

**STRENGTHENING THE
MALDIVIAN JUDICIAL SYSTEM**

DRAFT DISCUSSION PAPER

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1. Introduction

- 1.1** At the request of the Attorney General of the Maldives, the Hon. Dr Hassan Saaed, the Commonwealth Secretariat, Political Affairs Division, invited me to examine the Maldivian Judicial System and prepare a strategic plan for its strengthening. The terms of reference are Annexure A.
- 1.2** My mission took place from 14 to 21 February 2005. It was facilitated by the Office of the Attorney General, especially Ms Aaishath Azima Shakoor, Deputy Director, Legal Affairs and her assistant Shafiya, without whose expert support and attention the mission could not have succeeded.
- 1.3** My program of interviews and inspections was extensive and full. It involved visits to the High Court and the Lower Courts (Family Court, Civil Court Criminal Court, Juvenile Court), including two Atoll or Island Courts, meetings with Judges, government officials, private lawyers, the Speaker and members of parliament, users of the court system, business people and bankers. It also included an important meeting with a leading Muslim cleric and a respected former Attorney General. A list of the people who graciously granted me an interview is Annexure B. I express my appreciation to them all for their time and advice.
- 1.4** It is not appropriate that I report on particular interviews or observations. Rather I have chosen to identify what appear to be the major features and problems of the legal and judicial system operating in the Maldives at this time. As the native language of the Maldives is Dhivehi, a unique tongue that can apparently be partially understood by speakers of Sinhalese from Sri Lanka, I have only been able to read the documents that have been translated into English which generally does not include the laws of the country. My observations of court practices

could for the same reason only be superficial. As a consequence I have been reliant on what people have told me in my meetings with them.

- 1.5** In this paper, I mean everything I say to be, and hope it will all be taken, not as criticism, but as a constructive contribution to reform. All nations have their own particular cultures and practices. Although often historically convenient, some elements of every nation's practices are usually in need of change to meet the demands of a modern society. Yet law reform is often slow, not least because lawyers have a vested (i.e. financial) interest in maintaining the status quo.
- 1.6** What is needed is determined leadership, and the very fact that the President of the Maldives and his Attorney General have sought this analysis and review is a significantly positive recognition of their acceptance of an urgent need for extensive legal reform in their country. As I mentioned to the Attorney General personally, the terms of reference given to me are courageous and strong. They bespeak a commitment by Government to modernise and expand the legal system to meet the needs of their country in the 21st Century.
- 1.7** It is vital that this courage and commitment be communicated, not merely to the lawyers and government officials of the country, but to the public at large. People must understand that without an effective, transparent and accountable system of law, a democracy cannot function properly or be at peace with itself. Without law, the rule of law, and a judicial system of competence and absolute integrity, no school, hospital, house, road, communications & transport system or any other economic entity can be built, and the country and its people cannot prosper. Nor can corruption and instability be eliminated. The people should be made aware of their Government's commitment to build a democratic society with these indispensable features.
- 1.8** It is therefore crucial to the wellbeing of every society and its people that their country have a legal and judicial system which has their

respect and confidence. As my terms of reference themselves make clear, and my mission emphasised, that situation does not now exist in the Maldives.

1.9 I hope that this report will be made public because only by creating discussion and interest – and, if appropriate, criticism – is it likely to contribute to changing that position for the better. In my experience, friendly nations in general, and their Judges and lawyers in particular, are more than willing to assist other countries genuinely committed to reforming and strengthening their legal and judicial system. I do not doubt that that applies no less to the Maldives than anywhere else.

2. Background

2.1. Demography

The Republic of the Maldives is situated south-west of Sri Lanka in the Indian Ocean and is comprised of 1,190 coral islands, forming an archipelago of 26 major atolls divided into 20 administrative regions. The archipelago spreads over 820 kms from north to south and 120 km from west to east covering an area of approximately 859,000 sq kms with a land mass of 300 sq kms. The Maldivian population numbers approximately 290,000 people, inhabiting 202 of the islands. Approximately 27% of the population lives in the capital Male, an island covering 1.77 sq kms.

2.2 History

For nearly 1000 years prior to the mid 19th Century, the Maldives was an autonomous kingdom (sultanate), except for a period of 15 years (1558-73) when it came under Portuguese rule. The Portuguese were expelled by the hero Bodu Muhammad Thakurufaanu and the Maldives returned to being an independent sultanate again, until the

year 1887 when it became a British Protectorate. It gained its independence from Britain on 25 July 1965.

Originally Buddhists, the Maldivian population converted to Sunni Islam in the mid-12th century due to influences from visiting Arab traders and following the conversion of the Maldivian ruler himself to Islam. It remains Sunni Muslim to this day. The country has had only two Presidents, with the present incumbent in office since 11 November 1978.

2.3 Economy

For the past twenty-five years the Maldives has been experiencing rapid GDP growth with a growth rate of 16.9% recorded in 1990 and 8.5% in 2003. The standard of living has increased markedly during this period as has international trade and foreign investment. Tourism is the primary industry in the Maldives, accounting for approximately 33% of the GDP. A full 87 of the Maldivian islands are exclusive resort islands, catering annually to a tourist population larger than the permanent population of the country. Fisheries account for a further 7% of the GDP. The currency is the Rufiyaa [approx Rf13 to the \$US].

2.4 Education and Health

The Dhiveeli literacy rate in the Maldives is 99%. While there is universal access to primary education, secondary education is not as widely available, and some basic tertiary education institutions have only recently been established in the country. English is taught but not widely used by the rank and file populace. Improvements in the health sector have included a life expectancy rise from 64 in 1990 to 70 in 2003 and an infant mortality rate decline from 34 in 1990 to 14 in 2003.

3. The Constitution

The Maldives has a written Constitution which states that the country shall be a unitary, sovereign, independent, democratic republic based on the principles of Islam.

3.1 Fundamental Rights

The Constitution enumerates the fundamental rights and responsibilities of Maldivian citizens. These include equality before the law, the right to be accorded protection under the law and be treated according to law, the presumption of innocence until proven guilty, the prohibition of punishment under retrospective legislation, the inviolability of residential dwellings, freedom of education, inviolability of letters and other means of communication, and freedom of movement. It also provides a right to acquire and hold property, the protection of property rights, the right to work, freedom of expression, freedom of assembly, freedom of association, and the right to a pension. It is the constitutional duty of every Maldivian citizen to be loyal to the State and obedient to the Constitution and the law, to uphold and protect the Constitution and the law of the Maldives. The Constitution pronounces any laws, regulations and principles inconsistent with the enumerated fundamental rights to be void.

3.2 The President

The President of the Maldives, who is both Head of State and Head of Government, is selected by the People's Majlis (Parliament) from any number of eligible candidates and confirmed by the public in a referendum on a single candidate. The term of office of the President is five years with no limit on the number of terms a President can serve. The President has the power to appoint as well as remove from office the Vice-President, Chief Justice, Judges, Speaker and Deputy

Speaker of the People's Majlis, Ministers, Attorney-General, representatives sent abroad with special privileges on behalf of the State, Atoll Chiefs, the Auditor-General and the Commissioner of Elections.

3.3 The Executive

Executive powers are vested in the President and a cabinet appointed by the President consisting of the Vice-President, Ministers and the Attorney-General.

3.4 The Legislature

3.4.1 The People's Majlis

The legislative power is vested in the People's Majlis, a unicameral legislature of 42 elected members and 8 members appointed by the President. Of the 42 elected members two members are elected from Male and two from each Atoll of the Maldives. The duration of each People's Majlis is five years. Both Ministers and civil servants are able to stand for election to the People's Majlis, and are able to continue in their existing positions even if elected to the People's Majlis.

3.4.2 The People's Special Majlis

The power to make and amend the Constitution is vested in the People's Special Majlis which consists of the members of the People's Majlis, the members of Cabinet, and a group of

members elected on the same basis and consisting of identical numbers as the People's Majlis.

3.5 The Atoll Chiefs

Each Atoll is administered by an Atoll Chief appointed by the President.

3.6 The Judiciary

The Constitution provides for a High Court to be presided over by the Chief Justice. Other courts are to be established according to the determination of the President. All judges, including the Chief Justice of the High Court, are appointed by the President.

3.7 Elections

Voting in the Maldives is voluntary and by secret ballot. Elections are organised by the Commissioner of Elections who is appointed by the President. The Commissioner is responsible for organising and conducting the Presidential elections, the elections of the members of the People's Majlis and the People's Special Majlis as well as any public referenda called for by the President. Under the present electoral system some members are elected by as few as 900 voters and some by as many as 29,000 voters.

4. The Legal System

4.1 The Maldivian legal system combines traditional Islamic law with aspects of common law. It is generally recognised that the legal system has been struggling to keep abreast with recent socio-economic developments associated with rapid economic development, a boom in

tourism, increased international trade and investment, fast population growth and changing living standards and lifestyle.

4.2 Two predominant issues are the large proportion of the population serving sentences in prison and the dramatic increase in drug abuse and related offences. Between February 2000 and September 2003 there was a 243% rise in persons serving prison terms. The majority of these (80%) were serving prison terms for convictions of drug offences and most (75%) were under 30. This high rate of persons serving prison terms is attributed chiefly to the long sentences prescribed in the Anti-Narcotics Act and the lack of available alternatives to criminal sentencing. Annexures C and D are the figures provided to me by prison authorities showing those in prison on conviction and remand respectively as at 19 February 2005.

4.3 Other weaknesses identified in the current legal framework are weak procedural structures and a lack of laws governing legal procedures, the absence of a formal law reporting system which is inhibiting the establishment of a strong doctrine of legal precedent, uncertainty regarding the respective standards of proof in civil and criminal matters, and unclear principles regulating the admission of evidence.

