THE RULE OF LAW IN THE MALDIVES AND THE TAX REGIME'S CONTRIBUTION TO ITS FAILURE

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PREFACE

This thesis was inspired by my work as an international tax adviser to the Maldives on behalf of the Asian Development Bank from 2011 to 2015. The Maldives had just transitioned from what was an autocracy to a supposed democracy, and from a tax haven to a country with new direct and indirect tax regimes.

During that period, I regularly witnessed Legislative, Executive and Judicial manoeuvres that were the antithesis of what I had always taken for granted in New Zealand as fair treatment of people in accordance of the rule of law. I observed the contradictions both generally in Maldivian society and in the taxation field. I began to question why there was a stark contrast between what I was observing in the Maldives and the ideals of a fair and equitable society, which my New Zealand upbringing, education and experience had instilled in me.

This thesis is therefore the outcome of a study of what the rule of law is supposed to be and whether, because the Maldives is a small, conservative Islamic state, its religion and culture explain, and even justify, the behaviour of the three branches of the State. That led to a review of Islamic notions akin to the Western perception of the rule of law.

The structure of the thesis is as follows: Chapter 1 offers a general introduction to the objective and design of the thesis. Chapter 2 gives a background to the unique geography, history, cultural features and economy of the Maldives. It also introduces the two principal taxes on which the analysis of application of the rule of law in the taxation field focuses.

Chapter 3 draws on the literature and jurisprudence to discuss various interpretations of the rule of law. It identifies six main elements of the rule of law as a benchmark to assess the level of compliance with the rule of law in the Maldives generally and in the sphere of taxation legislation and administrative practice. Chapter 3 also examines principles analogous to the rule

of law that can be found in Islamic *shari'ah* and arrives at some conclusions about the compatibility of the two.

Chapter 4 surveys some key instances of disrespect for the rule of law at the Legislative, Executive and Judicial levels of governance generally in the Maldives, while Chapter 5 looks at conflicts with the rule of law in the same branches of the State with particular reference to tax law and practice. This is where the main analytical focus lies.

Chapter 6 concludes with some comments about the state of the rule of law in the tax arena, in the light of the general state of the rule of law in the Maldives during the period under review. Chapter 6 also offers some recommendations on improvements in the way the rule of law could be applied in the Maldives if the country is to achieve its aspirations of a truly democratic Islamic state.

Kevin Holmes
September 2018

ABSTRACT

The thesis comprises an examination of the application of rule of law principles in the nascent democracy of an Islamic developing country – the Maldives – with a particular focus on the design and application of the country's newly-enacted tax legislation. The benchmark against which that investigation is undertaken is the features of the rule of law enunciated in the literature and jurisprudence in developed Western countries and parallel notions in Islamic jurisdictions. The study concludes that, contrary to the fundamental tenets of Islam, which the Maldives embraces, application of the rule of law generally has failed. The way in which the tax regime was established and is administered has contributed to that failure.

This research demonstrates the need for a seismic change in the mindset of those people in the Maldives who draft, enact, administer and adjudicate taxation legislation and other laws. Consequently, the thesis offers some recommendations on how a more focussed recognition and application of the rule of law might be achieved in the tax arena and more generally in the Maldives.

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LIST OF ABBREVIATIONS

BPT	Business Profit Tax
CIO	Central Intelligence Organisation
EBRD	European Bank for Reconstruction and Development
ECHR	European Commission for Human Rights
EU	European Union
GST	Goods and Services Tax
HKSAR	Hong Kong Special Administrative Region
HRCM	Human Rights Commission of Maldives
ICCPR	International Convention on Civil and Political Rights
ICE	Islamic Council of Europe
ICJ	International Commission of Jurists
IRAAA	Islamic Research Academy of Al-Azhar
JSC	Judicial Service Commission
MDN	Maldivian Democracy Network
MDP	Maldivian Democratic Party
MIRA	Maldives Inland Revenue Authority
MVR	Maldivian *rufiyaa*
NZD	New Zealand dollar
PTA	Prevention of Terrorism Act
SAHR	South Asians for Human Rights
TAA	Tax Administration Act
TAR	Tax Administration Regulation
TAT	Tax Appeal Tribunal
TIN	Tax Identification Number
TR	Tax Ruling
UN	UN
UNCHR	UN Commission on Human Rights
UNHRC	UN Human Rights Committee
UNWGAD	UN Council Working Group on Arbitrary Detention
USSR	Union of Soviet Socialist Republics
WHT	Withholding Tax

Chapter 1

INTRODUCTION

1.1 Exordium

It is well established in philosophy, legal, and political literature that, if people truly desire peaceful coexistence within and between societies, the rule of law (in the broad sense of the term)[1] must be preserved. This principle has existed since the time of the ancient stoic philosophers when the rule of law "appeared as a rule of restraint in the exercise of political power [when] ancient Greek philosophers [were] concerned about the potential for a democratic government to degenerate into a tyranny."[2]

Initially, Plato considered that "a true polity is one wherein Law reigns with undisputed sway, and where all the laws are framed in the interests of the community as a whole".[3] He postulated that "laws that are not established for the good of the whole state are bogus law"[4] and:[5]

> … where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.

Aristotle followed: "true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws".[6] He added that "in democracies which are subject

[1] The meaning of the term "rule of law" is discussed in Chapter 3.
[2] Ricardo Gosalbo-Bono, "The Significance of the Rule of Law and its Implications for the European Union and the United States", (2010) 72 *University of Pittsburgh Law Review*, 229, 232.
[3] Plato, *The Laws* (Harvard University Press, 1961), at ix.
[4] Gosalbo-Bono, above n 2, 233.
[5] Gosalbo-Bono, above n 2, 232.
[6] Aristotle, *Politics*, Book 3, Chapter 11 <http://jim.com/arispol.htm>.

to the law the best citizens hold the first place, and there are no demagogues; but where the laws are not supreme, there demagogues spring up".[7]

Later legal philosophers reiterated and expanded upon these notions. For example, in the Roman Empire both Cicero (106 BC-43 BC) and Thomas Aquinas (c.1225-1274) reflected Aristotle's thinking. Cicero demanded that:[8]

> [63] … men who are courageous and high-souled shall at the same time be good and straightforward, lovers of truth, and foes to deception; for these qualities are the centre and soul of justice.
>
> ...
>
> [64] But the mischief is that from this exaltation and greatness of spirit spring all too readily self-will and excessive lust for power. … [T]he more notable a man is for his greatness of spirit, the more ambitious he is to be the foremost citizen, or, I should say rather, to be sole ruler. But when one begins to aspire to pre-eminence, it is difficult to preserve that spirit of fairness which is absolutely essential to justice. The result is that such men do not allow themselves to be constrained either by argument or by any public and lawful authority; but they only too often prove to be bribers and agitators in public life, seeking to obtain supreme power and to be superiors through force rather than equals through justice.
>
> …
>
> [89] … [I]t is to be desired that they who administer the government should be like the laws, which are led to inflict punishment not by wrath but by justice.

Aquinas asserted that the sovereign, as the lawmaker in the 13th century, was exempt from the law; therefore, "since ... no man is coerced by himself, and law has no coercive power save from the authority of the sovereign ... none is competent to pass sentence on him, if he acts against the law."[9] However, Aquinas goes on to argue that the sovereign can voluntarily subject himself to the laws that he makes, on the grounds that (quoting Cato) "whatever law a man makes for another, he should keep for himself."[10]

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[7] Aristotle, *Politics*, Book 4, Chapter 4 <http://jim.com/arispol.htm>.

[8] M. Tullius Cicero, *De Officiis – Book 1: Moral Goodness*, translated by Walter Miller (Harvard University Press, Cambridge, 1913), 65, 67, 91. <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0048%3Abook%3D1>. Cicero served under Pompey, Crassus, Caesar, Antony and Octavian and, presumably, had them foremost in mind when he wrote this piece.

[9] Thomas Aquinas, *Treatise on Law (Summa Theologica I-II)*, Article 5, Reply to Objection 3, 175 <http://www.sophia-project.org/uploads/1/3/9/5/13955288/aquinas_law.pdf>.

[10] *Ibid*. According to Chase's translation, Cato said "Respect the law that thou thyself hast made": see Wayland Johnson Chase, "The Distichs of Cato: A Famous Medieval Text – Translated from the Latin, with Introductory Sketch", 7 *University of Wisconsin Studies in Social Sciences and History* (April 1922), 14 <https://archive.org/stream/distichsofcatofa00chasrich/distichsofcatofa00chasrich_djvu.txt> .

Although these lofty ideals were originally expounded as early as the 4th century BC,[11] the same concerns about the need for the rule of law still remain today.

Nowadays, the rule of law is a delicate phenomenon. Its fragility has been canvassed by various commentators from many countries. De Castro, for example, contends that "[w]hat Mexico really needs is a true restructuring of its fragile rule of law, which has lately affected all levels of government".[12] Similarly, Ranjah laments the precarious state of the rule of law in Pakistan.[13]

In some countries, the rule of law has completely broken down. Dysfunctional states, such as North Korea and Zimbabwe, immediately come to mind. Spina states simply that "... the DPRK[14] is not a rule-of-law state",[15] and Martin describes North Korea as "... a country lacking commitment to the rule of law [and] the law is whatever the leadership says it is ...".[16]

Blatant disregard for the rule of law by the Executive in Zimbabwe has been widely publicised. The Law Society of Zimbabwe observes that "... threats from the head of the Executive bode ill for the independence of the Judiciary. It constitutes unacceptable intrusion by one arm of the state into the domain of another",[17] and in former President Mugabe's words, "... [w]e shall ... proceed as government in a manner we feel as fitting and some of the measures we shall take are measures which shall be extra-legal ...".[18] Mambo reports that:[19]

> … [t]he [Supreme Court] ruling [ordering the Executive to take certain measures to stop farm invasions] angered the executive and, as a result, the Supreme Court judges were subsequently hounded out of office in a plot hatched by the executive. ... The muzzling of the judiciary has continued despite the fact that the Constitution of Zimbabwe stipulates, in line with international best practice, that no person or organ of state may interfere with the functioning of the courts.

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[11] Plato lived from c.428 BC to 347 BC and Aristotle from 384 BC to 322 BC.
[12] Rafa Fernandez De Castro, "Fragile rule of law threatens Mexico's one chance at energy reform" (29 July 2016) *Fusion* <http://fusion.net/story/174242/fragile-rule-of-law-threatens-mexicos-one-chance-at-energy-reform/>.
[13] Zia Ullah Ranjah, "Fragile rule of law" (14 November 2016) *Dawn* <https://www.dawn.com/news/1296175>.
[14] Democratic Republic of North Korea.
[15] Marion P Spina, "Brushes with the Law: North Korea and the Rule of Law" (2007) 2(6) *KEI Academic Paper Series*, June, 2 <http://www.keia.org/sites/default/files/publications/Spina.pdf>.
[16] Bradley Martin, "Rule of law in North Korea? More like law by rule" (23 June 2016) *Asian Times* <http://www.atimes.com/article/rule-of-law-in-north-korea-more-like-law-of-rule/>.
[17] See Elias Mambo, "On trial: The rule of law in Zim" (9 September 2016) *Zimbabwe Independent* <https://www.theindependent.co.zw/2016/09/09/trial-rule-law-zim/>.
[18] Mambo, above n 17.
[19] Mambo, above n 17.

Similarly, Shaoul has observed, in relation to the unlawful detention of journalists in Zimbabwe, that:[20]

> … [Mugabe] has openly flouted court orders and challenged judges to resign. ... The Supreme Court wrote to the president urging him to uphold the rule of law, carry out three High Court orders to release the journalists and not use the CIO[21] to arrest and detain civilians. Mugabe went on television to launch a vitriolic attack on the judges and journalists. ... Mugabe challenged the judges to resign, saying that they had no right to instruct him to do anything and that, because of their biased petition, the government could no longer trust them on any case involving the executive.

Other "functional" states, which are often under the grip of an autocratic regime, also often have scant regard for the rule of law; for example, Saudi Arabia and other Middle Eastern countries. To quote Hossein in respect of the Middle East generally:[22] "[i]n most Middle Eastern countries, an effective system incorporating the rule of law is, as yet, unavailable." In relation to Saudi Arabia, he adds:[23]

> … [w]hen analyzing the state and legal system of Saudi Arabia in terms of its compatibility with a rule of law system, most conclusions are negative. ... Saudi Arabia needs to develop the necessary institutions to adapt to the challenges of a modern society, some of which may pressure the state to develop good governance and encompass democratic principles conducive to promoting the rule of law.

Application of the rule of law is also found wanting in (supposedly) more sophisticated states, such as China, and in ostensibly democratic states, such as Russia, Turkey,[24] and even Singapore.

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[20] Jean Shaoul, "Zimbabwe: Mugabe government abandons the rule of law" (26 February 1999) World Socialist Web Site <https://www.wsws.org/en/articles/1999/02/zim-f26.html?view=print>.
[21] Central Intelligence Organisation.
[22] Esmaeili Hossein, "On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System", (2009) 26(1) *Arizona Journal of International & Comparative Law*, 2, 3.
[23] Hossein, above n 22, 43-44.
[24] See, for example, British Institute of International and Comparative Law, *Human Rights and the Rule of Law in Turkey – A Scoping Report* (British Institute of International and Comparative Law, December 2015) <https://www.biicl.org/documents/852_turkey_scoping_report_-_biicl_-_final.pdf?showdocument=1>, generally, and concluding (somewhat mildly) that "Turkey should consider providing additional training on the rule of law to all government officials, including members of the judiciary" (at 149).

Sharkey notes that "[d]eveloped rule of law has simply not existed in China ...".[25] Rather, governance relies on administrative regulations. In the context of Australian businesses operating in China, Sharkey continues:[26]

> ... foreign businesses aren't always successful in navigating a system where the rule of law doesn't apply. ... Businesses from Australia or other countries often rely upon law and formal institutions to ... provide certainty. However in China these norms don't exist. ... Strict rule of law ... is missing.

Li Shuguang tells us that the antithesis of the rule of law – that is, rule *by* law – is what exists in China:[27]

> Chinese leaders want rule by law, not rule of law ... . The difference ... is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.

Dilution of the rule of law has also become evident in Hong Kong – once a bastion of the principle – since its transition from a British colony to a special administrative region of China. For example, in 2016 China's Standing Committee of the National People's Congress unilaterally issued an interpretation of Hong Kong's Basic Law on a matter concerning oath-taking by two pro-democracy legislators, while the matter was before the Hong Kong High Court.[28] University of Hong Kong constitutional law specialist Johannes Chan Man-mun described the Committee's ruling as amounting to "giving instructions to a judge as to how to rule in a case, hurting judicial independence".[29] Ironically, the Chairman of the Committee claimed that its interpretation "safeguards the rule of law, and [is] a manifestation of the spirit

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[25] Nolan Sharkey, "Corruption looks different in China" (7 November 2016) *The Conversation* <http://theconversation.com/corruption-looks-different-in-china-66921>.

[26] Nolan Sharkey, "Crown employee arrests show danger of assumptions about China" (18 October 2016) *The Conversation* <http://theconversation.com/crown-employee-arrests-show-danger-of-assumptions-about-china-67148>.

[27] See Steven Mufson, "Chinese Movement Seeks Rule of Law to Keep Government in Check", *Washington Post* (5 March 1995), A25.

[28] The Standing Committee is the ultimate authority on the interpretation of Hong Kong's Basic Law: see Article 158 of *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Order No. 26 of the President of the People's Republic of China, 4 April 1990 <http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf>.

[29] Tony Cheung and Joyce Ng, "Beijing interpretation of Article 104 needed for a city in jeopardy: chairman of Basic Law committee", *South China Morning Post* (7 November 2016) <https://www.scmp.com/print/news/hong-kong/politics/article/2043737/beijing-interpretation-article-104-needed-city-jeopardy>.

of the rule of law",[30] which "won't amount to interference with judicial independence in the city."[31]

The Committee's interpretation reflected the Chinese government's mindset already expounded in September 2015 by the head of China's central government liaison office in Hong Kong. He declared that the Chief Executive of Hong Kong was "a pivotal position appointed by and accountable to the central government as well as to Hong Kong".[32] As such, he "transcends the executive, legislature and judiciary."[33] Furthermore, he stated that Hong Kong did not embrace the rule of law element of separation of powers: "the separation of powers political system … cannot be applied to the HKSAR[34] in its entirety."[35]

As to Russia, Hendly claims that:[36]

> … [a]lmost without exception, Russia languishes near the bottom of indexes that purport to measure elements of the "rule of law" in countries around the world.[37] ... [A] more robust rule of law in Russia will require fundamental changes in attitudes and behavior on the part of both state and society.

Rajah has described Singapore as: [38]

> ... a regime that had systematically violated the rule of law [and a] regime that has systematically undercut 'rule of law' freedoms [while it] has managed to be acclaimed as a 'rule of law' state[39] [through the] Singapore state's strategic management of 'law'. ... [T]he Singapore state constructed legitimacy for itself despite methodically eroding rights through legislation even as it claims to be a Westminster-model democracy.

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[30] *Ibid*.
[31] Tony Cheung, *et al*., "Hong Kong will move on controversial security law, CY Leung says, as Beijing bars independence activists from Legco", *South China Morning Post* (7 November 2016) <https://www.scmp.com/news/hong-kong/politics/article/2043556/beijing-passes-interpretation-hong-kongs-basic-law-legco?utm_content=buffer15102&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>.
[32] Human Rights Watch, "Hong Kong: Investigate Handling of "Umbrella Movement" – Drop Charges against Peaceful Protesters, Restart Electoral Reform" (24 September 2015) <https://www.hrw.org/news/2015/09/24/hong-kong-investigate-handling-umbrella-movement>.
[33] *Ibid*.
[34] Hong Kong Special Administrative Region.
[35] *Ibid*.
[36] Kathryn Hendly, "Rule of Law, Russian-Style", (2009) *Current History*, October, 308, <https://media.law.wisc.edu/m/zgyzz/russian_style_rol.pdf>.
[37] Russia was ranked 89th out of 113 countries by the World Justice Project: see World Justice Project, *Rule of Law Index 2017-18* (World Justice Project, Washington DC, 2018), 7, 21 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf>.
[38] Jothie Rajah, *Authoritarian Rule of Law* (Cambridge University Press, Cambridge, 2012), 2.
[39] Singapore was ranked 13th out of the 113 countries in the World Justice Project's 2017-18 global rankings: see World Justice Project, above n 37, 7, 20.

These examples illustrate that all is not well with the application of the rule of law, particularly in autocratic countries, the governance of which is not based on democratic principles, as well as in apparently democratic states where the institutions of governance are failing. This thesis demonstrates that the Republic of the Maldives, being the country upon which the study focuses, falls into the latter category. Moreover, references to the treatment of the rule of law in China and Singapore are particularly pertinent because, as will be seen in Chapter 4, the Maldives government sees Singapore as something of a role model for economic development and, particularly since 2014, the Yameen-led government in the Maldives has fostered closer economic, military and social ties with China.

The study examines various aspects of the application of the rule of law generally in the Maldives. It then turns to an analysis of the application of the rule of law in a microcosm of Maldivian society, by focusing on the way that taxation law has been enacted and administered in the country since the introduction the tax regime in 2010. This thesis will show that, to a large extent, treatment of the rule of law in the taxation environment reflects the attitudes of governance bodies (namely, Parliament, the Executive, state administrative organs and the Judiciary) to the application of the rule of law more broadly in the small Maldivian society. The upshot is the need for a seismic change in the mindset of those people in the Maldives who draft, enact, administer and adjudicate taxation legislation (and, indeed, other laws).

1.2 Genesis of the thesis

The thesis entails an examination of the degree of recognition of rule of law principles in the design and application of newly enacted tax legislation in the nascent democracy of an Islamic developing country where application of the rule of law more generally has undeniably failed. The research questions are: (1) to what extent has the rule of law been taken into account in the construction and administration of tax law in the Maldives, and (2) has the tax regime contributed to the more general failure of implementation of the rule of law in the Maldives? The benchmark against which these questions are answered is the features of the rule of law enunciated in the literature in developed Western countries and in Islamic jurisdictions. Indeed, it turns out that the weight given to the rule of law in the Maldives falls far short of that typically

observed in the best performing rule of law Western democracies.[40] In short, this thesis examines the notion of the rule of law and its application in a specific Islamic context, in an effort to explain why it is applied in the way, and to the extent, that it is in the tax environment in the Maldives, and how its application might ultimately be enhanced.[41]

As noted in section 1.1, application of the rule of law in the context of taxation in the Maldives is, in fact, a subset of the broader issue of the application of the rule of law in the Maldives generally. The thesis addresses this subset as a coherent and manageable study of the rule of law in a specific discipline; however, the conclusions drawn from it are applicable across all of Maldivian society because Parliamentary, Executive and administrative practices relating to all aspects of society are grounded in the same cultural, religious and familial roots and attitudes, thereby producing the same concerns as those addressed in this study.

1.3 Why the Maldives?

The Maldives is a conservative Islamic developing country, which transitioned from an autocracy to a democracy in 2008, and from a tax haven in 2011 by introducing an income-type tax (namely, a business profits tax (BPT)) and a goods and services tax (GST). These two fundamental political and economic changes make the Maldives an ideal case in which to examine application of the rule of law because:

(i) the concept and application of rule of law can be addressed in the context of two political regimes; and

(ii) the inception and administration of the tax system offers a manageable subset of wider Maldivian society in which to study the application of the rule of law.

[40] Such as the five highest ranking countries in the World Justice Project's global rankings; namely, Denmark, Norway, Finland, Sweden and the Netherlands: see World Justice Project, above n 37, 21.

[41] Although not specifically analysed from the perspective of institutional theory in this thesis, application of the rule of law in the design and administration of tax legislation by Maldives institutions, such as Parliament, the Executive and tax authority, is a worthy illustration of how government institutions are "not neutral coordinating mechanisms but in fact reflect, and also reproduce and magnify, particular patterns of power distribution in politics ... ": see Kathleen Thelen, "Historical Institutionalism in Comparative Politics", (1999) 2 *Annual Review of Political Science*, 369, 394.

Furthermore, that the Maldives is a strict Islamic country provides the opportunity to consider the concept of the rule of law in the context of Islamic law (*shari'ah*) *vis-á-vis* the Western notion of the rule of law.

1.4 Why the period 2010–2017?

The principal period studied in this thesis runs from 2010 to the end of 2017. This period was selected because:

(a) the first taxation laws were passed on 18 March 2010,[42] so 2010 is the most logical year for commencement of the study of the application of the rule of law in relation to the tax regime; and

(b) this near eight-year period is a sufficient length of time to examine Parliamentary, Executive, Judicial and administrative behaviour in the recent history of the Maldives because it is long enough for the new tax laws to "bed down" and to observe over a reasonable period how they have been applied. Moreover, there are on-going rule of law issues both in general and in the field of taxation in the Maldives, which can be readily captured up to the end of 2017, the latest feasible date before submission of the thesis in 2018.

1.5 Research methodology

The research approach adopted in the thesis entails documentary analysis. It involves:

(1) a review and analysis of academic and other literature, and case law relevant to the research topic;

(2) a review of the manner in which the rule of law has been applied generally during the recent period of Maldives political history;

(3) an empirical review and critical analysis of Maldives taxation legislation and administrative practice from the perspective of incorporation and application of the principles of rule of law; and

(4) drawing conclusions and making proposals as an outcome of those reviews and analyses.

[42] The Tax Administration Act (Law Number 3/2010).

1.6 General approach

The general approach to the topic is, first, to give a brief background to Maldivian history, culture, politics, economics and religion, in order to set the context in which decisions concerning tax law and practice are made in this developing country (Chapter 2). This chapter also canvasses the principal fledgling tax laws of the Maldives – BPT, GST and the Tax Administration Act (TAA) – which have been introduced in the Maldives since 2010, as part of the reform of its tax system.

A general literature and case law review of the notions of the rule of law is then presented in Chapter 3, drawing on the works of eminent writers in the field from Western democracies and in Islamic jurisprudence. The intention is to reconcile the notions of the rule of law under each regime to demonstrate that the rule of law, from either perspective, is applicable to the Maldives, both in general and with respect to the imposition of taxation.

Chapter 4 then addresses the manner in which the rule of law has been applied (or ignored) in the Maldives since 2010. This chapter travels from the optimism enshrined in the newly-written Constitution to the pessimism arising from subsequent Parliamentary, Executive and judicial failures.

Chapter 5 examines a selection of provisions from the tax legislation, and the respective subordinate legislation and administrative rulings, which are contentious in the context of application of the rule of law. The causes of conflicts between the rule of law and the application of tax law in the Maldives are also canvassed in Chapter 5. In both cases, the reasons for misapplication of the rule of law are examined and found to be inexcusable by the standards set out in the literature reviewed in Chapter 3.

As a result of the review and analysis of academic and other literature, case law and the Maldives' experience in the application of the rule of law in general and in the taxation context, Chapter 6 proposes some recommendations to ensure that the rule of law is upheld in the design of tax legislation and in its day-to-day administration. Adoption of the recommendations in the

area of taxation can be used as a role model for application of the rule of law more generally in the Maldives and in other countries, which experience similar problems.

In summary, this thesis brings together the Western democracy-based notion of the rule of law and like principles in Islamic law, and examines how they have been applied generally and in the field of taxation in a fledging Islamic democratic developing state. From the empirical observations and analytical critique of the application of the rule of law in taxation law and practice in the Maldives, the thesis draws conclusions about the necessity for rigorous application of the rule of law in the taxation discipline and how that can be achieved both in that particular area and more widely in Maldivian society.

Chapter 2

THE MALDIVES

2.1 Background

To understand properly the application of the rule of law in the design of the Maldives' new tax legislation and in tax administration practice, it is necessary to canvass the wider context of social and political intrigue throughout the country's history. That requires a brief historic appraisal of Maldivian familial customs and politics, together with the way in which the country has embraced Islam. Together, these factors go a long way to explain contemporary behaviour in the sphere of taxation in the Maldives.

This chapter, therefore, first offers a general geographical and demographical background to the Maldives, then – more importantly for the purpose of this thesis – presents an historical overview of the familial network and ingrained Islamic beliefs, and their impact on the Maldivian psyche and Maldivian politics. These societal features underpin the means by which some sort of rule of law is supposed to operate in the Maldives.[1]

This historical summary is also important because it depicts:

(a) the continual presence of autocratic rule in the Maldives for all but three years during the last two millennia;

(b) omnipresent corruption in the country's leadership and, particularly in its modern history, the regular ousting of leaders (sometimes as a result of uprisings) and their replacement by members of rival factions; and

[1] The language used here is deliberately chosen First, "some sort of rule of law" because, as discussed in Chapter 3, the English-based common law concept of the rule of law is different from the corresponding notion under Islamic *shari'ah*. Nevertheless, for convenience, the term "rule of law" is used hereafter to cover both notions (except in Chapter 3, where the specific differences are discussed). Second, "supposed to operate" because, as is evident from the observations in Chapter 3, often the rule of law is ignored.

(c) the numerous ways in which the series of Maldives constitutions has been manipulated by key politicians, for their own ends, since 1932.

It will be seen that the country's history demonstrates that some current practices in the Maldives (including various aspects of the design, development and administration of tax law) should not be regarded as anything particularly unusual in terms of the way Maldivian governments and officials have traditionally carried out their tasks.

2.1.1 Geography and demographics

The Republic of Maldives (as it is officially known) is a small island Islamic nation, which straddles the equator, approximately 450km south-west of mainland India. It is an archipelago consisting of 26 atolls, comprising around 1,190 islands, of which 188 are inhabited and 126 are tourist resort islands.[2] The Maldives covers about 90,000 km^2, of which a mere 298 km^2 (or 0.3% of its total area) is land.

The total population of the Maldives at 30 September 2014 was 399,939, of which 85.3% were Maldivians and 14.7% were foreigners,[3] largely Bangladeshi construction workers and other predominantly Asian-sourced workers engaged in the tourism sector. Males accounted for 56.1% of the total population, while 43.9% were female.[4] The population has grown at an average rate of 4.3% p.a. from 2006 to 2014.[5] While the population is dispersed over the 188 inhabited islands, just under 40% of the total population resides in the capital city, Male' (an island of just under 2 km^2.)[6]

[2] As at 31 December 2016: Ministry of Tourism, *Tourism Yearbook 2017* (Ministry of Tourism, Male', 2017), 1 <http://www.tourism.gov.mv/pubs/Tourism_Yearbook_2017.pdf>. "Inhabited islands" are defined in section 155 of the Decentralization Act 2010. In laymen's terms, these islands are inhabited by Maldivians and foreign permanent residents.
[3] Derived from National Bureau of Statistics, *Maldives Population & Housing Census 2014 - Statistical Release: 1 Population and Households*, 2015, 13 <http://planning.gov.mv/nbs/wp-content/uploads/2015/10/Census-Summary-Tables.pdf>.
[4] *Ibid*.
[5] Asian Development Bank, *Fast-track Tax Reform: Lessons from Maldives* (Asian Development Bank, Manila, 2017), 2.
[6] National Bureau of Statistics, above n 3, 13, 30-31.

These statistics reveal much about Maldives society. First, geographically the country is a collection of disparate islands, which, with little in the way of developed infrastructure, historically lent itself to community insulation and rivalry between various clans.

Second, the administrative governance of the islands broadly separates islands inhabited by Maldivians from those utilised by foreign tourists. That segregation was introduced with the emergence of the tourism industry. It was driven by religious imperatives; namely, to restrict exposure (and integration) of devout and conservative Muslims[7] to (with) largely liberated Western holidaymakers enjoying "top-end" beach resort vacations.

Maldives law follows the tenets of Islam and prohibits the consumption of alcohol and pork outside of resort islands. Similarly, conservative Islamic dress and other Islamic behavioural codes (e.g. the prohibition of fornication) are to be respected on inhabited islands, but are not requirements applicable to resort islands. The geography-based dichotomy of the Maldives in this manner has allowed the country to adhere to its Islamic roots and simultaneously permit a selected few of the social and political elite to profit enormously from the USD 2.5–3 billion tourism industry.[8] Nevertheless, the hypocrisy of this plurality is not lost on conservative Islamic groups (and, indeed, others).[9] Maldivians' religious-based aversion to working in resorts (particularly females, who are, by family and societal pressure, dissuaded from doing so) accounts for much of the foreign population residing in the Maldives.

Historically, Male' has been the centre of a divisive and warring social and political elite and – unsurprisingly, especially given the proportion of the total population that lives there – continues to do so.

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[7] As early as 14 AD, the Moroccan traveler, Ibn Battuta, recorded that "… [t]he inhabitants of these islands are upright and religious and are men of right beliefs and good intentions": see H. A. R. Gibb, *The Travels of Ibn Battuta* (Goodword Books, New Delhi, 2011), 241. The Maldives government claims that the Maldives is a 100% Muslim country. Indeed, Article 9(d) of the Maldives Constitution (2008) denies Maldives citizenship to anyone who is not a Muslim. According to the Pew Research Centre, 98.4% of the population were Muslim in 2010: Pew Research Centre Forum on Religion and Public Life, *The Future of the Global Muslim Population – Projections for 2010-2030* (Pew-Templeton Global Religious Futures Project, Washington DC, January 2011), 158 <http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf>.

[8] "Tourism business worth US$2.5-3 billion, not US$700 million as thought, says President", *Minivan News* (2 June 2011) <https://minivannewsarchive.com/politics/tourism-business-worth-us2-5-3-billion-not-us700-million-as-thought-says-president-20966>.

[9] See, for example, "Maldives: the hypocrites' paradise" (21 April 2014) <http://www.dhivehisitee.com/people/hypocrites-paradise/>.

As to the gender composition of the population, there is a significant dominance of males over females. The relatively high population growth rate, poorly developed domestic skills training framework, insufficient number of jobs for overseas tertiary-educated graduates who return to the Maldives, and family-cum-societal aversion to family members working in jobs below their (self-perceived) dignity and status have led to disturbing social problems, including extensive drug abuse and gang violence by a large pool of youths (seemingly exclusively male), who are vulnerable – for handsome financial rewards – to carrying out illicit activities against the rivals of (i) members of different factions of the social and political elite, and (ii) religious extremists.[10]

2.2 Early history and religion

The general consensus among anthropologists appears to be that the Maldives was inhabited by the Singhalese (the "Dheyvis") by 5 BC,[11] and perhaps as early as 500 BC.[12] The Dheyvis were initially ruled by a religious leader (a *sawamia*).[13] They worshipped celestial elements.[14] Subsequently, a kingdom was formed under King Soorudasaruna (who, as a prince, was exiled from Kalinga, India).[15]

By 4 AD, Theravada Buddhism had spread to the Maldives and became the dominant religion.[16] In 9 AD, Arab merchants were travelling to the Maldives on their Indian Ocean trade routes and to access the abundant supply of cowry shells, a widely-used form of currency in Asia and

[10] See, for example, Azra Naseem and Mushfique Mohamed, "The long road from Islam to Islamism: a short history" (30 May 2014) <http://www.dhivehisitee.com/religion/islamism-maldives/>, Azra Naseem, "Does this government support Maldivian Jihadists in Syria?" (1 June 2014) <http://www.dhivehisitee.com/executive/maldives-jihadists-syria/> and Azim Zahir, "Politics of radicalization: how the Maldives is failing to stem violent extremism" (27 April 2016) <https://thewire.in/31645/politics-of-radicalisation-how-the-maldives-is-failing-to-stem-violent-extremism/>.

[11] See Albert Gray and H. C. P. Bell, *The Voyage of François Pyrard of Laval to the East Indies, the Maldives, the Moluccas and Brazil*, Vol. 1 (Hakluyt Society, London, 1887), 423, 426 and *Maldives History – History of Maldives, Presidents, Sultans, Constitution*, 1 <http://www.maldiveisle.com/history.htm>.

[12] See H. C. P. Bell, *The Maldive Islands: Monograph on the History, Archaeology and Epigraphy* (Ceylon Government Press, Colombo, 1940), 16, Clarence Maloney, "Where did the Maldives people come from?", *Newsletter 5*, (International Institute for Asian Studies, Summer, 1995), 1, Naseema Mohamed, "Note on the Early History of the Maldives, (2005) 70(1) *Archipel*, 7, 7, and Husnu Al Suood, *The Maldivian Legal System*, Maldives Law Institute, 2014, 3 (citing *The Mahavamsa* (The Great Chronicle of Ceylon)).

[13] Naseema Mohamed, *ibid*.

[14] Suood, above n 12, 3.

[15] Naseema, above n 12, 9.

[16] Helen Chapin Metz (ed.), "History", *Maldives: A Country Study* (United States Library of Congress, Washington DC, 1994), 1 <http://countrystudies.us/maldives>.

East Africa at the time. The Middle Easterners introduced Islam into the Maldives.[17] In 1153 AD, King Dhovemi Kalaminja Siri Thiribuvana-aadiththa Maha Radun converted to Islam,[18] thus beginning a line of six dynasties of sultans (and the occasional sultana).

The first sultan ordered his Maldivian subjects also to convert to Islam.[19] Scholars arrived from Islamic centres of learning in Egypt, and Islam became the state religion. The king was the ultimate protector of the faith, and he relied on the chief cleric for the legitimacy of his rule.[20] The chief cleric was also the chief justice, so judges began to apply Islamic *shari'ah* together with pre-Islamic customary law.[21]

Colton observes that the government was always ruled from Male' under a sultanate, which was not always passed on by primogeniture succession. Rather, a succeeding sultan (or sultana) was the outcome of political competition between the "great houses".[22]

To the extent that succession of the sultanate was along a matrilineal royal ancestry, it was, according to Maloney, "an anomaly for an Islamic society, and can only be explained in terms of the [Maldives' Sinhala] cultural history."[23] This may (at least partly) explain why Maldives customary law has co-existed with Islamic *shari'ah*.

By the end of 12 AD, the entire population of the Maldives had been converted to Islam.[24] And, broadly, that is how it has remained: Islam is now the cornerstone of the official history of the Maldives.

[17] Bell, above n 12, 17 and Maloney above n 12, 3.
[18] Maloney, *ibid.* and Suood, above n 12, 6.
[19] Maloney, *ibid.* and Suood, above n 12, 28.
[20] Suood, above n 12, 8.
[21] Suood, above n 12, 6.
[22] Elizabeth Overton Colton, *The Elite of the Maldives: Sociopolitical Organisation and Change*, A Final Thesis presented to the Faculty Committee of London School of Economics and Political Science (1995), 66. See also *Maldives History*, above n 11, 2, which states that "[t]he hereditary system continued to exist but [o]n many occasions the helm of power shifted from one family to the other following internal uprisings and the demise of kings."
[23] Maloney, above n 12, 2.
[24] Suood, above n 12, 7.

2.3 Modern history and politics

2.3.1 From Portugal to Britain

The monarchical, autocratic rule by the sultanate was largely uneventful until the Portuguese, attracted to the Maldives by its plentiful supply of cowry shells, coir rope and ambergris, seized control in 1558. The Christian Portuguese governed the Maldives from Goa, India, but their reign was short-lived: they were repelled in 1573 by Mohammed Bodu Thakurufaanu, who ascended to the re-established throne (and who nowadays is the national hero, whose victory is commemorated as National Day).

In 1752, pirates from Malabar seized control of the Maldives, but for only four months before the sultanate was reinstated. In 1640, the Dutch ousted the Portuguese from Ceylon and, as a consequence, imposed their authority over the Maldives, but were not directly involved with Maldives local affairs: they remained under the control of the sultan. However, when the British overpowered the Dutch in Ceylon in 1796, the Maldives became a British protected area, which was officially and forcibly imposed upon the Maldives by formal agreement in 1887, in an environment of local political rivalry, instability and turmoil.[25] That agreement (which lasted until 1965) meant that the British controlled the Maldives' external relations and defence. Like the Dutch, the British left the sultan to rule in all internal matters. In practice, however, the sultan took advice from the British on major domestic issues.[26]

Suood perceptively notes that "[t]he political rivalry between the influential family groups that led to the 1887 Protection Agreement with the British continued into the 20th century and dominated local politics for the best part of the 20th century."[27] To that, it will be seen that we can confidently add "and for the first part of the 21st century".

[25] *Maldives History*, above n 11, 2.
[26] *Ibid*.
[27] Suood, above n 12, 19.

2.3.2 Constitutional reform

By 1930, the political situation in the Maldives had deteriorated to the point where the country was run by a corrupt and dictatorial prime minister, Abdul Majeed Rannabandeyri Kilegefan, who had effectively sidelined the sultan. Isolated, fearing dethroning, and faced with succession issues,[28] the sultan sought British help, which culminated in a draft constitution under which the Maldives would be governed by a council of ministers under a prime minister. To address the succession issue, the constitution made the sultanate elective, rather than hereditary.

However, the British-drafted constitution was opposed by senior government officials, and the (Maldives) "Constituent Assembly", which was established to draft a constitution "appropriate to the Maldives",[29] rejected the British proposal as "inferior to the stature of [the] Maldives".[30] Nevertheless, the country's first constitution was adopted at the end of 1932. It replaced the royal absolutist government with an oligarchical regime, comprising the sultan, prime minister, chief justice and treasurer. Over time, the power of the prime minister usurped that of the sultan. During a period of inter-elite family rivalry, political turmoil and food shortages, the constitution was replaced in 1934. The new constitution was amended in 1936 and replaced in 1937. The 1937 Constitution was abolished in 1940. Further new constitutions were adopted in 1942, 1944 and 1951.

A constitutional referendum was held in 1952, as a result of which the sultanate was abolished and the Maldives became a republic, in 1953, under the presidency of Mohammed Ameen Didi. The Maldives' status as a British protectorate was terminated. However, not unlike the earlier series of constitutions, the first republic was short-lived. During a further, more serious famine from 1951 to 1953, which affected the islands (rather than Male'), the public became aware that Ameen Didi had been embezzling public funds, which prohibited the importation of

[28] There were doubts about the suitability and legal capacity of the crown prince to assume the throne, as defender of the Islamic faith in the Maldives. According to Manik, the crown prince had contracted venereal disease, was accused of making a nobleman's daughter pregnant, thus fathering an illegitimate son. This behaviour was clearly contrary to the tenets of Islam: see Abdul Hakeem Hussein Manik, *Iyye* [Yesterday] (Novelty Printers and Publishers, Male', 1997), Chp. 1, 3-4.
[29] Mohamed Amin, *Dhivehi Raajjeyge Qaanoon Asaasee ge Hayaath* (The Life of the Constitution of Maldives) (Novelty Press, Male', 2003), 3-4, cited by Suood, above n 12, 20.
[30] *Ibid*.

foodstuffs. That ultimately led to his demise,[31] and the subsequent 1954 referendum outcome that resulted in the re-instatement of the sultan (now to be elected by Parliament).

Male' central government economic repression of the Southern atolls, which were supported by the presence of a British military base at Gan, resulted in their secession in 1959. However, the secessionists were overpowered in 1963, and on 26 July 1965 the Maldives gained independence from Britain. A national referendum held in March 1968 again resulted in the abolition of the sultanate and the re-establishment of a republic. Accordingly, a new constitution – which provided for government by a President and Executive – and the Second Republic were proclaimed on 11 November 1968, under the presidency of Ibrahim Nasir.

During Nasir's authoritarian rule,[32] constitutional amendments were made in 1970, 1972 and 1975, the latter of which abolished the position of (the then adversarial) prime minister. Nasir's rule ended when he fled to Singapore in 1978.[33]

2.3.3 The Gayoom era

The Minister of Transport and former Maldives permanent representative to the UN (UN), former student at Al-Azhar University in Cairo[34] and lecturer in Islamic studies at Ahmadu Bello University in Zaria, Nigeria, Maumoon Abdul Gayoom, was elected President in 1978 with 92.96% of the votes cast. He was subsequently re-elected as President in 1983, 1988, 1993, 1998 and 2003 with 95.6%, 96.4%, 92.76%, 90.9% and 90.28%, respectively, of the votes cast. No other candidates were permitted.[35]

[31] Ameen Didi was beaten in public on 31 December 1953 and died 18 days afterwards: Manik, above n 28, Chp. 8, 2-4.
[32] He called only one Cabinet meeting between April 1977 and November 1978: see "The Dictatorship of President Nasir 1969–1978", *Maldives Culture* (2009), 2.
[33] A subsequent investigation revealed that he had absconded with millions of dollars from the state treasury: Metz, above n 16, 3.
[34] The pre-eminent centre of Islamic learning in Egypt.
[35] The 1977 and 1997 constitutions stipulated that Parliament nominated the President and that nominee only would be voted on nationally for a five-year term.

