

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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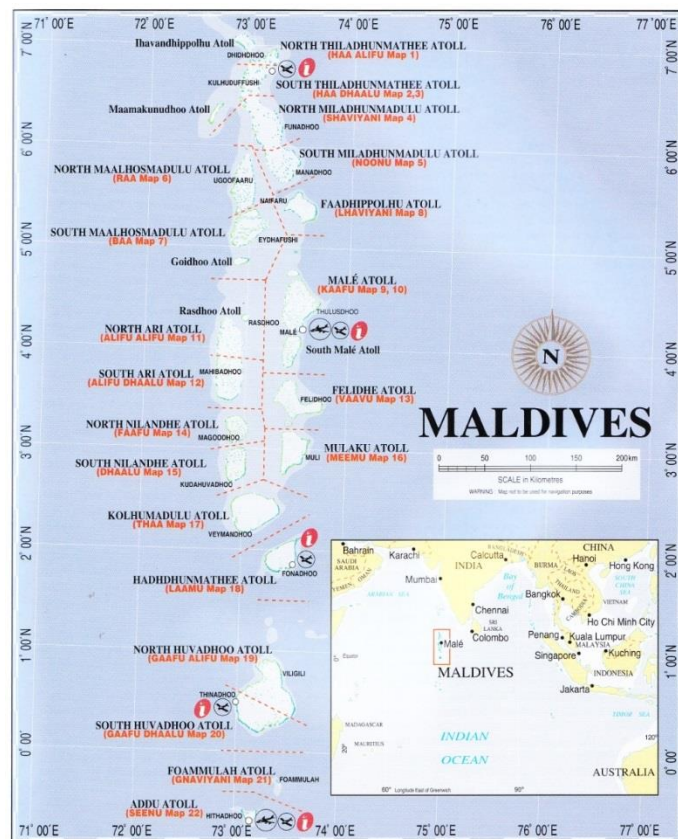
Session I Making a New Constitution

Maldives

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Country Background

The Republic of Maldives is one of three 100% Muslim nation-states in the world.¹ It is a chain of 1190 islands in the Indian Ocean, grouped into 26 natural atolls (see map²), traditionally divided into 20 administrative units.³ Until the 2008 Constitution called for a decentralized administration, executive power vested in the central government in the capital Malé. Approximately 200 of the islands are inhabited by a total population of around 400,000 people, who are represented by elected members of parliament in the unicameral “People’s Majlis”, based in Malé. The GDP per capita income of US\$4521 per head is derived mainly from tourism and fisheries.⁴ Recorded



¹ Although the Maldives ratified ICCPR and ICESCR in 2004, every Constitution of the Maldives has stipulated that all citizens shall be of the Muslim faith, i.e. the religion of the state is Islam.

² Map of Maldives, *Atoll Editions, Atlas of the Maldives, A reference for travellers, divers and sailors*, 4th edition, Victoria, Australia.

³ In the 1998 Constitution, Chapter 8, “Atoll Chiefs” granted some powers to an appointee to manage the affairs of the atoll, but atoll chiefs were accountable to the central government in Malé. They were appointed by the President and for all practical purposes were part of the state government apparatus.

⁴ Statistical Pocketbook of Maldives 2015 <<http://statisticsmaldives.gov.mv/nbs/wp-content/uploads/2015/10/Statistical-Pocketbook-of-Maldives2015.pdf>>.

history shows that from 1153 the Maldives has been a monarchy until 1968 (except for a brief period of 7 months in 1954).⁵ The first constitution was promulgated in 1932 entrenching the “hereditary, elected monarchy” of Maldives. The 1953 Constitution decreed a Republic with a president in charge (instead of a Sultan),⁶ and established a Senate and a Lower House and an Attorney General for the first time.⁷ In 1954 Maldives, however, reverted to a Sultanate, (abolishing the Senate, Lower house and Presidency on 1 March 1954), and remained so until the 1968 Constitution re-established Maldives as a republic with a unicameral parliament. A new constitution was again promulgated in 1998. This was in place till the new (current) Constitution of 2008 came into effect. Prior to the promulgation of the 2008 Constitution, a public referendum was held as to whether the people preferred a parliamentary system. With a vote of over 60% a presidential system was retained.

