

EFFECTIVE ANTI-CORRUPTION ENFORCEMENT IN THE AREA OF PUBLIC PROCUREMENT

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I. INTRODUCTION

While the well-renowned tourism industry of Maldives paints the country as the epitome of serenity and calmness, the island nation has been in the midst of chaos and uncertainty in the recent years.

The state audit report¹ published on 4th February 2016 exposed the biggest corruption scandal in the history of Maldives. The report confirmed the embezzlement of \$79 million through the state-owned Maldives Marketing and Public Relations Corporation (MMPRC). Equally unsettling, was the conviction of the first democratically elected leader of Maldives on a terror-related charge, which led to severe condemnation from the international community on the basis that the trial process contravenes international fair trial standards and that the conviction was politically motivated, along with allegations that the judicial system of Maldives is compromised².

The Global Corruption Barometer 2013³ survey revealed that 97 per cent of the respondents believe corruption to be a threat in the public sector of Maldives. According to the survey, the Parliament, followed closely by political parties and the Judiciary is perceived to be the most corrupt institution of the country.

Undoubtedly the country is in dire need to re-enforce the current methods of combating corruption in order to reach the full potential of social and economic development of the small island nation and to gain public confidence in its constitution.

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¹<http://audit.gov.mv/assets/Uploads/MMPRC-Special-Audit-Report-2016.pdf>

²<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15915&LangID=E>

³<http://transparency.mv/wp-content/uploads/2013/12/FINAL-TM-POSTER-ENG.pdf>

A. Anti-Corruption Commission of Maldives (ACC)

The Maldivian legal system is currently governed by the Constitution of 2008 which mandates the establishment of an independent statutory institution to combat corruption.⁴ Hence, the Anti-Corruption Commission Act⁵ (hereafter referred to as the ACC Act) was enacted; and The Anti-Corruption Commission (hereafter referred to as ACC) was established on 16th October 2008. The ACC is an independent legal entity, possessing power to sue, be sued and to make undertakings in its own capacity.⁶

1. Key Functions of the Anti-Corruption Commission

The ACC Act mandates the following obligations for the Commission:⁷

- To inquire into and investigate all allegations of corruption; any complaints, information, or suspicion of corruption must be investigated;
- To recommend further inquiries and investigations by other investigatory bodies, and to recommend prosecution of alleged offences to the Prosecutor General, where warranted;
- To carry out research on the prevention of corruption and to submit recommendations for improvement to relevant authorities regarding actions to be taken;
- To promote the values of honesty and integrity in the operations of the State, and to promote public awareness on the dangers of corruption;
- Conduct seminars, workshops and other programmes to enhance public awareness on the prevention and prohibition of corruption; conduct surveys and research to further this end and the publication of such surveys and research;
- Disclose information pursuant to the prevention and prohibition of corruption that require public disclosure and publish statements where necessary;
- Implement and monitor the implementation of the Prevention and Prohibition of Corruption Act and formulate and implement all rules necessary for the enforcement of the Act.

B. Implementing UNCAC in Maldives

Maldives acceded to the United Nations Convention against Corruption (hereafter referred to as UNCAC) on 22nd March 2007. The provisions of the convention are incorporated into the domestic law through amendments, by passing new laws or by adopting them into the administrative system. A review of implementation of the UNCAC⁸ had been completed in 2015, which identifies the legal and institutional gap in effectively implementing the UNCAC.

C. Legislation Relevant to Corruption Cases

Currently three fundamental laws are used in the battle against corruption. The Prevention and Prohibition of Corruption Act⁹ (hereafter referred to as PPC Act), which criminalizes specified acts of corruption committed by public officials; the ACC Act, which established and governs the ACC; and the newly enacted Penal Code¹⁰ (hereafter referred to as the 'new Penal Code'), which replaced the age-old penal code of 1968, bringing forth revolutionary changes to the Criminal Justice System of the country.