A new constitution was adopted in 1997, under which Gayoom was made "the supreme authority to protect and propagate the religion of Islam in the country".[36] According to Suood:[37]

> ... work on drafting a new Constitution to replace the 1968 constitution began in 1980. The [Parliament] elected in 1980 took more than 17 years to complete its work. The 11th Constitution of the Maldives was ratified on 7th November 1997, and took effect from 1st January 1998. This Constitution, despite having been 17 years in the making, was heavily criticized for failing to usher in democracy, separation of powers, protection of human rights, rule of law and due process.

Gayoom's regime was notorious for its corruption, suppression of free speech, abuse of human rights and the tactics that it deployed against dissidents; namely, arbitrary arrests, detention without trial, forced confessions, torture,[38] unexplained disappearances of inmates and politically-motivated murder. Unsurprisingly, there were three attempted coups against Gayoom's government (all of which he survived) in 1980, 1983 and 1988, the last survival with the assistance of the Indian military.

Gayoom's downfall was precipitated in 2003 by the custodial death of a now-immortalised 19-year old youth, Evan Naseem, which resulted in public riots, further killings of prisoners and the focus of attention of the international community on the Maldives. As Robinson puts it, Naseem's death resulted in "[a] submissive population hitherto willing to ignore dark rumours, subdued by strict Islamic obedience and decades of regime entreaties to 'respect our national unity', [being] finally confronted with inescapable evidence."[39]

Gayoom yielded to pressure for a democracy-based constitution, which "after four years of political wrangling",[40] was adopted in 2008, and is still in place. It provided for a multi-party political system, recognition of human rights, separation of powers between Parliament, the Executive and the Judiciary, and independent oversight commissions. Nevertheless, as we shall see in Chapter 4, Suood perceptively noted that "[t]he political bickering left little time for

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[36] Article 38 of the 1997 Constitution. Some justification might be found for this from Gayoom's standing as a religious scholar and his father's claim (also a religious scholar and former chief judge) that he was a descendant of the Prophet Mohamed: above n 22, 152.
[37] Suood, above n 12, 25-26.
[38] Political prisoners' accounts of their treatment while incarcerated include being fed with broken glass, and being handcuffed to coconut trees with sugar poured on their heads and left to the ants: see J.J. Robinson, *The Maldives – Islamic Republic, Tropical Autocracy* (Hurst & Co., London, 2015), 1.
[39] Robinson, above n 38, 2. The evidence to which Robinson refers was the display by Naseem's mother (in defiance of the authorities) of Naseem's bruised and battered body in Male''s Republic Square.
[40] Suood, above n 12, 26.

serious debate on making the Constitution a viable document for governing the country in a smooth fashion."[41]

Robinson contends that "[t]he authors of the new constitution, Maldivian and foreign, had anticipated a Gayoom victory in the presidential elections and stripped the Executive of its teeth. This power was instead vested in Parliament."[42] As it turned out, that approach has not yet made any difference.

Despite the coup attempts, Gayoom's "unmolested"[43] autocracy prevailed for 30 years – to make Gayoom Asia's longest serving dictator – until the Maldives conducted its first democratic elections in October 2008, in which Maldivians voted in favour of a new President, the leader of the liberal Maldivian Democratic Party (MDP), Mohamed Nasheed. However, as Robinson tellingly observed, "[d]emocracy might have arrived, but the country's unique combination of patronage and apathy was not going to budge".[44]

2.3.4 Democratic upheaval

Nasheed was forced to enter into a short-lived coalition government with minor parties, which included the conservative Islamic Adhaalath Party. Before the coalition broke up, this party ensured that the government enshrined various traditional aspects of Islam into Maldives society, such as facilitating Wahhabism through Saudi Arabian-sourced funding and religious "capacity building".[45]

In 2009, Gayoom's party won a majority in the Parliamentary elections, which inhibited Nasheed's ability to pass legislation: "[n]ow, entrenched in parliament, the old regime launched a systematic and highly successful campaign of sabotage to disrupt and strangle any attempt by the MDP to implement the democratic reforms demanded by the new constitution."[46]

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[41] *Ibid*.
[42] Robinson, above n 38, 4.
[43] Robinson, above n 38, xviii.
[44] Robinson, above n 38, 71.
[45] This conservative religious moralising was empowered by the guarantee of the right to freedom of speech under Article 16(a) of the 2008 Constitution, which simultaneously denies the right of freedom to communicate opinions and expressions that are contrary to "any tenet of Islam" (Articles 16(b) and 27). See also Article 19 (freedom "to engage in any conduct or activity that is not expressly prohibited by Islamic Shari'ah").
[46] Robinson, above n 38, 4.

Moreover, as we shall see in Chapter 4, the Judiciary (which had been appointed by Gayoom prior to the 2008 election) was blocking Nasheed's government. His frustration with the Judiciary came to a head when he ordered, unconstitutionally, the detention of the Chief Judge of the Criminal Court (a man of dubious character and the prime frustrator of judicial process),[47] which culminated in a Gayoom-backed, xenophobic Islamic nationalism-driven coup" in February 2012.[48] The Vice President, Mohammed Waheed Hassan – described by his former energy advisor as "an unfortunate puppet"[49] – assumed the presidency.

After an inane series of Supreme Court decisions, which manipulated the timing of the November 2013 presidential elections,[50] Gayoom's half-brother, Abdulla Yameen, became the new President. Through their ambivalence, and oblivious to what was to come, Maldivians had unwittingly built a new family-governed prison around themselves.

In effect, the Maldives continues to pass through historical cycles as power transfers from one autocratic regime to another, except for the short spell of democracy (such as it was) from 2008 to 2012. Colton summarises it succinctly:[51]

> For nearly a thousand years the Maldive Islands were ruled as a singular political entity by autocratic sultans and, before that, by kings. The modern day President rules in many ways

[47] The judge "was complicit in protecting Gayoom and his cohort from investigation for corruption and human rights abuses during [Gayoom's] rule .. [and] ... had also been accused by the government of having links to organized crime ... . He had dodged repeated attempts at disciplinary procedures thanks to his colleagues on the judicial watchdog [the Judicial Services Commission, discussed in Chapter 4], and avoided arrest through an increasingly farcical series of manoeuvres that culminated in his taking and hiding the court's warrant stamp in his home every evening. Without a warrant it was illegal for the police to arrest him ... . Trials of loyal thugs and drug dealers could … be derailed by arbitrarily dismissing state prosecutors for … "contempt of court" …. .": Robinson, above n 38, 8.

[48] A Commonwealth-brokered Commission of National Inquiry found that there was not a coup *per se*, but that Nasheed had resigned of his own accord, albeit under pressure: *Report of the Commission of National Inquiry, Maldives* (30 August 2012), 60. Criticisms of that report are set out in Azra Naseem, "CONI & the Coup: I. Constructing the truth" (22 September 2012) <http://www.dhivehisitee.com/executive/making-coup-legal/>, Azra Naseem, "CONI & the Coup: II. Law as an instrument of political power (24 September 2012) <http://www.dhivehisitee.com/executive/coni-coup-ii-law-instrument-political-power/> and Azra Naseem, "CONI & the Coup III: The Legacy (21 March 2016) <http://www.dhivehisitee.com/executive/coni-and-the-coup-iii-the-legacy/>.

[49] In a leaked email, which he wrote to an official in the Trade Ministry: "Who turned out the light: Maldives' solar ambitions plunged into darkness", *Minivan News* (24 June 2012) <https://minivannewsarchive.com/politics/who-turned-out-the-light-maldives%e2%80%99-solar-ambitions-lunged-into-darkness-39667>.

[50] The conduct of the Supreme Court is discussed in Chapter 4.

[51] Colton, above n 22, 187. Colton made this observation in 1995, during Gayoom's rule. However, it is equally pertinent to Yameen's rule in 2017.

> much as his Sultan-predecessors did. All major, and most minor, decisions for the nation are made by him. ... [T]he ruler did not tolerate any dissention.

2.4 Cultural and familial features

The political shenanigans described in section 2.3 can be best understood from an ethnological perspective. Ever since the time of its first rulers, the Maldives has been a class society, ruled by a relatively small socio-political elite (*beefulun*),[52] which comprises various "houses" located in Male'. The bulk of Maldivian society is dominated and controlled by this political-centred elite, which directs or influences all social, cultural, economic, political, religious and commercial affairs of the country.[53] As the traditional aristocracy, the *beefulun* exhibit an obsession with political power, "maintained by an ideology that only [they] could rule" the Maldives.[54]

A "house" is both the physical and ideological centre of a basic political unit. It is made up of a person's consanguineal relations and affinal relations, which create alliances between houses, and loyal friends, thus broadening power bases. It is through the house that political power and elite status are achieved and maintained.[55] The house becomes the important means of a person's identification. When a house becomes politically powerful, its supporters can expect favours from the person in charge.

Nevertheless, one house cannot completely rely on all of the kin, affines and friends who make it up. "Relationships are situational."[56] Because members of a house are motivated to take advantage of the best opportunity that comes their way to advance their individual interests, allegiances to houses change. That, of course, produces rivalry between houses. The rival political behaviour of alliances of Male' houses depicts "reiterative patterns of cycles of

[52] The other two classes are *miihun*, who are "ordinary" people, and *beekalun*, a "middle class", comprising a select group of people who were formerly *miihun*, who had moved up a rank because they were trusted servants of, or political advisors to, the *beefulun*, or are wealthy traders: see Colton, above n 22, 53-55.
[53] Colton, above n 22, 98.
[54] Colton, above n 22, 51. Colton contends that "Maldivians are highly analytical [and] always seek to discover the underlying political motivations for all actions." Colton, above n 22, 50.
[55] Colton, above n 22, 129.
[56] Colton, above n 22, 128.

political conflict, power resolution, and opposition [which] are fuelled by envy and the desire for revenge."[57]

The government can, and does, control the elite. Colton recorded that "[t]he Male' elite are constantly aware of the power the "government" has over their lives, in terms of the critical rewards or punishments that can be metered out as a result of conforming, or not, to rules of the political system."[58] Particularly given the scarcity of land in the Maldives, the ruling government could obtain control over loyal houses by granting them land, and could equally take land from disloyal houses.[59]

Throughout most of its history, the Maldives has been isolated from the rest of the world, principally because of its treacherous reefs for shipping and its lack of valuable resources. Distance and travel time also kept population clusters in different atolls relatively insulated from each other. This insulation resulted in "an unusual degree of internal suspicion and distrust"[60] of those outside the walls of a house. Distrust grew the further the distance from the walls: distrust of other houses in Male', distrust of people from other islands and, at the extremity, distrust of foreigners. Until the arrival of tourists in the 1970s (with the attendant societal – but not economic – problems), Maldivians had little exposure to, and even less interaction with, foreigners.[61]

Appreciation of these social practices is vital for this thesis because they explain the Maldivian mindset, which has prevailed for centuries. This culture gave rise to attitudes and thinking that informs the behaviour of today's politicians, policymakers, judges and administrators and,

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[57] Colton, above n 22, 270.
[58] Colton, above n 22, 210.
[59] Traditionally, all land rights were held by the rulers. Nowadays, the government holds the rights over uninhabited islands. The government has granted leases of uninhabited islands to political favourites, sometimes on generous concessional terms, for the development of tourist resorts. The government's power of confiscation was recently illustrated by its unilateral cancellation of leases of resort islands and other land from business tycoon, Gasim Ibrahim (a *beekaleh*), when he challenged the President's preferred nominee for Speaker of Parliament: see Ahmed Naish, "Government denies unfairly targeting Gasim's businesses", *Maldives Independent* (6 April 2017) <http://maldivesindependent.com/politics/government-denies-unfairly-targeting-gasims-businesses-130028>.
[60] Colton, above n 22, 73.
[61] Colton notes that "[i]t was against the law for unofficial persons to converse with foreigners until the 1970s ... " (Colton, above n 22, 85), "[t]he Maldivian education system actually taught Maldivians (and their elders instilled in them from early childhood) to hate and fear foreigners because most were Kaffirs [infidels]" and "... Maldivians were taught to hate and fear even foreign Muslims because they were foreign, and most were treated as Kaffirs, though they were not." (Colton, above n 22, 88). In addition, *borah* traders from Gujarat, India, who dominated Maldivian trade from the mid-19th to the mid-20th century, were allowed to interact with Maldivians only to conduct business transactions, and were placed under curfew at night. (Colton, above n 22, 91-92).

therefore, goes some way to explain why certain actions taken by Maldivians in the formulation and implementation of (tax) laws since 2010 were carried out in the way they were. In particular, even today tax policymakers, legal draftsmen and tax administrators need to be mindful of the socio-political environment in which they are answerable for their actions, which ultimately is to the country's political and business elite, because, as Colton again puts it "[p]olitics and allusions to political maneuverings [*sic*] pervade ... the daily conversations of the nation's elite in Male'. ... Almost any action by a member of the elite is analysed by others in terms of political motivations ...".[62] "This leads to a society in which everyone is watching over his/her shoulder while at the same time trying to watch the path ahead."[63]

2.5 The Maldives economy

2.5.1 Major economic developments

As a maritime nation, the Maldives economy has been (and still is) totally reliant upon the sea, traditionally in fishing, then shipping and nowadays, most importantly, tourism. Each of these activities has been controlled by the Male' socio-political elite.[64] Historically (and even today),[65] "[l]oyal attachment to the ruler was the only way the trader could do business".[66]

Because of its isolation, for most of its history the Maldives has been largely a subsistence economy, generally unperturbed by the presence of foreigners. However, some "international trade" had begun by 10 AD with the presence of Arab merchants passing through the Maldives[67] and, presumably to some extent, had commenced before then with Indian and Sri Lankan seafarers.

In the 1900s, fish became the main export, particularly to Sri Lanka. From 1941 until its decommissioning in 1976, the British military base in Gan sustained the economy of the very

[62] Colton, above n 22, 243.
[63] Colton, above n 22, 242.
[64] See section 2.4.
[65] See Naish, above n 59.
[66] Colton, above n 22, 119.
[67] See section 2.2.

southern atolls of the Maldives. Since the 1970s, tourism has become the mainstay of the economy.

There has been a number of significant economic events during the last century, which have had a profound effect on the Maldives economy, and have entailed inevitable political consequences. Widespread food shortages during World War II, resulted in starvation. The shortages were orchestrated by the sultan and his family, and extortion by *borah* merchants, who controlled the export and import trade in the Maldives at the time.[68]

The economy began to expand after the dissolution of the sultanate in 1968, with the development of the first tourist resorts.[69] However, the collapse of the fish export market to Sri Lanka in the early 1970s and the closure of the British military base in Gan in 1975 caused severe setbacks for the Maldives economy and contributed to President Nasir's downfall.[70]

The economy grew significantly during the Gayoom presidency, primarily on the back of rapid development of the tourism industry and, to a lesser extent, fishing and construction. During this period, opportunities for wealth generation offered by largely high-end tourist resort developments resulted in accumulation of considerable capital in the hands of a (very) few,[71] political patronage to access the opportunities (and to retain Maldivian asset holdings),[72] polarisation of clan-aligned political allegiances and, as we shall see in Chapter 4, ultimately a general breakdown in the rule of law at the Parliamentary, Executive, judicial and administrative levels of government.

However, even with the dice cast in its favour, the tourism industry has suffered impediments, which have had ramifications for the economy generally and for public revenue. The most significant of these have been the December 2004 Banda Aceh, Indonesia, tsunami and the 2008 global financial crisis, both of which diminished tourist numbers in the immediately following years.

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[68] See Abdul Hakeem Hussein Manik, "The story of 20th century 'famines' in Maldives", *Maldives: Part 1* (Everglory House, Male', 1999), 1.
[69] The first two tourist resorts were opened in 1972.
[70] Metz, above n 16, 3.
[71] There are wide regional disparities, together with relatively high inequality in the distribution of income. In 2010, the Gini coefficient was 0.448 for the Maldives and 0.636 for Male' (based on the National Bureau of Statistics' *Household Income & Expenditure Survey Findings 2009/2010*).
[72] Naish, above n 59.

2.5.2 Government revenue

Until the 2010 tax reforms, most of the government's revenue came from two indirect taxes (namely, import duty and tourism tax) and land and resort rents. The tourism sector became the largest source of public revenue, directly and indirectly accounting for approximately two-thirds of the government's total revenue in 2010, via taxes imposed on tourists, customs duties imposed on goods imported by the industry, and resort lease rents paid for the use of government-owned resort islands.

Since the late 1980s, the International Monetary Fund had been pressing the Maldives to diversify its sources of tax revenue, in order to reduce its dependence on the tourism sector. But nothing substantive was done to reform the tax system until the economy and public revenue were struck by the effects of the tsunami and global financial crisis.

The need for tax reform became more acute when the government changed after the 2008 presidential election. The new government was determined to realise its ambitious programme of extensive social welfare reforms, and to improve the state of public finances, by increasing revenue and reducing expenditure by *inter alia* slimming down the country's bloated, inefficient and nepotistic civil service.[73] Thus, 2011 marked the beginning of the modern tax system in the Maldives.

The two major new taxes on which this thesis focuses are GST and BPT.[74] To facilitate the operation of those tax regimes (together with the minor taxes) the TAA was enacted in 2010.[75]

[73] Robinson claims that "Gayoom and his retreating government had cleaned out the state coffers before their departure, leaving the Maldives in what the World Bank would describe as "the worst economic position of any country undergoing a democratic transition since 1956"." Above n 38, 3.
[74] However, it should be noted that two other taxes were subsequently introduced; "green tax" and a remittance tax. The green tax has been imposed on tourists since 1 November 2015 at the rate of USD 6 per day for each day of their stay at a tourist resort, tourist hotel or on a tourist vessel operated in the Maldives and at a rate of USD 3 per day on tourists who stay in guesthouses (sections 1 and 4 of the Sixth Amendment to the Tourism Act (Law Number 42/2014). Remittance tax at the rate of 3% has been imposed since 1 October 2016 on money transferred out of the Maldives by foreigners employed in the Maldives (section 9 of the Fifth Amendment to the Employment Act (Law Number 22/2016).
[75] Law Number 3/2010.

2.5.2.1 Goods and services tax

The GST Act was passed by Parliament on 29 August 2011, ratified by the President on 2 September 2011,[76] and came into operation one month later.[77] The GST Act imposes GST on the value of goods and services supplied by registered businesses. It is currently levied at the rate of 12% in the tourism sector and 6% in the general sector.

2.5.2.2 Business profits tax

The BPT Act became law on 18 January 2011.[78] It imposes BPT generally at the rate of 15%[79] on the taxable profits of businesses that operate in the Maldives. The first MVR 500,000[80] of a business's taxable profits is tax-exempt.[81] BPT applicable to a particular tax year (ending on 31 December) is payable in three instalments: (i) the first interim payment, to be made by 31 July in the tax year; (ii) the second interim payment to be made by the following 31 January;[82] and a final payment to be made by the later of 30 April or 6 months after balance date.[83]

The BPT Act also imposes a final withholding tax (WHT) on certain payments made to non-residents for services and for the right to use intangible property. WHT is levied at source at the rate of 10% of the gross amount of the payment made to the non-resident.[84]

2.6 Summary

Chapter 2 has provided an overview of the political, social and economic history of the Maldives. It has explained how the Maldives has developed as an insular, conservative Islamic

[76] Law Number 10/2011.
[77] Section 64 of the GST Act.
[78] Law Number 5/2011.
[79] Section 7(b) of the BPT Act.
[80] Equal to NZD 44,877. (All exchange rates are at 31 December 2017).
[81] Section 7(a) and (b) of the BPT Act.
[82] Section 23 of the BPT Act.
[83] Section 24 of the BPT Act.
[84] Sections 6 and 7(d) of the BPT Act.

society subjected throughout most of its history to a series of autocratic rulers whose supremacy depended upon the support of familial ties centred on various houses.

Since the 1970s, the Maldives economy has become increasingly dependent upon the tourism sector. Gayoom's leadership facilitated the concentration of valuable tourist resort islands in the hands of a very few of his cohorts, at the expense of the wellbeing of the general population.

Gayoom's repressive 30-year autocracy succumbed to the country's first democratically elected government in 2008, which attempted to introduce wide-ranging economic and social policy reforms. In Chapter 4, general application of the rule of law (or, rather, the absence of it) is discussed against this general background of Maldivian society.

The significant tax reforms, which are most relevant to this thesis, were the introduction of the TAA, GST and BPT into what had essentially been a tax haven. The discussion in Chapter 5 of the application of the rule of law in the context of taxation in the Maldives focuses on the GST, BPT legislation and the TAA, taking account of the prevailing political, familial and house loyalty circumstances.

First, however, the meaning of the concept of the rule of law is examined in Chapter 3.

Chapter 3

THE "RULE OF LAW"

3.1 Introduction

The rule of law is the cornerstone of civil society. According to Tamanaha, there is "widespread agreement, traversing all fault lines, on one point, and one point alone: that the "rule of law" is good for everyone."[1] Put another way, the rule of law is the pedestal of orderly interaction between individuals. This principle was enunciated in 2012 by the Secretary General of the UN, Ban Ki-moon:[2]

> The rule of law is like the law of gravity. It is the rule of law that ensures that our world and our societies remain bound together and that order prevails over chaos. It unites us around common values and anchors us in the common good. But unlike the law of gravity, the rule of law does not arise spontaneously. It must be nourished by the continuing and concerted efforts of real leaders.

This statement was made in the context of the UN debate leading up to its adoption of the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (UN Declaration on the Rule of Law) in 2012.[3] In that declaration, the UN proclaims that:[4]

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[1] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004), Kindle edition, loc. 40. Nevertheless, the International Bar Association has deplored "the increasing erosion around the world of the Rule of Law": see Council of the International Bar Association, *Rule of Law Resolution* (International Bar Association, London, September 2005).

[2] UN General Assembly, *The rule of law at the national and international levels*, 67th session, 3rd Plenary meeting, High-level Meeting on the Rule of Law at the National and International Levels, Agenda item 83, (New York, 24 September 2012) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/67/PV.3>.

[3] UN General Assembly, *Resolution adopted by the General Assembly – 67/1 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 67th session, Agenda item 83 (New York, 30 November 2012). The Maldives was one of only two Muslim countries – the other was Nigeria – in a group of 39 countries (including the European Union) that entered into a voluntary pledging process at the high-level meeting, in which it undertook to carry out "concrete steps" to advance the rule of law: see the Annex to the UN Declaration on the Rule of Law.

[4] UN, above n 3, Preamble and Articles 1 and 2.

> … the rule of law ... is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built ... [, reaffirms its] solemn commitment ... to an international order based on the rule of law ... [and] recognize[s] that the rule of law applies to all States equally and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.

The rule of law is intertwined tightly with the notions of democracy (at least in the West), liberty, justice and human rights. This interrelationship is particularly evident in other pronouncements by international organisations, which promote the rule of law. For example, in its ambitious *Millennium Declaration*, the UN General Assembly declared its commitment to the rule of law and resolved to:[5]

> … strengthen respect for the rule of law in international as in national affairs ... , ... spare no effort to promote democracy and strengthen the rule of law, ... respect fully and uphold the Universal Declaration of Human Rights ... [and] strengthen the International Court of Justice, in order to ensure justice and the rule of law in international affairs.

In 2005, in its human rights resolution on democracy and the rule of law, the UN Commission on Human Rights (UNCHR) pronounced that it:[6]

> 1. *Declares* that democracy includes ... respect for the rule of law ...
> ...
> 8. *Recalls* that the interdependence between a functioning democracy, strong and accountable institutions and effective rule of law is essential for a legitimate and effective Government that is respectful of human rights;
> ...
> 11. *Recalls* ... that the rule of law and the respect of human rights are essential for the stability of democratic societies;
> 12. *Also recalls* that States are guarantors of democracy, human rights and the rule of law and bear responsibility for their full implementation;
> ...
> 14. *Calls upon* States to make continuous efforts to strengthen the rule of law and promote democracy ...
> ...
> 15. ... acknowledges [Parliaments'] fundamental role in the promotion and protection of democracy and the rule of law ... .
>
> (emphasis in original)

[5] UN General Assembly, *UN Millennium Declaration*, 8th plenary session (New York, 8 September 2000), A/res/55/2, paras. 9, 24, 25 and 30.
[6] Office of the High Commissioner for Human Rights, *Democracy and the rule of law – Human Rights Resolution 2005/32* (UN, 15 April 2005).

Similarly, in the UN Declaration on the Rule of Law, the UN "reaffirm[s] that ... human rights, the rule of law and democracy are interlinked and mutually reinforcing ... ."[7]

In the European context, the European Court of Human Rights (ECHR) has held that "'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms (1950)]."[8] Similarly, European Court of Justice member Antonio Tizzano has described the rule of law as being among "the defining characteristics ... at the heart of" of the European Union (EU).[9]

In addition, together with the principles of democracy and human rights, the rule of law is one of the three pillars of the Council of Europe. The Statute of the Council of Europe reaffirms the Council's:[10]

> ... devotion to the *spiritual and moral values* which are the common heritage of [the] peoples [of the founding member states] and *the true source of* individual freedom, political liberty and the *rule of law*, principles which form the basis of all genuine democracy.
>
> (emphasis added)

The Council then goes on to proscribe that "[e]very member of the Council of Europe must accept the principles of the rule of law ... ".[11]

The rule of law may be the highest priority of all. Reflecting on his experience during the Bosnian conflict in the 1990s, the UN High Representative for Bosnia reflected that:[12]

> … in Bosnia, we thought that democracy was the highest priority. ... In hindsight, we should have put the establishment of the rule of law first for everything else depends on it: a

[7] UN, above n 3, Article 5.
[8] See *Ukraine-Tyumen v Ukraine*, ECHR (Fifth Section), Application No. 22603/02, Final judgment, 4 October 2010, para. 49; *Former King of Greece and Others v Greece [GC]*, ECHR (Grand Chamber), Application No. 25701/94, 23 November 2000, para. 79; and *Malama v Greece*, ECHR (Second Section), Application No. 43622/98, Final judgment, 5 September 2001, para. 43. All three of these decisions cited the principle originally delivered in the judgment in *Amuur v France*, ECHR (Grand Chamber), Application No. 19776/92, 23 June 1996, para. 50.
[9] Antonio Tizzano, "The Rule of the ECJ in the Protection of Fundamental Rights", in A. Arnull, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, Oxford, 2008), 126, 138, cited in Tom Bingham, *The Rule of Law* (Penguin, London, 2012), 135.
[10] Council of Europe, *Statute of Council of Europe*, European Treaty Series (London, 1949), Preamble.
[11] Council of Europe, *Statute of Council of Europe*, above n 10, Article 1.
[12] Paddy Ashdown, "What I Learned in Bosnia", *The New York Times* (28 October 2002) <http://www.nytimes.com/2002/10/28/opinion/what-i-learned-in-bosnia.html>.

> functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts."

As the UN representative indicates, the rule of law permeates not only law and politics, but also economics. This is also seen in declarations of the UN, such as the UN Declaration on the Rule of Law[13] and the Millennium Declaration,[14] and in academic publications. In the former declaration, the UN General Assembly:[15]

> ... agree[s] that [its] collective response to the challenges and opportunities arising from the many complex political, social and *economic transformations ... must be guided by the rule of law* ...
> ...
> [is] convinced that *the rule of law and development are strongly interrelated and mutually reinforcing* [and] the *advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development*, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, ... all of which in turn reinforce the rule of law ... .
>
> (emphasis added)

In the Millennium Declaration, the UN General Assembly alludes to the rule of law embedding international economics, stating that it is "committed to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system".[16]

Adherence to the rule of law is also evident in the economics context in the way organisations such as the World Bank impose legal and economic reforms as conditions of their financing on certain borrowing countries, which are perceived to have *inter alia* inadequate market mechanisms and rule of law.[17]

In the academic world, the interconnection between economic development and the rule of law has also been addressed by, for example, Reifeld, who asserts that:[18]

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[13] UN, above n 3.
[14] UN, above n 5.
[15] UN, above n 3, Preamble and Article 7.
[16] UN, above n 5, para. 13.
[17] See, for example, World Bank, *Governance and Development* (The World Bank, Washington DC, 1992). For a discerning critique of the World Bank's imposition upon developing countries of its procedural and institutional rule of law requirements, see Lawrence Tshuma, "The Political Economy of the World Bank's Legal Framework for Economic Development," (1999) 8 *Social & Legal Studies*, 75.
[18] Helmut Reifeld, "Developing Democracy and the Rule of Law in Islamic Countries", in Birgit Krawietz and Helmut Reifeld (eds.), *Islam and the Rule of Law – Between Sharia and Secularization* (Konrad Adenauer Stiftung, Berlin, 2008), 129.

> … [d]evelopment potentials do not depend on social and economic conditions alone, but also on the fundamental values and political goals of a nation that form the foundation for the development of the rule of law, a liberal democracy and a social market economy. Promotion is easiest when each of these developments – tardy or speedy as it may be – goes hand in hand with the others.

In the context of its advocacy of democracy, human rights and market based economies in transitional states, the European Bank for Reconstruction and Development (EBRD) also committed itself to "the fundamental principles of … the rule of law [and welcomed] the intent of Central and Eastern European countries to further the practical implementation of … the rule of law".[19] According to Tamanaha, "[d]evelopment specialists uniformly agree that absent the rule of law there can be no sustainable economic development."[20] Clearly, these declarations were made in an international context, but the principles of the rule of law contained in them are equally applicable in a national sense.[21]

Given the high esteem in which the rule of law is held by such august bodies as the UN, the Council of Europe, the World Bank and the EBRD, it is apposite to understand what the term actually means. As the late 19th century British doyen of constitutional theory, Albert Dicey, wrote, "[i]f ... we are ever to appreciate the full import of the idea denoted by the term "rule, supremacy, or predominance of law...", we must first determine precisely what we own by such expressions ...".[22]

But that is easier said than done. Urabe observes that "[s]ince Albert Venn Dicey advanced it as the pride of the English Constitution in the nineteenth century, … the modern Rule of Law has meant many things to many people. Therefore, it is difficult to define the meaning of the Rule of Law briefly and exactly."[23] As Tamanaha aptly puts it: "the rule of law is an exceedingly elusive notion"[24] giving rise to a "rampant divergence of understandings".[25]

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[19] EBRD, "Agreement Establishing the European Bank for Reconstruction and Development", in European Bank for Reconstruction and Development, *Basic Documents of the European Bank for Reconstruction and Development* (EBRD, London, September 2013), revised ed., 3.
[20] Tamanaha, above n 1, loc. 50.
[21] Indeed, the title and Article 7 of the UN Declaration on the Rule of Law (above n 3) specifically refer to its application in a national context.
[22] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan, London, 1885), 8th ed., 110.
[23] Noriho Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan", (1990) 53(1) *Law and Contemporary Problems*, 61, 61.
[24] Tamanaha, above n 1, loc. 67.
[25] Tamanaha, above n 1, loc. 74.

Nevertheless, Bingham thought that "the task of devising at least a partial definition cannot be avoided indefinitely ... [s]o we must take the plunge."[26]

There is an extensive Western literature on interpretations of the rule of law. This chapter examines some of the more notable contributions. Furthermore, because the Maldives is an Islamic state, this chapter also discusses the comparable notion to the rule of law in Islamic jurisprudence, the extent that the Islamic approach differs from the notion of the rule of law in Western democracies, and attempts to reconcile the two approaches.

The common threads in the various interpretations of the rule of law in the literature and pronouncements of international bodies are then taken as a benchmark against which to observe, in Chapter 4, the application of the rule of law generally in the Maldives, and, in Chapter 5, in the formulation and administration of the country's tax regime.

3.2 Interpretations of the "rule of law"

Legal scholars have not been able to formulate convincingly a concise definition of the rule of law. Rather, they have offered various constituent elements of the rule of law, which each author considers reflects its salient features. For example, Allan describes the rule of law as:[27]

> ... primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order ... The rule of law is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed.

Although "not comprehensive and not universally applicable",[28] in Bingham's view:[29]

> … the core of the existing principle of the rule of law [is] that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

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[26] Bingham, above n 9, 8.
[27] T R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, Oxford, 1993), 21.
[28] Bingham, above n 9, 42.
[29] *Ibid*.

Similarly, Raz derived the elements of the rule of law from his "basic intuition" that "if the law is to be obeyed, *it must be capable of guiding the behaviour of its subjects*"[30] (emphasis in original). All laws must be prospective, open, clear, adequately publicised and relatively stable (that is, not often change). There must be an independent Judiciary, natural justice (that is, open and fair hearings without bias), review of primary and secondary legislation (to ensure that it conforms with the rule of law) and administrative action, and limitations on the discretion of prosecuting authorities to ensure that they do not pervert the law.[31]

Without specifically defining the term, other commentators take a broadly similar view of its constituent elements. For example, Jayakumar considers that:[32]

> … [t]he Rule of Law concept, in essence, embodies a number of important interrelated ideas. First, there should be clear *limits to the power of the state*. A government exercises its authority through publicly disclosed laws that are adopted and enforced by an *independent judiciary* in accordance with established and accepted procedures. Secondly, *no one is above the law*; there is *equality before the law*. Thirdly, there must be *protection of the rights* of the individual. In modern society, the value of the Rule of Law is that it is essential for good governance. Governments must govern in accordance with established laws and conventions and not in an arbitrary manner. The law must set out legitimate expectations about what is acceptable behaviour and conduct of both the governed and the government. This is important: *the law must apply equally to the government and individual citizens*.
>
> (emphasis added)

Various pronouncements by international organisations have also attempted to crystallise the ingredients of the rule of law. In 1955, the International Commission of Jurists (ICJ) declared in its "Act of Athens" that:[33]

> 1. The State is subject to the law.
> 2. Governments should respect the rights of individuals under the Rule of Law and provide effective means for their enforcement.
> 3. Judges should be guided by Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties in their independence as judges.
> 4. Lawyers of the world should preserve the independence of their profession, assert the rights of an individual under the Rule of Law and insist that every accused is accorded a fair trial.

[30] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979), 214.
[31] Raz, above n 30, 214-218.
[32] S. Jayakumar, "Singapore", in Francis Neate (ed.), *The Rule of Law: Perspectives from Around the Globe* (Lexis Nexis, 2009), 143. Application of the rule of law in these terms in Singapore has been hotly contested: see, for example, Jothie Rajah, *Authoritarian Rule of Law* (Cambridge University Press, Cambridge, 2012), 2.
[33] See Norman S. Marsh, *The Rule of Law in a Free Society – A Report on the International Congress of Jurists, New Delhi, India January 5-10, 1959* (ICJ, Geneva, 1959), 2.

In 2004, the UN Secretary General, Kofi Anan, reported on the rule of law to the UN Security Council in these terms:[34]

> The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are *accountable to laws* that are *publicly promulgated*, equally enforced and *independently adjudicated*, and which are *consistent with international human rights norms and standards*. It requires, as well, measures to ensure adherence to the principles of *supremacy of law*, *equality before the law*, *accountability to the law*, *fairness in the application of the law*, *separation of powers*, *participation in decision-making*, *legal certainty*, *avoidance of arbitrariness* and *procedural and legal transparency*.
>
> (emphasis added)

The UNCHR also spelt out specific features of the rule of law in its resolution on democracy and the rule of law when it:[35]

> 1. *Declare[d]* that democracy includes ... the ***separation of powers***, the ***independence of the judiciary, transparency and accountability*** in public administration, and free, independent and pluralistic media;
>
> [and]
>
> ...
>
> 14. *Call[ed] upon* States to make continuous efforts to strengthen the rule of law and promote democracy by:
>
> *(a)* Upholding the ***separation of powers*** ...
>
> *(b)* Guaranteeing that ***no individual or public or private institution is above the law***, by ensuring that:
>
> (i) The principles of ***equal protection before the courts and under the law*** are respected within their legal systems;
>
> ...
>
> (iii) All government agents, irrespective of their positions, are promptly held fully accountable for any violation of the law that they commit;
>
> (iv) The administration of justice is ***free from any form of discrimination***;
>
> (v) A sufficient degree of ***legal certainty and predictability*** is provided in the application of the law, in order to avoid any arbitrariness;
>
> (vi) Comprehensive anti-corruption strategies and measures are adequately developed and applied in order to maintain the ***independence and impartiality of the judiciary***, and to ensure the accountability of the members of the judiciary, legislative and executive systems;
>
> ...
>
> (viii) ... special ***tribunals are independent, competent and impartial***, and that such ... tribunals apply established procedures of ***due process*** of law and guarantees of a ***fair trial*** ...;
>
> *(c)* Respecting ***equal protection under the law***, by:
>
> ...

[34] UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General* (UN, 23 August 2004), S/2004/616, para. 6.
[35] UNCHR, above n 6.

(iii) Guaranteeing the right to a ***fair trial*** and to a ***due process*** of law ***without discrimination*** ...;
(iv) Promoting continuously that ***independence and impartiality of a judiciary*** free from unlawful or corrupt outside influence;
...
(vii) Encouraging the continuous training of public servants, ... parliamentary experts, lawyers, judges at all levels and the staff of the courts, as appropriate to their area of responsibility, on international standards and jurisprudence in the field of human rights, in particular with respect to the legal aspects and procedures related to the ***equality under the law***;
…

(emphasis in bold added)

Recurring constituent elements of the rule of law appear in various parts of this declaration: independence of the Judiciary (clauses 1, 14(b)(vi) and (viii), and 14(c)(iv)), no-one is above the law (clause 14), equality under the law (clauses 14(c) (stem), and 14(c)(iv) and (vii)), impartiality in the administration of justice (clauses 14(b)(iv), (vi) and (viii), and 14(c)(iv)), legal certainty (clause 14(b)(v)), there is no arbitrariness (clause 14(b)(v) (predictability) and clauses 14(b)(viii) and (c)(iii) (due process and fair trial)) and accountability in public administration (Clauses 1, 14(b)(iii) and (vi)).

In Europe, the European Commission for Democracy through Law (Venice Commission) believes that the rule of law "requires everyone to be treated by all decision-makers with ... *equality* and *rationality* and in *accordance with the law*"[36] (emphasis added), but also adds that people must "have the opportunity to challenge decisions before *independent and impartial courts* for their unlawfulness, where they are accorded *fair procedures*"[37] (emphasis added). In the Venice Commission's view, the components of the rule of law are:[38]

(1) Legality, including a transparent, accountable and democratic process for enacting law [that is, supremacy of the law]
(2) Legal certainty
(3) Prohibition of arbitrariness
(4) Access to justice before independent and impartial courts, including judicial review of administrative acts
(5) Respect for human rights
(6) Non-discrimination and equality before the law.

[36] Venice Commission, *Report on the Rule of Law*, Adopted by the Venice Commission at its plenary session (Venice, 25-26 March 2011), 5.
[37] *Ibid*.
[38] Venice Commission, above n 36, 10.

The seven most significant characteristics of the rule of law, which can be discerned from the foregoing general overview of significant contributions to the literature and statements from prominent bodies, are:

(1) Supremacy of the law;
(2) Separation of powers and judicial independence;
(3) Equal application of the law;
(4) Accessibility, intelligibility and predictability of the law;
(5) Availability of a judicial dispute resolution mechanism and due process;
(6) Judicial impartiality; and
(7) Protection of fundamental human rights.

Of these seven elements, the first six are particularly pertinent to the topic of this thesis. Each of these six features is discussed in more detail in sections 3.2.1 to 3.2.6 below.

3.2.1 Supremacy of the law

Supremacy of the law is undoubtedly the oldest and most fundamental of all of the characteristics of the rule of law. Tamanaha asserts that "the broadest understanding of the rule of law, a thread that has run for over 2,000 years, often frayed thin, but never completely severed, is that the sovereign, and the state and its officials, are limited by the law."[39] Thus, "[c]itizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power."[40] Nowadays, the supremacy of statutory law is taken for granted in modern Western democracies.

We saw in Chapter 1 that, as far back as 400 BC, Plato implied that the rule of law meant that the law is supreme – that is. it is not "subject to some other authority and has none of its own"[41] – and that Aristotle also advocated supremacy of the law.[42] Much later (in 1690), one of the original libertarian thinkers, John Locke, expressed similar sentiments in relation to the position

[39] Tamanaha, above n 1, loc. 1663.
[40] Tamanaha, above n 1, loc. 511.
[41] Ricardo Gosalbo-Bono, "The Significance of the Rule of Law and its Implications for the European Union and the United States", (2010) 72 *University of Pittsburgh Law Review*, 229, 232.
[42] Aristotle, *Politics*, Book 4, Chapter 4 <http://jim.com/arispol.htm>.

of the English monarch. He quotes with approval King James I's speech to the English Parliament in 1609:[43]

> The King binds himself by a *double* oath to observe the fundamental laws of his kingdom. Just by *being* a king he tacitly binds himself to protect … the laws of his kingdom. … Therefore all kings who are not tyrants, or perjured, will be glad to bind themselves within the limits of their laws.
>
> (emphasis in original)

In relation to England, this, of course, stems from the core of the Magna Carta of 1215, which curtailed King John's authoritarian powers by subjugating him to baronial decisions and, ultimately, his successors to omnipotent legislation enacted by Parliament. As part of this transfer of power, the Magna Carta set out seven rules, which are particularly relevant to this discussion:

(1) Supremacy of the law: "No free man[44] shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we[45] proceed with force against him, or send others to do so, except ... by the law of the land" (Article 39).

(2) Right to justice: "To no one will we sell, to no one deny or delay right or justice" (Article 40).

(3) Fair trial: "... no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it" (Article 38).

(4) Competent judges: "We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well" (Article 45).

(5) Lawful judgments: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals ..." (Article 39).

(6) Proportionality: "... a free man shall be fined only in proportion to his offence ..." (Article 20) and "[e]arls and barons shall be fined only ... in proportion to the gravity of their offence" (Article 21).

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[43] John Locke, *Second Treatise of Government* (1690), 66 <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>.

[44] A "free man" was a man who was not tied to the land as a villein or serf.

[45] Here, "we" refers to King John.

(7) No taxation without consent: "No 'scutage' or 'aid' may be levied in our kingdom without its general consent ..." (Article 12) and "... we will allow no one to levy an 'aid' from his free men ..." (Article 15).[46]

These rules formed the written foundation of the principles of liberty and rights of, initially, free men – and later all individuals – in the English kingdom, to protect them against state based autocracy and tyranny.

