

REPUBLIC OF MALDIVES
ASSESSMENT OF THE JUSTICE SECTOR REFORM PROPOSALS
FINAL REPORT¹: AUGUST 2019

1. INTRODUCTION

Following presidential and parliamentary elections in September 2018 and April 2019 respectively, the government of Maldives undertook comprehensive reform of various facets of governance, including a review of the country’s system of justice. The elections brought to power a strong majority of reform-minded people in both the executive and the legislative pillars of the state in Maldives. Several political parties that campaigned on a judicial reform platform maintain that they therefore have an express mandate from the electorate to reform the judiciary.² A general sense of purpose and a willingness to transcend party-political and even ideological differences seemed to offer an opportunity for meaningful and sustained judicial reform, and with this in mind the Attorney General’s Office (AGO) produced a wide-ranging set of justice-sector reform proposals, including a number of possible statutory and constitutional amendments.

2. TERMS OF REFERENCE (ToR)

2.1 The United Nations Development Programme (UNDP), long a partner with successive Maldivian governments in reform of the justice sector, thereupon instructed me “to conduct an assessment of the justice sector reform proposals put forth by the government of the Maldives ... including a review of the legal framework and current policies in relation to the proposals” and “identifying the needs of the judiciary and if the proposals made by the government are feasible”. This assessment was to focus on the following objectives:

- a) To collect qualitative data on accessibility and challenges of the public in accessing the justice sector services and proposed remedies for the challenges;
- b) To collect qualitative data on challenges within the justice sector and proposed remedies for the challenges;

¹ This report follows on a preliminary report (25 June 2019) and an urgent summary of reform proposals (24 July 2019). This report is the third and consolidating document relating to an assessment of a battery of reforms currently being proposed for the Maldivian justice sector.

² This was confirmed in personal interviews conducted with political stakeholders across a wide spectrum, including leaders of political parties.

- c) To provide an assessment of the government's reform proposals for the judiciary, including recommendations for revision;
- d) To identify, based on findings, any areas in need of legislative and/or administrative reforms to improve access to justice.

2.2 The “justice sector reform proposals put forth by the government” is a reference to a draft Policy Paper produced by the AGO embodying a searching and comprehensive analysis of the justice sector, identifying perceived shortcomings and proposing a variety of remedial constitutional and/or legislative amendments. Conformably this report more pertinently addresses the issues identified in the Policy Paper.

2.3 The report is also directed at addressing associated issues raised in a 27 June 2019 letter from the Acting Secretary General of the Judicial Service Commission (JSC) to the UNDP Resident Representative to the Maldives. Assistance was requested in two respects: these were “a comprehensive appraisal of all the judges, as per the qualifications prescribed under the Judges Act (13/2010) and ... an enquiry into all or any instances of the Supreme Court’s encroachment on powers and privileges of the Parliament, the Judicial Service Commission and other State Institutions”. The letter also requested the assistance of international experts in such appraisal and enquiry into judicial overreach. These requests were taken as supplementing the formal terms of reference set out in 2.1 above.

2.4 Mr Jason Gluck, a constitutional law expert, was instructed to focus specifically on the constitutional issues raised by the ToR and to advise on certain other constitutional questions. While he was in Malé he and I conducted a number of joint consultations and took the opportunity to debate some of the questions that arose in these consultations. The Gluck report is annexed and the section dealing with the judiciary should be read in conjunction with this report.

3. STATUTORY CONTEXT

The immediate context in which the assessment is to be made and in which the AGO’s Policy Paper is to be addressed is the regime introduced in August 2008 when the country adopted a new constitutional dispensation under the Constitution of the Republic of Maldives, 2008. The Policy Paper provides the following succinct yet comprehensive outline of the statutory impact of the Constitution and the concomitant legislation on the justice sector:

The enactment of a new Constitution in 2008 paved the way for an independent and impartial judiciary to be established in the Maldives [Article 141(c) and (d)]. The three-tier judicial branch established by the Constitution consists of lower courts that were later established by law, and the High Court and the Supreme Court as appellate courts, with the Supreme Court being the apex court [Article 141(a)].

In addition to containing provisions to ensure the independence of the courts, the Constitution also contains provisions on the jurisdiction of the courts as well as provisions relating to the qualification of judges [Article 149], their mode of appointment [Article 148], security of tenure and removal [Article 154]. These provisions in the Constitution were supplemented by the Judicature Act and the Judges Act, which were enacted in 2010, towards the end of the two-year transition period.

The Judicature Act of 2010 established superior courts and magistrates' courts as lower courts, and clearly laid down the jurisdiction of said lower courts, as well as those of the High Court and the Supreme Court. It also established a Judicial Council – comprised of the Chief Justice, a Supreme Court justice, the chief judges of the High Court and superior courts, and magistrates from two different regions in the Maldives – to be responsible for the formulation and harmonization of court rules and procedures and to provide guidance on the general administration of courts, and a Department of Judicial Administration for the administrative management of the courts and their staff, with a Chief Judicial Administrator who was to be accountable to the Judicial Council.

Further, to oversee the selection and appointment of judges and to review allegations of misconduct and take disciplinary action against judges, the Constitution established the Judicial Service Commission as an independent institution. Only judges and magistrates other than the Chief Justice and judges of the Supreme Court are within the direct mandate of JSC. The Chief Justice and the Supreme Court judges are appointed by the President on the recommendation of the JSC and confirmed by the Parliament.

With the newly established courts system and independent institutions for the administrative management of the courts and the selection and appointment of judges and the oversight of their conduct, it seemed that the system would begin to function properly. However, the institutional framework established by the Constitution and the Judicature Act proved to be short-lived, with the Supreme Court assuming the role of a self-declared 'custodian of the Constitution'.

4. BROADER CONTEXT

4.1 A proper assessment of the current state of the administration of justice and more particularly of the advisability/feasibility of the reform proposals requires a good deal more than a technical evaluation. It is not merely a clinically legal exercise. Assessing the adequacy of any public service inherently involves gauging the level of public satisfaction. It has both a social and a political component and must be assessed in its particular context. In a functioning democracy, dissatisfaction with a public service ought ideally to be sensed, measured and dealt with at a

political level. In any emergent democracy, a society in transition, these sensory and remedial mechanisms have to be nurtured and developed over time.

4.2 All of this holds true for a system of justice, a public service of vital importance, and assessing its adequacy and evaluating proposed reforms entails not only legal but also political and social considerations. It is, moreover, an infinitely more complex public service than, for instance, maintaining public roads, and its assessment requires infinitely more nuanced and contextually sensitive analysis. Public perceptions and political and cultural attitudes are of particular significance and may outweigh legal or administrative considerations. Therefore, although guiding principles are mandatory, it is as well to approach any so-called universal best practices with caution, if not a touch of scepticism. Just as constitutions are not one-size-fits-all, so any system of justice has to be adapted to the particular constitutional, political, social, cultural and historical context in which it is to operate. For this reason alone it is advisable to effect systemic changes only if and when necessary and as minimally as possible. Thus, for instance, in deciding on the number and location of island magistrates' courts, there is more to the exercise than statistics — the long-standing role and status of the local magistrate (and his predecessor the qadi) is a factor to be taken into account.

4.3 The particular context in which the current assessment is to be performed is unique. This I had come to know during an extended tour of duty as a senior electoral consultant in Malé in 2013. Consequently, initial desk research for the current mission was conducted against a broadly familiar background. I verified the following set of environmental circumstances relevant to the assessment of the justice system and the proposed remedies.

4.4 The society concerned is geographically, historically and culturally unique. Maldivians are an island people,³ interacting for at least a millennium with many crisscrossing seafaring peoples from whom they acquired the strands of their own unique identity.⁴ They speak their own unique language, they long since evolved their own script and they proudly claim all but universal literacy.

³ The World Bank (at <https://www.worldbank.org/en/country/maldives/overview>) gives the population as approximately 440,000, dispersed over some 200 inhabited islands.

⁴ Their unique qualities and practices were recorded as early as the fourteenth century CE by Ibn Battúta and the seventeenth century CE by Francois Pyrard of Laval. See list of references.

Maldives is a middle-income country, its economy,⁵ centred on Malé, having developed enormously over the last few decades. Although loosely under British suzerainty until 1965, the Maldivians were never colonised; and although they adopted their first written constitution in 1932 and held many elections during the twentieth century, they were essentially under an autocracy until the adoption of the current constitution in 2008.⁶ While overtly and exclusively Islamic since the twelfth century CE, they still have some pre-Islamic customs and beliefs. Notwithstanding their being scattered over a multitude of small islands, the people of Maldives have a strong sense of national identity and share a notable history which they simply call ‘the Maldivian story’. More importantly, they are rugged individualists, robustly egalitarian, peace-loving and law-abiding, who constructively worked with international development agencies in the run-up to the adoption of the Constitution and eagerly took to participatory democracy.

4.5 Correspondingly the Constitution they adopted in 2008 heralded an entirely open and liberal constitutional democracy with genuine universal adult suffrage and an extensive Bill of Rights enforceable by an independent judiciary. Unfortunately, as subsequent events have shown repeatedly, this radically new set of values and rules was not fully internalised by the political stakeholders or Maldivian society at large. As was aptly said at the time, “the gap between socioeconomic growth and the emergence of strong political institutions had not yet been entirely filled”.⁷ The first decade of the new democracy was consequently characterised by a succession of political confrontations and crises, often involving the Supreme Court. The judiciary proved incapable of assuming the greatly enhanced role provided for it by the 2008 Constitution. It had consisted of functionaries in an autocratic state with no experience, training or understanding fitting them for ordinary adjudication in a polity governed by the Rule of Law, let alone for guiding inexperienced constitutional organs through their awkward early days in a constitutional democracy.