Features of the 2008 Constitution

The 2008 Constitution provides for an executive President and a legislature, the People’s Majlis (parliament), both elected directly every five years by universal suffrage. The elected President can only serve for a maximum of two terms of office. The Majlis comprises two elected members from each of the 20 administrative atolls and Malé. Where the residents registered in an administrative atoll exceed 5,000, one additional member is provided for each group of 5,000 in excess of the first 5,000. The Majlis in 2017 has a total of 85 (proportionally represented) members.

The Constitution provides for an independent judiciary where judicial power is vested in the courts, with the Supreme Court as the highest court in the country.

Basic rights and freedoms, including freedom of the media, of assembly and of association, are guaranteed in a separate fundamental rights chapter. Freedom of expression is guaranteed so long as such expression is not contrary to any tenet of Islam. These fundamental rights (and the term of office of MPs) can only be changed after public referendum, which is a key feature. Independent commissions and offices (Human Rights, Elections, Auditor General and Prosecutor General, Civil Service Commission, Anti-Corruption Commission) are established.

What events led to the new Constitution of 2008?

Prior to the 2008 Constitution, parliament consisted of 50 members, eight of whom were appointed by the President while the other 42 members were elected by the people, comprising two members each from the 20 atolls (19 atolls plus Malé the capital). The President enjoyed enormous powers, including control of the judiciary; the last appeal, after the country’s highest court (called High Court then) has made a ruling can be made to the President. Political parties were not allowed, despite the fact that President Maumoon Abdul Gayoom came into office in 1978 styling himself as a reformer.⁸ Disputes and points of contention amongst members of the public arose with regard to the amount of power vested in the President and his government, lack of freedom to criticize the government and

⁵ Clarence Maloney, *People of the Maldivian Islands* (Orient Longman, 1980).

⁶ Urmila Phadnis and Ela Dutt Luithui, *Maldives, Winds of Change in an Atoll State* (South Asian Publishers, New Delhi 1985).

⁷ Amin Didi, *Maldives Republic...Welcome* (In Dhivehi), (Maldives Government 1953).

⁸ Personal conversations on 23.8.2017 with HE Dr Ahmed Shaheed, Foreign Minister and government spokesperson and a Presidential appointee to Majlis during the Gayoom presidency.

the (popularly perceived as “rubber-stamp”)⁹ role of MPs and the mode of choosing the President, which was through Parliamentary nomination.¹⁰

A critical point was reached when a young man was beaten to death in prison in 2003. Heated public debate and emotion triggered events that led Maldives to observe international human rights norms. An independent authority to monitor human rights, Human Rights Commission, was created in 2003 and in early 2004 a decision was announced by the government to amend the then constitution of 1998. The felt need for change of the status quo and institute a multi-party democracy with separation of powers firmly established drove the process.

At what point was it decided to make a new Constitution rather than amend an existing Constitution? Who made the decision, how was it made, and what factors influenced it?

On 31 May 2004, the government invited submissions from the public on ideas and proposals to amend the existing Constitution of 1998.¹¹ Two main premises were seen as requiring immediate change: the term and credentials of the President. Two strong contenders for the Presidency had emerged at the time, Mr Qasim Ibrahim and Mr Ilyas Ibrahim who did not have university credentials, as did Mr Gayoom. One way of barring these contenders (as proposed) was to stipulate formal qualifications; this proposal was not acceptable at all. President Gayoom decided that given the volume of concerns tabled, the task mandated nothing less than a fresh conceptualization, rendering all contestants equal. One of the factors that influenced the decision was that the sitting President (Gayoom) who had already completed four terms might be barred if a limitation to the term was brought about as an amendment. A fresh Constitution meant that President Gayoom could compete as a fresh candidate. Gayoom running again under the new Constitution was acceptable to the other parties at the time because separation of powers and multi-party democracy and independent institutions would be instituted for the first time in the country. It was a perfect compromise, negotiated and accepted by all concerned.

