

# Oxford Constitutional Law

## **Maldives: The State of Liberal Democracy**

**Shamsul Falaah**

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## **I. Introduction**

As in the past two years, the judgements issued by the Supreme Court of the Maldives (hereinafter, the “SCMV”) in the year 2017 in regard to constitutional matters could be argued as being one of the principal reasons for democratic backsliding and as a U-turn from its past decisions. The SCMV, in conjunction with the executive, controlled the switching of political parties of Majlis members and restricted the Majlis’ powers in making no confidence votes against the positions established in the Constitution. The consequence of these decisions was that the Majlis members thus affected were obligated to remain in the ruling party under the mercy of the judiciary and the executive thus giving more control to the executive.

This article intends to highlight the state of liberal democracy in the Maldives based on the constitutional case law of the SCMV in the year 2017. This entails analyzing the relevant cases, discussing the controversies that surfaced around them and their politics.

## **II. Liberal Democracy on the Rise or Decline?**

In the Maldives, liberal democracy is declining due to the muddled constitutionalism that has occurred through the unacceptably disconcerting actions of the three branches of government.<sup>1</sup> This section discusses the constitutional cases responsible for this decline and the politics behind them.

### **A. Ex Parte (Attorney General’s Office) 2017/SC-C/11**

Unsurprisingly, the first case where the SCMV issued a U-turn judgement was in the case of *Ex Parte (Attorney General’s Office) 2017/SC-C/11* (hereafter, the *Motion of No Confidence Case*).<sup>2</sup> In this case, the Attorney General (AG) vigorously contended that the appointment, removal, and acceptance of resignation of cabinet ministers comes under the discretion of the President and not under the discretion of the Majlis. And, the power of the Majlis to take no confidence votes under Article 101 of the Constitution of the Maldives, 2008 (hereafter, the “Constitution”) must be exercised apolitically – not for political reasons. The

Attorney General also contented that a minister could only be removed by the Majlis by an impeachment process based on valid impeachable grounds or bases, despite the fact that the Constitution gave the power for taking no confidence votes against the cabinet ministers.<sup>3</sup>

This constitutional matter was brought by the AG amidst the controversial ‘no confidence’ motion submitted by the opposition against the Speaker of the Majlis which was defeated on 27 March 2017. Following this, the executive-controlled Majlis amended the Regulations Governing the Proceedings of People’s Majlis requiring a ‘no confidence’ motion against the Speaker and the Deputy Speaker of the Majlis to have a minimum of 42 lawmakers’ signatures. Based on this, the no confidence motions against the Speaker and Deputy Speaker were rejected by the Majlis.

The executive was apprehensive of MPs joining the opposition and voting against the stands of the ruling party, not only in regard to the removal of the Speakers for the Majlis, but also of the cabinet ministers and the President.

As the Court, in most of its constitutional cases, declares that the Court has stated that it observes the establishment of the separation of powers in different constitutional jurisdictions; in most cases, this is a formality. However, in its analysis of foreign jurisdictions, the Court confined its discussion to the United States (US) only.

In this instance, the Court, relying on the public referendum held during the constitutional drafting process, on 18 August 2007, to decide whether it is a presidential or parliamentary system that is the most suitable for the Maldives,<sup>4</sup> focused its arguments and discussions on constitutional conventions in strict presidential systems. The Court argued that since the Maldivians had preferred a presidential system in that referendum, the interpretation of the constitutional provisions establishing the checks and balance system between the executive and the legislature and their powers, must be consistent with the characteristics and features of a presidential system.<sup>5</sup> Based on these reasons, the Court decided that the power granted by the Constitution to the Majlis in taking away the no confidence votes of the cabinet ministers is not absolute and must be exercised only on valid and impeachable grounds – not solely for political reasons. The Court also ruled that the Majlis’ power to remove the President and judges, as well as the members of the Elections Commission, the Civil Service Commission, the Human Rights Commission of the Maldives, the Anti-Corruption Commission, the Auditor General, and the Prosecutor General, must also comply with the rules of due process of law as discussed in the judgement.<sup>6</sup> This includes all the positions stated in the Constitution except for those of the Speaker and Deputy Speaker of the Majlis and its members.

