

review⁵ (ADR).

CJR and ADR are two very different things, both conceptually and functionally, even though both concepts have at times being described with the same term – *judicial review*. It is thus that Black’s Law Dictionary includes the two notions as two distinct meanings of the same term *judicial review*. As this article is focusing on CJR alone, we will not discuss Black’s explanation of the term with reference to the practice of ADR, but will look at how Black defines the term in relation to CJR. The definition goes as follows: “1. A court’s power to review the actions of other branches or levels of government; esp., the court’s power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power.”⁶

A simple description of the term CJR would be to say that the concept means the practice or process of a generalist court or a specialized constitutional court conducting judicial assessment of a legislation or a parliamentary act, or an executive or administrative policy, action or decision for comport with a written constitution which is deemed supreme and limiting the political powers in accordance with the idea of *constitutionalism*. The outcome of this process would be the court declaring either that the law, act, policy, or decision being reviewed is unconstitutional and therefore null and void, or that it is in conformity with the constitution and therefore legitimate and valid.

Many scholars have tried to define CJR, and we can have a look at a few of them here: *Firstly*, Corwin’s definition says that “(Constitutional) Judicial Review is the power of a court to pass upon the validity of the acts of a legislature in relation to a “*higher law*” which is regarded as binding on both.”⁷ *Secondly*, Hartmann’s description, rather than a definition, goes as follows: “The notion of judicial review can be understood broadly as judges keeping government action in check, although American jurisprudence usually defines it more narrowly. Judges have the power to stay or rescind the actions of all three branches of government. They review the executive branch if, for instance, a citizen challenges an administrative order in court. They review the judicial branch itself when a party appeals the verdict. Likewise, they review the legislative branch if the issue of this litigation is the validity of the statute upon which the initial verdict rests. ... As a common analogy puts it, the notion of review implies that a yardstick exists with which the object under review can be measured. In other words, judicial review presupposes

⁵ As a common law country, the United States also inherited the British practice of *administrative judicial review*, and the practice exists in the country as a parallel system of judicial review. The British common law practice of *administrative judicial review*, commonly referred simply as judicial review in English law and scholarly works of English law, is a process or a procedure whereby the exercise of executive power or administrative and adjudicatory actions and decisions taken by ministers, government departments, local authorities, tribunals and state agencies, including delegated legislation, are judicially checked for lawfulness – that is, for conformity with legislation made by Parliament – or legality on the basis of one or another of three grounds: “error of law, lack of due process, and improper exercise of discretionary power”. Traditionally, these three grounds were known to be illegality, irrationality, and procedural impropriety, as observed by Lord Diplock in the landmark case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL). One of the main purposes of the process is to hold the government accountable to the law. (See Timothy Endicott, *Administrative Law*, (Oxford: Oxford University Press, 2011), 39.; Neil Parpworth, *Constitutional & Administrative Law*, (Oxford: Oxford University Press, 2012), 251.; *Hilaire Barnett, Constitutional & Administrative Law*, (Oxon: Routledge, 2013), 562.; and Lisa Webley & Harriet Samuels, *Public Law: Text, Cases, and Materials*, (Oxford: Oxford University Press, 2012), 414.) In this process, “the role of the judiciary is both to determine what the legal rules are that apply and to decide on the facts whether the rules have been breached.” (See A W Bradley and K D Ewing, *Constitutional and Administrative Law*, (Harlow: Pearson Education Limited, 2007), 725). As is clear, the difference between *administrative judicial review* and *constitutional judicial review* is that in case of the former, Courts check administrative and executive actions and decisions for conformity with *primary legislation* made by the ordinary legislature, while in case of the latter, Courts check actions of both Executive and Legislature, as well as any other independent state bodies, for conformity with the written Constitution.

⁶ Black’s Law Dictionary, 2009, Op. Cit., 924.

⁷ See Edward S. Corwin, “Judicial Review in Action”, in *University of Pennsylvania Law Review*, Vol. 74, No. 7, 1925-1926, pp. 639-671, at 639.

a hierarchy of norms. In reviewing legislation, the yardstick is usually a constitution. The constitution – the authority that creates the branches of government and confers certain powers upon them – also sets the framework wherein parliament is supposed to make its laws. Insofar as a law does not comply with the “paramount law”, it cannot prescribe or proscribe anything. This is how United States constitutionalism usually interprets the notion of judicial review.”⁸ *Thirdly*, Whittington et al defines it as follows: “Constitutional review is about a court’s power to strike down statutory enactments or legislation and administrative actions and decisions for being incompatible with a constitution.”⁹

The function of CJR is, as is clear from the definitions given, to uphold a ‘higher law’ that is to bind all political power in the State, to limit political power within the bounds of a supreme law, or to establish a ‘*government of law and not of men*’. In short, it is a tool or a means to achieve *constitutionalism*. In fact, in a typical constitution predicated on the idea of *republicanism* and *rule of law*, CJR is the key constitutional and legal instrument of upholding *constitutionalism* and shackling political powers and holding them accountable to the law. CJR, as a constitutional, legal, and judicial procedure, enforces the norms of the written constitution upon the institutions and officials holding political powers of the State, whether in the Executive, in the Legislature, or an independent body. CJR gives life to the idea of the constitution being the supreme law that binds and controls political authority. Stating this fact, the celebrated constitutional scholar and jurist Cappelletti calls CJR “a central element of ... modern constitutionalism”.¹⁰

If CJR is a tool or a means of achieving and sustaining *constitutionalism*, it is very important for us to understand what *constitutionalism* is. An ordinary dictionary of the English language would tell you the meaning of the term more or less in the following way: the word *constitutionalism* carries the notion of believing in or adhering to the ethical or normative value that political power should be established by, given legitimacy by, and used strictly in accord with, and controlled and limited by a written and supreme Constitution to which all officials and institutions of government are subject to, subservient to, and strictly accountable to. It is, then, a component of the general

⁸ See Bernd J. Hartmann, “The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919” in *BYU Journal of Public Law*, Vol. 18, No. 1, 2003, page 107-130, at 108-109.

⁹ See Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, (Oxford: Oxford University Press, 2008), 81.

