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EDITOR'S PICK

Protection of Environment During Armed Conflicts

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Introduction to IUMJOL Vol.2 Issue. 1

بسم الله الرحمن الرحيم

In the name of Allah, the Most Gracious, the Most Merciful.

It is with great pleasure that we announce the publication of the second issue of the IUM Journal of Laws (IUMJOL), which commenced its scholarly journey in 2024. Since its inception, IUMJOL has remained firmly committed to promoting rigorous, high-quality, and impactful legal research, serving as a platform for critical engagement with contemporary legal challenges at national, and international levels.

The IUM Journal of Laws (IUMJOL), Volume 2, Issue 1 (2025), brings together a diverse and comprehensive collection of multidisciplinary research contributions from distinguished international scholars. Through this collaborative scholarly engagement, the journal seeks to foster critical dialogue, promote comparative legal perspectives, and contribute meaningfully to ongoing debates in contemporary legal scholarship. The articles in this volume examine significant legal issues spanning environmental protection in conflict situations, constitutional development and judicial review in the Maldives, corporate governance and directors' accountability in comparative perspective, and child protection and legal reform grounded in Islamic legal principles, offering both analytical depth and practical relevance.

Overall, this issue of IUMJOL aims to provide scholars, practitioners, policymakers, and students with intellectually stimulating and practically relevant research, while reaffirming the journal's role as a dynamic platform for legal inquiry, academic exchange, and the advancement of legal knowledge. The Editorial Board extends its sincere gratitude to the contributing authors for their valuable scholarship, the peer reviewers for their rigorous and constructive evaluations, and the editorial and technical teams for their professionalism and dedication, all of which were essential in ensuring the quality and successful publication of this issue.

Ikram Abdul Sattar
Editor-in-Chief
IUM Journal of Laws (IUMJOL)
Islamic University of Maldives

General Overview and Journal Vision

1. Introduction:

IUM Journal of Laws (IUMJOL) is a double-blinded peer-reviewed academic journal published by Kulliyyah of Shairah at the Islamic University of Maldives. The journal is published once a year in both Dhivehi and the English language to allow local and international intellectuals of legal scholarship to disseminate their scholarship. This journal aims to expand legal scholarship by providing an academic platform for scholars and academicians to share and exchange knowledge.

2. Scope and Aim:

IUM Law Journal (IUMLJ) /IUM Journal of Law (IUMJOL) covers a variety of topics in Law and Shariah. The journal aims to publish research papers on law reform, discussions on legal doctrines, academic analysis on case reports, issues relating to the application of law in practice, and comparative legal analysis of different laws and legal systems. Additionally, the journal accepts high-quality original manuscripts of international law, research on Islamic law, and Fiqh of classical and contemporary issues.

3. Ethical Standards:

All articles published in IUMJOL shall meet the highest ethical standards. Therefore, authors are required to maintain high standards of ethical behavior when preparing their manuscripts for publication. Articles that do not meet IUMJOL's ethical standards will be rejected.

4. Copyright Protection:

Copy right of all materials published in IUMJOL is vested in the Kulliyah of Shariah and Law, Islamic University of Maldives. Authors must waive their rights to enable IUMJOL to maintain the full copyright protection of materials. Authors are required to obtain permission if intended to reproduce or use the IUMJOL published materials.

5. IUMJOLs' Editorial Board

In addition to the following members of the editorial board, members of the local advisory committee and international advisory committee sit-in the IUMJOL's editorial board.

Editorial Board

Publication Guidelines

IUMJOL-AUTHOR GUIDELINES

2.1- THE MANUSCRIPT:

The manuscript submitted **must be original** and must not have been published or submitted for publication in another journal. The length of the manuscript must be **between 6000 and 10000 words**. The Similarity Index (SI) must be a minimum 20% by Turnitin screening. All manuscripts should be accompanied by an abstract and a list of references.

The manuscript **must be submitted online** through the IUMJOL website at the following URL: https://jol.ium.edu.mv/about/submissions. Submissions via hard copy will not be accepted.

2.2- FORMATTING OF THE MANUSCRIPT:

Manuscripts must be formatted according to the IUMJOL manuscript.

The text of the manuscript shall be organized in the following manner:

1. The first page is the **'Title Page'** containing a full title, a running title of not more than 50 characters, full name, institutional affiliation, telephone number (with country code), and email address of the 'corresponding author,' and full names and institutional affiliations of the other authors.
2. To ensure the double-blind peer review, the second page of the manuscript will have a full title (removing all identifying information about the authors), an abstract, and keywords.
3. The 'Introduction' and the rest of the manuscript will be on the third page

All illustrations, figures, and tables are captioned and placed within the text at the appropriate points rather than at the end.

The blinded manuscript and title page must be submitted in the following form:

1. Microsoft Word (.docx) and fully written in English, if the manuscript is written in the English language or fully written in Dhivehi if the manuscript is written in Dhivehi language. However, the original verses of the Holy Quran and the Prophetic sayings may be written in Arabic in Dhivehi manuscripts.
2. Times New Roman font with single-spaced and 12-point font throughout and *Faruma* font with double spacing and 12-point font for Dhivehi manuscripts.

2.3- HEADINGS:

Title:	14-points font, upper case, bold, centered.
First level heading:	12-point font, upper case, bold, left aligned (Right aligned for Dhivehi).
Second level heading:	12-point font, lower case, bold, left aligned (Right aligned for Dhivehi).
Third level heading:	12-point font, lower case, bold, italicized, left aligned (Right aligned for Dhivehi).

2.4- ABSTRACT:

All manuscripts should be accompanied by an English and Dhivehi abstract of not more than 250 words which clearly states the objectives, significance, methodology, results, and conclusion of the study. Use single spacing and in 11-point font of *Italicized* Times New Roman font with single-spaced throughout and *Faruma* font with single spacing for Dhivehi abstracts. All articles published in the IUMJOL must include a Dhivehi and English abstract. Hence, all local authors must include a Dhivehi abstract along with their English abstracts. For foreign authors, the editors will arrange for a translation.

2.4.1- Keywords:

Three to five keywords should be mentioned at the end of the abstract.

2.5- CITATION AND REFERENCING:

Authors must follow the "footnotes system" in accordance with the latest OSCOLA citation style. The footnotes must be in 10-point font and single spacing. At the end of the article, there must be a list of references prepared according to the latest OSCOLA style.

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The following examples illustrate citations using the Oscola footnotes system. Examples of footnotes are followed by shortened versions of citations to the same source.

Book

One author

First time citation:

Subsequent citations:

Two or more authors

2.6- MANUSCRIPT ACCEPTANCE:

Decisions are based on a pre-review by the editors and a subsequent double-blind peer review by at least two independent reviewers.

2.7- SUBMISSION OF REVISED MANUSCRIPTS:

The authors are strongly advised to carefully read and revise the manuscripts in accordance with the comments made by the reviewers. The authors are also required to provide a point-by-point reply to each of the comments made by the reviewers by filling in the "**Author's Response to Reviewers Form**".

2.9- PROOFS AND COPYRIGHT ASSIGNMENT FORM:

Upon acceptance for publication, the galley proof will be sent to the authors who would then be responsible for careful review and approval of it. Copyrights of accepted manuscripts will be transferred to IUMJOL. Authors must obtain permission to reproduce all materials of which the copyright is owned by others. A **Copyright Assignment Form** will also be sent at this stage. An immediate response to both is required and failure of which may affect the publication of the manuscript in a particular issue of the Journal.

2.10- REJECTED MANUSCRIPTS

Manuscripts that do not adhere to the above formatting guidelines and the footnoting system will be returned to the corresponding author without being sent for review.

2.11- SUBMISSION PREPARATION CHECKLIST

As part of the submission process, authors are required to check their submission's compliance with all of the following items, and submissions may be returned to authors that do not adhere to these guidelines.

No	Items	Check
1	The submission has not been previously published, nor is it before another journal for consideration.	
2	A title page and an anonymised version of the manuscript are submitted.	
3	A structured abstract, in both English and Dhivehi, and keywords are included.	
4	The manuscript adheres to the formatting requirements of the journal and footnotes system of the OSCOLA (latest edition) as outlined in the **Author Guide.**	

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The names and email addresses and other personal details shared with the journal for administrative purposes will be used exclusively for the stated purposes of this journal and will not be made available for any other purpose or to any other party.

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The Editorial Board must arrange for academic reviewers to review each manuscript in the area in which the manuscript is written.

2.15- REVIEWER'S RESPONSIBILITIES

- Reviewers must treat the manuscripts received for the reviewing process as confidential. It must not be shown or discussed with others without authorization from the editor of IUMJOL.
- Reviewers assigned must not have conflicts of interest with respect to the original work, the authors of the article or the research funding.
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- If the assigned reviewer considers themselves not able to complete the review of the manuscript, they must communicate with the editor, so that the manuscript could be sent to another suitable reviewer.

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Protection of Environment During Armed Conflicts

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Abstract

Armed conflict inflicts profound and often enduring harm on the natural environment, with direct consequences for civilian survival, public health, and post-conflict recovery. This article examines the evolving international legal framework for protecting the environment during armed conflict, focusing on three major instruments: the International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts, the International Committee of the Red Cross's Guidelines on the Protection of the Natural Environment in Armed Conflict, and the International Criminal Court Prosecutor's 2025 Policy on Addressing Environmental Damage through the Rome Statute. It argues that, taken together, these instruments signal a significant normative shift from viewing environmental harm as an incidental by-product of warfare towards an integrated approach combining prevention, operational guidance, and individual criminal accountability. At the same time, the paper highlights persistent legal and practical gaps, particularly in contemporary conflicts marked by urban warfare, prolonged occupation, and large-scale ecological devastation, as illustrated by the situation in Gaza. The article concludes that strengthening interpretation, implementation, and accountability is essential to align legal norms with the realities of modern armed conflict and ecological vulnerability.

Keywords: Armed Conflict, International Humanitarian Law, Environmental Protection, International Criminal Court

ހަނގުރާމަތަކުގެ ތެރޭގައި ތިމާވެށި ހިމާޔަތްކުރުން

ތާޖުއްދީން ސަނީ، އަދި ސްވާލިހް އެޗް. ވެންގޯ

އެބްސްޓްރެކްޓް

ހަނގުރާމަތަކުގެ ސަބަބުން ވަރަށް ގިނަފަހަރަށް ޤުދުރަތީ މާހައުލަށް ދިގުދެމިގެންދާ ފަދަ ބޮޑެތި ގެއްލުންތަކެއް ލިބޭ، އެކަމުގެ ސީދާ އަސަރު މަދަނީ އާބާދީގެ ދިރިއުޅުމާއި، ޢާއްމު ސިއްޙަތާއި އަދި ހަނގުރާމައަށްފަހު، އެކަމުގެ ދަތިކަމުން އަރައިގަތުމުގައި ކުރިމަތިވެއެވެ. މި ލިޔުމުގައި ބައިނަލްއަޤްވާމީ ހަނގުރާމައިގެ ހާލަތުގައި ތިމާވެށި ހިމާޔަތްކުރުމުގެ މަސައްކަތާ ގުޅުންހުރި ބައިނަލްއަޤްވާމީ ޤާނޫނީ ބިނާ ތަރައްޤީވަމުންދާ ގޮތް ދިރާސާކޮށްފައިވާއިރު، މީގައި ތިން މައިގަނޑު ވަޘީޤާތަކެވެ. އެއީ އިންޓަރނޭޝަނަލް ލޯ ކޮމިޝަނުން ތައްޔާރުކޮށްފައިވާ ހަނގުރާމަތަކާ ގުޅޭގޮތުން ތިމާވެށި ހިމާޔަތްކުރުމާބެހޭ މުސައްވަދާ އުސޫލުތަކާއި، އިންޓަރނޭޝަނަލް ކޮމިޓީ އޮފް ދަ ރެޑް ކްރޮސްއިން ހަނގުރާމައިގެ ތެރޭގައި ޤުދުރަތީ ތިމާވެށި ހިމާޔަތްކުރުމާ ބެހޭގޮތުން ތައްޔާރުކޮށްފައިވާ ގައިޑްލައިންސް އަދި ރޯމް ސްޓެޓިއުޓް މެދުވެރިކޮށް ތިމާވެށްޓަށް ލިބޭ ގެއްލުންތަކަށް ހައްލުހޯދުމާ ބެހޭ ގޮތުން އިންޓަރނޭޝަނަލް ކްރިމިނަލް ކޯޓުގެ ޕްރޮސިކިއުޓަރުގެ ޕޮލިސީ 2025 އެވެ. މިލިޔުމުގައި ދައްކުވައިދޭ ގޮތުގައި، މިއީ ކުރިން ބަލައިގަނެވުނު ގޮތަށް ބަދަލުވެފައި އަރިސްކުރައިވާކަން ފާހަގަ ކުރެވެއެވެ. އެގޮތުން ތިމާވެށްޓަށް ލިބޭ ގެއްލުންތަކަކީ ހަނގުރާމަތަކުގެ ނަތީޖާއެއްގެ ގޮތުގައި ދެކިފައިވާ ނަޒަރިއްޔާއިން ބަދަލުވެ، ގެއްލުންތައް ހުއްޓުވުމާއި، ޢަމަލީ ލަފާދިނުމާއި، އަދި ފަރުދީ ޖިނާއީ ޖަވާބުދާރީވުން ހިމެނޭ ފުޅާ ނިޒާމަކަށް ބަދަލުވަމުންދާކަން ފާހަގަކުރެވެއެވެ. މީގެ އިތުރުން މިލިޔުމުގައި ޤާނޫނީ އަދި ޢަމަލީ ހުސްކަންތައް ފާހަގަކޮށްފައިވާއިރު، ޚާއްސަކޮށް ރަށްރަށުގެ ތެރޭގައި ކުރިއަށްދާ ހަނގުރާމަތަކާއި، ދިގުމުއްދަތަކަށް ހިފަހައްޓާފައިވާ ސަރަޙައްދުތަކާއި، ފުޅާ ސަރަހައްދެއްގައި ތިމާވެށްޓަށް ލިބޭ ބޮޑެތި ގެއްލުންތަކުގެ މިސާލެއްގެ ގޮތުގައި ޣައްޒާ ހިމެނެއެވެ.

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ޤާނޫނީގޮތުން ހުރި ގޮންޖެހުންތަކުގެ މައްޗަށް ބަލާލާފައިވާނެއެވެ. އެގޮތުން ދިގު ދުރުދިގެންދާގޮތުގައި އަހަރުތަކުގައި ކުރެވުނު ހަނގުރާމައިގެ މައްސަލަތަކުވެސް މިކަތްތަކުގައި އަލިއަޅުވާލެވިފައިވާނެއެވެ. މިދިރާސާ ނިންމާލާފައިވަނީ ހަނގުރާމަތަކާއިގުޅިގެން ތިމާވެއްޓަށް ކުރިމަތިވާ ނުރައްކާތެރިކަންތަކުގެ މައްޗަށް ބަޔާނުތަކުގައި ބައިނަލްއަޤުވާމީ ޤާނޫނުތައް މާނަކުރުމާއި، ތަންފީޒުކުރުމާއި ޖަވާބުދާރީކުރުވުމުގެ މައްޗަށް އަލިއަޅުވައިލާފައެވެ.

ކީވޯޑްސް: ހަނގުރާމަތައް؛ ބައިނަލްއަޤުވާމީ އިންސާނީ ބައްދުތަކާގެ ޤާނޫނުތައް؛ ތިމާވެށި ހިމާޔަތްކުރުން؛ އިންޓަރނޭޝަނަލް ކްރިމިނަލް ކޯޓު

Introduction

Armed conflict has long been recognised as a cause of severe and often irreversible environmental harm, yet international law has historically treated such damage as an incidental by-product of hostilities rather than as a fundamental concern of civilian protection or based on the intrinsic value of the environment.[1] In recent years, however, this position has begun to shift. Growing awareness of the interdependence between environmental integrity, human survival, and post-conflict recovery has driven renewed legal and institutional attention to the protection of the natural environment during armed conflict.[2] This evolution is reflected in the International Law Commission's *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*,[3] the International Committee of the Red Cross's *Guidelines on the Protection of the Natural Environment in Armed Conflict*, and, most recently, the Office of the Prosecutor of the International Criminal Court's *Policy on Addressing Environmental Damage through the Rome Statute*.[4] While there are also other initiatives, such as the movement for the recognition of ecocide,[5] this paper focuses on the aforementioned instruments.

The paper argues that these instruments collectively signal a normative transition: from fragmented and reactive protection towards a more integrated framework that combines prevention, operational guidance, and individual criminal accountability. At the same time, it contends that significant legal and practical gaps remain, particularly in contemporary conflicts characterised by urban warfare, prolonged occupation, and large-scale environmental devastation affecting civilian populations.

The Impact of war on the environment

While the majority of environmental degradation and damage occurs during peacetime activities around the world,[6]armed conflict affects the environment through multiple, interrelated pathways that extend far beyond

1 Katherine Sarah Jane Old, 'Environmental Protection and Transitions from Conflict to Peace' (2020) 37 *Australian Yearbook of International Law*.

2 Karen Hulme, 'Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?' (2010) 92 *International Review of the Red Cross* 675.

3 International Committee of the Red Cross, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (ICRC 2020); United Nations International Law Commission, *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/74/10; Carsten Stahn, Jens Iverson and Jennifer Easterday, *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press 2017); Karen Hulme, 'The ILC's Work Stream on Protection of the Environment in Relation to Armed Conflict' <http://www.qil-qdi.org/ilcs-work-stream-protection-environment-relation-armed-conflict/> accessed 25 February 2025.

4 United Nations International Law Commission, *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc A/77/10 (2022); International Committee of the Red Cross, *Guidelines* (n 3); International Criminal Court, Office of the Prosecutor, *Policy on Addressing Environmental Damage through the Rome Statute* (2025).

5 Muhammadamin RF, 'The International Protection of Vulnerable Groups During Armed Conflicts' (2020) 5 *Qalaai Zanist Scientific Journal* 1.

6 Center for Youth and International Studies, 'The Intersection of Environment and Warfare: Navigating Risks and Sustainability'<https://www.cyis.org/post/the-intersection-of-environment-and-warfare-navigating-risks-and-sustainability> accessed 12 December 2025; Rafael Reuveny, Andreea S Mihalache-O'Keef and Quan Li, 'The Effect of

immediate battlefield damage. Military operations routinely result in the destruction of water infrastructure, contamination of soil and groundwater, deforestation, air pollution, and the degradation of agricultural land.[7] These impacts are often aggravated by displacement, the collapse of environmental governance, and the unsustainable exploitation of natural resources, producing long-term consequences for civilian health, food security, and livelihoods.[8]

Contemporary conflicts demonstrate that environmental harm is neither accidental nor peripheral. Urban warfare, the use of explosive weapons in densely populated areas, and prolonged sieges amplify environmental destruction by damaging sanitation systems, waste management facilities, and energy infrastructure.[9] In occupied or besieged territories, restrictions on access to land, water, and environmental services further intensify ecological degradation and civilian suffering.[10] This has been the situation in Gaza, for example.[11]

Indeed, the situation in Gaza provides a stark illustration of these dynamics. Israeli bombardment has resulted in extensive damage to water and sanitation infrastructure, leading to groundwater contamination, untreated sewage discharge into the environment, and heightened public health risks.[12] The destruction of agricultural land and green spaces has undermined food systems and reduced ecological resilience, while the accumulation of rubble and hazardous debris poses long-term environmental and health challenges.[13] These harms are not limited to the duration of hostilities but persist into the post-conflict phase, constraining recovery and deepening humanitarian vulnerability.

Despite the scale of such damage, existing legal frameworks have struggled to respond effectively. The high threshold of "widespread, long-term and severe" environmental damage under Additional Protocol I captures only a narrow category of harm, leaving much conflict-related environmental degradation unaddressed.[14] As a result, the cumulative, indirect, and reverberating effects of warfare on ecosystems and civilian survival often fall through normative gaps, underscoring the need for more robust interpretive, preventive, and accountability-based approaches.

Indeed, arguments that the law of armed conflicts has its own logic that takes precedence above environmental concerns continue to be raised.[15] But, thankfully, far less frequently than in the past. They are increasingly allowing for a more persuasive and forceful conversation about the critical need to prevent, minimise, and alleviate

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Warfare on the Environment' (2010) 47 *Journal of Peace Research* 749; Marie G Jacobsson, 'Third Report on the Protection of the Environment in Relation to Armed Conflicts' UN Doc A/CN.4/700 (3 June 2016).

7 Cordula Droege and Marie-Louise Tougas, 'The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection' (2013) 82 *Nordic Journal of International Law* 21 <https://brill.com/abstract/journals/nord/82/1/article-p21_3.xml> accessed 13 December 2025.

8 Carsten Stahn, Jens Iverson and Jennifer Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (Oxford University Press 2017) <https://academic.oup.com/book/26778> accessed 13 December 2025.

9 International Committee of the Red Cross, *Guidelines* (n 3) paras 8–15.

10 Karen Hulme, 'Enhancing Environmental Protection During Occupation Through Human Rights' (2020) 10 *Goettingen Journal of International Law* 203 <https://www.gojil.eu/issues/101/101_article_hulme.pdf> accessed 13 December 2025.

11 United Nations Environment Programme, *Environmental Impact of the War in Gaza: A Preliminary Assessment* <https://www.unep.org/resources/report/environmental-impact-conflict-gaza-preliminary-assessment-environmental-impacts> accessed 13 December 2025.

12 United Nations Environment Programme, *Environmental Impact of Conflict in Gaza* (UNEP 2024).

13 United Nations Office for the Coordination of Humanitarian Affairs, *Hostilities in the Gaza Strip: Environmental and Humanitarian Impact* (2024).

14 Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) art 35(3).

15 Daniel Turack, 'Environmental Law of Armed Conflict' (2008) 22 *Arab Law Quarterly*.

environmental damage in conflict-affected areas.[16] While nations are encouraged to take voluntary measures to better safeguard the environment,[17] the need for a more effective regime cannot be overemphasised.

ILC Draft Principles

The draft guidelines for use during armed conflicts recognise the environment's intrinsic civilian nature and reflect some of the existing treaty-based and customary international humanitarian law rules and principles that provide broad or indirect environmental protection.[18] Other norms of international law that safeguard the environment, such as international environmental law and international human rights law, are also recognised as being important in armed conflicts.[19] In instances of occupation, human rights law and international environmental law play a particularly important role, complementing the law of occupation, which was primarily codified in the first half of the twentieth century.[20]

The occupying power's environmental responsibility to the inhabitants of the occupied area, the territorial state, and other states is spelt out in the draft principles for situations of occupation.[21] The draft standards for use during armed conflicts are also consistent with current treaty law, which protects the natural environment against widespread, long-term, and severe harm. Despite this, the majority of the 28 draft principles focus on environmental impact below that high level. This includes harm inflicted inadvertently or via negligence, harmful activities, or harm caused by actors other than the dispute parties.[22]

This comprehensive approach is based on the recognition that environmental harm in conflict is caused by a variety of reasons that are not just tied to hostilities.[23] The preservation of natural resources from environmentally harmful or unsustainable utilisation is addressed by five draft principles.[24] A common issue in today's military conflicts, the majority of which are non-international. The prohibition of pillage, which is an established customary rule that applies in both international and non-international armed conflicts, is one of the pertinent draft principles.[25]

In times of occupation, the prohibition of pillage sets an absolute restriction on the occupying power's use of an occupied territory's natural resources or by private players operating within the effective control of the occupying power. Simultaneously, the draft occupation principles take into account longer-term environmental degradation

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16 Marja Lehto, 'Overcoming the Disconnect: Environmental Protection and Armed Conflicts' (ICRC Law & Policy Blog, 27 May 2021) <https://blogs.icrc.org/law-and-policy/2021/05/27/overcoming-disconnect-environmental-protection-armed-conflicts/> accessed 25 February 2025.

17 Ibid.

18 Anna Kukushkina, 'International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict' (2021) *SSRN Electronic Journal*.

19 Santosh Upadhyay, 'Armed Conflict and the Environment' (2017) 28 *Yearbook of International Environmental Law* 112.

20 Arie Afriansyah, 'State Responsibility for Environmental Protection During International Armed Conflict' (2011) 8 *Indonesian Journal of International Law* 307.

21 United Nations International Law Commission, *Draft Principles* (n 4) principle 20.

22 Viktorija Jakjimovska and Ezéchiel Amani, 'Protecting the Environment in Non-International Armed Conflicts: Are We There Yet?' <https://www.ejiltalk.org/protecting-the-environment-in-non-international-armed-conflicts-are-we-there-yet/> accessed 28 February 2025.

23 Tara Smith, 'Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity' (2019) 32 *Leiden Journal of International Law* 567.