The decision of the *Motion of No Confidence Case* is contrary to the Court’s decisions made for the previous two cases (*Ali Waheed and Dhivehi Qaumeey Party v State (Attorney General’s Office)*)<sup>7</sup> decided in 9 December 2010,<sup>8</sup> where the Court concluded that it is clear from Chapters three, four and five of the Constitution that the separation of powers in the Constitution follows the features of both the presidential and parliamentary forms of government and therefore that the Maldives has a “hybrid” form of the two systems. The Court went further arguing that determining the form of government established by the Constitution must be confined to the Constitution<sup>9</sup> only – the Court was silent in the public referendum, unlike in its ruling for the *Motion of No Confidence Case*. Moreover, the Court’s twisting of the words of the provision “*ithubaarunekkamuge voteh*” (vote of no

confidence) to “impeachment”, despite the unambiguousness of the phrase and without even referring to the minutes of the constituent assembly, is paradoxical.

Another disturbing trend is the Court’s approach to expressing the guarantees under the principle of due process of law. In this way, this concept was first adopted by the Court in the case of *Mohamed Fahumee Hassan v. People’s Majlis (State)*<sup>10</sup>(hereafter, “*Fahumee’s Case*”), where the Court stated that the following guarantees fall under due process as per the case law of the Supreme Court of the United States: (1) criminal procedure must be complied with in criminal proceedings and civil procedure must be followed in civil proceedings; (2) substantive due process / the courts limiting the deprivation of rights of any individual without due process of law; (3) prohibition against vague laws; and (4) as a vehicle for applying the rights in the Bill of Rights under the doctrine of incorporation.<sup>11</sup> Since then the Court, in several instances, has reiterated and reaffirmed this approach in the same wording, however; it is silent on any specific case of the US Supreme Court. The paragraph is almost a straight lift – translation – from Wikipedia on due process.<sup>12</sup> More importantly, the fourth point is questionable on where the Court affirmed the “doctrine of incorporation”; this has no basis or relevance to the Maldivian Constitution or legal system.

In addition to the executive influence on the judiciary, like the decision of *Fahumee’s Case*, the decision of the SCMV in the *Motion of No Confidence Case* could be argued as a “self-guard” judgement to prevent the removal of the justices of the Supreme Court, most significantly, Justice Ali Hameed, who was cleared from a case of misconduct due to a leaked sex tape scandal.

Later, in August, a no confidence motion submitted against the AG was put on hold by the Speaker of the Majlis until the Regulations Governing the Proceedings of People’s Majlis are amended as per this decision.<sup>13</sup>

## **B. Ex Parte (Attorney General’s Office) 2017/SC-C/17**

The second controversial case decided in 2017, is the case of *Ex Parte (Attorney General’s Office) 2017/SC-C/17* (hereafter, “*Floor-Crossing Case*”).<sup>14</sup> This case was submitted by the AG on the same day, 3 July 2017, when the opposition submitted a motion of no confidence against the Speaker of the Majlis for the second time in the same year, despite the amendment of the Majlis regulation to submit a no confidence motion with the signatures of 42 members. Considering the change in the political landscape, the executive feared that a series of no confidence motions might be submitted, not only against the AG, but also against other ministers, Speakers of the Majlis, and the President when the opposition submitted a no confidence motion with 45 signatures against the Speaker. The only option for the executive was to seek a solution from the SCMV in their favour. Therefore, the AG submitted this case arguing that the floor-crossing of the Majlis members was a threat to established democracy and to the welfare and benefits of the Maldivians and the law and order and sovereignty of the Maldives. The AG also requested that they be allowed to interpret the relevant constitutional provisions.

The Court held that the Majlis members who were elected on political party tickets would be disqualified once the member who, after being elected on a political party ticket, leaves that party, or defects to another party, or is expelled from the party. Moreover, the Court ordered the Majlis to pass an anti-defection law. The decision explicitly stated that the decision must be complied with following its issuance – which means not by members who had been expelled or left or defected to another party before the decision.

As in the previous case, in this case also, the Court reiterated that it had observed the principles related to the floor-crossing and anti-defection laws of different constitutional jurisdictions. In its reasoning and in support of their decision, the Court referred to, the Indian Supreme Court's case of *Kihoto Hollohan vs Zachillhu And Others*,<sup>15</sup> the United States, Singapore, Pakistan, Sri Lanka, Nepal, Bangladesh, and the Seychelles. With the exception of the Indian Supreme Court's case, the Court did not mention any other particular case from any other jurisdiction. Article 68 of the Constitution requires the interpretation of the Bill of Rights (BOR) to promote the values that underlie an "open and democratic society," and Article 16 allows the limitation of the BOR, except that a limitation imposed to protect the tenets of Islam, to the extent only if demonstrably justified in a "free and democratic society". Therefore, it is arguable that the Court's reliance on Pakistan, Sri Lanka, Nepal and Bangladesh are constitutionally justifiable under these provisions.

