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法官和律师独立性问题特别报告员莱安德罗·德斯波伊的报告

增编

访问马尔代夫**

内容提要

法官和律师独立性问题特别报告员莱安德罗·德斯波伊于2007年2月25日至3月1日对马尔代夫进行了访问。该国政府邀请他往访，以帮助当局执行为落实总统2006年3月通过的改革议程而执行的路线图，尤其是为建立独立司法系统和真正的权力分立而进行宪法和法律改革。特别报告员与政府和司法官员举行了仔细的讨论，并直率地会见了另外的许多对话者，从他们那里深入了解马尔代夫司法和法律界目前面临的问题；他还采访了Maafushi监狱中未判决的囚犯。本报告以这些讨论为依据，概述马尔代夫的司法系统，以及该国的主要司法部门目前面临的挑战。

特别报告员非常感激马尔代夫政府为他提供这次独特的机会，以便就地研究该国司法部门的处境，并审查其所进行的改革的现状和范围，这些改革旨在使其司法制度符合马尔代夫所作出的国际承诺，尤其是根据其对最近加入的《公民权利和政治权利国际公约》和《经济、社会和文化权利国际公约》所作出的承诺。他认为该国政府对尽快在此方面取得进展所表现的关注和兴趣十分宝贵。

通过访问，他发现该国具有强烈的政治意愿并有配套的资金，这是取得任何进展的关键所在：马尔代夫司法系统的现状如要符合民主治理系统中独立性和有效性的起码国际标准，肯定急需进行深入的改革。只有通过该国的各种政治力量进行持续的政治对话，必要时争取国际社会的支持，才能实现这些目标。

目前，马尔代夫的司法部门听令于总统，因此缺乏独立性。其结果是，司法部门不能发挥公平、独立司法以及保障和保护人权的根本作用。未进行适当的司法审查延长审前拘留时间以及在被告没有律师代理的情况下进行审判，这些情况司空见惯。其司法系统中的其他缺点还包括：该国大部分地区严重缺乏法官和律师，这尤其是由于其所处的地理位置非常艰难，以及该国除在伊斯兰教法方面具有一定能力以外，严重缺乏对未来的法官和律师进行适当法律培训的内部能力所致。另外，刑事调查完全由警察一手负责，检察官或法官不能发挥任何审查的作用，这在调查期间是否尊重人权方面带来了严重的问题。在检察服务方面，特别报告员建议设立总检察长的职位，与作为内阁成员的司法部长分开，并因此只保留其作为政府的法律顾问这一作用；总检察长将具有独立性，并在警察调查中发挥重大作用。值得欢迎的是，该国正在努力开展编纂法律的工作，尤其是起草新的《刑法》和新的《刑事诉讼法》，争取将伊斯兰教法和普通法统一起来。

关于法律专业方面，该国严重缺乏律师，刑事司法系统中尤其如此，因而使得辩护权大打折扣。另外，法律界的独立性也得不到保障。没有任何律师协会，司法部负责处理一切惩戒性事项和问题，并可以撤消开业执照。应当成立独立的律师协会，为律师提供其从事专业工作所需的独立性。该协会应具体负责举行取得开业执照的共同考试、颁发和

撤消执照、保障从事法律专业的最低标准、决定惩戒性事项，并普遍地独立代表法律界的利益。

马尔代夫的司法系统如要符合民主治理系统中的独立性和有效性方面的最低限度国际标准，肯定急需进行深入的改革。在此方面，特别报告员欢迎该国政府决定开始进行彻底的宪法和立法改革，以建立各种权力分立和独立司法系统，并于2008年在该国举行首次民主选举。他鼓励所有志在完成这些根本改革的人继续努力，在既定的期限内实现这一目标。尤其是，他大力支持紧急通过目前正由宪法大会特别会议审议的《宪法》草案，并促请各主要政党恢复会谈，以遵守政府改革议程中为通过该《宪法》确定的2007年5月31日这一期限。

特别报告员希望，该国政府、司法界和公民社会中一切有志于建立独立、公正、有效和透明的司法系统的人士，均将从他的结论和建议中找到能为其努力提出方向并提供支持的内容。他还希望，国际社会在该国历史的这一关键时刻看到为马尔代夫政府提供一定种类和水平的可持续援助的紧迫性，因为此种援助对实现所述的各种目标、让该国能成功地实现向民主过渡所必不可少的，并因此促请国际社会采取这一行动。

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, LEANDRO DESPOUY, ON HIS MISSION TO MALDIVES (25 FEBRUARY-1 MARCH 2007)

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I. INTRODUCTION

1. Pursuant to his mandate, the Special Rapporteur on the independence of judges and lawyers visited Maldives from 25 February to 1 March 2007 at the kind invitation of the Government. He had been invited by the Government to assess the situation of the judiciary in the country and assist the authorities in the implementation of a number of constitutional and legal reforms aimed at establishing an independent judiciary and a real separation of powers in the country, pursuant to the Road Map towards a Reform Agenda adopted by the President in March 2006.

2. During his visit in the capital, Malé, the Special Rapporteur held meetings with the President of Maldives, Maumoon Abdul Gayoom, a number of government ministers, judges from courts at various levels, the Attorney-General, prosecutors, lawyers, and

representatives of international organizations and of local non-governmental organizations. He travelled to Addu atoll, in the south of the archipelago, where he met with judges of that region as well as civil society representatives. He also visited the Maafushi prison where he interviewed several detainees.

3. Beyond the current political difficulties that have arisen, there exists a consensus to adopt in-depth institutional and structural reforms, especially with regard to the judiciary. This is why, by means of his conclusions and recommendations, the Special Rapporteur aims to support and encourage the prompt realization of this objective. He urges the international community to strongly support this process in a sustained manner.

II. MAIN FINDINGS

A. General political and legal background

4. The Republic of Maldives gained independence on 26 July 1965. Article I of the Constitution provides that it is “a sovereign, independent, democratic republic based on the principles of Islam”. The President of the Republic, Maumoon Abdul Gayoom, came to power in 1978. The principle of separation of powers and the independence of the judiciary is not enshrined in the Constitution. Under the Constitution, the President is the most powerful political institution: he is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces and the Police of Maldives. He is, further, the supreme authority for the propagation of the tenets of Islam in Maldives and head of the judiciary. The President also appoints the Cabinet of Ministers. The People’s Majlis (Parliament) is made up of 50 members, of which 42 are elected by popular vote and 8 are appointed by the President.

