

I. Introduction

This assessment, based on a one-week visit to the Maldives in August 2012, examines the opportunities and constraints for the development of constitutional democracy in the Maldives. The high hopes for the country after the first-ever democratic election in 2008 have been tempered by the events of February 2012, in which President Nasheed was removed from office. Indeed, some observers consider this to be a case of a broken transition to democracy. As such, the time is opportune for an assessment of the problems and prospects for continued democratic transition.

The aim of the present exercise is not to review recent events so much as to lay the groundwork for the future. Our focus is on the structural and institutional conditions that are likely to hamper further democratic deepening. Instead of focusing on personalities, we are looking at processes. This is squarely in line with the recommendations of the Commission of National Inquiry (CONI), which issued its final report at the end of August 2012.

Besides being a small and geographically isolated country, the Maldives features several unusual conditions that render it a challenging environment for democratic development. These include a political culture that has emphasized recrimination rather than reconciliation; a very thin civil society; very limited transparency; a tradition of patronage; nascent higher education; and weak, politicized institutions. At the same time, the country is confronted with major social and economic problems that would challenge even more institutionally developed societies. This renders the current moment one of very high stakes. Continued political conflict is quite likely in the short term, but there are several alternative scenarios for the mid-term. Perhaps the most likely outcome is a cycle of failed governments and there are certainly plausible scenarios of democratic backsliding. The most desirable, but perhaps least likely, outcome is the emergence of a genuine constitutional democracy. However, this will require significant institutional deepening.

II. Country Background and Context

A. Introduction

The Maldives faces some very severe challenges. The democratic system is young and has been severely tested by the events culminating in the February 2012 controversial resignation from office of Mohamed Nasheed. While development in the past three decades has been impressive, the economic structure is not particularly balanced and is highly vulnerable to external shocks. Social problems include rampant drug use, including very high per capita rates of heroin addiction (some estimates place as high as 8% of the population of Male); limited work opportunities and high youth delinquency; and a large population of illegal immigrants, many of whom may be trafficked. The population is young, with an estimated 43% under the age of 21. Expectations are high but government capacity to deliver is low. A looming budget financing crisis means that there is little room to maneuver.

B. Politics and Government

The Maldives was ruled from 1978 to 2008 by President Maumoon Gayoom. Gayoom, an Islamic scholar trained in Egypt, was initially hailed as a modernizer but became increasingly repressive after a failed coup attempt in 1988. Systemic torture and the use of the law to repress opponents were allegedly common. The Constitution allowed him to replace judges at will which allowed him to interfere in particular cases quite easily, and at one point Gayoom also served contemporaneously as Minister of Justice. At the same time, a good deal of development occurred under his watch, with great strides in improving literacy and infant mortality. A large network of people were promoted by him and provided with higher education overseas, including many in the political class.

The country is now undertaking a very uneven process of state transformation, from a patronage-based system toward one based much more on transparent, rational decision-making. The 2008 Constitution, described in more detail below, was a centerpiece of this effort. But progress has been very limited and the older political logic still pervades many of the new institutions. Nor is it certain that effective transformation will continue. Institutional design for democracy is a probabilistic exercise rather than a mechanistic one and there is no blueprint that will guarantee outcomes.

The political culture of the Maldives is understudied but seems to have certain distinct features. Struggles over power typically result in one side dominating former opponents, leading to lasting grudges. A culture of patronage, in which government jobs and infrastructure are the currency, has become somewhat entrenched and will be difficult to eliminate. At the same time, the need for civil service reform and rationalisation means that there are some politically difficult choices to be made, and soon. This does not bode well for the mid-term.

C. External Actors

The Maldives state is weak and vulnerable to international pressure on security as well as the economy. A 2005 resolution in the European Parliament calling for a travel boycott against the Maldives played an important role in encouraging continued rearguard reforms of President Gayoom. India, United Kingdom, the United States as well as the Commonwealth and United Nations seem to be the external actors with most influence.

At the same time, there are relatively few external actors with a sustained interest in the country. The Maldives is peripheral to three different regions: South Asia, Southeast Asia and the Middle East. The country has historical trade links with each, and also has ties with the West and with China. To some degree, the state has shifted among these various outsiders for finance, political support, and markets.

The Gayoom regime benefited from international isolation, and it was difficult to learn much about the country from outside. To some degree this was deliberate government policy. Foreigners were not allowed to travel freely in the country, and tourists were physically isolated from the local population. Until very recently, the country had signed substantially less treaties than most other states and so was not subject to systematic monitoring by international organizations and treaty bodies.

