

Democracy Derailed:

The unconstitutional annulment of Article 285; and its' consequences for democratic government in the Maldives.

The Maldives is a long-time constitutional autocracyⁱ used to a President with all the powers of the State. The President – signified in persona by former President Maumoon Abdul Gayoom who held the title the past 30 years – was a President who could, and often would, allot land for service, provide medical assistance and scholarship to the worthy, and could hand out jobs with titles and benefits to fit the social status of those hand-picked. The President also policed the streets, undertook investigations, administered justice, interpreted law, set standards of “jurisprudence”, and held the final word and verdict as the last resort of appeal, the Supreme Justice, where the Courts failed. Those who fell afoul of the regime were restrained for public order, and those who gained favour were blessed by the good government of the day. The stress was on homogeneity, a people of one language, one religion, one ideology, one voice and one mind. The peaceful transition to separation of powers and constitutional democracy on August 07, 2008, then, is already situated in this socio-cultural and political context.

On the dawn of August 08, 2008, little of the political realities of a 30-year regime changed. With no interim caretaker arrangement, President Gayoom continued in office until elections; even then choosing to contest, running for his 7th five-year term, with the interim Supreme Court decision that the two-term limit on presidents did not apply to President Gayoom for he is a first time contender under the “new” Constitution. The manifest change then, to the lay observer, as well as media and the public, is the change of a President in three decades, when President Mohamed Nasheed won the 2008 elections and took office on 11 November 2008.

Today, neither the media and general public, nor the politicians, appear to quite understand that all powers are not vested in the President once a State adopts separation of powers. The role of the Parliament in government, the role of the Judiciary to promote democracy and ensure good government, the role of the Civil Service to be loyal to the government of the day and implement policy, the differential roles of independent bodies and their positions as powerful and trusted accountability agencies to hold together the constitutional democracy is overshadowed by politics.

Ignored by the media and citizen as outside the main political arena, is the Judicial Service Commission (JSC); with the constitutional mandate to establish an

independent judiciary in the first two-years of the Constitution, to protect independence of judges, and to promote public confidence in the judicial system.

An offspring of the former Ministry of Justice, the JSC was set up by MP Ahmed Zahir, a former Minister of Justice, and the first Chairperson of the JSC. Staff of the abolished Ministry of Justice took the lead positions, bringing in their personal connections to judges developed over years of daily dealings when the Ministers of Justice provided administrative support, legal advice, as well as guidance on verdicts in some cases before the Courts. Thus, self-interpreted as the *Guardian of the Judiciary* with a duty to protect the judges, the JSC rejects Rule of Lawⁱⁱ, Accountability and Transparencyⁱⁱⁱ as “threats to judicial independence”^{iv}. JSC’s approach is to defend judges, deny complaints, interrogate complainants, ensure financial security and other benefits to judges, and to provide bodyguards and protection of the police to judges when public discontent against a judge becomes serious; leading to impunity amongst judges^v, not all, but the few whose name come up serially.

Few amongst the general public, or media, understand the critical position of the Judicial Service Commission in institutionalizing democratic government, or its’ constitutional powers, duties and obligations; or it’s unique role in its’ first term of office. Those who do understand either confuse the public more with their “polititalk” or remain silent, for they have far more to lose than gain of an Independent Judiciary.

The Parliament majority being those who administered the judges, and the justice system of yesterday, have shown no interest in checking JSC. Worse still, is that the judges themselves are miseducated into the notion that *independence of judges* equals *non-interference by the President*. With this, the “leaders” of the judiciary adopted for themselves the role of the former Minister of Justice; and the Judges Association became a tool, used strategically, to confuse the public, and judges themselves^{vi}.

The Interim Supreme Court took on “parental responsibilities”, miseducating of judges, putting out self-interested rulings, amending laws to reorganize the judiciary, and strengthening their hold on the judiciary as a whole, by usurping powers and taking control, of the JSC, denying an independent check on the judiciary.

Insulated behind closed doors, inadmissible to anyone but those ten members privileged under Article 158^{vii} of the Constitution, the JSC does what it wills, without check or penalty. JSC’s resistance to change, denial of democracy, and breach of trust – the irresponsibility, irrationality, and self-interest of its’ members,

and their refusal to uphold Constitutional duties and obligations – and, downright treachery in dismissing Article 285^{viii} as ‘symbolic’ is the greatest challenge to the Constitution (2008), Rule of Law and democratic government in the Maldives.