24 Stavros Pantazopoulos, 'UN Lawyers Approve 28 Legal Principles to Reduce the Environmental Impact of War' <https://ceobs.org/un-lawyers-approve-28-legal-principles-to-reduce-the-environmental-impact-of-war/> accessed 28 February 2025.

25 Ibid.

caused by bad occupation practices. One of them aspires to protect the occupied territory's natural resources from unsustainable usage.[26]

Given the role that business enterprises may play in maintaining conflict economies and creating environmental harm, two additional draft principles on corporate due diligence and corporate liability are pertinent in the context of illegal exploitation of natural resources in conflict-affected areas. These two draft principles address the legislative and other actions that states can take to ensure that corporations and their subsidiaries practice due diligence and are held accountable when they harm the environment.[27]

In this cluster, the final draft principle tackles the unintended consequences of conflict-induced human displacement. Population displacement is a common occurrence when an armed conflict breaks out, and it can result in severe human misery as well as environmental damage. The latter was mostly about using natural resources for food and shelter.[28]

Many of the draft principles are based on and reflect existing obligations derived from widely ratified treaties or customary international law that have been interpreted in an environmentally friendly manner. Other draft principles are based on nations' or international organisations' existing or growing practices. In this regard, the draft principles, which reflect both international law and practice, are meant to either clarify or contribute to the ongoing development of international law.[29]

In addition, the Commission's work on this topic has included regular meetings with relevant specialist organisations such as the United Nations Environment Programme, UNESCO, and the International Committee of the Red Cross.[30] This also ensures that the final result is not disconnected from reality on the ground. This is a critical factor for the efficient application of the ILC principles, as well as their ability to provide direction to these many actors and assist them in taking actions that improve environmental protection in conflict situations.[31] The more applicable the draft principles are, the more likely they are to have an impact in practice. It's also necessary to do outreach and raise awareness. As far as nations are concerned, the UN General Assembly's deliberations undoubtedly help, but much will depend on civil society.[32]

ICRC Guidelines

According to research, the majority of violent conflicts in the last 60 years have occurred in biodiversity hotspots.[33] This hastens the loss of nature that we're talking about, even in times of peace. When the environment is harmed, conflict-affected populations are the ones who pay the price.[34] As a result, this is essentially a civilian protection

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26 Karen Hulme, 'Enhancing Environmental Protection During Occupation Through Human Rights' (n 10).

27 Taygeti Michalakea, 'Corporate Responsibility for the Protection of the Environment in Relation to Armed Conflicts' <https://ceobs.org/corporate-responsibility-for-the-protection-of-the-environment-in-relation-to-armed-conflicts/> accessed 28 February 2025.

28 United Nations High Commissioner for Refugees, 'Climate Change, Conflict and Displacement: Understanding the Nexus' (UNHCR ExCom Side Event 2018).

29 Daniëlla Dam-de-Jong and Britta Sjöstedt, 'Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles' (2021) 44 *Loyola of Los Angeles International and Comparative Law Review* 129.

30 Advisory Committee on Public International Law, *Advisory Report on the ILC's Draft Principles on Protection of the Environment in Relation to Armed Conflicts* (2020).

31 Ibid.

32 Britta Sjöstedt and Anne Dienelt, 'Enhancing the Protection of the Environment in Relation to Armed Conflicts – The Draft Principles of the International Law Commission and Beyond' (2020) 1 *Goettingen Journal of International Law* 33.

33 Thor Hanson and others, 'Warfare in Biodiversity Hotspots' (2009) 23(3) *Conservation Biology* 578.

34 Ibid.

concern. But why has this been the case for decades? We can all recall the Vietnam and Gulf wars, eras in history when environmental issues were a topic of public conversation.[35]

But why is there such a surge of interest now? There are several elements. One among them, though, is the increasing influence of climate change.[36] We are increasingly seeing environmental deterioration tied to or unrelated to the conflict, as well as climatic hazards. And this exacerbates the impact of conflict-related environmental harm on vulnerable communities. Because they, like us, rely on the environment for food, water, and livelihood.[37] As a result, the ICRC's work in this sector has taken on additional importance as a result of the combined effects of environmental degradation, climatic hazards, and violence.

While a certain degree of environmental harm is inherently linked to conflict, it cannot and does not exist indefinitely. There are legal guidelines that explicitly define these boundaries. International Humanitarian Law does not address all environmental consequences, but it does contain restrictions aimed at limiting the types of environmental damage that can occur during a conflict.[38] The question then becomes what can be done to improve the implementation and understanding of these legal requirements.

The ICRC updated its recommendations on the protection of the natural environment in armed conflict in 2020, further up their efforts to promote and increase respect for the relevant IHL norms.[39] This document outlined 32 guidelines and recommendations on international humanitarian law and environmental issues. So, rather than the larger chronological and legal scope that the ILC's vital work takes, it focuses on IHL.[40]

These rules have been amended since the initial edition was produced in 1994 in response to a request from the United Nations General Assembly.[41] What inspired the update or what is included in it, the 2020 edition incorporates advances in international law since 1994 in areas such as weapons law and how laws governing the conduct of hostilities relate to the natural environment, while keeping in mind its civilian nature.[42] In a nutshell, the ICRC recommendations serve as a one-stop shop for all relevant international humanitarian law protecting the environment. The fundamental reason for putting everything in one place is that it is expected that the guidelines will serve as a reference tool for states, parties to armed conflicts, and others who may be asked to advocate, implement, or apply IHL. As a result, it serves as a reference tool and a one-stop shop for pertinent IHL.[43]

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35 Joana Castro Pereira, 'Environmental Issues and International Relations: A New Global (Dis)Order' (2015) 58 *Revista Brasileira de Política Internacional*.

36 Katie Peters and Mairi Dupar, *The Humanitarian Impact of Combined Conflict, Climate and Environmental Risks* (United Nations General Assembly 2020).

37 Ibid.

38 Vanessa Murphy and Helen Obregón Gieseken, 'Fighting Without a Planet B: How IHL Protects the Natural Environment in Armed Conflict' (ICRC Law & Policy Blog, 25 May 2021) <https://blogs.icrc.org/law-and-policy/2021/05/25/fighting-without-planet-b/> accessed 28 February 2025.

39 International Committee of the Red Cross, *Guidelines* (n 3).

40 Ibid.

41 United Nations General Assembly, Decision 46/417 (9 December 1991).

42 International Committee of the Red Cross, *Report Submitted to the 48th Session of the United Nations General Assembly on Protection of the Environment in Time of Armed Conflict* (17 November 1993).

43 Finnish Institute of International Affairs, 'Protecting the Environment During Armed Conflict: What Are the Next Steps?' <https://www.fiia.fi/en/event/protecting-the-environment-during-armed-conflict> accessed 28 February 2025.

The guidelines are seen as a valuable addition to the ILC's crucial work. They range in breadth and method, with some commonality, such as asserting the natural environment's civilian nature and the application of common hostile laws to the natural environment.[44]

Moving on to the content of IHL as it relates to the environment, and more specifically, the IHL outlined in the guidelines, there are four aspects to consider. IHL applies to the environment in a variety of ways, which are organised into four areas which make up the 32 regulations and recommendations.[45]

The first is a set of rules that provide specialised environmental protection. Specifically, we imply that the rules were enacted for that specific purpose, and they include the terms natural environment, as opposed to generic rules that apply to other civilian objects but also safeguard the environment. And when we talk about IHL and armed conflict in international law and the environment, the specific norms that protect the natural environment are the ones that everyone talks about first.[46] The employment of tools and techniques of warfare that are intended or expected to cause widespread, long-term, and serious damage to the natural environment is specifically prohibited.[47] That's a very high bar, with widespread, long-term, and severe consequences. Articles 35 and 55 of the Additional Protocol 1 contain this information. That is the rule that everyone remembers. That is an absolute threshold, meaning that no matter how great the military advantage, if the damage is broad, long-term, and severe, it is prohibited. It's pretty powerful in that way.[48] This requires a great deal of attention, but there are also extremely essential laws within the conduct of hostilities that safeguard the environment below that high threshold. So, part of what needs to be done is to spend a lot of time talking about the more general but equally crucial conduct of the rules of hostility.[49]

Moving on to the more basic rules, starting with the most obvious and well-understood: it's widely accepted that the natural environment has a civilian character by default.[50] i.e., unless sections of the natural environment become military objectives, all of the diverse parts of the natural environment remain civilian objects. It's not to suggest they can't become military targets, but the setting is by nature civilian.[51] This is a significant fact since the principles of distinction, precautions, and proportionality, which are core IHL conduct of hostility regulations that safeguard civilian objects, also apply to the natural environment.[52] One of the things that the new ICRC guidelines try to do is provide some commentary on how those principles can be applied to the environment because it does demand more consideration, given that the environment is always present and as the military carries out its missions.[53]

A brief discussion on the importance of the proportionality principle. All conduct of hostility standards are significant, but the principle of proportionality in particular is an IHL responsibility that has a lot of promise for the environment and can provide powerful protection if correctly applied and understood.[54] This rule states that any aspect of the natural environment that is not a military target is also protected against accidental or disproportionate

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44 Cordula Droege and Marie-Louise Tougas, 'The Protection of the Natural Environment in Armed Conflict' (n 7).
45 Karen Hulme, 'Taking Care to Protect the Environment Against Damage' (n 2).
46 International Committee of the Red Cross, *Guidelines* (n 3) pt I.
47 Ibid. rule 2.
48 Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) arts 35 and 55.
49 Carsten Stahn, Jens Iverson and Jennifer Easterday, *Environmental Protection and Transitions from Conflict to Peace* (n 8).
50 Jean-Marie Henckaerts and Dana Constantin, 'Protection of the Natural Environment' in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014).
51 International Committee of the Red Cross, *Guidelines* (n 3) pt II.
52 Ibid.
53 Ibid.
54 Ben Schueler, 'Methods of Application of the Proportionality Principle in Environmental Law' (2008) 35(3) *Legal Issues of Economic Integration* 231.

damage because of its civilian nature, and the collateral damage must not be disproportionate in comparison to the anticipated concrete and direct military advantage from an attack on that military objective.[55] Alternatively, a military goal in general. As a result, disproportionate harm is prohibited. When estimating what that incidental civilian injury will be, both direct and indirect effects on the natural environment, as long as they are reasonably foreseeable, must be taken into account. According to the ICRC, that's significant because it has consequences for proportionality as we gain a better understanding of the long-term effects of conflict on the ecosystem, or of military activities on the environment.[56]

The third section is devoted to the rules that govern certain weapons. These are only a handful, but the restriction on employing biological and chemical weapons, as well as rules to reduce the impact of large war relics, can all help to safeguard the environment indirectly.[57]

Finally, the fourth and last section lays forth rules for the implementation of IHL distribution. So, for example, laws of military training and their transmission to civilians, as well as general IHL norms, include the natural environment. Emphasising that the natural environment should no longer be an afterthought when considering issues such as civilian protection.[58]

ICRC Recommendations

It's crucial how we put these guidelines, which can be highly protective if followed correctly, into practice. It is not enough that they exist on paper; much more work needs to be done to guarantee that they are widely distributed, implemented, and enforced.[59] The ICRC has made four major recommendations to nations to help with this, with the goal of reducing the environmental impact of conflicts in the long run.

They are first requesting that governments promote IHL norms safeguarding the environment and, if they have not previously done so, integrate them into armed forces doctrine, education, training, and disciplinary procedures, as well as appropriate international policy or legal frameworks.[60]

Second, actions should be taken to improve understanding of the consequences of conflict on the natural environment in order to reduce the negative effects of military operations when they occur. For example, mapping regions of particular environmental value or fragility in advance could be an example of this. This could include national parks or habitats for endangered species.[61]

Third, identify and define demilitarised zones in regions of significant environmental importance or fragility, such as national parks and habitats of endangered species. Despite the fact that the recommendation requires the most thought and work, the ICRC remains convinced, as it has for several decades, that the use of a demilitarised zone or a protected zone, as the ILC draft principles address, is an important way to provide a lot of clarity, especially of

55 International Committee of the Red Cross, *Guidelines* (n 3) rule 7.
56 Ibid.
57 International Committee of the Red Cross, *Guidelines* (n 3) pt III.
58 Ibid pt IV.
59 Finnish Institute of International Affairs (n 43).
60 International Committee of the Red Cross, *Guidelines* (n 3).
61 Finnish Red Cross, 'Protection of the Natural Environment in Armed Conflict' (33rd International Conference 2019) <https://rcrcconference.org/pledge/protection-of-the-natural-environment-in-armed-conflict/> accessed 28 February 2025.

the kind that military commanders require when conducting military operations. As a result, precise definitions of zones with high environmental importance are required.[62]

Finally, examples and best practices of steps that could be done to comply with IHL, preserving natural environments, will be shared. Conferences, military training, and exercise exchanges are all possibilities.[63]

With the observation that we are all becoming progressively engulfed in the climate and environmental crises, efforts to implement the legal protections granted to the natural environment under IHL are only one aspect of this, but a critical part. Finally, greater adherence to IHL could reduce the environmental damage of conflict, and crucial preventative work is needed to ensure that those safeguards are implemented. The way in which international law tries to keep unwarranted suffering from armed conflict to a minimum.

The 2025 ICC Policy on Addressing Environmental Damage through the Rome Statute

The accountability dimension of environmental protection in armed conflict has been significantly reinforced by the Office of the Prosecutor's *Policy on Addressing Environmental Damage through the Rome Statute*.[64] Unlike the International Law Commission's Draft Principles and the ICRC Guidelines, which are primarily preventive, interpretive, and operational in nature, the ICC Policy does more in situating environmental damage within the framework of individual criminal responsibility under existing international criminal law. Its fundamental premise is that serious environmental harm is not legally marginal but may constitute a core element of Rome Statute crimes where it forms part of prohibited conduct or contributes to civilian suffering.[65]

A major contribution of the Policy lies in its clarification that environmental damage may be relevant across the multiple crime categories within the Court's jurisdiction. While Article 8(2)(b)(iv) of the Rome Statute expressly criminalises attacks causing widespread, long-term and severe damage to the natural environment in international armed conflicts, the Policy emphasises that environmental destruction may also fall within the scope of other war crimes and crimes against humanity where it underpins attacks on civilian objects, forcible displacement, persecution, or inhumane acts.[66] This interpretive approach addresses a significant gap left by IHL-based protections, which have struggled to capture cumulative and indirect environmental harm that does not meet the high treaty threshold.

The Policy further extends accountability discourse beyond active hostilities. It explicitly recognises that environmental damage may arise in situations of occupation, protracted instability, and conflict-related exploitation of natural resources, including conduct linked to economic activity and governance failures.[67] In this respect, the Policy complements the ILC Draft Principles on natural resource governance and corporate due diligence by identifying circumstances in which environmentally destructive conduct may give rise to individual criminal liability, even where such conduct occurs outside traditional battlefield contexts.[68]

Another notable innovation is the Policy's evidentiary and methodological orientation. The Prosecutor commits to drawing on environmental science, expert ecological evidence, satellite imagery, and climate data to assess

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62 Thibaud de La Bourdonnaye, 'Greener Insurgencies? Engaging Non-State Armed Groups for the Protection of the Natural Environment During Non-International Armed Conflicts' (2020) 102 *International Review of the Red Cross*.

63 Ibid.

64 International Criminal Court, Office of the Prosecutor, *Policy on Addressing Environmental Damage through the Rome Statute* (n 4).

65 Ibid paras 6–10.

66 Ibid paras 18–26; Rome Statute of the International Criminal Court (1998) art 8(2)(b)(iv).

67 Ibid paras 27–33.

68 United Nations International Law Commission, *Draft Principles* (n 4) principles 10–13.

foreseeability, gravity, and the long-term consequences of environmental harm.[69] This approach responds directly to longstanding critiques of international humanitarian law's limited capacity to address slow-onset, reverberating, and intergenerational environmental damage resulting from armed conflict.

Despite its normative significance, the Policy is subject to important limitations. It does not amend the Rome Statute, nor does it create a standalone international crime of environmental destruction. Its application remains constrained by jurisdictional limits, the narrow scope of Article 8(2)(b)(iv), and the requirement that environmental harm be legally connected to existing crimes.[70] Moreover, the Policy expressly acknowledges that prosecutorial discretion, evidentiary complexity, and political constraints will shape enforcement outcomes.[71] In that regard, it operates as an interpretive and strategic instrument rather than a binding expansion of international criminal law.

Nonetheless, when read alongside the ILC Draft Principles and the ICRC Guidelines, the ICC Policy strengthens an emerging, multi-layered framework for environmental protection in armed conflict. By linking environmental destruction to criminal accountability, it reinforces the normative shift away from viewing environmental harm as an unavoidable consequence of war and towards recognising it as conduct capable of engaging the gravest forms of international legal responsibility.

Conclusion

The protection of the environment during armed conflict has moved decisively from the margins of international humanitarian law towards a more visible and structured legal concern. The ILC Draft Principles, the ICRC Guidelines, and the ICC Prosecutor's 2025 Policy together reflect an emerging consensus that environmental harm is inseparable from civilian protection, sustainable peace, and accountability for serious violations of international law. By addressing different phases of conflict and combining preventive, operational, and punitive dimensions, these instruments collectively strengthen the normative architecture governing wartime environmental protection.

Yet, as the analysis of contemporary conflicts, including Gaza, demonstrates, law and practice remain misaligned. Environmental destruction continues to occur at scales that devastate civilian life while evading effective legal response. Threshold limitations, enforcement challenges, and political constraints continue to undermine protection, particularly in non-international armed conflicts and prolonged occupations. Bridging this gap requires not only the progressive interpretation of existing norms but also sustained political will, institutional coordination, and the meaningful integration of environmental considerations into military planning and post-conflict reconstruction.

Ultimately, treating the environment not as a silent casualty of war but as a legally protected civilian interest is essential to the credibility and humanity of the international legal order. Strengthening compliance, accountability, and implementation is no longer aspirational; it is an urgent necessity in an era defined by ecological fragility and persistent armed conflict.

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69 Ibid paras 34–40.
70 Ibid paras 41–44.
71 Ibid paras 45–48.

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Constitutionalism in the First Constitution of the Maldives

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Abstract

The Maldives saw the promulgation of her first Constitution in 1932. A key question relating to that constitution is whether it meaningfully guaranteed the supremacy of the basic law or a *government of law* instead of a *government of men*. To answer it, this article explores, on the one hand, the concept of *constitutionalism* as a normative politico-legal doctrine that guarantees *rule of law* over political powers, the practice of *constitutional judicial review* as the main legal and judicial tool of enforcing and upholding *constitutionalism*, and the *independent judiciary* as the key platform for conducting *constitutional review* to uphold *constitutionalism*. On the other hand, it analyses relevant provisions in the Constitution of 1932 to see whether it enshrined the principle of *constitutionalism*, whether it provided for a mechanism of *constitutional judicial review*, and whether it established an *independent judiciary* which could function as an efficacious venue for upholding *constitutionalism* and ensuring a *government of law*.

Keywords: Constitution of Maldives 2008; Constitutional judicial review; Judicial independence; Constitutionalism; Maldivian Judiciary

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ނުވަތަ އުޞޫލުން ބަލާއި "ދުސްތޫރީ މުރާޖަޢާ" ގެ އިޞްލާޙު ބޭނުން ކުރެވޭ މައިގަނޑު އަދި މުހިއްމު މަސްލަ ކަމުގައެވެ. އަންނަނިވި ދުވަސް، 1932 ވަނަ އަހަރުގެ ޤާނޫނުއަސާސީގައި މަބާދުއް ދުސްތޫރިއްޔަތު އެކަށައަޅާފައި އޮތްތޯ ބައި، ބަލައި ދުސްތޫރީ މުރާޖަޢާގެ ނިޒާމެއް ގާއިމު ކޮށްފައި އޮތްތޯ ބައި، ބަލައި މަބާދުއް ދުސްތޫރިއްޔަތު ނުވަތަ އުޞޫލުގެ މަފްހޫމު ބާރުވެރިކޮށް އަދި ގާނޫނުގެ ހުކުމަށް ހަރުދަނާ ކަމަކަށް ވުރެން އެކަށޭނެ ފުރާ ވުރެ މިނިވަން ފަނޑިޔާރުގެއެއް ގާއިމު ކޮށްފައި އޮތްތޯ ދުސްތޫރީ ޤާނޫނުގެ ބަލާއި، މި މަޤްޞަދުގައި 1932 ވަނަ އަހަރުގެ ޤާނޫނުއަސާސީ ތަޙުލީލު ކޮށް ދިރާސާ ކޮށްފައި ވާނެއެވެ.

ގުޅޭބަސްތައް: ދިވެހިރާއްޖޭގެ ގާނޫނުއަސާސީ 2008؛ ދުސްތޫރީ މުރާޖަޢާ؛ ފަނޑިޔާރުގެ މިނިވަންކަން؛ ދުސްތޫރީ ވެރިކަން؛ ދިވެހިރާއްޖޭގެ އަދުލު އިންސާފުގެ ނިޒާމު.

Introduction

The Republic of Maldives had six constitutions before 2008,[1] each of them marking a milestone in the country's politico-legal evolution and her journey on the path of *Rechtsstaat* and *rule of law*.[2] The first of them—the very first Constitution of the country, promulgated in 1932—was in more than one respect the most important one. It had a lasting impact on both the form and the substance of all the six constitutions that came after it.

A key question in the historical and analytical study of first Constitution of the Maldives is to ask whether it adhered to or conformed with the philosophy of *constitutionalism*. Was it, as per the categorization of constitutions by scholars such as Sartori, a *garantiste* one which meaningfully provided for the limitation of political power, guaranteeing a *government of law* instead of a *government of men* for the Maldivian people, or should it be described as a *nominal* or *façade* constitution which failed to do so? [3]

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[1] After the first Constitution of 1932, which saw two amendments, one announced on 5th July 1934 and the second coming on 28th January 1937, the second Constitution was promulgated on 23rd April 1942 (had one amendment, announced on 31st May 1951); the third on 1st January 1953 (no amendments); the fourth on 7th March 1954 (First Amendment on 4th June 1964, and Second Amendment on 10th July 1967); the fifth on 11th November 1968 (First Amendment on 26th April 1970, Second Amendment on 1st August 1975, and Third Amendment on 21st April 1975); and the sixth promulgated on 27th November 1997 (no amendments during its period of operation spanning ten years, seven months and six days). The current Constitution, promulgated on 7th August 2008, is the Seventh Constitution of the Maldives. The current one provides, at least in theory, for co-equality of the judicial branch in accord with the doctrine of *trias politica*, for the independence of judiciary, and for strong-form constitutional judicial review, while enshrining all the substantive and fundamental values of *constitutionalism* in its various provisions.

[2] The German term *Rechtsstaat* and the English concept of *rule of law* are commonly understood to mean the same thing: law being the highest power in a community, and that understanding is not really erroneous. However, *Rechtsstaat* is perhaps an idea more oriented towards the political order, its "basic tenet … (being) that the government ought to be closely regulated by law". See Glenn Schram, "Ideology and Politics: The Rechtsstaat Idea in West Germany," *The Journal of Politics* 33, no. 1 (1971): 134, https://www.jstor.org/stable/2128536. On the other hand, *rule of law* is a more general concept meaning that law must be the supreme thing that regulates the community, in politics but also in other aspects of communal life. On the similarity and distinction between what these two terms denote and connote, see Nick W. Barber, "The Rechtsstaat and the Rule of Law," *The University of Toronto Law Journal* 53, no. 4 (2003), https://www.jstor.org/stable/3650895.

[3] Giovanni Sartori explains what he calls *nominal constitutions* and *façade constitutions* in the following terms: "I call "nominal" the constitutions (which are) … fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders … Nominal constitutions are therefore "nominal" in the very simple sense that they bear the "name" constitution. (They) … do not restrain the exercise of political power in a given polity. Actually, nominal constitutions do not really pretend to be "real constitutions." They frankly describe a system of limitless, unchecked power. They are not a dead letter. It is only that this letter is irrelevant to the *telos* of constitutionalism. … The façade constitutions are different from the nominal ones in that they take the appearance of "true constitutions." What makes them untrue is that they are disregarded (at least in their essential *garantiste* features). Actually, they are "trap-constitutions." As far as the techniques of liberty and the rights of the power addressees are concerned, they are

To answer this question, we need to examine the 1932 Constitution closely and pursue, in our investigation, three main lines of inquiry: *firstly*, we must see whether it truly enshrined and embodied the doctrine of *constitutionalism* — whether it meaningfully provided for the binding of the Government with the shackles of its controlling and restricting norms; *secondly*, we have to examine whether it provided for a mechanism of *constitutional judicial review* (CJR) to enforce its principles and rules upon and against the Government; *thirdly*, we ought to see whether it set up and empowered a truly *independent judiciary* which could carry out that enforcement. Why these three things, one might ask; and the answer is not very complicated. They — a supreme basic law embodying and establishing *constitutionalism*, an effective mechanism of *constitutional judicial review*, and an *independent judiciary* — are the necessary constitutional and legal foundations upon which political power can be held in check and subjected to the *rule of law*.[4] They are the building blocks of *constitutionalism.* Without any of them, there is no *constitutionalism*; if any of them is missing, there can be no real restraining, restricting, or limiting of political power by the law; they are necessary if a State is to have a *government of law and not of men*.