During the 10 years from 1215, the Magna Carta was refined such that a definitive version emerged in 1225 in which the monarch (then Henry III) undertook to not do "anything whereby the liberties contained in this Charter shall be infringed or weakened; and if any thing contrary to this is procured from anyone, it shall avail nothing and be held for nought."[47] Further amendments in 1354 saw the provisions of the Magna Carta extended beyond free men to "every man, of whatever state of condition that he be"[48] and entrenched the principle of application of the "due process of law" in the administration of justice.[49] The English Parliament further cemented the authority of the Magna Carta in 1368 when it legislated that the "Great Charter be holden and kept in all Points, and if any Statute be made to the contrary, that shall be holden for none."[50]

The influence of the Magna Carta as an instrument of liberty and justice followed the 17th century English colonists to America, and became the basis of fundamental law there. In 1639, the General Assembly of Maryland proclaimed that:[51]

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[46] Articles 12 and 15 formed the basis of the tenet, "no taxation without representation", which was to later become a key feature underlying the American War of Independence from 1775 to 1783.

[47] Conclusion of the 1225 version.

[48] (1354) 28 Edw. III, Cap. 3 (now renamed the Liberty of Subject Act 1354, which is still in force) <http://www.legislationgov.uk/aep/Edw3/28/3>.

[49] *Ibid*.

[50] (1368) 42 Edw. III, Cap. 1 (A Confirmation of the Great Charter and the Charter of the Forest and a Repeal of those Statutes that be made to the contrary) <https://books.google.co.nz/books?id=kcaIpnh0gtgC&pg=PA324&lpg=PA324&dq=1368+42+Edw+3+c+3+UK.&source=bl&ots=sZZ3y1mu9K&sig=amqRvulyas4mBo9_vO-tKdkwuCI&hl=en&sa=X&ved=0ahUKEwjw68uP7svWAhXEybwKHREPCt04ChDoAQg-MAU#v=onepage&q=1368%2042%20Edw%203%20c%203%20UK.&f=false>. Over time, the Magna Carta has undergone numerous revisions such that nowadays only four articles of the original 1215 version remain in English law. Notably, for the purposes of this thesis, they include Article 39 (supremacy of the law) and Article 40 (the right to justice).

[51] General Assembly of Maryland, *An Act for the Liberties of the People* <http://press-pubs.uchicago.edu/founders/documents/v1ch14s1.html>. In addressing the question of whether or not this Act was the first American Bill of Rights, Rees notes that the legislation was never passed by the General Assembly.

> … all the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saveing in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province) And Shall not be imprisoned nor disseissed or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province ...

Supremacy of the law evident in the Magna Carta is also incorporated into the United States Constitution of 1787. Article VI of the Constitution states that:

> … [t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Similarly, the United States Bill of Rights 1791 draws on the rights enshrined in the Magna Carta in its declaration that no-one can be "deprived of life, liberty, or property, without due process of law."[52] As Bingham notes, "the law as expressed in the Constitution was to be supreme, binding not only the executive and the judges, but also the Legislature itself. Tom Paine was therefore right to say … 'that in America THE LAW IS KING'."[53]

(emphasis in original)

Dicey similarly saw the law as the ultimate test of the propriety of a person's actions. In addressing the supremacy of the rule of law as a characteristic of the English Constitution, not dissimilar to Article 39 of the Magna Carta the first of his "three distinct though kindred conceptions"[54] was that no-one is punishable or can be made to suffer except for a distinct breach of the law established before the courts.[55]

See Charles A. Rees, "The First American Bill of Rights: Was it Maryland's 1639 Act for the Liberties of the People?", (2001) 31(1) *University of Baltimore Law Review*, 41.

[52] Amendment V.

[53] Bingham, above n 9, 8. Here, Bingham is referring to Thomas Paine's 1776 treatise, *Common Sense* (Oxford University Press, Oxford, 1995), 34.

[54] Dicey, above n 22, 110.

[55] *Ibid.*

3.2.1.1 Liberalist philosophy

It was noted in section 3.1 that liberty and the rule of law go hand-in-hand. Although not expressed in exactly those terms, the Magna Carta was concerned with ensuring the liberty of individuals by restraining the power of the ruler through the supremacy of the law. This idea was promoted extensively by philosophical exponents of liberalism from the 16th century. According to Locke: [56]

> … [f]reedom of men under government is having a *standing rule* to live by, *common to every one* in the society in question, and *made by the legislative power* that has been set up in it; … and *not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man* .... .
> ...
> Absolute arbitrary power and governing without settled standing laws are both inconsistent with the purposes of society and government. Men wouldn't quit the freedom of the state of nature for a governed society, and tie themselves up under it, if it weren't to preserve their lives, liberties and fortunes with help from stated rules of right and property. It can't be thought that they should intend to give to anyone an absolute arbitrary power over their persons and estates, and strengthen the law-officer's hand so that he could do anything he liked to them. ... [The] ruling power *ought to govern by laws that have been published and taken in, and not by spur-of-the-moment dictates and frivolous decisions. ... [T]he rulers are kept within their bounds* … .
>
> (emphasis added)

The ultimate authority or supremacy of law is also found in Montesquieu's words: "liberty is a right of doing *whatever the laws permit*; and, if a citizen could do what they forbid, he would no longer be possessed of liberty …"[57] (emphasis added). Under Pangle's interpretation, Montesquieu therefore "identifies liberty with a life lived under the rule of law."[58] Tamanaha contends that this "legal liberty" is "the dominant theoretical understanding of the rule of law in modern liberal democracies".[59]

In modern parlance, this doctrine means that the Executive's power is subordinate to an individual's personal freedom, such that the Executive cannot impose its contrary will when a person acts in accordance with statutes passed by his or her representatives; that is, legislation passed by Parliament or a corresponding democratically appointed legislative body. It therefore

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[56] Locke, above n 43, 9, 44.
[57] Charles Louis de Secondat, Baron de Montesquieu, *Spirit of Laws* (1748, Batoche Books, Kitchener, 2001), Book XI, section 3, 172.
[58] Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of the Laws* (Chicago University Press, Chicago, 1989), 109.
[59] Tamanaha, above n 1, loc. 520.

follows that judges and public servants are not free to over-ride the authority of legislation, which has been enacted by the representatives of the people to whom it is to apply; only those representatives have the authority to change that legislation.

An individual is free to the extent that government officials are required to act in accordance with the existing law. Thus, questions of legal rights and liabilities should ordinarily be resolved by application of the law and not the exercise of a government official's discretion.[60] To illustrate this notion, Bingham uses, *inter alia*, the example of a tax inspector:[61]

> We expect the taxes we pay to be governed by detailed statutory rules, not by the decision of our local tax inspector. He has the duty to apply the rules laid down, but cannot invent new rules of his own. Nor has he an unlimited power to remit taxes lawfully due: as one judge succinctly said: 'One should be taxed by law, and not be untaxed by discretion.'[62]

3.2.1.2 Formal legality

Notwithstanding the high ideal of the law being a facilitator of liberty, rigid application of the law inevitably leads to "formal legality" or "legal positivism" – the law is simply what it is stated to be in the statutes, irrespective of the virtues of its content. This means that if a law was created by the representatives of the people in the correct procedural manner, it is (supremely) authoritative and whatever it says is to be applied. Cass considers this interpretation of the rule of law as one end of a spectrum of interpretations:[63]

> At one extreme, a starkly positivist conception of the rule of law encompasses the notion of control to whatever extent and by whatever means the state chooses so long as certain formal requisites of laws' enactment and application are met. It is a conception of *law-boundedness* irrespective of the ends served by the law.
>
> (emphasis in original)

Bingham succinctly describes the formal legality approach to the law. He is clear that judges are subservient to Parliamentary law and that, in a Parliamentary democracy, Parliament's supremacy is inviolable:[64]

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[60] Bingham, above n 9, 48ff.
[61] Bingham, above n 9, 49.
[62] *Vestey v Inland Revenue Commissioners* [1979] Ch 177, 197, per Walton J.
[63] Ronald A. Cass, *The Rule of Law in America* (John Hopkins University Press, Baltimore, 2001), 1.
[64] Bingham, above n 9, 168.

> We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the rule of law; and in which the judges, consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed.

This formalistic interpretation embodies a procedural approach to the rule of law, rather than a substantive one. Disciples of this narrow positivist narrative, like Austin[65] and Raz, argue that the rule of law "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or the dignity of man";[66] "the law ... says nothing about fundamental rights, about equality, or justice."[67] Along these lines, Palmer advocates a conception of the rule of law that is "more in the tradition of the "formal" rather than "substantive" theories of the rule of law".[68] Rather, for Palmer "[d]emocracy, justice and human rights stand on their own feet ...[a]s does the rule of law. These concepts must be distinct ... even if they are inter-related."[69]

The problem with such a formalistic approach is that, because it takes no account of whether the content of the law is immoral, unethical or even immoderate, it "offers no dictates about the proportion or types of government activities that ought to be rule bound."[70] Take, for example, a criminal law (which has been duly passed by Parliament) that prescribes that the minimum penalty for a person found guilty of jaywalking is 10 years' imprisonment. By most accounts, the severity of such a sentence would be seen as outlandish relative to the nature of the offence.[71] Nevertheless, legal positivism requires that the law is what it is stated to be and is to be applied accordingly. The remedy available to those who disagree with the law is not to have it not applied, but to induce their representatives in the Legislature to change it.

The upshot is that the formal legality approach to the rule of law "renders it open to a range of ends. ... If law and rights are whatever the state says they are, as legal positivism holds, there appears to be no way to set legal limits on state action. [Formal legality] emphasises a rule-

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[65] John Austin, *The Province of Jurisprudence Determined* (John Murray, London, 1832).
[66] Raz, above n 30, 211.
[67] Raz, above n 30, 214.
[68] Matthew Palmer, "The Rule of Law, Judicial Independence and Judicial Discretion", Kwa Geok Choo Distinguished Visitors Lecture, National University of Singapore, 20 January 2016, 5 <https://www.courtsofnz.govt.nz/speechpapers/HJP.pdf>.
[69] Palmer, above n 68, 7.
[70] Tamanaha, above n 1, locs 1421-1422.
[71] It would certainly have contravened the proportionality principles in Articles 20 and 21 of the Magna Carta: see section 3.2.1.

bound order established and maintained by government."[72] Thus, "often the rule of law is discussed in a manner that claims its own legitimacy without respect to whether the law is just or conforms to the interests of the community."[73]

One disturbing consequence of the formalistic interpretation is that the rule of law can very easily become rule *by* law. This, of course, is something that is observed in autocratic states. Tamanaha notes that "[r]ule by law carries scant connotation of legal limitations on government, which is the *sine qua non* of the rule of law tradition",[74] and cites China as a culprit.[75] This view is endorsed by Carothers, who claims that:[76]

> … [s]ome Asian politicians focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power. ... [T]his narrow conception is built into what has become known as Asia-style democracy.

In a similar context, when discussing the application of the rule of law in the context of Article 13 of the Constitution of the former USSR,[77] the Venice Commission made a very perceptive observation (which, as will be seen in Chapter 4, is particularly pertinent to the Maldives):[78]

> Here there was no general concept of the rule of law, but a much narrower notion of strict execution of the laws, based on a very positivistic approach. This forbade going beyond the first stage of the definition of the rule of law, "rule by law", or "rule by the law". ... *This conception may still be enshrined in practice and prevent the development of a more comprehensive definition of the rule of law; law is more easily conceived as an instrument of power than as a value to be respected*. In other words, *especially in new democracies, the ... values of the rule of law still need "sedimentation"*, that is that they have to become part of day to day practice and, in the words of Valery Zorkin, "legal awareness".[79]
>
> (emphasis added)

[72] Tamanaha, above n 1, locs. 1367 and 1579-1580.
[73] Tamanaha, above n 1, loc. 2036.
[74] Tamanaha, above n 1, loc. 1346.
[75] See also Kevin Holmes, "The Politics of the Improper Use of Double Tax Treaties: China Waves Red Flags", [2011] *British Tax Review*, 307, 308-312.
[76] Thomas Carothers, "The Rule of Law Revival," (1998) 77(2) *Foreign Affairs*, 3 <https://www.foreignaffairs.com/articles/1998-03-01/rule-law-revival>. See also Rajah, above n 32.
[77] Article 13 stipulated that "[s]upreme supervisory power over the strict execution of the laws by all People's Commissariats and institutions subordinated to them, as well as by public servants and citizens of the U.S.S.R., is vested in the Procurator of the U.S.S.R."
[78] Venice Commission, above n 36, 8.
[79] V.D. Zorkin, "Rule of Law and Legal Awareness", in Francis Neate and Holly Nielson (eds), *The World Rule of Law Movement and Russian Legal Reform* (Moscow City Chamber of Advocates, Moscow, 2007), 46.

3.2.1.3 Natural law

If a strictly positivist approach to the law ultimately results in rule by law, the rule of law is sterile. For that situation to be averted, the law itself must be based on, or justified by, some underlying, more fundamental basis, which embraces the common good. Natural law posits that those reasons or justifications are moral standards, or logic or reason. Tamanaha notes that, in the classical period and the Medieval period, the supremacy accorded to the rule of law was directly linked to the religious based belief – "Christian or Catholic in origin"[80] – that the content of the law was morally right and was oriented to the good of the community.[81]

In fact, the morality-based notions of natural law can be traced back much earlier than Christianity or Catholicism. The moral code expounded by the Ten Commandments is believed to have been transmitted to Moses on Mt Sinai in 1300 BC.[82] Even earlier, Hammurabi, the sixth king of Babylon enacted the "Code of Hammurabi" during his reign from 1792 BC to 1749 BC. That code was based on notions of justice and equality. Its prologue stated that the code was written "to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak ... to further the well-being of mankind."[83]

Greek philosophers like Homer, Plato and Aristotle developed notions of natural or divine-inspired law. Gibbons observes that Plato's *Laws* "describes a cosmology in which human lawgivers imitate the gods by ruling over human beings for the purpose of promoting a rational desire for good ... . The idea that the norms of human morality have a cosmological basis would shape Stoic thought subsequently."[84] Thus, Aristotle argued that "[h]e who commands that law should rule may be regarded as commanding that God and reason alone should rule."[85]

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[80] Birgit Krawietz , "Introduction", in Birgit Krawietz and Helmut Reifeld (eds.), *Islam and the Rule of Law – Between Sharia and Secularization* (Konrad Adenauer Stiftung, Berlin, 2008), 10.
[81] Tamanaha, above n 1, locs. 2037-2038.
[82] Bernard Grun, *The Timetables of History* (Simon & Schuster, New York, 1991), 4.
[83] Constitution Society, *The Code of Hammurabi* <http://constitution.org/ime/hammurabi.htm>.
[84] Kathleen Gibbons, "Stoicism", in Michael T Gibbons (ed.), *The Encyclopedia of Political Thought* (John Wiley & Sons Ltd, 2015), 2.
[85] K.N. Saikia, "Philosophy of Natural Law", (1996) *JTRI Journal* (September), 3.

Making allusions to the role of God, later Cicero most famously claimed that:[86]

> … [t]here is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. ... This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. ... [I]n all times and nations this universal law must for ever reign, eternal and imperishable. It is the sovereign master ... . God himself is its author, – its promulgator, – its enforcer. He who obeys it not, flies from himself, and does violence to the very nature of man.

Later still, Aquinas interpreted law in similar terms: "an ordinance of reason for the common good made by him who has the care of the community."[87]

It is the moral standards, or logic or reason, that make formal legal rules rationally binding on individuals in a society. In other words, for a valid legal system to obtain, laws passed by a Legislature must have recourse to "higher" or "more fundamental" norms. Thus, natural law can be regarded as a formal set of legal rules that arise out of a moral or reasoned code of conduct (which is an informal concept).

Hayek observed that the rule of law is "effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority."[88] Thus, the rule of law goes beyond mere statements of legal rules; rather, it obtains its authority from its moral and political underpinnings. If that were not the case, rule by law – rather than the rule of law – becomes a real possibility.

This is the other extreme of Cass's spectrum of interpretations of the rule of law, which introduces the notion of justice: "[a]t another extreme are conceptions of the rule of law that would make the concept synonymous with *justice*. These conceptions see the widespread

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[86] Francis Barham, *The Political Works of Marcus Tillius Cicero; Comprising His Treatise on the Republic; and His Treatise on the Laws. Translated from the Original, with Dissertation and Notes. In Two Volumes* (Edmund Spettigue, London, 1861), Vol. 1, Book III, 270.
[87] Thomas Aquinas, *Treatise on Law (Summa Theologica I-II)*, Article 4, Objection 3, 160 <http://www.sophia-project.org/uploads/1/3/9/5/13955288/aquinas_law.pdf>.
[88] F.A. Hayek, *The Constitution of Liberty* (University of Chicago Press, Chicago, 1960), 218.

appeal of the rule of law as dependent on the morality of the laws that rule."[89] (emphasis in original)

But the notion of justice itself is a nebulous concept. Rousseau attempts to resolve the determination of justice in his theory of social contract. This philosophy postulates that the general will of the people determines what is just and unjust, and that general will applies to each individual because it comes from all alike.[90]

Widner observes that the rule of law "usually connote[s] the antithesis of disorder, vigilantism, corruption, abuse of power, and arbitrariness."[91] As well as exhibiting the characteristics of predictability, publicity, prospectivity, due process, fair hearings, impartial adjudicators, she contends that:[92]

> … the concept of the rule of law also contains an appeal to a sense of fairness not satisfied by a "law of rules" based solely on adherence to statutes and careful attention to procedure. Content or substance mattered too. As the example of apartheid in South Africa brought home forcefully, due process in the presence of abhorrent statutes also offended the sense of justice.

The appeal to a higher moral authority is also reflected in judicial pronouncements. For example, in *R. v Secretary of State for the Home Department, ex parte Pierson*, Lord Steyn considered that "… Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."[93]

In the international context also, recourse has been made to the moral underpinnings of the rule of law. For instance, we saw in section 3.1 that the preamble to the Statute of the Council of Europe harks back to natural law by reference to the Council's "devotion to the spiritual and moral values", which are formulated as the common heritage of the member states and "the true source of individual freedom, political liberty and the rule of law ...".[94]

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[89] Cas, above n 63, 2.
[90] Nicholas Dent, "Rousseau, Jean-Jacques", in Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford University Press, Oxford/New York, 1995), 780.
[91] Jennifer A. Widner, *Building the Rule of Law* (W.W. Norton & Co., New York & London, 2001), 27.
[92] *Ibid*.
[93] [1998] AC 539, 591.
[94] Council of Europe, above n 10.

It is therefore clear that the notion of supremacy of the law, as an element of the rule of law, cannot be confined to a formalistic interpretation without risking transmission of the rule of law to rule by law. Instead, if the aspirations of the authors of such founding documents as the Magna Carta, the liberalists and other values-oriented legal philosophers are to be achieved, in appropriate circumstances there must be room for recourse to the principles that underlie the stated law, so that the rule of law can apply in the manner desired in modern, progressive societies. As Thomas and Thomas put it:[95]

> … [i]f the rule of law remains the one rational tool of mankind standing between anarchy and total oppression, it must be responsive to the ethical sense of fairness and justice of those it governs. *Without this ethical underpinning the best that can be said for the rule of law is that its main function is to maintain order, and it matters not what type of order is maintained. An essential purpose of a true rule of law, therefore, is that the members of the legal community are willing to live together under rules which embody the value of order and the value of justice* ... . These then are the attributes of a true rule of law: a society or community consensus seeking to secure justice – that which is felt to be right, reasonable, and proportionate for a particular time and place; and order which requires continuity, certainty, consistency – a balance between rights and duties, effectiveness and restraint on power, plus the ability to meet changing conditions.
>
> (emphasis added)

3.2.2 Separation of powers and judicial independence

In a democracy, the rule of law goes hand-in-hand with the separation of powers between the Legislature, the Executive and the Judiciary. For the liberalist, the separation of powers between the Legislature, Executive and Judiciary "promotes liberty by preventing the accumulation of power in any single institution, setting up a form of competitive interdependence" in the machinery of a state.[96]

Locke's thesis postulates that separation of powers between the Legislature and the government is necessary to ensure that the government is bound by the laws passed by the Legislature because, if that were not the case, "the very people who have the power to make laws [and] also ... have the power to enforce them ... might come to exempt themselves from obedience to the

[95] Ann Van Wynen Thomas and A. J. Thomas Jr., *A World Rule of Law – Prospects and Problems* (SMU Press, Dallas, 1975), 4-5, 8.
[96] Tamanaha, above n 1, loc. 531.

laws they had made, and to adapt the law – both in making and enforcing it – to their own private advantage."[97]

In 1777, Montesquieu was also advocating the separation of powers, claiming that "power should be a check to power."[98] Montesquieu's philosophy was cemented in the French Declaration of the Rights of Man and of the Citizen (1789),[99] Article 16 of which states that "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."

This ideal is complete with the third pillar of the separation of powers – namely, an independent Judiciary – which "insures that a consummately legal institution is available to check on the legality of government action."[100] Tamanaha contends that "the thrust of the institutional design supporting the rule of law - especially an independent judiciary - is to insulate judges from political forces in order that they may render decisions based exclusively upon the law."[101]

Moreover, Coulson considers that a powerful and independent Judiciary is "the only real guarantee of individual liberty in any system."[102] Again, there is no liberty if judicial power is:[103]

> … not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be subject to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Bingham reiterates the need for independent judges as an essential ingredient of the rule of law. He interpreted Dicey's first conception of the supremacy of law[104] as requiring the need for "a proven breach of the established law of the land [to] be a breach established before the ordinary courts of the land, not a tribunal of members picked to do the government's bidding, lacking ... independence ... ."[105]

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[97] Locke, above n 43, 46.
[98] Montesquieu, above n 57, Book XI, section 4, 172.
[99] See <http://avalonlaw.yale.edu/18th_century/rightsof.asp>.
[100] Tamanaha, above n 1, loc. 533.
[101] Tamanaha, above n 1, loc. 1552.
[102] N.J. Coulson, "The State and the Individual in Islamic Law", (1957) 6 *International and Comparative Law Quarterly*, 49, 57.
[103] Montesquieu, above n 57, Vol. 1, Book VI, section 6, 173.
[104] See section 3.2.1 and above n 54.
[105] Bingham, above n 9, 3.

But to be effective, separation of powers requires that institutional arrangements are in place that protect the Judiciary from interference by state actors. Like Bingham, Tamanaha argues that this is achieved by:[106]

> ... selection of judges based upon legal qualifications (legal training and experience), long-term appointments for judges, procedural and substantive protections against the removal of judges, reasonable compensation for judges, and sufficient resources to maintain a functioning court system (support staff, books, courtrooms, etc.). ... These institutional factors were not alone enough, however, to assure the autonomy of judges. They were *complemented by attitudes external to the judiciary, among government officials and the public at large, that it is improper to meddle with the judiciary* as it fulfills its role interpreting and applying the law, *matched by reciprocal attitudes among judges that it is improper to allow themselves to be influenced by considerations or pressure external to the law*. The separation of powers did more than protect the judiciary; it simultaneously lessened the potential for abuse that might come from judges' having too much power. Judges depended upon cooperation from other branches of the government ... for the enforcement of their decisions.
>
> (emphasis added)

At the international level, an independent Judiciary has also been considered a vital component of the rule of law. The UN Declaration on the Rule of Law states that the UN is "convinced that the independence of the judicial system ... is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."[107]

In the context of this thesis, the safeguard of a separate and independent Judiciary (if there were one) is particularly relevant to the propriety of pronouncements, determinations and actions by Maldives tax officials in the course of applying tax laws enacted by the Maldives Parliament.

3.2.3 Equal application of the law

In principle, the law should apply equally to all: there must be no discrimination in the administration of justice.[108] For Voigt, this is the most important characteristic of the rule of

[106] Tamanaha, above n 1, locs. 1805-1811.
[107] UN, above n 3, Article 13.
[108] UN, above n 107.

law.[109] Again, Cicero promulgated this principle in 44 BC: "in a free people, ... all enjoy equal rights before the law ...".[110]

Rousseau contended that the laws must be general in application. To clarify, he added "[w]hen I say that the object of laws is always general, I mean that law considers subjects collectively and considers kinds or actions, never a particular person or action."[111]

Later, Dicey asserted that no-one is above the law; rather, everyone is equally subject to the law, which Dicey referred to as "the idea of legal equality"[112] or "the universal subjection of all classes to one law administered by the ordinary Courts",[113] and commonly referred to today as "equality before the law".

In 1949, in *Railway Express Agency Inc. v New York*, Justice Jackson put it this way in relation to the administration of law by public officials:[114]

> There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Again, equal application of the law is also recognised in the UN Declaration on the Rule of Law, wherein the UN General Assembly "recognize[s] that all persons, institutions and entities, public and private, including the State itself, are accountable to just, *fair and equitable laws* and are *entitled without any discrimination to equal protection of the law*."[115] (emphasis added).

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[109] Stefan Voigt, "Making constitutions work: Conditions for maintaining the rule of law", (1998) 18(2) *Cato Journal*, 191, 196 and Stefan Voigt, "Islam and the Institutions of a Free Society", (2005) 10(1) *The Independent Review*, 59, 62.
[110] M. Tullius Cicero, *De Officiis – Book 1: Moral Goodness*, translated by Walter Miller (Harvard University Press, Cambridge, 1913), 89.
[111] Jean-Jacques Rousseau, *The Social Contract* (1762, translated by Jonathan Bennett, 2017), Book 2, section 6, 18 <http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>.
[112] Dicey, above n 22, 114.
[113] *Ibid.*
[114] 336 US 106, 112–13 (1949).
[115] UN, above n 3, Article 2.

3.2.3.1 Discretionary powers

Dicey held the view that the rule of law (and the supremacy of the law of the Legislature, in particular) did not extend to the exercise of discretionary power by the Executive because to allow a state discretionary power would result in an arbitrary exercise of power.[116] That interpretation has not escaped criticism. Other commentators contend that discretionary powers are a necessary part of decision making, which is integral to administration of laws.[117]

Nowadays, it is trite that some degree of discretion needs to be exercised by government ministers and officials in order for matters of state to function smoothly because, typically, the complexities of social democratic states make it impossible for statutes to embrace all circumstances surrounding the matters that they are intended to address.[118] Hence, a government's use of subordinate legislation in the form of regulations, determinations and similar sorts of notices.

Hayek observed that modern governments must exercise discretion if they are to function efficiently: "[n]obody disputes the fact that, in order to make efficient use of the means at its disposal, the government must exercise a great deal of discretion."[119] But he adds that "[t]his, however, is a discretionary power which can and must be controlled by the possibility of a review of the substance of the decision by an independent court. This means that the decision must be deducible from the rules of law ... ."[120]

Bingham concludes that "[t]he rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."[121] Therefore, government officials must operate within a limiting framework of the law. This

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[116] Dicey, above n 22, 110.
[117] See, for example, Tamanaha, above n 1, loc. 1431.
[118] Even Aristotle alluded to this problem in 350 BC, albeit not in the context of administrative discretion. He considered that "law is always a general statement, yet there are cases which it is not possible to cover in a general statement. … .": Aristotle, *Nichomacheon Ethics*, Book V, Chp. 10, secs 3-7 (translated by Harris Reckham, Perseus Digital Library, 1934) <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%253Atext%253A1999.01.0054%253Abook%253D5>.
[119] Hayek, above n 88, 213.
[120] *Ibid*.
[121] Bingham, above n 9, 54.

means that ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not to exercise them unreasonably.[122] Thus, in accordance with the rules of natural justice, "the mind of the decision-maker should not be tainted by bias or personal interest …".[123]

Similarly, Tamanaha contends that "the rule of law not man" says that government officials must sublimate their views to the applicable laws …".[124]

3.2.4 Accessibility, intelligibility and predictability

The first of Bingham's eight "ingredients" of the rule of law[125] is that the law must be accessible and, as far as possible, intelligible, clear and predictable.[126] This feature was prescribed by Locke as early as 1690 (the "ruling power ought to govern by laws that have been published and taken in ..."),[127] and has been endorsed by other commentators and organisations. For example, the first of the World Bank's five "critical elements" of the rule of law:[128]

> … is "a set of rules known in advance [which] implies three elements: the existence of a coherent set of rules; their communication with accuracy, clarity, and effectiveness, and the application *only* of rules known in advance (nonretroactivity of laws)."
>
> (emphasis in original)

In 1944, Hayek also espoused that:[129]

> … [s]tripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

[122] Bingham, above n 9, 60.
[123] Bingham, above n 9, 49.
[124] Tamanaha, above n 1, loc. 2034.
[125] Bingham, above n 9, 35.
[126] Bingham, above n 9, 37.
[127] Locke, above n 43, 44.
[128] World Bank, above n 17, 30.
[129] F. A. Hayek, *The Road to Serfdom* (Routledge, Abington, 1994), 75-76.

Tamanaha also argues that "the laws be declared publicly in clear terms in advance, be applied equally, and be interpreted and applied with certainty and reliability."[130] Following Hayek, he links this requirement to what he calls "legal liberty", contending that it:[131]

> … promotes liberty by enabling individuals to predict when they will be subject to coercion by the state legal apparatus, allowing them to avoid legal interference in their affairs by not running afoul of the law. ... The rule of law had the virtue of placing limits on government actions, and rendering them more predictable. ... An indeterminate and unpredictable legal system would fail in this respect.
> …
>
> The rule of law in [the formal legality] sense entails public, prospective laws, with the qualities of generality, equality of application, and certainty.

Certainty also requires that those who are subject to the law be able to predict reliably what legal rules will be found to govern their conduct and how those rules will be interpreted and applied.[132]

Again, we see these criteria manifested in the UN Declaration on the Rule of Law, which states that the UN "recognize[s] the importance of fair, stable and predictable legal frameworks."[133]

3.2.5 Judicial dispute resolution mechanism and due process

A means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which parties themselves are unable to resolve.[134] Bingham states that "anyone who is liable to have an adverse decision made against him should have a right to be heard."[135] According to Tamanaha, this is a requirement of formal legality: "[t]he fullest procedural sense of formal legality also includes the availability of a fair hearing within the judicial process."[136] Higgins goes so far as to say that "the absence of a compulsory recourse to the Court falls short of a recognisable "rule of law" model".[137]

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[130] Tamanaha, above n 1, loc. 511.
[131] Tamanaha, above n 1, locs. 515, 1190, 1317 and 1733.
[132] Tamanaha, above n 1, loc. 968.
[133] UN, above n 3, Article 8.
[134] Bingham, above n 9, 85.
[135] Bingham, above n 9, 49.
[136] Tamanaha, above n 1, loc. 1735.
[137] Rosalyn Higgins, "The Rule of Law: Some Sceptical Thoughts", British Institute of International and Comparative Law (16 October 2007), 6–7.

Similarly, the UN Declaration on the Rule of Law states that the UN:[138]

> 12. ... commit[s] to an effective, just, non-discriminatory and equitable delivery of public services pertaining ... to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid
> [and]
> 14. ... emphasize[s] the right of equal access to justice for all ... .

As to due process, Urabe argues that the "law exists to protect individual rights and liberties both in substance *and procedure*" (emphasis added).[139] Due process in administration of the law is a well-established component of the rule of law. We saw in section 3.2.1 that the 1354 amendment to the Magna Carta incorporated a requirement for due process in the administration of justice and that the United States Bill of Rights 1791 prohibited the deprivation of life, liberty or property without due process of law.[140]

Shapiro and Levy consider that "the requirement of due process is the core expression of [the] rule of law ideal".[141] It is an essential safeguard of the rule of law.[142] This was to "limit arbitrary abuses of powers of government from whatever source abuse might come".[143] In other words, "[d]ue process incorporates a specific mechanism to ensure that the government acts in accordance with law – fair procedures."[144]

Accordingly, as we have seen, at the international level the requirement for due process has been included in, for example, the UNCHR resolution on democracy and the rule of law.[145]

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[138] UN, above n 3.
[139] Urabe, above n 23.
[140] This requirement was also included in the Fifth and Fourteenth Amendments to the United States Constitution.
[141] Sidney A. Shapiro and Richard E. Levy, "Government Benefits and the Rule of Law: Toward a Standards-based Theory of Due Process", (2005) 57(1) *Administrative Law Review*, 107, 112.
[142] Shapiro and Levy, above n 141, 110.
[143] Rodney L. Mott, *Due Process of Law* (Da Capo Press, 1973), 159.
[144] Shapiro and Levy, above n 141.
[145] UNCHR, above n 35.

3.2.6 Judicial impartiality

Impartiality of the Judiciary is belaboured in the literature: "liberal theorists uniformly allocate a special place for an independent, neutral Judiciary as the final preserve of the rule of law".[146] Put simply, it means that judges must not be biased for any reason in their decision making. They must take a neutral stance based purely on the facts of the case before them. In Tamanaha's words, "[j]udges must be committed to fidelity to the law, and must have as their primary interpretive orientation to seek out the correct understanding of the legal rules."[147] This also means that they must be fair to the parties that appear before them.

Once more, Cicero had something to say about this element of the rule of law: "[i]t is peculiarly the place of a magistrate to [and] it is his duty ... to enforce the law, to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust."[148]

Judicial impartiality is closely meshed with independence of the Judiciary. In Bingham's view, there is a requirement of:[149]

> … judicial independence, including that part of the separation of powers that requires that judges are independent of the executive, as well as anyone or anything other than the government, i.e. any kind of vested interests which would lead them to decide matter otherwise than impartially applying the law to the facts of a case. They must "neutralize, any extraneous considerations which might bias their judgment …".

Judicial impartiality was documented in the 17th century. Sir Mathew Hale, the Chief Justice of the King's Bench,[150] compiled a set of rules, which he said were to guide him in his conduct as a judge. These included:[151]

> (1) That … the administration of justice … be done … [u]prightly …
> …
> (4) That in the execution of justice, I carefully *lay aside my own passions*, and not give way to them however provoked.
> …
> (6) That I suffer *not* myself to be *prepossessed with any judgment* at all, till the whole business and both parties be heard.
> (7) That I never engage myself in the beginning of any cause, but reserve myself *unprejudiced* till the whole be heard.

[146] Tamanaha, above n 1, loc. 871.
[147] Tamanaha, above n 1, loc. 1295-1298.
[148] Cicero, above n 110, 127.
[149] Bingham, above n 926, 93.
[150] From 1671 to 1676.
[151] Bingham, above n 926, 20. See also Aquinas, above, n 87, 76.

> …
> (10) That I be *not biased* … .
> …
> (12) … I keep myself *exactly according to the rule of justice*. …
> …
> (16) To *abhor all private solicitations* of whatever kind soever and by whomsoever … .
>
> (emphasis added)

Bingham observes that "the judges' role in maintaining the rule of law is crucial, and Hale gave a valuable and relatively early indication of how they should perform their duties."[152] Lord Chief Justice Hewart's famous 20th century dictum follows from these precepts; namely, "jusitice should not only be done, but should manifestly and undoubtedly be seen to be done."[153]

In the United States Justice Marshall had also observed that "[c]ourts are mere instruments of law, and can will nothing."[154] As Tamanaha puts it, "judges – and legal officials more generally – must interpret and apply the law in an unbiased fashion"[155] and "insure that the outcome of a case does not turn on which person happens to be the judge."[156]

All of this means that the right people must be appointed as judges. Again, it was Aristotle who first insisted that the character and orientation of the judge is the essential component of the rule of law.[157] Tamanaha describes the appropriate appointment and role of judges in terms of ability and neutrality:[158]

> The standard twofold construction is, first, to identify the judiciary (comprised of legal experts) as the special guardians of the law, and, second, to deny the presence of the individual who is the judge. ... [T]he judge becomes the law personified. In the ideal, *the judge is to be unbiased, free of passion, prejudice, and arbitrariness, loyal to the law alone. ... [T]he judge has no will*. ... [N]o other government official undergoes goes this necessary transformation in which the subjective individual is replaced with the objective judge.
>
> (emphasis added)

[152] Bingham, above n 9, 22.
[153] *R. v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256, 259.
[154] *Osborn v Bank of United States* 22 US (9 Wheat.) 738, 866 (1824).
[155] Tamanaha, above n 1, loc. 1927.
[156] Tamanaha, above n 1, loc. 1933.
[157] Tamanaha, above n 1, loc. 1821.
[158] Tamanaha, above n 1, loc. 1789.

He argues that:[159]

> … [i]ncreasingly assertive courts making decisions with political ramifications … may be detrimental to the rule of law itself, when the judiciary is highly politicized, intimidated by external pressure, singularly motivated by personal or group agendas, corrupt, or lacking in expertise or experience.

This point is important because, as we shall see in Chapter 4, these characteristics are often absent from the Judiciary in the Maldives.

Thus, we move from the rule of law to the "rule of man":[160]

> If judges consult their own subjective views to fill in the content of the rights, the system would no longer be the rule of law, but the rule of the men or women who happen to be the judges. Substitute one judge for another with different views, or get a different mix of judges, and the result might be different.

Heydon goes further, contending that "judicial activism has created a threat to the rule of law."[161]

At the international level, the Declaration on the Rule of Law states that the UN is "convinced that the ... impartiality and integrity [of the judicial system] is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."[162]

3.3 Principles analogous to the rule of law under Islamic *shari'ah*

The discussion of the origins and meaning of the rule of law in sections 3.1 and 3.2 was from the Western perspective. One may validly question why such a perspective of the rule of law, which at its heart is liberty in Western secular democracies, is appropriate in a state that follows the teaching of Islam.[163] It is trite that in Islam all sovereignty belongs to God (*Allah*) and, as a

[159] Tamanaha, above n 1, locs. 1602 and 1606.
[160] Tamanaha, above n 1, loc. 1534.
[161] J. D. Heydon, "Judicial Activism and the Death of the Rule of Law", (2004) 10(4) *Otago Law Review*, 493, 515.
[162] UN, above n 3, Article 13.
[163] Simply because a state's predominant religion may be Islam, it does not necessarily follow that the state adopts Islamic *shari'ah* as its basis of law. For example, Azerbaijan, Tajikistan, Chad, Somalia, and Senegal are Muslim

matter of doctrine, it is incumbent upon all Muslims to respect and obey God's laws, which are expounded in the *Qur'an*.[164] The *Qur'an* requires Muslims to obey their rulers.[165] The corollary is that Muslim rulers must meet their obligations to their people, which entails the administration of justice.[166]

The dominance of Western thought over the concept of the "rule of law" *per se* – and that among Western states belief in the rule of law is orthodoxy[167] – might lead one to conclude that the West has a monopoly over the concept. But it is a fallacy to think that is so. Welton contends that:[168]

> … the concept embroiled in the term "rule of law" is in fact a legal and political value shared by both the West and Islam ... . The Islamic world, too, has a devotion to the rule of law that has prevailed through much of its history ... .

In his discussion of the origins of trusts, Gousmett makes the telling point that the general presumption in most texts on the subject is that trusts are a common law concept that developed in England over many centuries.[169] Instead, the English common law based trust may have been predated by a concept of trust that emanated from Islamic jurisprudence. Indeed, the same may be said of the concept of the rule of law.

Just as the foundation of Western law lies in Christian roots, the foundation of Islamic *shari'ah* law lies in Islam, but more profoundly than the link between Christianity and the law in the West. While the law in the West became increasingly secularised and divested of its Christian connection over time, resulting in separation of religion and the state, Islamic law has remained strongly wedded to the religion, so that a religious-based mandate, via *shari'ah*, is embodied in the operation of the state. However, that does not mean that Muslim states necessarily strictly adopt *shari'ah* as their pervasive law (although a very few, such as Saudi Arabia and Iran, do so). Rather, most Islamic states embrace some aspects in relation to certain societal functions

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majority countries, which do not do so: see Toni Johnson and Mohammed Aly Sergie, "Islam: Governing Under Sharia", Council on Foreign Relations (25 July 2014) <https://www.cfr.org/backgrounder/islam-governing-under-sharia>.

[164] The pure word of God, according to Islam.

[165] *Qur'an* 4:59.

[166] *Qur'an* 5:42.

[167] Tamanaha, above n 1, loc. 43

[168] Mark David Welton, "Islam, the West, and the Rule of Law", (2007) 19(2) *Pace International Law Review*, 169, 172, 173.

[169] Michael Gousmett, "Origins of the trust", [2017] *New Zealand Law Journal* 107, 107.

(e.g. family, succession and, to a lesser extent, criminal matters), but adopt Western legal norms in relation to most other matters. The Maldives falls into the latter category.

Weeramantry argues that Islam adopts a theocentric approach, which is a theoretically different foundation from that on which Western law has been built. Discussing the concept of human rights, he contends that, unlike the Western conceptualisation of the rule of law, Islam:[170]

> … is not preoccupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man and his Maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place.
>
> ... Islamic human rights doctrine deals primarily with God and man and is theocentric rather than anthropocentric. ... [I]t emphasises the concept of duty rather than that of rights.

Islamic law emanates from, principally, the *Qur'an* – the "bedrock" of Islamic law[171] – and also from the *sunna*[172] and *hadith*[173] of the Prophet Mohammed. In short, in Islam the origin of the law is divine and Qur'anic principles apply to every aspect of law and living.[174]

Weeramantry observes that:[175]

> … [t]he study of law and theology in Islam went hand-in-hand. No distinction was made between rules of law and rules of religion. ... [T]he law was never, in the Islamic system, divorced from the word of God and ... a built-in axiom of ... legal work anchored [it] always to a religious base. ... [T]he *Qur'an* and the traditions of the Prophet (*Sunna*) were the roots of the law, while the opinions of jurisconsults (*ra'y*) could be brought in by way of supplementation where the main sources were silent. ... *[The Qur'an is] an entire moral code and the construction of every [Islamic] legal principle [has] necessarily to be related to this moral base.*
>
> (emphasis added)

Although the *Qur'an* itself infrequently spells out legal rules,[176] it does enunciate (repeatedly) principles of righteousness, most notably (in a legal context) justice and fairness.[177] The *Qur'an*

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[170] C. G. Weeramantry, *Islamic Jurisprudence – An International Perspective* (The Other Press, Petaling Jaya, 2nd ed., 2001), 116-117.
[171] Weeramantry, above n 170, 5.
[172] Rules derived from the sayings, conduct, way of life, practice and example of the Prophet Mohammed.
[173] Traditions or stories of the Prophet Mohammed.
[174] Weeramantry, above n 170, 27.
[175] Weeramantry, above n 170, 30-32.
[176] Coulson points out that "no more than approximately eighty verses [of the 6,236 verses in the *Qur'an*] deal with legal topics in the strict sense of the term" (see N. J. Coulson, *Islamic Surveys – A History of Islamic Law* (Edinburgh University Press, Edinburgh, 1964), 12). The two primary areas of legal rules addressed in some detail in the *Qur'an* relate to family law and succession law.
[177] See, for example, *Qur'an* 5:9, 16:9, 53:38-39 and 57:25.

specifically requires rulers to carry out their role with justice.[178] Krawietz posits that justice is "a normative principle that governs and characterises all Islamic law."[179] Welton contends that "[a] rule of law that is not somehow associated with the promise of justice, even if not part of its definition, is inconsistent with Islam and cannot survive."[180] He considers that a Western interpretation of the rule of law that embraces equality and justice is consistent with core Islamic values. Thus, Weeramantry argues that the Islamic approach to the rule of law circumvents the formalistic approach adopted in Western legal thought by some jurists and legal scholars:[181]

> It is a mistake ... to look upon the formalisation of procedures as a hallmark of the availability of legal redress. When a system like the Islamic is permeated with the concepts of equality, equity and justice under the law, it is wrong to search for formalities of judicial procedure or structure as necessary prerequisites to the availability of redress.