5. The Judiciary

5.1 The Courts

The Maldives has a three tier system for the administration of justice. The lower courts are administered by the Ministry of Justice. These include one general court in each inhabited island, as well as four specialised courts which sit in Male: the Criminal Court, the Civil Court, the Family Court and the Juvenile Court. The High Court, presided over by the Chief Justice, hears appeals from these lower courts as well as first instance cases in exceptional circumstances.

There is an automatic right of appeal from the lower courts to the High Court which sits in Male.

According to the Constitution, the President is the highest authority for administering justice. Thus the President has an appellate jurisdiction enabling him to hear appeals from the High Court with his decision being final. What is known as a Judicial Committee, which meets in his office, "hears" these appeals and advises the President about their result, but this process appears to be executive or administrative rather than judicial. There are no "hearings" as such although written submissions by the parties are entertained. Apart from the Chief Justice whose High Court's decisions are those appealed to the Judicial Committee, its other members are not judges at all. The Attorney General who, as the nation's chief prosecutor, is in substance one of the parties to many appeals, was a member of the Committee until quite recently.

5.2 Training

It is widely agreed that judges currently lack adequate legal training. Similarly, the legal profession is relatively young and training in the common law is a comparatively new occurrence amongst legal professionals, with the first common law trained lawyer only commencing practice in the late 1980s. There is no faculty of law in the Maldives although the *Shari'ah* Institute has a School of Law which provides some training in legal principles. The only fully trained lawyers have been educated overseas, principally in Malaysia, Australia and Britain. The current Attorney-General, who is a graduate of the University of Queensland (Australia), has recently visited Malaysia seeking to expand the availability of legal training to Maldivians seeking to practise law.

6. Criminal Law

6.1 The current Maldivian Penal or Criminal Code was enacted in 1967 in response to civil unrest in certain regions of the country. As a code enacted to deal with a specific uprising, it is not comprehensive and is largely unable to address current crime patterns and problems facing the country.

6.2 A proposed amended to the Penal Code has been drafted but is yet to be enacted.

6.3 Preliminary Matters

6.3.1 Purpose

The purpose of the current Code is defined as “establishing and maintaining public tranquillity, public order and justice within the jurisdiction to which the Constitution of the Maldives applies”.

Section 11 of the proposed Code provides a more detailed account of the general purpose of the Code, viz. to establish a system of prohibitions and penalties to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests entitled to legal protection, including Islam, life lineage, mind and property.

Objectives of the proposed Code include:

- to prescribe penalties that are in proportion to the blameworthiness of the offender and the seriousness of the offences
- to ensure guilty conduct and only guilty conduct is condemned as criminal

- to safeguard the rights of the accused or convicted
- to clearly define prohibited behaviour, its consequences and the limits of punishment

Additional purposes include ensuring public safety through the use of merited punishment in order to vindicate public norms, the deterrent influence of penalties, and confinement to prevent recurrence of criminal behaviour.

6.3.2 Non-Statutory Crimes

The current Code acknowledges that *Shari'ah* may influence punishments and crimes prescribed by the Code whereas section 12 of the proposed Code abolishes all non-statutory crimes.

6.3.3 Jurisdiction

The current Code prescribes different laws for uninhabited islands and inhabited islands, whereas the proposed Code is equally applicable to both.

6.3.4 Civil remedies

The current Code does not distinguish between civil remedies and criminal punishment for criminal conduct, whereas the proposed Code does make this distinction (s.14) and provides that the victim of a crime may pursue civil remedies regardless of the outcome of concurrent criminal proceedings.

6.3.5 Burdens of proof

The current Code does not provide for burdens of proof. The proposed Code dedicates section 15 to this matter prescribing a presumption of innocence until proven guilty and sets the standard of proof for conviction at ‘beyond a reasonable doubt’. The standard of proof for a defendant attempting to prove a defence is ‘by a preponderance of the evidence’.

6.4 Offence liability

6.4.1 Requirements of offence liability and defences related to the offence

On a matter not addressed by the current Code, the proposed Code codifies the requirement of liability. Section 20 requires that in order for a person to be found liable for an offence (guilty of an offence), the prosecution must satisfy all elements of the offence, and fail to meet the requirements for any relevant exception or defence.

While all crimes under the current Code contain the same elements of an offence defined by the proposed Code, section 21 of the proposed Code serves to clearly categorise and defines these elements as conduct, circumstances, result of conduct and culpability.

6.4.2 Causal relationship between conduct and result

The current Code provides for the liability of multiple persons where each person intended to commit an act that is an offence and allows the trial Judge to vary the punishment of each person in proportion to their involvement.

The proposed Code introduces a ‘but for’ test and notions of remoteness into the causation requirement. It reinforces the

notion of concurrent liability in the current Code but does not grant the Judge a discretion as to punishment.

6.4.3 Requirement of an act

The current Code implies a requirement of an act in order to establish liability for an offence, whereas section 23 of the proposed Code expressly requires an act, unlawful possession or an omission to perform a statutory duty in order to establish liability.

6.4.4 Culpability requirements.

The proposed Code introduces a hierarchy of four defined terms of culpability which do not appear in the current Code: purpose, knowledge, recklessness and negligence.

Both the current and the proposed codes allow for the admissibility of evidence of ignorance, mistake or mental disease or defect to negate the culpability requirement.

6.4.5 De minimis rule

Section 28 of the proposed Code requires that where a harm or wrong caused is too trivial to warrant the condemnation of criminal conviction the court must dismiss the charged offence. This requirement, which does not appear in the current Code, ensures that the court will convict only in appropriate situations and avoid punishment for insignificant transgressions.

6.4.6 Accountability for the conduct of another

The proposed Code, in line with the provisions of the current Code, allows for the culpability of a number of people where

more than one person contributed to the offence. The proposed Code provides the requirements for being found culpable for the conduct of another and provides guidelines for Judges in grading the liability of such accomplices. This is an improvement on the current Code which simply provided for a general discretion to be exercised by a Judge in these matters.

6.5 General defences

6.5.1 Justification defences

The current Code does not deal with the justification defences in a general sense whereas section 40 of the proposed Code provides for a general justification defence that bars liability where the conduct in question is found to be justifiable.

The proposed Code lists a number of specific justification defences, namely where a person's conduct:

- is necessary to avoid a harm or wrong that is greater than the potential harm or wrong of the actual conduct (s.41)
- is necessary for the lawful execution of a public duty (s.42)
- is necessary to bring a person into lawful custody or to prevent a person's escape from custody or to prevent a suicide (s.43)
- is by those charged with a special responsibility for others and within the range allowed by the particular subsections (s.44)
- is necessary for the defence of a person or property

In these cases the conduct must be in proportion to the threat of potential harm (ss.45, 46) in contrast to the current Code which

does not have a 'proportional' requirement except where the conduct causes the death of a person.

6.5.2 Excuse defences

Section 50 of the proposed Code elaborates upon the existing general provision found in the current Code that a person is to be found culpable for an offence committed under a certain state of mind, only to the extent that the person created that state of mind.

The proposed Code provides a detailed list of such states of mind including involuntary acts or omissions, insanity, immaturity, involuntary intoxication, duress, impaired consciousness, ignorance or mistake.

6.5.3 Non-exculpatory defences

Non-exculpatory defences are not provided for in the current Code but are introduced by section 60 of the proposed Code. They provide a defence to prosecution, or a bar to pleading, trial, or sentencing. These defences include the expiry of a time limit for prosecution, where the accused is unfit to plead, stand trial or be sentenced due to his mental or physical condition, diplomatic immunity, and prior prosecution for the same offence or for a different offence under certain listed conditions.

6.6 Liability of corporations and other non-human entities

The current Code does not address the issue of the liability of corporations and other non-human entities. Section 70 of the proposed Code, however, sets out the circumstances under which a corporation will be held liable for offences authorised by the corporation, or

committed by a corporate agent. Section 71 provides that employment by a corporation is not a bar to prosecution of the individual.

6.7 Inchoate offences

6.7.1 Criminal attempt

The current Code recognises attempted crimes as amounting to an offence. Section 80 of the proposed Code goes further in defining attempt liability, and lists the actions which amount to an attempt to commit an offence

6.7.2 Criminal solicitation

Aiding and abetting the commission of an offence are provided for in the current Code. The proposed Code renames these as criminal solicitation, and specifies the culpability level required, as well as narrowing the application of the law to cases of direct offences only.

6.7.3 Criminal conspiracy

Participation in a conspiracy is viewed by the current Code as establishing accomplice liability. The proposed Code, however, separates conspiracy from accomplice liability and sets out clear definitions relating to the offence of criminal conspiracy.

The current Code does not, but the proposed Code does, address the issues of defences for inchoate offences. In line with the current Code, the proposed Code grades criminal attempt, solicitation and conspiracy at one grade lower than the offence attempted, solicited or conspired.

6.7.4 Possession of instruments of crime

The proposed Code provides for a general offence of possessing an instrument of crime whereas the current Code only prohibits the possession of an instrument specifically used for counterfeiting.

6.8 Offence grades and their implications

6.8.1 Generally

A general framework for the grading of offences is provided by the proposed Code. Previously, each offence held its own unique penalty. Thus the proposed Code goes some way in providing for a consistent and simplified method of administering penalties. But there are still many complexities. Unlike the current Code, the proposed Code does not direct the form which imprisonment shall take, choosing instead to leave such directions to sentencing guidelines and the prison system. Islamic law punishments of retaliation, amputation for theft and lashes are not included in this proposed grading. Lashes, however, are authorised in the proposed Code under specific crimes as additional to a punishment drawn from the prescribed graded punishments. It is important to note that section 411 of the proposed Code defines 'lashes' as a symbolic, and presumably a humiliating, punishment which is not designed to cause bodily injury.

