



‘Developing Constitutional Culture in the Context of Constitutional Implementation’: The Case of the Maldives’ First Democratic Constitution

Mariyam Zulfa

The Republic of Maldives is an Indian Ocean archipelago of approximately 1200 islands arranged in 26 ring-like geographical atolls. For administrative purposes 19 atolls have been demarcated. Constitutionally the archipelago is a unitary state, with the state government centralized in the capital Male'.¹ In 2008 the new Constitution was promulgated and a new chapter entitled ‘Decentralized Administration’ was incorporated into the first ever democratic constitution of the Maldives.² This did not work out though.³

The Maldives has a history of monarchical political systems built on undemocratic constitutional rules, evolved over eight centuries of recorded history.⁴ The *Dhivehi Tarikh* records that 89 Sultans and 4 Sultanates reigned over the islands from 1153 to 1968,⁵ and that there existed a hereditary oligarchy of power-holders.⁶ The very first Constitution of the Maldives promulgated by Sultan Shamsuddine in 1932 was said to have come about due to an unstable political situation pressured by an influential Prime Minister,⁷ supposedly discontent with too much power vested in the Sultan. This was the first indication that the Sultanate was going to be abolished in the Maldives.

The Sultan fearing that in the event of non-election of himself as Sultan and that ‘the Prime Minister might install a Council of Regency with the intention of being the President of a local Republic’, made

¹ The population of the Maldives is 338,434 with 31% living in Male’: Statistical Pocketbook of Maldives 2015 <http://statisticsmaldives.gov.mv/nbs/wp-content/uploads/2015/10/Statistical-Pocketbook-of-Maldives2015.pdf>. The Maldives is a 100% Muslim nation.

² By ‘democratic constitution’ I mean one that allows political parties to operate freely, outlines procedures for free and fair elections and stipulates independent institutions such as the Human Rights Council, Auditor General’s Office, Elections Commission and Prosecutor General’s Office. Prior to the *Constitution of the Republic of Maldives 2008*, all state institutions were answerable to the Executive and its head, ie the President. The mode of choosing the President was through Parliamentary nomination. The public then voted ‘yes’ or ‘no’ to the candidate approved by the Majlis. In this way, President Maumoon Gayoom was in office for four consecutive terms (of five years each) since 1978 with over 90% approval, until the impetus for change came about in the Maldives.

³ Here, I mean ‘decentralization’ in the form of ‘the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government such as regional [and] local levels of administration’: Markus Bockenforde, ‘Decentralised Forms of Government’, chapter 7, International IDEA, *A Practical Guide to Constitution Building* (2011).

⁴ Athaulla Rasheed, ‘An Institutionalist Approach to understand the recent political changes in the Maldives’ (2012) *Law Asia Journal* 159.

⁵ *Dhivehi Tarikh* is the official record of Maldives history (in Dhivehi) beginning from 1153, when the Maldives converted to Islam: Naibu Tuttu, et al. (eds.) *Dhivehi Tarikh*, (Government of the Maldives Islands 1902).

⁶ Urmila Phadnis and Ela Dutt Luithui, *Maldives, Winds of Change in an Atoll State* (South Asian Publishers, New Delhi 1985) (Phadnis and Luithui) at 94: An abridged version of *Dhivehi Tarikh* in English is available in HCP Bell, *The Maldivian Islands: An account of the Physical features, Climate, History, Inhabitants, Production & Trade* (Government Press, Colombo 1883).

⁷ Phadnis and Luithui at 20.

attempts to garner the support of the British government.⁸ I believe though, the British government had no influence as to what went on in the Maldives as the traditional Sultanate system was too culturally ingrained.

When the first Constitution was passed, some royal prerogatives of the Sultan were renounced and in their place was (1) a People's Assembly of 47 members elected from the atolls and (2) a Legislative Council consisting of 28 members of whom seven were nominated by the Sultan. The government, nonetheless, according to Phadnis and Luithui, remained as a 'close family reserve' of the Sultan.⁹ Notwithstanding, some representation from the atolls was, for the first time, introduced to parliament and atoll voices were heard in the deliberation of matters relating to them. So, gradually but surely, the push was there to include island voices in governance despite the fact that the Sultan was so powerful.

Later, the 1953 Constitution decreed a Republic with a president in charge (instead of a Sultan),¹⁰ and established a Senate and a Lower House and an Attorney General.¹¹ In 1954 the 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 the Maldives as a Republic with a unicameral Parliament and President. But as Athaulla Rasheed argues, political leaders were able to manipulate political institutions, including the parliament that created the constitution, to consolidate power in the head of the Executive head, enabling the President to exercise a level of authority similar to that exercised by past autocratic monarchs.¹² This was the predominant culture on which incoming Presidents stylized themselves, that is, as benevolent rulers.