In the following sections, we will briefly look at the doctrines of *constitutionalism*, the concept of CJR, and the *independence of judiciary* to elaborate on what is stated in the above paragraph, to establish the major premise of the argument of this article, and to provide a conceptual basis for the analysis of the 1932 Constitution to see if it indeed conformed with the philosophy of *constitutionalism*.

Constitutionalism: The End

If government is to be restrained and restricted by a supreme law, the people framing a constitution for a state must first have *the belief* that it is how things must be. There should be the conviction that the ruler cannot be a *leviathan*[5] enjoying, whether *de facto* or *de jure* or both, all-encompassing and unlimited sovereign powers of government. This belief and conviction must then be translated into supreme law through enshrining and entrenching it in the

a dead letter." According to his view, a constitution which is truly and effectively framed to attain the "*telos ... of constitutionalism*" is a *garantiste* constitution. In his understanding, such a constitution would constitute "a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government." As for the guarantees such a constitution would include, he observes that "certain techniques of allocation of power, a bill of rights, the rule of law, judicial review," among other things must be guaranteed. See Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *The American Political Science Review* 56, no. 4 (1962): 861 & 855. https://www.jstor.org/stable/1952788.

[4] See *infra*, Notes 32, 33, 34, and 35 and the corresponding passages quoted from Mauro Cappelletti.

[5] See Thomas Hobbes, *Leviathan or The Matter, Form and Power of a Commonwealth Ecclesiastical and Civil*, (Oxford Clarendon Press, 1909): First published in 1651 (publisher unknown). Hobbes famously proposed the idea that once the society, under a *social contract*, creates a sovereign government, that government then has all sovereign powers of making laws, enforcing them, and adjudicating on all disputes in such a way that the government – or monarch – cannot be held accountable to a law. This idea was principally based on the European traditional practice of absolute monarchy and the Christian idea that kings held power by a divine right which could not be challenged and undermined by any human authority except the ultimate authority of the Vicar of Christ—the Pope himself. History has shown that such absolute and untrammelled power in the hands of the leader or government—even the so-called "democratically elected" governments—is sooner or later used in terrible forms and ways to oppress the people; from the absolutism and despotism of Caligula and Tiberius of Rome to Hitler of Germany and Mussolini of Italy, from Abu Ali al-Mansur al-Hakim of Fatimid Egypt to Abdul Fattah al-Sisi of modern Egypt, from King Leopold II of Belgium to the neo-liberal, neo-con, capitalist, and hegemonic governments of modern USA and Britain, the truth that is clearly seen is that when rules and governments sit above Just, Equitable, and Good law, people suffer in terrible ways under the dictates of the whimsical and capricious arbitrariness of those in power.

constitution framed for the governance of the state.[6] This is how *constitutionalism* is born in any state.

An ordinary dictionary of the English language would explain the primary meaning of the word '*constitutionalism*' in more or less the following terms: it carries the notion of believing in or adhering to the 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 law to which all officials and institutions of Government are subject to, subservient to, and accountable to. *Constitutionalism*, then, is a moral doctrine based on the fundamental ideas of *justice* and *right reason*; it is also a manifestation or a form of the general doctrines of *Rechtsstaat* and *rule of law* which seek to arrange a community, including all its communal affairs as well as the lives of its individual members, within the confines of the law. It is about subjecting the ruler, or rulers, or the government, or political powers, to a law that is *higher* than them; it is about *establishing a government of law* instead of a *government of men*. This higher law or supreme law is typically called a *constitution*—hence, the term *constitutionalism*.[7] McIlwain gives the classic definition of this significant term 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."[8] This definition by McIlvain as well as what other well-known scholars have said on the concept,[9] 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 supreme basic law which sets out how government is formed and how it must work. By establishing *rule of law* over politics and by ensuring that all political authorities and officials act in accordance with pre-determined rules, *constitutionalism* seeks to, as McIlvain says in his definition itself, remove arbitrariness from government.[10] In

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[6] Nwabueze, one of the leading constitutional jurists of Africa, stated that three questions must be asked in examining whether *constitutionalism* has been enshrined in a constitution. Of those three, the first question—which is the one relevant to the point being made here—is to ask how or in what form the restraints on the political powers of the State are imposed; whether the rules limiting government are legal rules embodied in a written and supreme constitution, or just factual limitations imposed by ordinary law or convention and usage. … In answering this question, he says that the restraints limiting government must come from a supreme constitution which is unalterable by the ordinary legislature. See Benjamin O. Nwabueze, *Constitutionalism in the Emergent States*, (Fairleigh Dickinson University Press, 1973), 4-10.

[7] On this point—the idea that the Constitution as the basic and supreme law of the land is a law higher than all political powers and that the Government is subservient to it in every way—Thomas Paine wrote memorably and eloquently. "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The Constitution of a country is not the act of its Government, but the of the people constituting a Government. … and Government without a Constitution is power without right. … the continual use of the word 'constitution' in the English parliament shows there is none; and that the whole is merely a form of government without a constitution, and constituting itself with what power it pleases. If there were a Constitution it certainly could be referred to; and the debate on any constitutional point would terminate by producing the Constitution. One member says this is constitution, and another says that is constitution – today it is one thing, tomorrow it is something else – while the maintaining of the debate proves there is none." See Thomas Paine, *Rights of Man*, (Wordsworth, 1996), 36, 41, & 91-92.

[8] Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, (Cornell University, 1947), 21-22.

[9] See, for example, Alexander Stanley De Smith, "Constitutionalism in the Commonwealth Today", *Malayan Law Review* 5 (1962): 205, https://www.jstor.org/stable/24861712.; Sartori, "Constitutionalism: A Preliminary Discussion," 861.; Richard S. Kay, "American Constitutionalism," In *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander, (Cambridge University Press, 1998), 16.; Larry Alexander, *Constitutionalism: Philosophical Foundations*, (Cambridge University Press, 1998), 4; Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review*, (Cambridge University Press, 2007), 21.; Dieter Grim, *Constitutionalism: Past, Present, and Future*, (Oxford University Press, 2016), 6-11.; Nick W. Barber, *The Principles of Constitutionalism*, (Oxford University Press, 2018), 2.

[10] Nwabueze explains what 'arbitrariness' is as follows: "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

today's world, the idea or doctrine of *constitutionalism* is almost unanimously accepted as a politico-legal ideal to which every state must conform.[11] In its nature, it is an end in itself, although it seeks to realize ends even more fundamental and crucial for every member of the society.

Although the concept of *constitutionalism* entered academic discourse as simply the idea of shackling and holding to account political power or government, and has retained that basic idea as its core, it has grown and become mature to include many secondary concepts and principles which complement and strengthen the original and fundamental concept. This can be seen from a reading of works by leading modern scholars,[12] who, while having differing ideas of what completes *constitutionalism* as a doctrine, suggest in general that constituent principles and tools such as *popular sovereignty*, *supremacy and primacy of the constitution*, *independence of the judiciary*, *separation of powers*, *protection of fundamental rights and liberties*, *constitutional and civil control of military and police*, in addition to the necessary *general substantive* and *general procedural* limits on government, must be there in the constitutional design and framework for *constitutionalism* to exist.[13] The term has also being used to carrying

because it happens to be benevolent, since all unfettered power is by its very nature autocratic." Nwabueze, *Constitutionalism in the Emergent States*, 1.

[11] Waluchow, *A Common Law Theory*, 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."

[12] See Barber, *The Principles of Constitutionalism*, 2-3, who writes: "Perhaps constitutionalism binds the state to the rule of law and popular sovereignty, or to the separation of powers, or to the separation of powers and, also, to human rights. ... In addition to a commitment to some or all of these principles, it seems that these principles constrain the state in a particular type of way: through law, and, more specifically, through their application by judges. Constitutionalism requires judges to possess and exercise the capacity to strike down acts of the state that run against these principles. On some accounts of constitutionalism, strong- form judicial review— where the courts possess the power to declare acts of the legislature to be unconstitutional— is a necessary feature of the doctrine. Constitutionalism requires the legal realm to limit and regulate the political. Relatedly, a connection is sometimes drawn between constitutionalism and entrenchment: not only do judges enforce these principles against state bodies but constitutionalism also requires that the capacity of the legislature to override judicial decisions, or to amend the constitution to alter the scope of judicial power, is constrained. The strictures of constitutionalism, it seems, apply to the legislature as well as to the executive." Also, see Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law*, (Springer, 2016), 2: "Since its origins, constitutionalism has striven to achieve the goal of limiting political power through the acquisition of three legal tools: (i) the adoption of a written constitution, prescriptive toward the institutions of the state and suitable to act as paramount law upon its acts; (ii) the separation of powers of the state; (iii) the legal protection of a wide range of individual rights." See also, Kesiena Urhibo, "The Prospective Nexus between Constitutionalism, the Rule of Law and Democratic Good Governance: The Nigerian Experience," *Beijing Law Review* 14, no. 2, (2023), 584-605, doi: 10.4236/blr.2023.142030, which gives a list of "indices of constitutionalism from various works as follows: 1) government according to constitution; 2) representative/democratic government; 3) separation of powers; 4) respect for human rights; 5) independent judiciary/judicial review; 6) control of the police/military by the constitution.

[13] Especially important is the doctrine of *supremacy* or *primacy of the Constitution*, for there cannot, as common sense alone can tell us, be any subjection of political power or Government to the law unless and until the basic law has been framed by a source higher than the Government and that basic law stays above the Government. This "higher law" position of the fundamental law of the polity – the Constitution – is the meaning, essentially, of the doctrine of the *supremacy* or *primacy of the Constitution*. This axiomatic principle has been accepted by scholars in general, and one example has already been given above – what Nwabueze stated on the matter (See Note 6 above). The meaning of *supremacy of the Constitution* has been explained lucidly by Jutta Limbach, former President of the German Constitutional Court and one of the most well-known constitutional jurists of modern Europe. He says that the "concept of the supremacy of the constitution confers the highest authority in a legal system on the constitution. Stating this principle does not mean just giving a rank order of legal norms. The point is not solely a conflict of norms of differing dignity. The principle of the supremacy of the constitution also concerns the institutional structure of the organs of State. The scope of the principle becomes clear if we reformulate it: the supremacy of the constitution means the lower ranking of statute; and that at the same time implies the lower ranking of the legislator." He goes on to say that there are "three traits that primarily characterise the principle of supremacy of the constitution." He gives

other related meanings. However, for this work we will just focus on the primary meaning, or the main idea of *constitutionalism* as McIlvain, Corwin, de Smith, Sartori and others have explained it, instead of discussing those related meanings and what constitutes the core values of *constitutionalism* and what the necessary tools which must accompany it are.

The question as to *how* the doctrine of *constitutionalism* can be embodied in a constitution, however, must be addressed. It has been argued that the very fact of the existence of a *written constitution* as the basic law of the polity should mean *constitutionalism* is there in principle or in theory, irrespective of whether there are express or definitive provisions in the constitution enshrining the precepts and principles of *constitutionalism*. That would be true if the constitution in question has been established in accord with what scholars such as Thomas Paine have said[14] about a constitution being by definition and of necessity an instrument of controlling and limiting a government and a constitution which fails to do not being a constitution in truth. The view that a truly *garantiste* constitution framed on the basis of *republicanism*, by a people who are truly the *locus of sovereignty* in the polity, would be a basis for *constitutionalism* by the mere fact that it exists, was held by the United States Supreme Court itself, in the case of *Marbury v. Madison*.[15] However, if a constitution has been granted or put in place by a powerful

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them in the following words: "1. The possibility of distinguishing between constitutional and other laws; 2) the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and 3. An institution with the authority in the event of conflict to check the constitutionality of governmental legal acts." See Jutta Limbach, "The Concept of the Supremacy of the Constitution," *The Modern Law Review* 64., no. 1 (2001): 3, https://www.jstor.org/stable/1097135.

[14] See *supra*, Note 8.

[15] Several passages from the Court's judgment contain this view of the Court, and some of them are as follows: "That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent. … This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. … The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act. … Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. … If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. … Certainly, all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. … This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. … 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. ... If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. ... Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. ... This doctrine would subvert the very foundation of all written Constitutions. It would

sovereign who sits and continues to sit above the law, such as an absolute monarch or a despotic and authoritarian government, this is not necessarily the case. In such case, the constitution prescribed by those in power may just be a *façade* which does not have the genuine status of a *supreme law* or a *nominal* one which merely describes the power structure as it is. A constitution which an ordinary legislature or the ordinary institutions of the Government can amend and change is no different—it cannot truly uphold *constitutionalism*. In other words, there can be "constitutions without constitutionalism" as Nwabueze, Casper, Chen and many other jurists have observed.[16]

Hence, to establish whether a constitution enshrines the *doctrine of constitutionalism*, we must *first* examine whether it is a truly *republican* and *garantiste* constitution, originating from the general will and consent of people who are genuinely the *locus of sovereignty* in the polity and who use their sovereign powers to create a government under the *rule of law*. If a constitution passes this criterion, we may conclude that it upholds *constitutionalism*. *Second*, we may go on further to see if the constitution includes express and definitive provisions which enshrine and embody the *doctrine of constitutionalism*. If it does, there can then be no debate that that constitution upholds *constitutionalism*. It is this two-tier test that we will employ, in Section VI below, to examine whether the Maldivian Constitution of 1932 adhered to *constitutionalism* to provide the first foundation for establishing a *government of law and not of men* in the country.

Constitutional Judicial Review: the Means

Mere profession of the postulates of *constitutionalism* in a constitution, mere inclusion of the principles and precepts of *constitutionalism* in a constitution and prescribing a constitutional obligation for political officials and institutions

declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure." See the judgment of *Marbury v. Madison*, 5 U.S. 137 (1803). Also, see Section VII for a brief explanation of how the United States Supreme Court justified the practice of *constitutional judicial review* in this case.

[16] Nwabueze put the point in the following terms: "That there is a formal written constitution according to whose provisions a government is conducted is not necessarily conclusive evidence that the government is a constitutional one. Again, the determining factor is: Does the constitution impose limitations upon the powers of the government? There are indeed many countries in the world today with written constitutions but without constitutionalism. Normally, a constitution is a formal document having the force of law, by which a society organizes a government for itself, defines and limits its powers, and prescribes the relations of its various organs inter se, and with the citizen. But a constitution may also be used for other purposes than as restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable legal restraints. Far from imposing a brake upon government, such a constitution may indeed facilitate or even legitimize the assumption of dictatorial powers by the government. … The Soviet government provides perhaps the most glaring example of arbitrary power, and yet the Soviet Union has a constitution of 146 articles which, somewhat in the fashion of the democratic constitutions of the Western countries, contains a guarantee of individual rights as well as procedures for the exercise of governmental functions, indeed a full paraphernalia of a seemingly regularized system of restraints. Yet all this seems to be nothing but a façade." See Nwabueze, *Constitutionalism in the Emergent States*, 2. Casper states that "… constitutionalism does not refer to having a constitution but to structural and substantive limitations on government …" Gerhard Casper, "Constitutionalism," *University of Chicago Law Occasional Paper*, no. 22 (1987): 16. See also Albert H. Y. Chen, "The Achievement of Constitutionalism in Asia: Moving Beyond 'Constitutions without Constitutionalism," In *Constitutionalism in Asia in the Early Twenty-First Century*, ed. Albert H. Y. Chen, (Cambridge University Press, 2014), 1. In addition, Sartori's explanation of *garantiste*, façade, and nominal constitutions also shows that not all constitutions are there to truly uphold rule of law and constitutionalism (See *supra*, Note 4).

to honour them is not sufficient. For *constitutionalism* to be truly enforceable, the constitution must provide tools and instruments and prescribe processes and procedures through which those provisions ensuring *constitutionalism* may implemented. CJR has been almost universally accepted as the best such mechanism. It is pointing out this fact that Chen and Maduro made the following remarks: "In the early twenty-first century, a well-developed system of constitutional review is now generally accepted as an essential or desirable feature of a liberal constitutional democracy."[17]

To look at basic terminology, the term '*judicial review*' was first used, or at least brought into common parlance in the legal academia, during the first decade of the twentieth century by Corwin[18] in the USA. He introduced the term and used it as early as 1909,[19] defining it as "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."[20] The new term soon became common, not just in the USA, but also in the United Kingdom. However, as Tushnet notes,[21] it gained a different meaning on the eastern side of the Atlantic. He writes: "The term "judicial review" … (means) In US usage … the judicial practice of determining whether a statute is consistent with the Constitution; (while) in British usage it refers to the judicial practice of determining whether administrative action is consistent with statutory authorization." This difference which Tushnet is pointing out is what distinguishes the two types of the wider concept of *judicial review* from each other: the newer practice of *constitutional judicial review* (CJR) developed in the USA which Corwin is describing in the definition given, and the traditional British common law practice of *administrative judicial review*[22] (ADR). CJR and ADR are two different things, both conceptually and functionally, even though they share a lot with each

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[17] Albert H. Y. Chen and Miguel P. Maduro, "The Judiciary and Constitutional Review," In *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet et el, (Routledge, 2013), 191.

[18] Keith E. Whittington, "Reconsidering the History of Judicial Review", *Constitutional Commentary* 35, no. 1 (2020): 1, https://heinonline.org/HOL/Page?handle=hein.journals/ccum35&id=4. Also, see Mary S. Bilder, "Idea or Practice?: A Brief Historiography of Judicial Review," *The Journal of Policy History* 20, no. 1 (2008): 14, http://ssrn.com/abstract=1134831.

[19] Corwin used the term in such works as *The Growth of Judicial Power*, the work of which he started in 1909. He also used the term in 1914. See Edward S. Corwin, *The Doctrine of Judicial Review*: *Its Legal and Historical Basis and Other Essays*, (Princeton University Press, 1914).

[20] Edward S. Corwin, "Judicial Review in Action," *University of Pennsylvania Law Review* 74, no. 7 (1926), 639, https://www.jstor.org/stable/3313984.

[21] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, (Edward Elgar Publishing Limited, 2014), 6.

[22] 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 University Press, 2011), 39.; Neil Parpworth, *Constitutional & Administrative Law*, (Oxford University Press, 2012), 251.; Hilaire Barnett, *Constitutional & Administrative Law*, (Routledge, 2013), 562.; and Lisa Webley and Harriet Samuels, *Public Law: Text, Cases, and Materials*, (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 Anthony W. Bradley and Keith D. Ewing, *Constitutional and Administrative Law*, (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.

other and have at times being described with the same term. 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 it 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."[23]

CJR is a tool, an instrument, a mechanism, or a means established by a supreme constitution to empower a judicial institution to enforce its principles and rules, and to enforce its supremacy and primacy over and upon all political power and the exercise of such power. If we look at it in operation, it is a type of adjudication in which a competent court – usually a specialized *constitutional court* or a generalist superior court[24] – judicially evaluates actions, decisions, or policies of the government or individual state institutions and agencies for comport with a written constitution which is deemed supreme and limiting political powers in accordance with the idea of *constitutionalism*. The outcome of this adjudication 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. The purpose, obviously, is to prevent government institutions and officials from violating the constitution, and holding any violators duly accountable where any breach has taken place. As for the question of what can be reviewed through CJR, *primary legislation* enacted by the Legislature, *subordinate legislation* made by the Executive, decrees and proclamations by the Head of State or Head of Government, resolutions passed by the Legislature or the Cabinet, ministerial decisions, government policies, local government actions and decisions,

[23] Bryan A. Garner, *Black's Law Dictionary*, (West, 2009), 924.

[24] Courts exercising the power of CJR are typically categorized as either American model generalist courts, or as European model *constitutional courts*, or as hybrid courts which combine some features from both these two models. In the American model, it is the ordinary courts of the ordinary judicial branch of the State – the *Ordre Judiciaire* – which practice the power of CJR. This is the case in the USA, where all federal and state courts, from the US Supreme Court to state lower courts, can exercise CJR in principle. In the European model, courts of the ordinary *Order Judiciaire* are not empowered, not even permitted, to do CJR, but a fourth organ of the State—distinct and apart from the Legislature, the Executive, and the Judiciary—is created and empowered to perform that function. That organ is a special court, or a *constitutional court*, which has no jurisdiction other than hearing CJR cases. The European model was proposed in theory by Hans Kelsen, the notable European jurist of the early twentieth century, and put into practice for the first time in Austria, where a Kelsenian *Constitutional Court*, specializing in constitutional review and placed outside the normal judiciary and the ordinary governmental system, was created in 1920. (See Tom Ginsburg, "The Global Spread of Constitutional Review," In *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, (Oxford University Press, 2008), 85.) Czechoslovakia also established a *Constitutional Court* in the same year. (See David Deener, "Judicial Review in Modern Constitutional Systems," *The American Political Science Review* 46, no. 4 (1952): 1086, https://www.jstor.org/stable/1952114.). The model found its ultimate and quintessential form, as many believe, in the German Constitutional Court established by the Bonn Constitution – *Basic Law* or the *Grundgesetz* of the German Federation – in 1949. It is notable that there is a common misunderstanding, which needs to be avoided, regarding the distinction between a *constitutional court* and an ordinary court which is placed in the ordinary *Ordre Judiciaire* and hears CJR cases together with ordinary civil and criminal cases; many seem to think that any court exercising CJR jurisdiction can be characterized or described as a *constitutional court*. This misunderstanding can be seen from Suood's description of the Supreme Court of the Maldives as "a constitutional court," (See Husnu Al Suood, *The Maldivian Legal System*, (Maldives Law Institute: 2014), 156.) a description which constitutional theory and scholarly practice do not warrant. A *constitutional court* does not sit in the ordinary judicial branch of the State; it is placed outside the three ordinary organs of the State, and is strictly specialized in hearing constitutional review cases. The Maldivian Supreme Court, therefore, is not, and cannot be described hence, as a *constitutional court*. It is, rather, a generalist Apex Court heading the Maldivian *Ordre Judiciaire*, similar to, in this context, to the United States Supreme Court which hears constitutional judicial review cases together with civil and criminal cases.

actions and decisions of institutions and law enforcement officers such as police are common examples.

Many scholars have given definitions to the doctrine of CJR, and we may look at a few of them here: *Firstly*, Corwin's definition, already given above, 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."[25] *Secondly*, Hartmann's description 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 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."[26] *Thirdly*, Whittington et el define 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."[27]

These definitions assert what has been stated above: that the function of CJR is to uphold a fundamental law higher than the government that is to bind all political power in the State, to limit political power within its bounds, or to establish a '*government of law and not of men*'—that is, a government that rules and governs strictly in accord with the *supreme law* and other laws which are made under it, and not according to the whims and caprices or the arbitrary decisions and actions of those who happen to hold positions of power in the Government. In fact, in a *garantiste* constitution predicated on the idea of *republicanism* and framed on the foundation of *rule of law*, CJR is not just *a* tool of upholding and protecting *constitutionalism*: it is *the main* mechanism for it. CJR gives life to the idea of the constitution being the supreme law that binds and controls political authority. Stating this point, celebrated constitutional scholar and jurist Mauro Cappelletti calls CJR "a central element of … modern constitutionalism".[28]

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[25] See *supra*, Note 21.

[26] Bernd J. Hartmann, "The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919," *BYU Journal of Public Law* 18, no. 1, (2003): 108-109, https://heinonline.org/HOL/Page?handle=hein.journals/byujpl18&id=113.

[27] Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, (Oxford University Press, 2008), 81.

[28] Mauro Cappelletti, "The Expanding Role of Judicial Review in Modern Societies," *Revista Juridica* 58, no. 1 (1989): 11. https://heinonline.org/HOL/Page?handle=hein.journals/rjupurco58&id=11. The point is 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

Independent Judiciary: the Venue

The third foundation of *constitutionalism* is an *independent judiciary*: a judiciary which has constitutional legitimacy and power to impartially, authoritatively and effectively enforce the Constitution—the *supreme law*—upon political powers of the State. Such a judiciary is given the status of an independent branch of the state co-equal to the political organs, and given *de jure* capacity and authority to enforce the norms of the Constitution upon political officials and institutions, by the constitution itself. Only on the basis of such *de jure* independence of the judiciary can *de facto* independence of the courts can truly come about.