The Tsunami had a significant effect as the government was given an overwhelming amount of material aid that it was unable to effectively channel. This led to the emergence of new organizations including the Red Crescent Society, and foreign groups were able to travel to remote islands for the first time. More generally, globalization has meant that such social and economic segmentation is no longer so easily manageable. The young people of the country are quite plugged into the electronic media, and an internal culture of hyper-communication around twitter has emerged. NGOs with links to Western countries have a small presence, and there is some Saudi and Pakistani funding of religious institutions.

External actors play a crucial though sometimes underappreciated role in small countries. The inclusion of foreigners on the Commission of National Inquiry about the events of February 7-8 was intended to establish the credibility of the process, though whether it was effective in doing so remains open to dispute. At the same time, there is a tendency to try to involve foreign actors in what are fundamentally domestic disputes. The task of external actors is to manage this tension, intervening very selectively when such action can make a difference, but without substituting for the development of domestic institutions. In some sense, working in small countries requires more diplomatic skill than in large countries, for mistakes are magnified.

D. Economy

The economy is highly dependent on tourism (which began only in 1972) and fishing. This unusual economic structure presents the Maldives with both challenges and opportunities.

The literature in political economy on the resource curse is relevant to understanding the challenges that are posed by dependence on tourism. A long line of research has identified a set of problems common to countries with geographically concentrated natural resources such as oil or diamonds. Such resources have value on the world market. The basic argument is that governments in such states can obtain sufficient revenue from controlling those resources that they do not need to strike a fiscal bargain with their citizens. Countries that lack such resources, on the other hand, have no choice but to conclude a bargain with the citizens, in which the government offers services in exchange for taxes. Historically, such bargains are the basis of the emergence of modern constitutionalism and democracy. Without such a bargain, government can dominate citizens; in addition, cycles of conflict may result as factions compete to control the concentrated resources. Resource curse countries also have a different state structure in terms of information—the metaphorical backroom deal is sufficient rather than a publicly transparent budgeting process.

Tourism in the Maldives does not fit this story perfectly, but has some features in common. Like oil, tourism is geographically concentrated in specific limited locations, and sold to consumers abroad. In the Maldives, the ownership of these resources is controlled by a small number of people, ultimately dependent on government recognition of their property rights. The government need not really conclude a fiscal bargain with its citizens so long as it can conclude a bargain with those who control the tourism industry.

This basic economic setup would seem to be less than ideal for democracy. In addition, the easy availability of foreign labor, with roughly 100,000 foreign workers in the country, further disadvantages the average citizen because the elites need not bargain with the rest of the population for labor.

Crucially, however, tourism is not a commodity for export, but a service industry that requires the foreign consumers to come to the country to enjoy it. This puts an upper constraint on repression, as the Maldives “brand” competes with other tourism destinations around the world. Unlike oil, which can always be sold on the world market, tourism is highly sensitive both to external shocks outside the control of the Maldives, *and* to internal disruptions. While the fiscal aspects of the resource curse seem to be relevant to the Maldives’ situation, the peculiar nature of tourism requires some basic agreement among the population so as not to disrupt the views of those abroad. But it also encourages threats, such as President Nasheed’s call for a tourism boycott after his removal from power.

The crucial question then becomes how the tourism revenues are utilized. In extreme resource curse countries, such as Saudi Arabia or the Arab emirates, the revenues are essentially controlled by a single family. In the Maldives, a relatively small number of businesses have controlling interests in the industry. There remains room for a bargain as to how these resources are used, and the extent they will be used for the benefit of the populace. A fiscal bargain is necessary, not only for democracy, but for the development of administrative capacity. The major legislative achievement of Nasheed's regime was a tax bill, involving a Goods and Services tax (GST), a corporate profits tax, and customs reform. (President Waheed vetoed the corporate profits tax after taking office.) The tax scheme was able to garner the support of multiple parties, and might be considered an example of how the political process is supposed to work, in that a major issue of public policy was addressed through the legislative process. This was, however, a very rare case.

III. Governance Institutions

A. The Constitution

1. Process

The 2008 Constitution was produced as part of the package of reforms launched by President Gayoom following increased international pressure and scrutiny. The drafting began in 2004 when a constitutional assembly (Special Majlis) was created under the terms of the 1998 Constitution. As per the 1998 Constitution, this involved the ordinary legislature (Majlis) sitting together with a specially elected set of representatives, along with the cabinet and a number of direct presidential appointees (eight in each of the two Majlis for a total of 16). Only a small number of the elected members were from Male.¹

The Special Majlis received early input from a wide range of sources, including a complete draft prepared by the Law Society with the assistance of international expert Yash Ghai. Ultimately drafting was carried out by a 21-member committee assisted by a Canadian law professor, Douglas Schmeiser. Issues that garnered a good deal of attention included the need to eliminate appointed representatives; the need to ensure greater representation for Male, which previously had 30% of the population but less than 5% of the elected seats; and the need for the Majlis to elect its own speaker. These were all largely reactions to the Gayoom-era political institutions.

