

THE CONSTITUTION, THE COURTS AND  
PARLIAMENT: AN ANALYSIS OF THE JUDICIAL  
POWER IN REVIEWING FUNCTIONS OF  
PARLIAMENT IN MALDIVES

BY

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## **ABSTRACT**

In 2008, the Maldives adopted a new democratic Constitution which separated the three branches of government; the legislative, the executive and the judiciary. The Constitution of the Republic of Maldives vested these three branches of government with specific powers and functions. Despite constitutions specifying the powers and functions of each branch of government, there are allegations of attempts by branches of government to reach beyond the boundaries of the constitution. This research examines the increasing allegations that the Supreme Court of Maldives limiting the powers of the parliament and performing functions of the parliament. This research utilizes tools of qualitative methodology to further comprehend the constitutional concepts relevant to this research. Through document analysis, this research reviews relevant literature on the concepts of separation of powers, parliamentary sovereignty, judicial review and how these concepts were adopted in the jurisdictions selected for the purposes of this research. Secondly, this research examines the historical origin, organizational structure, powers and functions as well as internal procedures established for the functioning of both the parliament and judiciary of Maldives. After which, this research conducts two case studies; a case study on the functioning of the parliament and a case study on the decisions of the Supreme Court and the High Court of Maldives. Furthermore, written interviews were conducted to gather the opinions of stakeholders regarding the effect of the decisions of the apex courts on the effective functioning of the parliament, and possible reformative actions. Based on the case studies and the opinions of the participants of this research, this research finds that the Supreme Court of Maldives have been citing ambiguous provisions of the Constitution to broaden its constitutionally vested power to judicial review, undermining the supremacy of the Constitution, limiting powers of parliament and performing the legislative and oversight functions of the parliament. This research concludes by recommending the establishment of mechanisms to enforce the constitutionally established scope of the judicial review power of the courts. This research also recommends establishing mechanisms that allows branches of government to freely perform their constitutionally mandated functions without being subjected to undue influence and interference from other branches of government.

## خلاصة البحث

في عام 2008، اتخذ جزر المالديف دستوراً ديمقراطياً جديداً، يفصل بين السلطات الحكومية الثلاثة؛ السلطة التشريعية والسلطة التنفيذية والسلطة القضائية. ينص دستور جمهورية المالديف هذه الفروع الثلاثة للحكومة وسلطات ووظائف محددة. على الرغم من الدساتير التي تحدد سلطات ووظائف كل فرع من فروع الحكومة، هناك مزاعم عن محاولات من قبل فروع الحكومة لتجاوز حدود الدستور. يبحث هذا البحث في الادعاءات المتزايدة بأن المحكمة العليا لجزر المالديف تحد من سلطات البرلمان وأداء وظائف البرلمان. يستخدم هذا البحث أدوات المنهج النوعي لفهم المفاهيم الدستورية ذات الصلة بهذا البحث. من خلال تحليل الوثائق، يستعرض هذا البحث الأدبيات ذات الصلة بمفاهيم الفصل بين السلطات والسيادة البرلمانية والمراجعة القضائية وكيف تم هذه المفاهيم في الولايات القضائية المختارة لأغراض هذا البحث. ثانياً، يبحث هذا البحث في الأصل التاريخي، والهيكلي التنظيمي، والسلطات والوظائف، فضلاً عن الإجراءات الداخلية الموضوعة لعمل كل من البرلمان والسلطة القضائية في جزر المالديف. بعد ذلك، يجري هذا البحث دراستي حالة؛ دراسة حالة عن سير عمل البرلمان ودراسة حالة عن قرارات المحكمة العليا والمحكمة العليا في جزر المالديف. علاوة على ذلك، تم إجراء مقابلات مكتوبة لجمع آراء أصحاب المصلحة فيما يتعلق بتأثير قرارات المحاكم العليا على الأداء الفعال للبرلمان، والإجراءات الإصلاحية الممكنة. استناداً إلى دراسات الحالة وآراء المشاركين في هذا البحث، وجد هذا البحث أن المحكمة العليا لجزر المالديف قد استشهدت بأحكام غامضة من الدستور لتوسيع سلطتها المخولة دستورياً للمراجعة القضائية، مما يقوض سيادة الدستور، ويحد من صلاحيات البرلمان وأداء الوظائف التشريعية والرقابية للمجلس. ويخلص هذا البحث إلى التوصية بإنشاء آليات لفرض النطاق الدستوري لسلطة المراجعة القضائية للمحاكم. يوصي هذا البحث أيضاً بإنشاء آليات تسمح لفروع الحكومة بأداء وظائفها المنصوص عليها في الدستور بحرية دون التعرض لتأثير وتدخل غير مبرر من الفروع الأخرى للحكومة.