Supplementary legislation that supports the anti-corruption framework of Maldives includes the Prevention of Money Laundering and Financing of Terrorism Act¹¹, Public Finance Act¹², Public Finance

⁴The Constitution of Maldives 2008: Article 199 (b)

⁵Act no 13/2008, the Anti-Corruption Commission Act

⁶Act no 13/2008, the Anti-Corruption Commission Act: Article 2

⁷Act no. 13/2008, Anti-Corruption Commission Act: Article 21

⁸<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1506809e.pdf>

⁹Act no. 2/2000, Prevention and Prohibition of Corruption Act

¹⁰ Act no. 9/2014, the Penal Code

Regulation of 2009 and Maldives Banking Act¹³. In 2015, two important international cooperation laws were enacted: the Law on Extradition,¹⁴ and the Act on Mutual Legal Assistance in Criminal Matters.¹⁵

II. MEASURES FOR DETECTION OF CORRUPTION

A. Laws which Aid Early Detection of Corruption

Investigating allegations of corruption is the core responsibility of the ACC mandated under Article 21(a) of the ACC Act. Hence, ACC is under legal obligation to inquire into suspicions of corruption regardless of the source of information, which may include information obtained through media, public concerns, official reports or corrupt activities directly encountered by public officials.

However, a scant number of laws aid the early detection and prevention of corruption in the country.

1. Asset Declaration

Declaration of assets is a key tool in detecting corruption. In addition to increased transparency and public confidence, it would help monitor conflict of interests which may otherwise be left undetected. Annual asset declaration in the form of a general statement of all property and monies owned, business interests and all assets and liabilities is a constitutional obligation for the Executive, Members of the Cabinet, Members of the Parliament and Judges.¹⁶ Unfortunately, due to the lack of legal provision criminalizing illicit enrichment, the fundamental purpose of asset declaration has been largely left unrealized.

2. Conflict of Interest

While asset declaration aids in detecting conflicts of interest, section 6.8 of the Public Finance Regulation¹⁷ necessitates a written authorization from the ACC if a public office or governmental agency procures from a business that has a conflict of interest with any of its employees, henceforth, establishing an effective method of cross-checking the parties involved.

3. Legal Obligation which Assists in Detection of Corrupt Activities

Article 30 (a) of the Civil Service Commission Act obligates civil servants to report knowledge regarding breaches of law or regulation, as well as accusations of such breaches to the responsible director of their office. If the employee is dissatisfied with the outcome of the said complaint, Article 31 of the Act gives the employee the discretion to report the complaint to the civil service commission. These articles guide civil servants to take action when corrupt activities are observed, which in turn paves the path to detect and tackle corrupt activities in their first stage.

Furthermore, a False Statement given to a public official or a law enforcement office while performing an official function, with the intention to mislead is criminalized under Article 20 of the PPC Act and Article 521 (a) and (b) of the new Penal Code. These Articles, applicable not only to civil servants but also to every person within the jurisdiction of Maldives, acts as a strong incentive to give honest statements and to refrain from concealing relevant information.

B. Methods of Gathering Information to Detect Corruption

Awareness and education programmes held by ACC encourage the general public to report all forms of information, complaints, suspicions, speculations or allegations of corrupt activities, which may be reported through a toll-free telephone line, e-mail, letter, or in person. The informant is given the choice of reporting cases anonymously.

Early detection of corruption is largely dependent on whistle-blowers. The Global Corruption Barometer 2013 survey revealed that, 11 per cent of respondents were reluctant to report an incidence of

¹¹ Act no. 10/2014, the Prevention of Money Laundering and Financing of Terrorism Act

¹² Act no. 3/2006, Public Finance Act

¹³ Act no. 24/2010, Maldives Banking Act

¹⁴ Act no. 1/2015, Extradition Act

¹⁵ Act no. 2/2015, Mutual Legal Assistance in Criminal Matters Act

¹⁶ The Constitution of Maldives 2008: Article 76, 120, 128 and 153

¹⁷ Public Finance Regulation 2009, enacted through Article 49 of Act No. 3/2006, Public Finance Act

corruption, and of this, 22 per cent would not report for fear of the consequences.¹⁸ Whistle-blowers are protected under Article 232 (b) of the new Penal Code and Article 18 of the PPC Act. Additionally, Article 41 of the Banking Act, Article 44 of the the Prevention of Money Laundering and Financing of Terrorism Act and Article 35 of the Maldivian Civil Service Act¹⁹ provides protection for the employees of their relevant offices.

Suspicious Transaction Reports traced by the Financial Intelligence Unit (hereafter referred to as FIU) constitute one of the most significant methods of detecting corrupt activities. The FIU of Maldives is an operationally independent Unit within the Maldives Monetary Authority, established by Prevention of Money Laundering and Financing of Terrorism Act. The FIU forwards the respective intelligence information and Suspicious Transaction Reports to the Maldives Police Service.