Why Article 285?

Article 285, is, in my informed opinion based on privileged access to restricted records on the judges database as well as records on their official files,^{ix} and discussions with those few judges I have had the honour to meet, the backbone of democratic government in the Maldives. The drafters of the Constitution, many of whom now sit in Parliament (Majlis) including Speaker Abdulla Shahid and MP Dr. Afraasheem Ali - who are also ex-officio members of the JSC - shared the same vision, at least at the time of Constitution drafting.

It is a pragmatic clause, a necessity when one considers the Judiciary is often the weakest link in “new democracies” (UN, 2000); and an obligation when one considers the realities of the Maldives’ Administration of Justice under the previous Constitution (1998); and the vast difference it had to the Independent Judiciary the Constitution (2008) envision to achieve in fifteen years, by 2023.

The judges appointed prior to 7 August 2008, were appointed by the Minister of Justice, some hand-picked on to the bench as pay-off for their various political contributions or some other service. They all have a Certificate in Justice Studies (or similar title, of a duration of 6 months to two years), awarded on completion of a tailor-made crash course offered upon the adoption of the Constitution (1998).

Not all sitting judges have a formal education of any substance, nor are they fluent in a second language^x, and little opportunity for knowledge improvement or professional development was provided. It was not necessary as all decisions could be guided by the legal teams at the Ministry of Justice. Only about 40 among about 200 sitting judges are graduates. Of the 40 graduates not all hold an LLB - some have degrees in Sharia’ or in another subject, acquired from an Arab university. The “ruling^{xi}” of current Chair Adam Mohamed Abdulla being that all Arab Universities include Sharia’ as a mandatory subject in all programmes qualifying all graduates from Egypt, Yemen and Saudi Arabia to the bench.

Competency of a judge was decided based simply upon a judges’ physical health, i.e. his ability to come into Court.

As for impunity and misconduct, records^{xii} show judges have rarely received more than an administrative caution by the Minister of Justice for such serious crimes as breach of trust and abuse of power and negligence, as well as serious sexual

offences, possession of pornography etc. Most of the complaints lodged with the Ministry of Justice by members of the Public remain unattended^{xiii} in the judges' personal files and include not only misconduct, but serious allegations of a criminal nature such as repeated sexual offences against minors. The public has tales of islands where few women dare go to claim child support for fear of Magistrates who expect sexual favours in return, of islands where Magistrates dictate personal edict in place of law etc. Whilst none of these public complaints were addressed, what was taken seriously, records show, and was disobedience in refusals to follow orders of the Ministry of Justice^{xiv}. As long as the directives of the Minister of Justice were followed the judges had absolute powers to act with impunity if they so deemed. Some often did so.

A few had returned to the bench after serving criminal sentences, and some had continued on the bench with no penalty despite having been found guilty of dishonesty.

Article 285 placed upon JSC the duty and obligation to assess every sitting judge appointed prior the Constitution (2008) coming into force, to confirm whether or not they possess all the qualifications of a judge as required under Article 285. The purpose, from a rights-based approach, is two-fold: first, to assure the public that all judges are qualified and worthy of their high office on the bench, and are thus capable of building and maintaining public confidence and trust in the judiciary; and second, to provide judges with the necessary knowledge, capacity and most important of all, confidence to work in independence.

The sitting judges recruited for the Administration of Justice, having had no orientation on the newly introduced doctrine of governance, Article 285 was a personal affront as evident from three statements issued by the Judges Association. That Article 285 is an obligation to the people, and not an offence to judges, who after all were quite qualified to preside over trials where the Ministry of Justice [or later the Courts in Male' could guide and direct cases, and provide support to judges, was never explained. Instead, it became a tool for the self-acclaimed leaders of the judiciary to be used in fear-mongering and controlling the judiciary.

Power Play and Politics

Interim Supreme Court Justice Abdulla Saeed who, as head of the Interim Supreme Court, declared himself the Chief Justice and the interim bench as The Supreme Court in the days running up to the end of the two-year interim term, did not see it as his duty to correct the judges' misconception, but rather was actively engaged in

miseducating judges,^{xv} creating strife, and causing discord between the administration of President Nasheed and the Judiciary.