5. The Maldivian legal system is a combination of sharia law and codified common law. However, statutory law is embryonic or absent in many areas. The legal framework still falls short of international standards particularly in areas relating to freedom of expression, freedom of association, freedom of religion, women’s rights, workers’ rights and criminal justice. Since its independence, Maldives has ratified the Convention on the Rights of the Child in 1991 and its two Optional Protocols in 2002 and 2004; the Convention on the Elimination of All Forms of Discrimination against Women in 1993; the International Convention on the Elimination of All Forms of Racial Discrimination in 1984; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2004 and its Optional Protocol in February 2006. In a welcome step, in September 2006, Maldives also adhered to the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol enabling individuals to submit petitions to the United Nations Human Rights Committee, and also to the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments entered into force on 19 December 2006.

6. Since 2003, notably after a shooting incident in the Maafushi prison in which several detainees were killed and wounded, mounting pressure from the civil society and repeated demonstrations, in particular by the emerging opposition party called the Maldivian Democratic Party (MDP), have led the President and his Government to decide to embark upon democratic reforms. To that effect, in December 2003 the President set up a Human Rights Commission and in February 2004 he decided to revise the Constitution in order to establish a separation of powers. In March 2006 the Government adopted a Road Map for the Reform Agenda which includes commitments to strengthening governance and the protection of human rights, enhancing the independence of the judiciary, developing a multiparty system and holding the first multiparty elections in 2008, and enhancing the role and freedom of the media. Concerning the judiciary, proposed reforms include the adoption of a new Constitution which will include the principle of an effective separation of powers, the establishment of a Supreme Court and the tabling before Parliament of a new Penal Code, a number of bills establishing a new criminal procedure as well as a bill regulating the powers and duties of the police.

B. Recent economic and social changes affecting the judiciary

7. Until 15 years ago, Maldivian society did not have major interactions with foreign countries. There was no concept of property, and very limited commercial exchanges. Today, especially due to the massive growth of tourism, property has become very valuable and new and complex issues have arisen in relation to construction. At the same time, the country has experienced dramatic social changes. Assaults and violence have increased considerably, as have money laundering and counterfeiting. Drug trafficking and consumption have become widespread, emerging as the most important social problem of the country. Yet, faced with those new challenges, judges and lawyers have not been provided with the required legal instruments to address them. The only areas in which reforms were introduced relate to family law, in particular marriage and divorce, which used to be settled amicably and are now settled in the courts.

C. The court system

8. The Constitution of Maldives states in its article 39 that the President shall be “the highest authority of administering justice in the Maldives”. He is both the head of the judiciary and the final arbiter of appeals. The Constitution provides for the President to determine the number of courts and their location. Currently, the judicial system is organized in a two-level court system composed of:

(a) First instance courts, known as “Island Courts”, distributed among the 200 inhabited islands grouped into 20 atolls and organized under the Ministry of Justice which is entrusted with the administrative affairs of the judiciary; and the specialized courts, known as “Malé’s Courts”, composed of the Civil Court, the Criminal Court, the Family Court and the Juvenile Court, all of them situated on the Malé atoll;

(b) A High Court of Justice that functions as the appeal court. That jurisdiction also functions as a court of first instance for politically sensitive cases which are prosecuted by the Attorney-General’s Office. There is no Supreme Court.

9. The Island Courts, presided over by a single judge, deal with civil and criminal matters but do not have jurisdiction to hear cases involving serious criminal offences and civil cases where the amount or the subject matter in dispute exceeds 5 million rufiyaa. Those are dealt with by Malé's Courts, which raises serious issues of the accessibility of the justice system since travelling to the capital is unaffordable for the majority of the population. Even though Island Courts exist in all the inhabited islands, lack of legal expertise and limited jurisdiction often make them ineffective. Also, due to the great distance between the islands of the archipelago, it is very difficult for the State to assign qualified judges in each and every inhabited island, as this generates high overhead costs and a heavy administrative burden.

10. Under the President's proposed constitutional amendments, the Chief Justice, acting with the advice of the Supreme Judicial Council, will have the authority to determine the number of courts to be established and the places where they are to be established.

11. The High Court of Justice handles appeals from the courts of first instance. The fact that it sits only in Malé raises the issue of the accessibility of justice at the appellate level. Cases before that jurisdiction are usually heard by a panel of two judges. Following a High Court ruling, litigants can appeal to the President's Office to overturn the ruling or have it sent back to the High Court for reconsideration. The President has authority to confirm or overturn the High Court's judgements and to order a second hearing. Further to a presidential decree of 1995, the President is assisted in this task by a Judicial Advisory Committee, composed of the Chief Justice and other members who are not judges. As this body is mainly not composed of judges and does not follow proper judicial procedures, it does not provide an independent judicial review, a gross violation of the international standards and principles on the independence of the judiciary. In addition, the Chief Justice may be involved in approving or rejecting his own decisions. Also, in cases involving the State, the President can act simultaneously as a party and a judge.

D. Other relevant institutions

12. On 11 November 2005 the Judicial Services Commission was established to advise the President on the appointment and dismissal of judges. It consists of the Minister of Justice and the Attorney-General, the Chief Justice, a member of the Judicial Advisory Committee to the President, a Justice of the High Court, a judge of the lower courts, two members of the legal profession and a member of the general public. The Special Rapporteur found that this body lacked the appropriate means and authority to function properly. In addition, being only an advisory and not a decision-making body, it can only have minimal impact, especially as it has no power to administer the budget for the functioning of the judiciary, a key to effectively guaranteeing its independence. Reform of the Judicial Services Commission should be a priority.