¹⁰ Mauro Cappelletti, “The Expanding Role of Judicial Review in Modern Societies”, *Revista Juridica*, vol. 58, no. 1 (1989): 1-18, at 11. The point is strongly put forth by Cappelletti in the following passages: “... The first step was the written constitution, primarily conceived as a codification of individual and social values. Here we find the necessarily vague terms of these values being transformed into positive law in an attempt to give legal significance and positive meaning to meta-legal ideals. ... The second step was to give a rigid character to modern constitutions, conferring a relative immutability on the superior law and the values it enshrines. This rigidity was in marked contrast to such nineteenth century constitutions as Italy's *Statuto Albertino*, which the legislature could change at any time by ordinary statute. ... The final step was to provide a means for guaranteeing government's obedience to the constitution, separate from the legislative power itself and embodied in the active work of the judges or, in some systems, of a special constitutional court. This active work of the judiciary makes the necessarily vague terms of constitutional provisions more concrete and gives them practical application. Through this work the static terms of the constitution become alive, adapting themselves to the conditions of everyday life. It is in this way that the values embodied in the Higher Law become practical realities. Hence this framework of modern constitutions and judicial review synthesizes the ineffective and abstract ideals of natural law with the concrete provisions of positive law. ...” See Mauro Cappelletti, “Judicial Review in Comparative Perspective” in *California Law Review*, vol. 58, no. 5 (October 1970): 1017-1053, at 1018-1019. Another passage from Cappelletti makes the point even clearer: “... it involves a serious attempt to make *effective* the provisions of the constitution. To this end, machinery was necessary. Judicial review is such machinery. Judicial review is the institutionalized attempt to guarantee the enforcement of the constitution, of its rights, duties, and processes ...” See Cappelletti, 1989, Op. Cit., 11-12. He goes on to say that “(Constitutional) review of legislation is necessary if one wants to have a serious chance of making a constitution effective as an enforceable law superior to, and binding upon, the political branches.” See *Ibid*, 13.

doctrine of *rule of law* which seeks to arrange a community, including all its communal affairs as well as the lives of its individual members, within the confines of the law.

McIlwain gives the classic definition of the term '*constitutionalism*' in the following words: "constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. ... the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism ... (is) the limitation of government by law."¹¹ De Smith's definition and explanation of '*constitutionalism*' go as follows: "Constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. The rules may be at one extreme (as in the United Kingdom) mere conventional norms and at the other directions or prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law. Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty."¹² Another leading jurist to define the term is Sartori, who states: "And the purpose, the telos, of English, American, and European constitutionalism was, from the outset, identical. ... (having) a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government".¹³

These definitions, and the study of what other well-known scholars have said on the concept, make it clear that there is a consensus among Western jurists that the traditional and central idea of *constitutionalism* is the limitation of government within the bounds of a basic law. The idea in the West begins with the American and French revolutions of 1776 and 1789 and constitutional transformations, as well as the philosophical teachings of such thinkers as Locke, Paine, Rousseau, and Hamilton¹⁴ who were key figures in politics or academia in these countries during the times of those revolutions. All of them spoke about subjecting government to the supreme law, and restricting and limiting government within the bounds of that law. By establishing rule of law and by ensuring that all political authorities and officials act in accordance with pre-determined rules, *constitutionalism* seeks to remove arbitrariness from government.¹⁵ In today's world, the acceptance of *constitutionalism* and the limitation of political power is general,¹⁶ and taken as a political and constitutional ideal.

¹¹ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, (New York: Cornell University, 1947), 21-22. There are other very enlightening definitions of the term *constitutionalism*.

¹² See Alexander Stanley De Smith, "Constitutionalism in the Commonwealth Today", *Malayan Law Review*, vol. 5 (1962): 205.

¹³ See Giovanni Sartori, "Constitutionalism: A Preliminary Discussion", *The American Political Science Review*, vol. 56, no. 4 (1962): 853-864, at 861.

¹⁴ According to C. P. Patterson, Richard Hooker (1554-1600), Algernon Sydney (1622-83), and John Locke (1632-1704) are the key English thinkers who contributed during the late Middle Ages and the Enlightenment era to the development of the idea of limited Government: C. P. Patterson, "The Evolution of Constitutionalism" *Minnesota Law Review*, vol. 32, no. 5 (April 1948).

¹⁵ Nwabueze explains what arbitrariness in the following words: "Arbitrary rule is government conducted not according to pre-determined rules, but according to the momentary whims and caprices of the rulers; and an arbitrary government is no less so because it happens to be benevolent, since all unfettered power is by its very nature autocratic." Benjamin O. Nwabueze, *Constitutionalism in the Emergent States*, (Rutherford: Fairleigh Dickinson University Press, 1973), 1.

¹⁶ Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review*, (Cambridge: Cambridge University Press, 2007), 21: "... the fact of the matter is that most states not only grant government powers, but they also limit them in a variety of ways. In other words, most states embrace constitutionally limited government."

At this point, the proposition becomes clear that CJR as an effective tool of achieving, upholding, and sustaining the ideal of *constitutionalism* can only function where there is a judicial organ of the State which is independent, impartial, and has *de jure* as well as *de facto* capability of enforcing the supreme law upon political powers of the State.

The Independent Judiciary

A people can include grand words in a constitution they write for themselves, guaranteeing the values of *rule of law* and *constitutionalism* on paper. But a constitution cannot enforce itself; grand words cannot raise up from the pages of a book to shackle unruly political forces. The postulates of *constitutionalism* can only be enforced insofar as a responsible and faithful human agency does it. States built upon the foundations of *republicanism* and *rule of law*, throughout the world, have entrusted the task of enforcing the supreme law or the constitution, of being the *guardian of the constitution*, and of implementing and upholding *rule of law* and *constitutionalism* to an *independent judiciary* because both *a priori* and *a posteriori* reflections and observations show that it is the best option.