4.6 When these political and judicial crises elicited a succession of concerned and critical interventions by the international community, the Maldivian government, while initially asking “States to not only criticise but also to invest in bringing about meaningful change”,⁸ eventually responded with defiance – by, for instance, withdrawing from the Commonwealth in 2016. This

⁵ Substantially derived from tourism that does not directly interact with the local population.

⁶ See the works of H.C.P. Bell, T.W. Hockly and Mohamed Nasheed in the list of references.

⁷ UNHRC: *Report of the Working Group on the Universal Periodic Review: Maldives*, 13 July 2015.

⁸ UNHRC: *Report of the Working Group on the Universal Periodic Review: Maldives*, 13 July 2015.

increasing instability culminated in the declaration of a national emergency in early 2018 and at that stage the prospects for the upcoming presidential and parliamentary elections were extremely gloomy. The Maldivian people, however, to the surprise of many observers, not only managed to conduct those elections freely and fairly, but elected and peacefully transferred power to a multi-party government committed to wide-reaching reforms. This remarkable turnaround was achieved by the Maldivian people themselves, showing the resilient spirit that had preserved them and their country for so long.

4.7 Reform of the justice system is an integral – if not a crucial – component of the envisaged reform programme. A striking feature of the decade of political turbulence was a series of stand-offs between the judiciary and the political class that actually commenced even before the inception of the new dispensation, when the panel of interim Supreme Court judges declared that they would constitute the final complement. The decade was also characterised by a succession of highly politicised and contentious criminal trials, and clamp-downs by the Supreme Court on independent constitutional agencies and the legal profession. These, in turn, elicited a series of withering reports and statements concerning the Maldivian judiciary by reputable international agencies, together with detailed remedial recommendations.⁹ An even more striking feature was the absence of any noticeable reaction to these reports on the part of the Supreme Court,¹⁰ which had assumed complete control of the judiciary.

4.8 The drafters of the Constitution had been alert to the need to ensure a better qualified judiciary and in Chapter XIV made detailed provision to that end. In essence, every existing judge had to pass an upgraded qualification test in order to qualify for reappointment. Regrettably, however, this transitional arrangement in the Constitution broke down, effectively consigning the country to a cohort of largely unqualified (and in some notable instances disqualified) incumbents. Crucially, at the eleventh hour, the transitional incumbents of the Supreme Court, who were to

⁹ See list of references for inter alia:

Gabriela Knaul: *Report of the Special Rapporteur on the independence of judges and lawyers*, 2013 (which follows on the earlier Einfeld [2005] and Despouy [2007] reports).

Bar Human Rights Committee of England and Wales: *Trial Observation Report*, 2015.

ICJ & SAHR: *Justice Adrift: Rule of Law and Political Crisis in the Maldives*, 2015.

Commonwealth Human Rights Initiative: *Searching for a lost democracy*, 2016.

Commonwealth Ministerial Action Group: *Concluding Statement of the CMAG*, 2016.

Diego Garcia-Sayán: “UN rights expert urges Maldives reforms after mass suspension of lawyers”, 2017.

¹⁰ This is not entirely accurate. In the first quarter of 2019, the Supreme Court issued a document it called *Road Map on Judicial Reform and Independence*, which contains a compendium of steps it envisages taking, the bulk of which echo recommendations made during the preceding decade.

have been replaced during the two-year transition period, unilaterally announced their continuation in office. There was little party-political experience in Maldives and the concept of an independent judiciary functioning as constitutional watchman under the Rule of Law was unknown to the political role-players. So while the politicians were distracted by their internecine squabbles, astute judges took the opportunity to usurp power.

5. EXECUTION OF CONSULTANCY

5.1 The ToR contemplated two separate in-country sessions in order to consult relevant stakeholders including but not limited to relevant government institutions, judiciary, lawyers and civil society organisations.

5.2 First visit:

5.2.1 Pursuant thereto I spent a week in-country between 25 May and 1 June 2019, conducting consultations with a wide variety of interlocutors. Most of the interviews were arranged through the good offices of the UNDP and/or the AGO but I also privately consulted several additional Maldivians.¹¹ The interviewees represented a wide cross-section of Maldivian society, mostly but not exclusively people with reliable knowledge and understanding of the administration of justice and the functioning of the courts. An immediate and striking feature of the interviews was the unanimity – and the vehemence – with which the interlocutors expressed their condemnation of and lack of trust in the judiciary, and the conviction with which they blamed the Supreme Court for the parlous state of the court system. Without exception the view was that unless and until the Supreme Court had been brought to heel and purged of its delinquent incumbents, any attempt at reform and establishing confidence in the country’s system of justice was stillborn.

5.2.2 While the litany of complaints repeatedly identified the Supreme Court as the root cause of the universal lack of public trust in the judiciary, the courts in general were perceived to be inaccessible and many judges arbitrary and intolerant. The judges of the Supreme Court were accused of personal and political corruption, of having allowed themselves to be used as tools of the executive, of having encroached repeatedly on the lawful domains of other organs of state and

¹¹ I had spent some eight months in Malé as senior UN consultant to the Electoral Commission in 2013 and maintained contact with a number of Maldivians and a general interest in the country.

of acting erratically and dictatorially. They were said to have stunted the development of the judiciary and the legal profession, of habitually treating litigants, their legal representatives and the lower courts with disdain, and of interfering at will in the functioning of these courts. There was particular concern that the Court had blatantly entered the political arena in February 2018 and had materially contributed to the politico-legal unrest that resulted in a national emergency being declared by then President Yameen.

5.2.3 The consensus was that notwithstanding the implementation of the Penal Code in 2015 and the Criminal Procedure Code in 2017, criminal cases were generally still being conducted as before. As far as could be ascertained, programmes to familiarise judges, prosecutors and law-enforcement officers with the radically different approach to criminal justice required by the Constitution and with the operational requirements of these statutes have not been as effective as hoped. To all intents and purposes criminal justice is being dispensed as before. The situation in the civil courts is reportedly even more problematic. Despite repeated recommendations over more than a decade emanating from universally respected authorities,¹² civil courts still operate without a standardised set of procedural or evidentiary rules. There is not a single textbook in Dhivehi to guide judges and lawyers on any aspect of substantive or procedural law, judges perforce act as they see fit and the upshot is a litigious gamble. Predictability, such an essential element of the Rule of Law, is unknown. Predictably, lawyers complain of arbitrariness, unpredictability and generally precarious litigation.

5.2.4 It was manifest from these interviews that the Supreme Court, or rather its current incumbents, constituted – or at the very least were perceived generally to be – an obstacle to any meaningful appraisal of the structure and functioning of the judiciary, and of the possible need for and likely efficacy of legislative and/or executive intervention. Consequently I requested a meeting with the Supreme Court judges in order to ascertain their response to the allegations against them and to establish their attitude to their possible consensual retirement. The judges¹³ proved impervious, both to the allegations and to the possibility of amicably retiring. Consequently I recommended in my preliminary report that the possible removal of the Supreme Court judges be regarded as a priority in any reform programme.

¹² See footnote 7 above.

¹³ I met the Chief Justice and three of his colleagues, together with certain officials.

5.3 Revision of data:

Following this first series of in-country consultations, I collated and reviewed the comments and complaints that the visit had elicited against the backdrop of the most immediately relevant observations and recommendations of earlier reviewers.¹⁴ It was painfully obvious that notwithstanding the manifest authority of the observers and notwithstanding the compelling force of what they had recommended, nothing significant had changed, or at least nothing to the good. While the Einfeld and Despouy reports dated from the pre-constitutional era, the 2013 Knaul report remains directly relevant. Special Rapporteur Knaul's stinging rebuke and unequivocal recommendations have fallen on deaf ears, not only those of the judges of the Supreme Court but also those of political role-players. The even more explicit comments and meticulously itemised recommendations of the fact-finding mission of the International Commission of Jurists (ICJ) in conjunction with South Asians for Human Rights two years later have likewise made no discernible impression. On the contrary, the situation has gone from bad to worse. More specifically, the Supreme Court has continued interfering beyond its constitutionally demarcated area of authority and contributed to the constitutional crisis that befell the country in February 2018. Meanwhile the judicial system as a whole has shown little change from the pre-constitutional era.

5.4 Second visit:

5.4.1 My second visit was accordingly directed more towards exploring ways of dealing with the problem created by the Supreme Court and assessing the feasibility of the reform proposals put forward in the AGO's Policy Paper. It lasted from 28 June to 13 July 2019 and entailed another series of interviews with interlocutors identified as having relevant information regarding the selected areas of focus. They included a number of judges (current and former) at all three levels on which the judiciary functions, government ministers, political party officials, parliamentarians interacting with the judiciary (including the Speaker and the Judiciary Committee of the Majlis)

¹⁴ The salient findings and recommendations of Judge Einfeld and Special Rapporteurs Despouy and Knaul are summarised in an annexure hereto. These reports are compulsory reading for any prospective reformer of the Maldivian system of justice.

and senior academics at both university law faculties, as well as the chancellor of the Judicial Academy, government agency heads, senior lawyers in private practice, prosecutors, members of the AGO and some informed and publicly minded members of civil society. It also involved inspections of court facilities at each of the three levels, including an island court.

5.4.2 As intimated earlier, I was joined by Mr. Jason Gluck for part of the second visit and had the benefit of conducting joint consultations with him and debating a number of the legal issues that predominate. I particularly appreciate having been afforded the opportunity to study his report insofar as it relates to the constitutional issues pertaining to the judiciary and endorse his findings of principle in that regard.

5.4.3 Upon ultimately collating and evaluating the data garnered in the course of the second visit, I formed a number of firm conclusions on the basis of which I was able to put forward a summary of corresponding proposals on an urgent basis. These are incorporated and expanded upon in the next section.