13. The Human Rights Commission of Maldives (HRCM), with powers to visit jails and detention centres and investigate and identify reports of human rights abuses, was established by presidential decree on 10 December 2003. However, it was reportedly dysfunctional from August 2005 until November 2007, when most of the members of the Commission resigned in protest against a new bill reviewing the status of the Commission adopted on 18 August 2005. This issue was resolved in August 2006, when the relevant act was amended, bringing the HRCM more into line with the Paris Principles. On 31 October 2006, the Government of Maldives and the United Nations signed a three-year project that is expected to help strengthen the capacity of the HRCM to achieve the long-term objectives of strengthening the human rights culture in the country; responding to human rights abuses; furthering economic equity; creating an active civil society that can address human rights issues in the country and, in light of the entry into force of the Optional Protocol to the Convention on Torture in Maldives, strengthening activities relating to detention monitoring. In addition to the HRCM, the creation of an Ombudsman's Office by 1 January 2008 is one of the objectives of the President's Road Map.

14. The Government created a Jail Oversight Committee in 2004, which is entrusted with the national inspection of prisons. Members are appointed by the President and include lawyers, judges and parliamentarians. The Committee has the power to inspect every cell block in the Maafushi prison without prior notice and reports to the President and the Ministry of Home Affairs. It has recently been given jurisdiction over the Dhoonidhoo pretrial detention centre. The Government is also planning to set up an Inspectorate of Prisons that will inspect prisons and provide advice on appropriate prison standards.

15. A Police Integrity Commission has been established to make the police accountable for their acts. However, the Special Rapporteur was informed that this commission has been given no publicity and is in fact not functioning.

E. Main recent reforms and developments affecting the judicial system

1. Reform proposals

16. The extensive reform agenda announced by President Gayoom with respect to the establishment of an independent judiciary and the modernization of the criminal justice system is based on the Road Map for the Reform Agenda of 27 March 2006, the President's 31-point Proposals for Constitutional Amendment of 14 February 2005 and the National Criminal Justice Action Plan of December 2004.

17. In the Road Map, the President makes a commitment to revise the Constitution, to strengthen the judiciary and to reorganize the administration of justice. He sets the following objectives to be completed by 1 August 2007: (i) to establish a Supreme Court; (ii) to table draft legislation on the Judicature before the People's Majlis; (iii) to table draft legislation on the Judicial Services Commission before the People's Majlis; (iv) to reform the criminal justice system through the tabling of a new Penal Code, Sentencing Bill, Criminal Procedure Code, Bill of Evidence, Police Bill, National Security Bill, Detention Procedures Bill and Parole Bill. With the exception of the Bill of Evidence, all bills mentioned under (iv) were tabled in 2006.

18. The reform of the criminal justice system provided for in the Road Map is based upon the National Criminal Justice Action Plan 2004-2008 elaborated by the Attorney-General in cooperation with UNDP and other stakeholders. It addresses specific areas such as criminal procedure, police powers, use of evidence in court including less reliance on confessions, juvenile justice,

strengthening of the penal system, jail management and the judicial system. In particular, it identifies the need to develop trial rules and procedures, the capacity to admit scientific and expert witness evidence, the doctrine of precedent, an independent Judicial Services Commission as well as graded sentencing guidelines. This is in addition to better case management and new legislation including a comprehensive new Penal Code. The Minister of Justice insisted that legislative reforms are essential to bring Maldivian laws into line with international standards. To that effect, foreign consultants have been making a substantial contribution to the drafting of the new texts. In particular, the new Penal Code has been drafted by Professor Robinson of the University of Pennsylvania. The Government hopes that this new code will be seen as an example in the Islamic world of how to harmonize Islamic law and modern law in line with international standards. The same approach is followed for the rest of the legislative reform.

19. The President's 31-point Proposals for Constitutional Amendment set out proposals for the new Constitution, including the clear recognition of the independence of the judiciary and other fundamental issues such as that the appointment and dismissal of judges will be made with the advice of the Judicial Services Commission, or the Parliament for the highest judicial posts.

20. The Special Rapporteur also notes with appreciation that the Ministry of Justice has adopted a Justice Strategic Plan for 2006-2010, which contains concrete cost assessments for a number of goals to be achieved at the short, medium and long term. He hopes these goals, which include the establishment of an independent bar association, a legal aid system and a juvenile justice system, and law courses at the Masters and PhD levels will be implemented promptly.

21. Specific proposals for reform under the Reform Agenda, the National Criminal Justice Action Plan and the President's 31-point Proposals are commented upon under the relevant sections of this report.

2. Political difficulties

22. In general the President's proposed reforms have had broad support among the different institutional actors. However, there are currently some difficulties within the Special Majlis, the special constitutional assembly in charge of the constitutional reform. Discussions within the Majlis are said to be chaotic to the point of stalemate, due to political divergences and to the fact that many members are not trained in parliamentary work. This blockage threatens the achievement of the Government's target, set out in the Reform Agenda, of adopting the new Constitution before 31 May 2007. To do that, the Government needs the agreement of the opposition since some members of the governmental party do not support it. In order to overcome the impasse in the Special Majlis, the Government and the opposition started regular talks in early 2007. However, on 26 March 2007, the Presidential Party suspended the talks, indicating that the MDP was not showing a commitment to expediting the work on the constitutional reform, and announcing that it would not resume talks until the MDP began to demonstrate a good faith commitment to a bipartisan reform process. The Special Rapporteur is seriously concerned about this impasse, which threatens the adoption of the new Constitution; as the centrepiece of the entire reform process, its adoption is an absolute priority.

F. The judiciary

Appointment, tenure and disciplinary measures

23. Security of tenure is not granted under the current Constitution. All judges are appointed by the President. In accordance with article 123 of the Constitution, the President may at his discretion remove a judge of any court from office. Furthermore, article 117 allows the President to remove the Chief Justice or a judge of the High Court. Since November 2005, judges are dismissed and transferred by the President on the advice of the Judicial Services Commission.

24. To ensure greater separation of powers, point 6 of the President's 31-point Proposals for Constitutional Amendment proposes to "divest the presidency of its role as the head of the judiciary". Point 16 states that the President will only appoint and dismiss the Chief Justice, the judges of the newly established Supreme Court and members of the Supreme Judicial Council with the advice of the Majlis. Point 25 also provides that the Chief Justice, with the advice of the Supreme Judicial Council, will appoint and dismiss judges of all courts.