Those who write a constitution can include in it promises guaranteeing the *rule of law* on paper. But a constitution cannot enforce itself; a panoply of grand words and solemn promises written on a piece of paper about government by and under the law cannot by themselves ensure that a people or a nation actually gets it; words do not rise up from the pages of a document to shackle unruly political forces. Promises and guarantees of *constitutionalism* must be enforced, hence, through a robust, responsible, and faithful human agency which fulfills the task in question—and it is almost universally accepted in today's world that an *independent judiciary* is the one best suited for the task. States throughout the world, have entrusted the role and responsibility 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.

The questions as to *what is an independent judiciary*, or *how such a judiciary is the best venue for enforcing constitutionalism*, are crucial questions which need to be addressed; but we will not address them here, for it will be a discussion too lengthy. For now, let us just substantiate our argument that an *independent judiciary* is a necessary foundation and the proper venue for enforcing *constitutionalism*, which is almost an axiomatic truth which does not need to be proved, with some statements from leading scholars in this field.

One such statement comes from Stephenson: "an independent judiciary with the power to constrain the executive and legislative branches is commonly thought to be the foundation of government under the rule of law".[29] Another is from Nwabueze who explains how only a judiciary which is *independent* can be key to *constitutionalism* at some length, concluding with the following sentence: "Only if its independence is constitutionally guaranteed, would the judiciary be able effectively to discharge, without fear or favour, its heavy responsibility of acting as the sentinel of constitutionalism …"[30] Finally, the significant point that it is only a *judicial* mechanism of constitutional review, in the form of an *independent judiciary*, which could effectively ensure *constitutionalism* was made strongly by Cappelletti, on the basis of both *a posteriori* and *a priori* reasoning. He also expressed the opinion, as argued above in Sections II and III, that a *supreme constitution* and a robust mechanism of CJR are both necessary for

framework of modem 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," *California Law Review* 58, no. 5 (1970): 1018-1019, https://heinonline.org/HOL/Page?handle=hein.journals/calr58&id=1043. Another passage from Cappelletti makes the point 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, "The Expanding Role," 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, he political branches." Ibid, 13.

[29] Matthew C. Stephenson, "When the Devil Turns …": The Political Foundations of Independent Judicial Review," *The Journal of Legal Studies* 32, no. 1, (The Chicago University Press, 2003): 59, https://doi.org/10.1086/342038.

[30] Nwabueze, *Constitutionalism in the Emergent States*, 17-18.

constitutionalism. 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",[31] 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."[32] He goes on: "In other words, it involves a serious attempt to make *effective* the provisions of the constitution. To this end, a 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; …"[33] He continues to argue that it is the judiciary which is best suited to provide this system of *constitutional review*. "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 very "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 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."[34]

First Constitution of the Maldives – An Introduction

The first constitution of the Maldives came in the year 1932, while the country was still a monarchy[35] and was under

[31] Cappelletti, "The Expanding Role," 11.
[32] Ibid.
[33] Ibid.
[34] Ibid, 11-13.
[35] By 1932, the Maldives had had a very long history as an independent monarchy—losing her sovereignty and independence to foreign powers only a few times and only temporarily, partially, and briefly. According to researchers of the history of the country, the Maldivian monarchy has records going as far back as 362 AC. (See Naseema Muhammad, *Heritage of the Maldivian People*, (Centre for Dhivehi Language and History, 2002), 31-32; Also, see Muhammad I. Lutfi, *Abridged History of the Maldives*, (Centre for Dhivehi Language and History, 2011), 25.) The Monarchy, which had lasted at least for some sixteen centuries, was first abolished on 1st of January 1953 in accord with a public referendum taken months before, in April 1952. (See Muhammad Amin et el, *Welcome … Maldivian Republic*, (Maṭbaʿatul Ḥukūmah, 1953), 7 & 79.; Also, see Ahmed Shaathir et el, *The Legal Life of the Maldives*, (People's Majlis, 1981), 120-121. The *First Republic* was promulgated on that

British domination as a "protected State".[36] The venture of the new Constitution was led by the powerful Prime Minister Sumuww al-Amir Abdul Majeed Rannabandeyri Kilegefaanu, his brother Abdul Hamid Didi who was the Representative of the Maldivian Government in British Ceylon, and a group of powerful elders, dignitaries and young reformers. The British administration in Ceylon played a key role in the affair. The reigning monarch, Sultan Shamsuddin Iskandar III was not keen on the idea of a written basic law restricting his powers, but went along with the constitution movement for reasons which are not relevant for discussion here.[37] The Constitution was promulgated on the 22nd of December 1932.[38] It had ninety-two Articles in eight main sections. The sections dealt with the basic description of the State, citizenship, fundamental rights of the people, the structure of Government, qualifications of the monarch, basic rules on the procedure for accession to the throne, the basic organs of Government, and ministries of the Government.

We will now conduct an analysis of the Constitution in order to see whether it enshrined and entrenched the doctrine of *constitutionalism*, whether it provided for the establishment of a system of CJR, and whether it provided for an *independent judiciary* which could function as an efficacious venue for upholding the norms of the Constitution to limit and restrain political power and hold them accountable to the supreme law. The discussion of these points in Sections VI, VII, and VIII would form the second premise of our argument leading to the conclusion in Section X.

Doctrine of Constitutionalism in the 1932 Constitution

As stated in Section II, the mere fact of the existence of a *written constitution* as the basic law of the polity may be a basis for *constitutionalism*, irrespective of whether there are explicit provisions in the constitution enshrining its principles and precepts. But that would be the case, as already stated, only if the constitution in question is a *garantiste* one, framed in accord with the idea of *republicanism*. It must be a constitution which, as Thomas Paine stated,[39] the people as the true *locus of sovereignty* have written for their polity to constitute their government to serve them in accord with the basic law they have promulgated, as a genuine exercise of their sovereign and *general will*.[40]

Was the 1932 Constitution of the Maldives such a *garantiste* constitution, established by and through the sovereign power and general will of the people? An analysis of the facts of history relating to how and why the Constitution came into existence, as well as what can be construed from the text of the Constitution itself, leads us to a position

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date, although it was a short-lived one, violently overthrown only some months later in August 1953 (See Shaathir et el, *The Legal Life of the Maldives*, 121.) with the restoration of the monarchy. The monarchy continued for fifteen more years, before it was abandoned for good with the promulgation of the *Second Republic* of the Maldives in November 1968 (See Shaathir et el, *The Legal Life of the Maldives*, 122.)

[36] See Naseema Muhammad, *Independent Maldives*, (Academy of the Dhivehi Language, 2013), 85. Also, see "The Second Schedule of the British Protectorates, Protected States and Protected Persons Order in Council," 1949/140, dated 28th January 1949. Note that the instrument refers to the Maldives as "The Maldive Islands", which was the official English name of the country before 1969. It was changed to "Maldives" upon declaration of the Second Republic on 11th November 1968. A couple of months later, Official Announcement No. 1/69 of the Ministry of External Affairs dated 21st January 1969 stated that the complete form of the English name would be "Republic of Maldives".

[37] For brief but helpful discussions on how the First Constitution was framed and introduced, see Suood, *The Maldivian Legal System*, 26-40.; and Shamsul Falaah, "Towards a Maldivian Nation-State: The Constitutions of 1932 and 1968," In *Constitutional Foundings in South Asia*, ed. Kevin Y. L. Tan & Ridwanul Hoque, (Hart Publishing, 2021), 199.

[38] Shaathir et el, *The Legal Life of the Maldives*, 11 & 81.

[39] See *supra*, Note 7.

[40] For an understanding of the concept of *general will*, as the term is used here, refer to Jean Jacques, *The Social Contract and Discourses*, trans. G. D. H. Cole (Dutton Publishing, 1955).

where it is hard to answer *yes* to this question. As the general consensus goes,[41] and as indicated above in Section V, our first Constitution came about as a direct result of a power struggle between the reigning Sultan, Shamsuddin Iskandar III, on one side, and his Prime Minister Amir Abdul Majeed and those who supported the latter on the other. It was not a product of a *republican* awakening of the people or a mature belief that *sovereignty* and the rights to form and conduct Government resided in the people; rather, it was the result of strong discontentment among the ruling class leaders about the Sultan having undivided and unchecked power. It came through primarily an attempt at emasculating the Sultan. Nonetheless, it would be untrue to say that there was no idea at all of subjecting the Government to the *rule of law* in some way, as can be seen from several provisions of the Constitution, which are discussed in the following passages. Here it may be noted that the Constitution of 1932 was, in this respect, not very dissimilar to the Magna Carta of medieval England which was formed on the basis of some ideas of limiting the powers of the King but was really focused on sharing power between the hitherto authoritarian and despotic King and disgruntled nobles of the realm who insisted on having a share of power and some say in matters of government. It must also be observed that the idea of subjecting the Rulers and the people to a higher law—*constitutionalism*—cannot have been a strange or incomprehensible one to the Maldivians; being an Islamic nation, the Maldivians were very familiar with the principles of the ultimate supremacy of the higher Divine Law over the rulers, both the rulers and the ruled being equally subject to Divine prescriptions of justice, and government being a sacred trust.[42]

Perusing the text of the 1932 Constitution to examine if it enshrined the *doctrine of constitutionalism*, the first thing we notice is that its Preamble appears in the form of a Royal Decree introducing and promulgating the Constitution, and not as a statement from a people who, being the *locus of sovereignty* in the State, were constituting a government through the exercise of their sovereign powers and *general will*. As such, the Preamble arguably did not carry any ideas of *republicanism* and *constitutionalism*. It read as follows: "Being in a state of humble supplication to Almighty Allah for Help, I, Sultan Muhammad Shamsuddin Iskandar the son of Sultan Ibrahim Nooruddin Iskandar, the Sultan of the Maldive Islands, accept and ordain the Constitution written below for the Maldives and decree its implementation in the governance of the State, upon the ways of promoting unity and harmony, of governing with equal and impartial justice for all citizens, of participation by the citizens in the affairs of government, of approving for the people freedom and security, of ensuring for all the people of the Maldives happiness and peace and harmony, and of easing matters for the kings who would succeed me on this Throne and also for the people of this land".[43] Conspicuously as well as significantly, this Preamble sounds like a decree upon a group of inferiors by a Superior, rather than a *supreme constitution* limiting the powers of that Superior and his Government.

While it is hard to argue that the 1932 Constitution was a *republican* constitution written with the objective of subjecting government to the superior authority of the law, it nonetheless contained, as aforementioned, provisions which, taken at face value, embodied or carried the fundamental idea of *constitutionalism* — the idea of the *supremacy* or *primacy of the constitution* and subservience of the Government to the *supreme law* provided in and

[41] See Suood, *The Maldivian Legal System*; Falaah, "Towards a Maldivian," 199.; and Ahmed Maajid, "Nineteen Thirty-Two and Beyond: An Overview of the Maldivian Journey on the Path of Written Constitutions", *CLJU(A) xcviii*, [2025].

[42] It should be noted here that the Magna Carta of medieval England also had its origin in Islamic legal and political thought and practice. It came about as a direct result of the experiences and enlightenment of English Barons and army which accompanied Richard the Lionheart in the Third Crusades. Richard and his army spent some ten years in the Holy Land of Palestine, engaged in a long war against Sultan Salahuddin Ayyubi, from who the English and other Europeans learned a lot including the values of accountable government under the higher power of the Law to which the Rulers and the ruled are equally subject to. It was those English Barons who returned to England later, demanded and forced Richard's nephew King John to issue the Royal Covenant that has become known as the Magna Carta. As such, while Western academia, in its Eurocentric and supremacist view, does not acknowledge it, the birth of Constitutionalism in the West may well lie in Islam.

[43] Constitution of 1932, Preamble.

by the constitution.[44] While it reformed or re-established the Governmental system of the Maldives,[45] which had existed for centuries but had no legally recognized and fixed structure, into four basic organs — 1) the Monarch, 2) the Council of Ministers, 3) the Legislative Council, and 4) People's Majlis — there were some provisions which stipulated that this Government, including the Sultan, would be under the authority of the Constitution and bound to obey and honour it. They are Articles 23, 35, 42, 54(3), and 92, which are given below.

Article 23

"All Powers of Governance of the State begin with and from the people. Those Powers shall be implemented in Governance through the arrangements provided below: -

(1) His Majesty the Sultan.

(2) Council of Ministers.

(3) Legislative Council.

(4) People's Majlis."[46]

Article 35

"If a matter which is not addressed in the Constitution is presented before the State, needing urgent and expeditious addressing with any delay of action being inappropriate or impractical, during a period when the Legislative Council has been dissolved for general elections, the Sultan shall have the right to address

[44] If this fundamental precept and principle of constitutionalism is missing in any given constitution, it does not matter whether the other ideas or tools of *constitutionalism* (See Note 11 and the corresponding explanation) are present or not in the provisions of that constitution. Without the conceptual and institutional supremacy and primacy of the Constitution over *all* political powerholders, including the Legislature, the Executive, and the Judiciary, and the Monarch if there is one, and also without the hierarchical supremacy and primacy of the Constitution over all forms of State legislation, there cannot be *constitutionalism*.

[45] Although there is no specific and express statement saying so, the Government established under the 1932 Constitution was a unitary Government, with all powers vested in the Organs of the State and the departments within those organs established as one central Government. In fact, the Constitution does not have a single provision stating how the atolls and individual islands of the country would be governed, leaving us with the presumption that the age-long customary and conventional system of governance in atolls and islands would be left as it was. Notably, the People's Majlis, provided for in Article 23 is a body representative of all the people including inhabitants of the atolls. Under Article 59, the People's Majlis would consist of 47 members, of whom 43 were elected by the inhabitants of the atolls to represent the atolls. The People's Majlis was assigned with some important functions, which are given below. (See *infra*, Note 47.) There is one more important point to note in relation to the People's Majlis. The original Dhivehi name, given in Article 23, is "Rayyithunge Majlis," in the same manner the Council of Ministers and the Legislative Council are named in the Constitution—as "Vazeerunge Majlis" and "Qaanoonu Hadhaa Majlis". As such, a translation true to the text of the provision would be "People's Council", just as we have translated "Vazeerunge Majlis" as "Council of Ministers" and "Qaanoonu Hadhaa Majlis" as "Legislative Council". However, the "Rayyithunge Majlis", which would later, with the amendment of the 1932 Constitution in 1934, become the legislative branch of the State and remain so permanently, (with the 1934 Amendment of the 1932 Constitution, the Legislative Council was taken out of the constitutional design and the Rayyithunge Majlis would replace it as the law-making organ of the State) has conventionally been called "People's Majlis" in English. To adhere to this convention and to avoid a confusion that the "People's Council" of the 1932 Constitution and the "People's Majlis" of the later constitutions are two different things, I have opted to translate "Rayyithunge Majlis" in Article 23 as "People's Majlis".

[46] Constitution of 1932, Article 23. Note that the Judiciary is not listed as an organ of a basic component of the State. This point will be addressed in the following pages, in Section VII.

the matter by writing and issuing Decrees through the Council of Ministers, in a way that does not contravene the Constitution."[47]

Article 42

"The Sultan has the Power to conduct the Government only within the limitations determined in the Law. He shall conduct no matter whatsoever of Governance in contravention to the Constitution."[48]

Article 54(3)

"The reasons which shall render the deposition of a Sultan mandatory are:

(1) (The Sultan) losing completely one of the necessary characteristics and qualifications of the Sultan.

(2) (The Sultan) being involved in and convicted upon adjudication of a crime for which the Religion, in the Shariah, has prescribed a *ḥadd* punishment.

(3) (The Sultan) opposing one of the principles and rules of the Constitution and abolishing it by personal action or decision."[49]

Article 92

"No law shall be made in contravention to the Constitution."[50]

Under these provisions, sovereign powers of the State begin with the people;[51] the Sultan's Decrees on matters not addressed by the Constitution must not be in violation to the Constitution; the Sultan's power to conduct the affairs and all matters of Government in comport and conformity with the Constitution; the deposition of the Sultan is mandatory if he commits any breach or violation of any of the rules and principles laid down in the Constitution; and no law can be made in contravention to the Constitution. To these provisions, we may add a few others—those which require the Monarch and high-level officials of Government to pledge to honour, abide by, and uphold the Constitution at all times. Under Article 85, the members of the Legislative Council are required to take such an oath

[47] Ibid, Article 35.

[48] Ibid, Article 42.

[49] Ibid, Article 54. (In the First Amendment of the 1932 Constitution, announced in 1934, this provision was in Article 50, and in the version promulgated as the Second Amendment, in 1937, the provision was numbered Article 49).

[50] Ibid, Article 92. The Article, in full, reads as follows: ""No law shall be made in contravention to the Constitution. If there arises a need to amend an Article in the Constituion, or a need to add an article to the Constitution or repeal an article therein, or a need to make a law on one of the matters mentioned in Article 30, such amendment or enactment or repeal can be effectuated by an Act, which has been passed by two-thirds majority of a Special Council comprising of the members of the People's Majlis, the members of the Legislative Council, (religious) scholars and nobles in Malé at the time sitting in the Presence of the Sultan, and which has then been Decreed for implementation by the Sultan."

[51] It is interesting to note that the Constitution does not say that the power shall remain with the people – the idea may be that the power, through the Constitution, has been transferred to the Monarch and his Government, in somewhat a Hobbesian arrangement. Nowhere does the Constitution state that the power is held by the Monarch and his Government as a trust. As such, it is not really clear that the Constitution took the people as the *locus of sovereignty*.

before they can, having been elected, assume office and start performing their responsibilities as members.[52] The reigning Sultan, at the time of the promulgation of the Constitution, was required by Article 51[53] to take an Oath before the Legislative Council stating his submission to the authority of the Constitution and acceptance of his obligation to obey it. Article 26 obliges new Sultans to pledge allegiance and obedience to the Constitution.[54] Under Article 86,[55] Members of the Council of Ministers are also required to swear to obey, honour, and uphold the Constitution before taking up their governmental responsibilities.[56]

What should we make of these provisions? They certainly appear to categorically establish the doctrine of *supremacy of the constitution* in the Maldives. For a comparative consideration, one could look at the United States Constitution, which has been taken as a *supreme law above all the organs of the State* based on just one indirect and ambiguous provision.[57] The *supremacy provisions* of the Maldivian Constitution of 1932 given above are more in terms of number, far clearer, and far more definitive. Should we take them as genuine, meaningful, and effective provisions guaranteeing *constitutionalism* and *rule of law* over government? However tempted one might be to do

[52] Constitution of 1932, Article 85. The Oath in full reads as follows: "I swear by the Lord Almighty Allah, to remain upon the way of obedience to the Constitution of the Maldives, and of protecting the Rights of the People, in good will, loyalty, fealty, and sincerity to the nation of the Maldives, the Sultan of the Maldives, and to the State of the Maldives."

[53] Ibid, Article 51. The Oath, in full, reads as follows: – "I swear by the Lord Almighty Allah to honour the Constitution, to honour the Laws of the Maldives, to protect and uphold the sovereign autonomy of the Maldives, and to protect the State."

[54] Ibid, Article 26. The Oath, in full, is as follows: "I swear by the Lord Almighty Allah to honour the Religion of Islam, the Constitution of the Maldives, and the Rights of the People, and to not dishonour or commit treachery against any of these things."

[55] Ibid, Article 86. Under this provision, Members of the Council of Ministers take the same Oath as taken by Members of the Legislative Council (See *supra* Note 44), with an additional phrase stating the pledge to perform his ministerial responsibilities faithfully and sincerely.

[56] Interestingly, the members of the People's Majlis are not required by the Constitution to take an Oath before they assume office. The reason is not clear; It may be argued that this was the case because the framers saw People's Majlis not as a co-equal branch of the State having the same status and significance as the other branches. Such an argument may be supported by the fact that the Constitution, in laying down the procedure for the election of the Monarch by a Special Council consisting of the Council of Ministers, the Legislative Council, and the Nobles, Scholars, and Leading Members of the Society in Malé the capital, in Article 26, leaves out the People's Majlis from the process. The process of deposing the Sultan is also carried out, under Article 55, without any role for the People's Majlis. However, some significant roles are assigned to the People's Majlis, giving strong grounds to argue that the Council has no less a standing than the other organs of the State in the constitutional design. The functions prescribed for the Council are as follows: 1) being part of the Special Council passing any laws on matters enumerated in Article 30, in pursuance to Article 30 and 92; 2) deciding whether to pass a Bill which, although passed by the Legislative Council, has been rejected assent by the Sultan and has then been failed to get two-thirds approval by the Legislative Council. Under Article 32, such a Bill would become law only if it is subsequently passed by the People's Majlis by a two-thirds majority; 3) voting on Bills proposing increase of tax rates or levying new taxes, as such Bills, under Article 40, needs approval from both the Legislative Council and the People's Majlis; 4) electing members to the Legislative Council, under Article 60. In addition, the People's Majlis has the power, under Article 82, to pass a no-confidence motion against the Council of Ministers. Where the Council passes such a motion, the Sultan is mandated to dissolve the Council of Ministers and reconstitute it, under the same provision. In conclusion, therefore, the argument that the Constitution treats People's Majlis to be of any less importance compared to the other organs of the State is also weak.

[57] The said provision is Article VI of the United States Constitution, which has come to be known as the Supremacy Clause. The relevant part of the Article reads as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It was mainly based on this provision, that the United States Supreme Court, in its decision in the case of *Marbury v. Madison*, judicially affirmed the supremacy and primacy of the Constitution above all federal Governmental powers and came up with the doctrine of *constitutional judicial review* in the United States. See below, Section VII, for a discussion of how it was done in the famous judgment penned by John Marshall, the first Chief Justice of the USA.

so, there are at least four reasons, in my view, which together provide a very strong basis for the argument that those provisions in the Maldivian Constitution did not really ensure *constitutionalism*.

1. *Firstly*, what the Preamble of the 1932 Constitution and the context it gave to the provisions that followed it has already been highlighted. The Preamble did not characterize or present the Constitution as one which the people of the country, being the *locus of sovereignty*, set out and acquired for themselves in order to establish a government under and restricted by their sovereign power and *general will* embodied in the Constitution. Rather, the Preamble quite clearly delivers a *granted constitution*, gifted by a Sovereign Superior – the Sultan – who ordained it for the benefit of his subjects—meaning that all the limits on his power in that Constitution were self-authored and self-imposed. It will be a strong argument to say that such a constitution truly limiting the Sovereign Superior who ordains it is an incoherent and irrational idea — a Sovereign Superior can set aside or revoke and annul the restrictions he has prescribed upon himself as legitimately as he has prescribed them. Hence, a constitution truly establishing *constitutionalism* must come from the people, on the basis of *republicanism*,[58] as Thomas Paine and others have stated.[59]

Indeed, the truly republican constitutions of the world framed on the basis of the idea of *constitutionalism* and limiting political power come with the statement, whether explicit or implicit, and whether in a Preamble or in the articles of the constitution, that they are set up by the people who constitute the *locus of sovereignty*, as a constituent act for their nation and their government. The United States Constitution, adopted in 1787 and put into operation in 1789, is a good example.[60] The first constitution of the French Republic, adopted in 1791, after the French Revolution, is another example.[61] In more modern times, the 1949 Bonn Constitution of the Federal Republic of Germany,[62] and the 1949 Constitution of the Republic of India[63] do the same. On the other hand, the Preamble of our first Constitution resembles that of the French Constitution of 1814, which came with the Bourbon restoration when the Monarch granted a constitutional charter in his capacity as the Sovereign Superior, to his subjects. The preamble of that Constitution read, in a similar vein to the Maldivian one: "We have, willingly and by virtue of the free exercise of our royal authority, consented to and consent to, have conceded and granted the Constitutional

[58] When we say that a constitution is set out or established by the people of a nation, it obviously does not mean that all the individual members are actively and directly taking part in the writing of the Constitution. If a constituent assembly or constitutional convention of the representatives of the people, in a way that the people are genuinely represented, carry out the task for and on behalf of the people, such a constitution is deemed to have been established by the people.

[59] See *supra*, Note 8.

[60] Constitution of the United States of America, 1789, The Preamble. It reads as follows: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

[61] Constitution of the French Republic, 1791, The Preamble. The opening paragraph is phrased in the following terms: "The National Assembly, wishing to establish the French Constitution upon the principles it has just recognized and declared, abolishes irrevocably the institutions which were injurious to liberty and equality of rights."

[62] Constitution of the Federal Republic of Germany, 1949, The Preamble. It reads as follows: "Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans … have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people."

[63] Constitutional Charter of France, 1814, The Preamble. It reads as follows: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

Charter to our subjects, both for us and for our successors, and forever." These words, it may be argued, do not show real *constitutionalism*. A constitution given thus, it can be contested, is in essence and substance no more than a royal decree, irrespective of its form.

2. *Secondly*, the Sultan as Head of State and the Head of Government,[64] enjoyed a wide range of powers which made it very difficult for any system of checks and balances incorporated into the Constitution to hold him accountable—whether such system was legal or political in character—to work in practice. The Sultan was the head of the executive,[65] the highest authority of legislation,[66] and the highest authority of establishing justice,[67] meaning that there was no true separation of powers in the constitutional design—the apparent separation of powers in Article 23 and complementary provisions was arguably form rather than substance.