6.8.2 Maximum authorised terms of imprisonment and fines

The proposed Code details the maximum authorised term of imprisonment and the maximum authorised fine for each class of offence.

6.8.3 Alternate forms of punishment

The proposed Code preserves the alternative forms of punishment that are found in the current Code including:

- banishment or exile
- house detention/arrest
- other sanctions

6.8.4 General adjustments to offence grade

Under section 95 of the proposed Code, a Judge is permitted to adjust the punishment of an offender upwards where the offence was committed in an exceptionally brutal manner or by a repeat offender or against an incompetent victim. Aside from these general adjustments, sentencing guidelines and specific offences allow for further adjustments based on criteria specific to those instances.

6.8.5 Cumulative maximum authorised sentence for multiple offences

The proposed Code for the first time addresses the issue of multiple offences. It prescribes the maximum cumulative authorised sentences that can be given where a person is convicted of multiple offences and establishes that multiple imprisonment terms are to be served consecutively rather than concurrently.

6.8.6 Prosecution for multiple offences

Section 97 of the proposed Code allows the courts to convict a person for multiple offences based on the same conduct but limits such convictions for multiple offences to particular circumstances that are set out in the section.

6.9 Offences against the person

6.9.1 Homicide offences

The current Code prohibits the disobedience of “an order lawfully issued under judicial or legal authority”. It further states that where such disobedience resulted in the death of a person, the offender is subject to the punishment prescribed by Islamic Law. No distinction is made between different levels of culpability in the causing of a death.

Under the proposed Code, homicide offences are distinguished according to the level of culpability and are categorised as murder (s.110), manslaughter (s.111), negligent homicide (s.112), causing, aiding, soliciting or attempting suicide (s.113) and concealing a homicide (s.114). The proposed Code grades homicide offences in proportion to the level of culpability, from a class A felony for murder through to a class 1 misdemeanour for attempting to commit suicide.

6.9.2 Under the proposed Code, murder can be committed knowingly or recklessly “under circumstances manifesting an extreme indifference to the value of human life”, or as a result of “the commission, attempt to commit, or flight after commission of any violent offence” (the latter is subject to the accused being unable to rebut the presumption of recklessness and extreme indifference).

6.9.3 Under the proposed Code, manslaughter can be committed recklessly (with no need for the extreme indifference requirement necessary for murder), or where a murder is committed but under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The test for such a reasonable explanation is to be determined from the viewpoint of a person in the defendant's situation and circumstances.

6.9.4 Under the proposed Code, a person negligently causing the death of another commits negligent homicide.

6.9.5 The current Code prohibits disobedience of an order lawfully issued under judicial or legal authority that results in loss or injury to a person's body. The proposed Code extends this concept to prohibit the causing, aiding, soliciting or attempting of suicide. It also establishes a rebuttable presumption of suicide where a person ingests an overdose of a controlled substance or causes serious bodily injury to himself. Finally, the proposed Code defines suicide and allocates an offence grading to each different circumstance.

6.9.6 The current Code classifies as an offence, the concealment of evidence in relation to offences punishable with imprisonment or exile for life or for a period exceeding 10 years. The proposed Code specifies the unlawfulness of knowingly concealing a homicide.

6.9.7 Assault, endangerment and threat offences

The current Code defines assault as one person who "touches the other in anger or animosity or fights in that regard". The proposed Code, on the other hand, defines assault independently from the defendant's state of mind (s.120) and

classifies the various kinds of assault as serious assault, aggravated assault, injurious assault and simple assault. It allocates a grading ranging from a Class D felony for serious assault to a Class 3 misdemeanour for simple assault.

The proposed Code gathers a whole range of outlawed activities that exist under current law, which pose a risk to the safety and health of others, under the umbrella of 'reckless endangerment' which is defined as recklessly creating "a substantial risk to another of serious bodily injury or death" (s.121). The proposed Code also provides for the new offences of threats to cause bodily injury (s.122(a)) or false alarms (s.122(b)), and allocates a grading to each offence.

6.9.8 Sexual assault offences

The proposed Code draws together offences relating to sexual assault that are to be found across a range of current laws and regulations. It defines the offence as engaging in sexual intercourse without consent. It also provides for a rebuttable presumption that sexual intercourse within a marriage is consented to. Rape, aggravated sexual assault and sexual assault are graded from a Class B felony through to a Class 1 misdemeanour.

The proposed Code draws on existing regulations in defining and grading the various degrees of criminal sexual contact (s.131) and indecent exposure (s.132) offences. It also introduces the previously unknown offence of sexual exploitation (s.133) and hinges the grading of this offence on the age of the victim. In relation to all the sexual assault offences, the proposed Code declares consent by a minor invalid, and uses the age of the victim as a factor influencing the grading of the offence.

6.9.9 Restraint and coercion offences

The current Code prohibits only kidnapping in the form of terrorism, whereas the proposed Code creates general offence of unlawful restraint (s.140) and grades it according to the purpose and length of restraint and the vulnerability of the victim. Similarly, the proposed Code creates and grades a new offence of criminal coercion (s.141).

6.10 Property and privacy offences

6.10.1 The proposed Code distinguishes between different kinds of harms caused by a single act, which can then lead to multiple offences. Thus where a property offence is accompanied by an offence against the person, or an intrusion offence, the two are considered and dealt with separately and do not form the one offence (e.g. robbery is dealt with as a theft and an illegal use of force).

6.10.2 Theft

The proposed Code effectively consolidates the many provisions in the current law which deal with theft offences. In the proposed Code theft offences are graded in accordance with the value of the property and range from a Class C felony (if the value exceeds Rf500,000) to a Class 2 misdemeanour. Higher penalties are imposed where the property belongs to the government. The proposed Code clearly categorises the theft offences into 8 kinds: theft by taking or disposition (s.211), theft by deception (s.212), theft by extortion (s.213), theft of services (s.214), theft by failure to deliver funds entrusted (s.215), theft of property lost, mislaid, or delivered by mistake (s.216), unauthorised use of property (s.217) and receiving

stolen property (s.218). All these offences require knowledge by the defendant, except for the last which is satisfied by the recklessness of the defendant.

6.10.3 Property damage and destruction offences

The proposed Code again aims to consolidate the many existing offences relating to property damage into three clear and graded categories. The offence of criminal property damage (s.220) fixes the culpability level of recklessness to the damage caused by the offender. The grading for this offence is based on the value of the damage and ranges from a Class C felony to a Class 2 misdemeanour. Further offences of endangering property (s.221) and threatening catastrophe (s.222) are defined. Endangering property covers danger posed to inhabited or vital public facilities, and threatening catastrophe covers situations where a person knowingly possesses a catastrophic agent that will be used to commit a felony or else threatens to cause a catastrophe.

6.10.4 Criminal intrusion offences

The current Code prohibits trespass into a person's home. This is extended by the proposed Code to include trespass into any property to which the person does not hold the authority to enter (s.230). Two exceptions to liability are provided and the grading is allocated in proportion to the level of security enjoyed by the violated property. The proposed Code builds on the current Code when it prohibits unlawful eavesdropping or surveillance (s.231). Exceptions to liability include surveillance occurring in the normal course of business, or where the accused acts in good faith while believing the communication to constitute evidence of an offence, or where the surveillance is carried out by a law enforcement officer

acting under a warrant. One single grading is allocated to this offence. The proposed Code expands on the concepts that exist in the current law to define and grade the offences of unlawful acquisition of information (s.232) and unlawful disclosure or use of information (s.233).

6.11 Forgery and fraudulent practices

6.11.1 Forgery and counterfeiting; simulating objects of special value

The proposed Code seeks to amalgamate the numerous forgery and counterfeiting offences found throughout the current Code. It outlaws the forging and counterfeiting of both writing and objects and provides a grading based on the nature of the object that is forged (s.310).

6.11.2 Tampering with writing, record or device.

The proposed Code goes even further and prohibits tampering with writing, records and devices, not just the false creation itself (s.311). The level of culpability required is deceit and a set grading is provided.

6.11.3 Identity fraud

The existing offences relating to identity fraud are expanded upon and centralised by the proposed Code which prohibits the unauthorised impersonation of others (s.312). The grading for this offence distinguishes between trafficking in stolen identities and mere identity fraud.

6.11.4 Deceptive practices

The proposed Code consolidates all the existing laws relating to dishonest commercial practices under the general heading of deceptive practices (s.313). The offence requires a minimum culpability level of recklessness and requires also that the deceptive information be at least materially false or misleading.

6.11.5 Commercial bribery and breaching a duty to act disinterestedly

The proposed Code provides for a new offence relating to bribery not dealt with in the current law (s.314). It is prohibited both to accept and offer a bribe as well as to breach a duty to act disinterestedly. This prohibition include bribes offered to agents, fiduciaries and professional advisers (including lawyers).

6.11.6 Rigging publicly exhibited contest or public bid

The current law prohibits deception in elections. The proposed Code expands upon this provision by creating an offence that seeks to ensure that public bids and contests are executed with integrity and without corruption (s.315). The offence covers corruption in publicly exhibited contests and public contracts bids. The minimum level of culpability required is knowledge of the corruption that may result from the actions.

6.11.7 Defrauding secured creditors.

This matter is not addressed by the current law but is criminalised in a comprehensive manner by the proposed Code which prohibits the dealing with property subject to a security interest with the purpose of hindering enforcement of that interest (s.316).

6.11.8 Fraud in insolvency

This offence is a new creation by the proposed Code. It criminalises the fraudulent actions of a person who has knowledge of existing or pending insolvency proceedings.

6.11.9 Receiving deposits in a failing financial institution and participation in a pyramid sales scheme

These are two further offences to be created by the proposed Code. It specifies the level of culpability necessary to establish each offence as well as providing a grading for each offence.