Qualifications and training

25. Judges lack sufficient training before taking office and during their tenure. They are recruited with very limited or no practical legal experience. Two institutes offer training for judges and lawyers: the Faculty of Sharia and Law and the Faculty of Islamic Studies. The first focuses more on common law and the second on sharia law, but they do not provide a proper university level training. As a consequence, there is an acute shortage of legally qualified people, especially in civil, common and international law. A training programme has recently been launched by the Government: 18 students are currently undertaking a four-year course to become qualified judges in Malaysia, with a possibility of finalizing the training in Singapore, the United Kingdom or Australia. They are receiving training in international and common law, and will become judges upon their return. Also, a new programme is being launched whereby foreign professors are brought to Maldives to train judges locally.

26. The urgent need for legal training and education for lawyers, judges and prosecutors is recognized by all actors - the Government, judges, legal professionals and civil society - as being a top priority for which urgent and massive intervention is needed. Such training should consist not only of appropriate university education, but also provide judges and lawyers with the possibility to observe how trials are conducted in foreign countries.

Salaries

27. Salaries of judges are far too low; they earn approximately 60 per cent of the average national income. Furthermore, judges indicated that even within the Government their salaries are lower than those paid to civil servants working for a number of ministries.

These low salaries encourage corruption. Also, trained jurists tend to be more attracted by the independent legal profession, which is much more lucrative.

Ethical norms of judicial conduct

28. Corruption of judges has been reported by many victims and plaintiffs, and by judges themselves who refer to their very low salaries, which makes it difficult for them to resist external pressures. Judges have still not been provided with a professional code of conduct or guidance on ethics and are generally unaware of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex) of 2002.

Threats and lack of security affecting judges

29. Many judges indicated that they work in a tense environment, and receive threats, even death threats, notably when dealing with cases involving important criminals or large amounts of money. Many of them underlined the need for more measures to ensure their security.

Judicial immunity

30. Judges lack protection from unwarranted prosecution because of the lack of legislation on judicial immunity.

Women within the judiciary

31. The report "Gender issues in the criminal system of the Maldives", issued at the request of the Attorney-General and the Ministry of Gender on 2 September 2004, recognized that there is not a single female judge in Maldives. Even though there is no prohibition against their nomination and many women are legally trained and practise as lawyers, this situation remained unchanged at the time of the visit.

Right of association

32. No independent professional association of judges exists.

Alternative dispute resolution

33. There is currently no alternative dispute resolution mechanism, such as arbitration. The Attorney-General's Office indicated that it would produce draft legislation on arbitration. Judges also indicated that they would favour the establishment of alternative dispute resolution systems, such as amicable resolution, to help them reduce their heavy workload.

Prevailing mentality among judges and lack of public confidence in the judiciary

34. As a consequence of the extensive powers of the executive over the judiciary, judges are strongly discouraged from issuing judicial decisions that contradict the executive and effectively refrain from ruling against the Government. Many interlocutors underlined that, in addition to reforming the constitutional and legal framework, one of the main challenges in building a truly independent judiciary will be to change judges' profoundly anchored mindset of having to be loyal to the executive. Similarly, the lack of independence of the judiciary that has permeated the system for decades has generated a deeply engrained lack of trust in the judiciary on the part of the population. Building public confidence in the judiciary will be another important challenge.

G. The Attorney-General

Appointment, tenure and disciplinary measures

35. Article 42 of the Constitution provides that the President will appoint and remove the Attorney-General. Article 55 (2) states: "Nothing [in this article] shall restrict the President from directly taking charge of a Ministry or the Attorney-General's Office, as he deems fit, without appointing a Minister or an Attorney-General." The President appoints and dismisses prosecutors at his discretion, with the advice of the Attorney-General. There is no independent body or process for disciplining prosecutors: the Attorney-General is responsible for disciplinary actions. There are no associations of prosecutors responsible for protecting their interests.

Lack of prosecutors

36. Prosecutors are present in only 9 of the 20 atolls provided with Island Courts. One of the objectives of the Attorney-General's Office is thus to train more prosecutors so as to meet the needs. To that effect, it plans to launch a training programme for prosecutors in June 2007 in Malé's Faculty of Sharia.

Independence of prosecution

37. According to the President's 31-point Proposals for Constitutional Amendments, the President will retain his exclusive power to appoint and dismiss the Attorney-General. The independence of this position will therefore not be guaranteed. At present, the Attorney-General is at the same time part of the executive and chief of the prosecution services, which impacts significantly on the latter's independence. However, according to the Minister of Justice and the Attorney-General, the post of an independent Prosecutor-General will be established. A decision to that effect would have been taken by the Special Majlis. The Attorney-General will keep only his function as legal adviser to the Government. Legislation to that effect is being prepared by the Attorney-General's

Office, but has not yet been finalized or tabled.

Investigations and the role of the police

38. The police became a civilian force only on 1 September 2004, when it was separated from the military; they have therefore received training for military purposes. Major efforts will need to be undertaken to train the police as a civilian force, especially in the human rights standards applicable to their work. Further, there is still no legislation regulating the powers and responsibilities of the police. A Police Bill and a Criminal Procedure Bill have been drafted and tabled in the Majlis to that effect. However, at present the lack of regulation leads to arbitrary practices in the conduct of investigations, including too-frequent pretrial detention and abusive behaviour by the police. Police brutality in general, and in particular during demonstrations, where even a case of violence against a pregnant woman was reported by a witness, has been frequently referred to as a systemic and very serious problem. People fear to exercise their right to freedom of expression and assembly because of police brutality.

39. Investigations of crimes and offences are mainly the responsibility of the police, while the Attorney-General's Office has an extremely limited role. No rule allows prosecutors from the Office to be present during the investigation. In a few cases prosecutors are allowed to be present, but they cannot intervene in police investigations. They can only review the conclusions of a police investigation once the case reaches their office. Similarly, they cannot launch their own investigations. The absence of intervention by either prosecutors or judges in police investigations clearly affects respect for the applicable fair trial and procedural rules during the investigations. Yet, neither the Police Bill nor the Criminal Procedure Bill seems to appropriately address this issue. In addition, there exists a longstanding culture of investigation which focuses on obtaining confessions, and the prosecution and the judicial process rely considerably on those confessions. However, the Government indicated that there is a recent shift towards using more modern and elaborated investigative techniques, and that as a consequence the rate of confessions used as evidence has already fallen down to 9 per cent in 2006. An Evidence Bill aimed at introducing forensic, scientific and expert witness evidence is being drafted but has still not been tabled before the Majlis.