It is also important to emphasize the Court's use of the *Kihoto* case from the Indian Supreme Court. The borrowing of constitutional ideas or imitating practices of the Indian Supreme Court is not a new concept in the constitutional adjudication in the Maldives. Most importantly, this borrowing and imitation are seen in cases where the Court acts in an executive-minded manner, or in their inopportune judicial activism or adventurism.

Furthermore, the reason that the Court gave for the absence of anti-defection laws in western democracies is unconvincing. According to the Court, western democracies have not passed anti-defection laws because switching political parties by parliamentarians is rare and therefore there is no need for such laws. It is unclear of how the Court arrived at this inexplicable reason.

This decision of the SCMV represents a U-turn from its decision in the case of *Ibrahim Riza and Others (Moosa Anwar intervening) v State (Attorney General) 2012/SC-C/13* delivered on 4 December 2012 where the Court struck out section 119(e) of the *Second Amendment to the Decentralization of Administrative Divisions of the Maldives 2011*<sup>16</sup> which disqualifies a councillor who had been elected on a party ticket and then had decided to leave the party or was expelled from the party. In its reasoning, the Court concluded that this clause was contrary to the Articles 26(c) (the right to take part in the conduct of public affairs, directly, or through freely chosen representatives) and 30 (the right to establish and to participate in the activities of political parties) of the Constitution and is unjustifiable under Article 16 of the Constitution to qualify as a restriction justifiable in a free and democratic society. The Court went further arguing that the Maldives has a "majority election system" and therefore, unlike in a "proportional representation system", people vote for individual candidates not for specific parties or party ideologies,<sup>17</sup> and except in a proportional representation system, the disqualification of elected representatives, when they leave their political party, is not permissible, not even for those who elected the representative have this power.<sup>18</sup>

The aftermath of this decision, despite the Court's explicit reference to its non-retrospective effect, the ruling party requested that the Elections Commission remove some members from the party registry as a disciplinary action. The Election Commission, with the inclusion of the requests made by the ruling party and the member who had asked to leave their party before the deciding of this case, processed the requests and declared that members were disqualified as per the decision of the *Floor-Crossing Case*. The members appealed to the SCMV, and the Court issued a Court order clarifying that the decision of *Floor-Crossing Case* would not apply retroactively.<sup>19</sup> However, the decision of the Court has allowed the

government to disqualify any of their Majlis' member – simply removing the member from the party as a disciplinary measure.

### **III. Major Constitutional Developments**

#### **A. Sacking of Civil Court Judge Maryam Waheed**

On 16 February 2017, the SCMV issued an unprecedented court order ruling that the Civil Court Judge Maryam Waheed had lost the legitimacy, capacity, authority and had no standing to preside over trials in the courts of the Maldives.<sup>20</sup> This Court order was issued after the AG requested the SCMV to determine that the judgment of Judge Maryam Waheed in the Civil Court case number 707/Cv-C/2017, which ordered the government to hand over the island of Bodumohora to Marine Technology Maldives, was contrary to the ruling of SCMV in the Application for Appeal (No. 01/J-L-SC/2017) and to take further action regarding this matter. Accepting the arguments of the AG, the SCMV concluded that the Judge Waheed's decision was against the SCMV ruling (No. 01/J-L-SC/2017), and a violation of Articles 141(b), 143, 144, 145(c) of the Constitution and Articles 20 and 22(a) of the Judicature Act of the Maldives (Act No. 22/2010) and Article 86 of the Supreme Court Regulation and the Rules and Procedures and the Judges Code of Conduct.

With this ruling, the SCMV had bypassed all the constitutional guarantees afforded to judges and impaired the mechanism mandated for the Judicial Service Commission (JSC) under the Constitution and Judicature Act of the Maldives.

The main opposition party raised concerns over this action by the SCMV and said that this is a warning to all judges “who do not abide by the Government's interests, and specifically President Yameen's interests” and that it “brazenly undermines the Constitution”.<sup>21</sup>

#### **B. Orientation Program for New Lawyers**

On 18 March 2017, the Judicial Academy of the Maldives started an orientation program for the trainee lawyers which includes an introduction to the legal and judicial system and awareness of judicial ethics. This was first introduced in 2015 under the Regulation on the Licensing of Attorneys to Practice Law in the Maldives as a mandatory prerequisite for a trainee lawyer to become a full license holder.<sup>22</sup>

#### **C. Barring Journalists Covering Trial Proceedings**

The barring of journalists from court proceedings, sometimes without providing a reason, is not new in the Maldives. Journalists were barred from in-court media coverage after a judge of the Criminal Court was photographed while he was standing outside the courthouse. This was followed on 18 March 2017 by a series of journalists being banned, The Criminal Court released a press statement warning the media that it would take action against any person who aims to disrupt and undermine the peace, harmony, and sovereignty of the nation.<sup>23</sup>

#### **D. Suspension of Members of Local Councils**

One of the landmark changes introduced with the current Constitution was a better decentralization concept through local councils. The law on local councils gave broad powers to the city, atoll and island councils. However, the councillors elected by the people to these councils are bound by strict standards set by the Local Government Authority (LGA), although this is an independent body, it is currently controlled by the government.