6.12 Offences against the family

6.12.1 The proposed Code appropriates the provisions from the existing body of family law within the scope of the criminal code, leaving the rest to be addressed by civil law. Both the current law and the proposed Code rely on Islamic legal principles for their dealings with these offences.

6.12.2 Unlawful marriage

The proposed Code limits the number of wives a man can have to four, requires the consent of each wife before marrying another, and prohibits a man from marrying the sister of a current wife (s.410(1)). In contrast, a woman may be married only to one person at a time and is prescribed a post-marital waiting period before being able to marry again. The length is prescribed according to the circumstances surrounding the previous marriage, (s.410(2)). Marrying a close relative is also prohibited by the proposed Code (s.410(3)). A uniform grading of Class 1 misdemeanour is prescribed for all these offences of Unlawful Marriage.

6.12.3 Unlawful sexual intercourse

Under current law it is sufficient that a man and woman are isolated for a presumption of unlawful sexual intercourse to exist, e.g. in a room where the door is closed, although both are fully clothed. Under the proposed Code, a higher evidentiary burden is prescribed. It outlaws same-sex intercourse, and intercourse outside marriage (s.411 (1) & (2)). Sexual intercourse outside marriage must generally be witnessed by at least four male persons (8 eyes) in order to be proven. However, other evidence may be used instead, such as DNA evidence or evidence of a pregnancy, in which case the offence is one grade lower. For these offences a person had to freely engage in the act in order to be guilty of the offence. The grading allocated for intercourse outside of marriage is higher where either person engaged in the intercourse is married to another person and lower where both persons are unmarried (s.411 (3)(a)). The grading for same-sex offences is higher for males and lower for women (s.411 (3)(b)). An additional punishment of 100 lashes is authorised for this offence.

6.12.4 Unlawful sexual contact

Sexual contact outside of marriage or between persons of the same sex is penalised by both the current law and the proposed Code (s.412(1) & (2)). Under the proposed Code the contact must be committed willingly, and sexual contact outside of marriage is criminalised only where the act becomes publicly known prior to arrest. The proposed Code suggests a rebuttable presumption where sexual contact is to be presumed if two people of the opposite sex are behind closed doors alone (s.412(3)). Again, the grading under the proposed Code is more severe for persons who are married to someone else at the

time, in contrast to unmarried persons who commit the offence. Similarly, same-sex sexual contact is prescribed a lesser grading where it is committed by women rather than men.

6.12.5 Incest

The proposed Code reflects the current law in its criminalisation of sexual intercourse and contact with a close relative (s.413 (1)). The grading of the offence is harsher where the accused is a parent or grandparent of the relative and an additional punishment of lashes is authorised (s.413 (2)).

6.12.6 Corruption of an incompetent person

The proposed Code provides for an offence where a person causes an incompetent person to engage in an offence. There is a minimum culpability requirement, viz that the offender must have known the conduct of the incompetent person was going to facilitate an offence (s.414 (1)).

6.12.7 Child abandonment and parental duty of care

Current law prohibits parents from acting in a manner detrimental to the integrity, health, education or conduct of their child or exploits or oppresses a child. The proposed Code aims to extend these provisions by prohibiting guardians from leaving their child unattended in certain circumstances described by the section (s.415 (1)(a) & (2)). Similarly a guardian must take reasonable measures to prevent the commission of murder, assault and sexual assault against a child.

6.12.8 Non-support

Current Maldivian law requires a man to support his parents if he is able to, and requires parents to refrain from acting to the detriment of their children. The proposed Code extends these provisions and requires a capable person to support his children, incapacitated parents and spouses or parents aged over fifty (s 416 (1)).

6.12.9 Abortion

Both current law and the proposed Code penalise certain abortions. Under the proposed Code an abortion is unlawful only if committed after the first 120 days of pregnancy (s.417 (1)). In addition, an abortion is not unlawful if the pregnancy is putting the mother at risk (s.417 (2)) or if it resulted from sexual assault or incest (s.417 (4)).

6.13 Offences against public administration

6.13.1 Bribery and official misconduct offences

The current Code penalises bribery, official misconduct and related offences only where such conduct is in the context of criminal prosecutions. The proposed Code provides for the offences of bribery (s.510), influencing official conduct by threat (s.512 (1)), and official misconduct (s.512) without confining these offences to a criminal prosecution context. The offences focus on the misuse of official authority or power, and target both the public officials involved and those offering bribes or using threats in order to influence the officials. Bribery requires a minimal culpability requirement of knowledge and a single grading is prescribed. The grading for the offence of influencing official conduct by threat is based on

the severity of the harm caused or threatened (s.511 (2)). The offence of Official Misconduct is graded higher where the Official Misconduct is committed in return for a benefit (s.512(2)).

The proposed Code creates a new offence of misuse of government information or authority to obtain a benefit, which prohibits a person acting in his capacity as a public official from using either confidential information to which he has access, or his official authority in order to gain a benefit to which he is not entitled (s.513 (1) & (2)). The proposed Code extends the current law, which prohibits the unauthorised disclosure of confidential information by some public officials, and applies this offence to all public officials (s.514 (1)).

6.13.2 Perjury and other official falsification offences

The proposed Code centralises under one heading the offences of perjury (s.520), unsworn falsification to authorities (s.521), false reports to law enforcement officers (s.522) and false alarms to agencies of public safety (s.523) that currently exist in Maldivian law. The offences are all defined and allocated an appropriate grading. This grading and liability may depend on the consequences or materiality of the misleading statements. An exception to the offence of perjury is allowed, where a retraction is made before the falsification substantially affects the proceedings (s.520 (2)).

6.13.3 Interference with governmental operations and escape

The proposed Code collects the various existing offences in relation to interference with governmental operations and escape under the one heading and embeds them in the overall

grading scheme provided by the proposed Code. The following acts constitute an offence under this heading: obstructing justice (s.530), failure to report vehicular accident (s.531), resisting or obstructing a law enforcement officer or custodial officer (s.532), obstructing the administration of law or other government function (s.533), obstructing service of process (s.534), refusing to aid an officer (s.535), concealing or aiding a fugitive (s.536), escape; failure to report to a correctional institution or to report for periodic imprisonment (s.537), permitting escape (s 538), bringing or allowing contraband into a correctional institution; possessing contraband in a correctional institution (s.539), intimidating, improperly influencing, or retaliating against a public official, witness, juror, or voter (s. 540), failure to appear (when on bail or release on personal recognizance) (s. 541). In criminalising all these actions, the proposed Code is emphasising the need for a smooth and undisturbed operation of government. Each offence is defined and graded.

6.14 Offences against public order, safety and decency

6.14.1 Public order and safety offences

The proposed Code gathers under one article all the existing offences against public order, safety and decency not provided for by other articles. The offences under this heading are diverse and are all aimed at securing the safety and well-being of the general public. The actions which constitute an offence under this Article include rioting, forceful overthrow of the Government (s.610), recruiting mercenaries (s.611), false accusation of unlawful sexual intercourse (s.612), operating a regulated business or importing without a licence (s.613), entering the exclusive economic zone (s.614), engaging in disorderly conduct (s.615), failing to fast during Ramadan;

consuming pork or alcohol (s.616), criticising Islam (s.617) and failing to perform a duty to aid (s.618). The proposed Code defines each of the offences and provides for exceptions which ensure that a person is not penalised for acceptable behaviour. For example, the criticising of Islam is allowed for the purpose of scientific or religious study (s.617 (2)). Each offence is graded individually in proportion to the seriousness of the offences and the offence of consuming alcohol is accompanied by an additional punishment of 40 lashes (s.616 (2)).

6.14.2 Public indecency offences

The proposed Code establishes a category of these offences which gathers together existing offences as well as establishes a number of new offences, all of which are believed to offend public decency. This category includes the offences of prostitution (s.620), promoting or supporting prostitution (s.621), producing or distributing obscene material (s.622), abuse of corpses (s.623), sale of human body parts (s.624) and cruelty to animals (s.625). Each offence is defined and graded individually. The promotion or support of prostitution is graded higher than prostitution itself and even higher where the prostitution being promoted or supported is that of a minor (s.621(2)). The production, distribution and promotion of obscene material is graded higher than the viewing of such material and even higher where the material in question is child pornography. Certain exceptions are made in these offences to ensure that acceptable actions are not criminalised.

6.15 Crime control offences

6.15.1 Weapons offences

The proposed Code identifies two offences related to weapons: the use of dangerous weapons during an offence (s.710) and trafficking, manufacturing, selling or possessing catastrophic agents or firearms (s.711). Aggravating factors, which raise the grade of the offences, are cited and a presumption is established whereby the possession of 25 firearms indicates trafficking or manufacturing of firearms and the possession of 5 firearms indicates the selling of firearms.

6.15.2 Drug offences

The proposed Code integrates drug offences into the larger scheme of offences and offence grading which it establishes. It criminalises the trafficking (s.720), sale (s.721), use (s.722) and possession of drugs (s.723), all of which appear in the existing “Law on Narcotic Drugs and Psychotropic Substances” (LNDPS). In contrast, however, the proposed Code provides for a higher offence grading in relation to trafficking and a progressively lower grading for sale, use and possession. Thus, whereas under the LNDPS possession of 1 gram was enough to establish trafficking, under the proposed Code a minimum of 200 doses is required. In this manner, the proposed Code achieves greater proportionality between the crime and the corresponding grade.

Another difference is that the proposed Code does not allow for the immunity from prosecution in relation to drug use, granted under the LNDPS, to a person who voluntarily requests and undertakes treatment for their drug usage. The proposed Code also builds on the existing prohibition against the use of other harmful substances that are used for the purpose of intoxication, by prohibiting also the sale of such substances, where the seller has knowledge that the purchaser will use it for the purpose of intoxication (s.724). Another significant

difference is that, unlike the current LNDPS, the proposed Code does not criminalise the failure to report a drug crime.

