminally liable. The gross neglect of the dead should be deterred because it could potentially lead to the spread of disease.

Furthermore, express justification for this Section can be found in Islamic law which prohibits the abuse of corpses including mutilation and physical abuse.²³⁸

Note that this Code does not specifically criminalize infanticide because Section 110, governing Murder, is thought to provide a sufficiently broad offense definition to address such actions.

SECTION 624 – SALE OF HUMAN BODY PARTS

Corresponding Current Provision(s): None

²³⁸ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER II, at 460 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

Comment:

Generally. This Section covers persons who unlawfully buy or sell body parts or corpses. This offense includes the buying and selling of body parts on the black market. The offense excludes persons who pay or are reimbursed for the costs connected with lawful organ donation, as well as donation of blood, bodily fluids, and hair. The offense also excludes payments made under health insurance plans and payments made to reimburse the costs connected with scientific research. Finally, the offense excludes purchasing or selling drugs or other substances that have been made from human body parts and are used in medical or scientific research. These exceptions only cover the specific transactions described. Thus, intermediate transactions remain unlawful. For example, if a human kidney is sold to a black market operator who then sells the kidney to a scientific laboratory for research, the black market operator would still be liable for the original transaction through which he acquired the kidney since that transaction is not covered by any of the exceptions under Section 624(b).

Relation to current Maldivian law. There are no provisions in current Maldivian law governing the sale of body parts. However, this Section is considered necessary in order to protect the public interest in organ donations and transplants for the purposes of medical operations and scientific research. Allowing organs to be bought and sold on the black market would endanger the safety and security of such operations and research.

In addition, this offense attempts to prevent the exploitation of people so desperate to get funds that they are willing to sell their vital organs. Many powerful public policy arguments favor such a rule. First, vital organs are irreplaceable. A person who sells an organ has no opportunity to get it back in the future, while people who part with any other valuable object carelessly or recklessly may work hard to replace the object at a later time if they come to regret their earlier decision. Second, people who do not have sufficient information regarding their physiology may not have full awareness of the importance of apparently superfluous organs to their health. Though one can survive the loss of a kidney, for instance, it can seriously damage long-term health in ways which may be unforeseeable to an ordinary person. The argument for allowing the sale of human body parts only holds if the seller is fully aware of the consequences of his action. Last, the funds obtained by organ sellers do not make up for the damage to health, the pain from the surgery, and inconvenience of the lengthy period of recovery required. All these factors justify the assumption that sale of human body parts generally results in exploitation of the organ sellers, usually very poor people without access to accurate and complete health information.

This Section also creates certain exceptions to the offense, recognizing that the health care business is still a business and payment for certain expenses and products are appropriate. Even for the most selfless organ donor, the removal of an organ imposes certain direct and indirect costs. Direct costs would cover such costs as that of travel to the hospital, the surgery, and stay at the hospital after the surgery. Indirect costs would include the wages lost during the recovery period, the cost of child care during that period, etc. Thus, simply reimbursing the actual costs incurred by the donor does not create any risk of exploitation and so should not be punished. If the donor is left in no better position than if he had not donated his kidney, no exploitation is possible.

The Islamic prohibition on selling body parts of corpses is included as a form of prohibited abuse mentioned in the discussion of Islamic law in Section 625.

SECTION 625 – CRUELTY TO ANIMALS

Corresponding Current Provision(s): None

Comment:

Generally. This Section prohibits a person from subjecting an animal that he owns or any animal in his custody to cruel neglect or mistreatment. The definition of cruel mistreatment would not encompass any appropriate action of resistance to an animal attack, infestation by vermin, or other offensive animals, or any action generally in keeping with the common practice of animal care (such as punishment in the course of training an animal). Cruel mistreatment would be found when a person causes an animal pain either without any legitimate purpose (such as torturing a cat) or beyond the scope of the use of force appropriate to the purpose of its use (such as setting a cat on fire while attempting to train it). The notion of “cruel mistreatment” should be determined in light of the general views of the ordinary Maldivian about what constitutes cruel mistreatment. Similarly, the “neglect” offense should be determined by the common standard of what the ordinary Maldivian should expect of an ordinary animal owner. Taking custody of an animal makes one responsible for reasonable care of that animal.

The offense excludes persons who are acting according to accepted veterinary practice or who are doing scientific research, according practices accepted by the scientific community, on such animals. Lenity should be shown in the determination of the standards of the scientific community, as different schools of thought may consider different practices appropriate. It is not necessary that all scientists or veterinarians should think a particular action appropriate; however, a mainstream group of scientists or veterinarians should think it appropriate.

Relation to current Maldivian law. There is no current Maldivian law covering this offense. However, there is a strong public policy argument in favor of protecting animals from cruelty and mistreatment. Animals subject to such abuse can often become dangerously violent, and thus it is in the public interest to criminalize such behavior.

Furthermore, this Section is supported by Muslim jurists who agree that cruelty towards animals is forbidden in Islam. This prohibition includes mutilation, “branding animals on the face”, and “killing them for other than food.”²³⁹ The prevention of mistreatment of animals is also within the jurisdiction of the *muhtasib*.²⁴⁰

SECTION 626 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 620 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 620’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

²³⁹ IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER II, at 960 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

²⁴⁰ AL-MAWARDI, THE ORDINANCES OF GOVERNMENT 267-268 (Wafaa H Wahba trans., Garnet Publishing 2000).

CRIME CONTROL OFFENSES

CHAPTER 710 – WEAPONS OFFENSES

Chapter 710 creates offenses for the possessing, using, or dealing in weapons. Section 710 creates offenses for using a dangerous weapon in the commission of a felony. Under this Section, nearly any item that is potentially lethal can qualify as a dangerous weapon, reflecting an intention to penalize use of any such item in committing a crime. Section 711 creates offenses for merely possessing especially dangerous weapons – specifically firearms and catastrophic agents. This reflects an intention to prevent these weapons from even being available to the general Maldivian public. Section 711 also presents various grades of offenses where firearms are involved based on the level of involvement with the weapons.

Current Maldivian law is generally supportive of this Chapter. There are several provisions that address the possession and use of weapons for particular offenses. Islamic law also supports the responsible use and distribution of weapons, as well as penalties for improper use.

SECTION 710 – USE OF A DANGEROUS WEAPON DURING A FELONY

Corresponding Current Provision(s): Maldives Penal Code, Provisions 30, 31, 49, 51, 85, 140, 141 and 142

Comment:

Generally. Section 710(a) makes it a separate offense to use or display a “dangerous weapon” in the course of committing another offense. Thus, in addition to being liable for some offense under the draft Code, a person is liable for a separate offense under Section 710(a) if he uses, threatens to use, or displays a dangerous weapon while committing the underlying offense.

Section 710(b) grades the offense higher if the person discharges the weapon.

Section 710(c) provides aggravating factors that will affect punishment. If the offense involves a semiautomatic or automatic firearm, the offense is graded one grade higher than it otherwise would be with a manual weapon.

Note that the offender’s authorized sentence is subject to Section 1006 (Sentencing for Multiple Offenses). For example, if a person commits reckless homicide, he would be convicted of a Class B felony under Section 111 (Manslaughter). If he discharged a firearm in the course of committing the reckless homicide, he would also be convicted of a Class E felony under Section 710. Under Section 1006, the cumulative sentence for those offenses, assuming those are the only offenses for which he is convicted at that time, is the sentence for the Class B felony plus one-half of the maximum sentence for the Class E felony. Section 92 sets forth the maximum authorized terms of imprisonment. In this example, the maximum authorized sentence of imprisonment would be not more than 16 years – 15 years maximum for the Class B felony plus one-half of the maximum sentence of 2 years for the Class E felony.

The limitations on conviction for multiple related offenses in Section 94 (Prosecution for Multiple Offenses) apply to offenses under Section 710 and related underlying offenses. Therefore, if the underlying offense is defined to provide additional liability for using a dangerous weapon in the course of committing the underlying offense, an offender may not also

be held liable for an offense under Section 710. For example, Section 120 (Assault) provides that if an assault is committed with a dangerous weapon, the offense is a Class D felony (Serious Assault) rather than a Class 3 misdemeanor (Simple Assault). An offender who commits an assault with a dangerous weapon would be liable for serious assault under Section 120 rather than serious assault under Section 120 *and* an offense under Section 710. However, if the underlying offense is not defined to prohibit the additional harm of using a dangerous weapon in the commission of the offense, Section 94 does not prevent an offender from being liable for the underlying offense and an offense under Section 710. See Section 94 and accompanying commentary.

Section 710(d)(3) notes that the term “dangerous weapon” is broadly defined in Section 120(d)(1). Whether something is a dangerous weapon depends on the potential danger the item poses to a person; whether or not it has a lawful purpose; and whether or not it is appropriately possessed for such a lawful purpose. For example, if a thief brandishes a cast-iron skillet while robbing someone and threatens to beat the victim with the skillet, the skillet would be considered a dangerous weapon, since although it has a lawful purpose – to cook food – it is not being possessed for that purpose. Section 710(d) also provides definitions for automatic firearm, automatic loading action, and semiautomatic firearm.

Section 710(e) adds a sentencing factor that provides that the defendant’s baseline sentence is aggravated one level if he commits the offense after dusk and before dawn.

Relation to current Maldivian law. This Section is supported by several provisions of current Maldivian law that impose additional punishment for using weapons in the commission of several offenses. Provisions 30 and 31 provide penalties for making or conspiring to use weapons in attempts to overthrow the government or to commit crimes against the State.²⁴¹

Second, Provisions 49 and 51 outlaw possessing a weapon at an unlawful public assembly. Note that the attempted overthrow of the government is addressed by Section 610, governing rioting and forceful overthrow of the government. If a person is involved in an attempt to overthrow the government and employs a weapon to achieve his aim, this Section and Section 610 will be combined to determine his punishment.

Third, Provision 85(d) provides an offense for interrupting a legal or judicial proceeding. Provisions 140 and 141 provide additional penalties for persons possessing or utilizing weapons in the commission of theft or extortion. This Section would treat the use of weapons in all of the preceding situations in the same way it would treat the use of weapons in an attempt to overthrow the government or the commission of any other offense. The offense with regards to the weapons is the same no matter what the underlying crime might be. The difference is in the offense charged for those underlying crimes, which are covered in Sections 532, 611 and 612, and Chapter 210.