What was the process for making the new constitution? Why was this process adopted?

The preceding 1998 Constitution vested the power to make and amend the Constitution with what was called a “Special Majlis”.¹² This Majlis sitting together with the existing parliament and Cabinet forming a 114-member Constitutional Assembly was convened in July 2004 to prepare a new, draft Constitution.¹³ In July 2005 political parties were allowed to be registered. Hence for the Special Majlis, i.e. the Constitution making process, members were elected spanning all political ideologies; thus all voices were deemed as represented. Professor Douglas Schmeiser of the University of Saskatchewan was appointed as a consultant and 1 year was spent on drafting and agreeing to the Rules of

⁹ JJ Robinson, *The Maldives, Islamic Republic, Tropical Autocracy* (Hurst Publishers, 2015).

¹⁰ The public then voted “yes” or “no” to the candidate approved by the Majlis. President Gayoom has been in office for 4 consecutive terms since 1978 with a majority of over 90% approval, when the impetus for change came about in the Maldives.

¹¹ An agenda of 13 points was circulated for the purpose of initiating debate, this became a 31 point agenda and which was again expanded to include more pressing matters such as removing the gender-bar to the post of President and further qualifications required to become President: from conversations, above n 7.

¹² Article 92, *Constitution of the Republic of Maldives 1998* (Maldives).

¹³ Rainer Grote, ‘The Republic of Maldives: Introductory Note’ in Max Planck Institute (ed), *Oxford Constitutional Law* (OUP, 2008).

Procedure. The final draft of the Constitution was a 129-page document with 301 Articles in total (compared to 155 Articles of the 1998 Constitution).

Was there legal continuity to connect the new constitution with the old Constitution? Why or why not? If not, what is the theory for the validity of the new Constitution?

Since the 2008 Constitution represented a radical departure in conceptualization no continuity from the old constitution was envisaged or needed. The laws and institutions required to be formed were earmarked to be created in an interim period under a separate (and last) chapter, titled 'Transitional matters',¹⁴ to be completed in a period of 2 years from promulgation. The onus squarely fell on the incoming President to ensure that the 'technical requirements of implementation' as referred to by Professor Cheryl Saunders,¹⁵ be followed to the letter.

How was the constitution making process managed? How long did it take? What were the critical factors that enabled the Constitution to be finalised? How was the country governed during the constitution-making phase? Was constitution making sequenced with other major events (e.g. elections)?

The drafting process was slow with rival political parties at loggerheads over several issues including the proposed adoption of a parliamentary system in the Maldives,¹⁶ fielded by the main opposition party Maldivian Democratic Party (MDP) and the New Maldives (a reform movement including many Cabinet Ministers at the time). A public referendum was called in August 2007, however, over 60 percent of the public backed a presidential system of government, just as the incumbent Gayoom government wanted. The Speaker of the Special Majlis, Mr Qasim Ibrahim, was one of the contenders to the Presidential election under the new constitution, as well as Mr Mohamed Nasheed, leader of MDP whose was the strongest voice in the call for multi-party elections. The opposition was eager for change, the Gayoom government became conducive to heralding reform and on 7 August 2008 the new constitution was promulgated, catapulting the country into the 'Transition' phase. Presidential elections happened shortly thereafter and since Gayoom did not win a 50% majority, a second round was held.¹⁷ All other parties joined together in a coalition and Mr Nasheed (who came second in the first round) won the second round and became the first president under multi-party democracy. Parliamentary elections were held a year later.

How much, if any, of the old Constitution was retained in the new Constitution? Why?