## **APPROVAL PAGE**

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## **DEDICATION**

*I dedicate this thesis to my mother and father.*

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Tax Administration Act, 2010 (Act No.: 3 of 2010) (Maldives)  
Constitutional Reform Act of 2005 (United Kingdom)  
Human Rights Act of 1998 (United Kingdom)  
Constitution of the United States of America (United States of America)



## LIST OF ABBREVIATIONS

CSC	Civil Service Commission
Constitution of Maldives	Constitution of the Republic of Maldives 2008
DJA	Department of Judicial Administration
ECHR	European Convention on Human Rights
Egyptian Constitution	Constitution of the Arab Republic of Egypt 2014
EU	European Union
French Constitution	Constitution of France 1958
HRCM	Human Rights Commission of the Maldives
JSC	Judicial Service Commission
S.A.W.	Sallallahu Alaihi Wasallam (Peace be upon him)
SCC	Supreme Constitutional Court
SCOTUS	Supreme Court of the United States
UK	United Kingdom
UK Parliament	Parliament of the United Kingdom
USA	United States of America
U.S. Constitution	Constitution of the United States of America
U.S. Parliament	Congress of the United States of America

## TRANSLITERATION

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = هـ
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = ي

<b>Short:</b>	a = ’	i = ,	u = ُ
<b>Long:</b>	ā = َ	ī = ِ	ū = ِ
<b>Diphthong:</b>	ay = ِ	aw = ِ	

# **CHAPTER ONE**

## **INTRODUCTION**

### **1.1 BACKGROUND OF THE STUDY**

Apart from preventing concentration of powers within one branch of government, the purpose of separating branches of government is to allow the effective functioning of the government while also ensuring that each branch of government would be held accountable by the other branches of government. The Constitution of the Republic of Maldives 2008 (hereinafter Constitution of Maldives) divided the powers and functions of the government amongst the three branches of government; the executive, legislative and judiciary. The Constitution specified the powers and functions of each branch of government. The executive branch was vested with the power to determine the policies of the government and the function of enforcing the legislations enacted by the legislative branch. The legislative branch was constitutionally vested with the power to legislate and the functions to oversee the actions of the government to ensure the effective functioning of the government and hold the government accountable. The judiciary was vested with the power to administer justice and the function to judicial review legislations enacted by the parliament, executive orders, actions and decisions of any person or body performing a public function. This thesis analyses the relationship between the legislative and the judicial branches of government and how the judicial branch utilises its constitutionally vested power to judicial review legislations, actions and decisions of the executive and legislative branches of government and public officials and the power to interpret provisions of the Constitution of Maldives and legislations to encroach on the constitutionally vested powers of the legislative branch

and by doing so, simultaneously undermine the supremacy of the Constitution of Maldives by performing constitutionally mandated legislative and oversight functions of the parliament.

Every democratic system, regardless of its differences, exists with some form of separation of powers. The form of separation of powers adopted by countries does not necessarily have to be the same. It mainly depends on the people, history, culture, and the politics of that jurisdiction. Regardless of the form, the doctrine of separation of powers is adopted by democratic countries aspiring to govern effectively, with special regards to preventing concentration of powers within one branch of government. However, in nascent democracies there is the possibility of branches of government infringing on the powers of the other branches of government.