Provision 142 of the Maldives Penal Code provides an aggravating factor when weapons are used in theft or extortion between 6 p.m. and 6 a.m. This provision is reflected in the aggravating factor in Subsection 710(c)(2) for using weapons during an offense committed between dusk and dawn.

²⁴¹ The drafters believe that crimes against the state will be covered in another Chapter, so we have included no special provisions relating to attempts to overthrow the president or crimes against the state.

Islamic law supports this Section by broadly prohibiting the threatening use of dangerous weapons. Muslim jurists have looked unfavorably at even “pointing” or “gesturing” at others with dangerous weapons.²⁴²

SECTION 711 – TRAFFICKING, MANUFACTURE, SALE, OR POSSESSION OF CATASTROPHIC AGENTS OR FIREARMS

Corresponding Current Provision(s): Maldives Penal Code, Provisions 49, 51, 140 and 141; Law On Items That Are Prohibited To Be Brought In To Maldives Law No. 4/75 Provision 3

Comment:

Generally. Section 711 defines an offense for possessing, selling or trafficking in firearms or catastrophic agents. This offense picks up where Section 710 leaves off, making it an offense to simply possess these types of weapons. Section 711(a) creates an offense for trafficking, importing, manufacturing, possessing, selling, or transferring a firearm or catastrophic agent.

Section 711(b) creates rebuttable presumptions of selling and trafficking of firearms based on the volume of weapons possessed. Therefore, if someone is found possessing 27 firearms, he is charged with the offense of trafficking under 711(a)(2). Once the prosecution establishes that the defendant possessed such a large number of weapons, the fact giving rise to the presumption, it is presumed that he satisfies the requirements of Subsection (a)(2). However, he can rebut the charge by showing that he was merely possessing the weapons for his own use, thereby reducing the charge to a possession offense under 711(a)(4), which is a Class 12 misdemeanor under 711(c)(3). Likewise, someone found in possession of seven firearms is presumed to possess the weapons with the intent to sell them, and is therefore charged with the requirements of the offense of selling firearms under 711(a)(3). Again, he can rebut the charge by showing that he was merely possessing the weapons for his own use, thereby reducing the charge to a possession offense under 711(a)(4). See Section 15 (Burdens of Proof; Rebuttable Presumptions) and accompanying commentary.

Section 711(c) sets out the grading for this offense. Note that if applicable, a defendant may be charged with an offense under this Section as well as with an offense as defined by Section 613 (Operating a Regulated Business or Importing Without License). With regards to catastrophic agents, possession, selling, trafficking, importation and manufacturing are all Class D felonies under Subsection 711(c)(1), based on the inherent danger of catastrophic agents. A catastrophic agent is defined in Section 121(c)(1). For firearms, the penalty for the separate offenses of possessing, selling and trafficking of firearms increase the vary penalty based on the person’s actions and the number of weapons possessed in regards to the weapons. If a the person is caught selling even one firearm, he is guilty of an offense under 711(a)(3), and is charged with a Class E felony as provided in 711(c)(2). Similarly, if the person is caught importing even one weapon into the country, he is guilty of an offense under 711(a)(2) and is charged with a Class D felony as provided in 711(c)(1). If a person possesses one firearm, he is guilty of an offense under 711(a)(4) and is charged with a Class 1 misdemeanor as provided in 711(c)(3). However,

²⁴² AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 692,984 (Nuh Ha Mim Keller trans., Amana Publications 1994).

as discussed above, mere possession of firearms can result in more stringent charges if the person possesses enough weapons to meet either of the two rebuttable presumption thresholds in Section 711(b).

As in Section 710, Section 711(d) provides an aggravating factor of one grade level if any of the firearms involved are automatic or semiautomatic weapons. If multiple weapons are involved, the fact that just one of the weapons is an automatic or semiautomatic weapon is enough to trigger the aggravating factor.

Relation to current Maldivian law. This Section parallels existing Maldivian law, defining offenses whenever a person possesses firearms or catastrophic agents, whether or not in the commission of a crime. The language of this section tracks that found in “Law On Items That Are Prohibited To Be Brought In To Maldives Law No. 4/75,” which prohibits possessing, importing manufacturing, selling or transferring “weapons of war,” gunpowder and explosives. Section 711 also prohibits the possession, sales, manufacturing and importation of weapons and increases grading for the more serious offenses. This Section prohibits the same types of weapons as the above mentioned law as gunpowder and explosives fall under the definition of catastrophic agent in Subsection 121(c)(1), while “weapons of war” would seemingly be covered by both the prohibition on catastrophic agents (covering grenades and other explosives) and firearms (covering guns and including field artillery, rocket launchers, etc.)

This Section does not codify Provisions 140 and 141 of current Maldivian law, which define offenses for possessing weapons in the commission of theft and extortion. This is because this draft Code addresses the crime of theft generally in Chapter 210 and extortion specifically in Section 213. If a person is involved in theft and/or extortion and employs a weapon to achieve his aim, this Section and Chapter 210 will be combined to determine his punishment.

Furthermore, this Section is also in accord with international conventions to which the Maldives is a signatory.²⁴³ The “Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction” says signatories must take “any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Chapter I of the Convention, within the territory of such State.”

SECTION 712 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 710 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 710’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

²⁴³ CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION.

CHAPTER 720 – DRUG OFFENSES

Chapter 720 attempts to deter the drug trade and drug use as well as address the problem of glue-sniffing and industrial alcohol consumption by Maldivian youth. While these functions are already being served under current Maldivian law, Chapter 720 is organized in harmony with the rest of the Draft Code. Drug use is harmful to the individual, drug sales are harmful to society, and drug trafficking is harmful to this nation and others. The overall offense grade scheme of this Chapter reflects the relative severity of these harms in order to achieve the most appropriate punishment. Current law refers to grams, but the dangerousness of one gram of a drug varies from drug to drug. Therefore this Chapter uses doses rather than grams in order to precisely reflect the actual harm of the drug.

SECTION 720 – DRUG TRAFFICKING

Corresponding Current Provision(s): Law on Narcotic Drugs and Psychotropic Substances
Law No. 17/77 19-12-1977

Comment:

Generally. Section 720 criminalizes drug trafficking. Trafficking describes all aspects of the drug trade. Subsection (a) includes selling, possessing and prescribing drugs as possible indications of trafficking. Subsection (b) presumes trafficking if a person possesses more than [50] doses of a controlled drug, as possession of [50] doses is typically incompatible with simple personal use or even the direct sale of drugs to users.

Prescribing a controlled drug outside the course of professional practice is not necessarily connected with a drug-trading scheme. Nonetheless, Section 720(a)(3) defines this as trafficking because abuse of the medical profession's access to drugs is seen as equally dangerous and reprehensible. Moreover, because of the difficulty in distinguishing licit and illicit prescription or provision of medicines, the offense needs added deterrence when it is detected. The drafters presume that a physician who has abused the privilege once has likely violated it in the past. However, misuse of the powers of prescription in an isolated case, as in cases of self-prescription or cases of prescription for a single family member or friend should be taken into account at sentencing. The worst offenders under Subsection (a)(3) will be the physicians who indiscriminately abuse their privileges for profit by selling such drugs to multiple patients.

Relevant current Maldivian law. Existing law on drug trafficking, sale, use, and possession includes the activities covered by draft Chapter 720. This Section parallels current Maldivian “Law on Narcotic Drugs and Psychotropic Substances” (LNDPS). Provision 2 of the LNDPS makes it “an offense to grow, produce, import, export, well, purchase, give, handle for trading purposes, or to keep in possession any narcotic drugs or psychotropic substance in the Maldives.” Moreover, “any person found to be in possession of any narcotic drugs and psychotropic substance, in excess of one gram, shall be deemed to be in the business of trading in narcotic drugs and psychotropic substances.”

The scheme in this draft Chapter differs from the current law approach in several ways. First, the draft Chapter more clearly separates and separately grades the underlying behaviors of personal use, sale, and trafficking of drugs. This enumeration allows for accurate prosecution of the many elements and harms involved in drug offenses.

Second, the LNDPS and the draft Chapter differ in the assigned levels of punishment. LNDPS assigns the same punishment for sales and trafficking, whereas under the offense in Section 721, trafficking is punished more severely than sale. This distinction has been introduced to achieve a more finely adapted correlation between the harm caused by the crime and the applicable grade.

Lastly, this Section diverges from current Maldivian law in that possession of one gram of a substance will not lead to a resumption of trafficking. Section 720 states that the state will make a rebuttable presumption that one is involved in the trafficking of drugs if he has possession of [50] doses of a controlled drug. This is in line with the overall scheme of this Section, which recognizes that the harmfulness of one gram varies from drug to drug, and therefore it is better to use doses.

This Section is also in line with Islamic law, which prohibits the use or sale of substances that produces a “narcotic effect.”²⁴⁴

SECTION 721 – DRUG SALE

Corresponding Current Provision(s): Law on Narcotic Drugs and Psychotropic Substances
Law No. 17/77 19-12-1977

Comment:

Generally. Section 721 defines the sale of a controlled drug. Section 721(a) defines sale as an agreement to transfer drugs. Under this definition evidence of actual transfer is not needed to prove sale.

The distinction between “sale” and “trafficking” is one of degree of involvement with the drug trade. “Sale” generally describes the direct transaction with the end user, or the sale of quantities of drugs normally associated with that final transaction. “Trafficking” describes a higher level function in the distribution of drugs for sale. That is, one who sells, manufactures, obtains or provides drugs for resale; or one who sells to dealers rather than users. Under Section 721(b) “Sale” is presumed from the possession of more than [20] doses of a drug, as [20] doses are typically too many for one user to consume.

Relevant current Maldivian law. This Section parallels Provision 2 of current Maldivian “Law on Narcotic Drugs and Psychotropic Substances” (LNDPS). The grading differs because, as mentioned above, this draft Chapter distinguishes between possessing, purchasing, and selling narcotic drugs. This Section grades drug sale more seriously than drug use, trafficking, or possession because the selling drugs is considered to cause a greater harm to society. See the commentary to Section 720 for further explanation and for support from Islamic law.

SECTION 722 – DRUG USE

Corresponding Current Provision(s): Law on Narcotic Drugs and Psychotropic Substances
Law No. 17/77 19-12-1977

²⁴⁴ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 618 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“It is absolutely unlawful to use any solid substance detrimental to mind or body which produces languor or has a narcotic effect.”).