6. THE JUDICIARY

6.1 The Supreme Court:

6.1.1 The Supreme Court has not only failed to provide the constitutional guidance and stability demanded of it by the Constitution, but has become a major threat to democratic rule in the Maldives, not because of any fault in the Constitution but because of the unlawful conduct of the Court over the last decade.

6.1.2 The Court's contention that it has the extensive powers it has taken is without substance. It is based on an erroneous interpretation of the Constitution. This is clear from Articles 5, 6, and 7 read with Article 141(a) and, more pertinently, Article 141(b).¹⁵ It is the highest *court* in the land, the ultimate *judicial* authority and accordingly the ultimate *interpreter* of the Constitution. It does *not* have executive or legislative functions and is not empowered to give instructions to the Majlis

¹⁵ I am aware that in what follows I am relying on an unofficial English translation of a document written in a very different language. Nevertheless I am entirely satisfied that the interpretation contended for by the Supreme Court is wrong.

regarding its internal arrangements, nor to independent constitutional agencies. Nor does it have any power to make any declarations or issue any writs *suo motu* or *ex parte*.

6.1.3 However, although there is nothing wrong with the law as it stands, in order to make the powers, functions, and duties of the Supreme Court absolutely clear, the Constitution could be amended by inserting at the beginning of Article 143(a) the words “in any matter before them” (that already appear in Article 143(b)), so as to make plain that what is contemplated is solely an adjudicative function, not an overriding legislative or executive function.

6.1.4 Article 143(a) could further be reworded to correspond more closely with the wording of sub-article (b) in order to make plain that the distinction between the two sub-articles is that the Supreme Court and the High Court can not only determine matters of interpretation (which all courts can do) but that they alone can also invalidate legislative provisions that transgress the Constitution.

6.1.5 That said, for the interpretation of the Constitution on the question of the meaning of Articles 143(a) and (b), 144(a) and 145(c) in their context, and their recommended rewording, I readily defer to the expert opinion of Mr Gluck.

6.1.6 In common with all other judges, judges of the Supreme Court are subject to the discipline of the JSC in terms of Article 159(b) of the Constitution read with Article 21(b) of the Judicial Service Commission Act 10 of 2008 and Article 22(a) of the Judges Act 13 of 2010. The contention to the contrary by the Supreme Court is without substance.

6.1.7 In addressing the question of overreach, it would be in order to subject current incumbents of the Supreme Court bench to investigation by the JSC, backed by the Majlis, in accordance with Article 159(b) read with Article 154(b) of the Constitution, on charges of gross misconduct in undermining the Constitution, more specifically Articles 5, 6 and 7 read with Chapters III, IV and VI thereof, by falsely claiming and purporting to exercise authority in respect of matters where such authority in truth vests in the executive and/or the legislature. If there is reliable evidence of personal corruption or other impropriety, corresponding charges could be raised.

6.1.8 Any impeachment of a Supreme Court judge is a highly significant constitutional event and should ideally be used as an opportunity for education of the judiciary, as well as the public at

large, in the role of the judiciary in protecting and promoting the Rule of Law. The proceedings must therefore be exemplary in every respect.

6.1.9 Reform of the judiciary is a legitimate public concern and legislators have a legitimate interest in dealing with the matter, and in fact an obligation to do so. Since it is critical for the political leadership to maintain the legitimacy of the judiciary and not only its notional but also its actual independence, any suggestion of vengeance or a witch-hunt must be avoided at all costs. It is in the national interest that the proceedings be conducted as objectively and soberly as possible. Although constitutionally the JSC plays the main role in disciplining judges, the Attorney General, in his capacity as the legal adviser to the government and defender of the Rule of Law in terms of Article 133(a) and (e) of the Constitution, is empowered and obliged to use his good offices to ensure that the process remains as dispassionate as possible.

6.1.10 If and when any judges have been duly found delinquent and removed, reform of the rest of the judiciary should be considerably more effective and expeditious. The proper functioning of the Judicial Council and the Department of Judicial Administration could then be tackled. Given what was learned during interviews with the Chief Judicial Administrator, there is ample capacity to maintain an efficient service to the judiciary and the public.

6.2 The High Court:

6.2.1 There is compelling evidence that some of the current judges of this court should be investigated with a view to possible removal. There are many instances when this court is alleged to have called up cases from lower courts for them often never to be heard of again, and otherwise interfered in the lower courts' jurisdiction. Not only would such conduct be illegal in itself but it is further alleged that cases of political or financial note have been prone to such interference. There is other evidence of arbitrary adjudication by this court, which would (if substantiated) warrant material (or perhaps even complete) reconstituting.

6.2.2 I cannot assess the efficiency of the High Court on the available data, but there is good reason to question whether a population of fewer than half-a-million people, however many inferior courts there are, really needs a nine-person intermediate appellate court. The objective figures suggest that the High Court, properly managed and with a proper set of procedural rules, should manage

its legitimate appellate workload with no more than five judges. This, however, is a matter for departmental debate.

6.3 Other court matters:

6.3.1 The question of reappraisal of judges was raised by several interlocutors, and more pertinently in the letter from the JSC dated 27 June 2019.¹⁶ Article 285 of the Constitution, clearly only a transitional provision, is no longer available and the periodic promotion evaluation mechanism provided by Article 56 of the Judges Act is also not applicable. Accordingly, if there is to be a comprehensive reappraisal of judges, a special evaluation process (i.e. of educational qualifications and ethical criteria) along the lines of Article 285 of the Constitution will have to be effected by expanding Article 23(a) of the Judges Act.

6.3.2 Before this is done, however, the advisability of subjecting all serving judges to such a process should be seriously weighed. However well-intended, such an action could well be seen as impairing their independence. In any event, the perception will unavoidably be that the judges are being brought to heel, thereby further reducing their standing in the eyes of the public. The answer would seem rather to lie in upgrading, increasing and broadening their legal knowledge and enhancing their judicial skills.

6.3.3 The annexation by the Supreme Court of the Department of Judicial Administration and the effective abolition of the Judicial Council¹⁷ should be corrected right away and necessitate no legislative changes. At most all that is required is for the Supreme Court, after investigations and possible removals have been completed and any consequent new appointments are in place, to be formally approached by the AGO to review and set aside the offending rulings and clarify the situation of the two bodies concerned.

6.3.4 Consideration can, however, be given to amending Article 92(b) and (e) of the Judicature Act 22 of 2010 to afford the JSC some say in the hiring and firing of the Chief Judicial Administrator – but see 10.4.2 below.

¹⁶ See paragraph 2.3 above.

¹⁷ Reportedly the Supreme Court has recently reinstated or revitalised this body. To what effect is not, however, known.

6.3.5 If and when the Judicial Council is up and functioning, consideration can be given to adapting its composition and functions, but for now it would be better to allow it to find its feet, if only on a trial-and-error basis. In principle it is a useful consultative body where the geographically scattered nature of the judiciary and differences in status can be countered by collegial liaison.

6.3.6 At first blush the division of the third level of courts into specialised courts in Malé on the one hand, and on the other generalised courts with subject-linked jurisdictional limits on the islands, appears confusing and unnecessary, but for both historical and organisational reasons it makes sense and could be retained, at least for the foreseeable future.

6.3.7 At the same time there is merit in establishing a number of regional Superior Courts, albeit on an experimental basis. Objectively there are too many courts serving too few people, but it would be presumptuous for a transient consultant to express any firm view on a topic so closely linked to actual experience in practice.

6.3.8 What can be said, however, is that the efficiency of the judiciary as a whole could be dramatically improved by the adoption and implementation of a proper set of procedural provisions. Consequently the number of judges and the number of courts could be reduced without impairing their accessibility. Of course, their cost to the state would also be reduced.

6.3.9 Much more importantly, the quality of justice will be immeasurably enhanced once litigants, lawyers, court administrators and judges routinely work to a set of simple, predetermined and universally applied procedural rules. This would eliminate the need and limit the scope for individual judicial discretion, counter arbitrariness and personal favour and boost confidence in the judicial system.

7. ACCESSIBILITY

7.1 The Supreme Court is administratively remote and physically inaccessible. It sits in a former presidential palace, behind tall walls and massive gates. Interested parties, even the litigants themselves, have to apply in writing to enter; you have to surrender your personal possessions and are not allowed to come and go as you wish. Habitually the Court sits late at night – and at short notice. This is possibly a subconscious relic of the building's regal past, but it cannot be perpetuated. Whatever the cultural heritage, the constitutional role of the Supreme Court demands

a fundamental change of attitude. Members of the public are not guests in court; it is *their* court, and they are there as of right.

7.2 The High Court is slightly less inaccessible physically but still undesirably remote, while all the Superior Courts visited were relatively user-friendly though housed in office buildings architecturally unsuited for places to which the public should have free and welcoming access. Reportedly a new court building with accommodation for a number of courts is under consideration and it is to be hoped that the design will take cognisance of the very special needs of courts that demonstrably serve the public.

7.3 The only magistrates' court inspected was on Maafushi (incidentally in the course of an inspection of the correctional facility on the island). The court building was the most appropriate of all the courts visited, an attractive building within a walled garden, comprising a proper reception area, two well-proportioned courtrooms with adequate public seating, a dignified bench and private access to the judges' offices. Apparently, however, this standard is not uniform across the country. In the Addu area in particular there is a lack of adequate buildings and even in the Criminal Court, i.e. in Malé, there is a serious shortage of courtrooms.

7.4 One of the courtrooms on Maafushi was equipped with impressive audio-visual equipment but this is reportedly not in use. Apparently this is a common experience in the magistrates' courts, where the advent of the new dispensation with its technical aids and their use are not much in evidence.