The Sultan had power, by Articles 89[68] and 91,[69] to appoint all members of the Legislative Council for the first five years from the date of promulgation of the Constitution. Even after the first five years, he would still, under the general rule coming into operation following that period, under Articles 56,[70] have the power to appoint 7 out of the 28 members of the Legislative Council, while the remaining members were to be elected. In addition, the Sultan was vested with the power to appoint the Prime Minister[71] who would serve as the Speaker of the Legislative Council[72] and also as figurehead of the Council of Ministers,[73] the Ministers (members of the Council of Ministers)[74] constituting the Executive, all ambassadors,[75] and all officials of the State.[76] It was also "It is His Majesty the Sultan's authority and command that would be executed in … removing persons from all state positions".[77] Even though the Constitution retained the traditional position of the Prime Minister in the governmental system it adopted, his powers were greatly diminished and limited, to say the least, reflecting strongly the central position the Sultan

[64] There is a Prime Minister who performs the function of the Speaker of the Legislative Council (Article 58) and is a member of the Council of Ministers (Articles 65 and 90). However, the Prime Minister does not enjoy any significant powers in the running of the State, and is not assigned, as explained *infra* in Note 67, any substantive role in his capacity as a member of the Council of Ministers. He seems to be merely the figurehead of the Council and the First Member of the Council (Article 90), whatever that would mean. Article 27 clearly states that "His Majesty the Sultan shall be the Highest Authority in running all the affairs of the State". Article 28 reads as follows: "His Majesty the Sultan shall have the Powers of Assenting to and Implementing Laws." Article 49 says that "It is through the Ministers that His Majesty the Sultan shall conduct any affair of the State which he conducts". While the Constitution does not distinguish between the two capacities of *head of state* and *head of government*, these provision, read together with other relevant provisions, leaves us with the only plausible conclusion that the Sultan was both the Head of State and the Head of Government under the 1932 Constitution.

[65] Constitution of 1932, Article 27 and 28 (See *supra*, Note 55).

[66] Ibid, Articles 28 (See *supra*, Notes 65 and 66) and 36. Article 36 reads as follows: "The Authority to make any Law shall be vested in His Majesty the Sultan, together with the Legislative Council."

[67] See Section VIII below.

[68] Constitution of 1932, Article 89.

[69] Ibid, Article 91.

[70] Ibid, Article 56.

[71] Ibid, Articles 65, 82, and 89.

[72] Ibid, Article 58.

[73] Ibid, Article 90.

[74] Ibid, Articles 46, 50, 65, 72, 73, 89, and 91.

[75] Ibid, Article 50.

[76] Ibid, Article 46.

[77] Ibid.

was given.[78]

Further powers of the Sultan included the "power to issue Interim Orders to deal with emergencies and sudden dangers facing the country;[79] the power to block legislation unless a proposed piece of legislation is passed by a two-thirds majority of the Legislative Council, or passed by a simple majority of the Legislative Council and subsequently approved also by a two-thirds majority of the People's Majlis, which convenes once every year[80]—a threshold not at all easy to pass; the absolute and unshared powers of commanding the armed forces, declaring war, and making peace;[81] and the power to sign treaties.[82] Of these powers, the latitude given to the Sultan to block legislation is especially noteworthy. As has been already mentioned, the Constitution is quite clear that the role of the Sultan in legislation is not symbolical or formal as is the case, for instance, in the United Kingdom.[83] Article 36 of the Constitution is phrased in a way that is leaves no doubt that this is the position. The Sultan has formidable powers to block legislation as stated above, and when his role and authority in legislation comes with his power, under Articles 89 and 91, to appoint members of the Legislative Council for the first five years of the new constitutional order, and his power to appoint the Speaker of the Legislative Council, it is impossible to see how the process of legislation can be independent of the influence of the Sultan .

3. *Thirdly*, although there is a provision for deposing the Sultan in the situation where he "opposes one of the principles and rules of the Constitution and abolishes it by personal action or decision",[84] the process of doing it under this provision does not seem to be well set out and very likely to be effective in practice. The said process is laid down in Article 55, which stipulates that it is the Council of Ministers who would initiate the procedure for deposing the Sultan. The Council of Ministers would convene a Special Council for the purpose, consisting of itself, the Legislative Council, the nobles of Malé, religious scholars residing in Malé, and community leaders of Malé.[85]

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[78] The Constitution does not even have a dedicated provision stipulating the functions of the Prime Minister, instead giving him specific and very limited roles in provisions here and there in different sections. Those roles are, in the order of articles in which they are stipulated: 1) reading out the Royal Address of the Sultan before the Legislative Council in the inaugurating meeting of its term (Article 44); 2) making nominations and advising the Sultan on appointing and removing members to the Council of Ministers (Articles 50, 65, 72, & 89); 3) function as speaker of the Legislative Council (Article 58); 4) being a member of the Council of Ministers (Articles 65 and 90), although the Constitution does not state anything expressly what his position and role in the Council of Ministers is, other than being its figurehead; 5) signing the Decrees issued by the Council of Ministers, together with the Minister having authority over the matter by way of jurisdiction (Article 66); 6) being a member of the special adjudicatory committee established under Article 75 to hear criminal charges against a Minister or the Sultan (Article 75); and 7) holding and safekeeping one of the three keys to the treasury saferoom at the Ministry of Finance and opening it when ordered by the Sultan and in the latter's presence (Article 79).

[79] Constitution of 1932, Article 47.

[80] Under Article 28, a proposed legislation passed by the Legislative Council becomes law when the Sultan assents to it; Article 29 gives the Sultan the power to send back a Bill passed by the Legislative Council for reconsideration; Under Article 32, if the Legislative Council, having reconsidered a Bill returned by the Sultan under Article 29, passes the Bill by a two-thirds majority, the Sultan must then give it assent; Under the same Article (Article 32), if the Bill fails to garner two-thirds votes in the Legislative Council, it shall be parked to be submitted to the People's Majlis which is convened once every year, and if it is approved by the People's Majlis by a two-thirds majority by the People's Majlis, the Sultan is obliged to give it assent.

[81] Constitution of 1932, Article 48.

[82] Ibid.

[83] See *infra*, Note 95.

[84] Constitution of 1932, Article 54(3). See Section VI above.

[85] Ibid, Article 55. The provision itself does not detail the composition of the Special Council deliberating the matter of deposing the Sultan, but stipulates that its composition would be the same as the Special Council convened to elect a Sultan under Article 26. As such, we refer to the latter provision to see who would sit in the Special Council in the procedure to depose the Sultan.

Article 55 continues to state that once this Special Council passes the motion to depose the Sultan by a two-thirds majority, the decision would then be presented for approval and consent by the armed forces, all the people of Malé, and any people from the atolls present in Malé at the time. Such consent is, under the provision, mandatory for the process of deposing the Sultan to become complete and the decision of deposition enforceable.

One thing we need to note about this process of deposing the Sultan under Article 55 is that it is not a process of CJR; in other words, it is not a judicial process or procedure. Rather, it is a political process. It is in fact a mechanism of *political constitutionalism*, and cannot be characterized as *legal constitutionalism*. Another thing is about the efficacy and suitability of a political process—run by political bodies rather than any judicial body—being employed to address a clear violation of the constitution, which is the basic law—after all, "it is emphatically the province and duty of the Judicial Department to say what the law is"[86] and thus decide whether or not it has been breached. However, we shall not pursue discussions on the distinction between the two forms of *constitutionalism* and what it may mean in the scheme of things under the 1932 Constitution, or the question of whether prescribing a political process to judge whether the Sultan had breached the Constitution was the suitable, for it would be too long a discussion, which is not really necessary for the issue we are addressing in this article.

That said, a number of significant points need to be highlighted, in brief and without going into all the details, in order to see how challenging and possibly problematic, or even chaotic, the process of deposing the Sultan under Article 55 could become. *Firstly*, there is remarkable ambiguity in Article 55. While a decision to depose the Sultan by the Article 55 Special Council needs the "consent of the armed forces, all the people of Malé, and any people from the atolls present in Malé at the time" it is not at all clear who would be eligible to be counted into this general body of people. For example, how old must someone be in order to be eligible? What would happen if some eligible people refuse to take part in the process? Answers to such questions are simply not there. Another ambiguity is seen in the fact that the provision does not specify the vote percentage required for consent of the armed forces and the people to materialize. Would it be a simple majority of those who bother to attend and have their say? Would it be an absolute majority of all eligible persons? Would it be a two-thirds majority? Again, none of these questions are answered in Article 55 or any other provision. With these ambiguities, the Article was bound to create a lot of problems if and when it was called into action. *Secondly*, the Council of Ministers which, under Article 55, had the power to initiate the process of deposing the Sultan, was under the direct and immediate control of the Sultan, whose executive it was. It is, as explained above, the Sultan who appoints members of the Council of Ministers, and has the power to remove them from office. Would the Council then be in a position of sufficient discretion and independence to initiate the process of deposing the Sultan? If they attempt to commence the process, wouldn't the Sultan be able to upset it through the use of his power to remove members of the Council? *Thirdly*, at least for the first five years of the new constitutional order, it is the Sultan, as mentioned above, who appoints the Legislative Council, which is part of the Article 55 Special Council to depose the Sultan. With the Sultan having the power to remove members of the Legislative Council[87] during the first five years of the life of this body, it would be too much of a stretch of imagination to believe that the body would be independent and effective in dealing with a motion to

[86] See *Marbury v. Madison*, 5 U.S. 137 (1803). See Sections II and VII for further discussions of how the judgment of this case relates to *constitutionalism* and CJR.

[87] The Constitution does not give the Sultan this power in any specific statement, so the matter is not beyond debate. However, the fact that it, by virtue of Articles 89 and 91, empowers the Sultan to "appoint members to the Legislative Council for/during the first five years" and gives the Sultan the power "to remove persons from all public offices" in Article 46 means that the Sultan would have the power to remove members of the Legislative Council during the first five years of the new constitutional order.

depose the Sultan. *Fourthly*, the protection given to the Sultan by Article 68,[88] operating together with Article 49,[89] means that the chance of the Sultan being held responsible for a breach of the Constitution could be very narrow. Article 68 lays down that even for the decrees that come out bearing the Sultan's Seal, the Minister through whose department it is promulgated would be the one responsible. This provision is reinforced by Article 49, which says that it is through the Ministers that the Sultan would conduct the functions of government. If this is the case, the Sultan would, it seems, have a wide latitude to dodge responsibility for any violation of the Constitution under Article 54(3) by pointing fingers at the Minister through whom his decision in question comes out and is implemented.

One could counter this point by highlighting the fact that a Sultan was indeed removed at one time under the Constitution and arguing that it is proof that the constitutional process of deposition of the Sultan was effective and practical. However, the deposition of Sultan Shamsuddin Iskandar III, the Monarch who had promulgated the 1932 Constitution, by the Special Council provided for the purpose in the Constitution, on 2nd October 1934, was hardly a legal or political process conducted under the Constitution or in conformity with the Constitution. Although the official narrative holds that it was done under and in accord with the relevant provisions of the Constitution,[90] details in the pages of history bring out the picture of a violent revolution that stopped just short of bloodshed. There was no clear and credible allegation that the Sultan had violated the Constitution. The affair began when several people loyal to the Sultan were arrested on charges of "trying to overthrown the Constitution" in collusion with the Sultan. The capital city was rocked by protests against the Sultan and in support of the Ministers leading the revolution, aided and abetted by the military. It was a political affair which was never controlled or guided by the Constitution or the law; it was not a process of *constitutional review* to hold the Sultan accountable to the Constitution under its provisions discussed above; it was, quite clearly, a revolution ill-disguised and orchestrated successfully by the people who had power and popular support and could use it to oust the Sultan.[91]

4. *Fourthly*, as discussed below in Sections VII and VIII, the Constitution did not establish any mechanisms for enforcing the *supremacy provisions* it stipulates in Articles 23, 35, 42, 54(3), and 92, except the mechanism of *political constitutionalism* through the process of deposing the Sultan. In other words, there were no legal or judicial system to uphold those provisions in order to hold political powers accountable and subservient to the Constitution in practice. From this vantage point, those articles look little more than just empty promises. There seems to be a glaring contrariety between what was promised in the words of the *supremacy provisions* and what was designed into the mechanism of enforcement in practice.

Back to the question, what should we make of those provisions which seem to embody the *supremacy of the Constitution* and appear to guarantee *constitutionalism*? First of all, they must be credited for sowing the ideas of *legal* and *political constitutionalism* in the Maldives. There is no denying that they are the beginning of the Maldivian journey towards imposing limits on government through the instrument of the supreme and fundamental law. If the 1932 Constitution was a "constitution without constitutionalism" it at least took a historical step in establishing *government of law* in place of *government of men* in the future; if it cannot be described as the tree of *constitutionalism* which gave the nation the shade of *rule of law* over politics and government, it at least sowed the seed. Yet, it may be going too far to say that it, in itself, meaningfully guaranteed *constitutionalism*.

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[88] Constitution of 1932, Article 68.
[89] Ibid, Article 49.
[90] The task of assessing that narrative and determining whether it is true or not is not within the scope of this Article.
[91] For an account of how the whole affair unfolded, see Muhammad Amin, *The Life of the Maldivian Constitution*, (Maṭbaʿatul Ḥukūmah, 1951), 154-160.

CJR Enabling Provisions in the 1932 Constitution

Any use of power by a state organ, official, or institution must be predicated on the constitution if such use is to be legitimate. Legitimate state power originates in or is conferred only by the constitution and any "assumed power (by a state authority without constitutional basis) is usurpation".[92] The powers of the judicial branch is no exception; the authority of the judiciary to exercise CJR must also come from the Constitution.

There are two ways in which a constitution can be the basis of CJR by the courts.

First, as is the case with the *doctrine of constitutionalism*, it has been argued that a judiciary's power to do *constitutional review* of the policies and actions of state authorities can come from the mere fact of the existence of a supreme constitution which the Judiciary is obliged to enforce. This was the opinion of the United States Supreme Court in its judgment in the case of *Marbury v. Madison*. It has already been stated above, in Section II, that the judgment took the view that a truly *garantiste* constitution framed on the basis of *republicanism*, by a people who are truly the *locus of sovereignty* in the polity, would be a basis for *constitutionalism* by the mere fact that it exists. As part of the same argument, the famous judgment authored and read out by Chief Justice John Marshall on behalf of a unanimous Court stated: "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, for 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 the very essence of judicial duty. … If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. …"[93] These passages clearly show a jurisprudential justification of the practice of CJR to uphold a constitution on the basis that the Constitution exists as a *supreme law* above the legislature and the laws coming from that legislature. The Court was not relying on any specific enabling or empowering provisions for its review of the Judiciary Act 1801. That being said, we must observe that such justification of CJR by a judiciary or an apex court can only be legitimate and justifiable if at least two conditions are met. *First*, the constitution in the polity must have true supremacy and primacy over all political powers and institutions—it must be a truly *republican* constitution which establishes *rule of law* over political power. *Second*, the Constitution must, as the constituent instrument set up by the people who hold true sovereign powers, directly create and empower an *independent judiciary* as a co-equal branch of the State on the same level as the Legislature and the Executive. Where the judiciary is simply a delegated power from the legislature such as is the case in the United Kingdom, it makes no jurisprudential or rational sense for the Courts to use the mere fact of the existence of a fundamental law to challenge the acts of the Legislature which grants the judges their powers and is hence superior to them.[94] On the basis of these observations, we may conclude that it is

[92] Paine, *Rights of Man*, 141.

[93] *Marbury v. Madison*, 5 U.S. 137 (1803).

[94] In the United Kingdom of Great Britain and Northern Ireland, the Monarch holds the Sovereign Powers of Legislation in theory, but it is exercised in accordance with the *doctrine of parliamentary sovereignty*, in that Parliament in actuality is the ultimate and unchallengeable authority of legislation and it is against conventional convention for the Monarch to refuse to give assent to a Bill passed by Parliament. For a comprehensive discussion of the doctrine, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, (University Press, 1999), and Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, (Cambridge University Press, 2010). Where *doctrine of parliamentary sovereignty* or *parliamentary supremacy* exists, the powers of the Courts is considered as delegated by the sovereign Parliament, instead of being directly granted by the people through a *supreme constitution*. In other words, where there is *constitutional supremacy*,

quite clearly impossible that Maldivian courts could have used the mere fact of the existence of the 1932 Constitution as basis for establishing a system of CJR: it was not, as stated in Section VI above, really a *supreme constitution*, and it did not, as stated below in Section VIII, establish an independent and co-equal judiciary in the State.

The *second*, and in modern constitutions the typical, modality of establishing CJR in a constitutional system is to include enabling provisions in the constitution itself. These are provisions in the constitution which directly or indirectly empower the Judiciary to conduct CJR. When we look at the provisions in constitutions which enable or provide for systems or mechanisms or CJR, we see that they may be categorized into at least three distinct categories: *firstly*, there are provisions which may be described as *General CJR Provisions*; *secondly*, there is a category which can be labelled as *Special CJR Provisions*; and *thirdly* there are provisions which we may call *Constitutional Supremacy Clauses*.

As for *General CJR Provisions*, these are provisions in a constitution which expressly grant Courts a general power to practice CJR. The power they confer upon the Court is *express* in the sense that they are clear and definite in stating that the Courts or a specified Court would have the power to review actions, decisions, and policies of the other organs of the State and any state institutions for comport with the principles and rules of the constitution. It is *general* because the power conferred is not limited to a certain process or procedure, a particular dispute, or a specific class of issues and disputes, but as a general power to judicially uphold all of the provisions of the constitution, covering in general all acts and decisions of state organs and institutions, though there may be very limited and special issues not amenable to CJR. Such provisions may give the power of CJR to all the Courts of the *order judiciaire* or the ordinary judiciary, to one or more superior Courts of the *order judiciaire*, or to a *constitutional court*[95] which lies outside the *order judiciaire*. Examples of this kind of *General CJR Provisions* include Article 94 of the Bonn Constitution — the "Basic Law" or the *Grundgesetz* of the German Federation — read as a whole.[96]

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people transfer the powers of legislation, execution, and adjudication to the three organs of the state via the constitution directly; each organ acquiring the power directly from the people and not as a delegated power from another organ. Where there is *parliamentary sovereignty*, all powers of legislation, execution, and adjudication and establishing justice are entrusted to Parliament by the people, and it is Parliament which then delegates the executive powers to the State Executive organ, and judicial powers to the State Judiciary: in this scenario, it does not make rational or legal sense, as stated here, for the Executive or Judiciary to legally or judicially challenge the decisions of Parliament which is superior to both of them.

[95] See *supra*, Note 20.

[96] Constitution of the German Federation 1949. The Article Reads as follows: "(1) The Federal Constitutional Court shall rule: 1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body; 2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law or the compatibility of *Land* law with other federal law on application of the Federal Government, of a *Land* government or of one fourth of the Members of the Bundestag; 2a. in the event of disagreements as to whether a law meets the conditions set out in paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a *Land*; 3. in the event of disagreements concerning the rights and duties of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight; 4. on other disputes involving public law between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless there is recourse to another court; 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority; 4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*; 4c. on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the Bundestag; 5. in the other instances provided for in this Basic Law. (2) At the request of the Bundesrat, a *Land* government or the parliamentary assembly of a *Land*, the Federal Constitutional Court shall also rule whether, in cases falling under paragraph (4) of Article 72, the need for a regulation by federal law does

Though it might come as a surprise to some, the there are no *General CJR Provisions* in the constitutions of the USA and India, where strong-form CJR systems have become a key component of the constitutional system. As for the 1932 Maldivian Constitution, it did not have any *General CJR Provisions* either. The only provision in it which provided for *constitutional review*, as abovementioned in Section VI, was Article 55 which prescribed a procedure of political review and not CJR.

Secondly, there are what we may call *Special CJR Provisions*. These provisions do not confer general powers of CJR upon the Courts in any way and are not *constitutional supremacy clauses*, making them distinct from provisions which fall within the two other categories. When exercising CJR in these cases, the Courts are simply fulfilling a specific judicial function prescribed in relation to a specified case or matter—meaning that even without the general power of CJR, the Court could conduct review in these scenarios. Provisions which fall within this category may be upholding a particular provision of the constitution, or may be fulfilling a specific checks and balance function in relation to a specific matter. Due to the diversity of provisions of this type in terms of their content, it is especially difficult to give a define them. However, they may be divided into two main classes. *One* class include provisions which explicitly empower a specific court or the judiciary in general to conduct CJR, but in a certain case, in relation to a certain matter, or in relation to a specific dispute or a specific class of disputes. A very good example of such provisions is those which empower courts to do CJR to protect an entrenched Bill of Rights, as Articles 13(2),[97] 32(1),[98] and 32(2)[99] of the Indian Constitution do. Provisions assigning a Court the role of adjudicating upon disputes between the Legislature and the Executive, or between the federal or central government and provincial or local government are a second class of these provisions.[100] Provisions which belong to this category may be, for

not exist any longer or whether, in the cases referred to in the first sentence of paragraph (2) of Article 125a, federal law could no longer be enacted. The Court's determination that the need has ceased to exist or that federal law could no longer be enacted supersedes the enactment of a federal law under paragraph (4) of Article 72 or the second sentence of paragraph (2) of Article 125a. A request under the first sentence is admissible only if a bill falling under paragraph (4) of Article 72 or the second sentence of paragraph (2) of Article 125a has been rejected by the German Bundestag or if it has not been considered and determined upon within one year or if a similar bill has been rejected by the Bundesrat. (3) The Federal Constitutional Court shall also decide on such other cases as are assigned to it by a federal law. (4) The decisions of the Federal Constitutional Court shall be binding upon the constitutional organs of the Federation and of the *Länder*, as well as on all courts and those with public authority. A federal law shall specify in which instances its decisions shall have the force of law."

[97] Constitution of the Republic of India, Article 13(2). The provision reads as follows: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

[98] Ibid, Article 32(1). The provision reads as follows: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."

[99] Ibid, Article 32(2). The provision reads as follows: ""The Supreme Court shall have power to issue directions or orders or writs, including writes in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

[100] The current Maldivian Constitution contain a handful of such provisions. See Constitution of the Republic of Maldives. Article 16(c) which empowers the Supreme Court of the Maldives and the High Court of the Maldives to review legislation for any alleged restrictions on fundamental rights and liberties in contravention to the norms of Article 16; Article 65 which empowers Courts to review all cases of alleged violations of the Bill of Rights (Chapter Two) section of the Constitution; Article 74 which empowers the Supreme Court of the Maldives to do CJR upon any dispute relating to the matters of whether a person is qualified to contest in People's Majlis elections, or whether a Member of People's Majlis has lost constitutional legitimacy to remain as a Member, or whether a People's Majlis seat has become vacant; Article 95 which empowers the Supreme Court to give advisory opinions upon submissions for such advise by People's Majlis; Article 113 which empowers SCM to exercise the power of CJR to review the process of impeachment against President and Vice President conducted by People's Majlis; Article 172(a) which empowers the High Court of the Maldives and the Supreme Court of the Maldives to do CJR in cases of complaints and grievances relating to elections and public referenda; and Article 258 which empowers the Supreme Court of the Maldives to do CJR where there is a claim regarding the validity of a declaration of the state of emergency

convenience, labelled as *explicit special provisions*. Then there is the *second* class, which include provisions which do not expressly empower judges to do CJR and do not make a clear or easily recognizable confer of CJR powers on judges, but prescribe upon a specific court or the courts in general a judicial role of such nature that it is impossible for the Court to perform that role without exercising the power of CJR. A constitutional provision providing for ultimate and authoritative judicial interpretation of the Constitution by an apex court is a good example. Provisions of this class may be described as *implicit special provisions*. Looking at our 1932 Constitution for *Special CJR Provisions* turns out to be a futile exercise as well, for there were no such provisions in it.