6.15.3 Terrorism and organised crime

The proposed Code attempts to replace the current law regarding terrorism and organised crime and extend the reach of the offence. It identifies two offences under this heading: participating in a criminal organisation (s.730), and laundering of monetary instruments (s.731). The offence of participating in a criminal organisation includes a wide range of activities and criminal organisations in an attempt to provide a comprehensive offence. The grading of the offence is dependant on the level of culpability of the accused.

7. Court Procedures

7.1 Arrest and Sentencing

There are no Rules of Court generally found in modern common law courts. Instead certain rules and regulations are found in more informal publications.

7.1.1 Court Circulars examine individual offences and dictate the sentences to be administered for particular offences under specified circumstances. The number of times the offence has been committed previously and the level of culpability of the person who committed the offence are considerations to distinguish between degrees of offences and consequently between degrees of punishment. However, the directions dictated by each rule are entirely unique to the particular situation at hand and hold no wider application outside that single scenario. Sentences under these regulations include

varying periods of house arrest, banishment, jail terms and the withholding of a motor vehicle licence. *Shari'ah* concepts are used in these regulations at times to indicate the severity of the offence and consequently the appropriate sentence to be given.

- 7.1.2** A person on trial for drug abuse, who is undergoing treatment at a therapeutic institution for the drug abuse, is to have his sentencing delayed until the treatment is complete (13/JP/2003).
- 7.1.3** Allowances are made for menstruating women and ill persons to have a punishment of flogging postponed until a more appropriate time (02/JP/2003).
- 7.1.4** Progressively increasing punishments are allocated for each further time a person disobeys a lawful order by running away from the confinement, or each further time a person encroaches on another person with the intention of committing a sex offence (14/SP/2003 & 13/SP/2003).
- 7.1.5** Specific punishments are dictated by the regulations, to be administered in regard to varying levels of involvement in motor vehicle accidents. The regulations detail the different possible levels of culpability and involvement and the corresponding sentence for each one (12/SP/2003).
- 7.1.6** These regulations prescribe periods of up to 6 months in jail to be served for the consumption of cologne, cough syrup and other liquid substances containing alcohol for the purpose of intoxication. The maximum sentence is to be handed out for third time offenders. Lesser sentences are prescribed where the offence has been committed fewer times (11/SP/2003).

- 7.1.7** A sentence of 2 years house arrest is dictated where a person uses substances other than drugs or psychotropic substances for the purpose of intoxication (this includes belladonna, sniffing Dunlop glue etc.) and 5 years is prescribed for a repeat offender (10/SP/2003).
- 7.1.8** The regulations require that, unless otherwise indicated by the law, children are given a sentence equivalent to two thirds that prescribed to adults (09/SP/2003).
- 7.1.9** Where a person breaks a house arrest order imposed by a court, the penalties range from a fine of 150 rufiyaa to 6 months in jail, depending on the number of previous times house arrest has been broken by the person (07/SP/2003).

7.2 Some rules relating to the conduct of judicial proceedings

- 7.2.1** A Judge is prohibited from conducting proceedings involving his family members, business associates and close friends or associates. In the event that such a relationship arises after the proceedings have commenced, the Judge is required to recuse himself from the case (provision 35).
- 7.2.2** Where a person who is summoned in connection to the proceedings refuses to sign the register recording the statements made in the proceedings, two court employees are required to sign and testify as to the truth of the statements, or in the absence of two employees, any two witnesses as well as the Judge (provision 65).
- 7.2.3** The rules within these regulations relating to double punishment for the same offence are far from comprehensive, relying instead on a referral to the President's Office for determination (provision 109).

- 7.2.4** On the issue of securing compliance with court orders, a procedure is set out in the regulations whereby on the first complaint of non-compliance a punishment is to be imposed together with an order to comply. There are no directions as to the kind of punishment to be imposed. Where further non-compliance occurs, the Ministry of Defence and National Security, in the case of Male, and the Ministry of Atolls Administration in the case of the atolls, are ultimately responsible for enforcing compliance (provision 184).
- 7.2.5** The regulations give an indication of how certain periods may be deducted from terms of sentences. Time spent in detention in preparation for serving a sentence, for example, may be deducted from the term of punishment, unless such time was due to a delay caused by the person sentenced. Time spent in detention for the purpose of medical care is to be deducted only if the person had been detained in the harbour or in prison during that time (provision 186).
- 7.2.6** The regulations requires all witnesses to appear in court, even where a statement was already given in the course of the investigation. The summoning of such witnesses is limited to two at a time. The regulations require the summoning of only enough witnesses to prove the case, and once sufficient evidence to prove the case has been gathered, no further witnesses are allowed to be summoned (provision 197).
- 7.2.7** A prior inconsistent statement cannot be departed from except in accordance with the norms of *Shari'ah* (provision 197(2)). Similarly, the regulation of coerced statements or statements alleged to be made by a person, but discovered not to have been made by that person, is to be governed by *Shari'ah* (provision 197(4)).

7.2.8 Confessions brought before the court are automatically accepted if they have been signed in a report of investigation. In regard to offences against Allah, it is sufficient that the confession was made during the course of investigations (provision 197). The regulations do not indicate any further requirements to ensure the proper obtaining of such confessions. Similarly to witnesses who refuse to sign as to the truth of a statement in court, if a person confesses in the course of an investigation but refuses to sign the confessional statement, two other witnesses to the confession are required to sign the statement instead (provision 198).

7.2.9 A ruling must be invalidated where a judgment is contrary to the statements provided by witnesses or the parties to the dispute, or “for reasons other than the aforementioned” (provision 212). The rules do not elaborate on the nature of these other reasons.

7.2.10 A judgment which imposes penalties for multiple convictions in the same case, is required to specify clearly which penalty is imposed under which provision of the Penal Code (provision 221).

7.3 Some procedures governing arrest or detention

7.3.1 Rights in relation to arrest or detention and access to legal counsel rely first and foremost on Articles 15 and 16 of the Constitution which guarantee the right to be treated in accordance with the law, the right to appeal against oppressive treatment, the right of an accused person to defend himself, and the presumption of innocence.

7.3.2 The arrest or detention of a person suspected of contravening orders of the State or a court of law is allowed at the discretion of specific ministries (Act No. 4/68). The regulations stipulating arrestable and non-arrestable offences list the particular offences which warrant arrest. Furthermore, Act No 5/78 (governing the procedure to be followed in detaining or arresting persons for a period exceeding 7 days) governs the extension of such detention. This law requires that a period of detention which exceeds 7 days must be approved by a 3 member committee appointed by the President. A period of detention that exceeds 15 days must be approved by a Judge appointed by the President for the purpose of examining these detention extensions. A period of detention exceeding 30 days must also be approved by that Judge and can be approved only where the detainee is under investigation for certain enumerated offences. After investigation, a person may also be detained for longer than 30 days, providing the Judge approves this extension while having regard to the type of offence alleged and the possible dangers posed to the public. At each point, the accused and his lawyer must be given the opportunity to give a statement to the Judge before any extension to his detention is approved. The regulations require that the accused be informed of the reason for his arrest within 15 days of arrest.

7.4 Access to legal counsel

7.4.1 The right to legal representation is governed by the regulation on seeking legal assistance. This regulation requires that a person arrested or detained for investigation be informed of the right to appoint a lawyer, and that a person is to be allowed to appoint such legal representation at any stage of the investigation. Similarly, the accused is permitted to make a phone call for the purpose of making such an appointment. The regulations require that where a person declines the opportunity

to appoint a lawyer, the fact that such an opportunity was presented and the reasons for refusal shall be documented and signed by the accused. In addition, the regulations specify that the accused shall have the opportunity to meet with his appointed legal counsel in private, providing the times of such meetings do not interfere with the investigation. However, such a meeting may be delayed by the Commissioner of Police or the head of the investigative authority under certain circumstances detailed by the Act.

7.4.2. The accused has the right to have his lawyer present at an investigation, and the presence of the lawyer is to be facilitated by the investigative authority. The involvement of the attending lawyer is limited under the Act so as to prevent unacceptable interference with the investigation. As well, the accused has the right to request and receive (after paying the specified fee) complete audio copies of the interviews done under investigation.

7.4.3 Under the regulations, the accused is to bear the transportation costs of the appointed lawyer and the lawyer is to bear the responsibility of obtaining any necessary assistance from a translator. The regulations also declare the confidentiality of discussions between the accused and his lawyer under 'lawyer/client' privileges and prohibit any information obtained during investigations from being revealed to any party except in accordance with the laws of the Maldives.

7.5 Regulations on trials procedures

7.5.1 The Island Courts have jurisdiction to hear most types of cases except major criminal offences and cases involving large monetary sums for which the courts of Male hold exclusive jurisdiction.

7.5.2 There are rules regulating the manner in which a summons is to be considered to have been received and prescribing penalties for non-compliance with a summons. The penalties may include a fine, a rejection of the claim in the case of the plaintiff (but apparently not upholding of the claim in the absence of the defendant) or 15 days house arrest, and are administered with regard to the number of times a non-attendance has occurred. The regulation also sets out the information required on a summons regarding the responsibilities of the person being summoned and the reason for the summoning. The regulations provide a mechanism for dealing with the reporting of such non-attendance to the relevant authorities.

7.5.3 The procedures require the commencement of a case for perjury against any person who retracts a confession in cases involving the infringement of "the rights of God", theft of a serious nature or serious political crimes. What is referred to as "the rights of God" are not clear.