What changes were introduced by the Constitution that required the development of a new constitutional culture or adaptation of an existing culture?

As can be seen from the above introduction, the Maldives existed as a Sultanate until 1968. After this, Republican forms of governance commenced. Since then, only two powerful Presidents have ruled – one for 20 years and another for 30 years, only because no democracy (here I mean one vote one citizen to elect a President) existed. The Presidents were voted in by secret ballot in the Parliament, in which the incumbent had had enormous powers, to the extent that commentators labeled it a 'rubber stamp'. A new constitution was promulgated in 1998. This Constitution, although more progressive in outlook than previous ones, still called for eight members of Parliament to be hand-picked by the President, illustrating very vividly Max Weber's notion of 'Sultanism without Sultans'¹³ by investing the power in the head of state to nominate members at his pleasure. The government was the centrally controlling institution, led again by a powerful head of state in whom was vested the authority to control the judiciary, with no independent institutions in place.¹⁴ Parliament this time had

⁸ The Maldives had the status of a protected state when the Maldives government signed an agreement in 1948 with the United Kingdom for the protection of the 'Maldives Islands by Her Majesty': Maldives-UK Agreement, 24 April 1948, Public Records Office London DO 118/64.

⁹ Phadnis and Luithui at 22.

¹⁰ President Mohamed Amin Didi, who was later ousted in a mob-style public uprising. The British Governor resided in Colombo, Sri Lanka when this event, one of the darkest episodes of the Maldives' history, occurred. H.E Amin Didi was banished and died in 1954 as a result of illness exacerbated by injuries sustained during the violent public uprising.

¹¹ Amin Didi, *Maldives Republic... Welcome* (In Dhivehi), (Maldives Government 1953).

¹² Athaulla Rasheed, n 8 at 169.

¹³ Max Weber, *The Theory of Social and Economic Organisation* (New York: The Free Press, 1964).

¹⁴ The Chief Justice was a member of Cabinet (and serves at the pleasure of the President). After the Highest Court in the land has given a verdict, final appeals can be made to the President, who has the power to overturn decisions.

two members from each atoll; thus there was a much stronger voice from the atolls than before in the legislature, although the President had the ease of passing legislation with the help of his eight appointed members. So, despite strong Presidential powers, cultural change for the greater inclusion of others in matters of law-making, at least, was begun.

The notion of democracy and democratic ideals – generated quite possibly with the Maldives joining the United Nations and eager to join in the so-called race of ‘development’ – drove the public to call for a ‘democratic’ constitution that was pro-development.¹⁵ The 1998 Constitution placed the responsibility of developing the Maldives ‘economically and socially’ on the President and his Cabinet.¹⁶ Regional administrative offices were created and the narrative of development (popularly called ‘*tharaqqee*’) in public discourse was constructed. A thirst for ‘material advancement’ by the atoll people to achieve ‘social cultural and political progress’ emerged.¹⁷ Hence material advancement was ingrained as something desirable in steering the cultural shift. The 1998 Constitution was based on President Gayoom’s vision for development.¹⁸ From here on in, development brought with it, of course, the desire for all forms new freedoms – freedom of expression, freedom of the press, the right to demonstrate, the right to criticize the government and so on – rendering the 1998 Constitution deficient; nothing short of a new constitution seemed to meet the order of the day. Political parties came into existence and elections were held to appoint a Special Majlis to build a new Constitution.

When promulgated in 2008, the new Constitution seemed perfect, separation of powers and independent institutions were enabled. The transition period¹⁹ was two years but in this time, sadly, the foundations were not laid correctly to consolidate democracy. In hindsight, constitutional culture as well the political culture that was predominant in the Maldives for centuries did not make it easy for the transition to happen smoothly from authoritarian to democratic styles of Presidency.

If a new constitutional culture was required, which actors were primarily affected?

During the popularisation of the narrative of ‘development’ in 2004, a protagonist emerged, Mr M W Deen, President Gayoom’s Minister for Atolls Administration, who was educating the public and generating awareness on the merits of decentralisation to the atolls and also advocating strongly for the creation of legislation to enable local government.²⁰ This time around, the concept of decentralization was garnered to promote cultural change. To familiarise local island chiefs on the methods and modes of decentralisation, workshops and educational courses were organised with the

¹⁵ Upon joining the United Nations in 1965, the Maldives’ first representative remarked that ‘during the 75 years of British protection, we [the state of Maldives] have had no contact with other countries. Now we want to feel part of the family of Nations’: Remarks of HE Mr Ahmed Hilmy Didi, first Permanent Representative of the Maldives to the UN, cited in Phadnis & Luithui at 74.