The *third* type of CJR provisions are *Constitutional Supremacy Clauses*. Such clauses expressly embody the *doctrine of the supremacy and the primacy of the constitution*. They are general provisions which state in clear and definitive terms that the constitution, as an expression of the sovereign will of the people, is the supreme and highest power in the land to which all political power is strictly subject and subservient to; they declare that all government bodies and officials are legitimised and shall function in strict adherence and observance of the Constitution; they set out categorically that constitutional norms—whether general principles or specific rules—have primacy over all other types of legal rules; they declare that any policy, law, action, or procedure that does not conform to th norms of the Constitution are invalid. *Constitutional Supremacy Clauses* are common in modern constitutions, as they are the cornerstone of *constitutionalism*. One example is the various provisions declaring *constitutional supremacy* in the German Constitution: Kommers states, observing that all legislative, executive, and judicial powers of the German Federation are placed under the Constitution, that "… several of its provisions make clear, it controls the entire German legal order, in which respect Articles 1, 19, 20, and 79 are particularly relevant."[101] The most famous *Constitutional Supremacy Clause* in modern constitutions may be Article IV, Clause 2, of the US Constitution.[102] We have mentioned above that the United States Supreme Court used the mere existence of a supreme Constitution in the State as basis for founding its practice of CJR in the landmark decision of *Marbury*. However, that was not the only basis used by the US Supreme Court in that case. The Court relied on the *Supremacy Clause* of the Constitution as well, in the following passages: "It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. ... Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."[103] Looking at our First Constitution, it is interesting to note that it included, as has been explained above in Section VI, several provisions—notably Articles 42 and 92—which stated that the Constitution was supreme and above the political powers of the executive, the legislature, and the judiciary vested in the Sultan and the other organs of the State. The question that immediately comes to mind is whether Maldivian judges could have legitimately built a system of CJR on the basis of these provisions, the way the US Supreme Court did on the basis of, *inter alia*, the *Supremacy Clause* of the US Constitution, or the way the Indian Supreme Court referred to the *doctrine of the supremacy of the Constitution* in the case of *Kesavananda*

by the President, a claim against the constitutional validity of a law enacted by People's Majlis in connection with that declaration, or regarding the constitutionality of any order issued by a state authority in connection with that declaration.

[101] Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *German Law Journal* 20, no. 4 (May 2019): 539, doi: 10. 101 7/gj.2019.46.

[102] Constitution of the United States, Article IV, Clause 2. The provision reads as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[103] See *Marbury v Madison* (1803), 5 U.S. 137.

Bharati[104] as a predicate for its exercise of the power of CJR. The answer seems to be an emphatic no, for, as explained elsewhere, words in a constitution guaranteeing supremacy for itself cannot be effective unless that constitution sets up an *independent* judiciary having the necessary status and authority to effectively enforce that supremacy, and the 1932 Constitution of the Maldives simply did not establish such a judiciary, as clearly explained below in Section VIII.

1932 Constitution and the Independence of Judiciary

One very remarkable feature of the Constitution of 1932 was that it did not establish a judiciary or court system as a branch, let alone as a *co-equal branch*, of the State. As aforementioned, the Constitution recognizes four powers or organs of the State: namely, (1) His Majesty the Sultan; (2) Council of Ministers; (3) Legislative Council; and (4) People's Majlis."[105] In fact, the Constitution did not provide any visible form of court structure or mechanism for the judicial function. While there was no mention of "judiciary" or an equivalent term in its pages, the only appearance of the word "court"[106] in its provisions was in Article 75, where it is stipulated that a criminal hearing[107] against a Minister, the Prime Minister, or the Sultan shall be heard by a Committee in which "a senior adjudicating official of the Court" would also feature as one of many members. The word "judge" does not appear at all in the constitution, which uses instead a phrase whose literal translation would be "those who adjudicate in cases of/upon disputes".[108] The name "Chief Justice" is conspicuous only by its complete absence from the constitutional text, despite the fact that the Maldives had a pre-constitutional history and tradition spanning for centuries of having a powerful and important state official leading the system of enforcing judicial justice called "the Chief Justice".[109] If the Constitution of 1932 did not establish a co-equal judicial branch of the State, the question is as to how the

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[104] *Kesavananda Bharati v State of Kerala & Anr.* (1973) A.I.R. S.C. 1461 (F.B.). In this case, the Indian Supreme Court held that it had the power to set aside any laws made by the Indian Union Legislature for contravention with any of the *basic features* of the Constitution, stating that the supremacy of the Constitution over political powers was one of those basic features. The following passages are of significance: "The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the Constitutional structure. … 1. The supremacy of the Constitution."

[105] Constitution of 1932, Article 23. See *supra*, Note 47.

[106] The Dhivehi term used in the text of the Constitution is "*Fan'diyaaruge*." While this term may at times be translated also as "Judiciary," it is used to mean the "Court" in Article 75 of the Constitution. Historically and traditionally, "*fan'diyaaru*" is the Dhivehi term for "judge", while "*ge*" means 'house'; hence, "*fan'diyaaruge*" comes from the idea of *the place where the fandiyaaru sits to adjudicate upon disputes*. It could be the private residence or house of the judge, and it could be an official building where the judge sits to adjudicate.

[107] The provision on this hearing, Article 75, begins in a phrasing which suggests that it is stipulating an impeachment hearing. However, the following Article (Article 76), which adds to what is said in Article 75, makes it clear, in the opinion of this writer, that it is just a special form of criminal trial conducted to hear a criminal accusation against a Minister, the Prime Minister or the Sultan, and which concludes with the pronouncement of a punishment under the Penal Code.

[108] This phrase appears in three Articles: Article 80, 81, and 82 of the Constitution and are discussed in the coming paragraphs of this Section.

[109] The traditional name for Chief Justice in the Maldives was "Bodu Fan'diyaaru" or "Uththama Fan'diyaaru", which had come from an older, proto-Dhivehi term "Uthu Padiyaaru". The "Bodu Fandiyaaru" had been a significant official of the Maldivian State throughout her history, with the position carrying weighty religious significance and conventionally being occupied by the seniormost, or one of the seniormost, religious scholars of the country. The First Constitution's failure to provide for the position of the Chief Justice of the State is an issue which merits discussion, with the possibility that the framers saw the "Minister of Justice" (*Vazeerul Haqqaaniyyaa* in the original Dhivehi text) in Article 90 as a replacement of the traditional "Bodu Fan'diyaaru" or Chief Justice; but that discussion is not within the scope of this article.

Government it designed performed the necessary state function of adjudicating upon and resolving legal disputes. We get the answer by carefully reading provisions such as Article 43, Article 90, Article 49, Article 46, Article 64, Article 65, Article 67, Article 73, Article 81, and Article 82. What these provisions definitively show is that the courts of law were to be part of the Executive, functioning under and subservient to political officials. They were to exist and function in the name of the Sultan and under his authority,[110] under the administrative oversight of a Minister of the Sultan's Executive—the Council of Ministers. That Minister was, as stipulated in Article 90, the "Minister of Justice"[111] who would head a Department of the Executive in which all judges were to work as mere employees. As explained elsewhere, the Sultan was the head of Executive or Government,[112] with the power to appoint the Prime Minister and all the Ministers,[113] and arguably also with the power to remove them.[114] The Sultan also, quite clearly, had the power to appoint and remove the judges at his own will and discretion,[115] with no security of tenure for judges. The Executive was to run in accord with his policies and under his authority. It is plain, then, that the judicial function of the State under the 1932 Constitution was firmly within and under the control of the political powers. The framers of the Constitution evidently saw no need or reason to set up an autonomous *judicial organ* of the State and took the judicial function as a component of the Executive.

That being the case, there is very little space to even begin talking about the *independence of judiciary* under the1932 Constitution. However, there were two provisions in the Constitution which draws our attention: Article 43 and Article 80. The former states that "The Sultan would not interfere in any law concerning adjudication in disputes; however, affairs of adjudication in disputes shall be conducted in the name of the Sultan and under his command."[116] The latter reads as follows: "Those who adjudicate upon disputes shall be independent in the process of adjudication unless and until they do not violate the law; no one shall interfere the processes of adjudication they conduct."[117] These provisions ostensibly give judges at least substantive or decisional independence. However, for at least two reasons, they were unlikely to be effective, to say the least. *Firstly*, the judges, as explained in the paragraph above, were within the Executive and under the full administrative authority of the King and his Ministers, with no security of tenure and subject to removal by the Sultan at will.[118] It is a fool's hope to believe that judges under such circumstances can be independent and impartial. *Secondly*, the main provision supposedly guaranteeing judges independence in adjudicating — Article 80 — contains an interesting statement: that judges would be independent in the process of adjudication "unless and until they do not violate the law". How can judges adjudicate independently when the very provision purporting to guarantee their judicial independence also says that that independence would be there as long as they *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 People's Majlis, or anyone else, claimed that a judge had violated a law in making a judicial decision? Who had the authority of final interpretation of the

[110] Constitution of 1932, Article 43.
[111] Ibid, Article 90(3).
[112] See *supra*, Notes 65 & 66.
[113] See *supra*, Notes 72 & 75.
[114] Constitution of 1932, Article 46. The provision reads as follows: "It is His Majesty the Sultan's authority and command that would be executed in appointing and commissioning persons to all positions of the State and in removing them."
[115] Ibid.
[116] Ibid, Article 43.
[117] Ibid, Article 80.
[118] In fact, it is a testament to the subservient position judges were placed in in relation to the senior officials of the Government that the Constitution provided for an *ad hoc* judicial body, in Articles 74, 75, 76, and 77, which was to include one "senior adjudicating official of the Court", to hear any criminal cases brought under the penal laws against a Minister, the Prime Minister, or the Sultan. Ordinary judges — "those who adjudicate upon disputes" — were not allowed to hear such cases even though they were clearly and evidently ordinary criminal trials and not impeachment proceedings.

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 Article 80 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 did 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. He could perhaps be even put on trial for violating the law! 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?

The foregoing discussion leads us to only one rationally tenable conclusion: the 1932 Constitution did not guarantee *judicial independence*. It lacked the third constitutional and legal foundation necessary for *constitutionalism*.

The Amendments

The first Amendment to the 1932 Constitution, in 1934, brought two notable changes in its provisions relating to the judges and judiciary. *Firstly*, as it merged the Legislative Council and People's Majlis, created originally as two separate bodies of the State Governance 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.[119] *Secondly*, a number of articles were inserted[120] to provide for an office that can be seen as that of the "Chief Justice", although this name was still not used. Yet, 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 Sharīʿah Affairs".[121] 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 Constitution, coming in 1937, made no further changes in relation to judges or the judicial function of the State.

Conclusion

If we look at this article as an exercise of deductive reasoning in the form of a syllogism — the major premise being that a constitution can be held to uphold *constitutionalism* if it provides for the supremacy and primacy of the constitution over all political powers, for an efficacious system of *constitutional judicial review* of all forms and kinds of governmental and political actions and decisions, and an *independent judiciary* which is co-equal and is constitutionally empowered to effectively and decisively enforce the system of *constitutional judicial review*, and the minor premise being the Maldivian Constitution of 1932 did not provide for all these three foundations of *constitutionalism* — then the logical conclusion would be that that Constitution did not ensure or uphold

[119] Constitution of 1932 as amended in 1934, Article 52, 1934.

[120] Ibid, 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.

[121] Ibid, 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 Sharʿiyyah". Here, the name "Ministry of Sharʿiyyah" is a translation of the name "Maḥkamah al-Sharʿiyyah", which is difficult to be translated, as in a Maldivian context of the time, the term "Sharʿiyyah" included not merely or only adjudication, but it was a term carrying a much wider meaning upholding the rules of Islamic Sharīʿah, including the leading of affairs of prayer, fasting, hajj, and ultimately also adjudicating in disputes in accord with basically the Sharīʿah".

constitutionalism. We got our 1932 Constitution as the first autochthonous constitution of South Asia, and it surely laid the foundation for the birth of *constitutionalism* in the future: but it did not itself guarantee *constitutionalism* for the Maldivian people and the State. It was not a *garantiste* constitution; it did not limit Government and subject Government to the supremacy of the Constitution. It was perhaps just a *nominal* constitution describing the existing power structure—a structure in which the Sultan had almost absolute power. The only change it brought might be to provide for legitimate power sharing by the Sultan's nobles.

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The Business Judgment Rule: Analysing Walt Disney Case in the Nigerian Context

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Abstract:

Corporations are vital to the economic development of any nation; they are an important vehicle for the development of capitalism. Directors are pivotal to the management of companies as they are often the alter ego of companies. The sensitive nature of the position of directors confers on them the status of a fiduciary in respect of the company as they are entrusted with managing its resources and affairs and must act in its best interest at all times. Thus, the ultimate duty of a director is the fiduciary duty and from which other common law and statutory duties flow. However, in certain instances, a director while acting as a fiduciary and in what he believes to be the best interest of the company may end up harming the company. The question therefore is, will the act of the director which has negatively affected the company be ameliorated because such act was done in the best interest of the company? Will intention be a strong factor in deciding directors' culpability for a decision taken but which has affected the company adversely? This issue came to fore in the US case of Walt Disney Derivative Litigation which espoused the business judgment rule. The objective of this article is to analyse the business judgment rule and its exposition in the Walt Disney case. The article also aims at examining the Nigerian company law with the aim of determining the application of the business judgment rule. It finds that while there is no express reference to the business judgment rule in the Nigerian company legislation and case law, there are provisions in the law that are in tandem with the spirit of the business judgement rule. Thus, directors in Nigeria also enjoys the protection which affords them the opportunity to exercise their discretionary powers without fear of liability as long as the powers are exercised in good faith. The article further finds that directors in Nigeria in fact enjoys wider protection than that offered under the business judgment rule as they enjoy what can be referred to as anticipatory protection which enables them to apply to court to seek some relief in anticipation of an action by the company itself or a minority shareholder. This article adopts the doctrinal research methodology to analyse the Nigerian legal framework in the context of the business judgment rule. It concludes by recommending that the position in Nigeria on anticipatory protection be adopted in stretching the business judgment rule in the United States while also recommending an amendment in the Nigerian Companies and Allied Matters Act to clear ambiguity and further enhance director's protection.

Keywords: Business Judgement; Companies; Corporations; Directors and Fiduciary Duty

ބިޒްނަސް ޖަޖްމަންޓް ރޫލް: ނައިޖީރިއާގެ އުސޫލުތަކުގެ ދެކެއިން ވޯލްޓް ޑިޒްނީ މައްސަލަ ތަޙުލީލުކުރުން

ޚައިރާތު އޮލުވަކެމީ އަކަންބީ، ހަފްސަތު އިޔާބޯ ސައަދޫ، އަދި އަބްދުލްރައްޒާގް އަޑެލޮޑުން ޑައިބޫ

އެބްސްޓްރެކްޓް:

ކޮންމެ ޤައުމެއްގެ ވެސް އިޤްތިޞާދީ ކުރިއެރުމަށް ކޯޕަރޭޝަންތަކަކީ ކޮންމެހެން ބޭނުންތެރި، އަދި ކެޕިޓަލިޒަމް ކުރިއެރުވުމަށް އޮތް މުހިންމު ވަސީލަތްތަކެވެ. ކުންފުނިތަކުގެ މެނޭޖްމަންޓްގައި ޑިރެކްޓަރުންނަކީ އެންމެ އިސް ދައުރެއް އަދާކުރާ ފަރާތްތަކެވެ. ކުންފުނީގެ ވަސީލަތްތަކާއި ކަންކަން ބެލެހެއްޓުން ޑިރެކްޓަރުންނާ ހަވާލުކުރެވިފައިވާތީ، އެފަރާތްތަކަކީ ކުންފުނީގެ "ފިޑިއުޝަރީ" ނުވަތަ އަމާނާތްތެރިކަމުގެ ޒިންމާ އުފުލަންޖެހޭ މަގާމުގައި ތިބި ބައެކެވެ. އަދި އަބަދުވެސް ކުންފުނީގެ އެންމެ ފައިދާހުރި ގޮތުން އަމަލުކުރަން އެފަރާތްތަކަށް ލާޒިމުވެއެވެ. އެހެންކަމުން، ޑިރެކްޓަރުގެ އެންމެ އިސް ވާޖިބަކީ ފިޑިއުޝަރީ ވާޖިބެވެ. އަދި ކޮމަން ލޯއާއި ޤާނޫނީ ވާޖިބުތައް މި ވާޖިބުން ނިކުމެގެންދެއެވެ. ނަމަވެސް، ބައެއް ހާލަތްތަކުގައި، ޑިރެކްޓަރަކު ކުންފުނީގެ އެންމެ ފައިދާހުރި ގޮތް ކަމުގައި ދެކޭ ގޮތެއްގެ މަތިން އަމަލުކުރުމުން ކުންފުންޏަށް ގެއްލުން ލިބިދާނެއެވެ. މިހެންކަމުން

އުފެދޭ ސުވާލަކީ، ކުންފުނީގެ ޝަރުޢީ އަސާސެއް ކުރިއަރަމުންދާއިރު އެކަން ކުރީ ކުންފުނީގެ ވާރިސުންތަކާއި ކަމުގައިވާނަމަ ޑައިރެކްޓަރުންގެ އެ އަމާނާތް ފުއްދާ ފަށްނުމެއް ޖެހޭތޯ؟ ޑައިރެކްޓަރުންގެ ނިޔަތުގެ ސަލާމަތް ކުންފުނިތަކަށް ޙިމާޔަތްކުރުމުގައި ވިޔަސް، ޑައިރެކްޓަރުން ޢިންސާފުގައި ކަމުގެ ދުވަހުގައި ޑައިރެކްޓަރުންގެ ނިޔަތަކީ ކުރިމަތިވާ ސުވާލެކެވެ. މި މަޤާލާގައި އުނގެނުމުގައި ތަޢާރަފުކޮށްދޭ "ފިޑިއުޝަރީ ޑިއުޓީ" މަބްދައުގެ ދަށުން "މަޤާލާގައި މަބްދައު" ބޭނުންކުރެވިފައިވާ ގޮތް ބަލާލައިފައިވެއެވެ. މި މަޤާލާގައި "ފިޑިއުޝަރީ ޑިއުޓީ" (ވިޔަފާރީގެ ނިޔަތްތެރިކަމުގެ ޤަވާޢިދު) ފަދަ ގާނޫނީ މަބްދައުތަކަށް ބަލާލައިފައެވެ.

Keywords: ވިޔަފާރީގެ ނިޔަތްތެރިކަން؛ ކުންފުނިތައް؛ ކޯޕަރޭޓް ގަވާއިދު؛ ޑައިރެކްޓަރުން އަދި ފިޑިއުޝަރީ ޒިންމާ

Introduction

Generally, directors are central to the business of companies as they manage the affairs, they are often referred to as trustees, managers and agents of the company. With the evolution and growth of the limited liability company, it became a reality that the shareholders who owns interests in the company are mostly disconnected from the day to day management of the company thus, the need for professional managers who can manage and conduct the business of the company in trust for the owners.[122] Therefore, it is a matter of trust that persons who are engaged to manage the company on behalf of the actual owners must do so in utmost good faith and act in the best interest of the owners at all times. Thus, the ultimate responsibility of the director to the company is loyalty and honesty hence they are regarded as fiduciaries to the company. It is on the duty of fiduciary that all other duties are built. It should be noted that the recognition of the legal personality of companies and the reality of its artificial nature means that companies are able to act only through their human elements.[123]

Directors are officers of the company though sometimes can also double as employees[124] and most times are the alter ego of the company.[125] Also, they are often referred to as trustees and agents of the company and while neither of these qualifications is absolutely true, directors can actually act as both in different circumstances. For example,

122 In small one man companies however, the owners are usually the directors of the companies themselves.

123 The fiction theory of law believes that the idea of corporate personality is a myth or fiction created by law as the company derives its legitimacy through the instrumentality of the law. Thus, the company can actually not do anything by itself without the human elements. See Khairat Oluwakemi Akanbi, 'Directors' Accessorial Liability: A Tool for Better Regulation' (2020) 16 *Maiduguri Law Journal* 100

124 A director can also be an employee, for example an executive director. See generally Alan Dignam, *Hicks & Goo's Cases & Materials on Company Law* (Oxford University Press 2011) 309

125 In their function of managing the company's business exercise all the powers of the company.

the position of directors in a company was described in the English case of *Forest of Dean Coal Mining Company*[126] thus:

> Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. It does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all the other shareholders in it.

Perhaps, a most interesting description of the status of directors in a company was given in the old English case of *Imperial Hydropathic Hotel Co., Blackpool v. Hampson*[127] thus:

> …when persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered points of view which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall pro tanto within the principles which govern that particular class.

The Nigerian case law have towed this line of reasoning in a number of cases. For example, in *Okeowo & Ors v. Miglore & Ors*[128], it was held that they are trustees as they act as trustees to the company's properties and monies and they must act thereto with utmost good faith. Nigerian courts have also qualified directors as agents of the company in a number of cases like *Trenco (Nig) Ltd v. African Real Estate & Investment*,[129] in the case of *Alphonsus Oriebosi v. Andy Sam Investment Co. Ltd*[130] it was held that they can be referred to as agents because they act on behalf of the company and the company can be vicariously liable for their actions.[131] Yet, it seems that they are much more as they wear different hats within a company, the Supreme Court of Nigeria in *Yalaju Amaye v. A.R.E.C Ltd*[132] per *Nnaemeka Agu* held that the better view is that directors are agents, trustees and fiduciaries of the company.

Thus, it seems that the status and influence of company directors cannot be over emphasized as they wear different hats within the company and it is almost impossible for the company to act without the active participation and knowledge of the directors as they actively manage the affairs of the company, monitor and supervise the activities of the corporate employees and are the brain of the company dictating corporate strategy.[133]

In the course of the exercise of their duties, directors as decision makers exercise a lot of discretion in managing the affairs of the company. As humans that are fallible, innocent mistakes can occur even when exercising their fiduciary

[126] (1878) 10 Ch.450 Per Jessel M.R
[127] (1882) 23 ChD 1at 12
[128] (1979) ALL NLR 282
[129] (1978) ALL NLR 124
[130] (2014) JELR 36415 CA, (2014) LCN 7310 CA
[131] Alphonsus Oriebosi v. Andy Sam Investment Co. Ltd (2014) LCN 7310 CA
[132] (1990)4NWLR (pt.145)422 SC
[133] Irrespective of the hat that directors wear in a company, what is not in doubt is that they are the brain of the company. Lord Denning in H L Bolton & Co v. T J Graham & Sons (1957) 1 QB 159 held that a company can be likened to a human body with brain and limbs. He said directors are the brains of the company which controls what it does and others within the company are like limbs which functions on the command of the brain. A cursory look at Nigerian case law shows that it aligns with this view. See Adeniji v. State (1992) 4 NWLR pt. 597, p.53, Delta Steel Nigeria Ltd v. American Computer Tech Inc. (1999) 4 NWLR pt. 597

duty and acting in what they believe to be in the best interest of the company. The business judgment rule originally developed in the United Kingdom and adopted across jurisdictions offers protection to directors when their actions and decisions affect the company negatively so long as there is no violation of the law or obvious act contrary to the company's interest. Nevertheless, it does not excuse wrongful behaviour on the part of directors. The rule was richly espoused in the US derivative case of *Re Walt Disney Co. Derivative Litigation* and provides that there is a rebuttable presumption in favour of company directors acting in good faith and in the best interest of the company at all time.

This article shall therefore discuss the role of directors especially as fiduciaries to the company which is foundational to the discretionary powers they enjoy. The article shall analyse the Walt Disney case where the business judgment rule was richly espoused in order to fully understand the application of the rule. The article also discusses the application of the rule in South Africa which as an African country shares a history with Nigeria as commonwealth countries. Finally, this article shall discuss the Nigerian company laws to determine whether the business judgement rule is applicable and to what extent. This is important because the business judgement rule is a pro corporate governance principle which can enhance the smooth running of corporations.

Legal Materials and Methods

In analysing the business judgement rule and the fiduciary duty as espoused in the Walt Disney Derivative case and the Nigerian context, this article uses the juridical normative method, which analyses the Walt Disney case in the light of the business judgement rule and examines the application of the rule under the Nigerian company law.

Legal materials to be analysed are the Companies and Allied Matters Act 2020 of Nigeria, the Company's Act of South Africa. Also, case law from different jurisdictions like the US, UK, South Africa and Nigeria will be used. Also, relevant journal articles and text are also used.

Results and Discussions:

Directors as Fiduciaries

While specific duties of directors are stated in the memorandum and articles of association, the general statutory duties are provided in the relevant statutes;[134] the basic duty of directors is the fiduciary duty upon which all other duties are based. This is because when the investor or business owner engages another person (director) to assist in the running of his business upon agreed terms, such a person (director) owes much more than a contract and must loyally serve the interest of the owner.[135] The fiduciary duty is expressed in terms of loyalty, integrity, good faith,[136] trust; confidence, acting in company's interest,[137] faithfulness, disclosure, knowledge and skilfulness.[138]

Another perspective to the fiduciary duty is that it is not expressed only through a positive act but also expressed by an omission to act if the circumstances suggest so. In *Regentcrest Ltd v. Cohen*,[139] the court in stating the subjectivity of directors' duty to act in the best interest of the company held that the pertinent question is whether directors believed their actions or omissions was in the best interest of the company. This goes to buttress the point that director's duty can be expressed through an omission.