Krawietz also observes that "it is generally believed that [the] foundation [of *shari'ah*] was laid in the Koran".[182] Thus, "the ultimate authority or sovereignty does not lie with human authorities, but in God's law, known as Shariah".[183]

However, while that might be the case, the principles espoused in the *Qur'an* needed to be interpreted by human beings, so that Islamic jurisprudence, like Western jurisprudence, involves intercession by man and, therefore, is not purely celestial. In a ""divine nomocracy" ... [i]t is true that the Shariah is God-made law, but on a more detailed and operational level it is interpreted by authorities (*ijtihad*) as well as by authorities in public affairs."[184] Similarly, Tellenbach observes that:[185]

> … [i]f we look at the reality of Islamic law we find quite a number of phenomena that suggest that there is a great deal of the human element interleaved between the divine origin of the law and its daily practice. ... [T]he Koran is not a code of law ... . It contains only a few immediate legal norms ... . The Sunna ... is similarly limited. ... [Islamic] jurisprudence is a matter for human beings, even if its fundamental purpose is to divine the will of God.

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[178] See, for example, *Qur'an* 38:26.
[179] Birgit Krawietz, "Justice as a Pervasive Principle in Islamic Law", in Birgit Krawietz and Helmut Reifeld (eds.), above n 18, 34.
[180] Welton, above n 168, 180.
[181] Weeramantry, above n 170, 119.
[182] Krawietz, above n 179, 38.
[183] Masykuri Abdillah , "Ways of Constitution Building in Muslim Countries – The Case of Indonesia", in Birgit Krawietz and Helmut Reifeld (eds.), above n 18, 53.
[184] Abdillah, above n 183, 54.
[185] Silvia Tellenbach, "Muslim Countries Between Religious and Secular Law", in Birgit Krawietz and Helmut Reifeld (eds.), above n 18, 115.

Bälz also puts the ball squarely in the court of Muslims themselves. He argues that it is "the responsibility of man for the concrete content of legal rules. ... It is always man who puts the divine ordinances into practice."[186] While law and religion are inseparable in an Islamic state, there is "the dichotomy of *shariah* (the divine, revealed law) and *fiqh* (jurisprudence, the mundane effort to understand interpret and implement the Shariah)."[187] Bälz cites the Egyptian Supreme Constitutional Court to support this view. In 1993, that court:[188]

> … made a distinction between absolute and relative principles of the Islamic shari'a. ... [O]nly the principles 'whose Origin and significance are absolute', ... i.e. which represent incontestable Islamic norms, be it because of their source or their meaning, must be applied. They are fixed, they cannot he subject to interpretative reasoning (*ijtihad*) and cannot evolve over time. They represent the fundamental principles and the fixed foundation (*thawabit*) of lslamic Law.
>
> Relative rules ... , conversely, can evolve over time and in different places, are dynamic, give rise to different interpretations and are adaptable to the nature of, and the changing needs in, society. It is up to the person in authority ... , i.e. the legislator, to interpret and establish the norms related to such rules, guided by his individual reasoning and in the interest of the shari'a. Such an interpretative effort should be based on reasoning and will not be limited by any previous opinion.

3.3.1 Supremacy of the law

The supremacy of the law was observed in the first Islamic state, Medina. In this respect, Brown notes that:[189]

> … [t]he Islamic state in Madinah was ... an organized society based on 'rule of law'. The supremacy of 'rule of law' is a distinguishing factor between a 'state' and other forms of organized political societies. It presupposes that all organs and agencies of the government are subject to and will abide by the rules of the same legal system which govern the individual citizen.

Rehman *et al* observe that:[190]

> … [t]he Prophet Muhammad (PBUH) was the executive head, legislature and Chief Justice of the Islamic State. He did not consider himself to be above the law. He sought to establish

[186] Kilian Bälz, "Shariah versus Secular Law?", in Birgit Krawietz and Helmut Reifeld (eds.), above n 18, 122.
[187] *Ibid*.
[188] *Al-Mahkama ad-Dustriyya al-'Uly* [Supreme Constitutional Court], Case 7/8e, 15 May 1993. Nathalie Bemard-Maugiron, "Courts and the Reform of Personal Status Law in Egypt – Judicial divorce for injury and polygamy", in Elisa Giunchi (ed.), *Adjudicating Family law in Muslim Courts* (Routledge, Abington, 2014), 106, 112.
[189] Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY, Albany, 2002), 168-69.
[190] Ata ur Rehman, Mazlan Ibrahim and Ibrahim Abu Bakar, "The Concept of Independence of Judiciary in Islam", (2013) 4(2) *International Journal of Business and Social Science*, February, 67, 74.

> this by his own acts and precepts and established an important rule of law that head of an Islamic State could be sued both as a private individual and also in respects [*sic*] of his public acts.

Al-Saleh argues that supremacy of the law in an Islamic context means that "all acts, procedures, dispositions and final decisions of the public authorities at any level cannot be valid and legally binding as to the people they affect, save to the extent that they are consistent with the law."[191] Thus, Islamic jurists have referred to the notion of the supremacy of the law as the "principle of legitimacy".[192] In other words, the acts of public authorities are not legitimate unless they comply with an empowering statute.

Supremacy of the law is also recognised in international declarations made by Islamic states, in terms that are rather more definitive than those that we read in various UN declarations about the rule of law. The *Universal Islamic Declaration of Human Rights* (the Islamic Declaration of Human Rights), for example, declares that God is the source of all law,[193] and adds that:[194]

> *Preamble*
> ...
> (g) ...
> (v) ... the rulers and the ruled alike are ***subject to ... the Law***;[195]
> (vi) ... obedience shall be rendered only to those commands that are ***in consonance with the Law***;
> (vii) ... all worldly power shall be considered as a sacred trust, to be ***exercised within the limits prescribed by the Law and in a manner approved by it*** ... ;
> …
> (xii) ... no one shall be deprived of the ***rights assured to him by the Law*** except by its authority and to the extent permitted by it;
> ...
>
> IV *Right to Justice*
> (a) Every person has the right to be ***treated in accordance with the Law, and only in accordance with the Law***.
> ...
> (e) It is the right and duty of every Muslim to ***refuse to obey any command which is contrary to the Law***, no matter by whom it may be issued.

[191] O.A.M. al-Saleh, "The Right of the Individual to Personal Security in Islam", in M.C. Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publications, New York, 1982), 85.
[192] See, for example, Weeramantry, above n 170, 79.
[193] Islamic Council of Europe (ICE), *Universal Islamic Declaration of Human Rights* (Paris, 19 September 1981), Preamble, para. (a). Weeramantry claims that "every one of the principles set out therein [that is, in the whole Declaration] ... can be supported on the basis of specific Islamic texts.": Weeramantry, above n 170, 113.
[194] ICE, above n 193.
[195] The "Law" means "the *Shari'ah* ... and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence" (Explanatory Note 1(b) to the Declaration).

IV *Right to Fair Trial*

...

(c) Punishment shall be awarded ***in accordance with the Law*** ...

(emphasis in bold added)

3.3.2 Separation of powers and judicial independence

While the law has been supreme in Islamic history, separation of powers and judicial independence has not always been present. It did not exist, for example, when the Prophet Mohammed ruled Medina. As a basis for the braiding of state and religion, Abdillah notes that "Muhammad [was] not merely a prophet, but also a head of state, a judge, and a military commander, so that Muslims believe that Islam does not separate religion and state."[196] Furthermore, there was no separation of powers under the first of the four "rightly guided"[197] caliphs.[198] As Lau observes, "[a]t the beginning of Islam it was the Caliph himself who administered justice. It was only under the rule of the Caliph Umar [the second Caliph] that judges were appointed. However, these judges ... [*qadis*] ... were regarded as the delegates of the Caliph or of the governor of a province."[199] This absence of separation of powers is still evident in Middle Eastern Islamic monarchies today, where the ruler maintains ultimate governing power, albeit that some of that power may be delegated to the Legislature, Judiciary and government institutions.

Separation of powers and independence of the Judiciary began with Caliph Umar bin al-Kattab, who separated the Judiciary from the Executive by appointing judges who were not also governors or state administrators.[200] He ordered his governors not to interfere with judicial proceedings.[201]

By the 16th century, Abu'l-Fath Jalal-ud-din Muhammad Akbar (more commonly known as Akbar the Great), the Mughal Emperor from 1556 to 1605, guaranteed the citizens of his

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[196] Abdillah, above n 183, 52.

[197] The term used by Sunni Muslims for the first four successors of Mohammed. They were Abu Bakar al-Siddiq (reign: 632-634), Umar bin Khattab (634-644), Uthman ibn Affan (644-656) and Ali ibn Abi Talib (656-661).

[198] See, for example, Abdulfatai O. Sambo and Hunud Abia Kadouf, "A judicial review of political questions under Islamic law", (2014) 22(1) *Intellectual Discourse*, 33, 36, 48, 49.

[199] Martin Lau, "The Independence of Judges under Islamic Law, International Law and the New Afghan Constitution", (2004) 64 *Heidelberg Journal of International Law*, 917, 920.

[200] Rehman *et al*, above n 190, 69.

[201] Rehman *et al*, above n 190, 74.

empire[202] an independent Judiciary, due process of law and fair trials.[203] Islamic jurists came to act "as negotiatory mediators between the ruling classes and the laity [and] used their moral weight to thwart tyrannous measures and at times led or legitimated rebellions against the ruling classes."[204]

Nowadays, independence of the Judiciary is also addressed in the Islamic Declaration of Human Rights: "[n]o person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an *independent judicial tribunal*"[205] (emphasis added).

Article 67 of the 1978 draft Al-Azhar Islamic Constitution (the Al-Azhar Islamic Constitution) also requires that the "state guarantee independence of the judiciary" and provides that "any encroachment upon its freedom shall be a crime."[206]

Despite Islamic scholarly writings and international pronouncements, frequently one observes in Islamic states – including the Maldives – diluted rule of law rights and freedoms being conferred on citizens in the states' constitutions. If they are robust, for various (and often spurious) reasons – principally related to excessive Executive power – those rights and freedoms are not always and consistently applied in practice. In this respect, Reifeld observes that Islamic countries:[207]

> … have various constitutional designs that are informed by Islam. As a general rule, their constitutions emphasise the principles of religious freedom, equal treatment and minority protection rather less than others that are exclusively secular in nature. In addition, most Islamic states lack democratically legitimised institutions, transparent administrative structures and, most importantly, a multi-party democracy whose pluralism might encourage a dialogue that is open and fair.

Modern history may lead one to wonder just how this Islamic-based rule of law manifests itself in, particularly Middle Eastern, Muslim states such as Iraq, Syria, Egypt, Saudi Arabia and

[202] Akbar's empire stretched from Afghanistan through the Indian sub-continent south of the Himalayas and north of (approximately) latitude 20º N to what is now Bangladesh.
[203] Weeramantry, above n 170, 121.
[204] Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton University Press, Princeton, 2004), 14, 16.
[205] ICE, above n 193, Article V(a).
[206] Islamic Research Academy of Al-Azhar (IRAAA), *A Draft Islamic Constitution* (1978), in Muhannad al-Ghazali, "Introduction to a Draft Islamic Constitution", (1981) 20(2) *Islamic Studies*, 153.
[207] Reinfeld, above n 18, 130.

Bahrain, and in Turkey. The recent history of each of these countries throws up with regularity political and secret trials, the absence of an independent Judiciary and due process, and illegal, unrestrained and politically motivated law enforcement actions. Welton's response to this question is that the rule of law in the Islamic world was "severely impaired in the nineteenth and twentieth centuries by Western colonialism and its aftermath",[208] and:[209]

> … [a]s a result of these historical developments, the rule of law remains undernourished in the Modern Islamic Middle East. In many of the successor states to the Ottoman Empire – Syria and Iraq, for example – where Islamic law has receded, one clearly sees the consequences of this history for the rule of law: arbitrary government, constitutions without constitutionalism, and a serious deficit in formal legality.

Nevertheless, Welton posits that the rule of law has now "resurfaced as a desired virtue, fully compatible with Islamic law and tradition."[210] While that desirability is undoubtedly true for legal reformers, it would perhaps be somewhat optimistic to attribute the statement to many leaders of Islamic states.

Wahlers's response is somewhat more incisive. He observes that:[211]

> … [t]here are many Islamic countries where fundamental civic rights are enshrined in the constitution, although their implementation in real life leaves much to be desired because independent institutions are lacking.

3.3.3 Equal application of the law

Rehman *et al* observe that:[212]

> … Islam does not allow any discrimination because of race, colour, language, and religious affiliation or social economic status. All the human beings, for the purpose of the enforcement of law, are equal in the sight of Allah. In the same way, they must also be equal before a judge who decides their disputes even if one of the parties to litigation is head of the state and his opponent is his subject. The companions of the Prophet (PBUH) used to observe strictly the equality among the litigants.

[208] Welton, above n 168, 173. Here, Welton is referring to Western-sponsored autocrats in, particularly, Middle Eastern states.
[209] Welton, above n 168, 185.
[210] Welton, above n 168, 213. Welton's statement was made in 2007 and therefore takes no account of events in the Islamic world during the past 10 years, which have exhibited gross breaches of the rule of law.
[211] Gehard Wahlers, "Preface" in Birgit Krawietz and Helmut Reifeld (eds.), above n 18, 6.
[212] Rehman *et al*, above n 190, 73.

In the Islamic context, equality under the law embraces the notion of Muslim brotherhood – that is, membership of a common group (namely, all Muslims) – bound together by a set of laws common to *all* members of the group. No-one can claim exemption from the divine-inspired law, which is applicable identically to everyone in the group: "[t]he law applies to all alike for it proceeds from God's commands to his creatures."[213]

Equality before the law was formally adopted in the Ottoman Empire in the early 19th century when, as part of a programme of wide-ranging reforms of the Empire, an Imperial decree established legal and social equality for all citizens of the Empire.[214]

Article 28 of the Al-Azhar Islamic Constitution provides that "[j]ustice and equality are the basis of governance" and Article 62 adds that "people are equal before the courts. It is not permissible to discriminate against an individual or group with special courts."[215]

Moreover, the principle of equality before the law is set out in international declarations made by Islamic states. Again, the Islamic Declaration of Human Rights states that:[216]

> *Preamble*
> ...
> g(i) ... all human beings ***shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination*** by reason of race, colour, sex, origin or language;
> ...
> (v) ... the rulers and the ruled alike are ... ***equal before the Law***;
> ...
>
> III *Right to Equality and Prohibition Against Impermissible Discrimination*
> (a) All persons are ***equal before the Law*** and are entitled to ***equal opportunities and protection of the Law***.
> ...
>
> VI *Right to Protection Against Abuse of Power*
> Every person has the right to ***protection against harassment by official agencies***. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be *reasonably* raised.
>
> (emphasis in bold added)

[213] Weeramantry, above n 170, 76.
[214] Edict of the *Hatti Sherif of Gülhane*, 3 November 1839.
[215] IRAAA, above n 206, 157. While this draft constitution proscribes injustice and inequality, Gouda argues that it is "fundamentally inconsistent with universally accepted principles of constitutionalism as well as with many foundational principles of the rule of law" because Islamic constitutionalism itself is inconsistent with many modern legal principles: see Moamen Gouda, "Islamic constitutionalism and rule of law: a constitutional economics perspective", (2013) 24(1) *Constitutional Political Economy*, 57, 76.
[216] ICE, above n 193.

3.3.4 Accessibility, intelligibility and predictability

Although Islamic law has been criticised for being "instance law", which lacks consistency and predictability,[217] Muslim jurists have endeavoured to develop *fiqh* by "reasoning aiming at approaching as close as possible to the highest ideals of Islamic doctrinal inspiration."[218] They are "unanimous in believing that Islamic law should be consistent and its application should be uniform."[219] This process is also intended to make Islamic law accessible and intelligible to Muslims. Zahraa contends that:[220]

> … Islamic law is knowable and easily predictable if it is researched by a knowledgeable scholar. ... To the Muslims, particularly Muslim scholars, Islamic law is clear, or at least readily available to give them sufficient answers to their various needs.
> ...
> [T]he jurists have made it crystal clear that Islamic law contains, *inter alia*, rules that have general as well as specific application and are formed in a rule-like text whether in the primary sources[221] or as clarified later by the jurists.

As to accessibility and its inter-relationship with predictability, Zahraa also argues that, although Muslim judges belong to different schools of Islamic thought and would therefore be influenced by their teachings, "this does not affect predictability of decisions because the views of the various schools are widely available to the public".[222] Moreover, "the availability of the various views and opinions of Muslim jurists … in turn facilitated predictability".[223]

In these respects, Muslim jurists are broadly similar to common law and civil law judges, whose interpretation of the law regularly differs (producing majority and minority court judgments and the overturning of judgments on appeal). The key point is that the accessibility, intelligibility and predictability components of the rule of law are generally evident in Islamic law in much the same way as they are in Western jurisdictions.

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[217] See, for example, David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", (1993) 3 *VJIL*, 819.
[218] Madhi Zahraa, "Characteristic Features of Islamic Law: Perceptions and Misconceptions", (2000) 15(2) *Arab Law Quarterly*, 168, 174.
[219] Zahraa, above n 218, 181.
[220] Zahraa, above n 218, 179-180.
[221] That is, the *Qu'ran* and *sunna*.
[222] Zahraa, above n 218, 180.
[223] Zahraa, above n 218, 193. Zahraa also notes that, to achieve "a relatively good degree of consistency", "the followers of each school used to adjudicate before a judge from their own school": *ibid*.

Furthermore, the principle of intelligibility is also enunciated in the Islamic Declaration of Human Rights: "[n]o act shall be considered a crime unless it is stipulated as such in the *clear wording of the Law*"[224] (emphasis added).

3.3.5 Judicial dispute resolution mechanism and due process

On the basis that Islam is a religion founded upon peace, resolution of disputes – including general arbitration[225] – is one of its cornerstones. Thus, Islamic law provides for a judicial dispute resolution mechanism. This emanates from the dictates of the *Qur'an*: "should you differ over something, then refer it to Allah and the Messenger";[226] "if two factions among the believers should fight, then make settlement between the two";[227] and "[t]he believers are but brothers, so make settlement between your brothers".[228]

The ability of a Muslim to have disputes heard by the courts is enshrined in the Al-Azhar Islamic Constitution. Article 28 states that the "rights of litigation are guaranteed and may not be infringed."[229] Similarly, the availability of a judicial dispute mechanism is also addressed in the Islamic Declaration of Human Rights:[230]

> *Preamble*
> ...
> (g) ...
> (xi) ... everyone shall, in the case of an infringement of his rights, be ***assured of appropriate remedial measures*** in accordance with the Law;
> ...
> (xiii) ... every individual shall have the ***right to bring legal action*** against anyone who commits a crime against society as a whole or against any of its members;
> ...

[224] ICE, above n 193, Article V(d).
[225] See, for example, Md. Zahidul Islam, "Provision of Alternative Dispute Resolution Process in Islam", (2012) 6(3) *IOSR Journal of Business and Management*, 31, Syed Khalid Rashid, "Alternative Dispute Resolution in the Context of Islamic law", (2004) 8(1) *The Vindobona Journal of International Commercial Law and Arbitration*, 95, Aishath Muneeza, "Is Conventional Alternative Dispute Resolution To Islamic Law?", [2010] 4 MLJA 97, and Hisham Hanapi and Mohd Izzat Amsyar Mohd Arif, "Alternative Dispute Resolution in Islamic Law: Analysis on the Practice of *Sulh*", (2018) 6(2) *International Journal of Social Science and Humanities Research*, 326.
[226] *Qur'an* 4:59.
[227] *Qur'an* 49:9.
[228] *Qur'an* 49:10.
[229] IRAAA, above n 215.
[230] ICE, above n 193.

V *Right to Fair Trial*

(a) No person shall be adjudged guilty of an offence and made liable to punishment except after ***proof of his guilt before an independent judicial tribunal***.

(emphasis in bold added)

Although not always evident in practice today,[231] classical *shar'iah* required courts to exercise due process.[232] This mandate arose from the injunction in the *Qur'an* that "Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice."[233]

Accordingly, the Islamic Declaration of Human Rights again provides that:[234]

II *Right to Freedom*

(a) Man is born free. No inroads shall be made on his right to liberty except under the authority and ***in due process of the Law***.

and

XXIII *Right to Freedom of Movement and Residence*

…

(b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom ***without recourse to due process of Law***.

(emphasis in bold added)

3.3.6 Judicial impartiality

According to Rehman *et al*, "Islam has attached great importance to justice and to its smooth and impartial administration." The requirement for impartiality also stems from the *Qur'an*, which implores believers to "[s]tand firm for justice and bear true witness for the sake of Allah,

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[231] See, for example, Ephraim Teage, "Human Rights Law and Religion: The Epicenter of Tensions", January 2015, 4. <https://www.researchgate.net/publication/270580243_Human_Rights_Law_and_Religion_The_Epicenter_of_Tensions> and Hasnet Lais, "Islamic Law and Human Rights: An Analysis of the Right to Fair Trial and Due Process (Pt. 1)", *New Civilisation*, 15 August 2012 <http://www.newcivilisation.com/home/ideas-philosophy/islamic-law-and-human-rights-an-analysis-of-the-right-to-fair-trial-and-due-process-pt-1/>.

[232] M. Cherif Bassiouni, "Crimes and the Criminal Process", (1997) 12(3) *Arab Law Quarterly*, 269, 274: ""[t]he concept of due process in criminal proceedings is found both in early as well as in recent writings of Muslim scholars and they are all in agreement on it."

[233] *Qur'an* 4:58.

[234] ICE, above n 193.

even though it be against yourselves, your parents or your relatives. … [L]et not your selfish desires swerve you from justice"[235] and "be just, even if it affects your own relatives".[236]

Imam Shafi'i (founder of the Shafi'i school of Islamic thought) taught the "utmost independence of judgment. ... A *cadi* [Muslim judge] should be just; he should not follow his passions, nor favour any party, nor fear any person. ... People should have no doubt as to his virtue (*'iffa*), sobriety (*salahiyya*), wisdom and knowledge of law and traditions."[237]

Weeramantry observes that the "Islamic concept of judicial function was an exalted one"[238] and contends that "impartiality was one of the pillars on which its dignity rested."[239] In the context of Islamic jurisprudence, he invokes Lord Hewart's maxim that justice was not only required to be done but must be seen to be done.[240] And Rehman *et al* contend that "the first responsibility that is laid on anyone who is granted authority by Allah is to judge with justice impartially between people and protect their rights on an equitable basis"[241] and "[j]udges can do justice only when they are absolutely autonomous to decide according to their own conscious and comprehension."[242]

3.4 Reconciliation of the Western notion and Islamic principles

The convergence of the West's secular rule of law concept with Islam's *shari'ah* comes about at two levels:

(1) The modern doctrines espoused under the rule of law emanate from recourse to natural law and the underlying principles of *shari'ah* hark back to the *Qur'an*; and
(2) Man has intervened in the concrete formulation, interpretation and day-to-day application of the godly principles, in both Western and Islamic jurisprudence.

[235] *Qur'an* 4:135.
[236] *Qur'an* 6:152.
[237] A.A.A Fyzee, "The Adab Al-Qadi in Islamic Law", (1964) 6 *Malaya Law Review,* 406, 408.
[238] Weeramantry, above n 170, 81.
[239] *Ibid.*
[240] *Ibid*. See also *R. v Sussex Justices*, above n 153.
[241] Rehman *et al*, above n 190, 71.
[242] Rehman *et al*, above n 190, 74.

The ideals of justice and equality permeate the first level. Therefore, Wahlers argues that:[243]

> … [t]he normative precept of "justice" enables us not only to enter a religious discourse but also to discuss principles of the rule of law in a secular sense [and] it is possible to compare even Islamic countries with regard to the conditions and options of developing the rule of law.

With respect to the second level, there is no dispute that, from either a positivist or natural law perspective, law in Western jurisdictions is man-made. Bälz contends that "there is no contradiction between Islamic law (Shariah) and secular law, because law is always man-made."[244] He argues that the "allegedly 'sacred' character" of *shari'ah* has been replaced by man-made statutes, and it is the latter that have given rise to "serious shortcomings with regard to the rule of law" in many parts of the Muslim world.[245] Essentially the same point had been made earlier by Weiss, who argues that:[246]

> … [a]lthough the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood.* Since the law does not descend from heaven ready-made, it is the human understanding of the law – the human *fiqh* (literally meaning understanding) – that must be normative for society.
>
> (emphasis in original)

An-Na'im agrees. He claims that:[247]

> … *shari'a* will always remain a historically conditioned human understanding of the Qur'an and Sunnah of the Prophet. While ... these sources are divine, ... their interpretation and expression as *shari'a* norms will always remain a human endeavour, open to challenge and reformulation through alternative human efforts. In other words, *the divine sources of shari'a cannot influence human life and experience except through human agency in the understanding and implementation of those sources* in the specific historical context of Islamic societies.
>
> (emphasis added)

For both reasons, the rule of law and its corresponding Islamic concept end up in the same place; namely, whether a Western or Islamic jurisdiction, the underpinning legal bases and tradition in either case requires that the fundamental rights of citizens be applied in the construction and administration of the law. That requires observance of the basic tenets of,

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[243] Wahlers, above n 211.
[244] Bälz, above n 186, 120.
[245] *Ibid*.
[246] Bernard Weiss, *The Spirit of Islamic Law* (University of Georgia Press, Athens, 1998), 116.
[247] Abdullahi a. An-Na'im, "*Shari'a* and Positive Legislation: is an Islamic State Possible or Viable?" (1998-1999) 5 *Yearbook of Islamic and Middle Eastern Law*, 29, 36.

especially, supremacy of the law, separation of powers and independence of the Judiciary, equality before the law, judicial impartiality and protection of human rights.

As Welton summarises it:[248]

> In order to succeed, *the rule of law in a modern Islamic state must be tied conceptually to the ideal of justice; a strictly positivist orientation will not suffice in an Islamic context*. The constitutional foundation of the rule of law must not only relate to Islamic jurisprudential values and traditions, but also must contain structural provisions, including an independent judiciary, that effectively disperse rather than consolidate power. ... [A]ttention must be paid to key areas of rules and rule-making, especially the need for stable rules, due process, and rule-bound law enforcement agencies. *None of these prescriptions are inherently inconsistent with Islamic law or history; they are not culturally dependent, and are applicable equally to a country with an Islamic tradition as to a Western liberal democracy.* ... [T]he rule of law can transcend the stigma of identification with Western culture, while retaining the elements essential to securing [its] conditions and values.
>
> (emphasis added)

3.5 Summary

The overview in this chapter of some of the key contributions to the literature on the rule of law and the principles that underpin Islamic *shari'ah* has shown that the two notions do not lie far apart. The rule of law as we know it in Western jurisdictions is prone to failure if the law is confined to formal legality. Rather, the law must be premised on underlying moral or logically reasoned principles – it does not really matter which for the purposes of this thesis – if a civil society is to be sustained.

By contrast, in Islam the basis of the law does matter: it is indisputably divine. Nevertheless, both sources have thrown up principles that are largely compatible; namely, justice, equality and fairness.

The problem in both cases, however, is that the sources provide us with only principles. To transform those principles into codes of practical application has required the intervention of fallible human beings. In this respect, both Islamic and Western jurisdictions have faced the same challenges. The result has been a rule of law in the West that contains certain accepted

[248] Welton, above n 168, 193.

elements, and principles in Islamic *shari'ah*, which exhibit much the same features. Thus, the respective Islamic theocentric and Western anthropocentric approaches to the foundation of law, contrasted by Weeramantry, make for "fundamentally different approaches to what is otherwise in the main a commonly agreed body of accepted principles. The result may now be very much the same but the route by which it is reached is different."[249]

Therein lies the critical point, which this chapter endeavours to bring out: broadly, the principles and elements that underlie the Western notion of the rule of law also underpin Islamic law. In the West, they have descended from natural law, be that moral, religious-based precepts or objective reasoning. In Islam, they have the have descended from a divine source, the *Qur'an*. In both cases, the "higher" principles have had to be subjected to (and still require) human interpretive intervention to render them practicable.

That conclusion means that, when the law and its implementation in the Maldives –particularly its tax laws – are put to the test against a rule of law benchmark in chapters 4 and 5, it is no defence to claim that the rule of law is not an appropriate standard because the principles of Islamic law apply in such a Muslim-dominated state.

[249] Weeramantry, above n 170, 117.

Chapter 4

DISRESPECT FOR THE RULE OF LAW IN THE MALDIVES

4.1 Introduction

In a fledgling democracy since 2008, the leaders of the Maldives have increasingly displayed a remarkably poor understanding of the notion that democracy is not just about having elections; it also requires robust, independent, transparent and law-abiding institutions, which implement the rule of law. From the President down through the Executive, administration and Judiciary, that lack of comprehension has been palpable. Despite relatively clear instructions in the Maldives 2008 Constitution, "their implementation in real life leaves much to be desired".[1]

Some of the more pronounced failures to recognise the most fundamental constituents of the rule of law – supremacy of the law, separation of powers, due process, equal application of the law and judicial impartiality, discussed in Chapter 3 – are canvassed in this chapter. The intention is to paint the general contextual background at a macro-level in order to understand how the rule of law applies at the micro (taxation) level. The shortcomings in the latter may, to some extent, be explained by the influence of the former.

For this purpose, it will be recalled from Chapter 2 that, in Maldives modern history under the Gayoom autocracy, lack of respect for the rule of law was a matter of political convenience. That has implications for the way that the rule of law is considered presently, particularly by the Judiciary, because judges appointed under Gayoom's regime (and, importantly for this analysis, Supreme Court judges) carried on in their positions in the post-Gayoom democratic period – and many of them still hold judicial positions today.

[1] Gehard Wahlers, "Preface" in Birgit Krawietz and Helmut Reifeld (eds.), *Islam and the Rule of Law – Between Sharia and Secularization* (Konrad Adenauer Stiftung, Berlin, 2008), 6.

This chapter addresses some noteworthy failures in the application of the rule of law in the Maldives at the three levels of governance: the Legislature, the Executive and the Judiciary. The failures at each level are illustrated by certain events which have occurred since 2010, which have demonstrated scant regard for the Constitution and the rule of law, culminating in a widespread breakdown of the rule of law by 2017.

The Maldives Constitution codifies clearly the elementary ingredients of the rule of law as a staple in the functioning of Maldives society. The salient elements of the Constitution are set out in the Appendix. The authors of the Constitution obviously had individual rights and freedoms in a democratic society uppermost in their minds. However, despite expressing their ideals quite clearly, the purpose and language of the Constitution frequently has not translated into practice. First, Parliament has not fully appreciated the underlying constitutional and rule of law tenet of separation of powers, exhibited by its acquiescence – rather than acting as a counter-balance – to Executive power. Second, the Executive has often simply ignored the Constitution and the law to achieve its objectives and, third, the Judiciary has regularly buttressed the unconstitutional practices of the Legislature and the Executive, and has granted itself law-making powers, contrary to the provisions of the Constitution. In doing so, in each case, the Legislature, Executive and Judiciary have undermined the rule of law.

4.2 Parliamentary failures

Chapter III of the Constitution addresses the role of the Parliament in the Maldives' social and political order. Legislative authority in the Maldives is vested in the People's Majlis.[2] At its most fundamental level, that lawmaking power includes, *inter alia*, the power to enact, amend and repeal any law, which is not inconsistent with any tenet of Islam,[3] and to supervise the exercise of Executive authority, ensure that the Executive is accountable for the exercise of its powers, and take steps required to ensure the same.[4]

[2] Article 70(a).
[3] Article 70(b)(2) and (c).
[4] Article 70(b)(3).

4.2.1 Acquiescence to Executive power

Since 2013, the Maldives Parliamentary majority has repeatedly shown its willingness to acquiesce to the wishes of the Executive. While in any democracy it is not unusual – indeed it is typically expected – that the majority party in Parliament enacts legislation in accordance with the wishes of its politically-aligned Executive, observance of the principles of the rule of law sets some boundaries upon the extent of Parliament's compliance with those wishes. Particularly in an Islamic state, Parliament should be a check on the excesses of the President and the Executive, which contradict Islamic codes of justice and equity.

It will be recalled from Chapter 3 that, while Muslims are instructed to obey their ruler (that is, in this case, the President of the Maldives), the *quid pro quo* is that the ruler is bound to carry out his or her role with justice.[5] It is therefore the role of Parliamentarians to ensure that the President and his Executive do just that. Consequently, it is incumbent upon Parliament, especially in terms of Article 70(b)(3) of the Constitution, not to pass laws that conflict with that principle. This function of Parliament, of course, reflects the separation of powers principle of the rule of law.

There are numerous examples of the Maldives Parliament's failure to uphold that tenet of Islam and the rule of law, and instead demonstrate its acquiescence to the desires of the Executive.[6] However, one particularly disturbing illustration shall suffice for the purposes of this thesis: the dismissal of two Supreme Court judges in 2014.

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[5] See *Qur'an* 38:26.

[6] See, for example, "MDP may challenge constitutionality of amendment to Audit Act", *Minivan News*, 3 November 2014 <https://minivannewsarchive.com/politics/mdp-mulls-challenging-constitutionality-of-amendment-to-audit-act-90776>, "MPs ask for re-appointment of former Auditor General Niyaz", *vnews*, 26 October 2015 <http://www.vnews.mv/52832>, Ahmed Naish, "Parliament approves MDP proposal for speaker to assume presidency after November 11", *Minivan News*, 27 October 2013 <https://minivannewsarchive.com/politics/parliament-approves-mdp-proposal-for-speaker-to-assume-presidency-after-november-11-69917>, Ahmed Nazeer, "Supreme Court accepts case to invalidate transfer of power to speaker"' *Minivan News*, 7 November 2013 <https://minivannewsarchive.com/politics/supreme-court-accepts-case-to-invalidate-transfer-of-power-to-speaker-70994> and "China-Maldives free trade deal rushed through parliament", *Maldives Independent*, 30 November 2017 <http://maldivesindependent.com/politics/china-maldives-free-trade-deal-rushed-through-parliament-134382>.

4.2.1.1 Dismissal of Supreme Court judges

Article 148(a) of the Constitution empowers the President to appoint judges of the Supreme Court, after consultation with the JSC and confirmation of their appointment by a majority of the Members of Parliament who are present and voting. Article 148(c) provides that "[j]udges shall be appointed without term, but shall retire at the age of seventy years." This provision is qualified by Article 148(d), which states that "[n]otwithstanding article (c), for a period of fifteen years from the commencement of the Constitution [that is, from 7 August 2008], Judges may be appointed for a fixed term of not more than five years, as specified in their terms of appointment."

As to the removal of judges, Article 154 states that:

> (a) A Judge shall not be removed from office during good behaviour and compliance with judicial ethics.
> (b) A Judge may be removed from office only if the Judicial Service Commission finds that the person is grossly incompetent, or that the Judge is guilty of gross misconduct, and submits to the People's Majlis a resolution supporting the removal of the Judge, which is passed by a two-thirds majority of the members of the People's Majlis present and voting.

On 10 December 2014, Parliament passed an amendment to the Judicature Act,[7] which reduced the number of judges on the Supreme Court bench from seven to five.[8] The amendment act also provided that:

- a judge could be dismissed only if the Judicial Service Commission (JSC) decided that he or she was not fit for the position;
- the JSC must submit the names of the judges to be dismissed within three days of the ratification of the amendment act by the President; and
- within seven days of submission of the names by the JSC, two-thirds of the Members of Parliament present and voting must vote in favour of the dismissal.

The amendment to the Judicature Act was ratified by the President immediately after it was passed by Parliament.

[7] Law No. 22/2010.
[8] Zaheena Rasheed, "Parliament reduces Supreme Court bench to five judges", *Minivan News*, 10 December 2014 <https://minivannewsarchive.com/politics/parliament-reduces-supreme-court-bench-to-five-judges-91568>.

At an emergency meeting on 11 December 2014, the JSC found the Chief Justice, Ahmed Fiaz Hussain and Justice Ahmed Muthasim Adnan (the only common law trained lawyer on the bench) guilty of gross misconduct and incompetence, and recommended to Parliament (apparently in a three-line letter)[9] that they be dismissed from the Supreme Court bench. On 14 December 2014, in the absence of any justification for the JSC's recommendation, Parliament voted in favour of removing the Chief Justice and Justice Adnan from office.[10] Details of the alleged gross misconduct and incompetence were not released by the JSC[11] and no opportunity was given to the judges to defend themselves.[12] Ostensibly, the Executive was aggrieved by certain dissenting minority judgments, which were unaccommodating of it, delivered by the two judges since President Waheed assumed the presidency in 2012.[13] Consequently,

[9] Zaheena Rasheed, "Majlis removes Chief Justice Faiz, Justice Muthasim Adnan from Supreme Court", *Minivan News*, 14 December 2012 <https://minivannewsarchive.com/politics/majlis-removes-chief-justice-ahmed-faiz-justice-muthasim-adnan-from-supreme-court-91600>.

[10] *Ibid*.

[11] Zaheena Rasheed, "JSC recommends dismissal of Chief Justice Ahmed Faiz and Justice Muthasim Adnan", *Minivan News*, 11 December 2014 <https://minivannewsarchive.com/politics/jsc-recommends-dismissal-of-chief-justice-ahmed-faiz-and-justice-muthasim-adnan-91575>.

[12] S. Chandrasekharan, "Maldives: Removal of Inconvenient Judges – Another set-back to Democracy", *South Asia Analysis Group*, Paper No. 5847, 18 December 2014 <http://www.southasiaanalysis.org/node/1682>, Transparency Maldives, "TM calls on state to uphold, respect and operate within the boundaries of the Constitution, and democratic norms and principles", Press release, 14 December 2014 <http://transparency.mv/files/media/8c5d60236ca858d36df75b4ab46adc45.pdf>, and Tom Ginsberg, "Addition by Subtraction in the Maldives", *TheWorldPost*, 29 December 2014 <https://www.huffingtonpost.com/tom-ginsburg/addition-by-subtraction-i_b_6388370.html>.

[13] See "Supreme Court rules Hulhumale", *Sunmv Online*, 5 December 2015 <http://english.sun.mv/7784>, "Maldives: Supreme Court Decision on Freedom of Assembly and Expression", *Global Legal Monitor*, United States Law Library of Congress, 13 December 2012 <http://www.loc.gov/law/foreign-news/article/maldives-supreme-court-decision-on-freedom-of-assembly-and-expression/>, Ahmed Naish, "Supreme Court criminalises offences within the exercise of freedom of assembly, expression", *Minivan News*, 8 December 2012 <https://minivannewsarchive.com/politics/supreme-court-criminalises-offences-within-the-exercise-of-freedom-of-assembly-expression-48474>, Ahmed Naish, "Supreme Court rules secret ballot, dismissal of CSC chair unconstitutional", *Minivan News*, 16 March 2013 <https://minivannewsarchive.com/politics/supreme-court-rules-secret-ballot-dismissal-of-csc-chair-unconstitutional-54632>, Ahmed Nazeer, above n 6, J.J. Robinson, "Supreme Court orders Elections Commission to restart re-registration process", *Minivan News*, 11 October 2013 <https://minivannewsarchive.com/politics/supreme-court-orders-elections-commission-to-restart-registration-process-68299>, Asra Naseem, "Supreme Court Verdict: Points of Note", *Dhivehi Sitee*, 11 October 2013 <http://www.dhivehisitee.com/election-2013/comment-piece/supreme-court-verdict-points-note/>, "Supreme Court orders Elections Commission to ensure election is fair", *Sun.mv Online*, 2 September 2013 <http://english.sun.mv/15636>, J.J. Robinson, "Supreme Court annuls first round of presidential elections", *Minivan News*, 8 October 2013 <https://minivannewsarchive.com/politics/supreme-court-annuls-first-round-of-presidential-elections-67952>, "Supreme Court issues injunction indefinitely delaying election run-off" *Minivan News*, 23 September 2013 <https://minivannewsarchive.com/politics/supreme-court-issues-injunction-indefinitely-delaying-election-run-off-66448> and Case No. 2013/SC-C/42 (in Dhivehi), translated in "Translation: Supreme Court verdict on Jumhooree Party vs Elections Commission", *Minivan News*, 10 October 2013 <https://minivannewsarchive.com/politics/translation-supreme-court-verdict-on-jumhooree-party-vs-elections-commission-68169>.

Parliament's amendment to the Judicature Act was orchestrated to implement the Executive's desire to dispense with the services of the "inconvenient" judges.[14]

Parliament's action to remove the judges has been criticised for not complying with Article 154 of the Constitution. For example, in a joint statement, the Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association contended that the judges' dismissals were contrary to Article 154[15] and that both the amendment to the Judicature Act and the dismissals breached *The Commonwealth (Latimer House) Principles on Accountability of and Relationship between the Three Branches of Government (2003)* (Latimer House Principles).[16] As a result, "the independence of the Judiciary and the Rule of Law have been severely jeopardised."[17] Parliament's actions also "constitute a clear breach of the Commonwealth Principles to which the Government of the Maldives have subscribed."[18]

It is apparent that Parliamentary and JSC procedures failed to meet the requirements of Articles IV and VII(b) of the Latimer House Principles. The reasons for the judges' alleged gross incompetence and/or gross misconduct were never known. Therefore, it was far from "clear" that such behaviour rendered the judges unfit to discharge their duties (Article IV). Furthermore, "proper procedures" for removal of the judges were not provided, disciplinary procedures were not fairly and objectively administered, and appropriate safeguards were not included to ensure fairness (Article VII(b)).