7.5 Reportedly island courts are to be clustered in circuits and, while I know too little to provide any concrete advice, the concept can be endorsed. The peculiar geographical spread of the country presents unique administrative challenges, hampering accessibility and hence impairing the quality of the adjudicatory service provided to the public. Requiring prospective users of the service to travel long distances and incur concomitant expense in time and money has to be balanced against the affordability of locating service points closer to the users. The correct balance can be struck only once the courts have adapted to the substantive and procedural requirements of a truly democratic justice system. That will take time, and accordingly consolidation and/or relocation of courts of first instance will have to remain in abeyance or, preferably, be implemented on a trial-and-error basis.

7.6 Quite apart from physical accessibility, courts, in order to fulfil their role in society, must be user-friendly. Vulnerable people, especially vulnerable women, should see courts as safe places, where they can find support and protection.¹⁸

8. JUDICIAL EDUCATION

8.1 This is undoubtedly the greatest challenge facing the country's justice sector. Indeed it would not be an exaggeration to say it is one of the greatest challenges facing the country as a whole. Maldivians are a peaceful and progressive people, commercially and politically active, living in a relatively prosperous and developed middle-income country. They have a liberal modern constitution, a vibrant multi-party system and a competent administration; but their system of justice lags far behind. There is no legal library in Dhivehi, not a single legal textbook in the official language, no civil code (only a handful of statutes, several dating from the pre-constitutional era), no evidence code, no civil procedure code, no academic legal debate, no attempt at building a local jurisprudence. Until a few weeks ago there was no organised legal profession, no quality control and disciplinary institution governing legal practitioners, no code of professional conduct, and no formal liaison between the profession and the judiciary – instead an uneasy stand-off.

8.2 Meanwhile it is common knowledge that the quality testing that was done at the time of the transition was eventually little more than a sham, claimed by a JSC member at the time to be “symbolic” – this while it was agreed that the level of judicial education was too low to cope in the new environment. Interviews conducted during my second visit with legal academics and the chancellor of the Judicial Academy offered no reassurance that there is a realistic prospect of conducting mass training at an adequate level for the judiciary, prosecutors, the police, lawyers, politicians and government officials. Education is needed in a number of key subjects in order to equip them to serve their country appropriately, for example, in constitutional law and the Rule of Law, human rights law, judicial and professional ethics, gender sensitivity – even mundane subjects such as evidence or civil procedure.

¹⁸ See the exceptionally perceptive 2017 UNDP report *Research on Maldives Women's Access to Justice* (in list of references).

8.3 What is particularly troublesome is that this state of affairs prevails to this day notwithstanding that these deficiencies were highlighted by Judge Einfeld several years before the constitutional transition of 2008, were reiterated by the Special Rapporteurs Despouy and Knaul and were a common feature of a number of authoritative reports thereafter. Clearly the message did not strike home and may still not be readily accepted, especially in political and judicial circles, and ways will have to be skilfully devised to ‘sell’ the need for judicial education to them. Perhaps the current flurry of disciplinary proceedings could serve as a catalyst. The crucial point, though, is for role-players to recognise the problem, acknowledge that it has been overlooked and genuinely resolve to address it now.

8.4 For the education itself, a concerted, sustained and imaginative campaign is necessary across a broad front. It will need a multi-pronged strategy involving, for example, sending handpicked Maldivians abroad and inviting foreign academics and/or judges on short-term teaching stints in the country; designing appropriate curricula for the various levels of trainees; training trainers to cascade specially designed modules for magistrates and law-enforcement officials; and the like. Extensive use of the country’s excellent broadcast and IT media could be considered in order to reach its far-flung magistracy.

8.5 Remedying the lack of legal literature in Dhivehi is a substantive project on its own. I suggest the appointment of a special task team, possibly coordinated by the AGO but picked from the ranks of legal and educational academics, lawyers and judges with appropriate foreign qualifications, librarians and translators, with a mandate to select and prioritise legal textbooks for translation into Dhivehi. In light of the necessarily limited market for legal books (including e-books) in Dhivehi, the project will probably have to be quite heavily subsidised.

8.6 The design of a broad training strategy will require careful planning with the assistance of experts in the field, while implementation will require skilled budgeting and dedicated project management, supervision, co-ordination and quality control. All of this will obviously cost a good deal and may well have to involve UNDP and the donor community, but there can be no doubt that it would be money well spent. It should be a one-off project running for no more than, say, five years and is essential to cementing the stability of the Maldivian state, and thereby promoting security in the region.

9. THE JUDICIAL SERVICE COMMISSION

9.1 The JSC is a key element in the governmental power structure created by the Constitution and has played a debatable role in the engagement between the judiciary and the other two pillars of state. At the times of both my visits, the JSC and the Supreme Court were in confrontation, and there is every reason to anticipate that the JSC will take the lead in any action against the judges of that court. A number of interlocutors identified the JSC as a major contributor to the continued malfunctioning of the judiciary and there is cogent evidence to support this contention.

9.2 In essence the JSC is a ten-person panel of five lawyers and five laypersons – or three judges, three legislative nominees, three executive nominees and an independent lawyer. This imbalance between judges and others is a bone of contention according to some interlocutors while it has also been contended that there should be no politicians in the body at all.

9.3 I do not intend getting involved in that debate. The appointment and removal of judges is constitutionally problematic, especially in constitutional democracies, there being a tension between, on the one hand, preserving the independence of judges while, on the other, ensuring their accountability. There are numerous constitutional devices aimed at striking this balance and as many supporting arguments; latterly the establishment of a dedicated independent body to perform the hiring-and-firing function has become popular. Some say such bodies should consist only of judges, but there are examples that suggest this promotes a judicial oligarchy, an elitist closed shop. Others contend that both the executive and the legislature have a legitimate interest in the composition and conduct of the judiciary and should therefore have a say in their selection, but there are cases that show this can conduce to politicising the judiciary and impair its independence. Others say that in removal proceedings, only judges should have a role. The debate is endless.

9.4 There is no internationally accepted best practice in this regard – if the truth be told, none of the mechanisms is perfect, but more often than not the fault lies not with the mechanism but with those operating it. In any event the likelihood in Maldives is that, whatever the composition of the JSC, for the foreseeable future the selection of judges and more specifically their removal will be overtly politically influenced, if not driven. Having regard to the role of the senior judiciary over the first decade of the constitutional era, this is inevitable and arguably even desirable, at least in the case of the senior judiciary. Constitutional adjudication is inherently political; so is the

selection of the adjudicators, and to deny this is sophistry. Respect for the Rule of Law and alert political checks and balances are the best monitors. In any event, the suggestion that removal of political representation from the JSC will depoliticise the process is naive.

10. SPECIFIC RESPONSES TO THE POLICY PAPER

10.1 Institutional reform in a dynamic context is always problematic, especially if not all the levers of change are under uniform control. It is therefore all the more necessary to be mindful of certain general principles:

- Having identified a fault, diagnose the cause before choosing a remedy.
- More often than not the fault lies not in a system but in its operators.
- Change only when and where necessary and as little as possible.
- Address institutional faults cautiously – they are usually interrelated and multi-faceted.
- Remain modest and patient in your ambitions, being prepared to adapt or wait.

10.2 It is also necessary to be modest in one's expectations. Changing laws does not change human conduct, not in itself and not as quickly as one would like. Moreover, changes to an existing system may have a knock-on effect on interacting components, with unwanted consequences.

10.3 *Redefining the authority and jurisdiction of the Supreme Court*

10.3.1 In principle there is nothing wrong with the constitutional and statutory framework in which the Maldivian justice system functions. The Constitution, as supplemented by the Judicature Act, the Judges Act and also the Judicial Service Commission Act, creates an adequate framework that is not to blame for the overreach by the Supreme Court. None of the proposed amendments is necessary, although some clarification of the wording of Article 143(a) of the Constitution could be considered. The fault lies with the people involved – the judges, the members of the JSC and politicians. If they act lawfully, diligently and ethically the system should function satisfactorily.

10.3.2 That said, I wish pertinently to endorse each of the specific observations enumerated in this section of the Policy Paper regarding the conduct of the Supreme Court. In my opinion:

- Save in exceptional circumstances, all hearings in all courts must be conducted in open court, i.e. reasonably accessibly to the public: this the Supreme Court consistently disregards.
- The Supreme Court has no power to issue any writ, ruling, declaration, order or process of any kind *suo motu*, i.e. of its own volition.
- It moreover has no power to decide any matter and/or to issue any such process *ex parte*, i.e. without having afforded those potentially affected thereby a fair hearing with regard thereto.
- Since the determination of any constitutional issue, i.e. involving the exercise of any powers under Article 143(a), potentially affects the executive and/or the legislature, due notice to them is necessary.
- In light of the above, it is clear that both substantively and procedurally the Supreme Court has acted unlawfully in usurping the functions of other constitutionally or statutorily created state organs, assailing their integrity and curtailing their independence.
- The Supreme Court acted unlawfully in interfering with the jurisdiction of lower courts, browbeating litigants' legal representatives and presuming to rule by unilateral and arbitrary judicial fiat.
- It failed to promote and develop the law and the Rule of Law, to guide and supervise the quality of justice in the courts, to build public confidence and establish public trust in the judiciary; in short to perform the vital functions of a pinnacle court in a constitutional democracy.
- And of course, knowingly breaking the law and doing so in the purported exercise of judicial power, is a fundamental breach of judicial ethics.

10.4 *Restructuring the system of court administration*

10.4.1 There is no good reason to effect any constitutional or legislative changes. The legal framework provided by the Judicature Act read with the Judges Act against the backdrop of the Constitution¹⁹ is theoretically sound and if properly implemented should provide mutually supportive administrative and judicial branches, each operating independently in its own sphere. In any event, it would be advisable to allow the DJA, once it has been fully emancipated from the Supreme Court, to function as originally intended in the legislation before considering any amendments.