[134] There are general common law duties but most of which has been incorporated into statutes in countries like Nigeria.
[135] Patrick D. Okonmah, 'Directors as fiduciaries Under Nigerian Company Law' (1997) *Tilburg Law Review* 181
[136] Section 305 (1) Companies and Allied Matters Act 2020, Okeowo v. Migliore (1979) 11SC 133
[137] Section 305 (3) Companies and Allied Matters Act 2020
[138] See generally Section 305 Companies and Allied Matters Act 2020
[139] (2001) I.B.C.L 80 at 1056

The concept of fiduciary itself evolved from the equitable principles of trust where a party is vulnerable and allows another party to act for it based on trust.[140] It is expressed in terms of loyalty, integrity, good faith, trust; confidence, acting in company's interest, faithfulness, disclosure, knowledge and skilfulness. The fiduciary duty has been given validation by both the courts and various legislations on corporate law across different jurisdictions.

Directors' Fiduciary Duty under the English Law

It is settled under the English law that directors have a duty of loyalty to the company and must avoid any form of conflict of interest. In the old English case of *Cooks v. Deeks*[141] the extent of conflict of interest was tested. Here, three directors took a railway line construction contract in their own names instead of the company's name to exclude a fourth director from the business and interestingly, use their votes as shareholders to ratify their action. It was the opinion of the Privy Council that their action was a fraud on the minority shareholder and conflict of interest precluded their ability to forgive themselves. A more recent English case on conflict of interest is the case of *JJ Harrison (Properties) Ltd v. Harrison*[142] where the conveyance by a company of some properties to one of its directors was set aside by the trial court and the director was held to account for the profits made on the sale of the property. In addition, it was shown that the director failed to make full disclosure to the company with respect to the value of the property. Although, the director appealed the decision on the grounds that the suit was statute barred based on the provisions of the Limitation Act 1980 and also on the ground that his defence of laches was rejected by the court; His appeal was dismissed and the court reiterated that when a director disposes a company property in breach of his fiduciary duty, such a director will be treated as a trustee of such property thus, the company is liable to recover the property or proceeds of the property held in trust but which was converted by the trustee.[143] The director's appeal was therefore dismissed.[144]

Similarly, in *Bhullar v. Bhullar*[145] a director established a company to buy a car park beside one of the company's properties, while the family company as a result of an existing family feud had resolved not to make any more investment in properties. Yet, it was held that the director ought to have disclosed to the company as the car park was an opportunity in line with the company's line of business. Thus, the director was held to have breached the conflict-of-interest duty and thus liable to make restitution to the company for the profits made.

It seems that directors can be liable for breach of duty even when they are no longer with the company so far as the act was done while still with the company. The case of *British Midland Tool Ltd v. Midland International Tooling Ltd*[146] suggests that directors preparing to enter into competition with the company after leaving the company are liable for breach of duty. In that case, some former directors of British Midland Tool Ltd were found liable of conspiracy and breach of duty when they planned to set up a rival company while engaged as directors and eventually did set up the company upon resignation. This position was reinforced in the case of *Shepherds Investment Ltd v. Walters*[147] where the claimant company brought an action against its erstwhile directors for breach of implied duty of fidelity and breach of fiduciary duty. The claimant company was an investment fund, and by 2003 began considering extending its business into whole-life policy market. Same 2003, three of its directors started discussions on establishing their own firm which would trade in whole-life policies and started preliminary

[140] Babajide S.Shoroye 'Directors as Trustees of Company's Powers and Properties: Understanding the Justification for Fiduciary Duties'. (2022) 12 *Developing Country Studies*, No.5 ISSN 2225-0565
[141] (1916) 1AC 554
[142](2002) IBCLC 162
[143] It should be noted that the company also cross appealed and this was allowed in part.
[144] See also Deg-Deutsche Investitions v. Konshy (2002) 1BCLC 478
[145] (2003) EWCA Civ 424
[146] (2003) 2 BCLC 523 at 560
[147] (2006) EWHC 836

steps towards actualising the plan after which two of the directors resigned. The new company was incorporated before the third director resigned. The court held that a director who intends to resign to set up a rival business must disclose as soon as the intention becomes irrevocable and thus held the directors liable.[148]

In *Re Barings PLC (No5)*[149], it was held that director's duty extends to providing adequate supervision to the employees and also putting in place an effective risk management system. In this case, a futures trader secretly conducted unauthorized trades on behalf of the company (the Barings Bank). Three London directors had ignored a warning about the activities in Singapore which eventually led the company into bankruptcy. Subsequently, the directors were sought to be disqualified under the Company Directors Disqualification Act 1986 on the grounds of unfitness. It was held both by the high court and subsequently by the court of appeal that the directors' duty of care extends to acquainting themselves with the company's affairs and supervising appropriately, thus the directors in this instance were unfit to manage company's affairs.

Directors' Fiduciary Duty in the United States

In the American case of *Hughes v. Northwestern University*,[150] the Supreme Court vacated the decision of the Court of Appeal and held that there was a breach of fiduciary duty under the Employment Retirement Income Security Act (ERISA). The plaintiffs had sued the defendant for breach of fiduciary duty for offering an expensive investment option when there were cheaper options. Both the trial court and the Court of Appeal had decided that there was no breach because the plaintiffs were not forced to invest in the expensive plan as they had the option to choose a cheaper investment plan. However, it was the opinion of the Supreme Court that a fiduciary's duty includes the duty to monitor and remove poor investments from the plan and failure to do so constitutes a breach of fiduciary duty under the ERISA. In *Smith v. Van Gorkem*[151]it was emphasized that the duty of directors entails making informed decisions with respect to the affairs of the company and it will be a breach of duty to act in ignorance,[152] though this case was on duty of care and skill. Knowledge is key and part of discharging their duty of care means that they must take steps to keep abreast of information that will benefit the company. It must be seen that they exercise due diligence and care in making decisions for the company. Personal interest must not clash with company's interest.

Similarly, the importance of the fiduciary role of a director was examined in the case of *Guth v. Loft*[153] where the company's director saw a business opportunity for the company but diverted same for himself instead. Guth was the president of Loft Inc. Loft Inc buys cola syrup from Coca Cola but Guth after Coca Cola failed to give a generous discount, decided to buy from Pepsi. However, before taking steps to buy from Pepsi, Pepsi went bankrupt and Guth bought over Pepsi in his personal capacity and subsequently with the aid of Loft Chemist formulated the Pepsi syrup recipe and sold it to Loft Inc. He was subsequently sued by Loft Inc.'s shareholders for breach of his duty of loyalty. His act of buying Pepsi for himself instead of Loft was deemed to be an act of disloyalty. The Delaware Supreme Court held that he breached his fiduciary duty by taking an opportunity the company was interested in. The court went further:

> On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, which is, from its

[148] Framlington Group Plc v. Anderson (1995) 1BCLC 475 note the earlier position in Balston Ltd v. Headline Filters Ltd (1990) FSR 385 which held that directors can take simple preparatory steps to establishing a rival business while acting as a director.
[149] (1999) 1BCLC 433
[150] 595 US_2022
[151] 488 A.2d 858 (1985)
[152] See also Moran v. Household Intern Inc. 490 A. 2d 1059 (1985)
[153] 5A.2d 503, 510 (Del.1939)

> nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Directors' Fiduciary Duty in South Africa

The South African company jurisprudence also affirms the existence and importance of director's fiduciary role in the company.[154] In fact, it gives a broad perspective to the fiduciary duty and is contextual with factors like power, vulnerability, discretion and influence being considered by the courts in arriving at a decision in specific cases.[155] For example, its scope was really explored in the case of *Volvo (Southern Africa) Pty Ltd v. Yssel*[156]. In this case, the respondent was employed by the plaintiff company as its IT manager but the employment was through H, a third party labour agent suggested by the plaintiff. The relationship between the company and the labour agent was regulated by a written agreement which included that the company would pay fees to H, the labour agent who would in turn pay the plaintiff. However, the company did not deal directly with H but dealt with the plaintiff. After some years, the company engaged additional six employees to work in its IT department via a similar route of using a labour agent. After a while, the plaintiff convinced both the company and the six employees to transfer the agency services to H. Thus, a written temporary service agreement was reached between the company and H in respect of the six employees. It should be noted that like the situation with the plaintiff, the company did not have direct dealings with H but engaged it through the plaintiff who facilitated the arrangement. After a while, it was discovered that unknown to both the company and the six employees, the plaintiff was receiving about 40% of the fees paid by the company to H as commission for facilitating the deal. The six employees subsequently terminated the agreement with H. The company brought an action against the plaintiff for the payment of the monies he made via the transaction which it claimed he earned in breach of his fiduciary duty to the company. The claim was dismissed by the High Court. On appeal, the contention was not that the plaintiff did not make secret profit rather that he does not stand as a fiduciary to the company. His argument was based on the fact that he had no contractual privity to the company. In upholding the appeal, the Court of Appeal held that the issue of fiduciary lies in whether in the circumstances; it would be reasonably expected of a party to act in another's interest. It held that his involvement in the transaction between H and the company was incidental to his employment as a manager in the company; and he was employed to further the interest of the company and not his personal interest. It therefore held that the plaintiff was a fiduciary who had a duty not to allow his personal interest conflict with the company's interest. The fact that he hid his commission from the company suggests that he knew he was making a secret profit.

Directors' Fiduciary Duty in Nigeria

In Nigeria, the fiduciary position of directors is solidly codified in the Companies and Allied Matters Act.[157] Section 305(1) provides that directors have a fiduciary relationship with the company and shall observe utmost good faith with the company. Section 305(3) further provides that a director must always act in what he believes to be the best interest of the company. Nigerian courts have also consistently validated this statutory position. For example, in the case of *Astra Industries Nigeria Limited v. Nigerian Bank for Commerce and Industry*,[158] it was emphasized that

[154] It is codified by the provisions of S.76(3) Companies Act 2008
[155] Howard Chitimira and Friedrich Hamadziripi 'A Reflective Discussion of the Director's Fiduciary Duties to the Creditors under the South African Company Law.' 2022 18 (1) Juridica*, Acta Universitatis Danubius*, 81. Available online at https://dj.univ-danubius.ro/index.php/AUDJ/article/view/1579/2079 accessed on 10/10/2023
[156] (2009) 6SA 531 SCA
[157] Companies and Allied Matters Act 2020
[158] (1998) 4 NWLR (pt.145) 422 SC

acting in the best interest of the company at all times is at the core of directors' duties. Here, the issue was whether the director of the defendant bank could have exercised his discretion in favour of the plaintiff. The Supreme Court per Onu (JSC) reiterated that when a director is exercising his discretionary power, such must be exercised in the ultimate interest of the company. Similarly, in *Okeowo & Ors v. Migliore & Ors*,[159] the Supreme Court emphasized that the fiduciary relationship of a director with a company is not for individual benefit but rather for the benefit of the company.

It must be stated that the directors' fiduciary duty as with all other duties is owed to the company itself and not specific shareholders.[160] In fact, directors may take decisions which may not be favourable to the existing shareholders but which may be beneficial to future shareholders and ultimately be in the best interest of the company.[161] In addition, in achieving its goals of fiduciary in relation to the company, regards must be had to the needs of the employees, the consuming public, the creditors and the society as the ultimate regulator and stakeholder in company's affairs.

The Business Judgment Rule

The 'Business Judgment Rule' was reinforced and made popular in the US case of *Re-Walt Disney Derivative Litigation*[162]. It is a legal doctrine which prevents a company's board from frivolous law suits based on the assumption of good faith.[163] The rule proposes that in the absence of contrary evidence, the actions of company's directors will not be reviewed by court because the rebuttable assumption is that they act in the best interest of the company at all times.[164] The rule does not necessarily clothe company directors with the garment of infallibility but believes that even in instances where they take a wrong decision, as long as there is no violation of any law or deliberate obvious act contrary to company's interest, they will be treated as exercising a business judgment in the best interest of the company but a judgment gone wrong, hence the court will not question or challenge the decisions. Thus, in suits challenging a director's action, the court in adopting the business judgment rule will uphold the decision so long as the director acted in good faith and with the belief that he was acting in the best interest of the company. The essence of the business judgment rule is to prevent or reduce pressure on directors who ordinarily exercise a lot of discretion in the discharge of their duties to the company.

It seems the earliest decision on the rule is the 1742 English case of *Charitable Corp v. Sutton*[165] where it was held that directors should not be held liable for good faith decisions even if such decision affected the company negatively so long as they acted diligently and with fidelity.

Re-Walt Disney Co. Derivative Litigation:

In the United States, the case of *Percy v. Millaudon*[166] is the earliest decision recognizing the business judgment rule. The Supreme Court of Louisiana held that directors should not be liable for errors of judgment or mistakes if

[159] More recently, the case of NIDOCCO v. Gbajabiamila (2013) LPELR-20899 (SC)
[160] Section 170(1) Companies Act 2006, see also section 305 CAMA 2020
[161] Percival v. Wright (1902) 2Ch 421, also in Re Pantone 485 Ltd (2002) BCLC 266 a director of two connected companies was alleged to have caused one of the companies to spend monies in excess of eighty six thousand pounds for the benefit of the other company in which he has interest, thus he caused the first company to incur a liability, the director was deemed to have breached his fiduciary duty.
[162] 907 A2d 693 (2005)
[163] Smith v. Van Gorkom 488 2d 858 (1985)
[164] Miller v. American Telephone & Telegraph Co 507 F.2d 759 (3rd Cir. 1974)
[165] Charitable Corp v. Sutton (1742) 26 ER 642, 2 ATK 404
[166] 8 Mart (n s) 68 (1829)

it was one that a prudent man can make. In *Litwin v. Allen*[167] the rule was expanded. It was held by the trial court that the directors of the company were liable for their decision to buy three million dollars of debentures as the purchase agreement gave the seller option to repurchase at the sale price within six months. Thus, the company bears the risk if there is a loss in value and no gain if otherwise. It was the opinion of the court that the directors in this case did not exercise their duty of care. In explaining the business judgment rule, the court made a distinction between business judgment and negligence; it stated that while directors are not liable for errors of judgment so long as they exercise reasonable skill, they are liable for negligently performing their duties.

The Walt Disney Derivative Litigation is a derivative action instituted by minority shareholders of Walt Disney Company. It was decided by the Supreme Court of Delaware and reinforces the business judgment rule. In addition, it demonstrates the application of the common law principle of minority protection. The minority shareholders of Walt Disney Company (WDC) had alleged that the directors of WDC breached their fiduciary duty in the manner of the appointment and subsequent termination of the company's President Michael Ovitz. Prior, there was a vacancy in WDC as a result of the death of its president and number two executive. The company's CEO Michael Eisner wanted a replacement and thought of Michael Ovitz who was a prominent figure in Hollywood and the founder of a successful company, Creative Artists Agency (CAA). Thus, WDC'S board appointed Ovitz with effect from October, 1995. The contract of employment was for a fixed term of five years. It contained downside protection at the instance of Ovitz who had to give up ownership of CAA to join WDC. In addition, the contract also contained clauses to the effect that if the employment was terminated before the expiration of the fixed 5 years and other than for reasons of malfeasance and gross negligence, Ovitz would receive:

(a) His basic salary for the remaining period of the five years.
(b) ¾ of the annual bonus he would have received for the fixed five years.
(c) All stocks option he would have been entitled to for the five years and
(d) 10 million dollars in lieu of the stocks option he would have been entitled to if the contract was extended for another five years.[168]

The contract also contained a clause to the effect that if Ovitz left the employment other than as agreed under the contract, he would forfeit the remaining benefits under the terms of employment and will be prevented from working for a competitor.

However, by December, 1996 just slightly a year after, WDC terminated the employment but without claiming cause and therefore making Ovitz entitled to the severance package agreed in the contract and which translated to about 130 million dollars and same was paid to Ovitz. Hence, the shareholders instituted the derivative suit.[169] The action alleged that both the downside protection clause in the contract of employment and the eventual termination without fault[170] are not in the corporation's best interest; and ultimately constitute a breach of the directors' fiduciary duty.

As stated, this is a landmark case which tested two main company law principles of minority protection and the business judgment rule; thus, it lasted almost a decade, with the trial finally commencing in 2004 after a series of pre-trial motions.

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[167] 25 NYS 2d 667 (Sup. Ct. 1940)
[168] It should be stated that Ovitz had insisted on a downside protection clause because he was giving up his 55% interest in the Creative Arts Agency.
[169] The original complaint was dismissed by the court of chancery in Re The Walt Disney Co Derivative Litig. 731 A, 2d 342 (Del. Ch.1998), the dismissal was appealed against and the appellate court affirmed the dismissal in part and sustained the claim in part, yet, there were other pre-trial motions and appeals like In Re The Walt Disney Co. Derivative Litig. 825 A. 2d 275 Del. Ch. 2003, Brehm v. Eisner, 746 A.2d 244 (Del. 2000) and In Re Walt Disney Co. Derivative Litig. 2004 WL 2050138 (Del. Ch. 2004)
[170] It was alleged that there were sufficient grounds to terminate the employment for cause.

The chancery court of Delaware which was the trial court entered judgment in favour of the defendants and held the directors were not in breach of their fiduciary duty to WDC. The plaintiffs had argued that the heavy severance package constitutes a breach of fiduciary duty of the directors as it was not in the best interest of the company. Also, they contended that there was sufficient ground to terminate Ovitz' employment for fault; it was alleged among other things that Ovitz was guilty of insubordination, lying and that his general performance was subpar. The court found no evidence of lying or insubordination and held that it was immaterial that he was not as successful as expected so long as there was no proof that he was grossly negligent.[171]

On appeal to the Supreme Court of Delaware, the decision of the trial court was affirmed. It was contended by the appellants that the provisions on the non-fault termination in the contract of employment and the subsequent approval and payment of the severance package was a breach of duty of care and good faith by the directors and that such breach deprives them of the protection of the business judgment rule;[172] alternatively, it was argued that even if the business judgment rule applies, paying the severance package amounted to a corporate waste.

It was also argued against Ovitz that he breached his fiduciary duty to the company as a director because he negotiated and accepted the severance package as contained in his employment contract and also negotiated his full non fault termination payment. It was the appellants case that the trial court erred by holding that there was no breach of a fiduciary duty. The Supreme Court of Delaware in affirming the decision of the chancery court with respect to the claim against the directors decided that the appellants failed to establish any breach of duty of care or duty to act in good faith. In fact, evidence showed that the directors properly informed themselves of all material facts necessary for the employment agreement including the non-fault termination clause. Besides, there was nothing to show that Ovitz's appointment could be terminated for fault as he had not committed any malfeasance or gross negligent act. Thus, there was no way the appointment could have been terminated for cause; upholding the non-fault termination clause was the best deal the company could get in the circumstance. With regards to the alternative claim on payment of the severance package amounting to corporate waste, it was held that such claim could not stand because the company had a contractual obligation to Ovitz which it had to fulfil by the payment. Executing a contractual obligation cannot amount to a corporate waste unless the contract itself is a waste. It was the opinion of the court that the actions of the directors constituted a business judgment properly exercised and not in any way a breach of any fiduciary duty.

With respect to the claims against Ovitz, it was held that Ovitz did not have and could not breach any fiduciary duty for negotiating his contract of employment as he had not yet become an officer of the company and thus could not owe a duty.[173] In addition, he no longer owed a fiduciary duty after his appointment was terminated more so as he did not participate in the termination of his own appointment. The court emphasized that would be directors and former directors cannot owe a fiduciary duty. Thus, Ovitz's both pre and post appointment actions did not breach any fiduciary duty. [174]

As can be seen from the above, this case reinforced the principle of business judgment protection for company directors. The idea behind the rule is to solidify and validate the decision-making powers of directors, it also gives

[171] While the plaintiffs tried to prove that he was negligent, there was no evidence to support such and the court rightly stated same.
[172] If this argument stands, it means the burden of proof will shift to Disney directors to show that they acted in good faith.
[173] Although, the issue of de facto presidency was argued but was rejected on the ground that it lacked both factual and legal sense besides being procedurally barred on appeal. It was held that actions that Ovitz took before his appointment took effect were incidental matters to his appointment. The alterations done to his contract of employment after his appointment did not include the issue in contention. See generally https://casetext.com/case/in-re-walt-disney-co-derivative-litigation-2 accessed 24/10/23
[174] ibid

a basis for the exercise of their discretionary powers in managing the affairs of the company and protect them from frivolous lawsuits that can distract them from performing their duties.

A careful perusal of the rule as expounded above will in fact show that it is in itself in the best interest of the company. This is because it encourages corporate decision making and also encourages risk taking which is crucial to corporate growth and development. When directors are confident that their actions are protected as long as done in the best interest of the company, they will be more emboldened to take more risks. In the absence of solid evidence to the contrary, their decisions will always be protected as done with the best interest of the company at heart. The minority shareholders of Disney perhaps irked by public opinion and the seemingly "outrageous" amount paid to Ovitz who had barely spent a less than eventful year felt the company had been short changed and tried to "save" the company by instituting the action going all the way to the appellate stage. However, the consistency of the findings of the two courts shows the reluctance of courts to interfere in the internal workings of companies unless there is cogent reason (s) to do so; and this must be proved by the plaintiffs as evident in this case. The plaintiffs/appellants could not prove that the directors do not deserve the protection offered by the business judgment rule. It can safely be asserted that the rule in a way underscores the important roles that directors play in corporate management such that their actions are almost clothed with the toga of invisibility so long as there is no violation of a law and a breach of a fiduciary duty.

Business Judgment Rule in South Africa

The rule is also recognized and codified in South Africa by virtue of section 76(4) of the Companies Act 71, 2008 which qualifies instances when the rule will apply. It provides that a director would have acted in the best interest of the company and with the degree of care, diligence and skill expected of such a director if he had taken steps to be well informed about the subject matter; the director in addition must not personally have or know someone who has personal financial interest in the subject matter of the decision[175] otherwise, such should be disclosed to the board of directors as required under section 75. The requirements under section 76(4) a can be explained as follows:

a) The director (s) must have taken reasonable steps to be well informed about the subject matter.

b) The director (s) must have no material personal financial interest or personally know a person who has personal financial interest in the subject matter of the decision otherwise, such director (s) must have disclosed same as required under section 75

c) The director (s) must have taken such decision rationally believing same to be in the best interest of the company. This requirement is an objective one and shows why the director's decision must not be influenced by personal interests.

In addition, section 76 (4)b provides that a director can rely on information, opinions, performance and recommendations of legal counsels, accountants and other professional advisers engaged by the company on matters of their professional competence. A director can also rely on the opinion, information, recommendation and report of employees of the company whom the directors believe are reliable and competent. A cursory look at these conditions shows that they are meant to eradicate any form of abuse or negligence and merely reinforces directors acting in good faith.

[175] Section 76(4)a(ii)aa

Business Judgment Rule in Nigeria

The Nigerian company law is essentially statutory though greatly influenced by the common law as a result of its history as a British colony. The main company legislation is the Companies and Allied Matters Act 2020. (CAMA)

The CAMA has undergone reforms from its inception as Companies Ordinance in 1912.[176] It has since gone through phases and amendments to reflect the needs and exigencies of the times. The Companies Act 1862 of England which was received via the Supreme Court Ordinance of 1914 made the common law, doctrines of equity and statutes of general application in force in England as at 1st January, 1900 to be applicable in Nigeria and was the earliest legislation on company law in Nigeria. Then came the Company Ordinance of 1912 which was the first local legislation and initially applicable to Lagos and later the whole country via the Companies Ordinance (Amendment and Extension) Ordinance 1917. By 1922, the Companies Ordinance 1922 came into force with amendments in 1929, 1941 and 1954. It later became the Companies Act 1963 and was in force until 1968 when it was repealed and the Companies Act 1968 came into force. The 1968 Act came with a lot of innovations and was in force until 1990 when it was repealed by the Companies and Allied Matters Act 1990 which established the Corporate Affairs Commission to administer the Act among other innovations. The 1990 Act had a number of amendments while it lasted including the 1991, 1992 and 1998 amendments. As stated, the common law is a great influence therefore a lot of common law principles have been codified.

The concept of Limited Liability Company have been codified as far back as the earliest legislation, thus, it is settled that the Companies and Allied Matters Act recognize the corporate existence of incorporated companies. It provides in sections 42 and 43 that an incorporated company is a body corporate with its own legal identity and clothed with all the powers of a natural person. This is in tandem with the common law principle of corporate personality.[177]

The status and importance of directors as managers of companies is also recognized under the CAMA.[178] It provides in section 87 that the board of directors is one of the organs that can act as the company.[179] It provides in (3) specifically in respect of directors that unless the articles provides otherwise, the business of a company shall be managed by the board of directors who may exercise such powers of the company that are not required by the articles of association or the Act to be exercised by the general meeting.