Comment:

Generally. Section 722 defines use of a controlled drug. If the person uses a controlled substance for his own intoxication, meaning the creation of any altered mental state, including hallucinations, euphoria, relaxation, and excitement, he commits the offense in Section 722. Section 722(b) is effectively a presumption of intent to use where a person possesses more than 5 doses of a drug. The user has minimal culpability as compared to the seller and trafficker, as his drug use tends to have its worst effects on the user himself, though it may have secondary effects on others.

Relevant current Maldivian law. This Section codifies several provisions of current Maldivian law, including Provisions 88(15) and 88(16), Provision 81 of the Rules Relating to the Conduct of Judicial Proceedings and the Law on Narcotic Drugs and Psychotropic Substances (LNDPS). In addition, the grading in this Section is consistent with Provision 81 of the Rules Relating to the Conduct of Judicial Proceedings in punishing the use of alcohol with one year imprisonment

LNDPS Section 2 makes it an offense to use narcotic drugs in the Maldives. There are only a few revisions made by this draft Section. First, the grading scheme of this Section differs because as mentioned above, this draft Chapter distinguishes between possessing, purchasing, and selling narcotic drugs. Because drug use is considered less of a harm than drug sale, the offense in this Section is graded one grade lower than that of Section 721.

Second, Chapter 720 does not provide an exception for drug users who voluntarily seek treatment before their use has been publicly exposed to legal agencies. Under the LNDPS, such a person may submit their wish for treatment to a committee, which may grant them immunity from prosecution so long as a curative treatment is in fact obtained at a level acceptable to the committee. This exception was removed because once the user has purchased and used the drug, the harm to himself and the society has already taken place. There should not be an immunity from prosecution, but this does not foreclose the possibility of the judge requiring treatment as part of the sentence. Refer to the commentary for Section 720 for further discussion of the differences between this Chapter and the LNDPS.

See the commentary to Section 720 for further explanation of this Chapter and support from Islamic law.

SECTION 723 – DRUG POSSESSION

Corresponding Current Provision(s): Law on Narcotic Drugs and Psychotropic Substances
Law No. 17/77 19-12-1977

Comment:

Generally. Section 723 defines possession as having at least one dose of a controlled drug. Possessors include those holding drugs that belong to others or those who possess the drugs for purposes other than sale or use meaning the evidence may not exist to convict them on counts other than possession. Because it is well known that any use of drugs is illegal, it is impossible to possess them for a legal purpose, so a mere possessor has some culpability, though less than others prosecutable under this Section. Note that if applicable, a defendant may be charged with an offense under this Section as well as one defined by Section 617.

Relevant current Maldivian law. This Section parallels Provision 2 of current Maldivian “Law on Narcotic Drugs and Psychotropic Substances” (LNDPS). The LNDPS is internally inconsistent in so far as it criminalizes possession of drugs in multiple sections. For example, the punishment for “possession for usage” in LNDPS Section 4 is far less than for mere “possession” in Section 2.

There are a few revisions however. First, LNDPS Section 2 assigns the same punishment as for trafficking if a person possesses as little as 1 gram of a narcotic drug or psychotropic substance. By contrast, the draft Code specifies that a person must possess at least [50] doses. The threshold supplied in Chapter 720 is consistent with the LNDPS overall scheme of lower punishments for possession and use than for trafficking and sale. Refer to the commentary for Section 720 for further discussion of how this Chapter relates to the LNDPS.

Second, the grading differs because, as mentioned above, this draft Chapter distinguishes between possessing, purchasing, and selling narcotic drugs. The draft Code defines possession separately from other drug offenses and assigns a lesser punishment. See the commentary to Section 720 for further explanation and for support from Islamic law.

SECTION 724 – SALE AND USE OF OTHER HARMFUL SUBSTANCES

Corresponding Current Provision(s): Criminal Court Circulars 10/SP/2003 and 11/SP/2003

Comment:

Generally. Section 724 deals with substances that are used for intoxication but are not classified as controlled drugs because they have a separate legal use.

Section 724(a) criminalizes selling or using such a substance as an intoxicant.

Section 724(a)(1) forbids sale of a solvent, such as glue, or an alcohol-based product, such as cologne, when the seller knows that the purchaser will use the product for its intoxicating effect. The knowledge requirement is designed to protect the hardware store owner who lawfully sells glue to carpenters from being guilty of an offense when one of his customers sniffs the glue rather than using it as an adhesive. On the other hand, if a potential purchaser is talking to his friend at the counter about who will bring the soda to add to the cologne so they can drink it that night, the seller cannot sell to that purchaser without being guilty of the offense described in Section 724(a)(1).

Section 724(a)(2) forbids inhaling solvents. According to Section 724(c)(2), in addition to glue, solvents include fuels and any other products that have a legal use but are known to be inhaled for their intoxicating effect.

Section 724(a)(3) forbids consuming alcohol-based products. The specification of a 20 percent alcohol content refers to the product purchased, not the concoction consumed. Therefore, if a person waters down cologne so that the resultant cola-water has an alcohol content of less than 20 percent, that does not absolve him of liability since almost all colognes have an alcohol content of well over 20 percent. Other products that have an alcohol content above this baseline amount include mouthwash and cough syrup. Of the alcohol-based products listed as examples, consumption of cough syrup can be a legal use. Therefore, Section 724(b) provides an exception for reasonable medicinal use. Notably, the alcohol content of cough syrups ranges from 0 to 30 percent. If a person takes cough syrup in excess of the recommended dosage, they only commit an offense if the cough syrup consumed has a high

alcohol content. Thus, in the case of cough syrup, the 20 percent mark serves as a threshold beyond which consumption is presumed to be for intoxication, and below which consumption is presumed to be medicinal only.

Relation to current Maldivian Law. This Section codifies several provisions of current Maldivian Law. First, current law outlaws consumption of “cologne, cough syrup and other liquefied substances which contain alcohol for the purpose of getting intoxicated.” (Criminal Court Circulars 11/SP/2003) Likewise, it forbids use of a “substance other than the drugs and psychotropic substances mentioned in law 17/77 for the purpose of intoxication (such as belladonna, sniffing Dunlop glue).”

However, Section 724 differs from Maldivian law in so far as it also criminalizes sale of such harmful substances. This Section was added to give retailers an incentive not to carry such substances unless their customers have in mind a legitimate use. Decreasing the supply of harmful substances should decrease their use. Moreover, the criminality of selling a substance for its intoxicating effect should not depend on how that substance is classified, though the type of substance may affect the degree of punishment. This is because a person’s mens rea for the crime remains the same regardless of the drug and only the relative dangerousness of the drug could reflect a more culpable mens rea.

The Islamic legal support for this Section is discussed in the commentary to Section 720.

SECTION 725 – DRUG OFFENSES GENERALLY

Corresponding Current Provision(s): Law on Narcotic Drugs and Psychotropic Substances Law No. 17/77 19-12-1977; Criminal Court Circulars 10/SP/2003 and 3/SP/2003

Comment:

Generally. Section 725 presents general provisions relating to Chapter 720.

Subsection (a) carves out an exception for doctors who lawfully prescribe controlled drugs, for pharmacists who fill prescriptions, and for others acting pursuant to explicit government authorization.

Subsection (b) explains that possession will be broadly construed. Possession will include not only the physical holding of the drug but any time a person exercises substantial control of a drug whether it be during the drugs growth and harvesting, its import and export or its purchasing and manufacturing.

The purpose of the language in Subsection (c) regarding charging of offenders with drug offenses is to prevent disingenuous charging. First, the chapter deals with doses of drugs, regardless of whether the quantity of drugs involved is of a single drug or multiple drugs. For instance, an offender caught with 100 doses of cocaine and 100 doses of heroin should be charged with a single offense, not one offense associated with heroin and another associated with cocaine. Second, the provision in Subsection (c) is intended to prevent a prosecutor from bringing separate charges for portions of a whole quantity of drugs. For instance, if an offender is caught with 400 doses of heroin, a prosecutor may not bring eight separate trafficking charges, each relating to a packet of 50 doses, in an attempt to inflate the ultimate sentence handed down to the offender. Nor should the prosecutor be permitted to bring one drug trafficking charge on 200 doses of heroin and a drug sale charge on the other 200 doses. Lastly, the provision should also prevent the prosecutor from convicting an offender on lesser included charges dealing with

the same drugs. While a person who commits a trafficking offense has also performed conduct sufficient to establish a sale or possession offense, a prosecutor may only bring one charge in relation to a certain set of drugs. Sale is a lesser included offense of the trafficking offense, and possession is a lesser included offense of trafficking, sale, and use.

Subsection (d) creates a one grade increase in the grading of an offense under Chapter 720 if the offense involves a dangerous drug. This Subsection requires that the elements of the offense be established as to the quantity of the dangerous drug before imposing the aggravation. For instance, an offender prosecuted for drug sale of 20 doses of heroin and 30 doses of marijuana can have the grade of the offense increased if the elements of the offense relating to the sale of heroin are proved. However, a person found with 2 doses of heroin and 30 doses of marijuana who successfully argues that the doses of heroin were for personal use and that only the marijuana was for sale might avoid the grade increase under this subsection for the sale offense. Of course, the heroin would be grounds for a separate use offense, to which the dangerous drug grade increase would apply.

Subsection (e) provides that dangerous drug shall be defined according to the [Maldives classified drug list].

Relevant current Maldivian law. This Chapter differs in some ways from current Maldivian law. The draft Section extends further than the Law on Narcotic Drugs and Psychotropic Substances (LNDPS) in that this Section is not limited to narcotics and psychotropic substances.

There are several differences in approach between this Section and the LNDPS. First, Chapter 720 does not criminalize certain offenses included in LNDPS. For example, the dealing in or possessing of money that one knows has been “obtained by an offense contrary to the LNDPS” is criminalized by the LNDPS while this draft Code addresses money laundering crimes in Chapter 730, which governs Terrorism and Organized Crime. Likewise, concealing or facilitating a drug crime (LNDPS Sections 6 and 7) is outlawed under Section 30(2), governing Accomplice Liability.

Second, current Maldivian law makes it an offense to publicly encourage the use of narcotics or psychotropic substances. This draft Code, however, addresses active solicitation of drug use or purchase by applying Section 81 (Solicitation) to this Section due to a belief that punishing conduct not arising to active solicitation leads to overbroad prosecution and prosecution of conduct manifesting minimal culpability.