Maldives is one such jurisdiction with a nascent democracy. Before gaining independence in 1965, Maldives was a protectorate of the British since 1887. Despite being a protectorate of the British, the British did not interfere with the internal politics or affairs of Maldives; no representative or governor from the British was stationed in the Maldives.<sup>1</sup> However, there was an agreement signed between the British and the Maldivians. This agreement as it turns out, would become one of the first limitations on the powers of the parliament to legislate.

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<sup>1</sup> The Commonwealth, "Maldives: History", The Commonwealth, <http://thecommonwealth.org/our-member-countries/maldives/history> (accessed 22 March, 2019).

### 1.1.1 Introduction to Maldivian Legal System

The Maldivian legal system is a mixture of Shari'ah and aspects of common law. In the preamble of the first Constitution of Maldives enacted in 1932, it is written that the provisions of the constitution regarding the foreign affairs of Maldives were drafted in conformity with the agreement between the Maldives and the British, the tenets of Islam and the culture of Maldives.<sup>2</sup> The powers of government were more concentrated within the executive branch. Throughout the constitutional history of Maldives till 2008, the parliament was under the control of the executive branch; members of the cabinet were simultaneously members of the parliament<sup>3</sup> and the executive branch had the power to appoint members to the parliament apart from the members elected to the parliament.<sup>4</sup> Furthermore, the executive branch had the power to dissolve the parliament. The Constitution of Maldives 1932 also imposed limitations on the power of the parliament to legislate. Maldives was a protectorate of the British, and an Islamic country. Therefore, the constitution did not allow the parliament to enact any legislation in contradiction with the tenets of Islam and the agreement signed between the Maldives and the British.<sup>5</sup>

Since the first Constitution of Maldives 1932, it is said there have been seven Constitutions enacted in the Maldives. Throughout its long constitutional history, Shari'ah had remained a consistent source of law. Even in the latest democratic Constitution of Maldives enacted in 2008, Islam is specified as the religion of Maldives.

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<sup>2</sup> Constitution of Maldives 1932, Preamble.

<sup>3</sup> Ibid., Article 65., In Article 65 of the Constitution, it states that the Prime Minister will be selected by the Sultan from amongst members of the *People's Majlis*. And that the Prime Minister will select Cabinet Ministers from amongst members of the *People's Majlis*. Cabinet Ministers are members of the parliament.

<sup>4</sup> Ibid., Article 56., In Article 56 of the Constitution it states that the Law-making Body would consist of 8 members appointed by the Sultan, 4 members elected from the Capital Male', and 17 members elected from amongst members of the *People's Majlis*.

<sup>5</sup> Ibid., Preamble.

Furthermore Article 10 of the Constitution of Maldives stipulates that Islam is the main source of law in the Maldives and that legislations cannot be enacted in contradiction with the tenets of Shari'ah.<sup>6</sup>

The Maldives is a multiparty republic country. Examples from both the parliamentary system of United Kingdom and the presidential system of the United States of America were taken in to consideration when drafting the Constitution of Maldives.<sup>7</sup> The branches of government are separated similar to that of the presidential system of the United States of America. The Constitution vests all legislative powers unto the parliament; the People's Majlis.<sup>8</sup> And all the executive powers are vested unto the President of the Maldives by the Constitution<sup>9</sup>. Similarly the Constitution vests all judicial powers unto the courts of Maldives.<sup>10</sup>

#### ***1.1.1.1 Islamic Influence in Maldivian Legal System***

It is commonly believed that Maldives embraced Islam in 1153 AD. Since then, the religion has become an imperative feature in the livelihoods of the people of Maldives. Therefore, all Constitutions and legislations enacted in Maldives are in conformity with the tenets of Shari'ah. The rights and freedoms provided in the Constitution of Maldives 2008 are provided to the extent that is not in contradiction with the tenets of Shari'ah.<sup>11</sup> All citizens of Maldives are required to be Muslims.<sup>12</sup> This is also a requirement of all

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<sup>6</sup> Constitution of the Republic of Maldives 2008, Article 10.