The new Constitution is a massive improvement in that, whereas previously the executive, legislature and judiciary were described as the three branches of state, they are now required to be independent of each other (previously all three powers were under the President along with the powers to appoint and dismiss judges). Fundamental rights have been recognized commendably by both but expanded and improved upon in the new constitution. Whereas the previous constitution had a chapter on Atoll

¹⁴ Articles 275 – 301, 2008 Constitution.

¹⁵ Cheryl Saunders, implementing the constitution of Fiji: challenges and opportunities, Presentation to a public discussion hosted by the USP School of Government 7 October 2015

<http://www.fijileaks.com/home/professor-cheryl-saunders-on-the-implementation-of-constitution-of-fiji>.

¹⁶ Secretariat of the People's Majlis, A short constitutional history of the Maldives, December 22, 2013 <https://minivannewsarchive.com/politics/a-short-constitutional-history-of-the-maldives-73902>.

¹⁷ As per Article 111 *Maldives Constitution 2008*.

Chiefs (appointed), now decentralized administration was called for, with local island and atoll councils (to be elected as opposed to appointed) and administered under a Local Government Authority.¹⁸

What sources or comparative experiences did constitution makers look to? Were any other international influences brought to bear?

Guided by the constitutional law consultant Professor Schmeiser and local experts, several international examples were examined, among them, the US constitution, the UK parliamentary system and constitutions of the region, including Sri Lanka, India and Pakistan. Maldives was a British protectorate from 1887 to 1965. Mr Nasheed who was educated in the UK had the British Conservative Party's technical assistance during the process and favourable leanings towards a British parliamentary form of governance were undoubtedly felt and promoted by MDP.

With hindsight, might anything have been done differently? Does the current constitutional instability in the Maldives relate to the decisions made in 2008?

The 2008 Constitution, Maldives' sixth, introduced a whole new set of democratic rights, enshrined the separation of powers and introduced mechanisms for accountability and transparency. It paved the way for Maldives' first multi-party elections in October 2008. Three years into his first term, President Nasheed was forced to resign, accused of violating the Constitution. His Vice-President Dr Waheed took over for the remainder of the term. In hindsight, the reason why Nasheed was compelled to take the drastic action of arresting a criminal court judge (which eventually led to his ouster) may be attributed to the inability of the Judicial Oversight body (Judicial Services Commission, JSC) to discipline/dismiss or take action on misdemeanours by the judiciary. Proper procedures were not followed in transition.¹⁹

As prescribed by the Constitution, elections were held in 2013 and Nasheed won 46%; like Gayoom in 2008, short of 50% + 1 required by the new constitution. Turmoil began with the third candidate, Qasim going to Supreme Court disputing election results. Supported by the Attorney General, the first round was annulled. Political parties' complaints to the Elections Commissions, EC, caused a conundrum; fresh elections were delayed; the Elections Commissioner's actions were curtailed by the Police and subsequently the Supreme court ruled that the Commissioner had breached his mandate (ultimately dismissing him) and issuing regulations which EC must adhere to.²⁰ The deadlines stipulated in the Constitution for holding of elections passed. To avoid further turmoil, President Waheed felt it as his responsibility to remain as leader despite parliament deliberating that the Speaker in this situation must take charge until election results were cleared. The framers of the 2008 constitution may not have contemplated parliamentary declarations to be ignored by the Executive. Complaints on electoral roll were submitted by Gayoom's party, the Progressive Party of Maldives (PPM) as well as Mr Qasim's Jumhooree Party (JP) creating further delays and complications. Eventually fresh elections were held and MDP won 46%, PPM 25% and JP 24%. A coalition was

¹⁸ Chapter VIII *Maldives Constitution 2008*.

¹⁹ Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* A/HRC/23/43/Add.3, 21 May 2013; International Commission of Jurists, *Maldives Securing an independent judiciary at a Time of Transition*, 28 February 2011.