Third, the LNDPS makes it a crime to fail to report a drug crime. The drafters have omitted the offense here because of the minimal culpability in failing report another person’s crime. Moreover, in such circumstances, a perception of the possibility of retribution might deter an ordinary person from reporting such a crime, even if such fears do not amount to a defense under Section 55 (Duress). Instead, the draft Code as a rule leaves the task of investigation and prosecution to the State.

Finally, this draft Code tackles the problem of medicinal use by providing an exception in Section 725(a) for trade in and use of drugs that is “expressly authorized by the government” or “in keeping with common medical or pharmaceutical practice.”

SECTION 726 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 720 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian Law. For discussion of the relationship between Chapter 720's defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially applied.

CHAPTER 730 – TERRORISM AND ORGANIZED CRIME

This Chapter expands on the Maldives' current law on terrorism and endeavors to punish groups that operate with a continuing criminal purpose or plan. The rationale behind this Chapter is to punish and deter these sorts of organizations because they pose a serious threat to security, civil order, and the national economy.

SECTION 730 – PARTICIPATING IN A CRIMINAL ORGANIZATION

Corresponding Current Provision(s): Law on the Prevention of Terrorism in the Maldives 1990

Comment:

Generally. This Section makes it a crime to participate in any way in the operations of a criminal organization. Even if a person's participation involves activities on behalf of the organization that would be otherwise lawful, those activities are crimes under this Section. The culpability required for liability under this Section is "recklessness." If the person unjustifiably disregards a known risk that the organization he is involved with may be a criminal organization he is liable under Section 730.

Section 730(a) defines the offense of participating in a criminal organization. Subsection (a)(1) punishes participation in the operation of a criminal organization. "Operation" of a criminal organization refers to any activity that is necessary for the planning or commission of the organization's criminal acts. Participation in such an operation can include involvement in the criminal activity itself, or merely providing support services or running legitimate businesses on behalf of the organization. The "material" requirement under Section 730(a)(3) is an important limitation, as not everyone who has contact with a criminal organization should be liable. For example, the person who sells napkins to a gangster is not liable, but a criminal syndicate's transportation coordinator probably would be.

Section 730(a)(2) criminalizes the recruitment of new members to a criminal organization. This Section is designed to ensure that individuals do not provide support, to entities or persons involved in criminal acts by recruiting participants. The culpability required by this Section is recklessness. Thus, a person is not liable for the offense unless he unjustifiably disregards a known risk that the recipient organization is a criminal organization. In addition, a person who tries to persuade or encourage others to become involved in the operations of a criminal organization, and succeeds in persuading the others to join commits an offense under this Subsection. Note, however, that if the person fails to persuade others to join, the person may still be guilty of attempting the offense. For further discussion of attempt liability, see Section 80 and its corresponding commentary.

Section 730(a)(3) criminalizes the provision of financial or material support to a criminal organization. This Subsection criminalizes contributions to criminal organizations even if the donor is not involved in the actual planning or commission of criminal acts. For instance, a contribution of money or weapons to a terrorist organization would be a crime under this Subsection.

Section 730(a)(4) makes it an offense to use or invest the proceeds of a criminal organization. Thus, were a member recklessly to take money that was derived from illegal drug

operations and invest it in the stock market or use it to open a legitimate business, he could be charged under this Subsection. This provision aims to prevent certain members of criminal organizations from escaping liability for the group's criminal activities by participating only in lawful activities. It also creates an obstacle to the operation of criminal organizations by denying such groups access to legitimate commerce and financial services.

Section 730(a)(5) is directed at the people with primary authority for organizing and running criminal organizations. The primary purpose of this Subsection is to allow the bosses of criminal organizations to be charged with a more serious felony than the other participants. A similar relationship exists between organizers/leaders and minor participants in Section 30, governing liability for the actions of others.

Section 730(b)(a) provides a definition of “criminal organization.” This definition includes terrorist groups as well as drug, gambling, and prostitution rings. In Subsection 730(b)(1)(A)(aa), the phrase “acts involving violence, catastrophe, or a threat of either” includes homicide, property destruction, kidnapping, hijacking, and endangerment. It is also meant to include all of the criminal acts described in the international and regional terrorism conventions to which the Maldives is party.²⁴⁵ Likewise, the phrase “acts constituting drug trafficking or sale” in Subsection 730(b)(1)(A)(bb) is meant to address criminal organizations that deal in illegal drugs. The phrase “as part of an ongoing plan or purpose”, present in both Subsections, is meant to exclude acts of violence committed by persons who have no internal organization or intent to operate as a criminal organization.

Liability under this Section does not preclude prosecution for conspiracy under Section 82. It is not necessary, under this definition that the violent or catastrophic acts be committed or planned in the Maldives. A terrorist group that committed more than two attacks in another country would qualify as a criminal organization. As such, any participation in or contribution to that organization by a Maldivian resident would still be a crime under this Section.

Section 730(b)(1)(A)(cc) includes in the definition groups that publicly announce or acknowledge a plan to commit violent or catastrophic acts even if they have not actually committed any as of the time of arrest. An announcement or acknowledgement is “public” if it is reasonably likely to reach the ordinary Maldivian (through any medium).

Section 730(b)(1)(B) includes groups designated as criminal or terrorist organizations by the United Nations.

Section 730(b)(2) provides a definition of “material support.” This definition includes providing financial support as well as support in the form of lodging, training, and equipment such as explosives, weapons, and the like.

Section 730(c) grades the offenses in this section. Under Subsection (c)(3) the baseline grade for a violation of this Section is a Class D felony. Subsection (c)(1)(A) provides that those who knowingly direct or control criminal organizations will be guilty of a Class B felony; Subsection (c)(1)(B) grades the offenses defined in Subsections (a)(1) through (a)(4) as Class C felonies where the defendant acts knowingly. Subsection (c)(2) lowers the grade of the offense defined in Subsection (a)(5) to a Class C felony if the defendant is only reckless as to the criminal nature of the organization.

²⁴⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; SAARC Regional Convention on Suppression of Terrorism, The South Asian Association For Regional Cooperation (SAARC); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989.

Relation to current Maldivian law. This draft Section replaces the current Law on the Prevention of Terrorism in the Maldives 1990 (LPTM). The definition of criminal organization is meant to encompass all groups that commit the crimes specified in Provision 2 of the LPTM.²⁴⁶ Provision 3 of the LPTM, prohibiting the “provision of funds or materials or any other form of assistance towards the commission or planning of any [terrorist] acts...” is replaced by Subsections (a)(1)-(3), which cover substantially the same types of conduct. Additionally, the draft Section reaches more broadly than the LPTM in an attempt to cut off support and inhibit the operations of criminal enterprises. This broader reach is necessary to fully address the problem of terrorist activity, and to give effect to Maldivian norms which condemn organized crime.

This draft Section is also in line with Muslim jurists’ condemnation of organized criminal activity as a form of “waging war against society” (*hirabah*).²⁴⁷ Some Muslim jurists have considered this to be any activity by an “individual or group” who take the “law into their own hands” or wishes to disrupt the “communal order.”²⁴⁸

Moreover, Section 730 also complies with international resolutions requiring state action to prevent any form of support, active or passive, to entities or persons involved in terrorist acts.²⁴⁹

SECTION 731 – LAUNDERING OF MONETARY INSTRUMENTS

Corresponding Current Provision(s): None

Comment:

Generally. This draft Section makes it a crime to use the financial system to attempt to commit further criminal activities. As with Section 730, Section 731 is intended to further hamper and prohibit the operation of organized criminal groups. It also protects the integrity of legitimate financial transactions and the banking system generally in the Maldives.

Section 731(a) makes it an offense to conduct certain financial transactions with the knowledge that the funds in question were obtained through unlawful activity. To be a crime under this Section, the funds must be of unlawful origin. Transferring money that was legitimately obtained is not a crime under this Section, even if the purpose of the transfer is unlawful. For discussion of willful blindness, see Subsection 24(d)(2) governing situations where a person may be held to act knowingly with respect to a circumstance element if the person is aware that it is probable that the circumstance exists.

²⁴⁶ These offenses include: (a) causing or attempting to cause death of people with the intent of achieving political ends or instilling fear among the public; (b) kidnapping or hostage-taking or attempt; (c) hijacking or attempt; (d) importation, manufacture, possession, sale or distribution of firearms, ammunition or any type of bombs or explosives without express permission of Government; (e) use or attempted use of firearms, ammunition, bombs, or any type of offensive weapons or explosives to cause death or injury to human life or damage to public property; (f) arson; (g) any verbal or written act committed to instill fear, or threaten life, person or property.

²⁴⁷ Islamic legal opinion (Fatwa) issued on September 27, 2001 by various Islamic scholars including Shaykh Yusuf al-Qaradawi (Chairman of the Sunna and Sira Council, Qatar), Mohammad Al-Awa (Professor of Islamic Law and Shari’a, Egypt), and Shaykh Taha Jabir al-Alwani (Chairman, Fiqh Council of North America).
<http://www.islamfortoday.com/terrorism.htm>.

²⁴⁸ JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 284 (Dar ul-Ishraq, 2001).

²⁴⁹ UN Security Council Resolution 1373.

Under Subsection (a)(2)(A) it is an offense to conduct a financial transaction in order to further the commission of an unlawful activity. For instance, if someone were to wire money to another person so that the second person could purchase illegal drugs or weapons, that would be an offense under this Subsection. In addition, accomplice liability, governed by Section 30, will be available in any case arising under Subsection (j)(2) where the unlawful activity constitutes a separate offense.

Subsection (a)(2)(B) prohibits transactions that “conceal the nature, location, source, ownership, or control of the proceeds of unlawful activity.” This is the classic crime of money-laundering. For instance, transferring profits from the sale of illegal drugs into an off-shore unnamed account would be a crime under this Section. “Concealment” requires that the defendant affirmatively act in some way that makes information about the proceeds more difficult to find. There is no “concealment” by omission.

Subsection (a)(2)(C) prohibits transactions in illegally obtained funds that are designed to avoid statutory reporting requirements. Maldivian banking and tax law would provide the underlying statutory reporting requirements.

Subsection (b) provides definitions of “financial transaction” and “monetary instrument” and do not require further explanation..

Under Subsection (c), the commission of any of the acts prohibited by this Section is a Class D felony.