In the name of developing judges for the new Constitution and upgrading them to meet the educational standards required, Justice Abdulla Saeed brought to Male' batches of Magistrates from the islands, using them as tools, and breaching the innocent trust they placed in Justice Abdulla Saeed as the Godfather of the Judiciary. Dr. Afraasheem Ali (MP) who chaired the JSC Committee to develop an on-the-job training plan for those judges who meet all other requirements, decided to have the Magistrates trained by his old school^{xvi}, the College of Islamic Studies, even going so far as to train the Magistrates himself, personally, as a Part-time lecturer.

Once JSC set to work on deciding indicators for assessment, it became clear this was one for discord. On one side was Justice Abdul Ghani Mohamed of the High Court with a graduate degree in Sharia' and Law, who wished to uphold the vision of the Constitution to have a high quality judiciary established in 15 years as provided by Article 285. In opposition were Justice Mujuthaaz Fahmy of the Interim Supreme Court and Judge Abdulla Didi of the Criminal Court. Justice Mujuthaaz Fahmy intently argued that lack of education could be not be considered an impediment, and nor should misconduct before 2000 be taken into account. Quite a logical reading when one considers Justice Mujuthaaz held a 6-month tailor-made Certificate of Sentencing, and had on record a conviction by the Anti-Corruption Board for embezzling State funds – a minor matter of pocketing MRf.900/- for overtime in 1998. Judge Abdulla Didi rarely joins in discussion, unless it is the matter of Criminal Court “Chief Judge” Abdulla Mohamed's misconduct, a matter that has been under investigation for a whole year now, costing the State over MRf.100,000 to date in fees for Committee sittings.

Justice Mujuthaaz Fahmy sulked, willfully dragging the matter until the balance was in his favour, with the High Court “mutiny” of 21 January 2010 where three Justices colluded to publicly accuse High Court Chief Justice Abdul Ghani Mohamed of misconduct and remove him from the JSC by a Resolution.

Justice Mujuthaaz Fahmy as Vice Chair took the helm replacing the outgoing Justice Abdul Ghani Mohamed, and all turned into mayhem at JSC as, what I have reason to believe is a high-level conspiracy, was carried out aggressively by the majority; six of the ten members whose personal and political interest it was to retain the former Administration of Justice.

The matter of Article 285 remained pending till the arrival of Justice Adam Mohamed Abdulla on 18 February 2010, when a new task-force of four judges

(two from the Commission, and two hand-picked from outside by Justice Mujuthaaz Fahmy) set to work under the efficient direction of the Interim Civil Service Commission Chair, Dr. Mohamed Latheef. In perhaps the most methodical effort in JSC so far, Dr. Latheef had the indicators/standards decided in three days, working an hour and a half each day. The only consideration, it appeared, was to make sure no sitting judge fell outside the standards.

Once “decided”, there was no room for debate at the Commission. MP Dr. Afraasheem Ali, with falsely assumed “authority” declared, speaking in his capacity as MP, that Article 285 ‘symbolic’. Speaker Abdulla Shahid remained silent, choosing to evade the question even when asked pointedly to explain to JSC members the purpose and object of Article 285.

When Justice Mujuthaaz Fahmy took over, all the work done during Justice Abdul Ghani’s time disappeared off the record, including submissions I myself had made in writing. None of it was tabled or shared amongst the members. The “majority”, all of whom stood to gain from a wholesome transfer rather than a transformation of the Judiciary in line with the Constitutional Democracy decided, by mob rule, that all judges would be reconfirmed - for reasons that certainly are not in the best interest of the people, nation, or constitution^{xvii}.

Unfettered by concerns raised by President Mohamed Nasheed, Chair of the Constitution Drafting Committee former MP Ibrahim Ismail, or the public; and with the tacit blessings of the Parliament majority, JSC held the judges under lock and key to ensure, the all judges were re-appointed for life. That is an estimated 30 to 40 years when one considers the average age of judges and the retirement age of 70. No judge may be removed unless JSC recommends, and the Parliament votes a judge out.