C. Non-legal Methods of Detecting Corruption

Although non-legal guidelines do not have the force of law, they embody a formal statement of behaviour expected of public officials, which brings together the government, businesses and civil society in the fight against corruption and plays an important role in understanding and identifying activities which may lead to corruption. A National Integrity Plan (NIP), recently initiated by the ACC formulates the ethics and conduct necessary to build a society free from corruption. Information sessions about NIP have been held in 44 institutions of the country to date.

III. INVESTIGATION AND PROSECUTION

A. Investigation Process

Investigation of corruption in Maldives takes a reactive approach as opposed to a proactive approach where suspicious conduct is investigated before or during the commission of the offence. It is noteworthy that an effort is being made by the ACC to move towards a proactive investigation approach which may make the ongoing battle against corruption more successful in the future.

1. Initiating Corruption Cases

The investigation process of corruption cases begins with the Members of the Anti-Corruption Commission, who review complaints reported and decide whether the complaint falls under the mandate of the commission and warrants investigation. Additionally, commission members initiate some cases based on information or allegations of corruption.

Once the Commission decides that an allegation warrants investigation, a case is filed with the commission and assigned to an investigation team which ordinarily consists of three investigators, both from auditing and legal backgrounds.

2. Evidence Collection

Article 22 of the ACC Act gives the commission the power to obtain admissible evidence from institutions that fall within the jurisdiction of the Act. Due to the reactive approach to investigation, the ACC habitually relies on documentary evidence. As such search and seizure of documentary evidence is the main form of evidence collection. If documentary evidence proves to be insufficient the ACC has the power to summon witnesses and persons related to the investigation to obtain their statements. Furthermore, the PPC Act enables the ACC to confiscate undue properties, obtain information of bank account details and transactions, as well as freeze suspicious bank accounts through a court order.²⁰

Forensic investigations for cases investigated by the ACC are undertaken by the Forensic Science Department of Maldives Police Services (MPS) under the Memorandum of Understanding between ACC and MPS. Covert investigation techniques have not been used in an investigation of a corruption case to date.

3. Consolidating the Findings of the Investigation

After evidence collection, the investigation team then analyses the data collected to prepare an Investi-

¹⁸ <http://transparency.mv/wp-content/uploads/2013/12/FINAL-TM-POSTER-ENG.pdf>

¹⁹ Act No. 5/2007, Maldivian Civil Service Act

²⁰ Act no. 2/2000, Prevention and Prohibition of Corruption Act: Article 24, 25 and 26

gation Report. Investigation Reports are based on the evidence collected, relevant findings of administrative or procedural mismanagements, recommendations for correctional measures, as well as the conclusion reached by the investigation team as to whether the case has sufficient evidence for prosecution. This report is submitted to the Members of the Commission who, based on evidence presented, take the final decision whether or not to prosecute.

Article 25(b) of the ACC Act states that, upon completion of an investigation, the Commission shall forward the case to the Prosecutor General's Office for prosecution if the case is one which involves an offence of corruption, and the Commission believes that sufficient evidence has been obtained to bring a conviction at trial.

B. Prosecution

1. Introduction of the Prosecutor General's Office of Maldives

The Prosecutor General's Office was established on 7th August 2008 under Article 220 (a) of the Constitution.²¹ The responsibilities of the Prosecutor General include supervision of prosecution of all criminal cases; institution and conduction of criminal proceedings in respect of any alleged offence; to take over, review and continue proceedings; and at his discretion, to discontinue any criminal proceedings at any stage prior to judgement by a court of law.²²

2. Prosecution in Cases of Corruption

According to the constitutional responsibilities of the Prosecutor General, the sole decision to prosecute in cases investigated by the ACC is vested with the Prosecutor General. Prosecution guidelines, formulated by the Attorney General provide the basis to determine the type or gravity of cases that warrant prosecution.