Several councillors were suspended by the LGA for meeting foreign diplomats; this undermines the status and broad powers vested with the Councils.

### **E. Mass Suspension of Lawyers**

On 30 August 2017, 56 lawyers, including prominent lawyers and former Attorneys General, submitted a petition to the SCMV expressing their concerns on the situation of justice in the Maldives. Their concerns mainly emphasized: the conducting of trials; charges of terrorism; baseless remand trials; judgements in absentia; testimonies of anonymous witnesses; the conduct of judges; undeserved penalizing of the judges and the security of the post; the governance of the lawyers by the SCMV; the SCMV overriding their jurisdiction contrary to the Constitution; judges influencing the work of other judges; the rights of the detained; the penalizing of lawyers without notifying the cause for action; the unmethodical functioning of JSC; and the role and responsibilities of the AG and Prosecutor General. The SCMV rejected the petition, and on 10 September 2017, the Department of Judicial Administration (DJA), a body governed by the SCMV, with a tweet declaring that 54 lawyers out of the 56 lawyers<sup>24</sup> were indefinitely suspended without providing any cause for the action. This again raises alarm about the judicial adventurism and the abuse of judicial discretion in the Maldives,<sup>25</sup> which also lacks due process and is contrary to the UN Basic Principles on the Role of Lawyers.<sup>26</sup>

### **F. Prevention of Opposition Rallies**

In the year 2017, several opposition rallies were prevented by security forces and by the government authorities denying any venue for the opposition rallies. The Maldives Broadcasting Commission (MBC) and the Maldivian broadcasting regulator also threatened the media to prevent the broadcasting of the opposition rallies. The MBC also imposed hefty fines on the pro-opposition local news channel, Raajje TV,<sup>27</sup> and Medianet, which is a local cable television provider, for rebroadcasting the “Stealing Paradise” documentary of Al Jazeera. It is dispiriting and against the mission of this independent organisation which has been designed “to responsibly protect the rights of “freedom of expression” as per the constitution with egalitarianism.”

These actions have prevented the opposition voice and unjustifiably obstructed the freedom of assembly and have set journalism back several years.

## **IV. Looking Ahead to 2018**

Unlike in other constitutional matters, the political parties in the Maldives did not intervene in the main cases arising in 2017. This could have been due to loss of faith in the judiciary which has become a politicized branch. The year 2017 ended amidst political turmoil with an active opposition who were, and are, despairing of the politicized judiciary and legislature, the members of which remain silent in fundamental constitutional matters, except for acting as a “rubber stamp” in matters that are important to the government. The media is under suppression, and there is an urgent need for the creation of a free and independent environment – not only by the state organisations, but also from political parties and influential business interests – which are the pillars of a liberal democracy.

The main question that awaits an answer is: How long will the judiciary, the Majlis, and the other independent organisations remain silent whilst paving the way for the government to rule autocratically with a supermajority of the Majlis?

The next presidential election is due in 2018. Therefore, the situation is expected to be complex and critical. If the judiciary is unwilling to take promising judicial activism in hand, then an election that is influenced by the politicians through the judiciary is again foreseeable, as was seen in the last presidential election and the local council elections of 2017 which were thrice delayed. It may also not come as a surprise if the government amends the Constitution to abolish the presidential term limits, and the SCMV uphold the constitutionality of such an amendment. In an even worse situation for the government – in which the judiciary and the Majlis might be unwilling to be influenced by them. In such a situation, the government may act against liberal democratic norms by engaging the help of the security forces. However, only time will tell how long this situation might last – the forces might stand firm in not obeying unlawful orders, or else the people may fight for their liberty and freedom and restore the derailed democratic system as it was seen to be in February 2012.

The year 2017 ended with no significant constitutional matters still pending in the High Court and the SCMV, but with only two constitutional cases being decided upon in the year, this has convulsed the picturesque beauty of the islands to a constitutional conundrum with ‘toothless’ constitutional organisations.

## V. Further Reading

Shamsul Falaah, ‘Abusive Judicial Discretion in the Maldives’ (*Maldives Independent*, 13 May 2017) <<http://maldivesindependent.com/feature-comment/abusive-judicial-discretion-in-the-maldives-130543>> accessed 5 December 2017.