7.5.4 The regulations stipulate penalties for particular offences, and require these penalties to be allocated according to the number of times the offence has been committed. For example:

- The penalties for the consumption of alcohol range from jail or banishment for 1 year for first time offenders and thereafter an extra year for each further time the offence has been committed.
- The penalty for a woman who falls pregnant without knowing the identity of the father is banishment for one year.

- The penalties for gross and offensive indecency are dependant on the gender of each person involved, the marital status of the people involved, whether the indecency was committed in public or private, the degree of indecency and the age and relationship of the people involved. The penalties are banishment or house arrest ranging from 1 month to 6 years.
- Further sexual offences and other offences are listed, each with their own relevant sentences. Penalties include flogging, fines, house arrest, jail terms and banishment.

7.5.5 The regulations set out the steps to be taken in order to freeze the assets of an accused in cases involving charges of serious corruption for fraudulent misappropriation of government funds, in order to ensure that the maximum amount of money is recoverable on the passing of judgment.

7.5.6 The regulations clarify the sentencing procedures in regard to accusations of adultery and fornication, defamation and other verbal abuse. While not specifying the particular penalty to be given, the procedures detail the appropriate penal code section or *Shari'ah* law to be applied for each of the three different offences.

7.6 Offences by children

Special rules govern the investigation of crimes committed by children and the filing of cases of offences committed by children, which are mindful of their status as children.

7.6.1 The court procedures provide for lesser sentences to be imposed on children under 16 years of age in relation to specific offences (e.g. narcotics). The legal responsibility of a child is reduced depending on age and the nature of the offence. For example:

- Children under 7 are not held liable for any offences they commit.
- Children between the ages of 7-14 are held responsible only for serious offences.
- Children between the age of 14-16 bear responsibility for criminal but not civil crimes, while at the same time regard is to be given to their age when imposing a punishment.

7.6.2 Where a child is found not to be legally responsible for an offence he committed, the responsibility is imputed to the parents.

7.6.3 Children are tried at a juvenile court presided over by a specialised Judge who is directed to administer a sentence of 5 years house arrest for any offences, other than murder or religious offences committed under section 7 of the Penal Code by a child between the age of 14-16, and a further 5 years where the child commits another such offence during the period of house arrest. For offences other than those for which the penalty is life imprisonment or banishment, the penalty on a child aged 14-16 is two thirds of the smallest penalty for that offence, and the nature of the penalty is to be converted from imprisonment or banishment to house arrest. Where a judgment of house arrest is passed on a child, the Judge may allow the child to be taken to and from school. Sentences of

finer or flogging are not imposed on children, except where the offence is one for which flogging is determined by the Islamic law.

7.7 General provisions

7.7.1 The regulations allow for a staying of judgment enforcement in situations where a stay will facilitate the rehabilitation of an offender. Where a judgment is given for imprisonment, banishment, house arrest or flogging, Judges are given the discretion to stay the enforcement of the judgment on people who are first time offenders. However, any monetary component of the judgment is to be paid in accordance with the judgment. The regulations allow for the sentence to be dismissed altogether, if the offender does not commit another offence during the period of stay order.

7.7.2 The regulations make provisions for deciding criminal cases in a summary trial. The prerequisite for a summary trial are the confession of the accused and the absence of any disputes as to damages. The types of cases that can be decided under a summary trial are listed in the regulations, and a strict timetable for the filing and hearing of such cases is prescribed.

7.7.3 The regulations require Judges to maintain consistency, and have regard to previous similar cases, when passing sentence for criminal cases.

8. Comments and Recommendations

I have taken the trouble of digesting the current and proposed criminal law to highlight its complexity and the need for thorough training of Judges and lawyers before the proposed Code is enacted. In my opinion there are some

areas which require considerable further thought as some offences are capable of misuse, ambiguity and uncertainty. Moreover, this study points up the anomaly that although this crucial element of the Maldivian legal system is being modernised, it will require a great deal more legal infrastructure to provide the people with a criminal law they can respect in the knowledge that it will protect rather than oppress them.

8.1 *Shar'iah*

8.1.1 Criminal law

My terms of reference state that the Maldivian legal system is “based on *Shar'iah*” and is “an amalgam of traditional Islamic law” and the common law. My inquiries suggested that Islamic law does not actually play a large role in the day-to-day conduct of the legal system. Some criminal offences owe their existence to Islamic teaching and are not found in common law systems. Adultery, unlawful sexual activity and the drinking of alcohol are examples.

Likewise, some Maldivian punishments are Islamic in origin and are not today practised in systems based on common law. Flogging and banishment and exile to other islands are the most prominent of these imposts as removal or excision of body parts is no longer practised.

Shar'iah also governs or influences family law and matters of succession and a few other matters. Flogging for adultery is now said to be rare and people are no longer stoned to death for having sex outside marriage. But whereas making a false complaint of adultery can receive as many as eighty lashes, the punishment is today regarded more as a symbolic humiliation than a violent physical exercise. I actually observed the lashing

implement in more than one court and was informed that this punishment is carried out in the court by the Judge.

The question of what role should be played by Islamic law in the life of Maldivians is one for the country and people as a whole. Under *Shar'iah* the Head of State is the final authority (Hakim) so although Islamic law provides for some harsh offences and punishments, I was told that the religious authorities accept the President's decision on issues where there may be conflict.

Western penal systems are not correct or desirable merely because they are Western but in the interests of humanity, transparent justice and consistency, consideration should be given to removing humiliating punishments and placing all sentencing on the same basis. For appropriate criminal conduct, deprivation of liberty or monetary fines are usually sufficient punishment and deterrence.

A Presidential pardon sometimes enables criminals serving long sentences for serious offences to leave jail well before their terms expire but there appear to be no rules for the use of the pardon and its use is desirably avoided. The rule of law requires early release to be governed by courts and duly constituted parole authorities.

Recommendation 1 – Penal Reform

- A. An international expert on penal systems should be invited to recommend reforms to existing and proposed sentencing provisions. Consideration should be given to removing flogging, banishment and other humiliating punishments and to establishing a series of alternative sentencing options including

weekend detention, community service, treatment regimes for sex, drug and alcohol offenders, counselling, parole and rehabilitation programs and the like.

- B.** Although a limited parole system has recently been introduced by regulation, a statutory Probation and Parole Service should be established to review sentencing in the light of rehabilitation, good behaviour and other publicly stated criteria. It should be headed by a respected Judge or leading citizen.

8.1.2 Family law

The Maldives reputedly has the highest divorce rate in the world, a phenomenon said by some to reflect the criminal strictures on sexual intercourse and the relative ease of divorce especially for men. I did not have the opportunity to examine in any detail the way family law operates. It will suffice to record that the Director of the Centre for the Holy Quran conceded that this area of the law needs improvement.

Maldivian men are still permitted to have up to four wives although it is said not to be a common occurrence and it now requires permission by a religious authority. A man must submit evidence that he earns sufficient to keep all the wives and children and the current wives are asked for their views on his taking additional wives. Although this is apparently a serious element of Islamic law, it may be appropriate to review this entitlement even further in the interests of women's dignity and equality under the law.

Recommendation 2 – Family Law

The President should establish a broad-based expert Committee to consider the need to reform family law to bring it into line with modern standards of marriage and divorce, maintenance of divorced spouses and the children of the marriage, and the obligations of married men and women to each other and their children.

8.2 Judiciary generally

The judicial system is in considerable disarray. There is no judicial independence, Judges receive little or no legal training and they have minimal expertise. They are lowly paid, do not have to be lawyers and there is no consistency in their conduct of cases or judgments. There is little respect for and trust in the judiciary. The lower courts in the islands are conducted by persons called magistrates whereas in Male they are called Judges even though some magistrates are more qualified than Judges in their own Court. I did not meet a single female member of the judiciary.

Recommendation 3 – Judicial Service Commission

An independent Judicial Service Commission consisting of the Chief Justice, former Judges and respected senior citizens with possibly one distinguished foreign Judge should be established to appoint or recommend the appointment of Judges, fix their salaries and benefits, and supervise and monitor their training and performance. Judges should hold office until the age of 70 years unless they retire early or are removed by the Commission through proven incompetence, corruption, crime or bankruptcy. A proper pension should be provided on retirement. I realise that some of these changes may require constitutional amendment.

8.3 The Chief Justice

The Chief Justice was out of the country during my mission although considerable notice of its timing was given. However, the Office of Chief Justice is completely compromised. Although the head of the High Court and presumably the judiciary as a whole, the Chief Justice does not sit as a Judge in Court. Apparently a distinguished Islamic scholar, the present officeholder is an adviser to the Supreme Islamic Council with a range of duties in connection with Mosques and in the conduct or supervision of a Koranic Citation Competition. He accompanies the President on trips overseas, travels alone on executive not judicial tasks, sits on Presidential Committees and has

other executive roles which are completely inconsistent with judicial office. He does not even have to be a lawyer.

Yet he plays a quite unique role in the decisions of his Court. The High Court is to all intents and purposes an appellate court only. Apart from the Chief Justice, there are four Puisne Judges who normally sit in benches of two. These Judges are paid about \$US1000 per month with a small number of additional benefits.

The Court has a quite sophisticated sound and recording system and its office has an impressively large staff, many of whom are engaged taking notes (not a verbatim transcript) of the hearing then taking place in the court through the sound system. It was explained to me that while his two colleagues are hearing a case, the Chief Justice sits in his Chambers also listening to the proceedings on the radio amplifier. When the argument is complete, the two Judges who have presided over the case then consult with their two colleagues who had nothing to do with the case to ascertain if there is unanimity or a division of opinion between all four. They then meet with the Chief Justice who gives his opinion about the result. If all four other Judges agree, the Chief Justice will probably approve their agreed result. If the opinions are divided, his view becomes decisive.