C. Adjudication and Trial Procedure

1. Introduction to the Judicial System of Maldives

The Constitution of Maldives vests its judicial power in the Supreme Court, High Court and the trial courts established by law. The Constitution states that Judges shall be independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, Judges are directed to consider Islamic *Shari'ah*. The Constitution further states that in the performance of their judicial functions, Judges must apply the Constitution and the law impartially and without fear, favour or prejudice.²³

2. Standard of Proof for Criminal Offences

The standard of proof for criminal offences in Maldives is laid out in the Constitution of Maldives²⁴ and in the new Penal Code²⁵ to be, proof of the defendants' guilt *beyond reasonable doubt*. Offences related to corruption are criminal offences for which the prosecution must prove the defendants' guilt beyond reasonable doubt.

3. Conviction Rate of Cases Involving Corruption

The conviction rate of corruption cases in Maldives is mortifying. Thus far, there has been only one successful conviction of a corruption case. In *Ismail Abdul Hameed v PG* (2011) the Supreme Court upheld the decision of the High Court and the accused was found guilty under Article 12 of the PPC Act for the offence of conferring an undue advantage.

4. Legal Penalties for Offences Involving Corruption

Under the new Penal Code the level of culpability for criminal offences is determined by adding the number of aggravating factors and subtracting the number of mitigating factors in accordance with Article 1002 of the new Penal Code.

²¹ The Constitution of Maldives 2008: Article 220 (a) of the Constitution states that there shall be an impartial Prosecutor Generals of Maldives.

²² The Constitution of Maldives 2008: Article 223 (c) and (g)

²³ Constitution of the Maldives 2008: Article 141 and 142

²⁴ Constitution of the Maldives 2008: Article 51(h)

²⁵ Act no. 9/2014, the Penal Code: Article 15

The following table²⁶ shows the penalty for the main offences related to corruption in the public sector, under the new Penal Code.

Article No.	Offence	Grading	Baseline Sentence	Maximum Sentence
510	Bribery	Class 3 Felony	3y, 2m, 12d	8 years
511	Influencing Official Conduct	Class 4 or 5, Felony	1y, 7m, 6d, or 9m, 18d	4 years
512	Official Misuse	Class 1 Misdemeanour	4m, 24d	1 years
513	Misuse of Governmental information or Authority to obtain a benefit	Class 4 Felony	1y, 7m, 6d, or, 9m, 18d	4 years
310	Forgery	Class 5 Felony	9m, 18d	2 years
310	Counterfeiting	Class 4 Felony	1y, 7m, 6d	4 years
311	Tampering with Writing, Record, or Device	Class 5 Felony	9m, 18d	2 years
315	Rigging Publicly exhibited contest or Public Bid	Class 4 or 5, Felony	1y, 7m, 6d, or, 9m, 18d	4 years

As a general principle, the new Penal Code does not apply to offences occurring or committed prior to 16th July 2015, when it came into effect. However, the new penal code states that in determining a sentence where the sentence prescribed for the offence under the new Penal Code is less than the sentence prescribed under the previous Act, the penalty for the offence shall be prescribed in accordance with the rules specified in the new Penal Code.

IV. PUBLIC PROCUREMENT SYSTEM OF THE MALDIVES

Every year millions of dollars are spent on public procurement. The Public Procurement System (hereafter referred to as PPS) is one of the few sectors in which the whole country becomes a stakeholder. The large amount of investments in public procurement open the floodgates for corruption, especially when established rules of best practice are not adhered to, and when the PPS is not diligently monitored.

A. Public Procurement System and Policies

1. Legal Framework of the PPS of Maldives

Two main laws govern the PPS of the country: the Public Finance Act,²⁷ and the Public Finance Regulation 2009²⁸ enacted under Article 49 of the Public Finance Act. The Public Finance Act mainly mandates the procedure for public expenditure, while the Public Finance Regulation, among other things, mandates the policies for public procurement. In 2010, Chapter 15 of the Public Finance Regulation named 'Public Procurement', based solely on public procurement policies, was introduced as an addendum to the said Regulation.

2. Main Policies Governing Public Procurement

The main policies of public procurement specified under the Public Finance Regulation are as follows:²⁹

- If the total value of goods purchased is less than MVR 1,000 (US\$65.15) such items may be purchased at a reasonable market price.

²⁶ Law no. 6/2014: Article 1002 (b): (1) Years (y). A year is a period of 365 days.

(2) Months (m). A month is a period of 30 days.

(3) Days (d). A day is a period of 24 hours.