¹⁹ See in particular Article 155 of the Constitution.

10.4.2 It would likewise not be advisable to interfere with the mechanism for the appointment of the Chief Judicial Administrator. Removing the power from the judiciary²⁰ and handing it to the legislature seems neither necessary nor advisable. The DJA is a specialised department serving the judiciary and having to interact with it on a daily basis. Selecting its head should therefore more sensibly reside with the Chief Justice and the Judicial Council (once that body is established and running properly).

10.4.3 While I do support the proposal to remove the power to appoint registrars from the chief judge concerned to the Chief Judicial Administrator and to have the scheduling of cases performed by registrars, the admissibility of cases and their allocation to judges is essentially a judicial function and should preferably be left untouched. There may be understandable reasons for wishing to make a change but it is as well to remember that registrars are as prone to bias as judges and possibly more vulnerable to undue influence.

10.5 Restructuring the court system

Abolishing the northern and southern branches of the High Court and substituting a circuit system seems sensible but, as in the case of all proposed structural changes, I recommend cautious, pragmatic and flexible introduction. As and when the palliative effect of a criminal procedure system takes root and its civil equivalent sees the light of day, case management and enhanced efficiency should have a significant effect on judges' court time and hence on staffing requirements.

10.6 Appointment of judges and conduct of disciplinary proceedings

While I support the determination to make a clean and manifest break with what has gone before, I caution against almost all the proposed changes under this rubric. On the face of it there is a perfectly good system of appointment of judges in Articles 148, 149 and 150 of the Constitution and Chapter II of the Judges Act. There is also no apparent reason to introduce new rules of conduct for judges or for their periodic evaluation and asset declaration. These features seem to be adequately covered by Articles 29, 56 and 65 of the Judges Act and unless and until they or any

²⁰ See Article 92(b) of the Judicature Act.

of them prove defective, I would recommend letting the judicial system settle down and function routinely before thinking of tinkering.

10.7 Re-evaluating the competence and qualifications of judges

Although no specific amendment is suggested under this heading, the Policy Paper expresses a proposed reform in a manner that calls for a response. The proposal reads: “The Government aims to ensure that justice is administered by qualified and competent judges by re-evaluating their current qualification criteria.” If this is to apply to future appointments only, it would be quite unobjectionable. But in the course of my meetings with the JSC and subsequently with the Justice Committee of the Majlis, there was a suggestion that currently serving judges would be ‘reappraised’. In meetings with individuals, too, this was a constant refrain – so much so that it appeared to be practically taken for granted. I must repeat that such a move would not only be seen as an attempt to cow the judiciary but would in all probability actually impair the independence of some of them. The willing and active participation of sitting judges is essential to the success of the whole reform programme. Alienating them at the outset would be fatal to the whole exercise and their ‘reappraisal’ cannot be supported.

10.8 Further areas of reform

The plan to institute a public defender system is obviously commendable, as is the promotion of alternative dispute resolution mechanisms and the development of an international arbitration centre. I should, however, caution against vigorous promotion of local arbitration as it will divert important litigation from the court system, where it develops judicial experience and contributes to the body of case law. A transitional court system cannot compete with an experienced arbitration facility: this I know only too well from experience in my own country.

11. THE ROLE OF WOMEN IN THE JUDICIARY

11.1 It is reassuring to see in the Policy Paper, albeit in a two-liner, that in order “[t]o address the unequal gender representation in the judiciary, the Government aims to propose changes to ensure that more women are represented in the judicial sector”. I cannot endorse this tentative proposal strongly enough. It is not merely or even so much a question of human rights and the recognition of the Constitution’s demand for gender equality. It is also not so much about the realisation that

patriarchal societies disadvantage themselves, that the ‘glass ceiling’ affects society as a whole. Nor am I concerned in this context about cultural values or faith-based perceptions of the respective roles of men and women.

11.2 The focus here is on courts and how well they function, the quality of justice they dispense, the value of the service they render to society. We are looking at judges and the image they project, the confidence they inspire and the reassurance of integrity that they give. And we are looking at them in a context where throughout the constitutional era the judiciary has been under a cloud.

Special Rapporteur Knaul reported:

The approach of the judiciary in general is quite conservative and representative of a very traditional and patriarchal societal structure. Gender biases and discriminatory attitudes and practices are widespread within the judiciary and the administration of justice. In this light, sustained and comprehensive sensitization and awareness-raising programmes on gender equality and women’s rights are urgently needed for all State institutions, including the judiciary, prosecutors and lawyers, in order to push for a change regarding patriarchal and discriminatory attitudes and practices and make access to justice a reality for women in the Maldives.²¹

Noting with concern that there were only eight women on the bench in the country,²² she added:

Women who do sit on the bench often suffer discrimination or patronizing attitudes from the other actors of the justice system, including from their peers, the Judicial Service Commission, and the public.²³

11.3 While the current and former woman judges I interviewed confirmed that discriminatory, patronising and downright chauvinist attitudes and practices had not changed, it would be quite wrong to say that nothing has changed since the Special Rapporteur – having been assured that, all other things being equal, judicial appointments went to women – made those telling observations. In the six years since, the number of women on the bench, I was informed, has dwindled to four, four out of nearly 200 judges in the country: some 2%. This is probably the most revealing statistic about the development of the judiciary since the first woman was appointed in 2007. It is also the loudest call for concerted reform of the system of justice in the Maldives. Breaking down the conservative, traditional and patriarchal judicial attitudes and customs is an integral and essential part of judicial reform, not for the benefit of women but to improve the quality of adjudication. Eliminating gender discrimination on the bench will be an invaluable step

²¹ Paragraph 79.

²² Paragraph 77.

²³ Paragraph 78. In section F (paragraphs 118-120) of her Recommendations (Chapter VII) she lists a whole number of remedial steps that could be taken in regard to the position of women in the justice system.

in changing the mindset of a judiciary still largely held captive by the cultural shackles of their autocratic past.

11.4 In the course of only a few weeks I met a substantial number of female lawyers – former judges, lawyers in private practice, prosecutors, civil servants and politicians – who, with a little training and some appropriate experience, could add value to the judiciary at any of the three levels. With the necessary encouragement and support, the leavening influence of a female presence on the bench should be noticeable within a year or two. Ideally it should be part and parcel of sustained government policy, not as ad hoc preferment but as a career choice with realistic prospects of advancement to the highest level. I understood from the former and current female judges I interviewed that a major and debilitating factor of a female judge’s existence is her isolation in an inhospitable environment, from which it follows not only that substantial numbers of women should be recruited but that care should be taken in their deployment to ensure moral and practical support from ‘the sisterhood’.

12. CONCLUSION

I am grateful to all those who made my mission such an engaging undertaking. Naming specific individuals would be invidious but I do wish to single out the UNDP Resident Representative and the Attorney General and their respective senior staff members who gave me invaluable advice and so competently arranged the multitude of meetings that gave substance to my endeavours. I must also express my gratitude to my interlocutors who unstintingly gave me their time and attention – without the benefit of their knowledge and insights I could not possibly have managed. It was a privilege and a joy to revisit the Maldives and to work once again with its remarkable people. Thank you.

Johann Kriegler

Johannesburg

August 2019

SUMMARIES OF THE EINFELD, DESPOUY AND KNAUL REPORTS

Einfeld report (2005):

Marcus Einfeld, a distinguished Australian jurist, visited Maldives in February 2005 on behalf of the Commonwealth at the invitation of the Maldivian Attorney General “to examine the Maldivian Judicial System and prepare a strategic plan for its strengthening”. This he did in a lengthy and thorough report, emphasising the vital importance of a judicial system of competence and absolute integrity, not only for democracy to grow but also for the peace and prosperity of the country as a whole. He painted a sombre picture of a rapidly developing and evolving economy with burgeoning property values and booming commercial activity but, unavoidably, with concomitant increase in crime, money laundering and drug trafficking – all of this with a justice system (judges and lawyers) wholly unable to cope.²⁴

His exhaustive analysis, principally of the criminal justice system, found the judicial system as a whole “in considerable disarray”. The hierarchical three-tier court system he found to be inefficient, the number of magistrates excessive and their workload often very light. Court procedure lacked procedural rules and hence consistency, and was unpredictable and arbitrary;²⁵ judges had little or no training and enjoyed little public trust or respect. He stressed the lack of competent and legally trained judges²⁶ with, among other requirements, sufficient knowledge of English to enable them to access common law authorities,²⁷ and the corresponding absence of training facilities, resources and textbooks for adequate initial and continuing training of judges and lawyers.

Some of his recommendations, not yet implemented, bear restatement – for example:

- that a law reform committee be established to address the gaping holes in the legal structure (e.g. an Evidence Act and the establishment of rules of procedure);

²⁴ The author reported that that the country had, for instance, only some elementary commercial statutes based on foreign precedents but no body of legal rules fit for a modern economy.

²⁵ The learned judge made plain that, in the absence of procedural rules, “[e]very Judge does his cases differently and unpredictably” and that “the Judge can exclude the lawyer from the hearing and can even strip the lawyer of the right to practise”.

²⁶ He said it was “of the utmost importance that Judges be comprehensively trained lawyers” and made a number of practical suggestions, e.g. for special lessons in the English language, liaison with other judicial bodies, engagement of Commonwealth judges as presiding officers or mentors and the like.

²⁷ The judge wryly observed that most judges he met did “not speak English to a serious degree”.