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[14] Chandrasekharan, above n 12.

[15] Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association, "Statement on Adoption of Amendment to the Judicature Act", 16 December 2014.
<http://www.cmja.org/downloads/news/CLA%20CLEA%20CMJA%20Statement%20December%202014.pdf>.
The UN Special Rapporteur on the independence of judges and lawyers also referred to Article 154 in her condemnation statement, implying that the article had not been complied with: "Maldives: UN expert concerned at 'unacceptable' dismissal of Supreme Court justices", UN News Centre, 22 December 2014 <http://www.un.org/apps/news/story.asp?NewsID=49661#.WjiNFTTRXZ4>.

[16] Commonwealth Secretariat, ComSecDecl1, 2003 <www.worldlii.org/int/other/ComSecDecl/2003/1.html>. Article IV (Independence of the Judiciary) of the Latimer House Principles states that "[j]udges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties" and Article VII(b) (Accountability Mechanisms – Judicial Accountability) states that "[i]n addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness."

[17] Commonwealth Lawyers Association *et al*, above n 15, 1.

[18] *Ibid*. The Maldives terminated its membership of the Commonwealth on 13 October 2016.

The Constitution also empowers Parliament to supervise the exercise of Executive authority and to ensure that "the executive authority is accountable for the exercise of its powers, and taking steps to ensure the same"[19] and to determine "matters relating to Independent Commissions ... in accordance with law".[20] Even more importantly, Article 75 specifies that Members of Parliament should be guided in their actions by considerations of national interest and public welfare "foremost", and should not exploit their official positions in any way for their own benefit or for the benefit of those with whom they have special relations. In addition, Article 103 provides that "members of the People's Majlis and persons appointed and employed by them shall not use their position or any information entrusted to them to improperly benefit themselves or any other person."

Given that Parliament did not have before it – nor even required the JSC to present – the basis for the JSC's contention that the two judges were guilty of gross incompetence or gross misconduct, it is difficult to see, by any stretch of the imagination, how the passage of the Judicature Amendment Act meets the letter and spirit of Articles 70(b)(3) and (5), 75 and 103 of the Constitution: the Legislature's actions clearly benefited the Executive. It is in this respect that the rule of law broke down: rather than buttressing the doctrine of separation of powers, Parliament preferred to submit to the will of the Executive.[21]

In addition to the joint statement issued by the Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association, the removal of the two judges as a result of Parliament's and the JSC's actions – although it is Parliament that is ultimately responsible for the outcome – has also been roundly criticised by jurists both internationally and domestically, as a failure in implementing

[19] Article 70(b)(3).
[20] Article 70(b)(5).
[21] The ICJ held both Parliament and the Executive responsible for the breach of the rule of law: see ICJ, "Maldives: removal of Supreme Court judges an assault on independence of the judiciary", News: Press releases, 18 December 2014 <https://www.icj.org/maldives-removal-of-supreme-court-judges-an-assault-on-independence-of-the-judiciary/>. To achieve the required two-thirds majority of Members of Parliament present and voting on the amendment act, it was alleged that some members, who might otherwise have voted against the Bill, were rewarded to vote for it or to remain absent from Parliament at the time that the vote was taken (see Zaheena Rasheed, "Majlis to vote on Chief Justice Faiz, Justice Muthasim dismissal on Sunday", *Minivan News*, 13 December 2014 <https://minivannewsarchive.com/politics/majlis-to-vote-on-chief-justice-faiz-justice-muthasim-dismissal-on-sunday-91582>). If that is correct, there would be further patent breaches of Articles 75 and 103 of the Constitution.

fundamental tenets of the rule of law. For example, internationally, the UN Special Rapporteur on the independence of judges and lawyers (UN Special Rapporteur) stated that:[22]

> … [t]he removal of two Supreme Court justices by local authorities threatens the independence of the country's judiciary and further compromises the rule of law ... . This decision seriously undermines the independence of the judiciary ... . [There has been] a series of developments in the country that point to a serious deterioration of respect for the rule of law and the independence of the judiciary. ... [T]he procedure for the removal was characterized by a "lack of transparency and due process" ... that rendered their dismissal concerning and "particularly unacceptable." ... [I]nternational human rights standards on this issue were "clear". ... [T]he Maldives [needed to] engage in a "transparent, impartial and independent process" in line with its international human rights obligations.

More pointedly, and making particular reference to the role of Parliament, the ICJ stated that:[23]

> … [t]he arbitrary and unlawful removal of the Chief Justice Ahmed Faiz Hussain ... and Supreme Court judge Justice Muthasim Adnan constitutes an assault on the independence of the judiciary ... . The Maldives *parliament and executive* have … trampled on the fundamental principles of the rule of law and separation of powers in a democratic State ... . The removal of the Supreme Court judges was astonishingly arbitrary ... . The superficial legislative and administrative manoeuvers used to get rid of them were grossly unfair and in flagrant violation of the Maldives Constitution, UN and Commonwealth standards on independence of the judiciary, and the obligations of the Maldives under international law.
>
> (emphasis added)

Domestically, the seven judges of the Civil Court resolved on 13 December 2014 that:[24]

> … the People's Majlis had "forced" the JSC to deem Faiz and Adnan unfit for the Supreme Court bench without due process, through an "unconstitutional" amendment to the Judicature Act. ... The move was against the principles of natural justice and several international conventions, and could "destroy judicial independence" in the Maldives. ... The People's Majlis had failed to provide the JSC with any instructions on recommending judges for dismissal.

In calling upon state authorities "to refrain from any action that will further undermine the independence and integrity of the judiciary",[25] and noting "with grave concern the increasing trend of undermining democratic practices and institutions by the State including [among

[22] UN News Centre, above n 15. The Maldives was a member of the UN Human Rights Council from 2010-2016; that is, when this statement was made.
[23] ICJ, above n 21.
[24] Zaheena Rasheed, "Civil Court condemns move to dismiss Chief Justice Faiz and Justice Adnan", *Minivan News*, 14 December 2014 <https://minivannewsarchive.com/politics/civil-court-condemns-move-to-dismiss-chief-justice-faiz-and-adnan-91593> and CvC/GMJ-G/2014/02 (in Dhivehi), 13 December 2014 <http://www.civilcourt.gov.mv/downloads/aammu_majilis_garaaru_13_12_014.pdf>.
[25] Transparency Maldives, above n 12.

others] the recent move to reduce the number of judges in the Supreme Court",[26] Transparency Maldives feared that:[27]

> … [t]he recent amendment to the Judicature Act ... followed by the recommendation of the Judicial Service Commission ... to remove two sitting judges will further undermine the independence of the judiciary. ... The decision by the JSC to remove Chief Justice Abdulla [*sic*] Faiz and Justice Muthasim Adnan without publicising the criteria against which they were evaluated raises questions about the transparency and fairness of the process. ... [T]he amendments to the Judicature Act allow... [the] JSC to override due procedure denying the right of Supreme Court Justices to defend themselves before their dismissal.

The Maldivian Democracy Network (MDN) added that Parliament's decision was "a travesty in the guise of upholding the Constitution".[28]

Finally, the Chief Justice himself described his and Justice Adnan's dismissal as "unconstitutional, and ... raises doubts over the separation of powers and the continuation of judicial independence in the Maldives".[29] He added that the day that the new Chief Justice was appointed was:[30]

> … [a] black day in the constitutional history of the Maldives. ... Taking ... a vote against the constitution is ... disrespectful to the constitution. ... Dismissal of a country's Chief Justice against the constitution is no small matter[.] ... MPs are mandated to uphold democracy. But today there are doubts over how they perceive democracy.

Perhaps the doubts are not so much about how Members of Parliament *perceive* democracy as about how they *use* it. As the ICJ and South Asians for Human Rights (SAHR) Fact Finding Mission to the Maldives observed, "[t]he general prevailing perception amongst independent observers ... was that the two judges were targeted because they were the two who routinely gave dissenting opinions in several cases in which the government and ruling party had an interest".[31] If that is correct, Parliament's removal of the judges was simply an act of retribution carried out on behalf of the Executive.

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[26] *Ibid*.
[27] *Ibid*.
[28] Daniel Bosley, "ICJ says Majlis has "decapitated the country's judiciary"", *Minivan News*, 18 December 2014 <https://minivannewsarchive.com/politics/icj-says-majlis-has-decapitated-the-countrys-judiciary-91694>.
[29] Zaheena Rasheed, "Abdulla Saaed appointed as new Chief Justice, dismissed Justice Faiz laments "black day"", *Minivan News*, 15 December 2014 <https://minivannewsarchive.com/politics/abdulla-saeed-appointed-as-new-chief-justice-dismissed-justice-faiz-laments-black-day-91613>.
[30] *Ibid*.
[31] ICJ and South Asians for Human Rights, *Justice Adrift: Rule of Law and Political Crisis in the Maldives – Report of the ICJ-SAHR Joint Fact-Finding Mission to the Republic of the Maldives on 5-13 May 2015* (ICJ, Geneva, and SAHR, Colombo, August 2015), 26.

4.3 Executive failures

Modern history of the Maldives provides numerous instances of the Executive and state institutions rebuffing the rule of law. Since 2010, they have primarily involved actions that have infringed upon individual freedoms supposedly guaranteed by the Constitution. The Executive and its officials have often simply ignored the restrictions imposed upon them by the Constitution and statutes.

4.3.1 Disregard for the supremacy of the Constitution and statutes

Although disregard for the Constitution and law was routine under Gayoom's regime,[32] such behaviour was also not beneath the dignity of the newly democratically-elected President in 2010, nor of his two successors. Again, there is no dearth of examples to illustrate the Executive's disregard for the Constitution, the law and, thus, the rule of law itself.[33] One particularly notable instance in the Maldives' recent political history shall suffice here to make the point: the arrest and detention in 2012 of the former Chief Judge of the Criminal Court.

[32] See Chp. 2, section 2.3.3.

[33] See, for example, the dissolution of the interim Supreme Court bench in 2010 (discussed in section 4.4.2), the military blockade of Parliament and detention of Members of Parliament to prevent a vote of no confidence in the Speaker, which would have threatened the continuation of the government (see "Opposition MPs forced out after soldiers and police storm parliament", *Maldives Independent*, 24 July 2017 <http://maldivesindependent.com/politics/opposition-mps-forced-out-after-soldiers-and-police-storm-parliament-131657> and "UN censures 'erosion of democratic norms' as arrest of lawmakers continue", *Maldives Independent*, 29 July 2017 <http://maldivesindependent.com/politics/un-censures-erosion-of-democratic-norms-as-arrest-of-lawmakers-continue-131735>); the Finance and Treasury Minister's threat to Members of Parliament to allocate expenditure in favour of supporters of the government budget (see Fatimath Shaahunaaz, "Opposition lawmakers boycott budget review committee meeting", *Mihaaru*, 20 November 2017 <http://en.mihaaru.com/opposition-lawmakers-boycott-budget-review-committee-meeting/>); and the allocation of government apartments on concessional terms to selected public officials (see "Discount flats for state officials undermine trust: Transparency", *Minivan News*, 5 April 2015, <https://minivannewsarchive.com/news-in-brief/discount-flats-for-state-officials-undermine-trust-transparency-95713>).

4.3.1.1 Detention of Criminal Court judge

On 15 July 2015, the Prosecutor General filed charges under section 81 of the Penal Code[34] against former President Nasheed for allegedly authorising in January 2012 the illegal detention of the former Chief Judge of the Criminal Court, Abdulla Mohamed.[35] This action was the culmination of a series of events contended to be unworthy of a Maldivian judge.

The judge had acquired office under the former Gayoom regime. He is alleged by a former member of the JSC to have been "a central controlling 'father figure' in the lower courts, answerable to former President Gayoom".[36] He was alleged to have been an impenetrable block to the programme of judicial reform, which Nasheed wished to carry out while in office.[37]

As a result of the repeated failure of the JSC to adequately deal with the allegations made against the judge, matters came to a head on 16 January 2012 when, allegedly under Nasheed's orders, "military assistance was sought for "fear of loss of public order and safety and national security" on account of Judge Abdulla, who had "taken the entire criminal justice system in his fist"."[38] The military detained the judge for approximately three weeks on an island controlled by the Defence Force, after the judge opened the Criminal Court outside normal working hours to facilitate the release of the deputy leader of an opposition party who had been arrested in relation to allegedly slanderous allegations, which he had made against the government.[39]

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[34] Law No. 1/81. Section 81 states that it is "an offence for any public servant by reason of the authority of [the] office he is in to ... arrest or detain in a manner contrary to Law innocent persons. ...".
[35] See Chp. 2, section 2.3.4.
[36] See Zaheena Rasheed, "PG files charges against former President Nasheed over Judge Abdulla's detention", *Minivan* News, 15 July 2012 <https://minivannewsarchive.com/politics/pg-files-charges-against-former-president-nasheed-over-judge-abdulla%e2%80%99s-detention-40711>. As early as July 2005, a former Attorney General in Gayoom's government complained about the judge's alleged misogyny, sexual deviancy, dismissal of an assault case despite the confession of the accused, and requesting an underage victim of sexual abuse to re-enact her abuse for the court, in the presence of the accused assailant: *ibid.*
[37] According to the Home Minister in Nasheed's government, the judge obstructed police investigations by delaying the issue of warrants, ordered police to conduct unlawful investigations, deliberately held up cases involving opposition party members, excluded the media from corruption trials, ordered the release of suspects detained for serious crimes without hearings, disregarded the directions of higher courts, maintained "suspicious ties" with family members of convicts sentenced for "dangerous crimes", and released a murder suspect (who subsequently killed a person) "in the name of holding ministers accountable": see Mohamed Naahee, "Supreme Court overrules Parliament's decision to invalidate Hulhumale Magistrate Court", *Minivan News,* 29 November 2012 <https://minivannewsarchive.com/politics/supreme-court-overrules-parliament%E2%80%99s-decision-to-invalidate-hulhumale-magistrate-court-48110>.
[38] J.J. Robinson and Ahmed Naish, "Chief Judge "took entire criminal justice system in his fist": Afeef", *Minivan News,* 18 January 2012 <https://minivannewsarchive.com/politics/chief-judge-took-entire-criminal-justice-system-in-his-fist-afeef-30926>.
[39] J.J. Robinson, *The Maldives – Islamic Republic, Tropical Autocracy* (Hurst & Co., London, 2015), 192.

As abhorrent as the judge's alleged misfeasances were and as difficult as it was for Nasheed to invoke constitutionally imposed channels to deal with the judge, Nasheed's alleged actions could not justify a disregard for the doctrine of habeas corpus,[40] which was unconstitutional.[41] The actions would have breached Articles 106 and 115 of the Constitution, and sections 2 and 3 of the Prevention of Terrorism Act,[42] as well as section 81 of the Penal Code.

The military detention of the judge was a prime example of unconstitutional abusive use of Executive power (in which the military was complicit). It contravened the rule of law principles of supremacy of the law and due process.

4.3.1.2 Waheed and Yameen regimes

Abuse of Executive power since the enactment of the Constitution in 2008 and the introduction of democracy in 2010 has not been confined to the allegations made against Nasheed. After Nasheed's departure from office in February 2012, Naseem argues that under "caretaker" President Waheed the Maldives moved towards "competitive authoritarianism",[43] a sham state described by Levitsky and Way as a hybrid regime where "formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority [but] [i]ncumbents violate those rules so often and to such an extent that the regime fails to meet conventional minimal standards for democracy".[44]

Waheed's competitive authoritarian rule witnessed judicial interference with the constitutionally based election process, repression of political opposition, murder of a Member of Parliament and attacks on unaccommodating journalists and media outlets.[45] Nevertheless, there was room for (manipulated) elections, the political opposition had a voice in Parliament

[40] A High Court order that the judge appear before it was ignored.
[41] See Article 48(d) of the Constitution. It was this sequence of events that lead to Nasheed's controversial departure from office on 7 February 2012 and his subsequent prosecution.
[42] Law No. 10/1990. Nasheed was convicted under this law, albeit in a trial that itself had scant regard for the rule of law: see section 4.4.5.1.
[43] Azra Naseem, "Keeping up with the authoritarians", *Divehi Sitee*, 3 September 2015 <http://www.dhivehisitee.com/executive/keeping-up-with-the-authoritarians/>.
[44] Steven Levitsky and Lucan A. Way, "Elections without Democracy – The Rise of Competitive Authoritarianism", (2002) 13(2) *Journal of Democracy*, April, 51, 52.
[45] Naseem, above n 43.

and in the public arena, and the media could continue to critique the government – albeit that the ultimate outcome on any issue was always going to be in favour of the government.

Not without justification, Naseem contends that, when Yameen took office, the negative aspects of Waheed's competitive authoritarianism "multiplied" and the country transitioned into "full-scale authoritarianism".[46] The government now controls the Legislature and the Judiciary,[47] has politicised the military, domestic security and police forces, allowed the security forces to act with impunity against political opponents.[48] It has also failed to investigate thoroughly the disappearance and murder of journalists critical of the government, routinely imprisoned opposition and peripatetic government actors on alleged charges of "terrorism", forced most key (non-incarcerated) opposition and non-government aligned politicians into exile abroad, and curtailed dissent by restricting freedom of expression.[49]

In his 2015 National Day address to the nation, in what might be interpreted as an exoneration of his authoritarian approach to government, Yameen praised Singapore's former Prime Minister Lee Kwan Yew, who "saw that developing discipline is much better than strengthening democracy" and "gave precedence to discipline over democracy".[50]

This ideology was later buttressed in Yameen's 2017 Independence Day address. Seemingly tiring of the constraints imposed upon him by the rule of law and the Maldives Constitution, and facing a loss of his Parliamentary majority, he gave the nation an insight into his view of the relative balance of power between the Executive and Parliament, and the constitutional framework, claiming that a:[51]

> … significant feature of the presidential system is that the State and the Government will continue to function through the Head of State and Government, even without

[46] *Ibid*.
[47] The room to challenge the government in Parliament (albeit by a minority) and for minority dissenting opinions in the judiciary – permissible under competitive authoritarianism – has now been removed. No judicial thought or action that is independent of the E118xecutive's purposes is countenanced and "conflict between the legislature and the executive branch is virtually unthinkable": Levitsky and Way, above n 44, 55.
[48] Naseem, above n 43.
[49] *Ibid*..
[50] Ahmed Naish, "Discipline trumps democracy says Yameen", *Maldives Independent*, 13 December 2015 <http://maldivesindependent.com/politics/discipline-trumps-democracy-says-yameen-120611>. But see Jothie Rajah, *Authoritarian Rule of Law* (Cambridge University Press, Cambridge, 2012), 2.
[51] "Deadlock and development: Yameen's Independence Day address", *Maldives Independent*, 26 July 2017, unofficial translation from the President's office of President Abdulla Yameen's Independence Day address to the nation <http://maldivesindependent.com/politics/deadlock-and-development-yameens-independence-day-address-131707>.

> commanding a majority in the legislature. Constitutional frameworks are designed in this manner to ensure that *the interests of the State reign supreme*. ... The Constitutional framework, newly introduced in 2008[,] is too burdensome and complicated for a country, which cannot boast a lifestyle of democratic history. ... The Maldives' elections framework and that of its elected officials is the perfect example of the complexity of the Maldives Constitutional framework.
>
> (emphasis added)

Yameen's statement reveals a complete misunderstanding or ignorance of Article 115(a) and of the rule of law concept of the balance of power and independence of the Judiciary, and is oblivious to the commensurate presidential power "to promote the rule of law, and to protect the rights and freedoms of all people",[52] as well as the fundamental rights and freedoms set out in Articles 18, 42, 43 and 67, in particular, and the more specific statements on the independence of the Judiciary in Articles 7 and 141 of the Constitution. The President's 2017 statement offends Article 141(c), which prohibits interference with, or influencing, the functions of the court.[53]

While it is not to be condoned, as a breach of a fundamental principle of the rule of law, Nasheed's illegal imprisonment of the Criminal Court chief judge pales into insignificance in the light of the conduct of the Waheed and, more so, the Yameen administrations. The more

[52] Article 115(c) of the Constitution.

[53] See Supreme Court Order No. 09/SJ-SC/2017 dated 16 July 2017 <http://english.judiciary.gov.mv/court-order-of-the-maldives-supreme-court/>. Referring to Article 141(c), that order stated that "despite repeated orders urging all to conduct themselves within the peripheries of the law and the regulations and to refrain from all acts which would unconstitutionally influence the decisions of the courts, it is noted that statements influencing and distorting court decisions are being issued and published by the media, and for the reason that such acts are prohibited by law, the Supreme Court of the Maldives pertaining to its authority as the guardian of the Constitution and the laws of the Maldives, urge [*sic*] the people not to commit such acts and hereby declares under the laws and the Regulation Protecting the Eminence of the Courts, that action shall be taken, without any exception, against those who commit such acts." Contrary to the "without any exception" part of the pronouncement, no direct action had been taken against the President at the time of submission of this thesis. This is, of course, unsurprising, given the court's subservience to the Executive: see section 4.4.

malevolent aspects of these regimes – and their associated repudiation of, especially, the human rights element of, the rule of law[54] – have been well documented.[55]

4.4 Judicial failures

Together with the conduct of the Executive, a further significant breakdown in the application of the rule of law in the Maldives, which has attracted considerable international scrutiny, lies with the Judiciary – the very institution that, more than all others, is expected to embrace, protect and maintain the concept. This breakdown has been extensively documented.[56]

The Judiciary's failure to uphold the rule of law has been most evident in the Supreme and Criminal Courts, and has occurred with respect to all of the elements of the rule of law discussed in section 3.2. This failure has been a bedrock for the undermining of the Maldives' nascent democratic reforms.

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[54] See Chp. 3, section 3.2.

[55] With respect to Waheed's regime, see, for example, J.J. Robinson, above n 39, 22-25. For a first-hand account of the reprehensible behaviour of state actors during the Yameen presidency, see Yameen Rasheed, "Dhoonidhu Diaries: Part 1 – Arrest and Incarnation", *The Daily Panic*, 29 June 2015 <http://thedailypanic.com/2015/06/dhoonidhoo-diaries-part-1-arrest-and-incarceration/>, "Dhoonidhu Diaries: Part 2 – Prison Cell", *The Daily Panic*, 18 July 2015 <http://thedailypanic.com/2015/07/dhoonidhoo-diaries-part-2-prison-cell/> and "Dhoonidhu Diaries: Part 3 – Heat and Captivity", *The Daily Panic*, 22 August 2015 <http://thedailypanic.com/2015/08/dhoonidhoo-diaries-part-3-heat-and-captivity/>. On 23 April 2017, Rasheed, an outspoken critic of the government and religious zealots in the Maldives, was brutally murdered – a crime for which no-one had been convicted at the time of submission of this thesis: see "Prominent blogger stabbed to death in Maldives capital", *Aljazeera*, 24 April 2015 <http://www.aljazeera.com/news/2017/04/prominent-blogger-stabbed-death-maldives-capital-170423142748274.html> and Azim Zahir, "Who killed my friend Yameen Rasheed?", *Aljazeera*, 27 April 2017 <http://www.aljazeera.com/indepth/opinion/2017/04/killed-friend-yameen-rasheed-170426080146094.html>.

[56] See, for example, ICJ and SAHR, above n 31, 12-24, Uladzimir Dzenisevich, *Searching for a Lost Democracy – A Fact Finding Mission Report on the Maldives* (Commonwealth Human Rights Initiative, New Delhi, 2016), 24-30, Robinson, above n 39, 274-291, President's Office, *A Legacy of Authoritarianism – A Dossier on the Maldivian Judiciary* (Government of Maldives, Male', February 2012), UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, Human Rights Council, 23rd session, Agenda item 3, UN General Assembly, 21 May 2013, A/HRC/23/43/Add. 3, ICJ, *Maldives: Securing an Independent Judiciary in a Time of Transition* (ICJ, London, February 2011), Neil Merrett, ""Pathetic state of judiciary", religious intolerance Maldives' major human rights failures: Dr Shaheed", *Minivan News*, 11 December 2012 <https://minivannewsarchive.com/politics/pathetic-state-of-judiciary-religious-intolerance-maldives-major-human-rights-failures-dr-shaheed-48721>, Azra Naseem, "Comment: Plan B", *Minivan News*, 20 September 2013 <https://minivannewsarchive.com/politics/comment-plan-b-66021>, Mushfique Mohamed, "Maldives' judiciary – an impediment to democracy consolidation", *Dhivehi Sitee*, 10 October 2013 <http://www.dhivehisitee.com/election-2013/latest-news/maldives-judiciary-impediment-democracy-consolidation/>, "The devil is in the judiciary", *Dhivehi Sitee*, 15 October 2013 <http://www.dhivehisitee.com/election-2013/latest-news/devil-judiciary/> and Daniel Bosley, "Judicial independence still an issue in Maldives, says US assistant secretary of state", *Minivan News*, 18 December 2014 <https://minivannewsarchive.com/politics/judicial-independence-still-an-issue-in-maldives-says-us-assistant-secretary-of-state-91683>.

4.4.1 Origin of judicial failures

The Judiciary's disregard for the rule of law stems from the practices that it adopted under the Gayoom autocracy. Entrenched judicial attitudes and loyalty to the former leader persisted after the regime change because judges who were in office at the time of adoption of the democracy-based 2008 Constitution continued in office thereafter. They were generally unqualified and the JSC failed to appoint new judges in accordance with the Constitution. The ICJ and SAHR noted that:[57]

> ... the judiciary under the prior system was an extension of the regime, appointed by, beholden to, and pronouncing sentences and verdicts on behalf of (and often dictated by) the Ministry of Justice. The President was the ultimate judicial authority, acting as the final arbiter of appeals from the High Courts. ... [M]any of the sitting judges under the pre-2008 regime had little or no formal legal education. In this way, the judiciary under the prior system had neither the requisite capacity nor independence required to function competently.

As a transitional measure, Article 285(a) of the Constitution allowed all judges in office at the commencement of the Constitution to remain in office. However, Article 285(b) required the JSC, within two years of the commencement of the Constitution (that is, by 7 August 2010), to determine whether or not the judges met the standards specified in Article 149, including being of "high moral character".[58] Where they did not, they were to be removed from office.[59] Again, as the ICJ and SAHR put it, "[t]he vetting process to be carried out by the JSC in accordance with Article 285 of the 2008 Constitution was intended to address these and other potential deficiencies and reappoint a judiciary that would be independent, impartial and competent".[60] However, the JSC was not up to the task.

According to numerous sources, the JSC has failed miserably in carrying out its constitutional and legal mandates.[61] In 2012, the UN Human Rights Committee (UNHRC) expressed its

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[57] ICJ and SAHR, above n 31, 11.
[58] Article 149(a).
[59] Article 285(c).
[60] ICJ and SAHR, above n 57.
[61] The most detailed account of this failure is given by Velezinee, who was a member of the JSC: Aishath Velezinee, *The Failed Silent Coup: In Defeat, They reached for the Gun – The unsuccessful plot to change the government through a quasi-legal court ruling, and the subsequent use of the police and military as illegal means to the same end*, 10 September 2012 <https://www.dhivehisitee.com/wp-content/uploads/2012/The%20Failed%20Silent%20Coup.pdf>.

concern that "the composition and functioning of the ... JSC ... seriously compromise[d] the realization of measures to ensure the independence of the Judiciary as well as its impartiality and integrity".[62] Subsequently, the UN Special Rapporteur considered that the JSC's vetting and reappointment procedure "soon became a politicized process, with many actors feeling their personal and political interests were at stake"[63] and "[b]ecause of this politicization, the Commission has allegedly been subject to all sorts of external influence and has consequently been unable to function properly".[64]

Similarly, the ICJ claimed that the JSC failed "to fulfil its constitutional mandate of properly vetting and reappointing the judges ... in a sufficiently transparent, timely, and impartial manner. ... JSC decision-making has been perceived as being inappropriately influenced by a polarized political environment".[65]

In its appointment of judges under the 2008 Constitution, the JSC took a rather generous view of what constituted a high moral character for the purposes of Article 149(a), deciding that the requirement was met if a judge had not been convicted of any of 29 criminal offences specified by the JSC, including those for which a *hadd* was prescribed under Islam,[66] criminal breach of trust or bribery, as prescribed in Article 149(b).

This liberal interpretation of high moral character was challenged by President Nasheed, who argued that:[67]

> … in a democratic society, the standards for assessing a person's moral standing are not necessarily the same as the standards used by the courts to judge their criminality. Deciding someone is of high moral character based simply on the fact that they do not have a criminal record, I do not think, is the best way forward. Articles 149(a) and 149(b) [of the Constitution] clearly differentiate between the two concepts. It is a matter of grave concern that the standards set by the [JSC] allows [*sic*] individuals to remain on the bench whose

The mandates are set out in Article 145 of the Constitution and section 17 (Members Code of Ethics) of the Judicial Service Commission Act (Law No. 10/2008).

[62] UNHRC, "Consideration of reports submitted by States parties under article 40 of the Covenant – Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. Maldives", CCPR/C/MDV/CO/1, 5.

[63] UNHRC, above n 56, 8.

[64] UNHRC, above n 56, 11.

[65] ICJ and SAHR, above n 31, 3-4.

[66] A punishment fixed in the *Qur'an* and *hadith* for crimes considered to be against God; namely, theft (amputation of the hand), illicit sexual relations (death by stoning or 100 lashes), making unproven accusations of illicit sex (80 lashes), drinking intoxicants (80 lashes), apostasy (death or banishment) and highway robbery (death).

[67] Velezinee, above n 61, 34.

> professional conduct have [*sic*] been called into question by the previous administration and Constitution, as well as individuals accused of various offences.

The JSC subsequently expanded its high moral standard criteria to also rule out judges who had convictions under administrative law.[68] In the end, the *Standards for re-appointment of sitting judges under Article 285* did not specify any ethical or moral requirement at all.[69] This was not surprising since one member of the JSC had already declared that Article 285 of the Constitution was "symbolic".[70]

The upshot was that, by the due date of 7 August 2012, 191 of the 197 judges appointed under the Gayoom regime were re-appointed, the remaining six being disqualified under the late-adopted administrative law conviction rule.[71] In the words of the UN Special Rapporteur, "[t]he 2008 Constitution completely overturned the structure of the judiciary, yet the same people who were in place and in charge, conditioned under a system of patronage, remained in their positions".[72] Reformation of the Judiciary in line with the aspirations of the proponents of the new Constitution and the rule of law was set to evaporate.

4.4.2 Usurping the Constitution

Article 282(a) of the Constitution required that an interim Supreme Court, comprising five judges, be appointed within 40 days of commencement of the Constitution. All judges in office at the commencement of the Constitution (other than the Chief Justice) would continue in office until permanent judges were appointed in accordance with Article 148.[73] The interim court would continue until the permanent Supreme Court, provided for in Article 145, was established.[74]

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[68] The initial criteria were published on 11 May 2010 and the President responded to them on 27 May 2010. The JSC released its revised criteria, encompassing the prohibition on administrative law convictions, on 26 July 2010 – 12 days before the reappointment deadline: see above n 65 and n 67.
[69] Velezinee, above n 61, 33. The other standards were: education – "whatever education level currently attained" and a six-month "sentencing certificate"; experience – a judge at the time the new Constitution came into force; and competency – a good attendance record!
[70] Velezinee, above n 61, 23.
[71] ICJ and SAHR, above n 31, 15. Apparently, three of the six disqualified judges were subsequently reinstated: see UNHRC, above n 63.
[72] UNHRC, above n 56, 13.
[73] Article 285 of the Constitution.
[74] Article 284 of the Constitution.

Contrary to these constitutional requirements, on 8 June 2010 (two months before the expiration of the period within which the new permanent Supreme Court was to be established, and before any law relating to the composition of the Supreme Court bench was passed)[75] the interim Supreme Court judges took it upon themselves to inform the President that they would remain permanently on the Supreme Court bench. In response to this illegal self-proclamation made with complete disregard for the supremacy of the law, on 7 August 2010 – the date of expiration of the transitional period within which judges were to be constitutionally appointed – the President declared the Supreme Court bench defunct[76] (itself an unconstitutional proclamation),[77] appointed a four-member bench (also an unconstitutional act)[78] and ordered the Defence Force to take control of the Supreme Court premises.[79] This resulted in the forced closure of the Supreme Court.

On 10 August 2010, Parliament passed the Judges Act,[80] which was ratified by the President on the same day, and the Supreme Court re-opened. Seven judges were subsequently appointed to the court under the Judges Act, including the five judges on the interim court bench, who had earlier proclaimed their self appointment. In accordance with Article 148(a) of the Constitution, they were nominated by the President and approved by a Parliament that was antagonistic towards the President. That left "many with the perception that the Supreme Court was appointed in a politicized manner".[81]

4.4.3 Supreme Court declarations of omnipotence

The Supreme Court bench has, on a number of occasions, declared its omnipotence in relation to the Constitution, frequently reciting the mantra that it acts on "its authority as the guardian

[75] As required by Article 145(a) of the Constitution.
[76] See President's Office, above n 56, 8.
[77] Since Article 284 of the Constitution provides that the interim Supreme Court was to continue until the permanent Supreme Court was established and the termination of tenure of the sitting judges failed to comply with the requirements of Article 154.
[78] Since Article 148(a) of the Constitution stipulates that the President can appoint judges to the Supreme Court only after consulting with the JSC (which he did: see Velezinee, above n 61, 56) and obtaining confirmation of the appointments by a Parliamentary majority vote (which he did not).
[79] UNHRC, above n 63.
[80] Law No. 13/2010.
[81] UNHRC, above n 63 and Velezinee, above n 61, 56.

of the Constitution and the laws of the Maldives".[82] In fact, the Court went even further and over-ruled the constitution itself when, on 9 November 2013, a majority[83] ruled that President Waheed would remain in office if a new President was not elected, on the ground that the so-called "principle of continuity of legitimate government would override any repercussions faced by the failure to adhere to constitutional deadlines."[84]

This attitude of invincibility has culminated in the court's unilateral issue of orders that supercede constitutionally valid statutes to the point where virtually any statutory provision can be over-ridden by using reference to the court's role in Articles 7, 141, 144, 145(c) and 156 of the Constitution.[85]

The Supreme Court also cites section 20(b) of the Judicature Act as a legislative basis for its perception of its ultimate authority.[86] That section provides that "[a] Supreme Court ruling on a matter shall be conformed to by the Executive, the Parliament, the Judiciary, those in independent posts, state institutions, those holding state positions, the police and the defense force and all the citizens".

However, that provision must be read in the overall context of the Constitution, such that, in the light of the underlying purpose and framework of the Constitution and the rule of law, the Supreme Court does not have a *carte blanc* simply to over-rule Parliamentary legislation and then expect all parties mentioned in the section – especially the Legislature – to comply with its ruling.

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[82] See, for example, above n 53 and Justice Saeed's "repeated" claim in *Supreme Court v Human Rights Commission of the Maldives* [HRCM], Case No. 2014/SC-SM/42, 16 June 2015, translated in Zaheena Rasheed, "Translation: Supreme Court v. HRCM", *Minivan News*, 24 June 2015 <https://minivannewsarchive.com/politics/translation-supreme-court-v-hrcm-100080> that "the Supreme Court as custodian of the Constitution would not violate the law and would follow due procedures": Zaheena Rasheed, "Supreme Court slams HRCM for basing rights assessment on "rejected" UN rapporteur findings", *Minivan News*, 30 September 2014 <https://minivannewsarchive.com/politics/supreme-court-slams-hrcm-for-basing-rights-assessment-on-%E2%80%9Crejected%E2%80%9D-un-rapporteur-findings-90331> and the Supreme Court's judgment on the removal from office of members of the Executive: Supreme Court, 2017/SC-C/11, 22 May 2017 (in Dhivehi) <http://www.supremecourt.gov.mv/mediafolder/sc_c11_hukum.pdf>, translated in Supreme Court, "Decision of the Constitutional Matter Submitted by the Attorney General's Office", 22 May 2017 <http://english.judiciary.gov.mv/decision-on-the-constitutional-matter-submitted-by-the-attorney-generals-office/>.

[83] Which again did not include the Chief Justice or Justice Adnan.

[84] Robinson (11 October 2013), above n 13 and Naseem, above n 13.

[85] See, for example, sections 4.4.4.1 and 4.4.4.2.

[86] See, for example, *Supreme Court v Human Rights Commission of the Maldives*, above n 82.

The Supreme Court's strategy is also reflected in the issue of the orders themselves.[87] The ethos is one of unilateral and dictatorial edicts, rather than adjudication on final appeal by petitioners of disputes between two (or more) parties and interpretation of the Constitution when a request to do so is made by Parliament, in accordance with Article 95 of the Constitution. Presumably it was this absolutistic tactic adopted by the court that moved the UN Special Rapporteur to note that "the judiciary seems to have retreated behind closed doors, refusing to enter into a substantive dialogue with other powers to address the situation".[88]

In terms of the overall context of, and the purpose underlying, the 2008 democracy-based Constitution, the Supreme Court's interpretation of its role reflects the judicial mindset that prevailed under Gayoom's autocratic regime, which was re-applied under Yameen's similar presidential approach.

4.4.4 Usurping the Legislature

The Supreme Court bench has exhibited a determination to exert its authority over all aspects of the judicial system. In doing so, the court has been unable – or unwilling – to distinguish between the role of delivery of justice and the role of judicial administration, which came at the expense of the separation of powers between the legislative and judicial branches of government. Two events illustrate the point:

(a) the repeal of Chapter 8 of the Judicature Act; and

(b) the restriction of the period within which appeals against judicial decisions may be made.

[87] And in its pursuit of *suo motu* actions, where the court has served up what appears to be predetermined outcomes of a dual and conflicted accuser and judge: see *Supreme Court v Human Rights Commission of the Maldives*, above n 82, and *Supreme Court v Elections Commission*, Case No. 2014/SC-SM/15 dated 9 March 2014 <http://www.supremecourt.gov.mv/mediafolder/2014-sc-sm-15.pdf> (in Dhivehi), translated in "EC Dismissals: Translation of Supreme Court verdict", *Minivan News*, 10 March 2014 <https://minivannewsarchive.com/politics/translation-supreme-court-verdict-on-elections-commission-contempt-of-court-case-79376>.

[88] UNHRC, above n 56, 7. The "situation" to which she refers is "the difficulties encountered by the Maldives on its transition towards democracy and the rule of law": *ibid.*

4.4.4.1 Repeal of Chapter 8 of the Judicature Act

Through the establishment of the Judicial Council[89] and Department of Judicial Administration under Chapters 8 and 9 of the Judicature Act, respectively (and also the establishment of the JSC under Chapter VII of the Constitution), Parliament made it obvious that judicial administration lay with those bodies and not with the Supreme Court.

In its unabashed offensive to control the administration of the judicial system, on 4 May 2014 the Supreme Court unilaterally issued a "bizarre"[90] ruling, which "repealed Chapter 8 of the Judicature Act, thereby abolishing the Judicial Council"[91] and disenfranchising seven of its members. As a consequence, the Department of Judicial Administration, established under Chapter 9 of the Judicature Act and largely responsible to the Judicial Council:[92]

> … has been functioning as a body under direct supervision of the Supreme Court. ... [T]he dissolution of the Judicial Council and the direct control of the Supreme Court over the Department of Judicial Administration have had the effect of centralizing administrative decisions in the hands of the Supreme Court.

The Supreme Court justified its action on the basis of Article 141(b) of the Constitution, which renders it "the highest authority for the administration of justice in the Maldives" and Article 156, which gives the courts "the inherent power to protect and regulate their own processes in accordance with law and the interests of justice."

At best, the court misconstrued those articles.[93] With respect to Article 141(b), in the overall context of the Constitution and in light of its purpose, and in the specific context of Chapter VI (The Judiciary), the court confused the "administration of *justice*" with administration of the *judicial system* – the latter with which the court has tampered and is not addressed by Article 141(b).

[89] The functions, responsibilities and membership of the Judicial Council are set out in sections 81, 82 and 83(a), respectively, of the Judicature Act.
[90] Husnu Al Suood, *The Maldivian Legal System*, Maldives Law Institute, 2014, 148.
[91] *Ibid.*.
[92] UNHRC, above n 56, 14.
[93] See "Supreme Court to validate some lower court rulings", *Maldives Independent*, 26 January 2016 <http://maldivesindependent.com/politics/supreme-court-to-validate-some-lower-court-rulings-121796>.

Furthermore, centralisation in the Supreme Court of administration of the legal system is contrary to the words of Article 156: "[t]he court*s* have the inherent power to ... regulate *their* own process*es*" (emphasis added). Plurality in that article points to all (levels of) courts and against monopoly control by the Supreme Court, and is also consistent with the cross-court membership of the Judicial Council, stipulated in section 83 of the Judicature Act.

At worst, the Supreme Court's ruling is an example of arrant disrespect for the principle of separation of powers between the Legislature and the Judiciary, and therefore a flagrant breach of the rule of law. Legislative authority in the Maldives is vested in its Parliament[94] and Parliament's powers include the amendment or repeal of any law.[95] Neither the authority nor the powers fall within the mandate of the Supreme Court.

4.4.4.2 Curtailing the appeal filing period

Against the background of Nasheed's trial,[96] in the name of more efficient administration of justice the Supreme Court decided that the statutory period within which an appeal against the decision may be filed with an appellate court was too long. Generally, the period was 90 days from the date of a judicial or tribunal decision.[97] Accordingly, on 27 January 2015 the court unanimously[98] ruled that the time period to lodge appeals in all cases would be reduced to ten days, on the grounds that the statutory provisions were in violation of Article 42(a) of the Constitution, which prescribes that "everyone is entitled to a fair and public hearing within a reasonable time ...".[99]

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[94] Article 70(a) of the Constitution.
[95] Article 70(b)(2) of the Constitution.
[96] See section 4.4.5.1.
[97] See, for example, sections 15 and 42(a) of the Judicature Act and section 34(b) of the Tax Administration Act. Under section 42(a)(2) of the Judicature Act, the appeal submission period is 180 days if the appeal is to the High Court against a decision of a lower court established in an island other than Male'. Under section 86(b) of the Employment Act (Law No. 2/2008) the appeal filing period is 60 days.
[98] That is, the five remaining judges on the bench after the removal of the former Chief Justice and Justice Adnan, discussed in section 4.2.1.1.
[99] Supreme Court Ruling 2015/SC-RU/01, 27 January 2015 <http://www.supremecourt.gov.mv/mediafolder/2015_sc-ru-01.pdf> (revocation of legislative provisions) (in Dhivehi) and Supreme Court Circular 2015/06/SC, 27 January 2015 <http://www.supremecourt.gov.mv/mediafolder/2015_06_sc.pdf> (new time period) (in Dhivehi). The circular states that if a decision made by a superior court, a magistrate's court or a tribunal is appealed, the notice of appeal must be filed in the required format with the court or tribunal the decision of which is being appealed and that court or tribunal must send the appeal documents to the High Court within seven days of receiving them from the appellant. The High Court must inform the relevant authorities and start considering the appeal within seven days of its receipt of the appeal documents.