### Footnotes:

**1** See Shamsul Falaah, ‘Abusive Judicial Discretion in the Maldives’ (*Maldives Independent*, 13 May 2017) <<http://maldivesindependent.com/feature-comment/abusive-judicial-discretion-in-the-maldives-130543>> accessed 5 December 2017.

**2** *Ex Parte (Attorney General’s Office)* No. 2017/SC-C/11 (22 May 2017).

**3** Article 101: (a) A motion expressing want of confidence in a member of the Cabinet may be moved in the People’s Majlis, under the hand of at least ten members, specifying the reasons. (b) At least fourteen days notice of the debate in the People’s Majlis concerning a motion under article (a) shall be given to the concerned member of the Cabinet, and he shall have the right to defend himself in the sittings of the People’s Majlis, both orally and in writing. (c) A motion of want of confidence concerning a member of the Cabinet shall be passed by a majority of the total membership of the People’s Majlis. (d) A member of Cabinet against whom a motion of want of confidence has been passed by the People’s Majlis shall cease to hold office. Constitution of the Republic of Maldives 2008 § 101.

**4** 63% of the people favoured a presidential form of government.

**5** *Ex Parte (Attorney General’s Office)* (n 2) 6.

**6** *Ibid* at 13–14.

**7** *Ali Waheed and Dhivehi Qaume Party v State (Attorney General’s Office)* No. 2010/SC-C/26, 2010/SC-C/25 (Supreme Court of the Maldives 9 December 2010).

**8** The Court issued one combined judgement for the two separate cases. *Ibid*.

- 9** However, the Court referred to the minutes of the People's Special Majlis (constituent assembly). Ibid at 6.
- 10** *Mohamed Fahumee Hassan v People's Majlis (State)* No. 2012/SC-C/35, 26 (Supreme Court of the Maldives 14 March 2013).
- 11** *Ex Parte (Attorney General's Office)* (n 2) 11-12.
- 12** See under 'United States' 'Due Process', *Wikipedia* (2018).
- 13** 'People's Majlis - Majlis Holds Its Eleventh Sitting of the Second Session' (no date) <<http://www.majlis.gov.mv/en/2017/08/24/majlis-holds-its-eleventh-sitting-of-the-second-session-2/>> accessed 28 February 2018.
- 14** *Ex Parte (Attorney General's Office)* No. 2017/SC-C/17 (Supreme Court of the Maldives 13 July 2017).
- 15** *Kihoto Hollohan vs Zachillhu And Others* 1 SCR 686 (India 1992).
- 16** Second Amendment to the Act Number 7/2010 (Decentralization of the Administrative Divisions of the Maldives).
- 17** *Ibrahim Riza and Others (Moosa Anwar intervening) v State (Attorney General)* No. 2012/SC-C/13, 10 (Supreme Court of Maldives 4 December 2012).
- 18** Ibid at 11.
- 19** *Court Order of the Supreme Court of the Maldives* No. 2017/SC-SJ/09.
- 20** *Court Order of the Supreme Court of the Maldives* No. 2017/SC-SJ/04 (16 February 2017).
- 21** 'The Supreme Court's Removal of Civil Court Judge Mariyam Waheed Brazenly Undermines the Constitution; is Clear Indication of President Yameen's Intensified Authoritarian Rule - Maldivian Democratic Party' (no date) <<https://mdp.org.mv/archives/73852>> accessed 28 February 2018.
- 22** Regulation on the Licensing of Attorneys to Practice Law in the Maldives § 4(f).
- 23** 'Press Statement of the Criminal Court | | Department of Judicial Administration' (no date) <<http://english.judiciary.gov.mv/press-statement-of-the-criminal-court/>> accessed 28 February 2018.
- 24** Two lawyers were already under suspension when DJA declared the mass suspension.
- 25** For a further reading on abusive judicial discretion in the Maldives *See* Falaah (n 1).
- 26** Transparency International e.V, 'Maldives: Rescind the Summary Suspension of 56 Lawyers Calling for Judicial Reform' ([www.transparency.org](http://www.transparency.org), no date) <[https://www.transparency.org/news/pressrelease/maldives\\_rescind\\_the\\_summary\\_suspension\\_of\\_56\\_lawyers\\_calling\\_for\\_judicial](https://www.transparency.org/news/pressrelease/maldives_rescind_the_summary_suspension_of_56_lawyers_calling_for_judicial)> accessed 28 February 2018.
- 27** 'Maldives Broadcasting Commission' (no date) <<http://broadcom.org.mv/v2/dh/cac-962016/>> accessed 28 February 2018.