Despite the sophisticated sound system, no transcript of the proceedings is produced. The staff members taking notes when I was observing this process were all young women who are not lawyers and have at best limited knowledge and experience of legal issues. Yet it is their notes which inform the Chief Justice and the non-participating Judges about the case.

These notes are not provided to the parties to the litigation and are not made public. How accurate and reliable a report of the proceedings they are is quite unknown because no one other than the Judges and the staff see them. Lawyers complained to me that decisions are often handed down which bear little relationship to the way the cases were fought, leading to the belief that the notes provided to the Judges to enable them to consider their decision were erroneous or incomplete.

To add to that quite extraordinary decision-making process, the Chief Justice is then a member of a Judicial Committee established in the President's office to consider appeals from the High Court and advise the President as the supreme judicial authority. Thus the Chief Justice makes decisions in cases he does not hear and then sits on appeals from his own decisions. Moreover, if an appeal is "upheld", the case often goes back to the same Judge as heard the original case.

There is virtually no reference in the High Court to previously decided cases because there are no law reports. There is accordingly much inconsistency in judgments on similar types of cases. I was informed that High Court decisions used to be published until one of its decisions was overruled by the President on the advice of his Judicial Committee. Now the Ministry of Justice only publishes the results of cases but uses false names for the parties.

This entire situation needs no words of condemnation from me. It contravenes basic tenets of the rule of law, is completely unsatisfactory and requires urgent change.

Recommendation 4 – The Chief Justice

- A.** The person holding the office of Chief Justice should be a lawyer fully trained overseas until a full Faculty of Law exists in the Maldives.
- B.** The person holding the office of Chief Justice should hold no executive office and have no executive function outside his Court.
- C.** The current Chief Justice should immediately cease to be a member of the President's Judicial Committee reviewing decisions of the High Court.
- D.** The Chief Justice should sit as a Judge of cases.
- E.** Neither the Chief Justice nor any other Judge should play a role in decision-making of cases in which he/she does not sit.

Recommendation 5 - The High Court and Judicial Committee

- A.** The Judges of the High Court should be paid substantially more and their salaries and benefits regularly increased.
- B.** Only those Judges who sit to hear a case should participate in the decision-making of the Court.
- C.** A full transcript should be taken of each hearing in the High Court and made available to the Judges, the parties and their lawyers. No other record or part record of the proceedings should be allowed.
- D.** A suitable foreign expert, such as a sitting or retired Registrar of a superior court in a common law country, should be invited to review and reform case management and listing procedures in the High Court.
- E.** The President's Judicial Committee should be abolished. It is not "judicial" at all. It breaks every tenet of the separation of powers and is a serious abuse of the rights of the people to fair and impartial justice under the rule of law. While it exists, the Chief Justice should not be a member of it and any appeal "upheld" and requiring a further hearing should go to a different Judge than heard the matter originally.
- F.** There should be established a Supreme Court of Judicature to hear appeals from the High Court. It should have 5 Judges for the time being of whom at least 3 should be from other common law jurisdictions. They should sit in benches of 3 unless the case raises constitutional issues, involves a serious criminal offence or raises issues where there have been conflicting prior decisions on the same subject matter, when all 5 should sit. For the time being, a majority of the Bench should be Judges from outside the Maldives. The decision of the Court must be final and binding on the parties and the community at large.

8.4 Lower Courts

There are about 200 lower courts in the various Maldivian islands. Some islands are said to have 2 courts. Some courts cater to no more than 100 people. Island Judges have limited civil jurisdiction and do not handle murder, rape and other serious criminal charges which are dealt with in Male.

Judges of these courts are officers of the Ministry of Justice and as a consequence do not enjoy even the semblance of independence. In fact some Judges admitted actually telephoning someone in the Ministry – sometimes a former Judge himself – to ask what decision to deliver on a case. Ministers and staff members of Ministries are said to feel free to telephone Judges to “assist” them in the judgments in particular cases. To keep what he thinks is a “good job”, this Judge normally complies with the official wishes.

Lower court judges do not have security of tenure and if they displease the authorities they are quickly deported back to the Ministry. They are paid about \$US600-700 per month. They do not get housing, health benefits or transport. There is no elevation process to higher positions. For those who sit and work in Male but come from the outer islands, there is some rental assistance but their accommodation is meagre at best. Some staff support is provided but the Judges take down their own evidence and write out their own judgments. Some judgments are up to 50 pages long.

The Lower Courts do not generally have continuous hearings. I was told that cases listed for hearing are typically given hearing times of 30 minutes or 1 hour at one sitting and then the parties are told to come back in two weeks or more to continue the case. Commonly one hearing is used to read aloud the statement of claim and another to read the defence. The cost of such inefficiencies is as prodigious as it is unjustified.

Lawyers spoke to me of completely dysfunctional case listing and management systems such that it is not uncommon that a lawyer will be telephoned at 8.30 am and

told to appear for a hearing at 10 am with his client and witnesses. Another example given to me by a businessman was of a case being suddenly cancelled by a telephone call from the Court Clerk without notice or a hearing before the Judge because the plaintiff could not come to court. No reason was given. I was informed that there are no pre-trial procedures and no or inadequate subpoena facilities. Judges are required to report their output of work which are then used to assess their efficiency.

I was told that most of the island courts have a very small caseload, some only twenty cases a year, many of them not contentious. Local Judges have other executive-style tasks as well, such as solemnising marriages, some debt collecting duties, and other non- judicial tasks. Yet the Ministry of Justice gives out awards to judges for the number of cases disposed of.

This situation is entirely unsatisfactory. Judges must be, and be seen to be, completely independent of the executive government. They must have security of tenure and be paid well in order to raise their status, attract suitable people to the Bench, avoid any susceptibility to laziness and inattention to duty, and completely eliminate any possibility of corruption. Judges of the same court must have equal status, and the same entitlements and titles.

Recommendation 6 – Lower Courts

- A.** All judges of the Lower Courts should have their salaries substantially increased and regularly reviewed. They should be given other benefits such as free insurance, medical treatment and transport while on or travelling for duty.
- B.** Judges must be completely independent of, and not have any attachment to, the Ministry of Justice or any other arm of the executive government. All Judges should come under the Judicial Service Commission referred to in Recommendation 3.

- C. Judges should be provided with support staff and technology to enable the evidence in their courts to be recorded and a transcript produced if necessary. They should be provided with internet connection and facilities to learn or improve their English language skills so that the facilities can be fully used.
- D. Until a full law reporting system is established, lower courts should be provided with a trained lawyer to catalogue decisions and circulate them to judges.
- E. The foreign expert referred to in Recommendation D for the High Court should be asked to undertake the identical tasks for the Lower Courts.
- F. Once established, training sessions should be conducted for lawyers and judges in the use of the procedures proposed.
- G. A system of circuit Judges for the islands would better share out the workload of the courts and avoid the situation that exists at present where some Judges have too little to do and some have too much.

8.4 Judicial Training

Most Judges are not graduates in law although some have passed courses in *Sha'riah* or Islamic Law in such countries as Egypt and Saudi Arabia. More recently, some have received a Diploma in *Sha'riah* Law from The Institute of Islamic Studies which has been established in Male. A few have received some training in Malaysia and Australia.

This situation gives rise to many problems. One is that there is no common denominator in judicial training and experience. Some have learned in Arabic, some in Dhivehi, a few in English (most Judges I met do not speak English to a serious degree). What they learn is a mixture of continental, common and *Sha'riah* law.

I was informed that the average age of judges at present is 28-32 years. This too young an age for judicial office must be looked at in the light of the fact that the

majority of the population is between 18 and 35 years old and that of the (approx) 140 people licensed to practise law in the Maldives, 90% are in full time government positions with an average age of 26 years. Only time can deal with this pool of inexperience for the Bench but the situation can be alleviated by a major immediate emphasis on training

Recommendation 7 – Judicial training

- A.** It is of the utmost importance that Judges be comprehensively trained lawyers. At the present time this training will have to take place in other countries such as Malaysia, Australia and other suitable places willing to offer them places. As is common in countries at a similar stages of development, the Government should be willing to fund or subsidise this training. It will rarely spend its money so wisely.

- B.** To gain maximum benefit from it, this overseas training facility requires a more extensive knowledge of the English language than is generally the position at present. Judges and potential Judges should be given immediate and continuing courses to improve their knowledge of English, especially in the understanding and appreciation of legal principles. This initiative would enable consideration to be given to holding some courts in English, especially in commercial and contract cases involving foreign corporations and entrepreneurs who now play a significant role in Maldivian tourism and industries.

- C.** Foreign common law Judges could greatly assist the Maldives in a number of ways. Because they lack knowledge of Dhivehi, they could only sit to hear cases, as they do in other countries, if courts could be conducted in English. In the meantime, introduction of a mentoring system and continuous legal training should be considered. Internet connection should be set up to enable Maldivian Judges to discuss their case and law problems with Judges elsewhere, and a rolling schedule of such Judges to visit the Maldives for seminars and the like should be instituted. Funding assistance should be sought from major national and international aid agencies

- D.** Judicial training is an ongoing process. In addition to expanding their facility in English to enable them to read law books and use the internet, Judges should be given the opportunity to meet and mix with other judges in seminars on particular topics both at home and overseas. This activity would also build a sense of collegiality and pride in their work, and avoid isolation.
- E.** A Law School is an urgent need. Without it there will always be a struggle to train lawyers and recruit competent Judges.

8.5 Law and Procedures

The biggest single complaint about the legal system – which I heard from virtually every sector of the community whom I met – was the lack of public law. All the statutes of the Maldives fit into two small volumes which include repealed laws. They are generally not available in English. There are no or no adequate and publicly available tort, administrative, bankruptcy or unfair dismissal laws. There are no laws to govern or regulate a wide range of public and commercial activity.