The constitutional justification for this move by the Supreme Court is wanting. It is more likely that its restrictive appeal lodgement period was politically motivated to frustrate Nasheed's appeal against his conviction,[100] since hitherto there had been no publicly canvassed concerns about the filing period and, according to legal practitioners, "the new timeframe would make it ... logistically and practically impossible for most people to prepare [and to lodge] an appeal case ...".[101] This is particularly so in the light of section 42(a)(2) of the Judicature Act's recognition of a longer (180-day) appeal submission period for appellants living in outlying islands. The effect was that the court's ruling, ostensibly premised on the constitutional right to a timely trial, now clashed with the more fundamental right to an appeal itself.

Inexplicably, in its somewhat emotionally-charged and contradictory response to Amnesty International's reference to the state of human rights in the Maldives in its 2015/2016 report on the state of human rights internationally,[102] the Supreme Court claimed – without providing any rationale – that Amnesty International "erroneously claims that the period for filing an appeal is 10 days".[103]

In reality, again the Supreme Court's action demonstrates either its inability to interpret constitutional law contextually or its rather blatant and seemingly politically-motivated disregard for the rule of law principle of separation of powers between the Legislature and the Judiciary.

The upshot of the court's *ultra vires* exploits is concisely expressed in the bleak conclusion of the UN Special Rapporteur's report:[104]

> According to the democratic principles of separation of powers, all branches of the State are equally important and none should be above the other or above the law. ... The lack of understanding in the delineation of the respective competencies, and the ensuing power

[100] See sbove n 96.
[101] Ismail Humaan Hamid, "Supreme Court has removed right of appeal, claim legal experts", *Minivan News*, 28 January 2015 <https://minivannewsarchive.com/politics/supreme-court-has-removed-right-of-appeal-claim-legal-experts-92424>.
[102] Amnesty International, *Amnesty International Report 2015/2016 – The State of the World's Human Rights* (Amnesty International, London, 2016), 242-245 <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>, 242-243.
[103] Supreme Court, "Press Release of the Supreme Court of the Republic of Maldives", 2 March 2016 <http://www.supremecourt.gov.mv/mediafolder/press-01-2016.pdf>.
[104] UNHRC, above n 56, 20.

> struggle ... have serious implications on the effective realization of the rule of law in the Maldives.

Maybe the UN Special Rapporteur was too generous by using the words "lack of understanding". Rather, the Supreme Court's understanding of the delineation is more likely to be quite acute, and its actions merely reflect its non-acceptance of the notion of equal balance of powers – and it is that which gives rise to the serious implications for the rule of law, to which the UN Special Rapporteur refers.

4.4.5 Due process and impartiality

While the Supreme Court's conduct discussed in sections 4.4.2 to 4.4.4 is offensive enough to the rule of law, perhaps the most repugnant of the Judiciary's behaviour in this context has been the Criminal Court's handling of political trials. In that court, the rule of law attributes of due process, fair trials, proportionality, and judicial independence and impartiality have played second fiddle to what can only realistically be described as predetermined outcomes in favour of the Executive. Although it is one among many such cases,[105] a most appalling example is Nasheed's trial in 2015 on charges of illegally detaining the former Chief Judge of the Criminal Court.[106]

4.4.5.1 Nasheed trial

It will be recalled that, in 2012, former President Nasheed faced trial under section 81 of the Penal Code in relation to his alleged illegal detention of the Chief Judge of the Criminal Court. The trial was stayed by the High Court on 1 April 2013 pending the outcome of Nasheed's challenge to the legitimacy of the JSC appointing judges to hear his case. As it turned out, the proceedings were stayed for just under two years, during which time Nasheed contested the 2013 presidential elections.[107]

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[105] See, for example, Rasheed, above n 55 and United States State Department, *Maldives 2016 Human Rights Report* <https://www.state.gov/documents/organization/265754.pdf>, 6-9.
[106] See section 4.3.1.1.
[107] In which Nasheed was defeated.

After that hiatus, the High Court informed the parties on 31 January 2015 that the proceedings were to resume on 3 February 2015. However, on 16 February 2015 the Prosecutor General formally withdrew the original charges against Nasheed. Then, on 22 February 2015, the Prosecutor General laid new charges under the section 2(b) of the Prevention of Terrorism Act (PTA);[108] namely, kidnapping or abducting a person or taking a hostage. Conviction under this provision would subject Nasheed to a maximum sentence of 10-15 years imprisonment or banishment[109] (with the possibility of hard labour in the case of imprisonment),[110] in comparison with three years under section 81 of the Penal Code. Accordingly, on 22 February 2015 Nasheed was re-arrested on the new charge and the first hearing was conducted before three judges in the Male' Criminal Court the following day. Again, aberrantly for the Maldives judicial system, the trial was completed after a total of 11 hearings within 19 days.[111]

There were numerous flaws in the process, which effectively denied Nasheed a fair trial before independent and impartial judges. The MDN, UN Human Rights Council Working Group on Arbitrary Detention (UNWGAD) and the Bar Human Rights Committee of England and Wales documented many "systematic procedural irregularities"[112] in the conduct of the trial, including:[113]

1. Two of the judges and the Prosecutor General were at the scene of the alleged crime and tried to prevent the arrest of the Chief Judge.[114] The judges had also provided witnesses statements to the police at the time of the investigation, which were used as evidence in the

[108] Law No. 10/1990.
[109] Section 6(b) of the PTA.
[110] Section 6(c) of the PTA.
[111] Zaheena Rasheed, "UN human rights chief expresses strong concern over "hasty and apparently unfair" Nasheed trial", *Minivan News*, 18 March 2015 <https://minivannewsarchive.com/politics/un-human-rights-chief-expresses-strong-concern-over-hasty-and-apparently-unfair-nasheed-trial-94041>. The MDN noted that the trial took place at "uncharacteristically extreme speed": Ismail Humaan Hamid, "Democracy Network alerts Special Rapporteur on Independence of Judges on Nasheed's sham trial", *Minivan News*, 14 March 2015 <https://minivannewsarchive.com/politics/democracy-network-alerts-special-rapporteur-on-independence-of-judges-on-nasheeds-sham-trial-93332>. Allegations of undue speed of the trial were rejected by the Deputy Prosecutor General: see Blinnie Ní Ghrálaigh, *Trial Observation Report – Prosecution of Mohamed Nasheed, Former President of the Republic of the Maldives* (Bar Human Rights Committee of England and Wales, London, April 2015), 45.
[112] Hamid, above n 111.
[113] "Nasheed trial "not free or fair" says Maldivian Democracy Network", *Minivan News*, 12 March 2015 <https://minivannewsarchive.com/politics/nasheed-trial-not-free-or-fair-says-maldivian-democracy-network-93223>.
[114] UNWGAD, "Communication addressed to the Government on 12 May 2015 Concerning Mohamed Nasheed", *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-third session, 31 August - 4 September 2015 – No. 33/2015 (Maldives)*, A/HRC/WGAD/2015, 12 October 2015, 7 <http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%2033_Maldives_Naheed_AUV.pdf>.

proceedings against Nasheed.[115] Nevertheless, the judges refused to recuse themselves from the case or to be named as defence witnesses, claiming that there was no conflict of interest.[116] After apparently only 20 minutes of deliberation,[117] the judges contended that:[118]

> … [i]t was for them as judges to choose whether to be witnesses or judges in the case, and they had chosen the latter. On that basis, and having ruled that neither the Prosecution nor the Defence could compel them to testify in the proceedings, they determined that their independence and impartiality was safeguarded, such that there was no basis on which to recuse themselves.

This either reflected a "fundamental lack of understanding surrounding the principle of judicial independence amongst the judiciary itself"[119] or was a deliberate act contrary to the rule of law.

2. The defence counsel were not permitted to conduct timely meetings with Nasheed to prepare for the hearings.[120]
3. The court denied defence counsel's request for what they considered sufficient time before the trial to examine the prosecution's evidence and to prepare a defence against the newly-laid terrorism charges, which culminated in the lawyers' withdrawal from the case on 9 March 2015.[121]

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[115] Above n 114, 13.

[116] One judge was called to the scene of the Chief Judge's arrest by the Chief Judge himself and the two judges were clearly visible in video footage of the scene, produced in evidence by the Prosecution: Ghrálaigh, above n 111, 39. Both judges were obviously working associates of the Chief Judge. They were subordinate to him and reported directly to him. The Defence claimed that they were his personal friends. They had lodged complaints with the HRCM on behalf of the Chief Judge, concerning his arrest and detention: MDN, above n 113 and UNWGAD, above n 114. Furthermore, the Prosecutor General was a judge in the Criminal Court at the time that the Chief Judge was apprehended: UNWGAD, above n 114, 3. Article 220 of the Constitution reiterates that the Prosecutor General must be independent and impartial. He must also uphold the constitutional order, the law and all citizens' rights and freedoms: Article 223(k) of the Constitution.

[117] UNWGAD, above n 114.

[118] Ghrálaigh, above n 111, 39.

[119] Ghrálaigh, above n 111, 20.

[120] When Nasheed could meet with his counsel while he was in detention, apparently information discussed in the meetings was not privileged. Although denied by the Maldives Correctional Services, the meetings were allegedly recorded: see Ahmed Naish, "Government 'spied' on Nasheed's meeting with lawyers Amal Clooney, Jared Genser", *Maldives Independent*, 10 September 2015 <http://maldivesindependent.com/politics/government-spied-on-nasheeds-meeting-with-lawyers-amal-clooney-jared-genser-117237>.

[121] The court stated that the defence had had the case documents for three years – that is, since the hearings into the original charges in 2012 – so, on the basis that no new evidence was tendered during that period, the court allowed the defence only three days for their initial case preparation and one day for the evaluation of witnesses: "Former President Nasheed found guilty of terrorism, sentenced to 13 years in prison", *Minivan News*, 13 March 2015 <https://minivannewsarchive.com/politics/former-president-nasheed-found-guilty-of-terrorism-sentenced-to-13-years-in-prison-93263> and Ghrálaigh, above n 111, 44-45. Of course, the case documents referred to by the court related to the original charge under section 81 of the Penal Code and not to the far more serious charge under section 2 of the PTA.

4. Prosecutors were accused of "witness coaching", which prompted the presiding judge to ask "whether it was a problem".[122]
5. The judges blocked or ignored defence lawyers' attempts to "negate state witnesses under High Court precedents".[123]
6. The Prosecutor General met privately with one of the judges during the trial.[124]
7. The judges denied Nasheed legal counsel at a remand hearing on 23 February 2015 (at which the court ordered that Nasheed be kept in detention until the end of the trial)[125] and at further hearings after his lawyers withdrew from the case.[126]
8. The court refused to admit or to hear defence witnesses on the basis that those witnesses could not negate the prosecutor's evidence and his witnesses' testimonies.
9. The judges answered or elaborated for the prosecution and its witnesses during cross-examinations by defence counsel.
10. The judges openly displayed animosity towards Nasheed and his defence counsel during the hearings.
11. Neither local nor international observers were permitted to observe proceedings.[127]

Two of the three judges selected to hear the case (including the presiding judge) were political appointments under Gayoom's regime. Furthermore, one judge had been suspended for 17 months in 2013-14 for alleged unethical misconduct.[128]

On 13 March 2015, the court found Nasheed guilty of "forced abduction"[129] and as "architect"[130] of the abduction plan,[131] and sentenced him to 13 years' imprisonment. Remarkably, in a further gross breach of the rule of law principle of due process, the High Court

[122] MDN, above n 113.
[123] *Ibid*.
[124] The court ordered that the television footage of the meeting be deleted and barred all journalists from the offending television station from attending the hearings.
[125] Rasheed, above n 111.
[126] MDN, above n 113.
[127] Only six members of the public and 10 media representatives were permitted to attend the hearings. The courtroom had the capacity to seat 40 observers: Ghrálaigh, above n 111, 42.
[128] Namely, sexually assaulting a female attorney from the Prosecutor General's office. The JSC subsequently determined that there was "insufficient concrete evidence" to prove the allegation: Ahmed Naish, "JSC clears Criminal Court Judge Abdul Bari Yousuf of ethical misconduct", *Minivan News*, 26 July 2014 <https://minivannewsarchive.com/politics/jsc-clears-criminal-court-judge-abdul-bari-yousuf-of-ethical-misconduct-88961>.
[129] Ghrálaigh, above n 111, 34.
[130] *Ibid*.
[131] Curiously, although section 3 of the PTA construes the planning of a kidnapping or hostage taking act as a terrorism offence under the Act, that section was not used as a basis for the charge.

– without hearing arguments from counsel – found that the Criminal Court had upheld Nasheed's constitutional rights on the basis that section 43 of the Judicature Act sets out the circumstances under which court decisions and rulings can be appealed. Amongst other circumstances specified in section 43, the Criminal Court's procedure leading to the decision in Nasheed's case did not contradict the law on how a hearing should be held,[132] nor were any of the judges faced with legal or judicial obstacles to make the decision or pass the judgment.[133]

Not unexpectedly, criticism of the courts' decisions came from various quarters. Noting that the court denied its request to observe the trial, the HRCM asserted that Nasheed "was denied fundamental rights which guarantee a fair trial by the constitution, and some rights granted by the International Covenant on Civil and Political Rights [ICCPR]".[134] Transparency Maldives expressed its "grave concern", noting *inter alia* that:[135]

> ... serious issues of conflict of interest were prevalent in the case [and] procedural irregularities raise[d] serious questions about the fairness, transparency and independence of the judicial process followed and the provision of the accused's inalienable right to a fair trial.

Similarly, Ghrálaigh also concluded that Nasheed's right to a fair trial – as guaranteed under the Constitution and international law – was breached, there was "a clear appearance of bias on behalf of two of the three judges, such as to vitiate the fairness of the entire proceedings".[136] Her concerns about the independence and competence of the Maldives Judiciary "as a whole" raised "real doubts regarding the general compliance of criminal proceedings in the Maldivian courts with Article 14(1) [of the ICCPR]".[137] With respect to the judges' conflict of interest, Ghrálaigh added:[138]

> … the fact that two of the judges ... had been identified by the Prosecution as witnesses capable of supporting the prosecution case is a clear and flagrant breach of Article 14(1), so serious as to undermine the fairness of the entire trial.

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[132] Section 43(b)(1) of the Judicature Act.
[133] Section 43(b)(2) of the Judicature Act.
[134] UN, *International Covenant on Civil and Political Rights*, adopted by the UN General Assembly Resolution 2200A(XXI), 16 December 1966 <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> and Hamid, above n 111.
[135] Transparency Maldives, "Transparency Maldives notes with concern the legal process under which the trial of former President Nasheed took place", 14 March 2015 <https://transparency.mv/2015/03/transparency-maldives-notes-with-concern-the-legal-process-under-which-the-trial-of-former-president-nasheed-took-place/>.
[136] Ghrálaigh, above n 111, 5, 57.
[137] Ghrálaigh, above n 111, 39.
[138] Ghrálaigh, above n 111, 39-40.

> The appearance of bias ... is indisputable. Indeed, the judges' acknowledgement that they could choose whether to be witnesses or judges in the case itself amounts to an explicit acceptance of apparent bias on their behalf. In such circumstances, the judicial panel could not possibly have appeared impartial to a reasonable observer.
>
> ...
>
> [I]f the judges had properly considered the principle of impartiality and had properly directed themselves on the matter, they could not but have recused themselves.

Reiterating points 1, 3, 7, 8 and 11 of the MDN irregularities (above), the UN Commissioner for Human Rights considered that:[139]

- the case involved "flagrant irregularities";
- the trial was "a rushed process that appears to contravene the Maldives' own laws and practices and international fair trial standards in a number of respects"; and
- "in a polarised context, and given the long-standing serious concerns about the independence and politicisation of the Judiciary in the Maldives, this case should have been handled with much greater care and transparency".

The UN Special Rapporteur went further, expressing her concern at:[140]

> ... the lack of respect for the most basic principles of fair trial and due process during Mr Nasheed's criminal proceedings.
>
> The series of due process violations ... since Mr Nasheed's arrest on 22 February is simply unacceptable in any democratic society.
>
> ...
>
> [T]he trial did not follow stipulations in the Maldives' Constitution .... and did not follow international fair trial standards.
>
> ...
>
> Mr Nasheed's trial was not only a clear violation of the Maldives' international human rights obligations under the International Covenant on Civil and Political Rights, but it also made a mockery of the State's own Constitution ... . The speed of the proceedings combined with the lack of fairness in the procedures lead me to believe that the outcome of the trial may have been pre-determined.

[139] UN Commissioner for Human Rights, "Conduct of trial of Maldives' ex-President raises serious concerns – Zeid", 18 March 2015 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15712&LangID=E>.

[140] UN, "Independent UN human rights expert calls trial of former President 'mockery'", 19 March 2015 <http://www.un.org/apps/news/story.asp?NewsID=50379#.WnJVI7PRXZ4>.

Although not directly related to the procedural aspects of the case itself, the UN Special Rapporteur made the broader, but telling, point about the general failure of the Maldives legal system in addressing fundamental breaches of the rule of law committed by its political leadership. She observed that:[141]

> … [t]he fact that one former president is being tried on serious terrorism-related charges for one alleged offence when his predecessor has not had to answer for any of the serious human rights violations documented during his [30-year] term is also troubling for a country whose Constitution enshrines the independence and impartiality of the justice system as a prerequisite for democracy and the rule of law.

The objections to the conduct and outcome of Nasheed's trial were played down by the government. On 6 May 2015, in something of an understatement, the Foreign Minister informed the UN Universal Periodic Review meeting on human rights in the Maldives that due process concerns about the trial were "procedural and not substantive [and] mainly focussed on the process and not the merits ...".[142] That, of course, is just another way of saying that Nasheed was guilty anyway.

In the same vein, in its submission to the UNWGAD on 10 July 2015, the government claimed that "none of the criticisms ... of the trial process were so serious either individually or cumulatively as to render the entire proceedings a denial of justice and [Nasheed's] detention arbitrary"[143] and "even if there was a violation of Mr Nasheed's due process rights, the violation was not of sufficient importance to nullify the proceedings".[144] These statements demonstrate a government in denial of its fundamental miscomprehension of the meaning of the rule of law as the foundation of a civil society.[145] The rule of law elements of due process, fair trials and judicial independence and impartiality were simply ignored.

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[141] *Ibid.*

[142] Ahmed Naish, "Foreign minister 'misled' UN on Nasheed trial", *Minivan News*, 10 May 2015 <https://minivannewsarchive.com/politics/foreign-minister-misled-un-on-nasheed-trial-97897>.

[143] UNWGAD, above n 114, 9.

[144] UNWGAD, above n 114, 11.

[145] In something of an exhibition of recalcitrance and further cynicism towards the rule of law, two of the judges in Nasheed's case were promoted to the High Court bench within three months of his trial (see Zaheena Rasheed, "Two judges in ex-president's terrorism trial appointed to high court", *Minivan News*, 8 June 2015 <https://minivannewsarchive.com/politics/two-judges-in-ex-presidents-terrorism-trial-appointed-to-high-court-99316>), one of them later being further promoted to Chief Judge of the High Court (see Department of Judicial Administration, "Justice Uz. Abdullah Didi has been Assigned as Chief Judge of the High Court" <http://english.judiciary.gov.mv/justice-uz-abdullah-didi-has-been-assigned-as-chief-judge-of-the-high-court/>). The third judge in Nasheed's trial was "rewarded" with a government apartment on concessional terms (supposedly for his integrity and strengthening of the State: see above n 33). He also was subsequently appointed Chief Judge of the Criminal Court: see Shafaa Hameed, "Top judge suspended", *Maldives Independent*, 23 February 2016 <http://maldivesindependent.com/politics/top-judge-suspended-122382>.

The UNWGAD concluded that, in the conduct of Nasheed's trial, the Maldives government had violated Articles 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and Articles 9, 14, 19, 22 and 25 of the ICCPR. The Maldives government rejected the UNWGAD's findings as "non-binding".[146]

In what can appropriately be described as an entrenchment of a "travesty of justice",[147] on 27 June 2017 the Supreme Court upheld the High Court decision and dismissed concerns raised by international observers.[148] In response to complaints lodged with the UNHRC by Nasheed that the Maldives was in breach of its obligations under Articles 14, 22 and 25 of the ICCPR, largely for the same reasons as the UNWGAD the UNHRC subsequently ruled that the judicial proceedings, based on charges of terrorism, "were politically motivated … and violated [Nasheed's] right to [a] fair trial".[149] The UNHRC also found that the Maldives failed to explain the legal basis for re-qualifying the charges against Nasheed from illegal arrest or detention to terrorism, or how Nasheed's alleged conduct satisfied the elements of the crime of terrorism under the PTA. The PTA was "formulated in a broad and vague fashion that is susceptible to wide interpretation … and does not comply with the principle of legal certainty and predictability."[150] The PTA therefore failed that rule of law threshold.[151]

Again the Maldives government was contumacious. In a convoluted statement, its response to the UNHRC took the legal positivist approach,[152] contending that "the Government accepts the conviction of Nasheed as lawful and final. The conviction has reached its finality after the decision of the Supreme Court on 27 June 2016 [and] Nasheed has been convicted lawfully

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[146] "Maldives rejects UN ruling Mohamed Nasheed held illegally", *Deccan Chronicle*, 2 October 2015 <https://www.deccanchronicle.com/151001/world-asia/article/maldives-rejects-un-ruling-mohamed-nasheed-held-illegally>.

[147] Amnesty International, "Maldives: 13 year sentence for former president 'a travesty of justice'", 13 March 2015 <https://www.amnesty.org/en/latest/news/2015/03/maldives-mohamed-nasheed-convicted-terrorism/>.

[148] See Zaheena Rasheed, "Supreme Court upholds verdict against Maldives ex-president", *Maldives Independent*, 27 June 2016 <http://maldivesindependent.com/politics/supreme-court-upholds-verdict-against-maldives-ex-president-125056>.

[149] UNHRC, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communications No. 2770/2013 and No. 2581/2016*, UN, CCPR/C/122/D/2270/2013 and CCPR/C/122/D/2851/2016, 4 April 2018, 16. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f122%2fD%2f2270%2f2013&Lang=en>.

[150] *Ibid*, 15

[151] See Chp. 3, section 3.2.4.

[152] See Chp. 3, section 3.2.1.2.

...".[153] There was certainly no moral-based, natural law interpretation to be found in that statement.

4.5 Summary

Using a selection of illustrations, this chapter portrays a litany of infringements in the application of all of the constituent components of the rule of law canvassed in Chapter 3, by the Maldives Legislature, Executive and Judiciary. As a contextual background to the way the rule of law is applied in the Maldivian tax regime (addressed in Chapter 5), this chapter has shown that more generally the rule of law (and particularly provisions of the Constitution, which reflect rule of law principles) has been either completely ignored or manipulated by the three pillars of the state. There has clearly been collusion between the Executive and the Judiciary, to the detriment of the Legislature, which, notwithstanding protestations to the contrary by the Supreme Court, has created a significant imbalance in the power relationship between the three branches.

Since 2010, when the majority of Parliamentary seats have been held by the government's political party (and its supporting parties), the Legislature has repeatedly failed to act in the interests of all Maldivian citizens, as required by the Constitution. It has passed legislation in violation of the Constitution to achieve the Executive's political aims or to protect the Executive.

The Executive also habitually plays scant regard to the rule of law. Even under the newly democratically-elected presidential regime, the rule of law has been subject to abuse, such as in the high-profile case of the detention of the Chief Judge of the Criminal Court, where the law was not supreme and due process was abandoned. The slide towards authoritarian rule from 2012 has seen further assaults on the rule of law and the emergence of the domination of unilateral Executive power.

[153] Ministry of Foreign Affairs, Republic of Maldives, "Government's Response to the Views adopted by the Human Rights Committee concerning Communications by former President Mohamed Nasheed", Press Release, 16 April 2018 <http://foreign.gov.mv/index.php/en/mediacentre/statements/4415-government%E2%80%99s-response-to-the-views-adopted-by-the-human-rights-committee-concerning-communications-by-former-president-mohamed-nasheed>.

The Executive has adopted a recalcitrant attitude when challenged by domestic and international monitors of its performance. Its entrenched view is that the Maldives is an independent and autonomous state and it will not be told by others (particularly Westerners) how it should behave. It is this intransigence that resulted, for example, in the Maldives' departure from the Commonwealth in 2016.[154] Instead, the government has sought solace in closer alignments (particularly for economic development and financial support) with China and Saudi Arabia, which do not place a focus on the rule of law – instead preferring rule by law[155] – much less require rule of law principles to be incorporated as conditions of their financial and other economic assistance.[156]

Moreover, the Executive has adopted very much a positivist approach to the interpretation of the rule of law; that is, it complies with the rule of law because it applies the law as it is written by its acquiescing Legislature, regardless of the absence of moral or ethical underpinnings. The Executive, therefore, certainly does not embrace a natural law perspective to the application of the rule of law, which would incorporate an interpretation centred more on the rights, freedoms and well-being of individual citizens, as espoused in Chapter II of the Constitution.

The Executive's position is mirrored in the manner in which the Judiciary carries out its functions. The Judiciary has been a major contributor to the erosion of the rule of law in the Maldives, largely because of many judges' ignorance, incompetence and unethical behaviour. Despite the efforts to transform the country into a democracy, the majority of its judges emerged from the Gayoom autocracy and reflect the mind-set of that era.

Unilateral and unconstitutional rules and orders discharged by the Supreme Court, made on the pretext of the court being the guardian charged with the responsibility of protecting the Constitution and the law, have served to embolden and empower the court and to reflect and implement the interests of the Executive and its political supporters. The rule of law has continued to erode as the judicial branch (especially the Supreme Court) has become increasingly subservient to the Executive branch.

[154] See above n 18.
[155] See Chp. 1, section 1.1.
[156] See World Bank, *Governance and Development* (The World Bank, Washington DC, 1992).

Most alarming has been the inability, from the lower courts through to the highest appellate court, to ensure and to protect the most basic elements of due process and fair trials, judicial impartiality and proportionality of penalties to offences committed – Nasheed's trial being the quintessential example of this gross shortcoming.

While the Executive may reject a natural law-based interpretation of the rule of law as an undesirable Western influence on the Maldives' Islamic way of life, and while the majority of the country's judges have been trained in Islamic *shari'ah* (to the extent that they have had any substantial legal training at all), the curious aspect of the failure of the two powers to apply the rule of law effectively is that they have resisted the analogous principles expounded by Islamic *shari'ah* itself. Those principles impose upon Muslims a recognition of the supremacy of the law, separation of powers, equal application of the law, rights to a fair trial, judicial impartiality and the delivery of punishments that are in proportion to the offences committed.[157] Instead, these tenets would appear to have been supplanted by the familial allegiances and political alliances discussed in Chapter 2.

This chapter has addressed the application of the rule of law in the Maldives at a macro level. The ineptitude displayed by the Legislature, Executive and Judiciary in applying the rule of law consistently does not bode well for its application a micro level; namely, in the sphere of taxation in the Maldives. Those branches of the state should be role models for sub-Executive level public officials. To the extent that they are undesirable role models, which are not subject to correction, those public officials can use them as justification for their own deviant practices, which similarly neglect the rule of law. Chapter 5 examines whether and, if so, how the rule of law has fared at the micro level of the Maldivian tax system.

[157] See section 3.3.

Chapter 5

TAXATION AND DISRESPECT FOR THE RULE OF LAW

5.1 Introduction

The general disintegration of the rule of law at the Parliamentary, Executive and judicial levels of governance in the Maldives is reflected in the way that it has been taken into account in the context of the country's new taxation regime. Parliamentary, Executive and judicial failures can embolden deviation from the rule of law at the public administration level. In other words, the failure of the three powers to respect the rule of law can "filter down" and instil a similar attitude in public service administrators: the three powers lead by example, albeit – as we have seen in Chapter 4 in the case of the Maldives – often the wrong example.

Although driven by economic necessity, the rushed tax reforms in part sowed the seeds for a less-than-robust application of the rule of law in the formation and administration of the country's tax laws. This chapter examines the ways in which Maldives tax legislation and administrative practice has contradicted the essential elements of the rule of law, discussed in Chapter 3, and, therefore, how the tax regime has contributed to the breakdown of the rule of law more generally in the Maldives.

Following the framework of Chapters 3 and 4, this chapter addresses shortcomings in the application of the rule of law in the field of taxation in the Maldives, at the Parliamentary, Executive (including public administration) and judicial levels of governance.

5.2 Conflict with the rule of law at the Legislative level

It will be recalled from Chapter 3 that two essential ingredients of the rule of law are separation of powers[1] and accessibility, intelligibility and predictability of the law.[2] Maldives tax law has often failed to meet these requirements. The conflict has arisen at the Parliamentary level and is primarily attributable to Parliament shirking its responsibility by excessive delegations to the Executive of its powers to enact intelligible and predictable tax laws, and poor drafting of primary tax legislation.

5.2.1 Shirking Parliamentary responsibility

The well-established principle of "no taxation without representation"[3] means that taxation can only be imposed on the citizens of a democratic society by their Parliamentary representatives. That proposition does not envisage the delegation of fundamental elements of the imposition (such as the extent of the imposition) being delegated by members of Parliament to the Executive or unelected public officials by way of regulations, administrative rulings or similar declarations. The role of civil servants is to administer the laws passed by the Legislature by way of regulations or administrative rulings and similar declarations. Delegation of the Legislature's law-making powers to the Executive breaches the fundamental rule of law element of separation of powers.

Nevertheless, it is, of course, of practical necessity in a modern society for the Legislature to delegate certain law-making powers to subordinate bodies. It is impracticable for the Legislature to address all the minutiae associated with the legislation that it enacts, nor are Parliamentarians necessarily competent, or have the time, to deal with such detail. Consequently, while Article 5 of the Maldives Constitution vests all legislative power in the

[1] See Chp.3, section 3.2.2.
[2] See Chp. 3, section 3.2.4.
[3] Although the author of this phrase has never been identified, it is premised on James Otis's Writs of Assistance speech (1761), given in the context of the American Revolution: see James A. Benson, "James Otis and the "writs of assistance" speech – fact and fiction", (1969) 4 *The Southern Speech Journal*, 256 and James M. Farrell, "The Child Independence is Born: James Otis and Writs of Assistance", 2014, University of New Hampshire Scholars' Repository, n 154 <https://scholars.unh.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1004&context=comm_facpub>.

People's Majlis, Article 94 empowers the Majlis to delegate the power to make regulations (which have legislative effect) to subordinate bodies.

However, there are implicit boundaries around the scope of the Legislature's ability to delegate legislative tasks because doing so typically circumvents Parliamentary (and, therefore, public) scrutiny of the law and concentrates greater power in subordinate functionaries. Indeed, if Article 94 is not read down, the Majlis could theoretically pass a law delegating all of its legislative powers to a subordinate body to make law by way of regulations.

The delineation between matters for primary legislation and those for secondary legislation is not absolute.[4] Nonetheless, as early as the mid-1820s, some basic principles had emerged, particularly from United States jurisprudence.[5] Specifically, the Legislature should not delegate functions that are entrusted to "its immediate personal care".[6] One such function is choosing and adopting policy and promulgating it in statutes, while subordinate bodies are to "give expertness and length to the legislative arm in the application of its policies through detailed rules".[7] But, "no power to choose policies may be given to the delegate".[8] As Justice Ranney put it in *Cincinnati, Wilmington and Zanesville Rail Road Company v The Commissioners of Clinton County*:[9]

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

[4] See, for example, *Wayman v Southard* (1825) 23 US 1, where the United States Supreme Court observed that "[t]he line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details" (at 43) – cited without attribution by the Wisconsin Supreme Court in *In re Griner* (1863) 16 Wisc. 427, 437 – and *Paul v Gloucester County* (1888) 50 N.J. 585, where Van Syckel J was "admonished not to be too confident in asserting where the precise limitation is upon the competency of the legislature to delegate powers of government" (at 594).

[5] See, for example, *Wayman v Southard*, above n 4 and John B. Cheadle, "The Delegation of Legislative Functions", (1918) 27(7) *Yale Law Journal*, 892. Although most jurisprudence on the point originates from the United States, similar principles developed in the United Kingdom,: see, for example, S. A. de Smith, "Delegated Legislation in England", (1949) 2(4) *The Western Political Quarterly* 514.

[6] Cheadle, above n 5, 896.

[7] Cheadle, above n 5, 898-899. Cheadle adds that "[s]uch bodies would not be prohibited from exercising their duties and functions through any implied inhibition growing out of the doctrine of separation of powers" (at 899).

[8] Cheadle, above n 5, 908.

[9] (1852) 1 Ohio 77, 88.

Similarly, in *Locke's Appeal* in 1873, the Pennsylvania Supreme Court held that:[10]

> … [t]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.

In more recent decisions, the United States Supreme Court has held that the Legislature "cannot delegate legislative power to [a subordinate body] to exercise an unfettered discretion to make whatever laws [it] thinks may be needed or advisable".[11] But delegation of legislative authority is not forbidden if the Legislature provides in its statute an "intelligible principle" to which the subordinate body is to conform,[12] and "delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority".[13] In his dissenting judgment in *Panama Refining Co. v Ryan*, Justice Cardozo considered that a delegate "is not left to roam at will ... picking and choosing as he pleases".[14] The judge was:[15]

> … far from asserting ... that delegation would be valid if accompanied by all that latitude of choice. ... He has choice, though within limits, as to the occasion, but none whatever as to the means. The means [must be] prescribed by [the Legislature]. There [must be] no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases.

Nevertheless, Steinberg argues that the United States courts have largely upheld the delegation of law making functions by resorting to the "primary standard theory"; that is, "where the statute

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[10] (1873) 72 Pa 491, cited with approval by the United States Supreme Court in *Field v Clark* (1892) 143 US 649, 694. Various subsequent decisions have also endorsed this approach: see, for example, *Chicago & N.W. Ry v Dey* (1888) 35 Fed. 866 ("The law books are full of statutes unquestionably valid, in which the legislature has been content to simply *establish rules and principles*, leaving execution and details to other officers" (at 874) (emphasis added)); *Buttfield v Stranahan* (1904) 192 US 470 ("Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the Statute" (at 496); *State v Atlantic Coast Line Ry* (1911) 56 Fla 617 ("Where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make **...** rules and regulations, ... such authority is not an unconstitutional delegation of legislative power. A statute may be complete when the subject, the manner, and the extent of its operation are stated in it"); *Cook v Burnquist* (1927) 242 Fed 321 ("The Legislature ... may pass a law covering a matter broadly and in general, leaving the administrative details to a [subordinate body], or to certain designated persons; but the administrative details of any particular matter included in a statute still retain their character of administrative details ... (at 329)); and in *Red "C" Oil Manufacturing Co. v Board of Agriculture of North Carolina* (1911) 222 US 380, the Supreme Court upheld the legislative approach that left it up to a subordinate body to determine the details that measured up to the standards required by, and stipulated in, the statute (at 394).

[11] *A.L.A. Schechter Poultry Corp. v United States* (1935) 295 US 495, 537-538.

[12] *J.W. Hampton Jr. & Co. v United States* (1928) 276 US 394, 410.

[13] *Mistretta v United States* (1989) 488 US 361, 373, citing *Panama Refining Co. v Ryan* (1935) 293 US 388.

[14] *Panama Refining Co. v Ryan*, above n 13, 434.

[15] *Panama Refining Co*., above n 14, 434-435.

which confers the authority to make the rule also prescribes some primary standard to which the regulations of the administrative body must conform, then there is no violation of the principle against the delegation of legislative power".[16]

Cheadle succinctly sums up the obligation imposed upon the Legislature: "[o]n principle, if the mandate to the legislature requires it to declare the policies of the state, the legislature should not shirk its duty by attempting to throw back upon [others] the responsibility for the policy".[17]

5.2.1.1 BPT Act

Despite these principles, the Maldives Parliament has shirked its responsibility to "complete"[18] the BPT Act – by allowing the tax base to, in effect, remain open-ended – when it enacted section 10(d)(9) of the BPT Act.

Section 10(d) of the BPT Act lists various types of expenses, which Parliament has authorised taxpayers to claim as deductions to determine the amount of "taxable profits" which are subject to BPT.[19] However, the sub-section concludes with "any other deduction prescribed by regulations made pursuant to this Act".[20] Allowing the Executive to determine additional deductions by way of regulation transfers a significant legislative power and policy responsibility to an administrative body, the outcome of which is not subjected to perlustration by the Legislature. Section 10(d)(9) extends to the Executive the Legislature's power to choose tax policy. It would, for example, be possible under that section for the Executive to permit deductions for unrealised losses (e.g. provisions), which is clearly a matter of policy and far beyond administration of the primary law.

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[16] William Steinberg, "Delegation of Legislative Authority", (1936) 11(2) *Notre Dame Law Review* 109, 115 and *Red "C" Oil Manufacturing Co.*, above n 10, 381.
[17] Cheadle, above n 5, at 919. Here, Cheadle was speaking in the context of public referenda, but the principle is equally applicable to delegation of legislative functions to subordinates.
[18] See *State v Atlantic Coast Line Ry*, above n 10.
[19] Sections 2(c), 3(a), 4(a) and 5(a)(1) of the BPT Act. "Taxable profits" are defined in section 43 of the BPT Act by simply cross-referencing to those sections. Nowhere does the BPT Act explicitly state that taxable profits are the residue of gross income less permitted deductions. This is merely a statutory inference, which compromises the intelligibility and predictability elements of the rule of law, canvassed in Chp. 3.
[20] Section 10(d)(9) of the BPT Act.

Deductions are fundamental to the determination of taxable profits and, therefore, to the determination of the (business profit) tax base. Thus, the extent of deductible expenditure is of such significance that it involves rudimentary policy choices. That matter comes within the purview of the Legislature's "immediate personal care"[21] and should be promulgated in the statute itself. Instead, section 10(d)(9) delegates a discretion as to what the law should be, rather than a discretion as to its execution,[22] and allows the Executive an unfettered discretion to make the law (in respect of the extension of permissible tax deductions) what it thinks it should be.[23] Therefore, the delegation is of more than an empowerment to sort out administrative details.[24]

Moreover, section 10(d)(9) offers no intelligible principle[25] or primary standard[26] to which the Executive is to conform in deciding what further deductions will be allowed. In short, section 10(d)(9) leaves the Executive free to roam at will, picking and choosing as it pleases.[27] Parliament failed to legislate on deductions as far as practicable and was not compelled by any necessity to leave it to the Executive to bring about the result pointed out by the statute (namely, the determination of taxable profits).[28] If it wished to extend the range of deductions, following these principles and common international practice Parliament could have simply passed an amendment to the BPT Act, which would have been subjected to Parliamentary scrutiny.

By contrast, section 20(j) of the GST Act, for example, prescribes that "[f]inancial services stipulated in the Regulation made pursuant to this Act" are supplies that are exempt from GST. Similarly, section 20(g) exempts from GST "[s]ervices specified in the Regulation made pursuant to this Act, that facilitate and are essential for the provision of services stipulated in Sections 20(a) to 20(f) of this Act" (which relate to exempt supplies of electricity, water, telecommunication and sewerage facilities, and education and health services).[29] Identification of such services requires a detailed inquiry, beyond the scope of a general policy-bound statutory rule. Here, in enacting sections 20(g) and 20(j), as required Parliament has embodied

[21] Cheadle, above n 6.
[22] *Cincinnati, Wilmington and Zanesville Rail Road Company*, above n 9.
[23] *A.L.A. Schechter Poultry Corp.*, above n 11.
[24] *Cook v Burnquist*, above n 10.
[25] *J.W. Hampton Jr. & Co*., above n 12.
[26] Steinberg, above n 16 and *Red "C" Oil Manufacturing Co*., above n 10.
[27] *Panama Refining Co.*, above n 14.
[28] *Buttfield v Stranahan*, above n 10.
[29] However, see section 5.3.1.1(a)(iii)(1) for the *ultra vires* approach to applying this section.

its policy choice, intelligible principle[30] and primary standard[31] in the statute: financial services and services ancillary to the nominated utility and public services are to be exempt from GST. The detail of determining the meaning of those services is appropriately turned over to the Executive for promulgation by regulation. That function involves minutiae, time and expertise, which is outside the efficacy and competence of the Legislature. Delegation by the Legislature of the functions of filling in the details[32] and determining facts or the "state of things",[33] upon which sections 20(g) and 20(j) of the GST Act depend, to the body that can best accomplish them is a good illustration of the application of the rule of law principles of intelligibility and predictability of the law, and separation of powers.

5.2.2 Legislative drafting deficiencies

Poor drafting of legislation breaches the rule of law tenet of intelligibility and predictability, resulting in uncertainty in the application of the law. Deficient drafting also produces unnecessarily complicated legislation, which creates tax avoidance opportunities, which in turn undermine the tax base. That results in unnecessary additional government expenditure being required to fund additional resources to monitor a more complex tax compliance regime, and more frequent use of legal processes where taxpayers object to the tax authority's interpretation of the law. Shortcomings in legislative drafting also impose a burden upon taxpayers and contribute to the "deadweight" cost of the tax system. These problems often occur in Maldives revenue law, but one particular instance in the BPT Act clearly illustrates the point; namely, the imposition of WHT.

5.2.2.1 WHT

Section 6(a) of the BPT Act attempts to identify payments made to non-residents that are subject to WHT. It provides that:

[30] *J.W. Hampton Jr. & Co.*, above n 12.
[31] Steinberg and *Red "C" Oil Manufacturing Co*., above n 26.
[32] *Wayman v Southard*, above n 4.
[33] *Locke's Appeal*, above n 10.

If the following payments are paid or payable in any tax year to a Person who is not a resident in Maldives in that year, then *the Person who makes the payment* shall be chargeable to tax in respect to such payment, under this Section.

(1) Rent, royalties and any *other such consideration* for the use of plant, machinery, equipment or *other property* for the purposes of a business;
(2) Payments made for carrying out research and development;
(3) Payments made for the use of computer software;
(4) Payment of fees for management, personal or technical services and *any other commission or fee* not constituting income from any employment;
(5) Payments made in respect of performances by public entertainers;
(6) Rent in respect of the viewing in Maldives of cinematographic films (whatever the format of the film).