H. The legal profession

Shortage of lawyers

40. There is a real shortage of lawyers in the country, in particular in the criminal justice system. The legal profession is nascent, with the first Maldivian lawyer having qualified in 1985. There are an estimated 272 registered lawyers in the whole country. The majority of them work in the private sector, of whom few regularly practise criminal law. About 60 work as legal officers in the Government.

Lack of appropriate training

41. While there is currently no requirement established by law for qualification as a legal practitioner, pre-degree-level of familiarity with sharia law is considered sufficient. Legal education in Maldives is provided by two law institutions which offer diplomas in sharia law only, and do not offer any form of continuing legal education in order to promote knowledge and understanding of legal ethics, rule of law and international human rights standards. No institution offers an education in common law.

Licence and disciplinary matters

42. Any law graduate may be granted a licence to practise as a lawyer from the Ministry of Justice. The Ministry deals with all disciplinary matters and issues and withdraws licences. There is no role for a professional association of lawyers in the current licensing process. As a result, the Ministry of Justice is in fact able to decide who can be part of the legal profession. In this context, lawyers are unable to exercise any effective independence, especially when conducting cases against the State.

Lack of a bar association

43. There is no bar association in Maldives. The Law Society, founded in 1990, acts as a lawyers' association, but without an official status. The Law Society has reportedly not been very active since 2002, except in mid-2004 when it was engaged with the President's Office in the drafting of the Proposed Constitutional Amendments, with the support of UNDP. The Law Society, with about 120 members, has very limited internal or project management capacity.

Access to legal material and legislation

44. Lawyers reported limited legal resources available to them to undertake legal research. Lack of clear written regulations and procedures is a major obstacle to their work. However, copies of existing rules and regulations are now made available on the website of the Attorney-General's Office.

I. Conduct of judicial proceedings

Lack of procedural rules

45. One of the main obstacles to the conduct of fair and transparent judicial proceedings is the lack of codified civil and procedural rules on which judges, but also lawyers and the accused can rely. A draft Criminal Procedure Code has been tabled in Parliament, while a Civil Procedure Code still needs to be drafted. The Government has fortunately indicated that it sees both of these texts as a priority.

Abuse of pretrial detention and lack of habeas corpus

46. While the distinction between arrestable and non-arrestable offences has been introduced only recently, prolonged and arbitrary pretrial detentions are still common. According to the current legislation and practice, a suspect can be held in detention for seven days without any review by any external person or body, or without even being charged. After 7 days, a three-member committee composed of government officials appointed by the President can approve a 15-day extension without disclosing the reasons for the detention either to the accused or to their lawyer. Consequently, suspects can be detained for a period of 22 days without being charged and without having their detention approved or reviewed by a judicial body. This is a breach of the international obligations subscribed to by Maldives, in particular article 9 of ICCPR which requires that an arrested person be brought before a judge “promptly”. After this 22-day detention period, a judge will have to authorize the extension of the detention. However, the right to defence cannot be exercised during that hearing. In practice, the judge examines the request for extension without hearing the detainee or his lawyer. Furthermore, there is no requirement for the court to provide the grounds for the extension of the detention in writing, or to give adequate notice of a hearing to the lawyer, who typically learns about the hearing once his client is already before the judge. Under this procedure, judges can decide to authorize a further 30-day extension, without limit. The Special Rapporteur was informed by several sources that judges are told by the police to sign the requests for extension of detention without examining the substance of the case. Since judges fall under the authority of the executive, it is practically impossible for them to refuse. Therefore, the Government imposes pretrial detention for as long as it wishes, typically for months.

47. The Criminal Procedure Bill, if adopted, will introduce significant changes to this procedure, such as the right to habeas corpus: within 24 hours of arrest, a detained person will have to be brought before a judge and will have to be assisted by a lawyer. A main concern is that outside Malé, detainees would still not have access to a lawyer because of the lack of lawyers, in addition to the issue of affordability.

Access to a lawyer and exercise of defence rights

48. Since 2004, the right of detainees to have access to a lawyer at all stages of their detention and trial has been recognized by the Regulations on seeking and obtaining the assistance of a lawyer. This is progress compared to the ambiguous article 16 of the Constitution which provided that a person charged with an offence shall be allowed to obtain the assistance of a lawyer whenever such assistance is required. Yet, a concrete major problem is the shortage of lawyers, as already noted, and the absence of a legal aid system within Maldives, where legal representation is unaffordable for the vast majority of the population.

49. Another obstacle is the lack of lawyers in the country willing to work on criminal cases, mainly because of the absence of procedural rules and the consequent difficulty in building a strong case. Also, the few existing criminal lawyers usually work in very tense circumstances, spending a lot of time dealing with police officers during the investigations. In fact, lawyers are not allowed to communicate with their clients during the investigation: they can be present, but they cannot speak. They can only speak to their clients during the breaks. The same applies to interrogations: lawyers are allowed to be present but cannot intervene. In addition to these procedural difficulties and the frustrations they cause, clients often do not have the means to pay appropriate fees.

50. As a consequence, the majority of the accused before the Maldives’ courts are unable to access legal advice, in violation of their right under article 14 of ICCPR. The principle of equal access to the courts is therefore seriously undermined in Maldives. In this context, the Ministry of Justice indicated that a major obstacle to the establishment of a legal aid system is the lack of lawyers.

Confessions as evidence and allegations of torture

51. Without a lawyer attending a criminal investigation, the police are said to be able to obtain false statements through coercion, mistreatment and torture. The police reportedly do not apprise persons of their basic rights and put pressure on accused persons not to seek legal representation. Indeed, in his National Criminal Justice Action Plan the Attorney-General acknowledges that “investigative authorities in the Maldives are untrained in modern methods of investigation. The result is a culture of investigation that focuses on obtaining confessions and a prosecutorial and judicial process that centre around confessions”. For his part, the Special Rapporteur gathered several testimonies about cases of mistreatment and torture during pretrial detention, and of convictions based on statements taken under duress. Moreover, former inmates have referred both to psychological and physical torture. It is also reported that courts do not investigate these cases.