The committee itself was deadlocked on the question of whether the country should have a presidential or parliamentary system, and the question was put to a public referendum. This led to the adoption of a presidential model. Some analysts viewed the referendum as one on Gayoom himself, as a parliamentary system would not have allowed him to take power. There were some assertions that he manipulated the results of this referendum, as he was still in full control of the active levers of government.

¹ National Democratic Institute, *Assessment of Opportunities and Challenges to the Development of Political Parties*, 25 (2004).

After the initial round of solicitation of input and the referendum on presidentialism or parliamentarism, the process was not particularly participatory. Regime opponents were focusing on finalizing the draft before President Gayoom's term would end in November 2008, for fear that he would seek to hold another election and retain the presidency under the new constitutional order. This meant that, in contrast with a growing international consensus, there was very little effort to inform the public about the constitution once drafted. The empirical evidence on the virtues of public participation in constitution-making is somewhat mixed around the world and we have some examples of very enduring and effective constitutions that were drafted without much local input (Japan) or without extensive public discussion (Philippines, South Korea). Nevertheless, it is safe to say that in the particular moment in Maldives history, a process that engaged the public imagination would have had the potential to encourage more active citizen engagement in ongoing governance. The drafting process of the constitution thus might be considered something of a missed opportunity.

2. *Substance*

The draft was finalized by the Special People's Majlis in June 2008, subsequently being ratified by President Gayoom in August. Substantively, the 2008 constitution was designed to shift the balance of power in executive-legislative relations away from the executive, as compared with the 1998 version. This was done because of an expectation that former President Gayoom would run again and win the office. The result is a very strong parliament, and relatively constrained presidency.

For example, pursuant to the 1998 constitution, the Speaker and Deputy Speaker of the People's Majlis were appointed and removed by the President.² However, this was amended in 2008 to have the People's Majlis elect the Speaker and Deputy Speaker as well as remove them.³ The provisions for presidential veto of legislation are weak, as a presidential return of a bill can be overcome with an ordinary legislative majority, as opposed to the 2/3 majority required in the 1998 Constitution.⁴ The president also lost the power to pass laws during recesses of the Majlis.⁵ The Executive must obtain the consent of the People's Majlis to spend public money or property, levy taxation, obtain or receive any money or property by loan or otherwise, and provide any sovereign guarantees.⁶

In addition, the 2008 Constitution added to the conditions justifying removal of the President by the People's Majlis the grounds of "serious misconduct unsuited to the office of President."⁷ This broad power introduces what might be considered an element of parliamentarism into the

² Art. 68, 70.

³ Art. 82(a) and (d).

⁴ Art. 91(b).

⁵ Art. 90 of 1998 Constitution.

⁶ Art. 97.

⁷ Art. 100(a)(2). This broad power was added to go alongside more standard reasons for removal – violation of the Constitution or the tenets of Islam or inability to perform the functions of the office. In addition, the President could resign under Art. 121, and this was apparently the modality used to remove former President Nasheed.

presidential system. Thus legislative-executive relations switched significantly toward the legislature. Nor is there is no presidential immunity before the courts.

The 2008 Constitution reflects a good deal of international influence in the rights section, including the essential components of all but one of the 1998 provisions as well as additional rights. Indeed, it can be considered in many ways a cutting-edge elaboration of constitutional rights, including rights to fair administrative action (Art. 43), environmental rights (Art. 23(d)), and novel rights to development, including a right to the establishment of sewage and electricity systems of reasonably adequate standards on every inhabited island (Art. 23(f) and (g)).

From an international point of view, the inclusion of an amendment providing that “a non-Muslim may not become a citizen of the Maldives.” (Art. 9.a) was controversial. This provision was widely criticized outside the Maldives but no local politician felt able to speak up against it. Freedom of expression is limited to those expressions not contrary to Islam (Art. 27), and the Right to Education mentions the duty of education to inculcate love and obedience of Islam, as well as human rights (Art. 36). These provisions reflect the effort to tailor to local needs.

Constitutional amendment under the 2008 scheme is quite difficult. Amendment requires the legislature to pass a bill with a three-fourths majority subject to written assent by the President.⁸ Amendments to rights provisions, the term length of the People’s Majlis, and the term of office and election of the president require majority approval in a national referendum. [2008 A.262(b)].