²⁰ Extra-judicially, according to International Commission of Jurists and South Asians for Human Rights, *Justice Adrift, Rule of Law and Political Crisis in the Maldives, A Fact Finding Mission Report*, August 2015.

announced by Yameen/PPM for the purpose of winning round 2.²¹ Today Yameen, brother of Maumoon Gayoom represents a break-away faction of PPM. He has reconstituted the coalition; hence once again chaos prevails in the Maldives.²²

Issues:

1. It is relatively easy for the Executive to influence decision-making of other powers. This may be due to the country's small size, and its political culture having been shaped from centuries of authoritarian rule, is naturally bent to conform to authority.
2. Despite separation of powers, the judiciary reigns supreme over the legislature as well as the Executive. This is not necessarily a bad thing, except that, it is, in practice, not independent, contrary to the Constitution's intentions. The reason why this is happening is that the JSC is controlled by the party that has the majority in parliament. Independence of the judiciary needs to be guaranteed.
3. The President's party currently has a supermajority in Parliament. Hence several amendments to laws and even the constitution itself are being made, often rapidly, leading to irreversible changes (such as sale of land to foreigners, which was hitherto prohibited, given the smallness of the islands).²³ This has come about because the constitution making process has deemed it fit to relax the constitution amendment process. The process can easily lead to abuse especially when a sitting President has a supermajority.
4. The Parliament and the Executive are acquiescing in and condoning judicial overreach whereas the judiciary is meant to hold the government accountable in upkeeping its constitutional mandate.²⁴ In hindsight could a bicameral structure or indeed a parliamentary system or a hybrid²⁵ have provided the checks and balances required?
5. Despite decentralized administration provisions, actual power has not devolved to the atolls. This may be because the legal infrastructure for the equitable distribution of resources (such as town planning laws, laws granting equal access to social and cultural rights) is not in place. In hindsight the transition period has been hurried and not taken into account the main goal of the Constitution: primacy accorded to the rights of the individual and equality in the participation of governance.

²¹ Securing 51% and forming government.

²² PPM leader Maumoon Gayoom (in spite of the Yameen/PPM presidency) is working with other parties, currently, to restore constitutionality. The Supreme Court meanwhile ruled that Yameen is the Acting leader of PPM and so the judiciary is deliberating on political parties' administration procedures, despite a Political Party's Act (2003) being in place.

²³ Defamation Laws with some provisions contravening the fundamental rights were passed in 2016, also Anti-terrorism law which gave Police huge powers. Anti-defection rules (proposed by the Executive) has been passed by the Supreme Court as a matter entered for judicial clarification, which has been criticized by various commentators as outside of the Court's jurisdiction as prescribed by the Constitution. See Husnu al Suood, "Constitution has been broken to pieces", Mihaaru news article (In Dhivehi) 8 August 2017 <<https://mihaaru.com/news/21809>>.

²⁴ Commonwealth Human Rights Initiative, *Searching for a Lost Democracy, A Fact-finding Mission Report on the Maldives* (CHRI 2016). It is noteworthy that the Maldives took the drastic action of leaving the Commonwealth citing interference: see British Broadcasting Corporation, BBC, 'Maldives leaves Commonwealth amid democracy row' (13 October 2016) <<http://www.bbc.com/news/world-asia-37647310>>.

²⁵ At least one commentator describes the current system as a hybrid: JJ Robinson (above n 8) at 66.

Mariyam Zulfa

At the time of the promulgation of the 2008 Constitution of the Maldives, Mariyam Zulfa was a member of the Maldivian Democratic Party (MDP), the first political party registered in the Maldives. She has worked in the government of President Mohamed Nasheed of MDP, the first President under multi-party democracy which the new constitution enabled. He was ousted in 2012, 3 years into his Presidency. Mariyam is an LLB graduate of the University of Western Australia and is admitted to practice law both in Australia and the Maldives. She is currently a post-graduate student reading Public and International Law at the Melbourne University Law School.