JSC being a Members Only club, electronically locked within the Department of Judicial Administration premises, and under the parental guidance of the Supreme Court, no one, not a single journalist, judge or member of the public, is privy to the details of what went on at JSC. The records of meetings are not available for public scrutiny, nor are they shared with the media or members of the judiciary. Even members are prevented from accessing audio records of sittings, the written minutes being edited by the Chair where he sees fit.

The fact is that the majority was achieved through pay-offs and “mob rule” rather than rule of law; and upheld self-interest rather than national or public interest^{xviii}.
To benefit are:

- (i) members of the previous regime holding majority in parliament, some of whom stand accused of serious crimes;
- (ii) former Ministers of Justice and former Attorney Generals who appear before the Court as legal counsel for the MPs and other politicians accused of serious crimes;
- (iii) the serious criminals who allegedly operate under the protection of certain members of the previous regime, by the assurance that the same cover-ups and abuse of justice would continue; and
- (iv) “Chief Judge” Abdulla Mohamed of the Criminal Court who is set to sit comfortably in the Criminal Court for life, i.e. approximately 30 years until retirement at age 70.

The fact is that fully aware of the public discontent, and the fact that at least two of the 10 members of the JSC had expressed concern and publicly criticized JSC’s actions on Article 285 as unconstitutional and downright treacherous; 59 judges, including 11 judges who do not fall under the jurisdiction of Article 285, sat docilely at the orders of the JSC Chair, and took oath under lock and key. Supervising the lifetime appointments was interim Supreme Court Justice who had earlier initiated a Ruling declaring himself The Chief Justice.

What went on in the minds of those taking oath, they would know. What fear led them to submit to such degradation, they would know. To my mind, and to many others who witnessed the scene, it was ample proof there is neither independent judge nor independent judiciary.

Independence begins with an independent mind, and the freedom and power to think for oneself.

In my mind, more questions remain:

Where goes the common individual right to a free and fair trial?

Where goes building public confidence and trust in the judiciary?

Where goes the judges’ right to independence and non-interference?

Where goes the independent judiciary, the backbone of democracy?

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ⁱ Articles 4 and 5 of the previous Constitution (1998), stated the powers of the State to be the Executive; the Legislature; and the *Administration of Justice*. Executive power was vested in the President and the Cabinet of Ministers; legislative power in the People’s Majlis and the People’s Special Majlis; and the power of administering justice in the *President and the courts of the Maldives*. Article 6 further stated that “the Government of the Maldives shall be the authorities exercising the powers of the State in accordance with this Constitution”.

ⁱⁱ JSC is under the full and total control of the Chair who controls information both into, and out of, the Commission. He holds both the Commission and Secretariat under lock and key, handing out Cautionary Notices to the Secretary General and senior staff threatening legal action if they defy him, and forbidding administrative/secretarial support or the use of the seal, used in administration. All incoming mail is first assessed by the Chair who then decides what goes in the drawer, the bin and the table. During Article 285 days, a request from the President to review Article 285 decision was dealt to the drawer, whilst petitions from 1652 citizens were classified bin material, as were requests from the US Embassy and UN Representative to meet with the Commission. On table are matters the Chair prioritizes. Members' requests go on Agenda, but never come up for discussion, hanging on agendas which sometimes list 20 or more items. The one and a half hour meetings, regularly extended another half to one hour since Justice Adam Mohamed Abdulla took over on 31 August 2010 rarely discusses more than one item. Much of the time is wasted on frivolous matters, and motions taken on absurdities. Substantive matters remain pending as daily eccentricities leave no room for that.

ⁱⁱⁱ The JSC has refused to open up or provide media access. Dr. Afraasheem Ali argues it could lead to the destruction of his political career. Judge Abdulla Didi of the Criminal Court is vehement transparency is a plot to disparage judges. The Speaker, Abdulla Shahid, repeatedly raise the issue of building public image of JSC but fails to support any change of reality such as a shift from protection of judges' fallibilities to strengthening the judiciary through accountability and building public trust and respect for judges; the adoption of in-house Standard Operation Procedures, professionalism, informed decision-making, time-lined work plans, or a vision to realize a competent and professional judiciary by 2023 as provided in Article of the Constitution.