3. *Consequences*

All constitutions have unintended effects, but the 2008 Constitution of the Maldives may have had more than usual. We focus on three sets of consequences: the political system, the fiscal burdens on the state, and the unintended impact of small constituency size. Perhaps the largest consequence of the constitution was extensive judicial empowerment, which is considered in a separate section later in the report.

a. Political System

While it was widely anticipated that Gayoom would win the presidency, Nasheed actually did triumph in the second round of the election and so took office. He was hampered, however, by the victory of his opponents in the 2009 legislative elections. Unable to govern effectively using the regular channels of government, Nasheed increasingly turned to extra-constitutional instruments. In 2010 he ordered the arrest of his opponents Abdullah Yameen and Gasim Ibrahim for corruption and vote-buying. In 2011, he ordered the arrest of Judge Mohamed

⁸ Art. 261; A.262(a).

Abdulla, who was subsequently detained in violation of court orders for approximately three weeks. This proved to be a central trigger for the February 2012 change in power.

If executive performance during the period was less than ideal, legislative performance has also been mixed at best. On the one hand, legislative output was up, as compared with the last years of the Gayoom regime. But demands on the system have increased significantly. Major pieces of legislation, such as the penal code, the evidence law, and other key statutes, remain unparsed. Relatively few legislators seem to take an interest in the craft of legislation, but there are some. Since the political crisis of early 2012, the legislature has come to a standstill.

In short, it was not anticipated that political gridlock was a likely constitutional outcome. But this is indeed what occurred at the very time that institutional transformation needed to be most vigorous. The constitutional design is partly to blame for exacerbating the lack of compromise.

b. Costs

Among all the independent commissions that were created, the Constitution failed to set up an independent salaries commission. The parliament was thus allowed to set its own salary. Other independent institutions also proposed high salaries to indicate sufficient status comparable to government ministers.

In addition, the vast structure of local government, with almost 1000 local counselors, is very costly. The State Department reports that since 2008, there has been an increase in the number of elected officials from approximately one elected official per 4,762 citizens to approximately one elected official per 170 citizens today. The executive also contributed to a top heavy government by making large number of political appointments at the central government level. In addition, President Nasheed went beyond constitutional requirements to create a set of provinces between the atoll level and the central government, resulting in four levels of government. The state thus carries extra-ordinarily high costs for a small country. The Constitution also exacerbates a demand for services that the country may not be able to afford. As mentioned above, the Constitution commits the state to provide water and sewage on each of 198 separate islands. Having judges and magistrates on each island is also costly. Some have talked about encouraging the consolidation of population to a smaller number of islands, and this may make a good deal of sense.

c. Constituency Size

Art. 71 sets up a scheme in which each of the 21 administrative divisions get at least two representatives in the Majlis, which led to a 77-member house. This is quite large for a small country, and contributes to the two issues identified immediately above: government function and costs. Each member must be paid a salary and allowances for administrative expenses. In addition, several very small constituencies were created with under 5000 members. Even at its best, such a scheme focuses voter attention on very local public goods, which may or may not

make sense from the perspective of the rational development of the country. At its worst, small constituency size could contribute to vote-buying, since the absolute cost of purchasing an island's votes is relatively low, and potentially controllable by gangs and mafia-like groups.

B. The Judiciary and Judicial Services Commission

The logic of the constitution-making process led to a significant expansion in judicial power. The 1998 system designated only a High Court and other courts, but the 2008 Constitution specified a Supreme Court, a High Court, as well as trial courts.⁹ The judiciary has a very wide authority to review laws and other actions for constitutionality, including monitoring laws for conformity with Islam.¹⁰ The Constitution also gives the Court very strong enforcement powers, including the power to make any equitable order that justice requires.

Formal judicial independence has been enhanced. The judiciary is expressly declared to be independent for the first time in 2008. Whereas previously Presidential appointments the courts were unconstrained, they now must be confirmed by a majority of the People's Majlis. Judges are now removable only by a two-thirds vote of the People's Majlis after a resolution by the Judicial Service Commission (JSC), whereas under Gayoom the President could remove them at will.¹¹ The JSC, composed of representatives from the judiciary and other bodies, is able to consult on appointments for the Chief Justice and Supreme Court, and appoint judges of lower courts.¹² The JSC also has the role of monitoring the assets of the judges.¹³

This heightened judicial power is consistent with many other countries in South Asia and around the world. Unlike many of those countries, however, the Maldives in 2008 had no tradition of judicial independence, relatively little formal law, and had very limited judicial capacity. This results in highly uneven decision-making, which seems to be perceived as such by the population.

The lack of formal law is something that has been on the reform agenda for several years. The drafting of a penal code, evidence law, and criminal procedure law represent significant steps toward rationalizing the formal legal system. These remain unpassed at this writing, however. The result is a situation which seems to fit the stereotype of "qadi justice", a term coined by the German sociologist Max Weber to capture judicial decision-making that was inconsistent from case to case and not based on the internal requirements of the law.