Contract and corporations laws were introduced only in the 90s following activation by foreign trained lawyers. 28 commercial laws were due to be introduced on March 1 this year after my visit concluded but they had not been circulated in the business community when I left the country, just a week before their introduction was due. Nor had they been published or discussed in the country's newspapers. New business taxes were being introduced in 2005 but the business community did not know what they were. There is no fee simple in the Maldives and no 99 year or longer leases. I was told that the Constitution provides for a maximum of 50 years but most leases of government land are for 5 or 6 years thus making investment a major risk because of insufficient tenure for security.

Subordinate legislation needs urgent codification and should be made publicly available. There are no serious Rules of Court and no evidence or procedure laws. I was informed that civil claims are conducted without adequate controls or rigour.

There is no provision for counter or cross claims. In criminal cases, there is no formal onus of proof and Judges can and apparently do conduct the cases any way they want. Every Judge does his cases differently and unpredictably.

For example, Judges can direct the prosecution to call and lead a defence witness without the request or consent of the defence or even asking for its opinion. Judges can and do disallow cross examination on whimsical or spurious grounds including that the question was asked and answered in examination in chief despite the fact that testing such answers is exactly what cross examination is supposed to do. If a lawyer protests too much, the Judge can exclude the lawyer from the hearing and can even strip the lawyer of the right to practise.

The concepts of enforceable natural justice, procedural regularity and due process are not known in Maldivian courts at this time. There are no prerogative writs and no provision for urgent injunctions to prevent events which will unilaterally determine legal rights in fact without a court hearing into the law and the facts. The need for the complicated sentencing provisions earlier outlined in the present and proposed new Penal Codes clearly indicates the failure of the Codes to establish a comprehensive framework for sentencing.

The Courts are not administered by Registrars trained in law. There is no system of alternate dispute resolution. There are no trained arbitrators and mediators. There is an inability to enforce court judgments and orders and no effective debt collection system. Whatever exists in these areas is at best clumsy, costly and ineffective. Yet nothing brings the law into greater disrepute than such a state of affairs.

I was informed that in order to enforce a judgment the successful party has to file another case at which the unsuccessful party is fined a small sum and again ordered to pay. Meanwhile no interest accrues on the judgment sum or debt and the unsuccessful party's property cannot be accessed until 3 enforcement processes are undertaken by which time in many cases there is no property left to access.

I was also advised that some Ministries of Government against whom judgments are obtained refuse to obey the Court's orders because the Courts come under another, i.e.

the Justice, Ministry. What this absurdity indicates is the absence of a culture of respecting and obeying court orders no doubt because there is no respect for the legal and judicial system at all.

There is a very high conviction rate in criminal cases, more than 90% said to be based on confessions made to police. This rate is too high for comfort and itself needs investigation. The onus is on the accused to prove a confession to be non-voluntary. Together with the extensive power to hold people without charge for the lengthy periods referred to earlier, the system is oppressive and unjust.

The limitation on the summoning of witnesses referred to in 7.2. 6 is a major impediment to the effective conduct of cases. The total reliance on in-court witnesses, coupled with restrictions on the flow of witnesses, severely slows the proceedings, particularly given the difficulties of transportation in the Maldives.

A Law Commission was established in 1993 to draft laws required by the executive government. It is not a Law Reform Commission. It is a part time drafting agency of the Government consisting of 11 members chaired by the Attorney General ex officio and consisting of Judges, lawyers and members of the private Bar. It has one in-house legal staffer but it has not been able to recruit lawyers as legal drafters so some foreign staff have been employed on a temporary basis. Its work output is thus limited.

Recommendation 8 – Law and Procedure Reform

- A.** A Law Reform Commission should be established as a matter of urgency with the brief of urgently writing new laws in the priority areas and then reviewing existing laws. The vast workload facing the Commission means that it must be a full time body and properly staffed and funded. A short term appointment of a foreign Judge or retired Judge well versed and interested in law reform would be a benefit in getting this process started with efficiency and enthusiasm. The Commission should have the right to call in foreign experts for particular subject areas of concern.

- B.** Pending an Evidence Act and the establishment of proper rules of procedure, a committee of private lawyers and State Attorneys in the Maldives under the chairmanship of the Attorney General should draft rules that will address the most serious of the matters referred to with a view to transforming legal proceedings into fair and predictable exercises. Assistance from overseas experts should be sought to assist in this process.

- C.** A foreign serving or retired Judge should be recruited with the immediate task of preparing Rules of Court for all courts. It is impossible to exaggerate the importance of this need.

8.6 The Legal Profession

A Law Society exists but it is not compulsory for lawyers to join it. Most practitioners are not members and the Society is now short of funds and ineffective.

As a consequence, there is no regulation of the legal profession, an unsatisfactory registration and licensing system through the Ministry of Justice, and no code of ethics or discipline. If lawyers misbehave in Court (contempt of court) in a Judge's opinion, the Judge can order summary house arrest or even jail without trial.

Because of inadequate training and the small number of practising lawyers, there is little expertise in the private profession. There are said to be no commercial lawyers and few lawyers have experience of the art of criminal defence work. A widespread complaint made by and about lawyers is that no one knows "what the law is". Lawyers and business people alike complain about the uselessness of paying a lawyer because there is so much incompetence in both lawyers and Judges and so much executive interference in the judicial system.

An independent trained and fearless legal profession is an indispensable element of a democracy based on the rule of law. The Maldives does not as yet possess that element.

Some specific anomalies also require attention. At present State Attorneys can appear in private legal cases and can be and are members of the Majlis. These arrangements are a direct breach of the separation of powers doctrine. The prime duty of lawyers is to the court and the client. They cannot have dual loyalties and serve different and often conflicting masters. The existence of this state of affairs again demonstrates a failure to appreciate how a democracy and the separation of powers are intended to operate.

Recommendation 9 – The Legal Profession

- A.** An independent Bar Association with statutory authority is an urgent necessity. No person should be allowed to practise law without prior membership of the Association.
- B.** Practice of the law should be based on annual licences provided by the Bar Association based on proof of qualifications, good behaviour and the completion of a number of continuing education courses.
- C.** No person should be allowed to practise law in the Maldives and therefore be a member of the Bar Association unless a proved competent professional, as far as possible with an overseas law degree. To this end, all lawyers should, prior to being admitted to practise, serve at least six months as a Reader in the Chambers of another lawyer with not less than five years practising experience either in the Maldives or overseas.
- D.** The Bar Association should establish a Code of Conduct and Ethics for members of the legal profession, monitored and policed by an Ethics Committee consisting of senior lawyers and respected citizens.
- E.** Until the Bar Association is self funding through membership fees and other income, the Government should ensure that it is adequately funded to carry out its responsibilities.

- F. The Bar Association, in consultation with the Government, should urgently consider the unsatisfactory situation of government lawyers being also private lawyers and/or members of the Legislature.

8.7 Human Rights

There is a Human Rights Commission in the Maldives but it is widely regarded as ineffective. There is discrimination against women despite the country's ratification of the UN Convention outlawing the practice. A woman cannot be President and there are no women Judges. There are a number of women in Parliament but the laws which rely upon the Koran tend to disadvantage women in significant ways. Freedom of speech, assembly, the media and other fundamental rights are not secure in the Maldives despite apparent constitutional protection.

Recommendation 10 – Human Rights

- A. There is a real need for a Bill of Rights to protect the citizens of the Maldives and to ensure they receive and can enforce their fundamental rights under the Constitution.
- B. The Human Rights Commission should be empowered by statute and adequately funded by Government to investigate and hold open public enquiries into government as well as private practices and to report on them fearlessly and publicly.
- C. Reports of the Human Rights Commission should be tabled in the Majlis for public debate and published in the media to inform the community at large.

8.8 Executive Government

There is widespread criticism that the extensive Presidential powers of appointment and intervention in public life are susceptible to misuse in order to reward family members and friends. I am not in a position to make a judgment on the matter, only

to report that this complaint came from a broad cross-section of the community. I am by no means the first to say it but democracy and the rule of law require the peaceful consensus of the populace to work successfully. They cannot function harmoniously without the people's confidence and trust in their leaders. Official favouritism or nepotism, if it exists, destroys the people's faith in the fairness and decency of their whole society.

Among the matters raised with me were the fact that Judges are appointed by the President who can also fire them at will, the Attorney General and Ministers hold office at the pleasure of the President, and many appointments are made through patronage, not qualifications or suitability. Many officeholders fear dismissal merely because of innovative policies, practices and, in the case of Judges, judgments given in court cases which do not find favour with the President and his advisers. I was told that many people hold two jobs – one public, one private, and that there is no understanding of conflict of interest in appointments.

Criticism of the President in the media is not permitted and there is much secrecy and no transparency in government. Only limited reporting of the proceedings in the Majlis and of court cases is permitted. Many matters of public importance are not published at all. As a consequence, the people are "dumbed down" into a state of at best indifference and disinterest, at worst frustration and anger. The longer term risks are obvious and dangerous.

It is well known that civil servants' salaries are too low and their training inadequate. But protection from outside public scrutiny seems to empower some elements of the executive government to act inappropriately for other reasons, such as the interference of the Justice Ministry in judicial decision-making and the unwillingness of some ministries to comply with court orders because the courts are seen as functions of the Justice Ministry.

Recommendation 11 – The Executive Government

- A.** Consideration should be given to a limitation on the number of terms an Executive President may serve. It is not uncommon in democracies. In France the maximum period is 14 years, in the United States it is 8. By contrast the current president of the Maldives has been in office for almost 27 years.

- B.** Civil service salaries and benefits should be increased and regularly reviewed.

- C.** Civil servants should receive initial and regular training in the separation of powers and the rule of law in democracies.

The Hon Justice Marcus R Einfeld AO QC PhD
Sydney, Australia
June 2005