This significant point was made in some eloquently presented passages by Cappelletti. A government that is limited and restrained by a “higher law ... subtracted from the whims of both temporary Parliamentary majorities and the will of the ruler of the day”,¹⁷ he says, is enabled by a constitution that is not simply a “guideline of political, moral, or philosophical nature, but as real law, itself *positive and binding law* but of a superior, more permanent nature than ordinary positive legislation.”¹⁸ He goes on: “In other words, it involves a serious attempt to make *effective* the provisions of the constitution. To this end, machinery was necessary. Judicial review is such machinery. Judicial review is the institutionalized attempt to guarantee the enforcement of the constitution, of its rights, duties, and processes; it is the instrument to solve those “conflict of law” which are the inevitable consequences of pluralism of the sources of law; ... Different, that is, nonjudicial kinds of machinery have also been tried as instruments for enforcing constitutions. The French Constitutions of 1799 and 1852, for instance, entrusted the role of controlling the constitutionality of legislation to the Senate, and most constitutions of the Socialist countries, as Professor Nikolic indicates, entrust this role to the “corps représentatif” itself, that is, the Supreme Soviet of popular assembly and/or their “presidiums”. ... Of course, unlike the courts, whose very nature demands a high degree of independence, and thus of nonaccountability, “political” bodies can be, or can be thought to be, accountable to the people: the issue of democratic legitimacy could be easily avoided by entrusting the function of control to such bodies. Comparative analysis, however, demonstrate that the solution of the use of political rather than judicial machinery for the enforcement of the constitution has always proved a failure. As for France, it is well-known that the *Sénat* ... of the Constitutions of 1799 and 1852 was totally unsuccessful. And as for the Socialist countries, Professor Nikolic has no hesitation to say that ... (the system of political bodies charged with enforcing the Constitution through constitutional review) ... has not proved effective, and that this every “inefficacité” was the main reason which brought Yugoslavia, Czechoslovakia and Poland to adopt, or try to adopt, a system of judicial rather than political review. Indeed, common sense itself suggests that a system intended to control the constitutionality of the activities of the political branches cannot be efficient if it is merely a control “from within”; to be efficient, it must be entrusted to organs *independent* from those branches. It should also be remembered that one vital *raison d'être* of the judicial review is to protect certain fundamental rights of individuals and minorities even against majoritarian will; hence no effective system of review can be entrusted to the electorate or to persons and organs dependent from, and strictly accountable to, the will of the majority. ... These reflections explain why

¹⁷ Mauro Cappelletti, “The Expanding Role of Judicial Review in Modern Societies”, in *Revista Juridica*, Vol. 58, No. 1, 1989, p. 11

¹⁸ *Ibid*,

even systems of judicial review are doomed to become totally ineffective, as the reporters Nwabueze, Carpizo and Fix Zamudio reiterate, if the judges to whom that task is entrusted are deprived of a sufficient degree of independence from the political power.”¹⁹

What, then, is an *independent judiciary*, which is a necessary component of the State not just to uphold impartial and unbiased justice in general but also for the upholding of the supremacy and primacy of Constitution, for the realization of *constitutionalism*, and for ensuring a “government of law and not of men”? Generally speaking, such a *judiciary* is one which is independent and autonomous in its institutional setup and administrative aspects under the *doctrine of separation of powers*, co-equal to the political branches of the State in status, and fully able and willing to adjudicate upon disputes and enforce the Constitution and laws without favouritism or bias, with impartiality and neutrality, and with justice and equity as its overriding objective.

From a historical perspective, both the idea and practice of *judicial independence* in the West came after its interactions with the Muslim world.²⁰ It began in England during the 16th and 17th centuries, as Pasquino states in the following words: “... it is only in England between 16th and 17th centuries, to my knowledge, that members of courts of common law put forward the idea of independence, vis-à-vis the King’s prerogatives.”²¹ Although classical thinkers such as Aristotle spoke of a *judicial function* of the Government which adjudicated upon disputes and resolved them to uphold justice,²² and although the Roman empire had a separate and specialized body of judges—though not independent from political powers—during the later periods of its classical,²³ Europe had to wait until the political developments in England leading to and following the Glorious Revolution for the idea that judges were to administer justice independently and impartially, on the basis of *lex* and not according to the will of *rex*.

In the traditional conception of the idea, as it developed in England and later elsewhere in the West, *judicial independence* meant two things:²⁴ *First*, it included the belief that those who adjudicate upon disputes—judges—must be neutral third parties vis-à-vis the parties in the dispute. A judge who is, upon an objective analysis, likely to be biased or exercise favouritism cannot be characterized as such a neutral third party.²⁵ *Second*, a later development in the idea, especially in Britain and the newly founded United States of America, proposed that the body of adjudicators or judges, as an element in the governmental function, must be distinct and autonomous from the other elements of government: namely, the Legislative and the Executive. It is on the basis of this notion of

¹⁹ Cappelletti, 11-13.

²⁰ Both the theory and practice of the independence and impartiality of judges and justice was a highly developed Islamic practice since the early years of the Islamic State founded in Madinah by Prophet Muhammad (peace be upon him). Muslim doctrines and practices were introduced to Europe mainly through interactions during the Crusades, Muslim Sicily, and Muslim Spain. However, a discussion of the matter is not within the scope of this article.

²¹ Pasquale Pasquino, “Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History”, in *Law and Practice of International Courts and Tribunals*, Vol. 2, Issue 1, April 2003, p. 13-14.

²² Ibid, 13.

²³ Ibid.

²⁴ Ibid, 14-15.

²⁵ Commenting on this, Fernandez and Rodriguez-Blanco wrote: “Traditional jurisprudence finds the foundation of independence in the parties’ right to a fair trial, as the Recommendation document issued by the Committee of Ministers of the Council of Europe on 17 November 2010 (CM/Rec (2010) 12) articulates:

The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.

judicial independence, that the philosophy of *trias politica*²⁶ describes and prescribes a constitutional design of three separate organs of the state in the form of the Legislature, the Executive, and the Judiciary.

The need for an *independent judiciary* has been explained by scholars since the early days of the life of the doctrine. Montesquieu's words on the matter are well known. He wrote: "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. ... Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. ... There would be an end of everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals."²⁷ A few years later, William Blackstone wrote, on the importance of judges being impartial and independent: "Were it [the judicial power] joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."²⁸ It is not just the need to protect the rights and liberties of the citizens which necessitates *judicial independence*. In a state where *constitutionalism* is adopted to achieve the end of *government of law*, an *independent judiciary* is needed to enforce the law upon the Legislature and the Executive where there arise conflicts between those two branches. In other words, where there is a legal dispute, such as one concerning the interpretation of the Constitution, between the Executive branch and the Legislative branch, only a separate and independent judicial department can be a neutral and disinterested third party, free from bias and acting without favour, to decide in the conflict in accord with the law.²⁹ As it is understood in modern Europe, the rationale of *judicial independence* has been comprehensively restated in Opinion No. 1 of the Consultative Council of European Judges.³⁰

²⁶ "Every state contains three powers, i.e. the universally united will is made up of three separate persons (*trias politica*). These are the *ruling power* (or sovereignty) in the person of the legislator, the *executive power* in the person of the individual who governs in accordance with the law, and the *judicial power* (which allots to everyone what is his by law) in the person of the *judge* ..." *Metaphysics of Morals*, in I. Kant, *Political Writings*, by H. Reiss (ed.)