- that training be instituted for judges and lawyers in judicial and professional ethics, the Rule of Law, internationally recognised human rights principles and common law jurisprudence generally;
- that foreign academics be brought in to conduct training and that funds be made available for training abroad.²⁸

Despouy report (2007):

Two years later the country again had the benefit of an investigation and report by an international advisor. In February/March 2007 Dr Leandro Despouy, an internationally renowned human rights and political reform expert,²⁹ at that time the UN Special Rapporteur on the independence of judges and lawyers, visited the country at the invitation of the Maldives government.³⁰ As in the case of the Einfeld report, Dr Despouy's report underscores the country's massive economic and consequent socio-cultural development, indeed its joining the modern world.³¹ This awakening necessitated radical upgrading of the legal system – the judiciary needed urgent in-depth reform if it was to meet minimum international criteria for independence and efficiency in a system of democratic governance. Dr Despouy listed a number of recommendations/observations, some corresponding with those of Judge Einfeld and some since implemented.³²

Many of Judge Einfeld's and Dr Despouy's concerns are as pressing today as they were at the time. Few of their recommendations have really seen the light of day. The bench is still largely staffed by judges ill-trained for their task in a modern constitutional democracy. There is still no standardised court procedure. Judges still act arbitrarily. Crucially, there is still little confidence or trust in the judiciary.

²⁸ The country has long enjoyed a practice whereby promising young Maldivians are sent abroad to study, not only in law. No project specifically aimed at training judges in human rights and constitutional adjudication has to my knowledge ever been implemented.

²⁹ He had as an OHCHR expert advised the governments of several countries, e.g. Paraguay, the Russian Federation, Equatorial Guinea and Colombia, on institutional strengthening and political/constitutional reform.

³⁰ The visit coincided with – and was probably triggered by – the constitution-making process that the report sees with prophetic insight as aimless wrangling by a Majlis “chaotic to the point of stalemate”.

³¹ The country had recently adhered to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, but the judiciary and the legal profession were not equipped to handle the consequent legal issues.

³² Besides echoing the profound concerns expressed by Judge Einfeld regarding the comprehensive incapacity of the judiciary to deal with the radically expanded task it would have to perform in the new dispensation, Dr Despouy expressed his own concern at the prevailing political and constitutional squabbles that were hampering the country's transition to democracy.

Knaul report (2013):

Nor were these the only warnings and advice that received scant attention in Maldives. On the contrary, as the country stumbled from one political confrontation and constitutional crisis to another and as one contentious criminal trial after another attracted international attention and condemnation, internationally renowned experts visited the country, conducted investigations, made adverse findings and shared valuable advice. In February 2013 UN Special Rapporteur on the independence of judges and lawyers Gabriela Knaul conducted a week-long investigation in the country and three months later her report was published. It is principally a comprehensive indictment of the Supreme Court and commences by referring to “tensions with and within the judiciary [that] have led to unrest and negative consequences on the consolidation of democracy”, “serious gaps in the legal system”, “misinterpretation of the concepts of independence of the judiciary and accountability”, “lack of transparency and adequacy of the Judicial Service Commission”, “the precarious situation of women in the justice system” and ultimately “the concerning lack of public trust in the judicial system”. Later the Special Rapporteur reports that she was “particularly struck to hear how little trust the public has in the justice system” and observes that “[t]he mindsets of the public and the authorities, including judicial authorities, have not yet assimilated the changes brought by the 2008 Constitution”.

She also points out in plain and unequivocal terms that:

The concept of independence of the judiciary has been misconstrued and misinterpreted in the Maldives, including among judicial actors. The requirement of independence and impartiality does not aim at benefitting judges, but rather the court users, as part of their inalienable right to a fair trial ... Independence is not synonymous with isolation either. While the judiciary is to decide matters before it without any restrictions, improper influences, inducements, or threats, it is bound by the powers granted by the Constitution and the laws and must function in a system of checks and balances with the other powers of the State.³³

Special Rapporteur Knaul also expresses serious concern at “inconsistencies and gaps in the Maldives’ legislation” and urges the adoption of “[n]ew and revised legislation ... in order to create a comprehensive, consistent and uniform legal system, whereby the rule of law can be enforced in a fair, equal and impartial manner, with respect for the principle of legality”.

³³ Paragraph 38.

She is also concerned at the Supreme Court’s assumption of control over the Department of Judicial Administration (DJA), the absence of a proper system of case management, case reporting and archiving, the absence of suitable internal regulations, judicial delays, a lack of transparency and a generally inaccessible court system. The report comments incisively on the harmful consequences of the Supreme Court’s abolition of the Judicial Council that had been created by the Judicature Act, resulting in the lower courts being seen as “excluded from the administration of justice and decision-making processes”.³⁴

The report is seriously concerned at the system of appointment of judges, both initially during the transition and thereafter, and suggests that while restarting a vetting and reappointment process did not seem possible “there are some pragmatic measures that could be taken to assess the quality of judges’ work and decisions”.³⁵ The Special Rapporteur also remarks on the lack of legal literature in Dhivehi, not only for the benefit of judges and lawyers but for parliamentarians, students, NGOs and the public. The report concludes with a number of very specific recommendations regarding judicial education, especially the translation of a basic legal library into Dhivehi, and urges the UN specialised agencies and the donor community to provide financial assistance and technical support in establishing the requisite institutions.

As in the case of Judge Einfeld’s and Dr Despouy’s reports, there is little if any evidence that Special Rapporteur Knaul’s concerns and her recommendations made any impression in Malé.

Other warnings and advice:

There were several further authoritative commentaries on the state of the administration of justice in Maldives after the Knaul report, e.g. from the ICJ / SAHR (2015), the Bar of England and Wales (2015), the Commonwealth Human Rights Initiative (2016) and the present Special Rapporteur (2017). Such repeated warnings by authoritative international observers were ignored, and it is clear that if the current initiatives are to effect a real break with the past, judicial reform must engage with the broader socio-political environment as a whole. And although it must be done while the political tide is propitious, and although some steps can and should be taken immediately, systemic degeneration takes time to eradicate. Habits die hard.

³⁴ The decision to take control of the DJA and to abolish the Judicial Council was taken unilaterally by the Supreme Court for reasons that were not disclosed at the time nor apparently discussed with the JSC or the AGO.

³⁵ The report does not spell out what is contemplated.

**ANNEX OF CONSTITUTIONAL MATTERS RELATING TO SYSTEM OF
GOVERNANCE, INDEPENDENT INSTITUTIONS,
AND THE JUDICIARY**

By email dated 20 May 2019, the Attorney General’s Office informed UNDP that, “Government also has plans to amend the 2008 Constitution of the Republic of Maldives, in order to make way for the multiple reform strategies in all spheres of governance in the Maldives. This is specifically necessary to initiate the judicial reform proposals specified above. It is important that an independent consultant reviews the Constitution in specific areas relating to the Government’s reform plan, and propose models that would best suit the country in these areas.” Based on this request, the terms of reference for the judicial sector assessment called for a review of “major challenges in the constitution for systems of good governance with a special focus on system of governance, independent institutions, state accountability and judiciary.” Consequently, this annex addresses the issues raised in the 20 May email and terms of reference, and is organized into the following topics:

1. Independent institutions
2. Decentralization
3. Judiciary

As a threshold matter, this annex does not purport to diagnose “problems” with the Maldivian constitution. Many Maldivian counterparts noted that challenges experienced in the Maldives since the enactment of the 2008 constitution could just as likely to be failings of constitutional interpretation, application, and enforcement as they are caused by the constitution itself. A frequent refrain during interviews was either that the Constitution had not been in force long enough to know how well it works or that for much of its life the constitution had been ignored or abused in key ways that contributed to the current challenges. As but one example, the failure of the Judicial Services Commission (JSC) to exercise effective oversight over the judiciary could be explained by a “failure” in how the constitution comprises the JSC, but it just as easily could be explained by the “failure” of the individuals themselves to exercise the constitutional authority granted to them in an appropriate and proper manner as members of the JSC. The new make-up of Parliament following the 2019 elections affords the opportunity to assess whether the JSC can perform effectively as constitutionally constructed or whether constitutional changes are needed. This will take time to assess. Therefore, this annex merely identifies constitutional provisions and matters that might merit additional scrutiny as Maldivian stakeholders seek to strengthen the constitutional institutions, rules, and mechanisms that are central to effective governance and accountability, with options based on comparative

international practice for other ways to approach these matters when and if Maldivians decide reform is in order. There are no recommendations in this annex: only observations and options.

1. INDEPENDENT INSTITUTION

The main concern expressed by Maldivian stakeholders about the constitutional independent commissions (in particular, the Electoral Commission, Human Rights Commission, and Anti-Corruption Commission) is that they have been manipulated, abused, politicized and/or otherwise ineffective: manipulated and abused to the extent other actors or bodies have at times sought to undermine them; politicized, in that at times they have been seen as working on behalf of the party in power rather than conducting themselves in an independent manner; and ineffective, in that many of them have failed to deliver on their mandates. There was disagreement, however, as to whether these challenges were caused by poor constitutional design or poor constitutional implementation.

Independent commissions, when operating effectively, play an important role in good governance. They can serve as neutral arbiters by removing particularly sensitive matters - for example, elections and public prosecutions - out of the political arena where they could be used for partisan gains. They can act as neutral monitors – for example, anti-corruption and human rights commissions – to increase public confidence that the foxes are not watching the chicken coop. And they can serve as neutral administrators – for example, a civil service commission or a finance commission – to increase the likelihood that administrative matters are not politicized to the benefit of one party or another. The reason for this independence or operational autonomy arises out of the need to protect the system of government itself, its neutral monitoring, and the promotion of transparency and accountability, and to make sure that politics is conducted on a level playing field. Unless these institutions function independently, it is argued, the system of governance as a whole will be compromised. It would be analogous to one of the players in a winning football side also being the referee.

The key to the effective operation of independent commissions is to design them in such a way as to protect their independence and neutrality while at the same time keeping them accountable to elected representatives. To achieve this, many modern constitutions seek to include provisions regulating how members will be appointed and removed, the qualifications applicable to each office, rules of conduct, reporting requirements and funding provisions. There are many approaches to achieving this balance, with the remainder of this section offering options for Maldivian stakeholders to consider given the uniqueness of the Maldivian context.