Trial proceedings

52. Currently, trial proceedings consist of a series of short hearings, leading to significant delays in adjudication. This creates inequitable situations, especially in light of the fact that many defendants are held in pretrial detention. Interruptions of trials and their postponement by the courts are also commonplace. The accused and the lawyers are informed of the hearings only shortly before they take place, sometimes the day before or the same day, which violates the right of the accused “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” (ICCPR, art. 14).

Right of appeal

53. The right of appeal can only be exercised before the High Court which sits in Malé. The fact that only one court can hear appeal cases creates a problem of timely delivery and, due to its geographical centralization, a problem of affordability. This results in a lack of access to the appeal court and therefore in a denial of the right to appeal. This serious issue is mentioned as a concern in the National Criminal Justice Action Plan. It requires an urgent review of the current appeal system, which has not been done yet.

54. The Special Rapporteur was also informed that of the five judges comprising the High Court, only two hear a case. However, the decision is taken by the five judges in a separate meeting, on a majority vote. This means that judges who did not hear the case can actually take a decision with regard to that case. In addition, the Chief Justice of the High Court never sits in a hearing but has the

power to decide a case if the other four judges do not reach a decision by majority vote. Furthermore, judges do not write dissenting opinions.

Sentences and their enforcement

55. Sentences are usually disproportionate, in particular with regard to drug-abuse-related cases, where young drug users are commonly sentenced to more than 20 years' imprisonment or even to life imprisonment. In a welcome development, the National Criminal Justice Action Plan suggests putting in place a graded framework to tailor sentences to the offender and the offence, and alternative forms of punishment. This graded framework is included in the draft new penal code.

56. The Attorney-General's Office mentioned problems with the enforcement of sentences pronounced by judges, which is currently the responsibility of the Department of Penitentiary and Rehabilitation. To resolve that problem, the Ministry of Justice is drafting legislation for the establishment of an agency on the enforcement of judgements. The Special Rapporteur supports this idea.

J. Drug-related offences

57. Trafficking and consumption of drugs is a serious problem in Maldives. In the last few years the phenomenon has reached huge proportions, with practically every family having at least one member affected by this problem. Drugs are easily available on the streets, mainly "brown sugar" and heroin. Although the Special Rapporteur has received no information on specific cases, he is aware of allegations that members of the police forces are involved in drug trafficking and even in offering drugs in exchange for certain "services" such as violent behaviour to provoke violence during demonstrations.

58. According to the National Criminal Justice Action Plan (2004-2008) elaborated by the Attorney-General's Office, in August 2003 about 80 per cent of the prison population were drug offenders with 29.3 per cent serving life sentences for drug-related offences. During his visit, including to the Maafushi prison, the Special Rapporteur observed that the vast majority of prisoners were young. The criminalization of young drug users and the imposition of very severe sentences is a particularly serious problem. One young offender said that he had been sentenced to 62 years' imprisonment.

59. While rehabilitation programmes and centres are referred to in reform plans and were mentioned by the director of the prison as being forthcoming, the Special Rapporteur observed with great disappointment and frustration that very little has been put in place so far. Only one facility for 150 persons has been created and families are required to share the costs. The reality on the ground is that a vast number of young drug offenders, both female and male, are left to languish in prison without being given any chance to rehabilitate.

60. Prison conditions are not appropriate and include poor access to medical facilities, no recreational or learning activities, discriminatory treatment, mistreatment of detainees and the use of drugs. The Special Rapporteur was told that prison authorities allow drugs to circulate in the Maafushi prison.

61. The National Criminal Justice Action Plan points out that:

"professionals working in this area suggest that the current situation is a reflection of a criminal justice system that too readily absorbs offenders into the system without providing exit points. Further, the unavailability of alternatives to detention, disproportionate sentences prescribed in the Anti-Narcotics Act and a general lack of correlation between crime culpability and sentences contribute to this issue. It has also been suggested that the prevailing punitive approach in sentencing is not effective in managing current crime patterns leading to high rates of recidivism and failures in re-integration into society".

Despite this analysis, no concrete measures have yet been adopted to make these important proposals reality.

K. Juvenile justice

62. Juvenile delinquency is growing at an alarming rate, mainly due to drug abuse and trafficking. According to the information provided by the Government, the vast majority of current offenders started at the age of 12 to 16 with petty offences, some of them ending up as serious criminals. The current juvenile justice system does not effectively address the problem: it focuses on sanctions such as fines, house arrest, banishment or jail, but does not provide for adequate options and programmes to guide young offenders out of the system, through rehabilitative mechanisms. This results in a system which regenerates criminality instead of diverting young offenders from criminality and offering them rehabilitation and reintegration.

63. The Maldives' juvenile justice system is extremely centralized: since there is only one Juvenile Court, in Malé, children need to come to the capital for a number of specified cases, while other cases can be dealt with by the Island Courts. The Minister of Gender and Family proposed a strategy of decentralization whereby every atoll would have a system of child protection, with trained personnel.

64. Another issue of concern is the low rate of prosecution and punishment of child sexual abuse cases; they mostly remain within the household. Under the currently applicable law, that is to say sharia law, those cases fall into the category of adultery and therefore require corroborating evidence from two witnesses. This is almost impossible to obtain in this kind of case. Furthermore, the testimony of the child is not sufficient for initiating a prosecution process. In addition to this serious problem of evidence, which requires urgent attention, judges are neither trained nor sensitized to juvenile justice issues.

L. Gender-based violence in the judicial system

65. Gender-based violence is underreported within the judicial system. Acknowledging being a victim of such violence is seen as a

shameful act. As a consequence women tend to avoid talking about it and reporting it. Three years ago, the Ministry of Gender initiated a campaign on the importance of reporting these acts. Yet, in several cases where women had the courage to report domestic violence, their husbands filed a complaint against them for abandonment. In other cases, women who had been victims of domestic violence were ordered to go back to their homes.

66. It is of great concern that gender awareness-raising programmes do not exist for the police and the judiciary in Maldives. Also, the country does not have a single woman judge at this time.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

67. Maldives was a relatively isolated country until it gained independence in 1965: as opposed to the other Commonwealth countries, it did not inherit a political and legal system that had been modernized by the colonial Powers. Therefore, its traditional institutions and legal system, based on a juxtaposition of sharia and common law, face immense challenges in today's society which is undergoing a period of rapid economic and social change, in particular due to the development of tourism.