(emphasis added)

(a) Section 6(a): Charge to tax

The stem of section 6(a) and section 6(a)(1)-(5) are cast in sweeping language, and are not based on any conceptually valid foundation. On a literal reading, the section embraces essentially all payments to non-residents for services performed for a person that is in business in the Maldives, whether or not those services are performed in or outside the Maldives. But a literal reading defies practical application in many cases. In reality, section 6(a) needs to be read down to be applied in practice, and that results in arbitrary application of the section, for the very reason that it cannot be justified on a rational basis.

Section 6(a) does not identify the scope of its ambit in respect of the payer upon which it imposes the WHT charge. The stem of section 6 refers to *any* person who makes a payment of the specified kind to a non-resident. Taken literally, it applies to payments made to non-residents, regardless of whether the payer is a resident or non-resident of the Maldives. Thus, the stem must be read down. Although the scope of application of section 6(a) to non-residents is not specified in the BPT Act, it must be inferred that section 6(a) cannot be intended to apply to non-residents who make payments specified in section 6(a) to other non-residents where the paying non-resident has no connection with the Maldives; for example, one would not expect the Maldives to impose WHT on the payment of management fees by a resident of the United Kingdom to a resident of New Zealand. In this respect, the intention of the section therefore appears to be that where a payment made by a non-resident *arises out of the non-resident's operations in the Maldives* (e.g. where the non-resident payer has a permanent establishment in the Maldives), WHT applies to the payment, and the stem of the section must be read accordingly.

The words of section 6(a) do not reflect any underlying policy intent. Put simply, the policy rationale that typically underpins the imposition of WHT is to tax income derived from a country where the activities that produce that income have a sufficient connection with the country (the nexus test) to draw on its public goods and services (the benefit theory of taxation). In the absence of WHT, we would in theory expect that the non-resident would be required to file an annual tax return in respect of its income derived from the country. It therefore follows that if a non-resident obtains the benefit of public goods and services in order to derive its income from the Maldives, it should make a contribution towards the cost of them by way of payment of Maldives tax.

Nevertheless, internationally WHT is often applied to payments made to non-residents where the nexus between the income producing activity and the country of source of the income is more tenuous, e.g. royalty payments for the use of a non-resident's copyright. Where the nexus justification for taxation of the non-resident's income is more doubtful, taxation of the non-resident is rationalised by the need for the government to raise tax revenue.

Section 6, together with section 25 (Accounting for and payment of withholding tax), do not make it clear whether the payer or the payee bears the WHT. Section 6(a) imposes the tax charge on the payer and section 25(d) denies the payer the right to recover the WHT from "any person", implying that the payer bears the tax. However, section 10(d)(8) avoids double taxation of the payee by allowing it a deduction for the income that suffered the WHT, implying that the payee bears the tax.

It is, of course, the government's prerogative to impose tax however it wishes, but if it wishes to actually collect the revenue on a timely basis, the law must be pragmatic. As it stands, section 6(a) places the Maldives in the dilemma of having to choose between:

(i) maximising tax collections by applying section 6 as literally and broadly as the words allow;

(ii) restricting its application to take account of situations where a non-resident that receives a payment provides its service entirely outside the Maldives and has no connection with the Maldives (other than merely receiving the payment from the Maldives or from a resident of the Maldives), akin to an exporter of goods to the Maldives; and

(iii) the administrative convenience of drawing arbitrary lines to exclude its application in cases where it is difficult to apply or to police.

(b) Section 6(a)(1): Rent, royalties and other such consideration

Although the language is somewhat tortuous, section 6(a)(1) is capable of a logical construction if it is read literally, except that, for its rational application, inferences must be made that its references to "a business" is to "a business in the Maldives" and to "other property" is to both tangible and intangible property.

The three fundamental issues surrounding the meaning of section 6(a)(1) are:

(1) What does the phrase "for the use of plant, machinery, equipment or other property" actually qualify?
(2) What does the word "such" in the phrase "other such consideration" actually refer to?
(3) What sort of property does "other property" mean?

The word "rent" in section 6(a)(1) would normally contemplate use of physical property. By contrast, "royalties" normally contemplates the use of intangible property. In the latter case, "other property" in section 6(a)(1) must encompass intangible property, so that royalties paid for the right to use (say) a patent falls within section 6(a)(1). In other words, a patent, which is not plant, machinery or equipment, must be "other property", so that section 6 subjects to WHT a payment made to a non-resident for the use of the patent. In the words of section 6(a)(1), the payment is "royalties … for the use of other property …".

"Other *such* consideration" must mean consideration like rent and royalties; that is, other consideration paid in respect of the use of tangible property (like rent) and intangible property (like royalties). Therefore, WHT is imposed on "other … consideration [like rent] for the use of plant, machinery [or] equipment …" and "other … consideration [like royalties] for the use of … other property …"; that is, intangible property.

This point is relevant because some taxpayers argue that applying the *ejustem generis* rule of statutory interpretation, the meaning of "other property" is restricted by the nature of the property described before it (that is, physical property in the form of plant, machinery and

equipment). Following this argument, "other property" can mean only similar *tangible* property, and therefore "other such consideration" applies only to consideration paid for the use of tangible assets. Therefore, payments made to non-residents by, for example, Maldivian telecommunications businesses for the right to use satellite transponder capacity are not consideration captured by section 6(a)(1). That argument is rejected because the inclusion of "royalties"[34] in section 6(a)(1) contemplates the use of intangible property, which can only fall within the phrase "other property". Thus, "other property" must be interpreted to include intangible, as well as tangible, property.[35]

Arguably "other property" can also refer to commercial land and buildings, such that rent paid to a non-resident is subject to WHT as "rent … for the use of other property", since land and buildings are not property in the specified form of plant, machinery and equipment in section 6(a)(1). A taxpayer may more successfully argue the *ejustem generis* rule here, on the grounds that land and buildings (for the use of which rental payments are made) are a logical and contemplated extension of the specified class of assets; namely, plant, machinery and equipment (for the use of which rent is also paid).

The point of this discussion is that the conflicting interpretations arise because of the absence of clarity in the wording of section 6(a)(1). It is a worthy example of the breach of the rule of law element of intelligibility and predictability, resulting in its uncertain application.

(c) Section 6(a)(2): Research and development

Section 6(a)(2) throws up a policy conflict bearing on intelligibility of the provision in an indirect sense. Read literally, section 6(a)(2) imposes WHT on any payments made to a non-resident for carrying out research and development, regardless of where the research and development activity is undertaken. From a policy perspective, that approach is likely to have a negative impact on the volume of research and development undertaken for the benefit of the

[34] Which are defined in section 43(a) of the BPT Act.

[35] However, it should be noted that the Indian courts have rejected such a broad interpretation, essentially on the grounds that periodic payments to use satellite transponder capacity are not royalties or payments for the use of a process or equipment (or payments for technical services: see section 5.2.2.1(c): see, for example, *Asia Satellite Telecommunications Co. Ltd v DIT* (2011) 332 ITR 340. Whether the Indian cases are good law in the Maldives turns on *inter alia* the compatibility of language in section 6(a)(1) with the corresponding Indian legislation (which is different, and is not analysed in this thesis) and final resolution of the Indian cases.

Maldives. Although the nexus test would require that the research and development activities – for which payments made to non-residents are subject to WHT – are conducted in the Maldives, the policy dilemma intensifies because that approach creates a tax disincentive for the research and development to be carried out in the Maldives. Perhaps, especially in this age of encouragement of research and development,[36] the obvious solution would have been for Parliament to exclude section 6(a)(2) from section 6 altogether.

(d) Section 6(a)(3): Computer software

Section 6(a)(3) also needs to be read down to be applied in practice. When customers buy "off-the-shelf" computer software for their own private or business use, they do not acquire proprietary rights in the software: they merely acquire the right to use the copyright in the software for their own purposes. In practice, the purchase of computer software in such cases is akin to the purchase of a good, albeit that the legal contractual rights are different.

However, the situation is different where the purchaser acquires rights to use the software in order to exploit it, rather than merely to apply it in his or her own private activities or business. When customers exploit the software, they adapt it as part of a process of incorporating it into other software, which they compile and sell. In that case, payment for the use of the software is a payment more obviously aligned to a payment for the use of the copyright – as included in the definition of "royalty"[37] – in the software (rather than the mere purchase of a good), and is correctly subject to WHT.

Thus, the broad wording of section 6(a)(3) requires The Maldives Inland Revenue Authority (MIRA) to delineate between payments for different types of software[38] – something which could have been avoided if Parliament had used more specific language when it enacted section 6(a)(3).

[36] See, for example, New Zealand Government, *Fuelling Innovation to Transform Our Economy - A discussion paper on a Research and Development Tax Incentive for New Zealand* (Wellington, 2018).
[37] Above n 34.
[38] See MIRA, *Withholding Tax Guide – How to Calculate, Deduct and Pay Withholding Tax*, MIRA 302, Version 11.2, 29 November 2011, 10.

(e) Section 6(a)(4): Non-employment services

Section 6(a)(4) is another contentious paragraph in section 6. The language is so wide that it ensures that all payments for non-employment services ("and any other … fee"), which are not specifically identified under the other paragraphs, are subject to WHT. If section 6(a)(4) is intended to be read literally, it would not have been necessary to list all the items in paragraphs (1) to (6); instead, section 6 could simply have said that any payment to a non-resident for services (not constituting income from employment) is subject to WHT. Since the section does not say that, section 6(a)(4) must be read down and restricted in its application.

In principle, the nexus test explained in section 5.2.2.1(a) should determine the application of section 6. This means that management fees, fees for personal and technical services and commissions should be subject to WHT only if the non-resident performs the services in the Maldives. That seems straight-forward for personal and technical fees, although in practice WHT is applied rather arbitrarily to payments for personal and technical services that have no connection with the Maldives.[39]

Moreover, because of the Maldives' dependence on the tourism sector as a source of tax revenue, management fees paid by a business in the Maldives (e.g. a resort) to a non-resident supplier of management services are subjected to WHT.[40] But the nexus test would not normally be met in relation to commissions paid by a Maldives resort to non-resident travel wholesaler or agent. Consequently, application of section 6(a)(4) is neither consistent nor rational.

[39] For example, fees for vessel pilotage in a foreign country paid by a Maldivian-resident owner of the vessel and air navigation over-flight charges paid by a Maldivian-resident airline to the aviation authority of a foreign country are subject to WHT while payments of *inter alia* docking and freight forwarding charges, subscriptions, rent of immovable property and advertising fees made in a foreign jurisdiction by a Maldivian resident are not: MIRA, *Payments not subject to WHT under section 6(a)(4)*, 23 March 2014 (uncirculated).

[40] The nexus test may nevertheless apply in the case of resorts, since the non-resident entity, which provides the management services to a Maldives resort owner, will often have an employee or employees present in the Maldives running the resort.

(f) Section 6(a)(5): Public entertainers

Again, one is left to infer that WHT is to apply to payments made to non-resident public entertainers for their performances *in the Maldives*, if the provision is to be applied logically. If that inference is not made, the scope of application of the WHT would become so geographically unrestricted that no connection with the Maldives would be required. Again, such an outcome would be both conceptually and practicably unrealistic.

(g) Section 6(a)(6): Film rentals

Section 6(a)(6) correctly incorporates the requirement for a link with the Maldives. Therefore, the application of this provision is self-evident. It is the only component of section 6(a) that can be confidently said to meet the rule of law requirement of intelligibility and predictability.

Ideally, the deficiencies discussed in section 5.2.2.1 require rectification by legislative amendment, but they still remain on the statute books more than seven years after their enactment. Instead, as we shall see in section 5.3.1, Parliament's failure to amend the primary law has resulted in the Executive (and its administrators) attempting to do the work for it, often in an *ultra vires* or, as the above discussion illustrates, in a haphazard manner.

5.3 Conflict with the rule of law at the Executive and administrative levels

A major practical consequence of the Legislature's shortcomings discussed in section 5.2 has been MIRA's perceived need to make the tax laws work in its day-to-day administration of them, which has often required "second guessing" Parliament's intention and, therefore, drifting into questions of tax policy, e.g. determining the scope of application of section 6 of the BPT Act. This has been driven by the economic imperative to increase tax revenue collections to meet the government's budgetary requirements. But the price of that approach has been a failure to adhere to the rule of law. Consequently, numerous conflicts with various elements of the rule of law have occurred at the Executive level in the administration of the

Maldives' tax laws.[41] However, the primary failing has been disrespect for the supremacy of Parliamentary law.

5.3.1 Disregard for supremacy of the law

Unfettered failure to adhere to statute is evident at both the Executive and administrative levels of government.[42] It manifests itself principally in proclamations by regulation and rulings. Parliament has been elected to determine the boundaries of the impost of taxation in the Maldives. As described in section 5.2.1, regulations and rulings issued at a sub-Parliamentary level must be based on statute, and when a statute itself is deficient regulations and rulings cannot make up for its deficiencies.[43] Therefore, in some cases, rectification of deficiencies in the tax laws can ultimately be made only by amending the statutes themselves.

5.3.1.1 Unilateral Executive and administrative decisions[44]

On many occasions, the Executive and MIRA have implemented regulations which created or extended taxation on, or exempted from taxation, certain transactions or events, beyond the limits stipulated by the relevant Parliamentary legislation. This breach of the rule of law has been facilitated to a significant extent by the ability of the Commissioner General of Taxation to formulate or amend regulations (which would otherwise emanate from the Executive) by issuing tax rulings. Unusually, section 84(a) of the TAA renders the rulings part of the relevant tax regulation, thus giving them the status of a regulation. This enables MIRA unilaterally to make rulings that have the force of Executive pronouncements without the need for them to be scrutinised by any outside body in a formal regulation-formation process. This mechanism, in effect, "sub-delegates" the authority to make and amend regulations. Traditionally, although drafted by MIRA, regulations were subjected to inter-departmental and presidential office review, and approved by the Attorney General before being ratified by the President and

[41] For example, see below n 46 and n 65.
[42] For the purposes of section 5.3, MIRA is the organ of administration, acting as a subordinate arm of the Executive.
[43] That situation is distinguished from one where the statute is in itself complete and Parliament has specifically delegated within the parameters of the statute particular administrative functions to the Executive or other subordinate body to implement by way of regulation.
[44] Administrative decisions here refer to decisions made by MIRA.

subsequently gazetted. Now, the Commissioner General's rulings morph into regulations, which are not subjected to such oversight and checks.

Again, there are numerous examples of Executive and administrative tax declarations that stretch beyond legislative limits. This section recites significant instances of this conduct from the GST, BPT and tax administration regulations.

A prime example is the timing of the promulgation of the Tax Administration Regulation (TAR). Section 51(c) of the original TAA[45] stipulated that "[r]egulations required to be made pursuant to this Act" were to be made within 6 months of ratification. Nevertheless, the TAR was not issued until just under 3½ *years* after ratification of the TAA. Regardless of the legislative requirements (and, therefore, the supremacy of Parliamentary law), the TAR continues to be applied as a matter of expediency. Again, the appropriate approach, which complies with the rule of law, would have been the Legislature amending the TAA to accommodate the longer-than-anticipated period required to compile and issue the TAR.

(a) GST Regulation and rulings

The GST Regulation and rulings are replete with instances of extra-ordinary imposition of, or exemption from, GST.[46] There are two particularly striking examples of brash Executive behaviour, which openly challenge the clear wording of the GST Act: (i) the placing of restrictions on certain input tax deductions, and (ii) the requirement for full GST invoices in relation to transactions of minimal value.

[45] Now section 83(c) of the amended TAA.

[46] See, for example:
- section 60(c) of the GST Regulation, which denies a deduction from output tax under section 36(c)(1) of the GST Act if a registered person has not properly accounted for output tax on the value of the supply in a taxable period earlier than the taxable period in which the deduction in respect of the bad debt is claimed;
- section 100 of the GST Regulation, which purports to over-ride sections 17(a) and 17(b) of the GST Act, which define the time of supply of goods and services as the earlier of the time of issue of a tax invoice or the time of full or partial payment (section 17(a)), and the time of supply of goods and services supplied under an instalment agreement as the earlier of the time that each instalment payment is made or falls due (section 17(b)); and
- section 65 of the GST Regulation, which denies a deduction for tourism tax authorised unconditionally by section 36(a)(3) of the Act, where that amount is not clearly stated on a tax invoice, receipt or credit or debit note issued by a registered person. Furthermore, there is no requirement in section 42(a) of the Act for tourism tax to be specifically stated on a tax invoice. Section 65 was subsequently repealed by paragraph 10 of Tax Ruling TR-2016/G32 (29 February 2016).

(i) Restrictions on input tax deductions

Other than requiring that a registered person acquires goods and services for the purpose of carrying on a taxable activity,[47] the GST Act imposes no restriction on deductions for input tax. Section 36(b) of the GST Act is a blanket authority to claim the deduction. It states that:

> … [i]f the business of the registered person is conducted by using goods and services obtained from another registered person, tax in relation to that business shall be paid to the MIRA after having deducted input tax which is payable to the registered person who supplied such goods and services.

Similarly, section 37 states that:

> (a) A registered person may set off an amount authorized by this Act as input tax against the output tax payable in a taxable period ... .
> (b) If a registered person has obtained a good or service for the purpose of carrying on a taxable activity, the amount of input tax paid for such good or service may be set off *in full* against the output tax.
>
> (emphasis added)

Input tax is defined in relation to a transaction between two GST-registered persons as "the tax payable under [the GST] Act by the recipient of the good or service to the supplier of the good or service.[48]

Not dissimilar to the Supreme Court's unilateral repeal of Chapter 8 of the Judicature Act and the statutory provisions relating to appeal periods in the Judicature, Employment and Tax Administrations Acts,[49] in its ruling, *Repeal of Section 45(c) of the Goods and Services Tax Regulation*,[50] MIRA rather audaciously amended section 46(a) of the GST Regulation, which was originally promulgated by the Executive on 1 October 2011. The amendment states that "[i]nput tax in relation to capital expenditure [which exceeds MVR 500,000[51]] incurred by a

[47] Section 37(b) of the GST Act.
[48] Section 8 of the GST Act.
[49] See Chp. 4, sections 4.4.4.1 and 4.4.4.2.
[50] Tax Ruling 220-PR/TR/2011/8 (22 December 2011). The validity of this tax ruling to accomplish the repeal of the original section 45(c) of the GST Regulation is doubtful since it took effect on 22 December 2011. In contrast, the authority for making or amending regulations by way of MIRA rulings applies from 29 December 2011, when the First Amendment to the TAA (which introduced section 84(a)) was ratified by the President.
[51] Equal to NZD 44,877.

registered person, with respect to a taxable activity conducted by that person shall be deducted from the output tax of that taxable activity in [a] manner ...” that spreads the amount of the deduction equally over a 36-month period.

Given the scheme and purpose of the GST Act and the context in which the words are used, the arguments are spurious that (i) reference to “a taxable period” in section 37(a) applies only to output tax and not commensurately to input tax, and (ii) input tax is ultimately set off in full,[52] albeit that it takes 36 months.

An equally unauthorised restriction on the deduction of input tax appeared in the former section 45(c) of the GST Regulation,[53] which claimed that:

> … [i]nput tax in relation to capital and revenue expenditure incurred by a registered person shall not be claimed if such expenditure is incurred for:
> …
> (c) indirect expenses incurred in the supply of a good or service (expenses not directly attributable).

This provision is patently outside the boundaries of the GST Act, which has nothing at all to say about a different input tax treatment for “indirect” expenditure. Furthermore, apart from the nebulous phrase “expenses not directly attributable”, paragraph (c) lacks certainty, intelligibility and predictability, in that the regulation is silent about what constitutes and does not constitute “indirect” expenditure. The shortcomings of this regulation were apparently soon recognised because 83 days after the regulation originally took effect MIRA issued a ruling that repealed section 45(c).[54]

Section 45 of the GST Regulation imposes restrictions on deductions for input tax included in:

- expenditure incurred for benefits to persons other than employees;[55]
- subscription fees of clubs or associations;[56]
- the price of goods purchased for free-of-charge distribution;[57]
- fund raising activities;[58] and

[52] As allowed by section 37(b) of the GST Act.
[53] Which took effect on 1 October 2011.
[54] Above n 50.
[55] Section 45(c) of the GST Regulation.
[56] Section 45(e) of the GST Regulation.
[57] Section 45(f) of the GST Regulation.
[58] Section 45(g) of the GST Regulation.

- the price of purchased goods and services where tax has been charged by the supplier in contradiction to the Act and Regulation,

if the supplier has not paid to MIRA the output tax in relation to such supply.[59]

Section 45 therefore contradicts sections 36(b) and 37(a) and (b) of the GST Act, which allow input tax deductions for expenditure made for the purpose of carrying on a taxable activity,

To entrench the supposed superior authority of the GST Regulation, section 44(a)(4) states that "[i]nput tax in relation to a good or service purchased by a registered person shall not be set-off against such person's output tax where the expenditure incurred to purchase the good or service is a type of expenditure for which input tax cannot be claimed under another section of this Regulation."

Accordingly, sections 44, 45 and 46 of the GST Regulation incorporate fundamental breaches of the rule of law principle of supremacy of Parliamentary legislation. This behaviour by the Executive is inexcusable in a democracy, even if its actions were driven by the need to augment the government coffers in a period of fiscal difficulties.

(ii) Tax invoice requirements

Section 42(b) of the GST Act makes it clear that, where a monetary threshold of MVR 5,000[60] is met, a supplier is free to omit the purchaser's name, address and TIN[61] from a tax invoice if the purchaser wishes. That is a statutory right conferred upon the purchaser by Parliament. Nevertheless, section 44(b) of the GST Regulation states (somewhat pretentiously "for the avoidance of doubt") that "a tax invoice issued under section 42(b) of the Act does not constitute a valid tax invoice for the purpose of" claiming input deductions against output tax. Similarly, section 61 of the GST Regulation boldly proclaims that "[n]otwithstanding Section 42(b) of the Act," registered persons shall include inter alia the purchaser's name, address and TIN, if requested by the person to whom the invoice is issued. The purpose of these sections is to facilitate tax audits by ensuring that there is a comprehensive audit trail from the supplier to the purchaser. However, they are *ultra vires* since an administrative regulation cannot over-ride

[59] Section 45(h) of the GST Regulation.
[60] Equal to NZD 449.
[61] Tax Identification Number.

a Parliamentary statue, which states something contrary to the regulation. Furthermore, at the policy level, there is little point in offering the concession under section 42(b) of the GST Act if the purchaser cannot claim an input tax deduction based on it because of sections 44(b) and 61 of the GST Regulation.

In a similar vein, section 14 of the GST Regulation purports to set the time of supply of goods and services at "the time at which a tax invoice *or receipt or credit note or debit note* is issued" (emphasis added). Section 17(a)(1) of the GST Act is clear that a tax invoice is the only document to be applied in the time of supply test. It is not open to MIRA to use the GST Regulation to unilaterally extend that legislative criterion to encompass other documents. This applies particularly with respect to the issue of a receipt, which, being a more common and earlier occurrence than the issue of a tax invoice, is likely to make the time of supply (and resultant liability of the supplier to account for GST) earlier than it otherwise would be under the statute. Furthermore, it is not clear why credit and debit notes should be brought within the general time of supply rule, since they do not reflect a supply *per se*, but merely facilitate an adjustment to the value of an earlier supply.

Section 41 of the GST Act makes it clear that Parliament intended that a registered person who supplies goods and services has 28 days in which to issue a tax invoice. However, section 23 of the GST Regulation shortens that period to three days. Moreover, where a tax invoice (or receipt) is not issued within the 3-day period, section 23(c) claims to require the transaction to be brought to account in the GST return for the taxable period "to which the time of supply specified in Section 17 of the Act relates". Presumably, if the 3-day rule were to have any effect, the intention of section 23(c) is to require the transaction to be accounted for in the GST return for the taxable period in which the transaction took place (which would normally be the case for transactions where the rule in section 17 of the GST Act applied to tax invoices issued within three days of the dates of supply specified in section 23(a) of the GST Regulation). However, as we have seen, section 17(a) of the GST Act states that the time of supply (which determines the taxable period and therefore the GST return in which output tax in relation to the transaction is included) is the *earlier* of the time at which a tax invoice is issued or the time of payment for the good or service. Consequently, if a registered person issued a tax invoice beyond the 3-day period (say, 21 days later), section 23(c) requires that the person includes the transaction in the GST return for the taxable period "to which the time of supply specified in Section 17 of the Act relates". Assuming that no payment has yet been made for the goods or

services, the time of supply specified in section 17 is the time that the tax invoice is in fact issued (that is, after 21 days), which may fall in the taxable period subsequent to the one in which the third day after the events specified in section 23(a) and (b) of the Regulation fell. Therefore, the rule in section 23(c) does not appear to produce the (albeit unlawful) policy outcome intended by the authors of the GST Regulation.[62]

(iii) Other *ultra vires* regulatory action

Other significant examples of *ultra vires* regulatory action both restrict and expand the GST base. They can be categorised into unauthorised:

(1) imposition of additional extra-statutory requirements on taxpayers to qualify for exemption from GST, thus restricting the statutory scope of the exemption;
(2) extension of exempt supplies beyond those prescribed in the GST Act; and
(3) exclusion of certain supplies from exemptions provided for in the GST Act.

Each action is discussed further in turn.

(1) Additional requirements for exemptions

Section 20(a) of the GST Act exempts from GST "[e]lectricity services provided by an electricity service provider registered with the relevant Government authority or State institution", but section 31(a) of the GST Regulation adds that the supply must be "via a meter or for a fixed charge". Section 20(b) of the GST Act exempts "[w]ater facilities provided by a water supplier registered with the relevant Government authority or State institution", but section 31(b) of the GST Regulation adds that the supply must be "via a meter by persons authorised by the Environmental Protection Agency to operate desalination plants".

[62] Similarly, section 24(a) of the GST Regulation imposes a time limit for the issue of a credit note of three days from the date that the change of value of the good or service has been identified. If the credit note is not issued within that time, section 24(b) of the Regulation requires that the transaction be included in the GST return for the taxable period to which the time of supply specified in section 17 relates. The same questions of legitimacy of the regulatory demand and skewed policy outcome also apply here.

Section 20(f) of the GST Act exempts "[h]ealth services provided by a health service provider registered with the relevant Government authority or State institution", but section 33(a) of the GST Regulation restricts health service providers to "clinics, health centres, health posts and other such health facilities run by the Government" and section 33(b) confines the meaning of "health services" to "health services provided by *hospitals and clinics* operated with the authorization of the Health Ministry" (emphasis added).

Section 20(g) of the GST Act exempts services specified in section 32(c) of the GST Regulation that "facilitate and are essential for the provision of [education] services", but section 32(c) of the GST Regulation adds the requirement that the ancillary services are "conducted without public access".

In each of these cases, the additional requirement is irrelevant to the statutory requirements in section 20.

(2) Extension of exempt supplies

Section 20(g) of the GST Act refers to *services* specified in the Regulation, but section 31(e) of the GST Regulation purports to also include "... *goods* necessary for the supply of such services" (emphasis added). The plain words of section 20(g) would confine application of the regulation to services and render this extension to goods nugatory.

(3) Exclusion of supplies from exemption

In a ruling in 2016, MIRA unilaterally removed from the GST base high-value supplies of goods and services that satisfied specified conditions. In the name of "facilitat[ing] the efficient administration of the Goods and Services Tax and to ensure fair competition without adversely impacting on government revenue", GST Ruling G3[63] purports to exempt from GST supplies:

[63] GST Ruling 220-PR/TR/2012/G3, *Contracts not subject to Goods and Services Tax* (6 March 2012) <https://mira.gov.mv/TaxLegislation/Tax_Ruling_2012_G3_English.pdf>.

(i) that are made under contracts in writing between two GST-registered persons, which are valid for more than 12 months;
(ii) that have an "estimated" value of at least MVR 500,000,000;[64]
(iii) that are awarded through an international tender;
(iv) for which the input tax of the recipient of the supply is forecast to exceed its output tax in all taxable periods over the duration of the contract; and
(v) for which MIRA's written approval has been obtained before the ruling takes effect.

That the ruling was made "to ensure fair competition without adversely impacting on government revenue" is a clear over-reach of the tax administration into an area that is indisputably a matter of tax policy – something outside MIRA's remit. Notwithstanding that magnanimous objective, the specificity of the conditions leaves one to conclude that this ruling is nothing more than an *ultra vires* attempt to enable a registered person to exclude GST from the amount of its tender, when bidding against foreign suppliers, which are not required to include GST in their bids.

The ruling demonstrates three fundamental breaches of the rule of law:
(i) a conspicuous disregard for the supremacy of the GST statute, section 12 of which requires GST to be accounted for by the registered person supplying goods or services under the contract;
(ii) arbitrariness in application of the law (the conditions having no logical basis other than, presumably, to accommodate a particular registered person(s)); and
(iii) unequal application of the law – registered persons that meet the conditions in the ruling are treated more favourably than those that are not. This breach of the rule of law is heightened by the requirement that MIRA's written approval must be obtained before the ruling takes effect.

While the policy objective underlying the ruling is admirable; that is, ensuring that the cash flow timing disadvantages for a GST-registered purchaser does not handicap a domestic GST-registered supplier in favour of a non-registered foreign supplier, it is for the Legislature to resolve the matter by way of amendment to the GST legislation and not for the tax administrator to carve out holes in the legislation in the name of efficiency and fair competition or tax equity.

[64] Equal to NZD 44,876,900.

(b) BPT Regulation

There is also a myriad of examples of the Executive using the BPT Regulation to over-ride explicit statutory requirements in the BPT Act.[65] Three particular cases in point are described here: (i) the Executive's unilateral decision (with the assistance of MIRA) not to collect interim tax due to be paid by taxpayers on 31 July 2011, (ii) corporate group loss relief, and (iii) assessing individuals on their interest income.

(i) Collection of BPT

After a period of indecision in April-June 2011 about whether or not the BPT Act would be repealed and replaced by a corporate income tax and personal income tax regime, the government decided in June 2011 that it would proceed with the extant BPT legislation, which would take effect from 18 July 2011. As a result of that uncertainty, the Executive unilaterally surrendered the mandatory collection of the first BPT interim tax payment,[66] which was due on 31 July 2011,[67] and collected only the interim payment due on 31 January 2012 (which otherwise would have been the second instalment)[68] and the final payment on the later of six months after a taxpayer's balance date or 30 April 2012.[69]

Furthermore, since the interim payment made on 31 January 2012 was based on a "reasonable estimate" of *all* of the amount of a taxpayer's taxable profits for the 2011 tax year,[70] section 23(d) of the BPT Act was also breached, because that section requires only that "the amount of the first and second payments required to be made under Section 23(a) ... shall be equal to *one-half of [the] estimated amount*" of the tax payable for the year (emphasis added).

[65] For example, BPT Ruling B15, para. 10, which restricts the deduction for realised capital losses to the amount of realised capital gains in a tax year, cf. section 13 of the BPT Act, which imposes no such restriction, and BPT Ruling TR-2012/B28, which exempts a director of a MIRA-registered company, who supplies business services to the company and does not carry on any other business, from registering with MIRA for BPT purposes, cf. section 4(a) of the BPT Act and sections 21(d) and 23(a) of the TAA, which requires such a director to register.
[66] Section 79(a) of the BPT Regulation
[67] Section 23(a) of the BPT Act.
[68] *Ibid*.
[69] Sections 17(d) and 24(a) of the BPT Act.
[70] Above n 66.

Since the requirement to pay the first interim payment on 31 July 2011 and its means of calculation are enshrined in sections 23(a) and 23(d) of the BPT Act, respectively, one would have expected that Parliament would have passed a statutory amendment to abandon the requirements for the 2011 year. As that did not occur and, as a matter of administrative expedience, the first payment was simply not collected and the amount of the 31 January 2012 payment was calculated on a basis different from that specified in section 23(d), in the absence of a statutory amendment the Executive's action was unlawful. Again, it contravened the fundamental rule of law principle of supremacy of the law.[71]

This conduct throws up another conflict with an element of the rule of law: this time, equal treatment of taxpayers, because only businesses that had balance dates between 18 July 2011 and 31 December 2011 were liable for tax in the 2011 tax year.[72] This offered generous cash flow advantages to taxpayers with balance dates falling between 1 January 2011 and 17 July 2011, since their tax liabilities did not begin until the 2012 tax year and their tax payments were deferred accordingly.

(ii) Loss sharing

Section 37 of the BPT Regulation permits loss sharing between companies with a 99% common shareholding, by allowing a profit-making group company to deduct (subject to certain limitations) a loss-making group company's losses.[73] However, section 13 of the BPT Act restricts loss relief only to the carry forward of losses for offset against taxable profits derived in later tax years by the company that incurred the loss(es).

[71] MIRA adopted the same unilateral approach in Tax Ruling TR-2015/B41 (22 January 2015), which amends section 11 of the BPT Regulation by relieving a liquidator from the statutory obligation to make interim payments which would otherwise be payable in accordance with section 23 of the BPT Act. Although the ruling is administratively logical, the Legislature has not given MIRA the power to waive interim tax payments at its discretion.
[72] Section 8(a)(1) of the BPT Act.
[73] Sections 37(a), (b), (c), (f), (h) and (i) of the BPT Regulation.

Section 37 of the BPT Regulation is authorised by section 10(d)(9) of the BPT Act.[74] However, although section 37(d)(4) of the BPT Regulation[75] *implies* that a loss utlilised in the group offset cannot be carried forward by the loss making company,[76] there is no statutory authority to reduce the loss in the loss-making company by the amount of loss that has been offset against the profit-making group company's taxable profits.

This inconsistency illustrates the mischief of allowing the administrative branch, in essence, to make law which Parliament should have enacted. Loss offsets are obviously a matter of policy, which should be addressed at a (higher) political level, rather than at the (lower) level of public administration. Because of the absence of an underlying statutory authority, MIRA cannot lawfully impose a requirement by way of the BPT Regulation to require a loss-making company to extinguish the amount of losses that were utilised by the profit making group company. Therefore, not only does section 37 of the BPT Regulation conflict with section 13 of the BPT Act, it creates an imbalance between lawfully permitting a deduction (in terms of section 10(d)(9) on the one hand and unlawfully denying the carry forward of a loss on the other hand.

(iii) Individuals earning interest

The Maldives does not have an individual income tax *per se*. An individual is subject to direct tax only if he or she derives taxable profits of more than MVR 500,000[77] from conducting a business. Therefore, unless interest income derived by an individual arises through the individual's business activities, it is not subject to tax. Notwithstanding that fairly obvious and fundament precept of the Maldives taxation regime, by way of an "announcement" in 2014 MIRA imposed tax on the interest income of selected individuals. The announcement[78] states:[79]

[74] See section 5.2.1.1.
[75] As amended by paragraph 4 of Tax Ruling TR-2013/B31, *Business Profit Tax: Fifth Amendment to the Business Profit Tax Regulation* (10 April 2013) <https://www.mira.gov.mv/TaxLegislation/Tax%20Ruling%202013-B31%20(English).pdf>.
[76] Refer to "otherwise" in section 37(d)(4).
[77] Equal to NZD 44,877.
[78] Announcement Number (IUL) 220-RPR/1/2014/31 (10 April 2014) <http://www.mira.gov.mv/announcement/Registration%20of%20individuals%20earning%20interest%20income.pdf> (in Dhivehi). "IUL" is an acronym for *iulaan*, which means "announcement".
[79] Unofficial translation.

> **Registration of Persons Earning Interest Income**
> Persons earning interest other than from a bank or financial institution which is approved by MIRA are considered as conducting a business, and therefore if the average monthly gross revenue earned from all business activities conducted by such persons during any 12-month period exceeds MVR 20,000,[80] such persons are required to register with MIRA under the Tax Administration Act (Law No. 3/2010).
>
> Therefore persons who earn such income are required to register with MIRA before 10th June 2014. Further note that … persons who do not register during this period would be penalised as per the Tax Administration Act. ...

It follows from registration and MIRA's position that a person earning the requisite amount of interest is in business that the person would be liable for BPT on the amount of interest (together with any other business income) that they derived in a tax year that exceeds MVR 500,000.

The announcement is conceptually wanting, contradicts the definition of "business" in section 43(a) of the BPT Act, and arbitrarily discriminates between a loan to an individual or company and bank deposits, and persons earning interest annually of more than MVR 20,000 and those earning less than MVR 20,000. It is also an overt violation of Article 97(b) of the Constitution, which prohibits the Executive from levying any tax, except pursuant to a law enacted by Parliament. Insofar as it applies to individuals, the imposition of what is essentially a personal income tax under the guise of BPT is a fundamental change in tax policy, which carries enormous political ramifications. It hardly warrants cogitation that what is in effect the introduction of a personal income tax is well outside the mandate of MIRA – as an organ of tax *administration* – let alone professing to introduce the change by way of an "announcement".

(c) Tax administration

Finally, the Executive branch has constrained the application of Parliament's legislation in its administration of the TAA. This restriction is evident in the treatment of taxpayers' appeals against decisions made by MIRA.

[80] Equal to NZD 1,795.

(i) Conditional appeals

Article 56 of the Constitution states that "[e]veryone related to a matter has the right to appeal a[n] … order in a … civil matter." Without explicitly conferring upon a taxpayer a right of objection to a decision made by MIRA, such a right is inferred by section 42 of the TAA, which simply states that "[w]here a taxpayer objects to a decision made by the MIRA, …". Section 43 of the TAA then goes on to grant MIRA authority to make regulations in relation to the *procedure* for handling objections: "[t]he procedure for reviewing objections made by taxpayers concerning decisions made by the MIRA, and for making determinations concerning such objections, shall be specified in the Regulation made pursuant to this Act."

However, section 37 of the TAR misconstrues the authority granted in section 42 of the TAA and purports to restrict its application by providing that "[a] taxpayer may not object to a decision of MIRA pursuant to a request by the taxpayer for an extension of the period to fulfil an obligation under a tax law or a request for the relief of fines outstanding due to the failure to fulfil such obligation during that period." This provision is *ultra vires* in respect of both section 43 of the TAA and Article 56 of the Constitution because it:

(1) goes beyond the scope of addressing only procedures for reviewing objections (already) *made* by taxpayers; instead, it focuses on whether objections can be made on certain matters *ab initio*;
(2) goes beyond the scope of addressing only procedures for making determinations concerning *such* objections; that is, objections already made – section 37 of the TAR does not address this at all; and
(3) attempts to fetter the taxpayer's right under Article 56 of the Constitution to object to *any* order (e.g. a decision by MIRA) in a civil matter (that is, the imposition of taxation upon the taxpayer) by ruling out the right to object (appeal) in certain cases.

5.4 Conflict with the rule of law at the judicial level

In the tax context, conflicts with the rule of law at the judicial level are far less prevalent than the other conflicts discussed in sections 5.2 and 5.3, and judicial breaches of the rule of law more generally in Maldives society, discussed in Chapter 4. Nevertheless, two particular rule

of law issues worth noting arise in connection with the Tax Appeal Tribunal (TAT). The first relates to its membership and the second concerns the timeliness of its judgments.

5.4.1 Membership of the TAT

The TAT was established under section 56(a)(1) of the TAA for the purpose of adjudicating tax matters. It comprises five members, who are nominated by the President, approved by Parliament, and then appointed by the President for a period of five years.[81] The nominees are subject to evaluation by the Parliamentary independent institutions oversight committee, which recommends to the full Parliament which nominees to approve. The tenures of the members of the first TAT expired on 28 November 2015.

The rule of law requires that, in carrying out their duties, judicial officers are to be independent and impartial.[82] Not only should they act independently, they should be seen to be independent and impartial.[83] If the conduct of the Legislature took place within the framework of the rule of law, neither the oversight committee nor the full Parliament would approve a Presidential nominee for whom the appearance of independence and impartiality in the judicial role was not established.

On 29 November 2015, the President appointed the members of the TAT for the ensuing five years.[84] They included three new members, one of whom was the spouse of the third-equal highest ranking officer of MIRA. He was the Director General in charge of the Large Taxpayers Department – which, as well as auditing large taxpayers, issues assessments, which trigger the dispute process – and was also in charge of the "Objections and Appeals Section" of MIRA, which reviewed cases before they made their way to the TAT.

While there is no evidence to conclude that his spouse does not come to her decisions with an independent mind, the fact that she is the spouse of such a senior member of a necessarily ever-present litigant undermines the appearance of – and therefore confidence in – the independence

[81] Section 56(a)(1) of the TAA.
[82] See Chp. 3, section 3.2.2, 3.2.6, 3.3.2 and 3.3.6.
[83] See Chp. 3, sections 3.2.6 and 3.3.6.
[84] See "President appoints members to Tax Appeal Tribunal" <https://presidency.gov.mv/presidentNews/news/2127>.

of an adjudicating body. This is all the more disturbing in the context of the Maldives judicial regime, which is largely devoid of public confidence.[85] That undermining of confidence could well be enhanced by the fact that, in the three decisions issued by the TAT since her appointment,[86] the member has given only dissenting decisions in favour of MIRA.[87]

5.4.2 Timeliness of TAT judgments

Article 43(a) of the Maldives Constitution stipulates that "[e]veryone has the right to administrative action that is lawful, procedurally fair, and *expeditious*" (emphasis added). Thus, TAT procedures are to be administered expeditiously.

However, it will be noted from section 5.4.1, that the TAT issued only three judgments during the period 29 November 2015 to 31 May 2018 – a period of 2½ years, while there were 13 cases pending between 29 November 2015 and 29 August 2017.[88] By any objective measure, the notion of swift administration of justice would appear to be a hurdle too high for the TAT.

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[85] See UN Development Programme, *Legal and Justice Sector Baseline Study 2014*, Maldives Attorney General's Office and the UN Development Programme in the Maldives, 2015, which found that "the general public have low levels of trust with respect to the quality of justice, independence, integrity and efficiency of justice delivery" (at 3). Nearly 40% of the respondents surveyed stated that the major challenge in seeking justice was corruption (at 36) <http://www.mv.undp.org/content/dam/maldives/docs/Democratic%20Governance/Legal&JusticeSectorBaselineStudy-web.pdf?download>.

[86] As at 31 May 2018.