(Cambridge University Press, 1977), p. 138

²⁷ See Charles de Scondat, Baron de Montesquieu, 1748, *The Spirit of Laws*, Translated by Thomas Nugent, 1752, Batoche Books Kitchener, 2001, p. 173.

²⁸ See Sam J. Ervin, Jr., "Separation of Powers and Judicial Independence", in *Law and Contemporary Problems*, Winter 1970, Vol. 35, No. 1, Duke University Press.

²⁹ Pasquale Pasquino, 15-16

³⁰ See Articles 10 to 13 of Opinion No. 1, Consultative Council of European Judges (CCJE), Strasbourg, 23 November 2001. The Articles read as follows: Article 10 – "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice." Article 11 – "This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state. It has an important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law (such as that of the European Union). To fulfil its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections with and influence by these bodies. Independence thus serves as the guarantee of impartiality. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining." Article 12 – "Judicial independence

Another question is about the various forms or aspects of *judicial independence*. There seems to be many ways of characterizing and explaining those aspects, and one is how Fiss has done it. In his views, there are three main notions or forms of *judicial independence*: *party detachment*, *individual autonomy*, and *political insularity*. He explains “*party detachment*” in the following terms: “(it) requires the judge to be independent from the parties in the litigation, not to be related to them or in any way under their control or influence. This aspect of independence is rooted in the idea of impartiality and is uncompromising in its demands—the more detachment from the parties the better. The bribe is, of course, the extreme example of a violation of this demand. But a less blatant link to one of the parties, such as a cultural tie that could cause the judge to identify with one party more than the other, may also count as a transgression”.³¹ On “*individual autonomy*” he says: “(it) concerns collegial relationships or the power of one judge over another. In common law systems, judges feel the pressure of other judges through the doctrine of *stare decisis*. Also, in both common law and civil law countries, higher court judges exercise control over their lower court colleagues through regular appellate procedures. These traditional forms of collegial control do not threaten the independence that rightly belongs to a judge. But more bureaucratic forms of control, such as those recently instituted in the United States through the Judicial Councils Reform Act 1980, may threaten a judge’s independence, or more specifically the judge’s claim for individual autonomy. That Act gives the judicial councils of the circuit courts power to investigate complaints against trial judges and to take disciplinary action that the judicial council deems appropriate. It thereby allows one group of judges, acting through an organization rather than the traditional appellate procedures, to review the work of an individual judge and discipline him or her.”³² Explaining third form or aspect, he observes: “A third form of independence—the most difficult to understand and the focus of this essay—concerns what I will call “*political insularity*”. It requires that the judiciary be independent of political institutions and the public in general. This form of independence overlaps with party detachment whenever one of the litigants before the court happens to be another branch of the state (say the executive), but it is required even when a case is wholly between private parties and thus should be seen as a separate requirement. It stems from the very nature of the judicial function and the obligation of the judges to decide what is just, not to choose the best public policy nor the course of action most desired by the public. The moral authority of the judiciary depends not solely on the dialogic processes through which judges exercise power, that is, listening to arguments and giving justification, but also on whether they are free from any political influence. The greater the insularity from political control, the more likely judges are to do what is just rather than what is politic.”³³

Another perspective of looking at the forms or aspects of *judicial independence* is to say that it includes *personal independence*, *substantive independence*, and *institutional independence*. *Personal independence* is described by

presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects - or may be seen as affecting - their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that “no man may be judge in his own cause”. This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.” Article 13 – “The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications – that is, the features which are necessary to secure it, and the means by which it may be secured, at a constitutional or lower legal level, as well as in day-to-day practice, in individual states. The focus of this opinion is upon the general institutional framework and guarantees securing judicial independence in society, rather than upon the principle requiring personal impartiality (both in fact and appearance) of the judge in any particular case. Although there is an overlap, it is proposed to address the latter topic in the context of the CCJE’s examination of judicial conduct and standards of behaviour.”

³¹ Owen M. Fiss, “The Limits of Judicial Independence”, in *The University of Miami Inter-American Law Review*, Fall 1993, Vol. 25, No. 1, 57-76, at 58

³² *Ibid.*

³³ *Ibid.*, 59-60.

the International Bar Association (IBA) as follows: (it) means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.”³⁴ As such, it overlaps with what Fiss has described as “*political insularity*”, but what he describes as “*individual autonomy*” can also be characterized as an element of a judge’s *personal independence*—that is, personal independence from improper influence from other judges. As for *substantive independence*, IBA says that this “means that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience”.³⁵ It has been also described sometimes as *decisional independence*, and overlaps, to a considerable extent, with what Fiss calls “*party detachment*”. Lastly, *institutional independence*, or *structural independence*, of the judiciary means that the Judiciary as a coherent and hierarchical system of courts and tribunals is set up as an independent and autonomous branch of the state. Such a set up needs a number of features for it to be meaningful. For example: 1) it must be based on the *doctrine of separation of powers*; 2) the courts must be an organized hierarchy which is logically and systematically established in a way not just the entire judiciary but separate courts and tribunals and individual judges are also given the right extent of autonomy; 3) the judiciary must be a co-equal branch of the State, at the same level as the Legislative and the Executive;³⁶ 4) the judiciary must have control over both central-level and court-level judicial administration or court governance;³⁷ 5) selection of judges must be free from political influence, through a system which is preferably under the control of senior judicial officers;³⁸ 6) the judiciary and courts must have financial and budgetary autonomy, with sufficient budget and resources provided to the judiciary,³⁹ and fair and adequate compensation secured for judges in a way that judicial salaries are irreducible;⁴⁰ 7) security of tenure and irremovability must be guaranteed for all judges;⁴¹ 8) judicial decisions must have finality, except where they are overturned by higher courts on appeal, and the political branches must not have power to overturn them through legislation or any other kind of decrees or resolutions whatsoever;⁴² and 9) the jurisdiction of the judiciary must cover all disputes and conflicts that require judicial resolution, and the power of the courts cannot be stripped or restricted by entrusting the resolution of such disputes to nonjudicial or political bodies.⁴³

The last question is about how a modern constitution can, through its design, ensure *judicial independence* meaningfully. This question has also garnered wide attention, and there is no space for us to go into details of the discussions around it. Let us have a brief look at what Melton has to say on the matter. The “components of de jure judicial independence” or the “aspects of constitutions (that) should enhance judicial independence” which he has pointed out, drawing on a number of academic studies, are as follows: 1) the Constitution must provide for judicial

³⁴ Article 1(b) of the IBA Minimum Standards of Judicial Independence 1982.