¹⁶ *Maldives Constitution 1998* Article 58(b).

¹⁷ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 2011) Chapter 2, ‘The problematisation of poverty: The Tale of Three Worlds and Development’ at 40.

¹⁸ In fact, it is on this platform of ‘*tharaqqee*’ that the incumbent President Yameen competed in the election in September 2018 and lost.

¹⁹ Chapter XIV Transitional Matters, *Maldives Constitution 1998*, in which certain milestones were set to be reached, for example, all judges to be qualified to a stipulated standard. This was not carried out and ultimately created chaos, leading to the President losing control of judges, culminating in Mr Nasheed taking the exceptional and unlawful step of arresting a Criminal Court judge.

²⁰ Mr MW Deen was appointed as Vice-President in 2012 (after President Nasheed was ousted and his Vice President Dr Waheed Hassan assumed the Presidency) and remains a popular figure today with Maldivians of all walks of life.

assistance of international experts and the United Nations Development Programme, for the purpose of bringing development to the people.

However, enough was not done to acculturate the general population to so many new dimensions of social change that were to come about, such as the guarantee of an individual's right to protection by the police and armed forces. For instance, while the Defence and Police forces had independent powers under the Constitution, they came to be under the Ministry of Defence and Ministry of Home Affairs respectively. The ingrained culture of accepting an all-powerful leader was very conducive to the Executive head taking matters into hand and wielding a powerful hold over independent institutions. Hence, ambitious politicians have been able to steer this cultural characteristic to achieve various ends, ends not necessarily always geared towards consolidating democracy and nurturing the rights and protections of the general populace that come with it.

The general population had limited appreciation of the fundamental expectation that the police existed to protect them, the public and not solely the Executive and inner coterie. The Prosecutor General's nexus to the police in terms of protecting the public has remained weak. Media too, although supposed to be free, was heavily pro-government. Party politics was intense in that in Parliament, whichever party held a majority was prone to revert to personal politics and sideline the interest of the greater good, even to the extent of passing legislation that eroded fundamental rights, if it so suited the agenda of the President (who held power over a majority of Members in Parliament).²¹

What proactive measures, if any, were taken to develop or adapt official and/or public culture to the needs of the new Constitution, during the constitution making process or in the implementation phase?

A Reform Agenda was created by President Maumoon Gayoom in 2004 to create new laws and to sensitize the people to the many freedoms that were going to be bestowed via the new Constitution. A 31-point agenda was circulated by the government to address pressing matters such as removing the gender-bar to the post of President. This was a new right that Maldivian women were granted under the new Constitution, but so far in the 10 years that the Constitution has been implemented, no women nominations have come forth for either Presidential or Vice-Presidential candidacy. This is despite the fact that the Maldives had had 4 sultanas in the past. President Gayoom created a Women's Ministry for the first time but fell short of reserving a dedicated number of seats for women in Parliament and Cabinet. He also created a Ministry for Legal Reform and brought young, western-educated men and women into positions of power instead of the previously appointed elite and family members of Gayoom's inner circle. But as he had been in office for 30 years and Maldivians as first-time voters in a Presidential election wanted change so badly, this reform agenda went unheeded and Mr Gayoom was defeated. In hindsight the reform agenda should have been accepted and carried through because by the time the interim period for the new government commenced, time was too short.

²¹ For example Chapter 2 of the *Constitution 2008* (which is the equivalent to a Bill of Rights or fundamental freedoms) clearly states that any change to any part of the chapter must be brought about after public referendum, but the very first amendment to the 2008 Constitution brought in personal politics to exclude certain actors from running for Presidency, capped the age of contenders to 65, thus violating international law. The introduction of anti-defection laws by President Yameen is another case in point which arguably goes against the spirit of the 2008 Constitution.

How effective were any such measures, in the short-term and over time?

In the short term, not very effective, because the trust of the people for President Gayoom's reform agenda as to its genuineness was broken. Negative public relations campaigns to discredit him (sometimes undeservedly) proved effective with a people who were revved up for change, it seemed, at any cost. All politicians clamouring for power used religion as a trump-card. Some in the pro-democracy camp went so far as to call for respecting the ICCPR's fundamental tenet of freedom of religion²² (Maldives' Constitutions have always, including the current one, explicitly specified that the state religion is Islam, the flipside of which is that anyone taking up another religion commits a crime). However, there was no traction on this issue because of the traditional culture that since 1153 AD the state is 100% Muslim.