Relation to current Maldivian law. Current Maldivian law contains no prohibitions on money-laundering. This Section is included to address the growing complexity of the global financial system and the serious threat to the integrity of that system posed by those who would use it to further illegal aims.

Islamic law supports this Section generally. Subsection (a)(1) is supported by Muslim jurists who prohibit dealing with wealth that has been “unlawfully obtained.”²⁵⁰ Furthermore, Subsection (a)(2) is supported by the Islamic legal principle that prohibits partaking in activities that further elements that are “instrumental causes” of unlawful behavior.²⁵¹

SECTION 732 – DEFINITIONS

Comment:

Generally. This Section collects defined terms used in Chapter 730 and provides cross-references to the Sections in which they are defined.

Relation to current Maldivian law. For discussion of the relationship between Chapter 730’s defined terms and current Maldivian law, refer to the commentary for the Section in which each term is initially defined.

²⁵⁰ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 275 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“It is unlawful to give property that has been unlawfully obtained.”).

²⁵¹ AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 390 (Nuh Ha Mim Keller trans., Amana Publications 1994).

PART III: SENTENCING GUIDELINES

CHAPTER 1000 – APPLICATION OF THE SENTENCING GUIDELINES

The following three Chapters outline the general principles of application for the sentencing guidelines. The drafters have created a grade for every offense defined in this Code. For every grade, there is a maximum penalty. The sentencing guidelines are designed to guide a sentencing court in imposing proper punishment on each offender and each offense within the statutorily authorized range.

The purposes of the sentencing guidelines are the same as the Code’s general purposes: to punish an individual proportionate to his desert, to state clearly society’s intolerance for the conduct, to prevent further bad acts by that person, and to deter others from committing the same offense.

While an explicit sentencing guidelines regime is a novel document for the Maldives, the guidelines themselves codify existing principles in use in Maldivian law. By codifying the sentencing factors already used in determining the sentence for any given offender into one regime, and giving particular weight to individual factors, the sentencing guidelines should make sentencing more systematic, more rational, and more effective. The desire to create such a uniform standard is already expressed in current Maldivian law.²⁵² Because the sentencing guidelines codify general factors used to determine sentences throughout current Maldivian law, this commentary does not compare the draft guidelines to existing law. Instead, this commentary discusses the workings as well as the rationale behind each particular sentencing factor.

SECTION 1000 – DETERMINATION AND ANNOUNCEMENT OF GUIDELINE SENTENCE REQUIRED

Corresponding Current Provision(s): None

Comment:

Generally. This Section has two purposes. First, the Section requires that a sentencing court determine what the sentence *would be* under the guidelines, even if the court will depart from that sentence. By placing this Section as the first in this Chapter, the drafters wish to state clearly that the sentencing guidelines guide all sentencing decisions. While the actual sentence suggested by the guidelines is not mandatory, sentencing courts are not free to ignore the guidelines. In each case, the public record must include the guideline sentence as well as an explanation of the sentencing court’s application of the guidelines.

The second purpose for this Section is to encourage systematic review of sentencing decisions by the High Court. It will take time for judges to become accustomed to implementing a novel Code and sentencing system, so oversight by the High Court should be particularly vigorous during the period immediately after implementation. By reviewing sentencing decisions, the High Court can ensure that judges properly implement the sentencing guidelines.

²⁵² Book 6 of the Rules Relating to the Conduct of Judicial Proceedings, Section 298 (“In passing sentences in criminal cases, having regard to how sentences are being determined in similar cases, sentences shall be determined in a way which will achieve uniformity. And in cases which in the opinion of the judge call for departure from the norm, advice of the Ministry of Justice shall be sought.”).

SECTION 1001 – GUIDELINE SENTENCE

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this Section is to instruct a judge in applying the sentencing guidelines. The nature of the charge will determine in which column the judge should look to determine the sentence. If the offense of which a person has been convicted is a Class C Felony, the judge should consider the column labeled “C Felony.” If the offense of which a person has been convicted is a Class 2 Misdemeanor, the judge should consider the column labeled “M2.” The sentencing factors will determine whether the defendant should get a sentence from a box high or low within that column, but the sentence should always come from that column.

The sentencing factors can be found both throughout the Code. Many of them can be found in the following Chapter, Chapter 1100 (General Adjustments to Baseline Sentence). Others can be found in the Special Part, attached to special offense definitions. A few can be found in the General Part.

Taking all of the relevant sentencing factors into account, a judge should determine whether the government has sufficiently proved the aggravating factors and whether the defense has sufficiently proved the mitigating factors. The baseline sentence for each grade, listed in the following section, should be imposed if no aggravating or mitigating factors are found; the baseline sentence functions as a default sentence. Each of the mitigating factors will reduce the level of a sentence given to an offender compared to the baseline sentence. Each of the aggravating factors will increase the level of a sentence given to an offender compared to the baseline sentence. The number of levels of mitigation proved by the defense should be subtracted from the number of levels of aggravation proved by the government.

Consider an example. Let us say an offender is convicted of a Class D felony. Let us also assume that the government proves three aggravating factors, one increasing his sentence by two levels, the other two increasing his sentence by one level each. Finally, let us also assume that the offender proves one mitigating factor, reducing his sentence two levels. The calculation would look like this:

Aggravation #1:	+2 levels
Aggravation #2:	+1 level
Aggravation #3:	+1 level
<u>Mitigation #1:</u>	<u>-2 levels</u>
Net Result	+2

So, the judge would look in the column for a D felony, and then look for the +2 box within that column. The sentencing guidelines would suggest a sentence of 3 years for that offender.

SECTION 1002 – GUIDELINE SENTENCE TABLE

Corresponding Current Provisions: None

Comment:

Generally. The table expresses the relative severity that certain punishments ought to take, according to the grading of the offense and the extent of mitigation or aggravation of the sentence under the sentencing guidelines. The commentary accompanying Section 1001 explains the process used in determining the appropriate sentence.

As a note, the table expresses the appropriate punishments as a measure of time incarcerated, not because incarceration is the preferred punishment, but because incarceration is one of the most common forms of punishment. A sentencing court should not presume that because the table is expressed in periods of incarceration that a sentence of incarceration only is the appropriate sentence in every case.

SECTION 1003 – GUIDELINE SENTENCE NEED NOT BE IMPOSED, BUT DEPARTURE MUST BE EXPLAINED

Corresponding Current Provision(s): None

Comment:

Generally. This Section builds on the previous provision, explaining how a sentencing court should go about departing from the sentencing guidelines. Having already established that the sentencing court must determine the appropriate sentence under the guideline, this Section states that the sentencing court may then depart upwards or downwards according to its own discretion. If the sentencing court does decide to impose a sentence departing from that sentence by more than two levels, then the sentencing court must explain the reasons for that departure in a written opinion.

The reasons for requiring a written opinion for departures from the sentence determined under the guidelines are numerous. If a sentencing opinion states how the sentencing court used the sentencing guidelines and how the sentencing court departed from the guidelines, the offender and society as a whole can understand better what choices were made and why. These careful explanations will reduce distrust of the criminal process, make the process more transparent, and eliminate the appearance of a sentencing process that is highly discretionary and arbitrary. Also, when a sentencing court writes out the logic of his sentencing decisions, other judges can observe and learn from that judge's opinions. A written opinion will allow the High Court to understand the reasons for a judge's decision and may persuade the High Court not to overturn a sentence. Last, if judges are systematically departing for one reason or another, the legislature may choose to take action to incorporate that factor in the sentencing guidelines.

SECTION 1004 – AMOUNT OF PUNISHMENT CALLED FOR IN GUIDELINE SENTENCE TABLE MAY BE IMPOSED THROUGH ANY AUTHORIZED PUNISHMENT METHOD

Corresponding Current Provision(s): None

Comment:

Generally. This Section states that incarceration is only one means of imposing punishment under the guidelines. Other means of punishment may be used as an alternative to incarceration entirely, or as a substitute for some period of incarceration. In a case of a drug addict convicted of petty theft, an appropriate sentence might be a period of drug treatment rather than any incarceration at all. On the other hand, in a case where a person is convicted of importing firearms into the country, and the guidelines recommend a sentence of three years and six months, it may be just as effective to substitute a fine for the last six months of the term. The sentencing court might then sentence the offender to three years of incarceration and a fine comparable in severity to six months imprisonment.

SECTION 1005 – PUNISHMENT METHOD EQUIVALENCY TABLE

Corresponding Current Provision(s): None

Comment:

Generally. This table establishes the appropriate measures of conversion between periods of incarceration and other nonincarcerative punishments. The rates of conversion are based upon studies of the intuitions of informed laypeople about the relative punitive value of various punishments. The purpose of the table is to enable judges to substitute alternative punishments for incarcerative punishments in a systematic fashion, rather than by using guesswork.

SECTION 1006 – SENTENCING FOR MULTIPLE OFFENSES

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this Section is to strike a proper balance between providing sufficient punishment for multiple offenses to keep the dignity of the criminal law in tact while not creating such extreme sentences that the costs of incarceration bankrupt the State.

In criminal law systems that allow an offender to serve concurrent sentences, the concurrent sentence in essence allows a “free” offense, or an offense without additional punishment. This practice creates a serious problem. Such a system fails to deter a person who has committed one offense from committing a further offense. Such a system also fails to treat a second (or third) offense as a serious one, by failing to punish the offense separately.

On the other hand, if every person who had committed multiple offenses were sentenced for each offense as if he had committed no other, most nations would find the criminal justice system swamped with inmates. The potential for amassing charge on charge and arriving at an unwieldy sentence under such a system is very high.

The system outlined in this Section provides a further punishment for each additional offense, but further punishment of increasingly less severity. Under this Section, the sentencing court should first calculate the sentence appropriate to each offense under the guidelines as if that offense were the only one committed by the offender. Of the sentences obtained, the judge should add together the full duration of the longest or most severe sentence, half the next most

severe sentence, one quarter of the third most severe sentence, etc. For each additional offense, a lesser and lesser fraction of the sentence for that offense should be added to the total. The net effect of this rule is that an offender should never serve a sentence twice as long or longer than the longest sentence for the most severe punishment mandated for an individual offense committed by the offender.