³⁵ Article 1(c) of the IBA Minimum Standards of Judicial Independence 1982.

³⁶ Kaufman writes: “The essence of judicial independence, therefore, is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality. This principle is embodied in the doctrine of separation of powers, which elevates the judiciary to the status of a co-equal branch.” See Irving R. Kaufman, “The Essence of Judicial Independence”, in *Columbia Law Review*, May, 1980, Vol. 80, No. 4 688.

³⁷ See, for instance, Articles 8 and 9 of the IBA Minimum Standards of Judicial Independence 1982; Points 35 & 36 of Beijing Statement

³⁸ See Article 15 of Beijing Statement

³⁹ See Articles 10 & 13 of the IBA Minimum Standards of Judicial Independence 1982; See Point 7 of UN Basic Principles; Point 37 and 41 of Beijing Statement

⁴⁰ See Point 14 and 15 of the IBA Minimum Standards of Judicial Independence 1982; Point 11 of UN Basic Principles

⁴¹ See Point 22, 23, 30 among others of the IBA Minimum Standards of Judicial Independence 1982; Point 11 of UN Basic Principles; Point 18, 21, 22 of Beijing Statement

⁴² See Article 19 of the IBA Minimum Standards of Judicial Independence 1982; Principle I of Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges 1994, European Union

⁴³ See Point 3 of the UN Basic Principles on the Independence of the Judiciary 1985; and Point 3 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1997; also, Point 8 of the IBA Minimum Standards of Judicial Independence 1982

independence with the Judiciary as a central organ of the State; 2) Judges must have secured tenure for life; 3) judicial appointment processes should not be controlled by the political branches of the State; 4) the process of removing judges should not be under the control of politicians, and preferably must be initiated by the public or a judicial council; 5) there must be few and well-defined grounds upon which judges can be removed; and 6) political branches of the State should not be allowed to reduce judicial salaries.⁴⁴

On the basis of the foregoing discussions, the following analysis of whether the Maldives had a meaningful mechanism of CJR between 1932 and 1998 focuses on whether the six constitutions during this period provided for meaningful independence of the judiciary, together with fundamental principles of *constitutionalism* and provisions enabling the Courts to do CJR. Let us now look at each Constitution from this frame of analysis.

Judiciary and CJR in the First Constitution

Perusing the 1932 Constitution from the perspective of our discussion, the first thing that becomes noticeable is that it did not establish a separate judicial branch of the State. Article 23 stipulates that the sovereign powers of the State which begins with the people would be exercised through four constitutional components or organs; namely, 1) the Monarch, 2) the Council of Ministers, 3) the Legislative Council, and 4) People's Majlis.⁴⁵

In fact, the 1932 Constitution does not provide any visible form of court structure or mechanism for the judicial function of the State. All it does is including the "Ministry of Justice" in an enumeration of the "Ministries of the State Executive".⁴⁶ Those Ministries are under the authority of the Monarch by virtue of several provisions of the Constitution,⁴⁷ and as a collective body led in their day-to-day functioning by the Prime Minister, making it clear that the framers of the Constitution saw no need to make the judiciary an independent organ or institution, or judges independent of the. The only provision regarding the appointment and removal of judges from office is in Article 82, which does not even use the word "judge", instead stating that "*those who adjudicate* can be removed from office and transferred from one territorial jurisdiction to another only in accordance with what is stipulated in the law". The Constitution gives the Legislative council the authority to determine "the territorial jurisdiction and powers of those who adjudicate"⁴⁸ through the laws it enacts. It also sets out that "the removal and transfer of those who adjudicate can be done in accordance with what the law stipulates".⁴⁹ That is about everything the Constitution states regarding the composition and functioning of the judicial component of the Government. In fact, it is a testament to the subservient position judges were placed in in relation to the senior officials of the executive that the Constitution provided for an *ad hoc* judicial body,⁵⁰ which was to include one of the ordinary judges, to hear any criminal cases brought under the penal laws against Ministers, the Prime Minister, or the King. Ordinary judges were not allowed to hear such cases even though they were clearly and evidently ordinary criminal trials and not

⁴⁴ James Melton & Tom Ginsburg, "Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence", *Journal of Law and Courts*, Vol. 2, No. 2, September 2014, 18-217, at 195-196. The University of Chicago Press

⁴⁵ Constitution of 1932, Art. 23.

⁴⁶ *Ibid*, Art. 90.

⁴⁷ Article 27 (The Monarch is the Highest Authority of the Running of the State), 28 (The authority of assenting to and executing and implementing laws resides in the Monarch), 49 (the Monarch shall conduct the affairs of the running of the state through the Ministers), 42 (the Monarch's authority and powers to run the State shall be within the limits set by the law, and he shall not do anything in contravention to the Constitution), 50 (The Monarch appoints and dismisses Ministers on the basis of consultation given by the Prime Minister), 65 (The Monarch appoints the Prime Minister after consultation of the Legislative Council from among the members of that Council)

⁴⁸ Article 81.

⁴⁹ Article 82.