Many of the judges reportedly lack even secondary education, and all or nearly all were appointed by the previous regime. The Constitution contemplated an interim period during which judges would be screened by the JSC and those without sufficient skill or qualification

⁹ 1998 Constitution Art.112; 2008 Constitution Art.141(a).

¹⁰ Art 10(b) (No law contrary to any tenet of Islam shall be enacted in the Maldives.) and Art. 143 (constitutional review).

¹¹ 154(b)

¹² Art. 147-148

¹³ Art. 153.

would be removed from office. Though appointments are for a life term to age 70, the constitution also included a provision allowing for five year terms for current judges, presumably to allow some transition from the old regime.

This empowerment of the judiciary reflects the confluence of international norms and the domestic logic of what I have elsewhere called political insurance in constitutional design.¹⁴ A departing power unsure that it will remain in office has a strong incentive to empower the judiciary so as to provide a forum to check the legislature. In contrast, where a constitution is made under the aegis of a strong political party that knows it will win post-constitutional elections, the judiciary will be much weaker.

This logic seems to have played out in the Maldives. Several of Nasheed's more prominent initiatives were squelched by the Supreme Court, which had never acted in much of an independent fashion before. His scheme to privatize the airport, for example, faltered when the courts declared a \$25 per passenger concessionaire's to be a tax, and thus in violation of constitutional requirements that the legislature pass all tax bills. Every anti-corruption case initiated in the courts was lost by the government as well. This no doubt contributed to Nasheed's fateful decision to arrest Judge Abdulla.

Many countries have experienced similar expansions of judicial power, but in the Maldives, the preconditions for this "judicialization" may not have been in place for such a sudden surge in authority. The previous judiciary, of course, had been appointed by Gayoom and many serious allegations of corruption existed. In addition, the legal framework is very underdeveloped, enhancing judicial discretion but without sufficient capacity to exercise it in a consistent, professional fashion.

The theory of the Constitution was that the Judicial Services Commission would be a central institution to ensure both judicial independence *and* judicial accountability. In the actual sequence of events, however, it has leaned much more heavily towards judicial independence than accountability. The JSC would, in an ideal world, ensure that the newly empowered judiciary was clean, competent, and protected from political influence. The JSC had a duty to effect institutional transformation. This mission, however, went unfulfilled. Although only three of the eight seats on the JSC were constitutionally mandated to the judiciary, the courts were essentially able to capture the JSC to ensure that the old judiciary remained in place under the new constitutional order.

The Interim Supreme Court first declared that provisions of a statute giving the Judicial Service Commission control over judicial administration were unconstitutional. Instead, it held that the "inherent powers" of the judiciary required that it control the administration, ensuring that the Court would be able to control the material resources of the judiciary, such as administrative jobs and contracts. It then used various techniques to take effective control of the Commission. The JSC itself, which under Art. 285 of the Constitution was tasked with screening out judges for corruption or lack of credentials, never engaged in a serious attempt to do so. Instead of

¹⁴ Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge 2003).

having an open process with hearings before the JSC, the Chair and certain members did some of the screening “administratively”, uniformly finding that the judges were sufficiently qualified. One dissident member of the JSC attempted to challenge some of these procedural techniques and the simply JSC held meetings without her. She was ultimately attacked with a box cutter on the streets of Male and removed from the JSC through an opaque political deal made between the JSC and the President’s Office.

With their personnel protected, the courts have been able to become involved in many areas of governance. They have developed an expansive view of their own jurisdiction, holding that the Human Rights Commission, for example, had no jurisdiction over cases involving the courts. The courts have also adopted the notion that they have certain “inherent powers” borrowing a concept found in some common law systems.

With power usually comes accountability. However, the Supreme Court has passed rules stating that lawyers and others could not criticize the courts without being found in contempt. The overall result is that the courts have established themselves as very central actors in the Maldives political system, and have sought to insulate themselves from outside scrutiny. This represents a grave misunderstanding of the concept of judicial independence, which should and must be balanced with accountability.

C. Independent Commissions

The Constitution sets up several independent commissions, including the Human Rights Commission, Anti-Corruption Commission, Civil Service Commission, and Elections Commission. These commissions, in turn, are subject to parliamentary legislation. In addition, there are crucial oversight commissions created by statute, such as the Police Integrity Commission. These commissions were appointed and structured in the 2003-2008 period of reform. Foreign assistance to the elections commission, with a number of European technical staff, was crucial to the integrity of the 2008 election.