68. Under the current constitutional and legal framework, the Maldivian judiciary lacks independence since it is under the control of the President. Also, the country is affected by a dramatic shortage of properly trained judges and lawyers and by a certain level of corruption within the judiciary. The police have very broad investigative powers and use investigation methods that focus on obtaining confession of guilt. Prosecutors and judges have no oversight in police investigations. The geographical structure of the country, with hundreds of atolls, 200 of which are inhabited but poorly equipped to render justice, makes this situation even more complicated. Under these circumstances, the Maldivian judiciary is unable to guarantee a fair trial to defendants.

69. On the other hand, Maldives is a party to the core human rights instruments which are binding on the State and require far-reaching legal and structural changes if the State is to meet its international obligations. Clearly, the current legal framework still falls short of those international commitments, not only with regard to the justice sector but also in such areas as freedom of expression, freedom of association, freedom of religion and women's rights.

70. Against this background, conscious of the need to modernize its society and impelled by the aspirations of its population, which wants change, the Government recently embarked on very important reforms that aim to establish a democratic system with true separation of powers. The Special Rapporteur fully supports the decision to embark on the envisaged reforms, and in particular the constitutional and legal reforms aimed at allowing the country to have an independent and effective judiciary that conforms to international due process standards.

71. Yet, while there exists, on the part of both the President and the opposition, a level of consensus on the need to introduce drastic reforms, it is of concern that serious difficulties have arisen about the way concretely to adopt those reforms. It is essential that all parties urgently resume discussions to allow the adoption, as planned, of the new Constitution by the end of May 2007. Indeed, this is a fundamental prerequisite for the transition of the country towards democracy and for the adoption of the rest of the planned reforms.

B. Recommendations

72. **Welcoming the current process of constitutional and legislative reform, which he considers an essential opportunity for the country to adhere to democratic principles and good governance, the Special Rapporteur makes the following recommendations.**

73. **The constitutional reform that is currently being discussed in the Special Majlis should be adopted as soon as possible, preferably before 31 May 2007 as planned in the Road Map for the Reform Agenda. With regard to human rights and the administration of justice, the new Constitution should include at a minimum the following:**

- **A real separation of powers and a clear recognition of the independence of the judiciary;**
- **Provisions for democratic multiparty elections;**
- **The establishment of a Supreme Court;**
- **The establishment of the post of an independent Prosecutor-General;**
- **A bill of rights that conforms to international human rights treaties ratified by Maldives, as well as relevant international human rights principles;**
- **An independent Judicial Services Commission, with decision-making power for the appointment, dismissal and discipline of judges, and for the financial management of the courts;**
- **An independent human rights commission.**

74. **The main political actors in Maldives should urgently resume the negotiations for the adoption of the new Constitution that were suspended on 26 March 2007. A climate of dialogue and tolerance should be promoted by all sides with a view to the prompt adoption of the constitutional reforms that are indispensable if the country is to have one day an independent, effective and impartial judiciary. In this context, the prohibition of peaceful demonstrations and their**

violent repression, followed by arbitrary arrests and violent abuses, should cease. Police brutality is indeed a major obstacle to the success of the constitutional reform.

75. Legislation on the reform of the criminal justice system, including the new Penal Code, the Sentencing Bill, the Criminal Procedure Code, the Bill of Evidence and the Police Bill, should be promptly adopted. The adoption of a new Penal Code, Sentencing Bill, Criminal Procedure Code and Bill of Evidence is essential for fair trial standards to be guaranteed within the Maldives' judicial system. The adoption of an appropriate Police Bill is also of key importance to regulate the powers and responsibilities of the police, in particular during investigations, and prevent abusive behaviour and excessive use of pretrial detention.

76. The Government and the Parliament of Maldives should ensure that the new constitutional and legal framework is in line with international human rights instruments, as well as with the following basic principles on the independence of the judicial system: the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors and the Bangalore Principles of Judicial Conduct.

77. An independent Judicial Services Commission should be established that is responsible for appointing, promoting and disciplining judges and prosecutors. To that effect, the new Judicial Services Commission Act should be promptly adopted. The Special Rapporteur considers it a priority that this body be independent and fully effective, and that it be provided with the decision-making authority to appoint, dismiss and discipline judges and prosecutors, and to administer the funds for the functioning of the judiciary, in order to effectively guarantee its independence. In this context, the financial autonomy of the judiciary could be guaranteed by establishing a fixed percentage of GDP for the judiciary's budget. Also, judges should be appointed for life, and should only be dismissed for misconduct or incapacity to carry out their duties due to health reasons.

78. A procedure should be established for the appointment of the Chief Justice and the judges of the newly established Supreme Court as well as the members of the Supreme Judicial Council, which guarantees their independence. The independence of these high judicial posts is key to guaranteeing the independence of the entire judiciary. Therefore, if the currently proposed system, whereby the President appoints these high judicial posts with the advice of the Majlis, is maintained, the President should not be permitted to take such decisions without the consent of the Majlis.

79. In light of the serious lack of trained judges and lawyers, and noting that current legal training is very limited and focused almost exclusively on sharia law, resources should be invested in capacity-building activities, which could include sending law students to foreign countries for appropriate training and bringing foreign professors to Maldives to train them locally. The Special Rapporteur strongly supports the establishment of a university Faculty of Law in Maldives, which would provide comprehensive modern legal training that is up to international standards. To that effect, he recommends that the international donor community, including donor countries and international organizations such as UNDP and others, provide financial support for these capacity-building projects.

80. Effective legislative and governmental measures should be taken to allow women to become judges, in accordance with international human rights treaties ratified by Maldives. That legally binding obligation has been repeatedly pointed out by international human rights bodies such as the Committee on the Elimination of Discrimination against Women. In particular, the Government is urged to implement the recommendations included in paragraphs 25 and 26 of the concluding comments of the Committee of 2 February 2007 (CEDAW/C/MDV/CO/3), which include the adoption of temporary special measures such as quotas for women within the judiciary.

81. The salaries of judges should be raised, not only to attract more jurists into the profession, but also to guarantee their independence vis-à-vis external pressures. Also, a professional code of ethics for judges should be elaborated, based, among others things, on the Bangalore Principles of Judicial Conduct of 2002.