⁵⁰ Articles 74, 75, 76, and 77 of Constitution 1932

impeachment proceedings. Finally, the Constitution, departing even from centuries old tradition, does not provide for the position of the Chief Justice of the country. The 1932 Constitution did state that “those who conduct adjudication, as long as they do not violate the laws, are in the process of adjudication independent, and none shall interfere in the proceedings they conduct”.⁵¹ A similar provision is found in Article 43, which says that “the monarch shall not interfere with the processes of adjudication.”⁵² These provisions ostensibly ensure that “those who administer justice” are independent and free from all kinds of influences. However, it is inconceivable that any form of meaningful independence could be there for judges when they were mere employees of the Executive, working under a Minister of the executive department, having no power to even hear ordinary criminal cases involving Ministers. In addition, there seems to be no way for judges to adjudicate independently when the very provision purporting to guarantee that independence also says that that independence would be there “as long as judges do not violate the law”. What would happen if there arises a situation where the Sultan, or the Council of Ministers, or the Legislative Council, or Majlis believe that a judge has violated a law in making a particular decision? Who had the authority of final interpretation of the law and deciding that a judge had or had not violated the law? The Constitution was silent on this point, but whoever might have had the final say in such a situation, and whoever might have had the final authority of interpreting the law in such situations, the wordings of the Article in question suggests that it was not the judges. The question of somebody else judging judges to see if they had acted in accordance with the law is one point of objection. Another is as to who would assess a judge when he is accused of having acted in contravention to the law, and what would happen to the judge in such a case. The Constitution does not give any answers to these questions, and one can assume that such a judge would be “removed from office” by the Sultan under Article 46. What else can one make of this, except to say that judges had to rule in ways that would please the Sultan if they did not want to come under fire through Article 46? These points make it abundantly clear that the 1932 Constitution did not have anything worth the name of *the judicial organ of the State*, let alone *judicial independence* in any meaningful way.

Articles 23, 36, and 42 of the Constitution included some basic principles relating to the idea of *constitutionalism*. They seem to recognize the people as the *locus of sovereignty* in the State and limit the Sultan and His Majesty’s Government within the confines of the Constitution—a government of law and not of men. Some might even go so far as to say that the Constitution had a number of provisions which together can be described as functioning like a “supremacy clause” of the US Constitution on the basis of which USSC founded the doctrine of CJR in *Marbury*.⁵³ Article 42, for instance, state that “the power of the Monarch to rule shall be within the bounds set out by the law; he may not do anything in contravention to the Constitution”. Article 92 states that “no law can be made in contravention to the Constitution. ...” But the Constitution gives no mechanism to enforce these provisions; It does not provide anything even remotely capable of enforcing the *supremacy* or *primacy* of the Constitution. In other words, there is no mechanism for holding any official, least of all the Sultan, to account for breach of the Constitution. Therefore, it would be too much of a stretch of imagination to suggest that Maldivian judges could have formulated and exercised a regime of CJR under these provisions against the executive or legislative branches. Even though the Constitution included provisions protecting some fundamental rights,⁵⁴ *constitutional review* to protect those rights against the executive or legislature could not be exercised by the judges for the same reasons.

⁵¹ Ibid, Art. 80

⁵² Ibid, Art. 43.

⁵³ See Section 2.4.1 on how CJR in the US began with the case of *Marbury v Madison* (1803), 5 U.S. 137.

⁵⁴ Articles 4-22, 1932 Constitution

The conclusion, then, is that the 1932 Constitution did not enshrine in it the values of *constitutionalism*, did not create an independent judiciary, and had no mechanism of CJR. The first Amendment to the Constitution,⁵⁵ in 1934, brought two notable changes in its provisions relating to the judges and judiciary. *Firstly*, as it merged the Legislative Council and Majlis, created originally as two separate bodies of the State system, to form a single entity called “People’s Majlis”, it included “a judge” as a member of that Majlis, chosen and appointed by the Monarch.⁵⁶ *Secondly*, a number of articles were inserted,⁵⁷ providing for an office that can be seen as that of the “Chief Justice”, although this name was not used. Still, the judges were not given the status of a separate branch of the State, and the seniormost judge—the *Chief Justice*, if one can use that term—, was under the Prime Minister working as head of the “Ministry of Shari’ah Affairs”.⁵⁸ As such, the 1934 amendment brought no noteworthy changes in relation to the status, independence, and powers of the judges in the scheme of constitutional affairs. The Second Amendment to the 1932 Constitution, made no further changes in relation to judges or judicial functions.

The Second, Third, Fourth, and Fifth Constitutions

The Second Constitution (1942) also did not consider judges as a separate organ or department of the State.⁵⁹ It mentions the word “judge” only once, in Article 13, stipulating that there would be “the judge” as one of the five members of the “Legislative Advisory Committee”. Apart from that, this Constitution says nothing about judges or judicial function of the State. The Amendment of 1951 patched up many loopholes in the 1942 constitution, but did not improve things for the judiciary. Judiciary was still missing as an organ of the State, while the “power to administer affairs of Shari’ah” was vested with the King expressly, assigning this power expressly to the Head of State and Head of Executive in the Maldives for the first time.⁶⁰ It differed from the 1934 and 1937 Constitutions in that it abandoned the practice of having the “Fa’ndiyaaru Beikalaku” as one of the six members appointed by the Monarch to Majlis.⁶¹ This official designated as “Fa’ndiyaaru Beikalaku”⁶² was still a member of the Council of

⁵⁵ See Table 1, Page 301-302.

⁵⁶ Article 52, 1934 Constitution

⁵⁷ Article 72 (The authority to uphold the tenets of Islam in the Maldives, to administer justice amongst the people, to implement and execute prescribed and discretionary punishments of Islamic Shariah, and observing all affairs of the Shariah shall be a Judge”; Article 73 states that “the Judge shall be chosen and appointed by the Keerithi Mahaaradhun with the advice of the People’s Majlis”. Article 74 stipulates the qualifications and requirements of the Judge.

⁵⁸ Article 74(5) – Enumerating the qualifications of “the Judge”, it says that he shall have the capacity of conducting and observing the affairs of Shariah, upholding the rulings, and run all the affairs of the Ministry of Shar’iyyah”. Here, the name “Ministry of Shar’iyyah” is a translation of the name “Maḥkamah al-Shar’iyyah”, which is difficult to be translated, as in a Maldivian context of the time, the term “Shar’iyyah” included not merely or only adjudication, but it was a comprehensive term meaning upholding the rules of Islamic Shari’ah, including the leading of affairs of prayer, fasting, hajj, and ultimately also adjudicating in disputes in accord with basically the Shariah”.

⁵⁹ Article 4 of the Constitution, for reasons having nothing to do with constitutional thought or knowledge, considered the Monarch and the Prime Minister as one organ of the State, the Ministry of Home Affairs as the second, and the People’s Majlis as the third.