As stated above, the sentencing court should use the longest sentence an offender would receive as the first offense, the next most serious as the second, etc. If two offenses are of the same grade and the same degree of aggravation, the court may consider one or the other as the most serious offense, even though the offenses are of equal gravity. However, the court should still apply the sentencing factors under Section 1104 (Aggravations and Mitigations for Prior Criminal History) to whichever offense was selected as the “first”, even if, in doing so, the “first” offense is made less serious than the “second” offense.

SECTION 1007 – EQUITABLE POWERS OF THE SENTENCING COURT

Corresponding Current Provision(s): None

Comment:

Generally. This section merely restates the powers of a sentencing court to make appropriate rules for offenders, usually to prevent further wrongdoing. Requiring a sex offender to avoid the groups of people he has previously targeted, such as children, or to avoid particular places, such as public parks or schoolyards, that were the scene for earlier offenses would be a typical example of such a power. Judges should use such power with care and consideration for its effects on the offender.

CHAPTER 1100 – GENERAL ADJUSTMENTS TO BASELINE SENTENCE

SECTION 1100 – APPLICATION OF GENERAL ADJUSTMENTS TO BASELINE SENTENCE

Corresponding Current Provision(s): None

Comment:

Generally. Subsection (a) provides that the sentencing judge shall apply both offense-specific sentencing factors and all relevant general sentencing factors from this Chapter to the baseline sentence.

Subsection (b) clarifies the way in which the sentencing judge shall apply the two sets of factors listed in Subsection (a) to one offense. The sentencing judge shall first look to the offense charged and then to this Chapter in determining a sentence. The sentencing factors in offense definitions take priority, in other words, this Chapter may be viewed as layered on top of existing specific sentencing factors. In order to avoid double-counting sentencing factors, if a factor is relevant and is present in both the specific offense and this Chapter, the factor shall only be applied to the extent it is not accounted for in the specific offense.

For example, under Section 130, Sexual Assault, having sexual intercourse with a person under the age of [14] is a Class B felony. Under Section 1102(a)(2)(A), the baseline sentence may be increased if the victim is particularly vulnerable because he is a child. If the victim was age 13, and had no other particular vulnerability, then the sentencing judge should not aggravate the sentence based on the victim's age. However, if the victim was significantly younger than age 14, then the sentence would reasonably be aggravated because of the victim's special vulnerability in light of the specific offense.

SECTION 1101 – AGGRAVATION FOR GREATER CULPABILITY LEVEL THAN REQUIRED BY OFFENSE DEFINITION

Corresponding Current Provision(s): None

Comment:

Generally. This Section directs the sentencing judge to aggravate the baseline sentence if the offender's culpability is higher than the minimum for the offense. This provision is meant to reflect an increase in a very significant (possibly the most significant) indicator of an offender's blameworthiness, his mental state. Thus this guideline does not limit the sentencing judge to an increase of one level for this factor, but rather, one level for each higher level of culpability over the offense's baseline.

Each offense has a required level of culpability as to the harm caused, according to the culpability levels defined in Section 24 (Culpability Requirements). The most common required culpability level is one of recklessness as to the harm caused. Where no specific culpability level is described in the offense definition, the Code in Section 24(h) states that one should assume that recklessness is the required level of culpability.

This section indicates that, where a person acts with a more culpable state of mind than that required by the offense, the sentencing court should increase the sentence for that offender. For instance, if an offender commits the offense of unlawful restraint, which requires that a person act recklessly, but commits the offense with the purpose of restraining that person. By committing that offense with a purposeful level of culpability, the offender exceeds the basic requirement of recklessness by two levels. For that reason, the offender's sentence should increase by two levels.

SECTION 1102 – AGGRAVATION FOR SPECIAL HARMS

Corresponding Current Provision(s): None

Comment:

Generally. The most important sentencing consideration is properly assessing the harm caused by an offender. This Section attempts to address several of the ways in which a harm can be made more serious than the minimum harm required by the statute.

Under Subsection (a)(1), the baseline sentence may be aggravated where the act has harmed the public interest. Since harms to the public interest are usually far-ranging in effect, attacks on the public interest are particularly dangerous. As no one has as strong an interest in protecting the public interest as he has in protecting his own, punishment of those who abuse the public interest must be especially strict in order to deter offenders.

Subsection (a)(1)(A), recognizes that the effect of disruption of a public facility, public service, or public institution can be particularly widespread. A person who interferes with the provision of electrical service or the function of an airport, to name two common examples, can affect people throughout the country or around the world. The kind of offenses that might commonly affect the public interest might be theft or property damage at a public facility or to the property of a public utility service, threats made against a public facility that close or inhibit the function of the facility, etc.

Under Subsection (a)(1)(B), there is an aggravation for offenses which damage the public trust in government or other public entity. Here, however, the harm is ephemeral, as it affects the attitudes of the public toward the ultimate security and transparency of their society. Fraud in banking or other financial services can have a similar effect on public trust as corruption in government.

Harm against government interests is particularly detrimental, and accounted for under Subsection (a)(1)(C). Government property can be an easy target for theft, and taxpayers ultimately pay for the theft. When a person assaults a government agent, such as a police officer or judge, the assault makes it harder to recruit future public servants. Harm against the Government, the representative of the people, merits special punishment.

Subsection (a)(2) provides an aggravation where a victim is particularly vulnerable to the kind of harm perpetrated against him. Committing offenses against vulnerable victims shows a particular depravity, a willingness to prey on those who have a diminished ability to protect or defend themselves, both during and after a crime. The elderly, the young, the ill, and other vulnerable victims have the least capacity to deal with the harms caused, whether fiscal or emotional.

While Subsection (a)(2)(A) lists several groups of people as vulnerable victims, the list neither contains all of those who might be a vulnerable victim to a particular harm nor automatically qualifies all those listed for vulnerable victim status. For instance, while a wealthy elderly woman might be particularly vulnerable to an assault because of her frail state, she would not be particularly financially vulnerable to embezzlement, since her wealth may leave her quite capable of absorbing a modest financial loss. On the other hand, a young, healthy adult man may not be a vulnerable victim generally, but, if a natural disaster occurs and leaves him homeless, he may be particularly vulnerable to any number of property offenses. Each offense will have its own vulnerable victims, and the aggravation should be adjudged on a case-to-case basis.

Subsection (a)(3) provides for an aggravation where the offender harms a place, artifact, property or other interest of historical, religious, environmental, or cultural significance. This is similar to the aggravation in Subsection (a)(1) in that such a harm is considered worse because it affects an interest belonging to the public and society at large. Such an interest is likely to be unique and irreplaceable, and therefore deterring such conduct justifies an increased penalty.

Under Subsection (a)(4), any other harm that exceeds the minimum required by the statute should be considered under this section. The relevant harm will vary from offense to offense. In a theft offense, the harm will generally be financial. If an offender steals goods worth 4,999 Rufiyaa, his offense will be graded as a Class 1 misdemeanor. However, had he stolen one Rufiyaa more, his offense would have been a Class E felony. Simply because of the value of the items stolen, the offender's sentence should be increased dramatically. For other offenses, the harm will be of a different kind. For assault offenses, the harm is bodily harm; where a person causes an injury to another that does not qualify as "serious bodily injury" yet presents a dire harm to the victim, the offender should receive an increased sentence. Where an offender has committed perjury, the importance of the lie told should play a role in determining the sentence. The relevant harm will vary from offense to offense, yet the sentencing judge should always accurately capture the importance of that harm at sentencing.

SECTION 1103 – AGGRAVATION FOR CRUELTY

Corresponding Current Provision(s): None

Comment:

Generally. Under this Section, if an offender commits an offense in a manner displaying great cruelty or disregard for human dignity, then the offender is particularly culpable and deserves greater punishment. As with all considerations of harm, one must always remember that the harm considered is only that which exceeds the minimum described by the statute. Sexual assault, among many other offenses, is an offense which necessarily entails substantial disregard for human dignity in its commission. In construing the meaning of this provision, then, one must look for excessive cruelty or gratuitous conduct beyond a typical case. A rapist who goes to excessive lengths to humiliate his victim or to exacerbate suffering should obtain this aggravation.

SECTION 1104 – AGGRAVATIONS AND MITIGATIONS FOR PRIOR CRIMINAL HISTORY

Corresponding Current Provision(s): Book 6 of the Rules Relating to the Conduct of Judicial Proceedings, Section 289.

Comment:

Generally. This Section directs the sentencing judge to aggravate or mitigate the baseline sentence based on the offender's prior criminal history or lack thereof. Prior history is taken as an indicator of the offender's dangerousness, propensity to commit crimes, and obdurate response despite prior sanctions. The offender who persists in a criminal pattern despite prior sanctions is particularly in need of stronger punishment in order to break him of the habit.

Subsection (a) follows the general rule that the worse the prior record, the greater the aggravation. Violent felonies are weighed particularly heavily because they most closely correlate with the offender's dangerousness and the amount of menace he poses to society. Note that Subsection (a) stipulates that its aggravation is to be applied only to the most serious offense at hand.

Subsection (b) allows for an aggravation when an offender has committed a substantially similar offense within the past two years. The aggravation is available regardless of whether the aggravation in Subsection (a) has been imposed. This Subsection is based on the principle that when an offender is particularly inclined to commit a certain type of offense, this inclination requires stronger sentencing to counteract it. An offender who commits a similar offense again manifests a culpable disregard for the rule of law. Having already committed a similar offense, the offender has failed to learn his lesson. That kind of response suggests contempt for the criminal justice process. Subsection (b) stipulates that its aggravation should be applied to any and all offenses that are substantially similar to an offense previously committed by the offender.

Subsection (c) directs that in calculating time intervals, the time spent under punishment is not to be included. This is because during this time, the offender is less likely to have the means and opportunity for committing a crime. A prediction or assessment of his behavior as a free man cannot fairly be made on the basis of his behavior as a prisoner or someone otherwise subject to punishment.

Subsection (d) offers a mitigation for the least dangerous offender, the person whose crime is an aberration from the rest of his life. This Subsection recognizes that while prior criminal history may be an indicator of dangerousness, lack of prior history and the aberrant nature of an offender's crime is an indicator of lack of dangerousness. An ordinarily law-abiding person can get "carried away" in a particular situation and commit acts which he would not otherwise commit. Subsection (d) also stipulates that the mitigation should apply only to the most serious offense.

Under Subsection (e), the sentencing judge shall only take into account felonies committed as a minor, but not misdemeanors. This Subsection is based on the principle that it is overly harsh to account for a minor's misdemeanors but that felonies are always significant and an indicator of the offender's dangerousness.