1.1 Appointment mechanisms

There is a great deal of variance on the appointment procedures for independent commissions – with each seeking to mitigate the risk of undue/unbalanced partisanship by spreading appointments across parties and/or institutions. One approach is to employ a **bi-partisan appointment procedure**, where the leader of the party in power and the leader of the opposition agree on each appointment (see, e.g, Belize, where the two members of the Elections and Boundaries Commission are “appointed by the Governor-General acting in accordance with the advice of the Prime Minister given with the concurrence of the Leader of the Opposition.” (Constitution of Belize, sect. 88(2))³⁶. Alternatively, each of the party in power and the opposition can select candidates without agreeing on the other’s selections.

A related approach perhaps more conducive to multi-party politics, is a **proportional appointment mechanism**, which typically relies on proportional representation (as reflected in the elected legislature) to select members of independent commissions. Colombia’s National Election Commission, for example, consists of nine members elected by the legislature in a plenary session “in accordance with a system of proportional representation and on the basis of proposals submitted by the political parties or movements with legal personality or by coalitions formed between them.” (Constitution of Colombia, art. 264).

A third approach uses **supermajorities** in parliament in order to force the majority to get buy-in from the opposition. In Portugal, for example, certain independent body commissioners are elected by Parliament by a two-thirds majority vote (Constitution of Portugal, art. 163). Of course, whether this has the intended effect depends on the supermajority threshold being higher than the majority party’s representation in parliament.

A fourth approach is through **multi-institution appointments**, where the president may select and nominate a candidate who must then be confirmed by the legislature. (In addition to countries like Chile and Lithuania, this is the procedure currently in place in The Maldives.) Alternatively, the legislature can take the initiative, either by proposing a candidate who must then be confirmed by the

³⁶ The reference to the Constitution of Belize, as well as most other references to national constitutions in this Annex, are drawn from a forthcoming publication from International IDEA on, “Independent Regulatory & Oversight (‘Fourth Branch’) Institutions, by W. Elliot Bulmer.

president, or by selecting a shortlist of candidates from which the president must make the appointment. In Kenya, for example, members of several independent institutions are first “identified and recommended for appointment in a manner prescribed by national legislation”, then “approved by the National Assembly,” and finally “appointed by the President.” (Constitution of Kenya, art. 250).

And finally, some more recent constitutions have established a **Constitutional Offices Commission** responsible for appointing commissioners to other independent commissions.

- In Fiji, there is a Constitutional Offices Commission consisting of the prime minister (as chair), the leader of the opposition, the attorney-general, two persons appointed by the president on the advice of the prime minister, and one person appointed by the president on the advice of the leader of the opposition (Constitution of Fiji, art. 132).
- Nepal has a Constitutional Council that is responsible for appointing members to Nepal’s independent commissions. It is composed of the prime minister, chief justice, speaker and deputy speaker of the Lower House, the chair of the Upper House and the leader of the opposition. (Constitution of Nepal, art. 284).
- In Sri Lanka, there is a Constitutional Council that consists of the prime minister, speaker, leader of the opposition, one member of Parliament appointed by the president, five persons nominated jointly by the prime minister and the opposition leader, and one member of Parliament nominated by third and minor parties (Constitution of Sri Lanka, art. 41A). ^[L]_{SEP}

Whichever approach is used, the chief objective should be appointing independent commissions and officials in a transparent manner that ensures their neutrality, non-partisanship, capacity and competence. A few lessons, however, may help indicate which approach might work best in a given political environment. For example, a bi-partisan approach may be less useful in a multi-party legislature. Multi-institution appointments might be less appropriate in a parliamentary system where the same party (or coalition) controls both the executive and legislature. The Constitutional Offices Commission will only work if the political balance is carefully engineered. In Fiji, for example, four of the six members of the Constitutional Offices Commission are either members of the government or are appointed by the government; only two are opposition members. This gives the opposition a voice, but not a veto – and so does not prevent the government from making partisan appointments. Indeed, the opposition in Fiji has refused to attend commission meetings in the past due to their perception that they always are ignored by the government. On the other hand, where the government

does not have a majority in the appointing body, and where in consequence appointments require some mutual agreement between the government and opposition parties, such bodies may be effective.

1.2 Other rules and mechanisms to promote neutrality, independence and accountability

Appoint mechanisms have a significant impact on the independence and neutrality of independent commissions. Other rules and mechanisms can also play a role, in addition to ensuring accountability of these institutions. Security and length of tenure, prohibition on partisan activities, financial independence, and adequate and protected salaries can all have a hand in determining the degree to which the commissions can operate independently and neutrally under the following principles:

- Members of independent commissions typically serve for a fixed term of office that is longer than the legislative or executive term. Thus, appointments to these institutions are staggered against the electoral cycle, which helps maintain their political independence. Another method to achieve a similar result is to stagger the terms of office for the commissioners so that members of the commission are appointed in successive years.
- Commissioners should have security of tenure with limited and clear conditions for their removal. A higher threshold vote and/or a vote that requires agreement across parties to remove a commissioner might also be appropriate.
- While commissioners should be chosen based on their merit, special consideration for groups that have historically been excluded – e.g., women – may be appropriate. For example, it is noteworthy that some independent commissions have never had a female commissioner (i.e., the Electoral Commission) while others have had women in small numbers.
- Transparent and consistently applied rules for recruiting commissioners – for example, how posts are advertised, how candidates are vetted, and adequate time for vetting – can contribute to greater integrity and legitimacy for these bodies.
- Salaries and benefits for the individual commissioners and the commission as a whole should be protected so that independence and neutrality cannot be undermined through threats of salary or benefit reduction. The Constitution of Zambia (art. 199) provides that the salary and terms of office of certain independent bodies “shall not be altered to his disadvantage after his appointment” and “shall be a charge on the general revenues of the Republic.”
- Annual reports to parliament and regular audits can provide accountability and oversight without sacrificing independence and neutrality. In South Africa, for example, independent

commissions “are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.” (Constitution of South Africa, art. 181). In the Bahamas, the accounts of some of the commissions are audited and reported on by the auditor-general; the accounts of the auditor-general’s office are in turn audited and reported on by the minister of finance (Constitution of the Bahamas, section 136). Equally important are (a) requiring the reports and audits; and (b) having a parliamentary committee that is capable of exercising its oversight responsibilities.

- Codes of conduct may also help to strengthen the independence, neutrality and integrity of commissions.

2. DECENTRALIZATION

Decentralization is another area where stakeholders were divided between whether the challenges were due to constitutional design of “decentralized administration” or in failure to effectively implement what the constitution already provides. Most people interviewed held the view that the current constitutional provisions on decentralization (Articles 230-235) are sufficient to accommodate the nature and degree of decentralization desired by most Maldivian stakeholders. Instead, they placed blame for insufficient and ineffective decentralization on the 2010 Decentralization Act, which they believe did not go far enough in devolving responsibilities and financial resources, and in failure to implement the 2010 Act itself. Further, the Maldivian Local Government Authority informed UNDP that major changes to the system of decentralization are expected with amendments to the 2010 Decentralization Act that are currently before Parliament, as well as through a substantial increase in revenue for island councils in the 2020 national budget (from 2% of national revenue to 5%, in addition to islands retaining 40% of the rents and fees they collect).

It is beyond the scope of this Annex to scrutinize the Decentralization Act itself. Constitutionally speaking, there are two major inquiries that might help Maldivian stakeholders assess whether the constitutional articulation of decentralization is appropriate.

2.1 Should the constitution provide greater clarity on the nature and degree of decentralization?

Constitutions typically address decentralization in one of three ways: (1) they can say nothing about decentralization and leave the matter entirely to ordinary legislation; (2) they can put forward general principles while leaving the details to ordinary legislation; or (3) they can give a detailed account of

the nature and degree of decentralization, including spelling out the structures (how many levels of decentralization), institutions (local government), powers and duties (the distribution of responsibilities between the different levels of government), and finances (revenue sharing) of the decentralized state. Each of these three systems can result in more or less decentralized states (there are highly centralized federal states and highly decentralized unitary ones). Often, therefore, the question of “how much should be constitutionalized” is not about how much decentralization is wanted but rather how much stakeholders trust the ordinary legislative process to meet the demands of those calling for greater decentralization.

The Maldives’ constitution sets forth principles and provides for the institutions of local governance but leaves to ordinary legislation the responsibilities that are decentralized, and the revenue island councils enjoy in order to execute those responsibilities. To the extent the Decentralization Act accurately reflects Maldivian consensus on the nature and degree of decentralization, greater elaboration in the chapter on “decentralized administration” may be unnecessary. But for those who think decentralization in The Maldives has failed because of ineffective implementation of the principles in Articles 230-235 or fear a future Parliament might undo gains made in currently envisioned amendments to the Decentralization Act, greater constitutional elucidation might be appropriate. Such an inquiry could be made about which powers should be exercised at the national, city, atoll, and island levels. And whether those powers should be exercised symmetrically or asymmetrically, such that islands with greater demonstrated capacity, larger populations, and/or greater revenue-raising capability could be allocated a greater number of service delivery responsibilities.