⁶⁰ Article 37, Constitution as Amended in 1951

⁶¹ Article 48, Constitution of 1942 as Amended in 1951

⁶² This name means “a judge” when translated literally into English, but it is clearly a reference to the highest official discharging the function of judgeship in the country. At the time, each inhabited island of the country had one judge, with names such as “Naa’ib” (literally meaning “deputy”) being used as official designation for the person who upheld the implementation of Shari’ah and the responsibility of adjudicating on disputes in the outlying islands. In Malé, the capital city, the judge had been traditionally called “Fa’ndiyaaru Kaleygefaanu” (literally, “Fa’ndiyaaru” means “judge”, and “Kaleygefaanu” was an honorific title). The “Fa’ndiyaaru Kaleygefaanu” or, “Fa’ndiyaaru Beikalaku” as used often in the early constitutions, was traditionally one of the most learned scholars of Islam in the country, and was what one might call the “Chief Justice”, although the Maldives did not have anything that can accurately be called a hierarchy of judicial officials with a seniormost or “chief” judge at the apex in her history, until well into the constitutional era. Exactly when the system of judges organized into a hierarchy is a question that may not have a clear answer, and lies beyond the scope of this research.

Ministers, under the Prime Minister.⁶³ Article 52 assigned that “Fa’ndiyaaru Beikalaku” with the power to uphold the tenets of Islam, to administer justice, implement prescribed and discretionary penal laws of Islam, and stated that he “shall be impartial and totally uninvolved and independent from political affairs of the country”.⁶⁴ How that is possible with him being part of the Council of Ministers led by the Prime Minister is highly debatable, to say the least. Unlike the previous Constitutions, the 1942 Constitution with its 1951 Amendment expressly stated that in case Majlis believed a “judicial pronouncement issued by the Maḥkamah al-Shar’iyyah is unjust” it could pass a resolution to state that and subsequently appeal the judicial pronouncement in question to an “Appeal Committee” consisting of the “Fa’ndiyaaru Beikalaku”, the Prime Minister, and a religious scholar appointed by Majlis.⁶⁵ The Judiciary was, then, in no better position compared to the previous constitutions even after the Amendment of 1951.

The third Constitution came in 1953 with the *First Abolition of the Monarchy* and the proclamation of the *First Republic*. This Constitution did not ensure judicial independence or any power of *judicial review* for the judges, but it is noteworthy in the evolution of the judiciary in the Maldives. It included only one Article which mentioned “judges” or “judicial functions” but they were significant: the first part of the Article established “Court of Justice” as a separate and visible department of the State⁶⁶ outside the Council of Ministers, though it was still under the Head of the State and Head of the Executive. Yet, the first constitutional establishment of a court of judicature was significant, as previous constitutions had simply created a ministry of justice which could employ officials performing judicial responsibilities. The 1953 Constitution also used the name “Chief Justice” for the first time in a Maldivian constitution, making him the head of the judicial department. Part (b) of the Article stated that the Chief Justice and the Naa’ibs⁶⁷ would be appointed by the Wali al-Amr.⁶⁸ However, any thoughts about this new framing of the constitutional provision dealing with the judicial function of the State being about improving the status of that function must be immediately dismissed, as the 1953 Constitution removed even the insufficient provisions guaranteeing decisional independence for judges in previous constitutions and did not say anything about judges being independent. All powers of appointing and removing judges were placed with the Head of State.

After the violent overthrow of the First Republic, the 1954 Constitution was introduced, and it migrated back to the same principles and provisions on the judicial function as in the 1932 Constitution and its amendments.⁶⁹ Under it, the branches of the State were the Monarch, the Council of Ministers, and Majlis.⁷⁰ It abandoned the designation “Chief Justice” used in the 1953 Constitution, and went back to the composition of the judicial function as in 1934, 1937, and 1951. Also, the “Court of Justice” mentioned in the 1953 Constitution was replaced with the old Maḥkamah al-Shar’iyyah.⁷¹ Its 1964 and 1967 amendments also did not make any alterations worthy of note.

The 1968 Constitution, the fifth constitution of the country, was proclaimed with the *Second Abolition of the Monarchy* and the proclamation of the *Second Republic*. This constitution also did not consider judiciary as a

who resided in Malé the capital city, with other judges being traditional officials upholding the adjudicating in disputes

⁶³ Article 50, Constitution of 1942 as Amended in 1951

⁶⁴ Article 62, Constitution of 1942 as Amended in 1951.

⁶⁵ Article 64, Constitution of 1942 as Amended in 1951

⁶⁶ Article 29(a), Constitution of 1953 – “There shall be a “Fandiyaaruge” in the Maldives. The senior officials of the “Fandiyaaruge” shall consist of a Chief Justice and a number of “Naaibs” as determined from time to time by the law”.

⁶⁷ See Note 1102, *supra*, which explains the meaning of the term “Naa’ib”

⁶⁸ Article 29(b)

⁶⁹ See Constitution of 1954, Articles 72, 73, 74, 75, 76, 77, 78, 79 and 80.

⁷⁰ Constitution of 1954, Article 25

⁷¹ Constitution of 1954, Article 81.

separate branch or organ of the State.⁷² The only provision it contains relating to the judicial function is Article 85, which stipulates that “the administration of justice and adjudication upon conflicts shall be conducted by those appointed for that purpose by the President”.⁷³ This constitution saw three amendments, in 1970, 1972, and 1975, and neither of them brought any changes to the way the administration of justice was set out in 1968.

The Sixth Constitution

Then came the 1997 or 1998 Constitution. It is referred to as the 1997 Constitution because it was assented to by President Maumoon Abdul Qayyoom on the 27th of November 1997,⁷⁴ and as the 1998 Constitution because it came into effect on the 1st of January 1998. This research shall henceforth refer to it as Constitution of 1998.