While additional work would be required for a complete analysis, it appears that many of these commissions lack internal rules of procedure and substantive standard against which to measure behavior. Furthermore, the commissions seem to lack record-keeping facilities. Without such standards and records, there is no chance that the commissions will be able to decide cases in a consistent fashion. This will inevitably lead to charges of selective enforcement and will guarantee the politicization of the commissions. Alternatively, it may lead to under-enforcement of the commissions’ mandates. Many of the commissions have apparently interpreted their roles narrowly, focusing on fact-finding and other activities that may keep them out of the heated political conflicts of the day. This is understandable, but hardly desirable for the fulfillment of the aspirations of the 2008 Constitution. It is worth noting, though, that the Constitution does make commissioners somewhat vulnerable to political interference from parliament, as they can be removed by majority vote for misconduct,

incapacity or incompetence.¹⁵ The latter term is sufficiently vague that it could lead to politically motivated removals.

D. The Parliament

In the current atmosphere of political crisis, parliament has been at a standstill. As in several other new democracies, it has operated as an arena for political conflict and protest behavior rather than a functioning legislature. This has significant consequences for the legitimacy of the system. In particular, it has prevented the passage of major and important statutes, such as the penal code, evidence law, and criminal procedure codes, all of which are crucial for constraining judicial discretion. Without a statutory basis for decision-making, the legal system will be perceived as inconsistent and arbitrary. By some estimates, half of the required statutes to implement the constitution remain unpassed.

E. Civil Society

Civil society in the Maldives appears to be fairly limited in scope. The legal framework dates only from 2001. However, there are a number of organizations, some of which have implemented projects with foreign funds. These organizations can provide important opportunities for building the skills of relatively underemployed young people in society. However, there is some concern that, like other institutions, the NGOs are aligned with various political agendas. In addition there is the risk that a few organizations will seek to obtain a chokehold on all funding and support, inhibiting the dissemination of skills throughout the society.

Some, such as the labor organization formed to represent workers in the tourism industry, the Tourism Employment Association of the Maldives (TEAM) do however hold promise and the group is seeking structural changes such as a minimum wage law, and an improvement in labor conditions on the resort islands. In many ways, these islands run as their own independent countries, where the reach of state law is minimal.

There is very limited capacity in the Maldives for policy analysis outside a very few select government ministries. Indeed, there does not seem to be a culture of reasoned justification. Instead, any effort to provide a neutral perspective is viewed as a partisan. This is a profound problem for the society and one that will completely impede the process of state transformation that is the nominal goal of the democratization process.

A priority for the country is to create capacity and institutions capable of neutral policy analysis. There are some nascent efforts under way in this regard, such as the proposal for a policy research institute at the University of the Maldives. The University itself was only incorporated as such in 2011, having been a college since 1999. The institution has not really begun to develop any research capacity, although it would like to.

¹⁵ Const. Maldives Art. 177(a) (elections commission); Art. 187(a) (civil service commission); Art. 197(a) (human rights commission); Art. 207(a) (counter-corruption commission); Art. 218 (auditor general).

IV. Conclusion: Three Scenarios

The Maldives finds itself in a situation in which virtually every organization in society has been politicized. Government organizations, civil society and the academic environment have not been sufficiently institutionalized, in the sense that the internal structures and processes make a difference to outcomes. One need not really understand the internal operations of Maldivian institutions in order to predict what they will do; instead one need only to know who the players are connected to and to whom they owe their political loyalties. Political discussion is exclusively about people and not about policies. This presents a profound challenge to the consolidation of democracy.

Stepping back from the current moment, one can imagine three alternative futures for the Maldives: a cycle of failed governments; dominance of one hegemonic faction; and a genuine constitutional democracy. We consider each in turn.

Cycle of failed governments: No one wants to go back to the days of one man rule, and all seem committed to the general project of systemic change. However, Maldivians differ on who they would like to lead the process, and may also disagree about the pace of reform. The deep cleavages of the present moment present a risk of a cycle of failed governments, in which expectations are not met and the public shifts back and forth among two or three different political groups, none of which take the tough decisions. In this scenario, personalities rather than policy differences will define the party system, and true national leadership will be a casualty. This scenario may be more likely to result if the current government pursues its legal case former President Nasheed too vigorously, or if he escalates conflict to try to “overthrow the government”, as one of his advisors said upon release of the CONI report. A national unity government, on the other hand, would be a positive step away from this scenario.