82. Owing to the serious threats some judges are subjected to, more security should be provided by the Government and all cases of threats against judges should be duly investigated and sanctioned. Also, specific norms recognizing the professional immunity of judges should be adopted.

83. Judges are encouraged to establish a judges' association to represent the interests of judges and provide them with an appropriate space to discuss issues linked to the exercise of their profession and the promotion of their independence. The Government should recognize such an association. This association should be able to represent Maldivian judges in international forums such as the International Association of Judges.

84. In order to guarantee the effective right to appeal of defendants, an appeal court should be established on every atoll. Also, pending the adoption of the reforms, the decision-making system in the High Court should be revised urgently in order to guarantee that only judges who have heard a case can take a decision on it.

85. The post of Prosecutor-General should be established and the relevant legislation, currently being prepared, should provide for it to be totally independent from the executive. Separate from the Prosecutor-General, the Attorney-General should retain only his current function as legal adviser to the Government.

86. Judges and prosecutors should be involved in police investigations in order to monitor and guarantee respect for human rights. In this context, more investigative power should be vested in the Attorney-General's Office and, once established in the new Prosecutor General's Office, to allow prosecutors to act in response to possible irregularities in the investigations or to request complementary investigations. Also, a judicial police could be established, which would be responsible for investigating crimes and offences under the direction of the judiciary, as is the case in many countries.

87. Investigative authorities should be trained both in human rights norms and in modern investigative techniques, including forensic, scientific and expert witness evidence, as mentioned in the National Criminal Justice Action Plan. The final version of the Evidence Bill, which should soon be tabled before the Majlis, should enshrine all of these basic requirements.

88. Since the current Police Integrity Commission is not functioning properly and has been the subject of criticism, a new Police Commission with sufficient authority and visibility among the police forces should be established. It should be given the necessary means to function effectively, in particular to investigate cases of police misbehaviour, appropriately discipline those found guilty of misbehaviour and disseminate information about its work.

89. Lawyers are encouraged to establish an independent bar association, which would provide them with the independence required for the exercise of their profession. The Government should officially recognize the bar association. This entity should be responsible, in particular, for creating a common examination to obtain a licence to practise, issuing and withdrawing licences, guaranteeing minimum standards for the exercise of the legal profession, elaborating a code of ethics, deciding disciplinary matters and in general independently representing the interests of the legal profession. The International Bar Association could be invited to provide assistance to Maldives for the establishment of its bar association.

90. A system of legal aid should be established as a matter of priority, to allow persons who cannot afford a lawyer to receive free of charge the assistance of a lawyer assigned by public authorities. International organizations and donors could assist in the establishment of such a system.

91. Urgent action should be taken to halt abuses of pretrial detention, which should be an exception and not the rule. The right to habeas corpus should be urgently implemented. Therefore, the right of a detained person to be brought before a judge, with the assistance of a lawyer, within 24 hours from arrest, should be granted to all detained persons as a matter of priority.

92. While imprisonment as almost the sole form of punishment has proven unsuccessful, alternative forms of sanction should be established. Sentencing should focus in particular on the rehabilitation of offenders, in particular for juvenile and young offenders. Sentences should be made proportionate to the concrete facts prompting them. As suggested in the National Criminal Justice Action Plan, a graded framework to tailor sentences to the offender and the offence should be put in place, as well as alternative forms of punishment. The suggested establishment of an agency on the enforcement of judgements is also to be supported.

93. Noting that drug consumption affects almost every family and that criminalization has proved unsuccessful, the Special Rapporteur recommends the urgent strengthening of both prevention and rehabilitation programmes. In particular, rehabilitation programmes and centres should be created as a matter of priority to give the many detained young drug offenders, both female and male, a chance to rehabilitate. The programmes should depart from the current punitive approach which has led to high rates of recidivism and failures to reintegrate into society.

94. The current juvenile judicial and protection system should be decentralized, since it is accessible almost only to children living on the Malé atoll. The Special Rapporteur encourages the urgent implementation of the governmental initiative, with the assistance of UNICEF, to set up a juvenile justice system, including the establishment of a Juvenile Justice Unit.

95. New legislation should be introduced to enable prosecution of child sexual abuse cases on the basis of reasonable evidence. Child abuse should not be considered a case of adultery: the victim is a minor who requires special protection, in accordance with the Convention on the Rights of the Child, to which Maldives is a party. Also, appropriate consideration should be given to the testimony of the child.

96. Spousal assault, non-consensual sex (whether inside or outside marriage) and sex with an underage minor should be considered separate and specific criminal offences. Judges and prosecutors must be trained in gender-based violence issues. Also, equal value should be attributed to evidence irrespective of whether it is provided by a man or a woman.

97. The Government should disseminate information about human rights treaties in the entire country, in order for people to be aware of their rights. Human rights education should be part of the school curricula.

98. There are few civil society organizations and they do not have adequate means to carry out their work. The Government should provide support to the work of nongovernmental organizations, recognizing that an active civil society is an integral part of a healthy democratic society, and complementary to the work carried out by the Government. In particular, non-governmental organizations working on the promotion and protection of human rights, including children's and women's rights, should be supported.

99. At this key moment in the history of Maldives, the international community, including relevant United Nations agencies engaged in Maldives, should become involved in the reform process and provide adequate support, both substantial and financial, to allow for the reform process to be completed and for the reforms to be implemented. In particular, assistance would be needed in the following areas:

- Support to capacity-building projects for judges, lawyers and prosecutors, in particular by providing financial support to enable judges to study abroad, foreign professors to be brought in to conduct training, or for other projects aimed at improving the capacity of Maldives to provide locally university training in line with modern international standards to future judges, lawyers and prosecutors;

- Support for the authorities of Maldives in the establishment of a legal aid system, including by providing financial support;
- Support for the authorities of Maldives in the establishment of a bar association;
- Support for the authorities of Maldives in putting in place a vast programme of rehabilitation for people convicted of drug use, who represent more than 80 per cent of sentenced and detained persons in the country. Maldives is facing huge problems in dealing with this issue and needs the assistance of the international community to resolve the problem. In particular, it needs technical expertise for the elaboration and implementation of these programmes, and financial assistance to finance them.

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