This was the first constitution of the Maldives to designate the judicial function as one of the three divisions or branches of the sovereign powers of the State, and it reintroduced the designation “Chief Justice” to refer to the highest ranked judge in the country. Under Article 4, the organs of the State were stated to be the Executive power, the Legislative power, and the power to Administer and Dispense Justice.⁷⁵ The same Article states that the President and the Council of Ministers shall exercise the executive power, while Majlis and the People’s Special Majlis shall exercise the legislative power.⁷⁶ As such, the Judiciary was given institutional independence to a considerable extent. However, this does not mean that the functional independence was guaranteed or secured for the judges, or that the Judiciary was given co-equal status. Article 4 (2) stipulates that the President and the Courts of Adjudication would exercise the power to dispense justice,⁷⁷ and Article 39 prescribes clearly that the President shall be the highest authority of justice in the country. Article 42 gives the President absolute power to appointment and remove the Chief Justice and judges at his absolute discretion.⁷⁸

By the time the 1998 Constitution came into effect, the fundamental structure of the Maldivian court system had been built in practice, as previous constitutions had not stipulated any rules on how the system would be and had left it to the discretion of the Head of State to formulate it as he saw fit. During the presidencies of Naasir and Maumoon, the court system had grown into a sophisticated system. It is irrelevant and unnecessary to go to the history of how that system evolved, but we shall give a brief account of what it had developed into. The fact that the Maldives is geographically divided into hundreds of tiny islands is one factor that contributes to the way in which the country’s court system is formulated. There are about 200 inhabited islands, and Malé, one of them, has been the capital since time immemorial. As it has the largest population and is where the seat of government is, the heart of the judicial system, including the Ministry of Justice, the highest courts were also located in the city. When the 1998 Constitution came into operation, the highest court was the High Court, which was basically the court of appeal, although it always had original jurisdiction in some specific issues, such as election complaints. Then there were courts of first instance in Malé, which were specialist courts; namely, Civil Court, Criminal Court, Family Court, and Juvenile Court. In all other islands, there was just one court in each island. While they were also courts of first instance, they were different from the four courts of first instance in Malé in several ways. Most importantly, they were not specialist courts and had jurisdiction to hear all types of cases. Secondly, their judges were ranked

⁷² Under Article 20, President, the Council of Ministers, and the People’s Majlis were the three designated branches of the State “which would exercise the sovereign rights of the people in the government of all the affairs of the State”.

⁷³ Constitution of 1968, Art. 85.

⁷⁴ Adam Shareef and et el, *Vol I*, Op. Cit., 32.

⁷⁵ Constitution of 1998, Art. 4 (1)

⁷⁶ Under Article 63, the People’s Majlis was empowered to enact statutes, while under Article 92, the People’s Special Majlis had the exclusive authority to make or amend constitution.

⁷⁷ Constitution of 1998, Article 4 (2).

⁷⁸ *Ibid*, Art. 42 (a).

lower than judges of the four courts in Malé.

When the 1998 Constitution came, it simply provided fundamental rules and principles upon which the existing court system would function. Articles 112, 113, 114, 115, 116 and 117⁷⁹ dealt with HCM. According to these Articles, the Court would comprise of the Chief Justice and a number of justices, all of whom would be appointed by the President.⁸⁰ The President had the power to make regulations regarding the procedures of the High Court.⁸¹ The authority to remove high court justices including the Chief Justice was at the absolute discretion of the President.⁸² While the eighth chapter of the Constitution dealt with HCM, chapter nine included the constitution's provisions relating to the lower courts. Under these Articles, all lower courts in both Malé and other islands were to be administered and run by a Minister of the President's Cabinet to whom he delegates and assigns the authority.⁸³ As such, the Maldivian judiciary was not a hierarchical system in which, there is an apex court, and then there are a number of levels or ranks of lower courts arranged from top to bottom even under the 1998 Constitution. Under other articles in chapter nine the President was given power to establish any number of lower courts, and locate them at any place in the country, as he saw fit.⁸⁴ He also had the power to appoint⁸⁵ and remove⁸⁶ all judges of lower courts at his absolute discretion.

Interestingly, the President being the highest authority of dispensing justice, under Article 39 of the 1998 Constitution, any party could 'appeal' the decision of the High Court to the President. Such 'appeals' would be heard by an internally placed body known as the Appeal Committee at the President's Office. One could question whether this was a judicial body in the true sense of the term, and we can safely say that it was certainly not a court, but it had the power to overrule the decisions of the High Court.

Conclusion

A system of constitutional judicial review (CJR) can only be effectively established when certain foundational constitutional principles are firmly entrenched. These include the recognition of the judiciary as a co-equal branch of government under the doctrine of separation of powers, the supremacy of the constitution over all state organs, and the constitutional empowerment of courts to invalidate legislative and executive acts that contravene constitutional provisions. Even in the absence of explicit textual authorization, judicial review may be derived from the entrenchment of fundamental rights and core constitutional principles, which can only be safeguarded through judicial enforcement, as famously articulated in *Marbury v. Madison*.⁸⁷

An examination of the Maldivian constitutions between 1932 and 1998 reveals that, although they contained clauses

⁷⁹ These Articles belong to Chapter 8 of the Constitution, which specifically deals with the High Court.

⁸⁰ Constitution of 1998, Art. 112.

⁸¹ Ibid, Art. 115.

⁸² Ibid, Art. 117.

⁸³ Ibid, Art. 121.

⁸⁴ Ibid, Art. 118 (1).

⁸⁵ Ibid, Art. 118 (2).

⁸⁶ Ibid, Art. 123.

⁸⁷ In the judgment of *Marbury*, it was stated that "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. ... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." - See *Marbury v Madison* (1803), 5 U.S. 137.

affirming constitutional supremacy—such as provisions requiring the Sultan to govern within constitutional limits and declaring unconstitutional legislation void—these did not translate into a functional system of judicial review. While these clauses theoretically provided a foundation for courts to invalidate unconstitutional acts, Maldivian judges did not interpret them as granting such authority. Similarly, although most constitutions included a Bill of Rights, courts lacked the institutional independence and authority necessary to enforce these rights against the political branches.

Moreover, several constitutional provisions actively constrained judicial independence. The recurring clause that judges enjoyed independence only so long as they did not act “in contravention to the law” undermined the very notion of an autonomous judiciary and discouraged any challenge to executive or legislative authority. Additionally, constitutional mechanisms for removing the head of state were consistently vested in the legislature, with no judicial role or justiciability, further marginalizing the courts.

Historical practice confirms this restrictive constitutional culture. Even in the face of clear constitutional violations, such as the *de facto* suspension of the 1932 Constitution, no judicial intervention occurred. This pattern persisted until 2008, despite improvements in legal institutions and judicial capacity. It is therefore evident that the framers of the pre-2008 constitutions did not intend to establish a system of judicial review. Consequently, the formal introduction and effective enforcement of CJR in the Maldives awaited the explicit provisions of the 2008 Constitution and the judiciary established under it.

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