While the rationale behind this Section is a strong one, the drafters realize that specific factual situations may give a sentencing judge a legitimate reason to depart from this guideline. For example, suppose a year before the current offense of theft, the offender committed a prior theft. However, in the first case, he stole a television just because he wanted one, and in the present case, he stole food for his hungry child. Although the offense is similar, the judge can reasonably take account of the different motivations in deciding whether or not to apply Subsection (b).

Relation to Maldivian Law. Currently, Maldivian law precludes consideration of any juvenile record.²⁵³ The drafters suggest that the commission of felonies as a juvenile may be reasonable grounds for aggravating the sentence of an offender.

SECTION 1105 – AGGRAVATION FOR REFUSAL TO COMPENSATE VICTIM

Corresponding Current Provision(s): Book 6 of the Rules Relating to the Conduct of Judicial Proceedings, Section 296.

Comment:

Generally. Section 1106 takes into account the offender’s willingness to attempt to put right the harm he has caused. Refusal to agree to compensate for harm is an indicator of an offender’s continued antisocial attitude and lack of compassion. Furthermore, it leaves the victim at a loss for a means by which to recover from the harm. Last, the aggravation incorporates the traditional Islamic law whereby the offender was required to make reparation to the victim. By essentially enhancing the punishment for those who refuse to make compensation, the Code affirms the importance of this traditional rule. Where an offender refuses to compensate a victim or agree to compensate him over time, under Subsection (a), his baseline sentence shall be aggravated.

Subsection (a) also recognizes the possibility of establishing a standing agreement to compensate a victim. While many offenders will not have the capacity for wholly reimbursing a victim immediately, an offender may accomplish the reimbursement over time, in periodic installments.

Subsection (b) recognizes that actually redressing harm may be impossible for financial or other reasons, and requires only a good-faith reasonable effort by the offender. The fact that a harm cannot be completely compensated for does not alleviate the offender’s duty to do as much as he can in order to partially compensate the victim.

Under Subsection (c), the court may delegate responsibility for deciding on the terms of compensation to the offender and the victim. This allows the victim to be a part of the judicial process and to inform the offender of what exactly the victim has been deprived of. However, the victim’s demands may not exceed the harm actually suffered. If the delegation of responsibility is unsuccessful, the court may decide on the terms itself.

Subsection (d) states that payments of compensation are not the same as fines or alternative punishment, and should not be included under provisions referring to these items.

Relation to Current Maldivian Law. The law currently acknowledges the possibility that an offender and a victim might reach an agreement on compensation.²⁵⁴ However, under the new system, the compensation will not preclude punishment. Allowing an offender to avoid punishment by paying compensation fails to punish the offender for his culpable act and treats the act like a simple case of civil negligence. Moreover, the offender will not be deterred from committing the offense again, since the worst penalty provided would be to lose the benefit he had made from the crime, and he might escape punishment and get to keep that benefit.

²⁵³ Book 6 of the Rules Relating to the Conduct of Judicial Proceedings, Section 289, subsection 17 (“Minors who are repeat offenders shall not be subjected to the principles specified in the law as regards the treatment of repeat offenders.”).

²⁵⁴ Book 6 of the Rules Relating to the Conduct of Judicial Proceedings, Section 296.

SECTION 1106 – MITIGATION FOR PUBLIC EXPRESSION OF GENUINE REMORSE

Corresponding Current Provision(s): None

Comment:

Generally. Subsection (a) mandates that an offender’s baseline sentence be mitigated one level if, before trial, he credibly and publicly acknowledges guilt and credibly and publicly expresses remorse. The “before trial” requirement should be enforced in accordance with Maldives Rule of Criminal Procedure 6.03(a), according to which a trial begins when the court “call[s] the trial to order.” No acknowledgment of guilt or expression of remorse after that point is of any effect. Note, however, the proviso in Subsection (b); an offender who submits a valid guilty plea will not necessarily receive this mitigation.

The “credible and public expression of remorse” requirement presents more difficulties. An “expression of remorse” must be an apology of some kind. An expression of remorse is “credible” if it is sincere and consistent with the offender’s other statements. For example, an offender’s expression of remorse would not be credible if he apologized for his offense in open court and later denied committing the offense in a newspaper interview. An expression of remorse is “public” if it communicates effectively the offender’s remorse to the community at large. Generally, an offender’s expression of remorse may be deemed “public” if it is witnessed by a substantial number of people, or published or broadcast in a medium (such as a newspaper, television, or website) that is viewed by a substantial number of people.

SECTION 1107 – MITIGATION FOR SUBSTANTIAL COOPERATION WITH AUTHORITIES

Corresponding Current Provision(s): None

Comment:

Generally. This Section provides a mitigation for offenders who have attempted to aid the authorities in apprehending fellow offenders. This sentencing factor rewards such actions because they may indicate an offender’s good intentions or repentance after a crime is committed. Furthermore, the availability of this mitigation may also encourage offenders to aid the authorities.

Subsection (a) provides that the government may move to mitigate an offender’s baseline sentence by up to three levels if the offender substantially cooperates with law enforcement authorities in the capture or prosecution of another offender.²⁵⁵ Subsection (b) adds that the

²⁵⁵ Note that the substantial cooperation required by Subsection (a) does not vary with the amount of mitigation requested in the government’s motion. Note also that this Section permits the government to move to mitigate the offender’s baseline sentence only if the offender’s substantial cooperation contributes to the “capture” or “prosecution” of another offender. “Capture” should be construed to mean the lawful arrest of another offender under Maldives Rule of Criminal Procedure 2.06; “prosecution” should be construed in accordance with Section 61(e): “[a] prosecution for [an] offense commences on the date the charging document is filed for an offense.” Thus, an offender’s substantial cooperation that contributes to neither the lawful arrest of another offender nor the filing of a charging document against another offender cannot ground a government motion for mitigation under this Section.

sentencing court must grant the government’s motion for mitigation if it finds the “substantial cooperation” required by Subsection (a), and that the sentencing court may not, on its own motion, mitigate a sentence on the ground of the offender’s substantial cooperation. The crucial term in this Subsection is “substantial cooperation.” The sentencing court must defer considerably to the government’s assertion that the offender has substantially cooperated with law enforcement authorities. The sentencing court may reject the government’s assertion only if it finds clear and convincing evidence either that the offender did not cooperate, or that the offender’s cooperation was not substantial. If the sentencing court denies the government’s motion, Subsection (b) precludes the sentencing court from independently searching the record for other instances of substantial cooperation.

SECTION 1108 – MITIGATION FOR IMPERFECT JUSTIFICATION

Corresponding Current Provision(s): None

Comment:

Generally. This Section provides a mitigation for those who commit an offense because of an imperfect justification. The rationale for this factor is that offenders who think they are justified in committing an offense, but whose reasons do not in fact rise to the level of a true justification, are less blameworthy than those who commit offenses they know are not justifiable.

Subsection (a) provides that the offender’s baseline sentence shall be mitigated one level if, at the time of the offense, the offender believed that his conduct was justified by a justification defined in Chapter 40; Subsection (b) requires that the baseline sentence be mitigated two levels if, in addition, the offense and the offender’s conditions and circumstances came close to providing a complete justification defense. Several points bear clarification here. First, the sentencing court must evaluate the offender’s belief, the offense, and the offender’s condition and circumstances as they were at the time of the offense. Second, to qualify for the one-level mitigation under Subsection (a), the offender need only have had a sincere subjective belief that his conduct was justified under Chapter 40; even a manifestly unreasonable, sincere belief satisfies the requirements of Subsection (a).

Third and most important, the meaning of the phrase “came close to providing a complete justification defense” varies with the justification defense asserted by the offender. The sentencing court should refer to the commentary for Chapter 40 when determining whether to mitigate the baseline sentence two levels under Subsection (b).

SECTION 1109 – MITIGATION FOR PARTIAL EXCUSE

Corresponding Current Provision(s): None

Comment:

Generally. This section provides for a mitigation when the offender substantially satisfies the requirements of an excuse defense. This sentencing factor accounts for the

exculpatory factors considered in Chapter 50. Generally, the defenses outlined in that Chapter excuse a person whose capacity to control himself or to perceive reality or the nature of his conduct is so limited that society should not punish him for that offense. The reason for that excusing condition may be one of many: insanity, immaturity, duress, involuntary intoxication, etc. However, such capacity varies widely from one offender to another, along a spectrum of capacity and culpability ranging from a person in complete control of his faculties to a person who is unconscious. How one draws the line as to what level of incapacity or lack of culpability constitutes a complete defense is somewhat arbitrary.

Regardless of where that line is drawn, some defendants will almost achieve the complete defense. These offenders will be able to show a lack of control or culpability for their actions that approaches the point where they would obtain a complete defense. Treating these defendants the same way as defendants who acted with complete control over themselves would ignore an important distinction in culpability. For this reason, this sentencing guideline mitigates the sentence for those defendants with only limited capacity to control themselves and to perceive reality.

For example, consider a defendant who suffers from a mental illness. If his illness is so severe that he cannot control himself or loses all touch with reality, the defendant may obtain a complete defense. However, relatively few defendants suffer from such severe mental illness. For many defendants who do not obtain such a defense, their illnesses are contributing causes to their offenses. Insofar as the illness limits a defendant's capacity to control himself, that defendant deserves less punishment. For a defendant with a truly limiting mental illness, a two-level mitigation will be appropriate. For a defendant whose mental illness had only modest impact on his capacity and culpability, a one-level mitigation will be appropriate. Note, however, that this mitigation is not automatic. Someone who happens to have a mental illness but whose illness had little if any impact on his rational decision-making process would not benefit from the mitigation. Automatic commitment to a psychological facility is not a consequence for benefiting from this mitigation.

In Sections 52 and 56, the Code refuses to consider antisocial personality disorder as a psychological illness for the purpose of the statute. Neither should antisocial personality disorder be considered as grounds for this mitigation. Antisocial personality disorder is an illness identified entirely by its symptoms rather than its origins. As the symptoms for the disorder include propensity to violence, irritability, inability to get along with others, etc., the disorder's definition simply defines violent criminality as an illness, without providing any reason to excuse offenders with that disorder.