In hindsight, the incoming so-called first democratic President, Mohamed Nasheed was, in my opinion, somewhat unprepared to build up trust and commitment to the values and culture that independent institutions propagated. He himself resorted to weekly Radio Addresses in which he stressed messages relating to freedoms and how transparently his administration was conducting the affairs of the government. Apart from this, no regular awareness-creation programmes were created geared towards building public confidence in independent institutions and in consolidating democracy. Eventually Nasheed was ousted and Gayoom's Peoples Party of Maldives came to power. In any event governing had proved extremely grueling for Nasheed, as the majority in Parliament made it difficult to pass laws. Very soon, members began to switch parties from which they were elected to office in the first place.

What were the consequences of any failure to develop a constitutional culture to underpin implementation of the new arrangements?

In short, grave. Respect for independent institutions waned sharply as soon as Nasheed was ousted. The Executive wielded control over the Police, Prosecutor General, Auditor General and Human Rights Commission and more importantly the judiciary. Members of Parliament were 'gently persuaded' to vote in a specific way by a powerful President and sometimes 'encouraged' to switch parties. Moreover, the Parliament itself came under the control of the President and sessions were unlawfully curtailed. Because of its small size, the Maldives has retained sovereignty traditionally by not allowing the sale of land to foreigners. However, the 2013 the Yameen government very swiftly passed legislation to sell land (as 99 year leases) with the stipulation that US\$2 billion was required to be invested. This law was hugely unpopular with the public and was passed through parliament despite a boycott by the opposition. Consequently, respect for the constitution has eroded to an alarming extent and society has become chaotic.

What lessons can be learnt from these experiences for other states that are implementing new constitutional arrangements?

1. Authoritarian political culture has been dominant. When introducing democratic styles of governance, care must be taken, as democracy alone does not feed hungry mouths.

²² Maldives ratified the *International Covenant on Civil and Political Rights* 1966, 999 UNTS 171 (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* 1966 993 UNTS 3 (ICESCR) under the Gayoom government on 19 September 2006.

2. Respect and trust for courts must be fostered but not to the extent that supreme court rulings overreach independent institutions such as the Elections Commission, Police and Human Rights Commission.
3. Law-making must continue in the interest of the general public despite political infighting. A bicameral legislature maybe the answer? This was the case culturally too.

Conclusion

Four sets of issues are relevant from the Maldives' constitution implementation experience:

1. *Design issues*: In hindsight, the ease with which the constitution could be changed was overlooked in the eagerness to incorporate freedoms and separation of powers. More importantly, the fundamental pre-design question as to whether a parliamentary system (as opposed to the current presidential system) could have promoted stability ought to have been debated more thoroughly.
2. *Transition milestones were not achieved*: For example, the qualification of judges (article 285) was not strictly adhered to for reasons of expediency. What needed to be done when transition milestones (for any reason) may not be attained was not specified. There may be room to revisit this issue in hindsight and understand what lessons can we learn from other countries that have suffered a similar predicament.
3. *Tensions between unitary and decentralisation issues*: The preamble says the Maldives is a unitary state whereas an entire chapter (chapter XIV) is devoted to decentralised administration. At what point does the devolution of power under decentralisation actually happen, that is, when does what is on paper become activated?
4. *Tensions between modernism and Islamicism*: Keeping in mind that tourism is the major industry of the Maldives, the requirement to make legislation (such as for the sale of pork and liquor) and regulations (such as the current regulations that dismantled the Maldives' first underwater museum of human sculptures as 'un-Islamic') must be balanced to incorporate international best practice in order to progress the country. Also women's position in governance requires positive encouragement.

Again, in hindsight, had the Reform Agenda, begun in 2004 by President Gayoom been heeded, constitutional cultural change could have been facilitated. Further, all four sets of issues may have been adequately addressed if the citizens themselves played a larger part in staking ownership in the Constitution. After all what kind of nation locks up the parliament by military force and illegally curtails sessions, and, when sessions do happen, passes legislation that goes against the tenets and ethos of the Constitution? Arguably, a nation that has a weak constitutional culture.

Mariyam Zulfa

At the time of the promulgation of the current Maldives Constitution 2008, Mariyam Zulfa was a member of the Maldivian Democratic Party, the first political party registered in the Maldives. She served in the cabinet of President Mohamed Nasheed as Minister of Tourism, Arts and Culture. Mariyam is an LLB graduate of the University of Western Australia and is admitted to practice law in Australia and the Maldives. She also has an MBA from Waikato University, New Zealand and PhD from Curtin University. She is currently a post-graduate student reading Public and International Law at Melbourne Law School at the University of Melbourne.