<sup>7</sup> Mariyam Zulfa, "Session 1: Making a New Constitution- Maldives", The Second Melbourne Forum on Constitution Building in Asia and the Pacific, (October 2017), [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0003/2536536/Maldives-Zulfa.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0003/2536536/Maldives-Zulfa.pdf) (accessed 16 August, 2019).

<sup>8</sup> Constitution of the Republic of Maldives 2008, Article 5.

<sup>9</sup> Ibid., Article 6.

<sup>10</sup> Ibid., Article 7.

<sup>11</sup> Ibid., Article 16 (a).

<sup>12</sup> Ibid., Article 9 (d).

who hold public offices in Maldives. In the qualifications prescribed in the Constitution of Maldives 2008 for the President,<sup>13</sup> members of the cabinet,<sup>14</sup> the members of Parliament,<sup>15</sup> judges<sup>16</sup> and the members of Independent Institutions.

As mentioned before, legislations are enacted in compliance with the tenets of Shari'ah. Even though English Common Law is also a source of law in Maldives, these influences are integrated into the legislations to the extent that is not in contradiction with Shari'ah. For example, it is evident that the Contract Act of Maldives is drafted with influences from the common law and the Shari'ah. Whereas the Family Act of Maldives is in compliance with all relative Shari'ah norms.

Maldives has come a long way to become a democratic nation. It became a reality in 2008, when the new democratic Constitution of Maldives was enacted. As mentioned before, this new democratic constitution separated and established the three branches of government; the executive, legislative and the judiciary. However, the Constitution of Maldives did not entirely separate the three branches of government. There were mechanisms put in place to ensure accountability, constitutionality and harmonious functioning of the branches of government. For example, the parliament had the power to question the decisions and actions of the government and the executive branch had the power to veto legislation enacted by the parliament. Whereas the judiciary had the power to judicial review not just legislations enacted by the parliament but also decisions and actions of the executive branch as well.

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<sup>13</sup> Ibid., Article 109 (b).

<sup>14</sup> Ibid., Article 130 (a) (3).

<sup>15</sup> Ibid., Article 73 (a) (3).

<sup>16</sup> Ibid., Article 149 (b) (1).

Recently, allegations regarding the Supreme Court utilising judicial review to limit powers of the parliament and perform functions of the parliament have been increasing. It could be seen as a form of judicial activism. Judicial activism through judicial review is not exclusive to new democracies. But judicial activism flourishes when there are ambiguous provisions in the constitutions, discretionary powers and lack of a mechanism to ensure that the judiciary does not overreach the boundaries of the constitution. In the Constitution of Maldives, the supremacy of the constitution is expressed in Article 268, in which it states that any legislation, decision or order in contradiction with the Constitution is invalid.<sup>17</sup> However, the Supreme Court is accused of undermining the supremacy of the constitution by going beyond the boundaries of the constitution. Furthermore, the judiciary is also accused of being a predictable political player, preferred to the unpredictable legislative process of parliament.

Within the last ten years, as the apex court in the hierarchy of the Maldivian judiciary, the Supreme Court of Maldives, is accused of performing constitutionally mandated legislative functions of the parliament and limiting the powers of parliament to perform its functions. While many of its decisions have been criticized locally and internationally, these decisions of the Supreme Court had been enforced. With allegations of the constitutionally vested powers of parliament being limited, it could be assumed that the parliament would be unable to perform its constitutionally mandated functions effectively. Furthermore, it could be assumed that the powers are being concentrated in the judicial branch, with the end result being the judiciary becoming the most powerful branch of government.

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<sup>17</sup> Ibid., Article 268.