Further, Members are stripped of any official identity and legitimate space for argument or dissent, or seek remedies through external intervention, by withholding basic necessities such as a functional official e-mail, administrative support, research assistance, working space, a desk, or even a minimum of a visiting card. This carries no serious detriment to the ex-officio members – Speaker and MP, the Judges, the Attorney General or Civil Service Commission Chair – who have a legitimate authoritative identity. But to myself, personally, the stripping of authority and due respect, as well as the misinformation about JSC and its' role, were major impediments to saving Article 285. The Chair decides what goes up on the website, and what goes down on record in the minutes, sometimes even shutting down the recording during meetings leaving some members out of record, Members' Pages are not permitted on the JSC website, nor is the publication of Members' curriculum vitae permitted. Recently, the Chair appropriated the Seal forbidding any use of it except under his personal supervision; and threatened the Secretary General (interim) of legal action if she were to disobey his unlawful orders. House Rules are yet to be adopted, months after the deadline of 26 January 2010 as provided in the JSC Act, Article 40.

^{iv} It stands to reason that the ignorance of democratic principles and concepts, as well as ignorance of the significance of Chapter Two on fundamental rights - the very essence of the Constitution - stands to benefit those who once lorded over the judges as Ministers of Justice directing trials and guiding verdicts where it stood to benefit the autocracy of the day.

^v Judge Abdulla Mohamed of the Criminal Court, one protégé of JSC eternally under investigation for gross misconduct, partiality, abuse of office, etc. has cost the State over MRf. 100,000 (US\$10,000) in investigations to consider whether or not he meets the good behaviour expected of a judge. Judge Mohamed Naeem of the Civil Court, who also holds the Chair of the Judges Association, does not trail far behind, with multiple complaints of abuse of office, public statements that put his independence and impartiality into question. The Judges Association, itself, is a tool in the hands of a few, to arrest checks on members of the judiciary.

^{vi} Read the three Public Statements issued by the Judges Association on Article 285.

^{vii} Article 158 stipulates JSC to consist of 10 members:

- (a) *the Speaker of the People's Majlis;*
- (b) *a Judge of the Supreme Court other than the Chief Justice, elected by the Judges of the Supreme Court;*
- (c) *a Judge of the High Court, elected by the Judges of the High Court;*
- (d) *a Judge of the Trial Courts, elected by the Judges of the Trial Court;*
- (e) *a member of the People's Majlis appointed by it;*
- (f) *a member of the general public appointed by the People's Majlis;*
- (g) *the Chair of the Civil Service Commission;*
- (h) *a person appointed by the President;*
- (i) *the Attorney General;*
- (j) *a lawyer elected from among the lawyers licensed to practice in the Maldives by themselves.*

^{viii} Article 285 of the Constitution of Maldives (2008):

- (a) *All Judges in office at the commencement of this Constitution except for the Chief Justice shall continue in office until such time as a determination pursuant to this Article.*
- (b) *The Judicial Service Commission established pursuant to Article 157 of this Constitution, shall within two years of*

the commencement of this Constitution determine whether or not the Judges in office at the said time, possess the qualification of Judges specified in Article 149.

(c) Where it is determined as provided in article (b) that a Judge does not possess a qualification or the qualifications specified in Article 149, such Judge shall cease to hold office.

(d) Where it is determined as provided in article (b) that a Judge possesses the qualifications specified in Article 149, such Judge shall be appointed as a Judge under this Constitution.

(e) Except as provided in article (c), Judges may only be removed from office as specified in Article 154 of this Constitution.

^{ix} These records were earlier kept at the Ministry of Justice and the President's Office and is known to all former Ministers of Justice, executives at the President's Office, and possibly former Attorney Generals and members of the Cabinet. All records were transferred to the JSC following the Constitution change and are now locked up under the control of the JSC Chair.

^x Lack of fluency in a second language is an impediment to further education for sitting judges, in the absence of any law books in Dhivehi. Further, the new concepts introduced in the Constitution (2008) are not familiar to the Dhivehi language, which would possibly obstruct the full understanding and internalization of those concepts that challenge long held convictions and practices.

^{xi} The learned Justice (as did ousted Justice Mujuthaaz Fahmy of the Supreme Court) fails to understand that Judges and Justices are permitted Rulings only on the bench, and it is through deliberation, argument, consensus, or vote that the Commission must decide all matters (Article 163 of the Constitution)

^{xii} Records of all sitting judges were transferred to the Judicial Services Commission from the President's Office and the former Ministry of Justice upon the Constitution coming into effect, and the establishment of the initial Interim Commission.