The above discussion of the availability of the mitigation for mental illness is analogous to the availability of the mitigation for cases involving involuntary intoxication, immaturity, and impaired consciousness, other excuses made available under Chapter 50. Since the excuse defenses contemplate similar physiological impairments of the rational decision-making process, the same concerns should attach. For examination of the underlying purposes of these excuse defenses, see the commentary to Chapter 50.

The duress defense is slightly different from the other defenses, so duress deserves a special discussion as a mitigation. Winning the duress excuse defense requires showing that a person of reasonable firmness would not have been able to resist the threatened harm. However, if a person is threatened with real harm that does not meet that standard, then that person is still not as culpable as another who commits the offense without any threat being posed to him. While a threat to expose a family secret, for instance, might not justify an excuse defense to the

embezzlement of a modest sum, the coercive impact of that threat may justly be considered under this mitigation. Further, even though the complete duress defense is not available as a defense to a murder, an offender who commits a murder under threats of serious harm is not as culpable as a murderer who kills in the absence of such threats. For that reason, a mitigation for duress may be obtained for a murder, even though the full excuse is not available.

As for the ignorance or mistake of law excuse and the mistake as to a justification, the mitigation might be applicable to those defenses where a person's mistake was not reasonable but made in good faith. Alternately, a defendant might receive the benefit of the mitigation where he received an official misstatement of the law from a public servant who was not of the authority that would grant him a complete excuse, but on which the defendant still relied. For instance, if a police officer erroneously assured a person that certain fishing practices were legal, the advice would probably not meet the requirements for the complete defense. However, if the person relied in good faith on that advice, a court might take that as a reason to mitigate the sentence of the offender. The offender should have taken better care to ascertain what the law is, but at least the offender made some effort and relied on his findings.

SECTION 1110 – MITIGATION FOR EXTREME EMOTIONAL DISTRESS

Corresponding Current Provision(s): None

Comment:

Generally. Under this Section, an offender who committed his crime under extreme emotional distress should have his sentence reduced below the baseline. The importance of this mitigating factor is recognized in the code in Section 110, where a defendant acting under extreme emotional distress will have his murder conviction reduced an entire grade. In the case of murder, that grading factor should take precedence over this one, but this mitigation should apply to all other sections of the Special Part.

Subsection (a)(1) requires that a person establish that he committed the offense under extreme mental or emotional disturbance. This disturbance could be a highly emotional episode, such as fear, anger, or frustration; a period of mental stress imposed by external factors; or any other form of distress that might limit a person's capacity for self-control. This mitigation is broad and reaches many mental and emotional conditions not otherwise provided for, notably those not deriving from a preexisting mental illness.

Under Subsection (a)(2), the offender must then establish that the disturbance arose from a cause for which there is a reasonable explanation. The purpose for this requirement is that the Code should not encourage people to refuse to control their emotions. Everyone is afflicted with anger or fear or frustration at one time or another in their lives. Only those episodes of remarkable stress or significance should suffice for the purposes of this requirement. A man who becomes trapped in an elevator with another man who has recently raped the first man's sister might beat the other man severely. The assault should not be condoned or excused, because retribution is not a valid justification for an assault. However, the moral distinction between that man and one who assaults another with little cause should be considered in sentencing.

The provision under Subsection (a)(2) requiring that the sentencing judge consider the facts as known to the offender at the time of his conduct safeguards the offender from having an unreasonable standard applied to him. The offender acted in light of the limited and imperfect

knowledge that any person has in the moment of his actions. Through investigation after the fact, anyone can gain a clearer picture of the facts; however, the judge must recognize the limitations of the facts as known to an offender.

CHAPTER 1200 – LIMITATIONS ON APPLICATION OF SENTENCING GUIDELINES

SECTION 1200 – LIMITATIONS ON AGGRAVATION OR MITIGATION

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this section is to reinforce the importance of the statutory limitations established in the General Part and ensure that they are carried out. After the sentencing judge has used the offense definition and the relevant sentencing factors to calculate a sentence, his final determination is nevertheless constrained by this Section. This is to ensure fairness in the administration of criminal justice.

The sentencing guidelines do not in any way diminish the importance of statutory maximums, which provide a guarantee to the defendant and assure him of what punishment he can expect. At the same time, a defendant who receives multiple mitigations should never fail to receive punishment or be sentenced to punishment that is without meaning. Only the conduct that the General Part describes as conduct not fulfilling the requirements of culpability, as justified conduct, or excused conduct is blameless conduct and thus not punishable. A person who does not obtain one of these exceptions or defenses should not escape punishment, even if that punishment is mild. The punishment mandated by courts should always have meaning and should always match the guilt of the offender.

SECTION 1201 – INCARCERATION AS PUNISHMENT

Corresponding Current Provision(s): None

Comment:

Generally. The purpose of this Section and Section 1202 is to guide the sentencing court in determining which punishment should be applied and what portion of the total punishment each punishment should comprise. Each individual case will inevitably be different. The circumstances of the individual offender, the nature of the offense, and the resources available to the State should determine which punishments an offender should receive.

This Section deals with the punishment of incarceration. While incarceration is fundamental to any system of punishment, it is not the sole, or necessarily even the primary, means of punishment. Incarceration achieves certain goals well and serves other purposes poorly. Incarceration is unquestionably the best means of controlling an offender's dangerousness to society during the period of his imprisonment. Incarceration is also an important means of showing the gravity of an offense. Incarceration is also the most restrictive of the available penalties, so, if imposed, the punishment should generally be imposed as the first step in the punishment process, with alternative sentences as subsequent punishment, gradually giving more and more freedom back to the offender. If incarceration were imposed later in the punishment process, incarceration could disrupt the rehabilitative effects achieved by the alternative punishments. For instance, if an offender were sentenced to incarceration and a drug treatment program, the offender should first be incarcerated and be treated for drug addiction

either concurrently with or subsequent to his incarceration. If the offender were treated for his addiction and then incarcerated, the offender would be more likely to relapse into drug use.

Subsection (b) contains an important requirement for the use of incarceration. If a person is convicted of a serious offense, defined as a felony offense against the person or another offense graded as a Class A or Class B felony, the person should serve a period of incarceration of at least one-fourth of his punishment. In most cases, substituting alternative penalties will simply be impractical, as imposing serious punishment entirely in the form of alternative penalties would mandate impossibly long periods of supervision or treatment or grotesquely large fines.

Beyond the practical difficulties of adequately punishing a serious offense with alternative punishments, incarceration often sends the most direct retributive message. In these cases of serious offenses, a person must serve a term in prison to show the seriousness of the offense.

SECTION 1202 – APPLICATION OF ALTERNATIVE PUNISHMENTS

Corresponding Current Provision(s): None

Comment:

Generally. This Section discusses why and how certain alternative punishments should be applied. In many cases of minor offenses, the alternative punishments will be appropriate as punishment on their own. In other cases, particularly in the case of serious offenses, alternative punishments should be imposed alongside incarcerative punishments. The particulars of a certain case may also indicate that a certain punishment is not appropriate for a particular offender. A sentencing court should keep in mind that the punishment should retain punitive value.

The first punishment discussed in this Section is house arrest. House arrest can be an effective punishment for relatively minor offenses. House arrest will often be an appropriate first step in a transition from incarceration to freedom. Factors particularly worth considering in determining whether or not to impose house arrest are the benefits to society and the offender's family in having the offender at home and the benefits to the offender of living in his home. An offender who has committed a nonviolent offense and who plays an important role in the home might be a good candidate for house arrest, as might an elderly or sick offender who has committed a nonviolent offense and who can get better care from his family than might be available in prison.

Community service is often an appropriate secondary punishment, except in the most minor of cases, where it may be the sole form of punishment. Community service may be served concurrently with almost any other form of punishment. For instance, a person might do community service at the same time that he serves a sentence for house arrest, incarceration, or intensive supervision. Community service should be tailored to remedying the same kind of harm that the offender caused. For instance, a person who commits property damage could be sentenced to clean up graffiti or damage caused by other vandals. Alternately, an offender with particular skills might be an appropriate candidate for community service, if those skills are in need. For instance, a physician convicted of defrauding his patients could be sentenced to work in a free government clinic without payment for a certain period.

Fines are often an effective means of punishment, one that imposes no costs on the State. It is important, however, that an offender not be thought to be “buying” his way out of serious punishment. The fine must fit the offender’s resources in such a way that the fine properly punishes the offender. Moreover, a fine should not be imposed on an offender if the offender has no means of paying the fine. Like community service, fines typically will be a secondary means of punishment, except in the least serious cases.

Intensive supervision is an appropriate punishment for most offenders, especially where such supervision helps reintegrate the offender into productive society. After a period of incarceration or house arrest, intensive supervision allows the State to continue punishing the offender while granting the offender more freedom. Because a period of intensive supervision requires active participation by the offender, only an offender capable of cooperating with the supervision should be considered eligible for this punishment. A careful distinction also should be maintained between intensive supervision and probation; the two are similar, but intensive supervision is a far more restrictive program of punishment.

Treatment programs can help counter some of the primary causes of criminal activity. Requiring an offender to participate in anti-addiction programs and psychological counseling can strike at the core causes of criminality and prevent further offenses. Treatment programs can be imposed concurrently with other forms of punishment.

A period of probation is often the most appropriate last step in integrating an offender back into society. Probation is the least restrictive means of punishment available. Probation rarely should be the sole means of punishment.

SECTION 1203 – FAILURE TO COMPLY WITH THE TERMS OF AN ALTERNATIVE PUNISHMENT

Corresponding Current Provision(s): None

Comment:

Generally. Since alternative punishments often require cooperation by the offender, it is necessary to provide for the case of the recalcitrant offender. If an offender does not comply, the punitive value of the alternative punishment is diminished. For this reason the offender should be returned to incarceration, to serve the remainder of his sentence as if he had never had that alternative sentence imposed. Generally, the word of the government should be sufficient to return the offender to jail, though the offender should have the right to respond to the government’s allegations.

SECTION 1204 – DEATH PENALTY

Corresponding Current Provision(s): None

Comment:

Generally. The death penalty is the most serious punishment available. The penalty is irreversible once imposed. For this reason, before imposing the death penalty, the State must be absolutely assured of the guilt of the offender, and the offense must be of the gravest kind. In the event the State seeks the death penalty, the State must meet all of the evidentiary requirements

imposed in this Section. Moreover, if the death penalty is imposed, the offender will have a right of appeal to the High Court for complete review of all findings.