[87] See *HPL Resorts (Maldives) Pvt. Ltd. v Maldives Inland Revenue Authority*, TAT-CA-W/2015/003 (12 April 2017) <http://tat.gov.mv/view/?doc=http://tat.gov.mv/dv/wp-content/blogs.dir/2/files_mf/casereport_hpl.pdf&TB_iframe=1&height=630&width=850>, *Lan'daa Giraavaru Pvt. Ltd. v Maldives Inland Revenue Authority*, TAT-CA-W/2015/002 (12 April 2017) <http://tat.gov.mv/view/?doc=http://tat.gov.mv/dv/wp-content/blogs.dir/2/files_mf/casereport_lg.pdf&TB_iframe=1&height=630&width=850> (in Dhivehi), both summarised in English at <https://online.ibfd.org/kbase/#topic=doc&url=%252Fdata%252Ftns%252Fdocs%252Fhtml%252Ftns_2018-03-06_mv_1.html&WT.z_nav=Navigation> (pay walled), and *Dhaalu Airport Holdings Pvt Ltd v Maldives Inland Revenue Authority*, TAT-CA-G/2016/002 (22 November 2017) <https://www.mira.gov.mv/legal_decisions/20171121_Judgment_Dhaalu%20Airport%20Holdings%20Pvt%20Ltd.pdf> (in Dhivehi).

[88] According to MIRA: see "List of Court Cases Filed Against MIRA And The State" <https://www.mira.gov.mv/Legal_Against.aspx>.

5.5 Summary

This chapter has examined the application of the rule of law in relation to the Maldives tax regime. It shows that there are numerous breaches of the tenets of the rule of law in that sphere, which is not inconsistent with the general disrespect for the rule of law in the Maldives evidenced in Chapter 4.

However, while Chapter 4 demonstrated that the rule of law is undermined in the Maldives at all of the Legislative, Executive and judicial branches of governance, disregard for the rule of law in the taxation domain occurs largely at the Legislative and Executive (including public official) levels. This disrespect manifests itself in Parliament's willingness to delegate the enactment of fundamental tax policy matters to the Executive branch, resulting in insufficient oversight and scrutiny of the tax measures adopted and, consequently, inconsistent and unprincipled rulings. The incoherent outcome, which results from this meddling by agents of the Executive in policy matters appropriately left to the Legislature was illustrated by the extra-statutory attempt to allow by way of regulation loss sharing amongst group companies.

The Maldives legislative approach in this respect lacks the underlying conceptual basis, which is well set out in early 20th century United States case law. It requires imposing on the Legislature the duty of enacting statutes that address the policy basis of the matter under consideration. At the same time, that approach allows delegation of formulation and implementation of the details of the legalisation – within the clearly-stated, policy-based legislative framework – to be undertaken by way of regulation and declarations at the Executive and sub-Executive levels. The upshot of the absence of such an approach in the Maldives has been a blurring of the dividing line between the rule-making role of the Legislature and that of the Executive, culminating in the Executive branch both determining tax policy and legislating it, thus bypassing democratically-based institutional surveillance. This problem was exemplified by section 10(d)(9) of the BPT Act, in contrast to sections 20(g) and 20(j) of the GST Act.

Nevertheless, deferring tax policy-focused legislation to Parliament does not necessarily mean that its output is lucid. The absence of the rule of law element of intelligibility and predictability of the law was shown in this chapter by the poor drafting of section 6 of the BPT Act, which has resulted in the incoherent application of WHT at the tax administration level.

Aside from the failure of the Legislature to apply elements of the rule of law in addressing matters related to taxation, the Executive and its administrative officials have repeatedly taken it upon themselves to blatantly ignore the supremacy of Parliamentary law, by unilaterally implementing regulations and rulings that openly contradict the plain language of the tax statutes. This conduct is exhibited in this chapter in all three of the significant components of the Maldives tax system; namely, GST, BPT and tax administration. That it has repeatedly occurred clearly conflicts with Raz's "basic intuition" that the rule of law requires a review of administrative action to ensure that administrators do not pervert the law.[89]

On a more positive note, in contrast with the performance of the Judiciary more generally in the Maldives, this study found no evidence of fundamental breaches of the rule of law by the TAT. While the two issues raised in this chapter relating to the TAT are concerning – and require remedial action – that limb of the judicial system is far more compliant with the rule of law than the judicial organs discussed in Chapter 4, presumably because of the absence generally of political sensitivities in taxation cases and the need for the TAT to concentrate on the technical aspects of Maldives revenue law.

[89] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979), 214 -218.

Chapter 6

CONCLUSION

6.1 Concluding observations

The notion of the rule of law is a well-established principle in legal literature and jurisprudence. It harks back to moral reasoning underpinning formal law from Babylonian times. It has survived through the ages, including the periods of the Old Testament, the Ancient Greeks, the early Christians and Muslims, and the Roman and Ottoman Empires, to the present day. Its longevity alone means that the rule of law is not to be treated lightly.

The literature and jurisprudence on the rule of law is extensive. Important contributions have been reviewed in Chapter 3. There, we saw that legal scholars continue to interpret the meaning of the rule of law as societies' circumstances over time and place have changed. But, at its heart, the rule of law is intended to offer assurance of individual freedoms. Accordingly, the consensus of opinion of legal philosophers and jurists has identified seven key elements of the rule of law; namely, supremacy of the law, separation of powers and judicial independence, equal application of the law, accessibility, intelligibility and predictability of the law, availability of a judicial dispute mechanism and due process, judicial impartiality, and protection of fundamental human rights. Today, these features of the rule of law are embedded in many nations' domestic laws and in international treaties, largely under the auspices of the UN and EU.

Although conventional wisdom concerning the rule of law *per se* reflects Western thought, importantly for this study the West does not have a monopoly over the principles that underpin the rule of law. The same elements manifest themselves in Islamic *shari'ah*, albeit without recourse to the term "rule of law". In Western nations, there is usually a separation between

religion and the State, and the law is "man-made". However, religion and the State are typically formally or informally integrated in Islamic countries and the law is "divine-inspired".

The principles analogous to elements of the rule of law in Islamic states are ultimately sourced in the *Qur'an*, *sunna* and *hadiths* of the Prophet Mohammed. They also are supremacy of the law, equal application of the law, the availability of a judicial dispute resolution mechanism, due process and judicial impartiality. Throughout Islamic history the notions of separation of powers, judicial independence, and accessibility, intelligibility and predictability of the law have been more tenuous. Nevertheless, contemporary Islamic legal philosophers and jurists broadly align these characteristics of the rule of law with the principles that underlie Islamic *shari'ah.*

Fundamentally, the salient point of connection between the rule of law and Islamic jurisprudence is the former's reliance on natural law and the latter's foundation on divine precepts. Thus, the constituent components of the rule of law can fairly readily be reconciled with the corresponding notions found in Islamic *shari'ah*. This compatibility is important for this thesis because it means that the rule of law cannot be challenged as a valid benchmark when it is applied in a conservative Muslim country such as the Maldives, on the grounds that an Islamic state is not answerable to the Western notion of the rule of law because it is governed by Islamic principles.

This thesis has shown that the state of the rule of law in general in the Maldives is broken. It is one of those states where "the rule of law remains undernourished … Islamic law has receded [and] one clearly sees the consequences of this history for the rule of law: arbitrary government, constitutions without constitutionalism, and a serious deficit in formal legality."[1] This is particularly ironic since, as was noted in Chapter 3, the Maldives was one of only two Muslim countries to undertake to carry out "voluntary steps" to advance the rule of law under the UN Declaration on the Rule of Law.

It is beyond any reasonable argument that the Maldives' transition from Gayoom's autocratic regime to a democratic system of government has been a failure. The Maldives has failed to

[1] Mark David Welton, "Islam, the West, and the Rule of Law", (2007) 19(2) *Pace International Law Review*, 169, 173.

successfully implement most of the features of the rule of law discussed in Chapter 3. In large part this is attributable to "many key elements of state apparatus remain[ing] within the control of the former Gayoom regime".[2]

Disrespect for the rule of law in the Maldives has been evidenced by:

- the Legislature's repeated acquiescence to the wishes of the Executive and, therefore, its disinclination to ensure that the Executive and MIRA are properly accountable to it;
- the Executive's and MIRA's disregard for the supremacy of the law, by simply flouting it; and
- the Judiciary's arrogance in usurping the Constitution and Legislature at the Supreme Court level, and its incompetence – particularly in the Criminal Court – in ignoring due process and judicial impartiality.

This thesis has found that, to a large extent, some of the failures to implement the rule of law more generally in the Maldives have filtered down to the formation and administration of the two main taxes in the country's new tax system. While the more widespread failure of the Judiciary to observe the principle of the rule of law is less apposite in the taxation context, the appearance of judicial independence and impartiality – and therefore the appearance of justice being done – has been compromised by the appointment of a member of the TAT. Furthermore, the tardiness in the release of judgments by the TAT undermines the efficient delivery of justice to Maldivian taxpayers.

Other breaches of the rule of law are more prominent in the area of taxation in the Maldives. Of particular concern is Parliament's failure to enact intelligible and predictable tax laws, and its propensity to leave it to the Executive (and ultimately to tax administrators) to do its work for it. That shortcoming has resulted in *ultra vires* Executive and administrative decisions. Frequently, GST and BPT regulations and rulings have disregarded the supremacy of statutory law by imposing requirements or restrictions on taxpayers, which the underlying statutes have either explicitly or implicitly not imposed. Some of the regulations and rulings have so blatantly contradicted either the GST or BPT statute that tax administrators have effectively stepped into

[2] Azra Naseem, "Keeping up with the authoritarians", *Divehi Sitee*, 3 September 2015 <http://www.dhivehisitee.com/executive/keeping-up-with-the-authoritarians/>.

the shoes of the Legislature, thus undermining the rule of law and the democratic principles on which it is based.

If the rule of law is to prevail in the Maldives tax system, it is vital that the Executive and its tax administrators take greater recognition of democratic Parliamentary authority, such that subordinate regulations and rulings are not used as a substitute for primary law to impose substantive taxing provisions – or to provide relief from them. This calls for Parliament to fulfil its roles in requiring that proposed tax legislation is put before it, competently scrutinising it and enacting tax laws in the interests of Maldivian society as a whole.

Therefore, to answer the research questions posed in Chapter 1, section 1.2, from the analysis undertaken in this thesis over the period 2010-2017 it can confidently be concluded that in certain critical respects inadequate cognisance was taken of the rule of law in the construction and administration of the Maldives GST and BPT laws. As a consequence, the inception of the tax regime and its subsequent administration has contributed to the general failure to implement the rule of law in the Maldives.

So, how is the situation to be rectified – at least in the sphere of taxation in the Maldives? Ultimately, a thorough understanding and respect for the rule of law must be instilled in the tax law and administration decision-makers. Principally, this requires a far greater appreciation of the supremacy of statutory law. It also requires Parliamentarians to understand their responsibilities to enact legislation that prescribes an "intelligible principle"[3] or a "primary standard",[4] which will rein in the Maldives Executive and public administrators.

This requires education of the relevant parties. Western and international aid organisations have shown themselves to be quick to provide such education,[5] but a successful solution for the Maldives does not lie there: recourse to the Western notion of the rule of law alone will not suffice. This thesis has addressed the intertwining of Maldives society and Islam. If the Maldives is truly the pious Islamic state that the government claims it to be, its moral compass in respect of the rule of law requires re-setting.[6] Consequently, if there is to be a genuine shift

[3] *J.W. Hampton Jr. & Co. v United States* (1928) 276 US 394, 410.
[4] William Steinberg, "Delegation of Legislative Authority", (1936) 11(2) *Notre Dame Law Review* 109, 115 and *Red "C" Oil Manufacturing Co. v Board of Agriculture of North Carolina* (1911) 222 US 380, 381.
[5] See, for example, World Bank, *Governance and Development* (The World Bank, Washington DC, 1992).
[6] The same imperative would apply even if it were not an Islamic state.

towards applying the rule of law in the Maldives, "re-education" must embody the principles of Islamic law that correspond to the rule of law. As Reifeld correctly observes, "[i]n order to enhance legal reform in [M]uslim countries, it is … important to first of all accept the Islamic framework of reference. Legal reform can only be encouraged through dialogue and must evolve from inside."[7]

That necessitates the involvement of Maldivian Islamic scholars to instill in participants in the tax regime adherence to Islamic tenets that are rule of law-like. It means going back to the first principles enunciated by the classical Islamic jurists and driven by the edicts of the *Qur'an*, *sunna* and *hadiths*. In short, it would be futile for a solely Western-dominated approach to be adopted in an effort to reform attitudes on the rule of law in the Maldives, imbued as it is by the Islamic way of life.

The proposition advanced here allows for decision-makers in the tax system to adopt a rule of law approach to the enactment of new, and amendments to existing, tax law, and to its administration. To a large extent, application of the rule of law in the Maldivian taxation context reflects the way that the principle is applied in many other areas of government, political and judicial influence. Therefore, the recommendations offered here are equally applicable to those other arms of governance and influential institutions across the broad spectrum of Maldives society – and, indeed, to other countries that find themselves facing the same predicament as the Maldives.

Ideally, genuine application of the elements of the rule of law in the realm of taxation would render the tax regime a role model, which encourages participants in other areas of Maldivian governance to adopt a similar procedure so that, ultimately, the rule of law could be applied consistently across all aspects of Maldivian society. Realistically, however, achievement of such a goal requires a seismic shift in the prevailing attitude of the political elite towards international norms of civil society and democracy. Unfortunately, currently, "long-term relationships and shared histories matter more than what the rules might dictate."[8]

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[7] Helmut Reifeld, "Developing Democracy and the Rule of Law in Islamic Countries", in Birgit Krawietz and Helmut Reifeld (eds.), *Islam and the Rule of Law – Between Sharia and Secularization* (Konrad Adenauer Stiftung, Berlin, 2008), 125.

[8] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004), Kindle edition, loc. 1761.

The outlook for advocates of democracy and personal liberty is bleak if the Maldives fails to adopt measures to rectify its attitude towards the rule of law. The tax system will remain unpredictable and unfair with an inherent bias in favour of the Revenue and those *beefulun* with vested interests. The consequence of that is widespread tax avoidance and tax evasion by a disillusioned taxpayer base, thus undermining the credibility of the tax regime as a whole.

A tax system that ultimately becomes dysfunctional because of disrespect for the rule of law merely reflects more widespread deficiencies in the application of the rule of law in society generally. Society degenerates into providing privileges for the selected few in the political elite to the detriment of fairness across all of its members. For the Maldives, that means reversion to the type of autocracy that the country experienced under Gayoom's 30 years of domination. But, even more profound would be the Muslim country's denial of basic Islamic doctrines, which it has been so keen to project. Rejection of the rule of law and its corresponding Islamic principles serves only to entrench the hypocrisy of the ruling elite, to supress the rights of the general population and to relive the Maldives' 20th century political history.

6.2 Limitations

This study has been subject to some limitations. First, the Maldives does not have well developed archival depositories, at least in the subject area of this these. Where archival material is available, typically it is recorded in Dhivehi. The research underpinning this thesis has largely been based on source material written in English. Consequently, the concluding observations made above emanate largely from that base.

Second, principally for the societal reasons discussed in Chapter 2, there is a general paucity of unbiased, analytical commentary in the local media and other publications on political and economic events in the country. That has necessitated a high degree of reliance in this thesis on the comparatively in-depth coverage and reasoned critiques provided by the *Maldives Independent* and its predecessor, *Minivan News* – albeit offered from a liberalist perspective.

Third, recognising the propensity for retribution historically in Maldives' society,[9] many Maldivians are reluctant to speak out, and have their views recorded, about breaches of the rule of law, which they personally encounter, particularly in the tax arena.[10] They may also lack sufficient evidence to corroborate their claim(s), in which case they could not be incorporated into this work. This means that breaches of the rule of law which actually occurred could have been omitted from this investigation, particularly in relation to tax administration practice.

Finally, to ensure that the thesis was coherent and kept to a manageable length (within the prescribed word limit), the period that this thesis addresses terminated at the end of 2017. This meant that subsequent developments in the abuse of the rule of law in the Maldives (both generally and in the taxations area) have not been considered. Those events will impact upon the conclusions drawn in this chapter by buttressing them or pointing to developments that break down breaches of the rule discussed in Chapters 4 and 5.

Despite these limitations, the evidence gathered and discussed in this thesis is sufficient to establish the failure of the rule of law in the Maldives and the way that the tax system has contributed to that failure. The conclusions drawn in section 6.1 are therefore still valid: they are based on a comprehensive legal analysis of mainly English language resource material available in the Maldives and elsewhere relevant to the circumscribed period under review.

6.3 Future research

There is much scope for further research on the practice of the rule of law generally in the Maldives, and in specific segments of its society. There is an opportunity for especially Maldivian academics to research Dhivehi language archives, records and other local resources to help our understanding of the Maldivian perception of the place of the rule of law in the broad context of Maldivian society and in relation to the functioning of particular state institutions, including MIRA. Such a study within the formal framework of institutional theory would be beneficial. In addition, other questions call out for research based answers; for example:

[9] See Chp. 2, sections 2.2 to 2.4.
[10] Where they do recount such instances, they are conveyed anonymously.

- How well are Islamic principles and practices, as applied in the Maldives reconciled with Maldivian political practice?
- How do we successfully infuse Islamic concepts akin to the rule of law into actors at various levels of State governance, including MIRA?
- Is the Maldives inherently different from other developing and neighbouring Asian countries in the application of the rule of law, especially in the area of taxation? This question invites an international comparative study.
- Have events that occurred after 2017 impacted on the conclusions drawn with respect to the period covered by this thesis?

This thesis has gone some way to understanding the degree of disrespect that the Maldives has for the rule of law both generally and in relation to its taxation regime. The sorts of questions posed above require investigation to develop further our understanding of the Maldives' position on the rule of law "spectrum" both domestically and internationally. With a clearer understanding, the Maldives will be better positioned to move towards being a country that respects the rule of law not only in the development and administration of its tax regime, but across all facets of society; in other words, to become a civil society where all citizens are treated equally and fairly in accordance with fundamental Islamic principles akin to the rule of law.

APPENDIX

Key Provisions of the Maldives Constitution[1]

CHAPTER I
STATE, SOVEREIGNTY AND CITIZENS

Article 4 – Powers of the citizens
All the powers of the State of the Maldives are derived from, and remain with, the citizens.

Article 5 – Legislative power
All legislative power in the Maldives is vested in the People's Majlis.

Article 7 – Judicial Power
The judicial power is vested in the courts of the Maldives.

Article 8 – Supremacy of Constitution
The powers of the State shall be exercised in accordance with [the] Constitution.

Article 10 – State Religion
(a) The religion of the State of the Maldives is Islam. Islam shall be the one of the basis of all the laws of the Maldives
(b) No law contrary to any tenet of Islam shall be enacted in the Maldives

CHAPTER II
FUNDAMENTAL RIGHTS AND FREEDOMS

Article 16 – Guarantees of and limitations on fundamental rights and freedoms
(a) This Constitution guarantees to all persons, in a manner that is not contrary to any tenet of Islam, the rights and freedoms contained within ... Chapter [II], subject only to such *reasonable limits* prescribed by a law enacted by the People's Majlis in a manner that is *not contrary to this Constitution*. Any such law enacted by the People's Majlis can limit the rights and freedoms to any extent *only if demonstrably justified in a free and democratic society*.
(b) The limitation of a right or freedom specified in this Chapter by a law enacted by the People's Majlis as provided for in this Constitution, and in order to protect and maintain the tenets of Islam, shall *not be contrary to article (a)*.

[1] The articles cited in this Appendix have been taken from Dheena Hussain, *Functional Translation of the Constitution of the Republic of Maldives 2008*, Ministry of Legal Reform, Information and Arts, 2008. "Citizens" are defined in Article 9 of the Constitution.

(c) In deciding whether a right or freedom in this Chapter ... has been limited in accordance with article (a) and (b), a court must be fully cognisant of and make reference to all the facts, including:
    1. the nature and character of the right or freedom;
    2. the purpose and importance of limiting the right or freedom;
    3. the extent and manner of limiting the right or freedom;
    4. the relationship between the limitation of the right or freedom and the importance of the right or freedom;
    5. the extent to which the objective for which the right or freedom has been limited could be achieved by limiting the right or freedom to a lesser degree;
    6. the extent to which the right or freedom must be limited in order to protect the tenets of Islam, or where the right or freedom has been limited pursuant to article (b).
(d) The onus of establishing that the limitation to any extent, of a right or freedom included in this Chapter is within the reasonable limitations prescribed in this Constitution is on the State or the person asserting the limitation of the right or freedom.

Article 17 – Non-discrimination
(a) Everyone is entitled to the rights and freedoms included in this Chapter without discrimination of any kind, including race, national origin, colour, sex, age, mental or physical disability, political or other opinion, property, birth or other status, or native island.

Article 18 – Duty of the State
It is the duty of the State to follow the provisions of this Constitution, and to protect and promote the rights and freedoms provided in this Chapter

Article 19 – Freedom from restraint
A citizen is free to engage in any conduct or activity that is not expressly prohibited by Islamic Shari'ah or by law. No control or restraint may be exercised against any person unless it is expressly authorised by law.

Article 20 – Equality
Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law.

Article 21 – Right to life
Everyone has the right to life, liberty and security of the person, and the right not be deprived thereof to any extent except pursuant to a law made in accordance with Article 16 of this Constitution.

Article 23 – Economic and social rights
Every citizen has the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources:
…
(e) equal access to means of communication, the State media, transportation facilities, and the natural resources of the country;

Article 26 – Right to vote and run for public office
Unless otherwise provided in this Constitution, every citizen of the Maldives eighteen years of age or older has the right:
(a) to vote in elections, and in public referendums, which shall be held by secret ballot;
(b) to run for public office;
(c) to take part in the conduct of public affairs, directly or through freely chosen representatives.

Article 27 – Freedom of expression
Everyone has the right to freedom of thought and the freedom to communicate opinions and expression in a manner that is not contrary to any tenet of Islam

Article 28 – Freedom of the media
Everyone has the right to freedom of the press, and other means of communication, including the right to espouse, disseminate and publish news, information, views and ideas. No person shall be compelled to disclose the source of any information that is espoused, disseminated or published by that person.

Article 29 – Freedom of acquiring and imparting knowledge
Everyone has the freedom to acquire and impart knowledge, information and learning.

Article 30 – Freedom to form political parties, associations and societies
(a) Every citizen has the right to establish and to participate in the activities of political parties.
(b) Everyone has the freedom to form associations and societies, including the following:
    1. the right to establish and participate in any association or society for economic, social, educational or cultural or purposes;
    2. the right to form trade unions, to participate or not participate in their activities.

Article 31- Right to strike
Every person employed in the Maldives and all other workers have the freedom to stop work and to strike in order to protest.

Article 32 – Freedom of assembly
Everyone has the right to freedom of peaceful assembly without prior permission of the State.

Article 36 – Right to education
(a) Everyone has the right to education without discrimination of any kind.
…
(c) Education shall strive to inculcate obedience to Islam, instil love for Islam, foster respect for human rights, and promote understanding, tolerance and friendship among all people.

Article 40 – Right to acquire and hold property
(a) Every citizen has the right to acquire, own, inherit, transfer or otherwise transact of such property.
(b) Private property shall be inviolable, and may only be compulsorily acquired by the State for the public good, as expressly prescribed by law, and as authorised by order of the court. Fair and adequate compensation shall be paid in all cases, as determined by the court.
(c) Nothing in this Article prevents any law authorising a court to order the forfeiture (without the giving of any compensation) of illegally acquired or possessed property, or enemy property.
(d) Property of a person shall not be forfeited in substitution for any offence.

Article 41 – Freedom of movement and establishment
(a) Every citizen has the freedom to enter, remain in and leave the Maldives, and to travel within the Maldives.
(b) Every citizen has the right to move to, and take up residence on, any inhabited island of the Maldives.
(c) Every citizen shall have equal access to the receipt of rights and benefits from any island where he has established residency.

Article 42 – Fair and transparent hearings
(a) In the determination of one's civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent court or tribunal established by law.
(b) All judicial proceedings in the Maldives shall be conducted with justice, transparency and impartiality.

(c) Trials of any matter shall be held publicly, but the presiding judge may exclude the public from all or part of a trial in accordance with democratic norms:
   1. in the interests of public morals, public order or national security;
   2. where the interest of juveniles or the victims of a crime so require; or
   3. in other special circumstances where publicity would prejudice the interests of justice
(d) All judgements or orders of a Court shall be pronounced publicly, unless the Court specifically orders otherwise for the reasons stipulated in article (c). All publicly pronounced judgements or orders shall be available to the public.

Article 43 – Fair administrative action
(a) Everyone has the right to administrative action that is lawful, procedurally fair, and expeditious.
(b) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(c) Where the rights of a person, a group or community has been adversely affected by administrative action, every such person, group or every person who may be directly affected by such action has the right to submit the matter to court

Article 45 – No unlawful arrest or detention
Everyone has the right not to be arbitrarily detained, arrested or imprisoned except as provided by law enacted by the People's Majlis in accordance with Article 16 of this Constitution.

Article 46 – Power of arrest and detention
No person shall be arrested or detained for an offence unless the arresting officer observes the offence being committed, or has reasonable and probable grounds or evidence to believe the person has committed an offence or is about to commit an offence, or under the authority of an arrest warrant issued by the court.

Article 47 – Search and seizure
(a) No person shall be subject to search or seizure unless there is reasonable cause.
(b) Residential property shall be inviolable, and shall not be entered without the consent of the resident, except to prevent immediate and serious harm to life or property, or under the express authorisation of an order of the Court.

Article 48 – Rights on arrest or detention
Everyone has the right on arrest or detention:
(a) to be informed immediately of the reasons therefore, and in writing within at least twenty four hours;
(b) to retain and instruct legal counsel without delay and to be informed of this right, and to have access to legal counsel facilitated until the conclusion of the matter for which he is under arrest or detention;
(c) to remain silent, except to establish identity, and to be informed of this right;
(d) to be brought within twenty four hours before a Judge, who has power to determine the validity of the detention, to release the person with or without conditions, or to order the continued detention of the accused.

Article 49 – Release of accused
No person shall be detained in custody prior to sentencing, unless the danger of the accused absconding or not appearing at trial, the protection of the public, or potential interference with witnesses or evidence dictate otherwise. The release may be subject to conditions of bail or other assurances to appear as required by the court.

Article 50 – Prompt investigation and prosecution
After notice of an alleged offence has been brought to the attention of the investigating authorities, the matter shall be investigated promptly, and where warranted, the Prosecutor General shall lay charges as quickly as possible

Article 51 – Rights of the accused
Everyone charged with an offence has the right:
(a) to be informed without delay of the specific offence in a language understood by the accused;
(b) to be tried within a reasonable time;
(c) not to be compelled to testify;
(d) to an interpreter to be provided by the State where he does not speak the language in which the proceedings are conducted, or is deaf or mute;
(e) to have adequate time and facilities for the preparation of his defence and to communicate with and instruct legal counsel of his own choosing;
(f) to be tried in person, and to defend himself through legal counsel of his own choosing;
(g) to examine the witnesses against him and to obtain the attendance and examination of witnesses;
(h) to be presumed innocent until proven guilty beyond a reasonable doubt.

Article 53 – Assistance of legal counsel
(a) Everyone has the right to retain and instruct legal counsel at any instance where legal assistance is required.
…

Article 54 – No degrading treatment or torture
No person shall be subjected to cruel, inhumane or degrading treatment or punishment, or to torture.

Article 56 – Right to appeal
Everyone related to a matter has the right to appeal a conviction and sentence, or judgement or order in a criminal or civil matter.

Article 57 – Humane treatment of arrested or detained persons
Everyone deprived of liberty through arrest or detention as provided by law, pursuant to an order of the court, or being held in State care for social reasons, shall be treated with humanity and with respect for the inherent dignity of the human person. A person may be deprived of the rights or freedoms specified in this Chapter only to the extent required for the purpose for which he is deprived of his liberty.

Article 59 – Respective legislation
(a) No person shall be found guilty of any act or omission which did not constitute an offence under Islamic Shari'ah or law at the time committed. Nor shall a more severe penalty be imposed than the one applicable at the time the offence was committed. If the punishment for an offence has been reduced between the time of commission and the time of sentencing, the accused is entitled to the benefit of the lesser punishment.
(b) This Article shall not prejudice the trial and punishment of any person for any act which was criminal according to international law.

Article 60 – Prohibition of double jeopardy
(a) If an accused is acquitted of an offence by a court, he shall not be tried again for the same or substantially the same offence. If an accused is found guilty and punished for an offence he shall not be tried or punished again for the same or substantially the same offence.
(b) The principle stated in article (a) does not apply to appeals relating to the offence.

Article 61 – Publication of acts and regulations
(a) All statutes, regulations, government orders requiring compliance by citizens and government policies shall be published and made available to the public.
(b) No person may be subjected to any punishment except pursuant to a statute or pursuant to a regulation made under authority of a statute, which has been made available to the public and which defines the criminal offence and the punishment for commission of the offence.
(c) All information concerning government decisions and actions shall be made public, except information that is declared to be State secrets by a law enacted by the People's Majlis.

(d) Every citizen has the right to obtain all information possessed by the Government about that person.

Article 63 – Voidance of laws inconsistent with fundamental rights
Any law or part of any law contrary to the fundamental rights or freedoms guaranteed by this Chapter shall be void or void to the extent of such inconsistency.

Article 64 – Non-compliance with unlawful orders
with unlawful orders
64. No employee of the State shall impose any orders on a person except under authority of a law. Everyone has the right not to obey an unlawful order.

Article 65 – Application to court to obtain a remedy
Anyone whose rights or freedoms, as guaranteed by this Chapter, have been infringed or denied may apply to a court to obtain a just remedy.

Article 67 – Responsibilities and duties
The exercise and enjoyment of fundamental rights and freedoms is inseparable from the performance of responsibilities and duties, and it is the responsibility of every citizen:
(a) to respect and protect the rights and freedoms of others;
(b) to foster tolerance, mutual respect, and friendship among all people and groups;
(c) to contribute to the well-being and advancement of the community;
(d) to promote the sovereignty, unity, security, integrity and dignity of the Maldives;
(e) to respect the Constitution and the rule of law;
(f) to promote democratic values and practices in a manner that is not inconsistent with any tenet of Islam;
(g) to preserve and protect the State religion of Islam, culture, language and heritage of the country;
(h) to preserve and protect the natural environment, biodiversity, resources and beauty of the country and to abstain from all forms of pollution and ecological degradation;
(i) to respect the national flag, state emblem and the national anthem.
Every person in the Maldives must also respect these duties.

Article 68 – Interpretation
When interpreting and applying the rights and freedoms contained within this Chapter, a court or tribunal shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and shall consider international treaties to which the Maldives is a party.

Article 69 – Non-destructive interpretation of Constitution
No provision of the Constitution shall be interpreted or translated in a manner that would grant to the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution.

CHAPTER III
THE PEOPLE'S MAJLIS

Article 70 – Legislative authority
(a) The legislative authority of the Maldives is vested in the People's Majlis.
(b) That law making power includes the power to:
    1. amend the Constitution (Article 70(b)(1));
    2. enact, amend and repeal any law;
    3. supervise the exercise of Executive authority, ensure that the Executive is accountable for the exercise of its powers, and take steps required to ensure the same;
    4. the approval of the annual budget and any supplementary budgetdetermine matters relating to independent commissions and independent offices "in accordance with law;

5. ...
6. perform duties otherwise expressly required by the Constitution and by law.

(c) The People's Majlis shall not pass any law that contravenes any tenet of Islam.

Article 75 – Function of members

Members of the People's Majlis should be guided in their actions by considerations of national interest and public welfare foremost, and should not exploit their official positions in any way for their own benefit or for the benefit of those with whom they have special relations. They shall represent not only their constituencies but the country as a whole.

Article 94 – Delegation of power to make regulations and orders with lawful authority

The People's Majlis may, pursuant to law and for prescribed purposes, delegate to any person or body power to make orders, and regulations, or other instruments having legislative effect, including the power to:

(a) determine a date on which any law shall come into or cease to have effect;
(b) make any law or part thereof applicable to any area or to any class of persons.

Article 95 – Reference to Supreme Court

The People's Majlis may by resolution refer to the Supreme Court for hearing and consideration important questions of law concerning any matter, including the interpretation of the Constitution and the constitutional validity of any statute. The Supreme Court shall answer the questions so referred and shall provide the answers to the People's Majlis, giving reasons for its answers. The opinion shall be pronounced in like manner as in the case of a judgment on appeal to the Supreme Court.

Article 97 – Taxation and expenditures

The Executive shall not

(a) spend any public money or property;
(b) levy any taxation;
(c) obtain or receive any money or property by loan or otherwise;
(d) provide any sovereign guarantees;

except pursuant to a law enacted by the People's Majlis.

Article 103 – Improper benefit

The members of the People's Majlis and persons appointed or employed by them shall not use their position or any information entrusted to them to improperly benefit themselves or any other person.

CHAPTER IV
THE PRESIDENT

Article 106 – Executive power

(a) The executive power is vested in the President as provided for in the Constitution and the law.
(b) …
(c) The principles of governance of the State being determined by this Constitution, the President shall uphold, defend and respect the Constitution, and shall promote the unity of the State.
(d) The President shall exercise Executive authority as provided for in the Constitution and law.

Article 115 – Powers and responsibilities of the President

In addition to the duties and powers otherwise expressly conferred on the President by this Constitution and the law, the President is entrusted pursuant to this Constitution with carrying out the duties specified herein and shall have the following powers to do so:

(a) to faithfully implement the provisions of this Constitution and the law, and to promote compliance by organs of the State and by the people;
(b) to supervise the efficient and harmonious functioning of all departments of Government;

(c) to promote the rule of law, and to protect the rights and freedoms of all people;
…
(e) to formulate fundamental policies of the State, and to submit policies and recommendations to the appropriate agencies and institutions of Government;
(f) to appoint, dismiss and accept the resignation of members of the Cabinet, and such officials necessary for the proper functioning of the duties of his office;
…
(t) to ensure that the security services comply with their obligations as provided in this Constitution;
(u) to perform all other duties specifically authorized by this Constitution and by law.

CHAPTER VI
THE JUDICIARY

Article 141 – Judiciary
(a) The judicial power is vested in the Supreme Court, the High Court, and such Trial Courts as established by law.
(b) The Supreme Court shall be the highest authority for the administration of justice in the Maldives. The Chief Justice shall be the highest authority on the Supreme Court. All matters adjudicated before the Supreme Court shall be decided upon by a majority of the judges sitting together in session.
(c) No officials performing public functions, or any other persons, shall interfere with and influence the functions of the courts.
(d) Persons or bodies performing public functions, through legislative and other measures, must assist and protect the courts to ensure the independence, eminence, dignity, impartiality, accessibility and effectiveness of the courts.

Article 142 – Compliance with law
The Judges are independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, Judges must consider Islamic Shari'ah. In the performance of their judicial functions, Judges must apply the Constitution and the law impartially and without fear, favour or prejudice.

Article 143 – Jurisdiction of the courts
(a) The Supreme Court and the High Court shall have jurisdiction to enquire into and rule on the constitutional validity of any statute or part thereof enacted by the People's Majlis.
(b) In any matter before them, all courts have jurisdiction to determine matters concerning the interpretation and application of any provision of the Constitution, and this shall not be deemed contrary to article (a).
(c) Every court has jurisdiction to overturn the decision of a lower court.
(d) Lower courts shall follow the decisions of a higher court.

Article 144 – Powers in constitutional matters
When deciding a constitutional matter within its jurisdiction, a court:
(a) may declare that any statute, regulation or part thereof, order, decision or action of any person or body performing a public function that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and
(b) may in connection with a declaration pursuant to article ([a]) make any order that is just and equitable, including:
    1. an order providing just compensation for any damage sustained by any person or group of persons due to any statute, regulation or action that is inconsistent with the Constitution; or
    2. an order suspending the declaration of invalidity (of a statute, regulation or action due to inconsistency with the Constitution) for any period and on any conditions, to allow the competent authority to correct the defect:

(c) may make an order limiting the retrospective effect of a declaration of invalidity of a statute, regulation or part thereof, order, decision or action of any person or body performing a public function that is inconsistent with the Constitution.

Article 145 – Supreme Court

(a) The Supreme Court shall consist of the Chief Justice and such number of Judges as provided by law. The Supreme Court shall consist of an uneven number of Judges.
(b) Matters shall be disposed of in the Supreme Court by an uneven number of Judges sitting together in session.

Article 148 – Appointment of Judges

(a) The President as the Head of State shall appoint the Judges of the Supreme Court, after consulting the Judicial Service Commission and confirmation of the appointees by a majority of the members of the People's Majlis present and voting.
(b) All other Judges shall be appointed by the Judicial Service Commission, to be established in accordance with the provisions of this Constitution.
(c) Judges shall be appointed without term, but shall retire at the age of seventy years.
(d) Notwithstanding article (c), for a period of fifteen years from the commencement of the Constitution, Judges may be appointed for a fixed term of not more than five years, as specified in the terms of their appointment.

Article 149 – Qualifications of Judges

(a) A person appointed as a Judge in accordance with law, must possess the educational qualifications, experience and recognized competence necessary to discharge the duties and responsibilities of a Judge, and must be of high moral character.
(b) In addition to the qualifications specified in article (a), a Judge shall possess the following qualifications:-
    1. be a Muslim and a follower of a Sunni school of Islam;
    2. be twenty-five years of age;
    3. has not been convicted of an offence for which a hadd is prescribed in Islam, criminal breach of trust, or bribery;
    4. be of sound mind.
(c) A person appointed to be a Judge of the Supreme Court, shall be at least thirty years of age; possess at least seven years experience as a Judge or practicing lawyer or both as a Judge and a practicing lawyer, and must be educated in Islamic Shari'ah or law.
(d) The People's Majlis shall pass a statute relating to Judges.

Article 154 – Tenure and removal

(a) A Judge shall not be removed from office during good behavior and compliance with judicial ethics.
(b) A Judge may be removed from office only if the Judicial Service Commission finds that the person is grossly incompetent, or that the Judge is guilty of gross misconduct, and submits to the People's Majlis a resolution supporting the removal of the Judge, which is passed by a twothirds majority of the members of the People's Majlis present and voting.

Article 156 – Administration of the courts

The courts have the inherent power to protect and regulate their own process, in accordance with law and the interests of justice.

CHAPTER VII
INDEPENDENT COMMISSIONS AND OFFICES
JUDICIAL SERVICE COMMISSION

Article 157 – Judicial Service Commission

…

(b) The Judicial Service Commission is an independent and impartial institution. It shall perform its duties and responsibilities in accordance with the Constitution and any laws enacted by the People's Majlis. The jurisdiction of the Judicial Service Commission shall extend to all members of the Judiciary and such other persons as designated by the People's Majlis.

(c) The Judicial Service Commission shall function as provided by the statute governing the Judicial Service Commission. Such statute shall specify the responsibilities, powers, mandate, qualifications, and ethical standards of members.

Article 159 – Responsibilities and powers

The Judicial Service Commission is entrusted with the responsibility and power:

(a) to appoint, promote and transfer Judges other than the Chief Justice and Judges of the Supreme Court, and to make recommendations to the President on the appointment of the Chief Justice and Judges of the Supreme Court;

(b) to investigate complaints about the Judiciary, and to take disciplinary action against them, including recommendations for dismissal;

(c) to make rules:
   1. regarding schemes for recruitment and procedures for the appointment of Judges;
   2. [regarding] ethical standards of Judges;
   3. providing for such matters as are necessary or expedient for the exercise, performance and discharge of the duties and responsibilities of the Commission;

(d) to advise the President and the People's Majlis on any other matter relating to the Judiciary or the administration of justice;

(e) to exercise such additional powers and functions prescribed by this Constitution or by law.

PROSECUTOR GENERAL

Article 220 – Prosecutor General

(a) There shall be an independent and impartial Prosecutor General of the Maldives.

(b) The Prosecutor General shall carry out his responsibilities and duties in accordance with the Constitution and any laws passed by the People's Majlis.

(c) The Prosecutor General is independent and impartial, and he shall not be under the direction or control of any person or authority in carrying out his responsibilities and the exercise of his powers. He shall carry out his responsibilities and exercise his powers without fear, favour or prejudice, subject only to the general policy directives of the Attorney General, and on the basis of fairness, transparency, and accountability.

CHAPTER XIV
TRANSITIONAL MATTERS

Article 282 – Supreme Court

(a) A Supreme Court comprising of five Judges, shall within forty five days of the commencement of this Constitution, be appointed to deal with all legal disputes arising under this Constitution and all matters coming to it on appeal from the High Court.

(b) Until the establishment of the Supreme Court as provided for in this Chapter and appointment of a person to carry out the responsibilities of the Chief Justice as specified in article (c), the highest authority for the administration of justice in the Maldives shall be a Judge of the High Court chosen from among themselves.

(c) Until such time as the new People's Majlis upon the recommendation of the Judicial Service Commission constituted as specified for in this Constitution, appoints a Chief Justice as provided for in Article 147, the responsibilities of that office shall be administered by a Judge chosen from within themselves … .

…

(e) The Supreme Court established as provided for in this Chapter, in formulating the principles applicable to the appeal process shall ensure that the following cases have the opportunity of appeal:
… .

Article 283 – Appointment of Judges to the Supreme Court

(a) The President as Head of the State shall appoint Judges to the Supreme Court established as specified in this Chapter. The appointments shall be determined after consulting the Judicial Service Commission and confirmation of the appointments by a two-thirds majority of the members of the People's Majlis present and voting.
(b) The Judges of the Supreme Court appointed pursuant to this Chapter shall possess the qualifications specified in Article 149 of this Constitution.

Article 284 – Term of Supreme Court

The Supreme Court appointed pursuant to this Chapter shall continue until the establishment of the Supreme Court as provided for in Article 145 of this Constitution.

Article 285 – Continuation of Judges

(a) All Judges in office at the commencement of this Constitution except for the Chief Justice shall continue in office until such time as a determination pursuant to this Article.
(b) The Judicial Service Commission established pursuant to Article 157 of this Constitution, shall within two years of the commencement of this Constitution determine whether or not the Judges in office at the said time, possess the qualification of Judges specified in Article 149.
(c) Where it is determined as provided in article (b) that a Judge does not possess a qualification or the qualifications specified in Article 149, such Judge shall cease to hold office.
(d) Where it is determined as provided in article (b) that a Judge possesses the qualifications specified in Article 149, such Judge shall be appointed as a Judge under this Constitution.
(e) Except as provided in article (c), Judges may only be removed from office as specified in Article 154 of this Constitution.

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