^{xiii} Considering the foul play, and dishonesty, in JSC, one cannot be confident that all records are intact.

^{xiv} The JSC shares the same mentality, refusing to investigate any public complaint including serial pop-ups of allegations of grave misconduct in a few infamous judges; instead halting all other business where a "respected" Member of the JSC feels misjudged or offended. One examples is Dr. Afraasheem Ali's concern and insistence on summoning Civil Court Judge Mohamed Naeem for a cautioning for having told the media that most of the members of the JSC do not know Law, whilst excusing Judge Naeem's conduct in multiple Complaints of abuse of power, rudeness, prejudice and plain boorishness to be "Naeem's character, and not something that can be checked, or relevant to conduct in a judge".

^{xv} The speech delivered by Justice Dr. Abdulla Saeed on 4 August 2010 after 59 judges took oath in a locked room, is telling of the miseducation and politicization of the judiciary lead by the interim Supreme Court; and the control held by the interim Supreme Court over the judges who having never been oriented to concepts of democracy and human rights introduced in the Constitution (2008), knows little of what goes on. Dr. Abdulla Saeed also forbid anyone but members of the judiciary to train judges, further closing off the judges and strengthening the Supreme Court's grip on judges.

^{xvi} Dr. Afraasheem Ali did not fulfill the Mandate, and returned twice with the same Report, having once been kicked out for not addressing the Mandate of the Committee. Second time the Report was in, the Majority was on hand to approve Dr. Afraasheem Ali's proposal. It may be also noted, that a number of irregularities in the programme, as well as complaints on the lack of new content has been raised by Magistrates. This includes the awarding of permission to continue for a judge, a veteran on the bench, who was found cheating during a class exam and suspended (in confidence) for a short while.

^{xvii} The JSC Chair Justice Adam Mohamed Abdulla confirmed the allegations on 3 August 2010 in a hastily concocted "Legal Reasoning"; yet no one amongst the learned members of the Judiciary, or the Law Community stood up in protest.

^{xviii} The militancy in JSC as of 21 January 2010; the hostility, harassment, intimidation and threats I have been subjected to, and still face on a daily basis, for daring to dissent; the secrecy surrounding Article 285 deliberations in JSC; the deliberate exclusion of members who dissent; the outright dishonesty of such respected public officials as the learned members of the JSC; the continued intimidation of staff; and the deliberate and calculated attempts to discredit "Velezinee" as an ignoramus, a stooge of the President, etc. rather than argue on the substance of the matter raise further questions, all clearly point to a Conspiracy. Why is it that the JSC was not willing to have the matter investigated by the Parliamentary accountability body? Why is it that the Parliament refused to respond to information and repeated requests for intervention submitted since February 2010? Why is it that when the Parliamentary Committee finally met with the JSC on 2 August 2010 it refused to discuss Article 285, saying the matter is to be scheduled "later", and facilitated JSCs treachery of 4 August 2010? Why is it that the Parliament has remained silent despite the flawed reasoning announced by "JSC Majority" on 3 August 2010? Why is it that neither the Parliament, nor a member of the Law Community see no criminal breach of trust in JSC's dismissal of Article 285 as symbolic?

About the Author:

Aishath Velezinee is one of only ten persons with privileged information on the [non-]fulfillment of Article 285; as a Member of the Judicial Service Commission of Maldives in its' first term.

First appointed to the JSC by Parliament as Member from the General Public (23 April – 26 July 2009); she was re-appointed as Member appointed by the President on 26 July 2009 when the first full-term JSC was appointed.

She accuses the JSC of unlawfully annulling Article 285 by declaring it a symbolic clause; refusing to check judges; of misinforming judges and public, and of intimidating and threatening staff to cover up what she has publicly called a covert coup: A plot to hold control over the Judiciary through denial of Independence to Judges, miseducation of judges, and obstruction of an Independent Judiciary, in order to retain political influence and control over the Judiciary.

She holds a Diploma in Journalism (IIMC, India; 1988), BA in Government; and in Women's Studies (University of Queensland, Australia; 2000) and a Masters' in Development Studies (Institute for Social Studies, Netherlands; 2004).