An issue related to the distribution of powers is the circumstances under which powers delegated to island councils may be reclaimed by the national government. This is another area where some constitutions choose to provide greater clarity – in order that the rules governing when and how the national government can supersede local authority are not left to the whim of the national government or parliament. For example, Article 100 of the South African constitution sets forth the circumstances under which the national government can intervene in provincial administration and provides for a check on the part of provincial governments to end the intervention if they deem it inappropriate.ⁱ

2.2 Should the constitution provide greater clarity on revenue sharing?

A foundational principle of decentralization is that revenue should track responsibilities so that the level of government charged with delivering a service has sufficient funds to do so. An imbalance between responsibilities and revenue can leave local government unable to afford to discharge their statutory (or constitutional) responsibilities – resulting in disruptions in important services and little recourse for residents to pursue remedy. Horizontal imbalances – where some local governments have sufficient revenue while others do not – can also occur. There are several approaches to avoiding fiscal imbalances, including allocating tax and other revenue-raising powers to local government, fiscal transfers, and adjusting the division or roles and responsibilities between national and local government. This Annex does not recommend one particular approach for the Maldives. Nor does it suggest that future fiscal allocations to local government might not be sufficient to cover the responsibilities placed on island councils via the Decentralization Act. However, based on interviews it is UNDP’s understanding that previous, current, and anticipated future allocations of finances between the national government and island councils are based on a study conducted in 2005 that examined the cost of service delivery on six islands. To the extent the Decentralization Act can ensure the allocated amount (or additional block grants) is tied to current costs related to current island council responsibilities, it would be prudent to do so. And should Maldivians choose to constitutionalize such a regime, they might consider a model such Article 214 of the South African constitution on “equitable shares and allocations of revenue.”ⁱⁱ

In addition to the two principles discussed above, a few specific constitutional amendments were raised by various stakeholders during the UNDP interviews, including:

1. Directly electing city council mayors, instead of being elected by the city council members.
2. Extending the term of island council members from 3 to 5 years and align them with parliamentary elections.
3. Changing the membership of the atoll councils so that the presidents of the island councils would make up the atoll councils.

UNDP does not have a view on the efficacy of these amendments at this time, but would merely note that careful consideration should be given to how these proposals will alter the balance of power between the City Council and the City Council mayor/administrator (in the case of proposal #1), and the island councils and atoll councils (in the case of proposal #3). Extending the term of island council members from 3 to 5 years and aligning them with parliamentary elections would reduce the number of electoral events in The Maldives, thus saving money.

3. JUDICIARY

This report goes into substantial detail over several challenges that have arisen in the judiciary, and in particular with the Supreme Court, since 2008. Many of these challenges have a constitutional perspective to them. However, like this Annex, the report takes the view that much of this has been caused by distorted interpretation and application of the 2008 Constitution and not necessarily due to constitutional design.

The starting point to any constitutional inquiry into the functioning of the judiciary is the inherent tension between judicial independence and judicial accountability. Judicial independence is a central tenet of a functioning democracy under the rule of law. At the time of the ratification debates over the U.S. Constitution, Alexander Hamilton wrote in *The Federalist Papers* that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” More recently, the principle of judicial independence has been reaffirmed in the United Nations *Basic Principles on the Independence of the Judiciary* and the *Bangalore Principles of Judicial Conduct*. The United Nations principles are particularly clear:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.³⁷

No one would argue, however, that judicial independence means an unchecked judiciary. Accountability to ensure both competence and integrity are essential to a properly functioning judiciary. Constitutional rules and mechanisms that provide for such accountability - including

³⁷ Basic Principles on the Independence of the Judiciary, principles 1 & 2, at <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>

mechanisms to discipline and possibly remove judges who neglect their duties or abuse their position of trust - are therefore fundamental.

The Constitution of the Maldives appropriately provides for appointment, disciplinary, and removal procedures that adhere to the principle of judicial independence while providing for accountability of judges. The appointment procedures in Article 148 spread responsibility for nominating, appointing, and confirming judges among three institutions - the President, the JSC, and the Majlis in the case of the Supreme Court, and the JSC for all other judges. Further, Article 154 provides a principled and sound basis for disciplining and removing judges after the JSC has found the judge to be “grossly incompetent” or guilty of “gross misconduct” and the Majlis resolves to support the JSC’s finding of removal by a two-thirds majority.³⁸ This procedure is close to that of India (Constitution of India, Article 124(4)) except that instead of removal being initiated by the President (as is the case in India), it is initiated by a finding of the JSC. In both cases removal is confirmed by a two-thirds vote in parliament.

Most Maldivian stakeholders interviewed expressed no objection to the existing procedures for appointment and removal – instead placing blame for current challenges in the judiciary on the extra-constitutional behavior of the Supreme Court and the failure of the JSC to exercise its constitutional responsibilities. That does not mean, however, that some constitutional changes could not improve functioning and accountability of the courts, and the Supreme Court in particular. The report notes, for example, that the words “in any matter before them” that appear in Article 143(b) of the Constitution could also be inserted at the beginning of Article 143(a) to make plain that what is contemplated is the Supreme Court acting in an adjudicative function and not a license to govern at will. Maldivians might also consider changing the wording of 143(a) to correspond more closely with that of 143(b) in order to make plain that the distinction between the two sub-articles is that the Supreme Court and the High Court can not only determine matters of interpretation (which all courts can do) but also invalidate executive or legislative provisions that transgress the Constitution. Article 159 could also be clarified so that where, as in Article 159(b), it states the JSC has the power “to investigate complaints about the Judiciary, and to take disciplinary action against them, including recommendations for dismissal,” this applies to the entire judiciary, including the Supreme Court.

³⁸ It is noted that disciplining judges on the basis of “gross incompetence,” while available in some judicial schools of thought, is sometimes considered problematic, as it allows judges to be second-guessed in their adjudication of disputes, which can (a) stifle the independence judgment of judges; and (b) be used by bad actors to remove judges for no reason other than they disagree with their decisions. Some commentators prefer accountability of this nature to be dealt with through the normal appeals process rather than through disciplining judges directly.

Many Maldivians also expressed concern over the functioning of the JSC – though, again, it is contested whether this is a problem of constitutional design or dereliction of duty on the part of previous JSC members. At the onset, it is important to emphasize that the purpose of a judicial council like the JSC is both to “safeguard the independence of the judicial system and the independence of individual judges” and to “promote the efficiency and quality of justice.”³⁹ One can immediately see in these objectives the essential balancing of judicial independence and accountability. And it is imperative that the JSC be designed and maintained in a manner consistent with this balance in order to not only preserve the integrity and functioning of the judiciary, but also to avoid establishing institutions and mechanisms that can be abused in the future.

A significant issue relating to judicial councils is its composition. In some countries the judicial council is made up entirely of judges, so as to preserve judicial independence. Good practice, however, also allows for non-judges – and even individuals from outside the legal profession – to reside on judicial councils in order to create checks and avoid judicial corporatism. Under UN principles, non-judge members should not be members of the executive or legislative branches, though in some cases members of the Government or parliament participate as *ex officio* members.⁴⁰ In addition, good practice is for judicial members to outnumber non-judicial members. The Maldivian JSC is heavily weighted towards non-judicial members – only 3 of the 10 members are judges while the rest are members of the executive or legislature, people appointed by the executive or legislature, and a lawyer elected from among the lawyers licensed to practice in the Maldives. In addition, the JSC includes members of the Government (the Attorney General) and parliament (Speaker of Majlis). While this facially would appear to contradict principles established by the UN, the Venice Commission, and other international bodies, it is essential to note that, “[t]here is no standard model that a democratic country is bound to follow in setting up its judicial council, so long as its composition is such as to guarantee its independence and to enable it to carry out its functions effectively. However, there is a tendency at the international level for judicial councils to have a mixed composition, and for a majority of members to be judges elected by their peers.”⁴¹

As has been noted throughout this report and Annex, due to the challenges that have been encountered with the performance of the JSC to date it may be not be possible to ascertain whether the JSC can

³⁹ *Report of the Special Rapporteur on the independence of judges and lawyers*, United Nations Human Rights Council, A/HRC/38/38, 2 May 2018 at paragraph 32.

⁴⁰ *Id* at paragraph 61 and 72-74.

⁴¹ *Id* at paragraph 66.

effectively guarantee the independence of the judiciary and support the effective functioning of the judiciary as currently constituted. Maldivians might consider, however, whether minor constitutional reforms might aid in this respect. With regard to the composition of the JSC, this could entail examination into whether Article 158 might be amended to (a) provide greater balance between judicial and non-judicial members; and (b) replace members from the executive and legislative with others who could be appointed by the Speaker and/or Attorney General (as is currently the case with the member appointed by the President). If any such changes were made, changes to Article 161(a) and (b) would also need to be amended, including perhaps by ensuring the term of office for JSC members is not aligned with the parliamentary calendar. (See, above discussion on independent institutions for why not aligning terms with the parliamentary calendar may be good practice.) It is noted that such reforms might appear to undermine the current need for greater oversight of the judiciary. Such considerations, however, need to be balanced against the long-term interest of an independent judiciary.

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ⁱ South Africa: 100. National intervention in provincial administration

1. When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -

a. issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

b. assuming responsibility for the relevant obligation in that province to the extent necessary to

i. maintain essential national standards or meet established minimum standards for the rendering of a service;

ii. maintain economic unity;

iii. maintain national security; or

iv. prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

2. If the national executive intervenes in a province in terms of subsection (1)(b)

a. it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;

b. the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

c. the Council must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the national executive.

3. National legislation may regulate the process established by this section.

ⁱⁱ South Africa: 214. Equitable shares and allocations of revenue

1. An Act of Parliament must provide for

a. the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

b. the determination of each province's equitable share of the provincial share of that revenue; and

c. any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

2. The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account

a. the national interest;

b. any provision that must be made in respect of the national debt and other national obligations;

c. the needs and interests of the national government, determined by objective criteria;

d. the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

e. the fiscal capacity and efficiency of the provinces and municipalities;

f. developmental and other needs of provinces, local government and municipalities;

g. economic disparities within and among the provinces;

h. obligations of the provinces and municipalities in terms of national legislation;

i. the desirability of stable and predictable allocations of revenue shares; and

j. the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.