²⁷ Act no. 3/2006, Public Finance Act

²⁸ Public Finance Regulation 2009

²⁹ Public Finance Regulation 2009: Chapter 8

- If the total value of goods purchased is between MVR 1,000 (US\$65.15) and MVR 25,000 (US\$1628.66) an informal Request for Quotation shall be made in order to obtain at least three quotations. The goods shall be purchased from the lowest priced technically acceptable offer.
- If the total value of services obtained is less than MVR 25,000 (US\$1628.66) an informal Request for Quotation shall be made in order to obtain at least three quotations. The service shall be awarded to the lowest priced technically acceptable offer. The reason for selecting a particular party shall be documented and signed by a public official.
- If the total value of the goods purchased or the services obtained is between MVR 25,000 (US\$1628.66) and MVR 1,500,000 (US\$ 97,719.87) a formal invitation is made to submit a bid, followed by a meeting between the relevant government venture and interested parties, during which detailed information of the requirements, the scope of work and the criteria for evaluation is shared in writing with interested parties. Bids shall be opened in the presence of all interested parties and shall be evaluated by the tender evaluation committee of the relevant public office, in accordance with their obligations under Public Finance Regulation and the evaluation criteria stipulated in the bid information paper. The work shall be awarded to the bidder who obtains the highest score.
- If the total value of the goods purchased or the services obtained is higher than MVR 1,500,000 (US\$ 97,719.87), the tender documents and proposals shall be submitted to the Nation Tender Board. The board evaluates the documents submitted and awards the bid to the most economically advantageous tender.

3. Corruption in Public Procurement

The largest number of cases handled by the ACC are related to procurement.³⁰ In 2015, 855 cases were registered in the ACC, of which 287 cases were related to public procurement; a total number of 871 cases were completed within the year, of which 256 cases were related to public procurement.

B. Ismail Abdul Hameed v PG (2011)

Ismail Abdul Hameed v PG (2011) is the only successful case of conviction under the PPC Act. The facts of the case are not related to the initial procurement procedure. The reason for conviction is mostly founded on misleading and false documentation, after the project had been awarded.

Ismail Abdul Hameed was accused of using his position as the Director of Waste Management Section of the Male' Municipality to confer an undue advantage to a company named Island Logistics, in the procurement and importation of a barge from the said company.

The Waste Management Section entered into an agreement with Island Logistics on 19th October 2007, to purchase a barge. According to the agreement the barge was to be delivered to Male', Maldives port within 90 days upon signing the agreement. 50 per cent of the agreed price was to be paid within 14 days after signing the agreement, and the remaining to be paid within 14 days after receiving the barge.

However, Island Logistics failed to deliver the vessel within 90 days in accordance with the agreement. Before the barge was delivered, Island Logistics requested Ismail Abdul Hameed to sign the protocol of delivery and acceptance of the vessel, claiming that it was required by the advising bank for the LC of the said business transaction. Ismail Abdul Hameed signed the requested protocol of delivery and acceptance claiming that the barge was delivered on 28th April 2008, as scheduled in the agreement. The barge was delivered a year after the scheduled date, on 23rd October 2008.

The Criminal Court ruled that the documentary evidence presented to the court proved beyond reasonable doubt that Ismail Abdul Hameed acted with clear foresight of the consequences of his action, therefore intentionally and was found guilty under Article 12 of the PPC Act and sentenced to eighteen month's banishment.

³⁰ <http://acc.gov.mv/en/wp-content/uploads/2016/05/Stat-Book-2015.pdf>

The case was appealed to the High Court and the Supreme Court. The decision of the Criminal Court was upheld by both courts.

Although Ismail Abdul Hameed was sentenced to eighteen month's banishment, the sentence was in fact not carried out. Instead, he spent one year under house arrest. As banishment was a punishment meted out by the judiciary before the new Penal Code came in to effect, it was a sentence generally carried out on first-time offenders. The sentence is believed to be disproportionate to the offence and lacking in the deterrence factor much needed to prevent acts of corruption.

V. CONCLUSION

Although numerous cases of corruption are investigated by the ACC every year, the lack of successful convictions and the continuing predicament of corruption in the Maldives, are clear indications of the magnitude of the task ahead of us. In my view, official research is crucial in identifying the reasons why the country is unable to move towards the desired outcome, which would enable us to build a robust plan of action to ensure a successful outcome in the battle against corruption.