Dominance of a Hegemonic Faction: There are certainly plausible scenarios of democratic backsliding. Indeed, some talk openly about a “Singapore option” for the Maldives, in which a single political party takes a leadership role in the political sphere, and empowers a technocratic state apparatus to provide for public good. However desirable such an approach might be as a normative matter, we do not believe that the institutional underpinnings or environmental conditions are auspicious for such a model to work in the Maldives. Singapore at independence inherited a high quality bureaucracy and a decent court system, as well as a cultural tradition rooted in meritocracy. Furthermore, it faced a very hostile international environment. Through the careful exercise of leadership, it exploited its strategic location to pursue an impressive program of national development. The Maldives lacks any of the institutional or cultural resources that Singapore had in pursuing its developmental model. It is also in a much more peripheral position in the international environment. Perhaps the major constraint, however, is that there does not appear to be a potential leader of the Maldives who could command the respect that Lee Kuan Yew earned in Singapore. Pursuing a strategy based on the promise of enlightened leadership seems risky.

Constitutional Democracy: The most desirable, but perhaps least likely, outcome is the emergence of a genuine constitutional democracy. Such a scenario would involve potential alternation in power among political groups; a focus on policies as the basis for political decision; significant constraints on extra-constitutional governmental action, along with a deep infrastructure to support the development and implementation of policies; and a sense of political maturity that has heretofore been lacking. Every element of this scenario will require significant institutional deepening. To that end, the next section of this report details specific recommendations.

V. Recommendations

Constitutional Education and Discussion

Constitutionalism requires developed institutions, as outlined in this report. But no democratic constitutional system can function effectively without an informed public. It is, ultimately, public pressure that ensures that government agents comply with the orders of courts and independent agencies. It is therefore essential that the citizens of the Maldives be informed of their constitutional rights. Several members of the Constitutional Drafting Commission had made precisely this suggestion. Nevertheless, no systematic effort was ever undertaken. Consideration should be given toward a kind of public education program about the contents of the constitution, as a way of encouraging citizenship. One possibility would be to hold a series of open public forums to discuss the text and meaning of the Constitution. This could involve relatively neutral figures from within the country, as well as a foreign scholar to provide an international perspective. The effort might also involve the education system, which does not have a mandatory program in civics.

Judicial Capacity and Accountability

The Maldives has made tremendous strides in the institutional structures of judicial independence. The challenge now is to enhance capacity to exercise this independence in a responsible fashion. There are several programs of capacity building in the works, and the judiciary will be able to absorb large amounts of training, considering the relatively low level of the current judicial education.

The flip side of judicial independence is judicial accountability. There must be mechanisms to ensure that the judges obey the law and apply it consistently. As described above, there are reasons for concern about the current situation, in which the legal framework is underdeveloped and the Supreme Court has foreclosed many channels of ensuring accountability.

Comparative experience suggests several channels of ensuring accountability. Some suggest that sustained judicial independence requires a vigorous private bar. A private bar can provide some social and political support for the courts, but also has the technical knowledge to let others know when judges make poor decisions. The Supreme Court rules foreclosing criticism of court decisions will have a chilling effect on public discussion, and will serve to intimidate criticism by the group best positioned to understand what the courts are doing.

The Maldives currently lacks a unified bar association, and the legal profession is very young. There are several different groups of lawyers, but registration is ultimately controlled by the Attorney General and the courts. Facilitating the emergence of a unified self-regulating bar would be very helpful, though not very likely given the politicization of the various groups.

Other mechanisms of ensuring judicial accountability include the media and NGOs. Many countries have created “court-watch” programs through which citizens go to the court and monitor what happens. This in turn requires open courtrooms, and we are not sure that all courts in the Maldives meet this standard. In any event, the rules squelching discussion of court decisions form a major barrier to this (or any other) channel of accountability.) Training journalists and NGOs in legal principles would help to ensure that there are some actors capable of interpreting the court for ordinary citizens.

In recent years, there has been a trend in many countries around the world to involve laymen in adjudication. This need *not* involve a jury system as found in common law countries. Countries such as Russia, Japan, Korea and Spain, which are not known as common law jurisdictions have recently adopted systems of lay participation that involve mixed panels of judges and laymen to decide cases. The scope and institutional design of these systems varies across jurisdictions, but a typical model would utilize 4-5 citizens to sit with 2-3 judges in serious criminal cases such as murder. The challenges of implementing such a system in the Maldives, with its dense network of family ties, should not be underestimated. But, if the current system of *judges* deciding cases is contaminated by personalism, a carefully designed system of lay participation might arguably do better in that the biases and relationships of multiple actors might cancel out.

The major point is that donors should support the development of judicial capacity in the Maldives, but must tie this to developing enhanced mechanisms of accountability.

Institutional Capacity of Independent Agencies

Each of the independent commissions needs to have sustained engagement with actors who can facilitate their institutional development. Reportedly, the elections commission has received a good deal of such assistance, and this might be the model for other commissions.

Capacity in the government is also uneven. Some agencies, such as the Inland Revenue Authority, have an excellent reputation, clear websites, and internal rules of procedure. Others lack any of these things.

To facilitate enhanced institutional capacity for government and independent commissions, donors could introduce a program of senior long-term institutional advisors with international experience who can sit with Maldivian counterparts and provide practical advice. The Maldivian institutions will need advice on every level, including how to organize internal rules of procedures; set up office system; navigate relationships with other institutions; and perform their statutory and constitutional missions. These advisors must be carefully selected, and the donor community should carefully coordinate their selection so as not to replicate or exacerbate Maldivian rivalries. Ideally, the advisors would themselves be a kind of team, whose ultimate shared goal would be to facilitate the functioning of the constitution.

Encouraging Neutral Policy Analysis

The efforts to develop a policy research institute at the University are important and should be encouraged. This might involve establishing relationships with other such institutions around the world; providing short-term and long-term in-country training assistance on methodology; commissioning selected trial reports to be co-produced with international consultants; and providing some institutional support that is tied to the ultimate production of acceptable work.

Externalizing Institutions

It is not sufficiently appreciated that every country in the world today externalizes certain government functions, either to other states, international organizations, or transnational networks of actors in civil society. Despite the continuing prevalence of discourse about sovereignty, countries routinely rely on international actors to: monitor internal government performance (through human rights regimes); protect foreign investment (bilateral investment treaties and the International Convention for the Settlement of Investment Disputes); create regulatory standards (World Intellectual Property Organization, or the antitrust regulators' network); adjudication of disputes (e.g. the privy council in London, the New York Convention on Arbitration); and many other functions. Such externalization makes particular sense for small countries which have limited human capital. The CONI is itself an example, for it will have to interpret part of the Maldives Constitution to fulfill its mandate.

The Maldives could do well to externalize certain governance functions on a selective basis. A recent example was running the bid process for airport privatization through the World Bank so as to avoid undue interference by local actors. Indeed, at the present moment, it may be true that *every* government contract is presumed to be awarded on the basis of favoritism, whether it is or is not. This has significant consequences for legitimacy, and reinforces the tendency to retreat to political networks for patronage and protection. Delegating this crucial function to a truly neutral body outside the government may be wise.

Given the massive government deficits and the threat of default, civil service reductions are going to have to be made fairly soon. This will, as described above, put major pressure on whomever is in power at the time, and will be a source of lingering resentments. Perhaps there may be a role for an external commission to examine the various job categories and make some recommendations for eliminating redundancies and waste. If accompanied by prior agreement to accept the cuts, such externalization would actually enhance the mid-term prospects for democratic deepening because it would eliminate a persistent source of resentment within the political system.

More generally, the international community should consider encouraging mixed bodies involving foreign advisors and members sitting along Maldivians, although the CONI experience may have not been ideal in this regard. Mixed commissions, in theory, are an excellent way to encourage professional norms, and many larger countries have overcome sovereignty concerns

to allow such mixed commissions, tribunals and agencies. For example, Kenya has recently gone through a process of vetting judges that involved foreign participation. The Judges and Magistrates Vetting Board included among its nine members three distinguished commonwealth judges: Chief Justice Georgina Brown of Ghana, Justice Albie Sachs of South Africa, and Justice Fred Chomba from Namibia. The board had a significant impact, rejecting four of the nine Court of Appeal Judges, and numerous lower magistrates. Had the Maldives JSC had such foreign participation, things would have been very different in the Maldives today.

Appendix: List of Meetings

Sunday 12 August

1. Ibrahim Ismail (Ibra)
2. Andrew Cox
3. Musthafa Luthfi
4. Mohamed Latheef
5. TEAM representative

Monday 13 August

6. Abdullah Shahid
7. Mariya Didi
8. Ahmed Hamza
9. Ibrahim Rasheed

Tuesday 14 August

10. Justice Muthasim
11. Dhiyana Saeed
12. Azima Shakoor
13. Police Integrity Commission

Wednesday 15 August

14. Adaalath
15. Mohamed Wahdeen (Deen)

Thursday 16 August

16. Policy panel: Dr Ahmed Shukry, Ms Saeeda Umar, Mr Ahmed Tholal, Mr Ibrahim Zakarya Moosa, Mr Ibrahim Rasheed, Mr Ibrahim Ismail, Mr Mohamed Nasheed, Dr Fawaz
17. President Gayoom
18. UN Country Team

Friday 19 August

19. Embassies: Canada, South Korea, Japan, USA, Australia, UK, Norway

Sunday 21 August

20. M.U Manika
21. Mohamed Ibrahim Didi (Modi)