It goes further in (4):

> *unless the articles otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, is not bound to obey the directions or instructions of the members in general meeting provided that the directors acted in good faith and with due diligence*[180]*"*

The combined effect of section 87 (1) (3) and(4) is that the Companies and Allied Matters Act recognizes that the board of directors together with the general meeting are the principal organs that acts as the company[181], the board is saddled with the management of the company and is under no obligation to take instructions from the general

[176] However, prior this time, it was the Joint Stock Companies Act 1855 that was the regulatory and introductory legislation on company law in Nigeria. It introduced the concept of limited liability.
[177] This principle was made popular by the case of Salomon v. Salomon & Co Ltd (1897) AC 22
[178] Section 269 defines a director as a person who manages and directs the affairs of a company.
[179] Others stated in section 87 are the general meeting, officers and agents acting under the authority of the board of directors or the general meeting.
[180] Emphasis is the authors.
[181] Officers and members in some instances when acting under the authority of the board or the general meeting can act as the company.

meeting.[182] In short, the board is the ultimate decision making organ of the company.[183] Nevertheless, 87 (5) of the Companies and Allied Matters Act provides that the general meeting can act as the board only[184] when the board is unable to act as a result of disqualification or a deadlock in boards' decision, but that is the only instance. The exception does not apply when the board refuses or neglects to act, in this instance, the general meeting can only institute an action on behalf of the company.[185] It seems therefore, that the exception allowing the general meeting to act is to forestall creating a vacuum when the board is unable to act especially as emergency situations may arise. When the failure to act is a deliberate refusal by the board, the general meeting cannot act as the board. Ultimately, the proviso in 87 (5) further entrenches the superiority of the decision-making power of the board of directors.[186] This assertion is supported by case law. A number of cases have described company directors as the directing mind and will of the company.[187]

Furthermore, the Companies and Allied Matters Act explicitly places the director in a fiduciary relationship with the company. It provides in section 305 that a director stands in a fiduciary relationship towards the company and must exercise utmost good faith in dealing with the company. It goes further in section 305 (3) and (4) to enjoin directors to always act in what it believes to be the best interest of the company. The standard is objective in ways that a normal, diligent, careful, skilful and faithful director would act in the circumstance.[188]

The effect of section 305 therefore is that directors' role as company fiduciaries is well grounded under the CAMA and this has been validated by case law.[189] In fact, no agreement or even provisions in the company's memorandum and articles of association can relieve directors of the responsibility of being a fiduciary.[190] It is an immutable duty[191].

Having established that the CAMA recognizes the supremacy of the decision making powers of directors and also qualifies them as fiduciary to companies, the question then is are the actions of directors in Nigeria subject to judicial review when it affects the company adversely? More succinct, are their actions protected by the business judgment rule?

A look at the Nigerian case law suggests that courts are ordinarily reluctant to interfere in the internal affairs of companies.[192] This is more so because the CAMA recognize the proper plaintiff rule via section 341 which provides that a company is the proper plaintiff to remedy a wrong done to it or ratify an irregular conduct.

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[182] Avop Plc v. Attorney General of Enugu State (2000) 7 NWLE (Pt. 664)260 CA
[183] The Court of Appeal in Batraco Limited v. Spring Bank Limited (2015) 5NWLR (Pt. 1451) 107 CA held that the board of directors do not require authorization from the general meeting.
[184] For emphasis
[185] Ladejobi & Ors v. Odutola Holdings Ltd &Ors (2006) 12 NWLR (Pt. 994) CA
[186] Note that 87(5) also empower the general meeting to make recommendations to the board and may ratify board's decision.
[187] The directing mind and will idea was the dictum of Lord Denning in H. L. Bolton (Engineering) Co. Ltd v. Graham & Sons. Nigerian cases like Nigerian Bank for Commerce & Industry v. Integrated Gas (Nig) Ltd (1999) 8NWLR Pt. 613 @129; Olawepo v. Securities and Exchange Commission (2011) 16 NWLR (Pt. 1272) 122 CA, Mokwe v. Ezeuko (2000) 14NWLR (Pt.686)143 CA have followed this approach.
[188] They are also enjoined to have regard for the interests of the employees, the members and the environment in which the company operates.
[189] Curiously, section 305 (5) provides that when a director's action or decision affects a member negatively, it would not be treated as a breach of duty by the director as long as the directors' action was done in the appropriate exercise of his powers. Yet, directors should only exercises their powers for the right purpose for which it is specified.
[190] In fact, multiple directorships do not abrogate director's fiduciary duty.
[191] Secret profits, benefits and conflict of interests are prohibited. It is not an excuse that a company refused or was unable to engage in a transaction for a director to promote his personal interest.
[192] Okoya & Ors v. Santili &Ors (1990) 2 NWLR (Pt.131) 172; Elufioye & Ors v. Halilu & Ors (1993) 6NWLR (Pt 310)570; Abubakri v. Smith (1973)6 SC 31

However, section 341 is subject to some exceptions listed in 343-346 and 353 & 354. For example, section 343 empowers a member of a company to apply to court for an injunction or declaration to restrain the company and its officers from performing (a) an illegal act, (b) violating any of the provisions of the memorandum and articles of association or (c) from performing actions that will affect the personal rights of the member, (d) committing fraud, (e) in an emergency situation where a general meeting cannot be practically called, (f) where directors' will make personal profit in the transaction proposed and (g) where the interest of justice demands.

It can be argued that on the face of it, the provision of section 341 limits the exposure of the activities of directors as corporate managers to courts and judicial review, since the general rule is that it is the company itself that can remedy its wrong or ask that the court interfere and review the actions of the directors. Nevertheless, even if this analogy subsists, limiting the exposure to judicial review is different from not subjecting it to judicial review. If a court can sue/ratify wrong done to it, it means that directors actions can be reviewed by the court. A holistic interpretation of section 341 and the exceptions particularly section 343 supports that in actual fact, director's actions can be judicially reviewed. A look at the exceptions listed above especially (a), (b), (d), and (e) and (f) already qualifies as breach of fiduciary duties. When a director commits fraud against the company, the director has breached his duty to act in good faith;[193] the same thing when a director commits an illegal act or makes personal profit; both qualifies as breach of a fiduciary duty.

The issue then is will directors enjoy the protection offered by the business judgment rule when an action is brought challenging their actions either by the company itself or by minority shareholders through personal, representative or derivative action under Companies and Allied Matters Act?

Firstly, it can be inferred subtly from the provisions of section 305(5) but again this is limited to when the director's action negatively affects a member of the company and not when it affects the company itself. Section 305 (5) provides that a director should exercise his powers for the specified purpose and not for a collateral purpose or power and that even if it affects a member adversely, it shall not constitute a breach of duty so long as it was exercised for a proper purpose. The above provision can be regarded as subtly clothing the director with the protection of the business judgment rule when the director's action affects a member negatively.

The issue is will the same protection be available when the director's action affects the company itself negatively? The answer lies in the provision of section 738 (1) which provides:

> if in any proceeding for negligence, default or breach of duty or trust against an officer of a company or a person employed by a company as auditor, it appears to the Court hearing the case that the officer or person is or may be liable but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case, including those connected with his appointment he ought fairly to be excused, the Court may relieve him, either wholly or partly, from liability on such terms as it may deem fit.

A cursory look at the provisions of section 738 shows that it has solidifies the business judgement rule. It applies in situations where the company itself or a member of the company brings an action to challenge the action of a director (s). Clearly, the wordings of the section is wide to cover both an action by the company itself or that by a member of the company; it states specifically that 'in any proceeding' not limiting it to a particular kind of proceeding brought by a specific class of persons. The court is empowered to relieve such director (s) from liability if in its opinion, such director had acted honestly and reasonably irrespective of the fact that the director's action constitutes a breach of duty. This is in tandem with the spirit of the business judgment rule.

[193] See Omisade v. Akande (1987) NGSC 11

In fact, section 738 gives a wider protection to directors in that it clothes them with anticipatory protection as they are empowered in section 738 (2) to seek relief from court in anticipation that the company or a minority shareholder may make a claim against them for negligence or breach of duty. It provides thus:

> (2) when any such officer or person has reasonable apprehension that a claim may be made against him in respect of negligence, default, breach of duty or trust, he may apply to the court for relief, and the court on the application shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or trust had been brought.

It should however be noted that the provisions of section 738 is not absolute but subject to the honesty and reasonableness test.

Thus, the combined effect of the provisions of sections 305, 341, 343-346, 353, 356 and 738 of the Companies and Allied Matters Act shows that the business judgment rule is recognised under the Nigerian company legislation.

A cursory look at the Nigerian case law in this respect generally shows that while there is no express reference to the business judgement rule, courts are ordinarily reluctant to interfere in the internal affairs of the company. However, this reluctance is edged on the proper plaintiff rule as provided in section 341 stated above. For example, in *Ephraim Faloughi v. Haniel Williams & Ors*,[194] where a minority shareholder sought to recover company's property allegedly taken over by the director, the court held that the court will not interfere as the alleged wrong do not fall under the exceptions stated under the law. Similarly, the Supreme Court held in *Tika Tore Press Ltd v. Abina*[195] where following the death of a majority shareholder, directors allotted shares to themselves to gain control of the company, the administrator of the deceased shareholder sought a declaration that the allotment of shares was ultra vires, the court though agreed with the ultra vires argument but held that it was an irregularity of an internal affairs of the company which could be ratified by the company. Also, the court of appeal in *Hasal Microfinance Bank Ltd v. BDA Ltd & Anor*[196] reiterated the principle when it held that by the provisions of CAMA, only the board or the general meeting can authorise the institution of a suit by the company. The suit was dismissed for incompetence and abuse of court process.

Conclusion and Recommendations

The business judgement rule developed to offer some protection to company directors against legal liability for decisions taken in the exercise of their powers as managers of the business of the company is a pro- corporate governance technique that can enhance corporate growth and development. Directors as corporate managers and fiduciaries exercise a lot of discretion in the discharge of their duties; it will not be in the ultimate interest of the company if they are handicapped from exercising their discretion optimally by the fear of liability as a result of a decision gone wrong. This is more so because of the often volatile and unpredictable business climate which can be caused by economic, political, technological and even social factors. This is perhaps why the rule has evolved over time in different jurisdictions.

This article has discussed the role of directors as managers of the affairs of companies. It in particular discussed the fiduciary role of directors with respect to companies and supports the rule that they must act in the best interest of the company at all times and discharge their responsibilities with utmost good faith. The article also examines the principle of business judgment which offers protection to directors from frivolous law suits. Specifically, the United States case of *Re Walt Disney Co. Derivative Litigation* was analysed where the business judgment rule was

[194] (1978) 4F.R.C.R, 32
[195] (1973) LLJR, SC
[196] (2023) LPELR-60313(CA)

espoused richly. This article also discussed the position in South Africa and it finds that the business judgment rule has been codified in the Company's Act 71 2008 of South Africa. Then, this article analysed the Nigerian legal framework to determine the extent of the recognition and application of the business judgment rule. Specifically, the Companies and Allied Matters Act 2020 which is the main legislation on company law in Nigeria was analysed.

This article finds that while there is no express reference to the business judgment rule in the Companies and Allied Matters Act, the rule is however recognised in a number of provisions especially sections 738, 305 and 341. The article argues that the position under the Companies and Matters Act gives a wider protection to directors in Nigeria as they enjoy protection even in anticipation of possible law suits by the company or minority shareholders as the case may be.

The article therefore recommends that the business judgment rule be stretched by jurisdictions like the United States where the rule evolved and South Africa to include anticipatory relief like that stated in section 738 (2) of Companies and Allied Matters Act.

It specifically recommends that the provisions of section 76 of the South African Company's Act 71 be amended to include anticipatory relief of section 738 (2) of the Companies and Allied Matters Act.

With respect to Nigeria, it is recommended that the provision of section 305 (5) should be amended to make it clearer and unambiguous. This is to avoid possible inconsistent court judgments. While, we await legislative reforms through amendment of section 305 (5), it is recommended that the courts in Nigeria should be pro-active in the interpretation of section 305 (5), the section should be construed in concise and definite terms to capture its essence which is to offer protection to directors. This is very important as legislative reform may not be immediate. Judiciary has a key role in legal development.

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Reconceptualizing Child Protection from Sexual Abuse through Maqasid al-Shari'ah: A Normative Framework for Law Reform in the Maldives

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Abstract

Child sexual abuse represents a grave violation of human dignity, requiring comprehensive legal and institutional responses. In Muslim-majority jurisdictions, reform initiatives must be anchored in a coherent Islamic normative framework to secure both legitimacy and practical effectiveness. In the Maldives, recent legislative developments have strengthened statutory protections for children; however, reform discourse frequently emphasizes procedural deficiencies while insufficiently engaging the Islamic legal imperatives that mandate proactive state intervention. Employing a doctrinal and normative legal analysis, this article draws upon classical Islamic jurisprudence and contemporary *maqasid al-shari'ah* scholarship to reconceptualize child protection as an intrinsic objective of Sharīʿah rather than a purely modern policy concern. It argues that the preservation of life, dignity, lineage, and psychological integrity necessitates strong safeguards against sexual abuse. Building on this foundation, the article advances a reform framework centered on preventive mechanisms, trauma-sensitive procedures, specialized institutional structures, and coordinated governance. Situated within the Maldivian legal context, this analysis demonstrates that strengthening child protection laws constitutes both a juridical necessity and a religious obligation. By aligning contemporary legal reforms with the higher objectives of Islamic law, Muslim-majority states can enhance the legitimacy and effectiveness of their child protection systems.

Keywords: Maqasid al-Shari'ah; child protection; child sexual abuse; Islamic legal theory; law reform; Maldives

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ކުޑަކުދިންނަށް ކުރާ ޖިންސީ ގޯނާއަކީ އިންސާނީ ކަރާމާތް ފުނޑުފުނޑު ކޮށްލާ ނުރައްކާތެރި ޖަރީމާއެކެވެ. މިފަދަ ނާއިންސާނީ އަމަލުތަކުން ކުޑަކުދިން ސަލާމަތްކޮށް ކުރުމަށް ބޭނުމީ، ހުރިހާ ދާއިރާއަކުން ފުރިހަމަ ފިޔަވަޅު ވާ ގާނޫނީ އަދި މުއައްސަސާތަކުގެ ހަރުދަނާ ނިޒާމެއް ބޭނުންވެއެވެ. އިސްލާމީ ޝަރީޢަތުގައި ގެންގޮސް މިފަދަ އިސްލާމީ ބަދަލުތަކާ އެންމެން ބަލައިގަންނަ، އަދި އަމަލީގޮތުން ބަދަލުތަކާ ނަތީޖާ ބަދަލުތަކަކަށް ހުރުމަށް ބޭނުމީ، އެ ބަދަލުތަކުގެ އިސްލާމީ އުސޫލުތަކުގެ މައްޗަށް ބިނާ ކުރުން ކޮންމެހެން މުހިއްމެވެ. ދިރާސާއިން ގާނޫނީ އެކަށީގެން ބަލާ ދިޔ، ފަހުގެ ދުސްތޫރުތަކުގެ ސަލާމަތް ކުޑަކުދިންނަށް ލިބިދޭ ރައްކާތެރިކަން ކުރިއަށް ފެށި ބޭރުގެ ހަރުދަނާ ވެސް ވެއެވެ. އެހެންނަމަވެސް، މި ދާއިރާގައި ކުރެވޭ ދިރާ ބަހުސްތަކުގައި ބޭރުގެ އަދި އަތެރޭގެ ނިޒާމްތަކުގެ ނިޔަތު ރައްކާތެރިކަމުގެ އިސްލާމީ ބިނާ ގާނޫނީ އުސޫލުތަކުގެ މައްޗަށް ރިސްކުގެ ނިޒާމުގައި ހުރި ދެކޮޅު އިނގިރޭސި އުސޫލުތަކުގެ މައްސަލަތަކެވެ. ކުޑަކުދިންގެ ހައްޤުތަކުގައި ދައުލަތުގެ އިސްލާހީ އިސްލާމީ ޝަރީޢަތުން ފުރިހަމަ ގާނޫނީ އުސޫލުތަކާއި ގުޅުމަށް ފާހަގަ ކުރާ މިންވަރަށް އެ ބަދަލުތަކުގައި ފުރިހަމަ ވިސްނާފައި ނުވެއެވެ. މި ދިރާސާއަކީ ފާހަގަ އަދި އިސްލާމީ ފިޤްހުގެ އަސާސީ ބަހާ ކޮށް ކުޑަކުދިންގެ ޖިސްމާނީ، ނަފްސާނީ، އަދި ޢަޤްލީ ރައްކާތެރިކަން ދިރާސާކުރާ މަޤާޞިދުއް ޝަރީޢާގެ ޒާތީ ނިޒާމުތަކުގެ ގޮތުން މި ދިރާސާ ބަލައެވެ. މަޤާޞިދުއް ޝަރީޢާގެ ބަލާފައިވާ ތަފްސީލުތަކާއި ކުޑަކުދިންގެ މަސްލަހަތު ކުރިއަށް ގެންދިއުމުގެ މަޤްޞަދާ ގުޅޭގޮތުން ކުޑަކުދިންގެ ޖިންސީ ގޯނާ ހުއްޓުވުމަށް ފާއިދާ ހުރި ކަންކަން ދައްކާލައިދެއެވެ. އިންސާނާގެ ފުރާނައާއި، އަބުރާއި، ނަސްލާއި އަދި ނަފްސާނީ ދުޅަހެޔޮކަން ރައްކާތެރިކުރުން ބޭނުމީ ޖިންސީ އަނިޔާއަކުން ހުރަސް ހުރުމަށް ރައްކާތެރިކަމުގެ އެއްބަސްވުމުގެ ބޭނުންތަކެއް މި ކަރުދާހުގައި ސާބިތު ކޮށްދެއެވެ.

މުހިއްމު ބަސްތައް: މަޤާޞިދުއް ޝަރީޢާ؛ ކުޑަކުދިން ރައްކާތެރި ކުރުން؛ ކުޑަކުދިންނަށް ކުރާ ޖިންސީ ގޯނާ؛ އުޞޫލުލްފިޤްހު؛ ގާނޫނީ އިސްލާހު؛ ދިވެހިރާއްޖެ.

Introduction

Child sexual abuse signifies one of the most serious threats to the safety and dignity of children, producing lasting psychological, physical, and social ramifications. Legal systems increasingly identify that those ordinary criminal processes are unsatisfactory to address such harms, requiring specialized protections and coordinated institutional responses. Nevertheless, the rational for child protection in Muslim-majority countries is intensely entrenched in the ethical framework of Islamic law itself and drives beyond legislative policy considerations.

The Maldives, as a 100% Islamic state, bases its legal system on both statutory enactments and Islamic principles. Although several laws address offences against children, including sexual crimes, legal reform debates often focus on procedural or institutional weaknesses without adequately enunciating the Islamic normative foundations that justify healthy state interference. This creates an artificial distinction between “modern” child protection laws and “religious” legal values, when in reality Islamic jurisprudence has long arranged the protection of vulnerable persons and the deterrence of harm.

Maqasid al-shari’ah doctrine offers a theoretical bridge between these realms. By highlighting the preservation of life (ḥifẓ al-nafs), dignity and honour (ḥifẓ al-‘ird), lineage (ḥifẓ al-nasl), and psychological well-being (ḥifẓ al-‘aql), maqasid theory positions child protection as a core objective of Islamic law rather than a marginal policy concern. From this perspective, the state allows a positive duty not merely to punish offenders but to introduce preventive, protective, and rehabilitative mechanisms that preserve children from exploitation and abuse.

Although scholars have increasingly applied maqasid reasoning to issues such as family law reform, gender justice, and child welfare, limited attention has been devoted to systematically articulating how maqaṣid can inform contemporary child protection frameworks, particularly in smaller Muslim-majority jurisdictions such as the Maldives. This article fills that gap. It contends that maqasid al-shari’ah offers a strong normative foundation, one that can direct legislative reforms, strengthen institutional responses, and justify courageous state action against child sexual abuse. Drawing together traditional Islamic principles, modern reformist scholarship, and lessons from

comparative contexts, it advances a maqasid - centered framework tailored for reforming child protection laws in the Maldives.

Literature Review

Existing scholarship shows that Islamic jurisprudence brims with normative resources for safeguarding vulnerable groups, especially women and children. Thus far many modern legal systems in Muslim-majority countries hesitate when it comes to turning these principles into healthy institutional action. Research on Islamic family law reforms highlights how formal protections often waver within careless enforcement, incoherent processes, and poor coordination between agencies, leaving unadorned divides between doctrinal ideals and real-world outcomes.[1]

This theoretical strand stresses that maqasid al-shari'ah isn't a stiff list of goals but a living, humanitarian scope for steering legal reforms today. Leading scholars frame it around core values like promoting welfare (maslahah), warding off harm (dar' al-mafasid), and upholding justice - values that vigorously inform how we interpret and apply the law. From this lens, protection of children isn't optional; it's a necessary legal and moral obligation, interlaced into the very core of the Shari'ah.[2]

Building on this foundation, other studies spotlight how maqasid-inspired readings pave the way for reforms that truly safeguard children and advance gender justice. They show, convincingly, how principles like welfare and human dignity give solid grounding for forward-thinking laws - think stronger procedural protections or dedicated agencies to support those who need it most.[3] These studies together make a compelling case: Islamic legal methods align seamlessly with today's child protection goals.

Empirical and doctrinal studies bring these concepts to life, showing how *maqasid* reasoning tackles real-world harms to children head-on. Take child marriage: when viewed through this lens, it clearly clashes with protecting life, health, and dignity, making a strong case for state action to limit or ban it outright.[4] While these analyses zero in on particular issues, they offer a useful roadmap for sizing up other child welfare fears, like sexual abuse.

Comparative studies from Malaysia's legal landscape shed further light on how Islamic principles can bolster modern child protection laws. In cases involving children's religious identity disputes, courts are turning more often to maqasid-guided reasoning alongside the "best interests of the child" principle to harmonize Shari'ah with constitutional rights.[5] These experiences show how Islamic normative frameworks can strengthen - rather than stand in the way of - child-centered legal outcomes.

Despite the growing body of work on maqasid and issues like family or gender justice, a clear gap lingers. Most scholars have not tackled how to systematically apply maqasid to child sexual abuse via sweeping criminal justice and institutional reforms. Most stick to doctrinal debates or narrow issues, overlooking how Islamic objectives could

[1] H Ismail and N Hassan, 'Protection of Women and Children in Islamic Family Law: Gaps and Proposed Reforms in the Malaysian Sharīʿah Legal System' (2023) 11(2) *Malaysian Journal of Syariah and Law* 12.
[2] M Tahir, 'Maqāṣid al-Sharīʿah Transformation in Law Implementation for Humanity' (2022) 6(1) *Journal of Contemporary Islamic Thought* 41.
[3] L Anisa and R Sari, 'Role of Maqāṣid Sharīʿah Interpretation in Achieving Gender-Responsive and Child-Protective Legal Reforms' (2024) 12(3) *Journal of Islamic Legal Studies* 115.
[4] A Hafidz, M Rahman and S Yusuf, 'Reassessing Harmful Marriage Practices through Maqāṣid al-Sharīʿah and Child Protection Principles' (2023) 5(1) *Journal of Islamic Family Law Studies* 55; Busriyanti, 'Child Marriage Practices from the Perspective of Maqāṣid al-Sharīʿah' (2024) 8(2) *Al-Istinbath: Journal of Islamic Law* 88.
[5] K Anuar and M Abdullah, 'The Implications of Religious Conversion on the Determination of a Child's Religion: A Comparative Analysis of Sharīʿah and Malaysian Civil Law within the Framework of Maqāṣid al-Sharīʿah' (2025) 9(7) *International Journal of Research in Islamic and Social Sciences* 32.

shape truly holistic child protection strategies. This article steps into that space, laying out a maqasid-driven normative framework custom-built for fighting child sexual abuse within the Maldives' legal system.

Conceptual Framework: Maqasid al-Shari'ah and Child Protection

Islamic legal theory has always viewed law as purposeful, not just a string of rigid rules. The doctrine of maqasid al-shari'ah embodies this by rooting the validity of legal norms in their power to promote human welfare and avert harm. Classical jurists, in turn, weighed obligations not merely by their textual letter but by the vital interests they safeguarded - pinning the core aim of the Shariʿah to preserving those essential human goods.

Through this lens, child protection isn't some side issue - it's right at the heart of Islamic legal aims. Children stand out as especially vulnerable, with their physical growth, mental well-being, and social ties touching on multiple maqasid all at once. Harm to a child, then, strikes at the Shari'ah's purposes in several dimensions right away. Today's scholars build on this, stressing dignity, justice, and human flourishing as core values woven deep into the maqasid.[6] Child sexual abuse strikes directly at these core values.

First, preserving life (hifz al-nafs) goes beyond mere survival - it covers bodily integrity and physical safety too. Sexual abuse puts children at risk of injury, deep trauma, and lasting health consequences, directly contradicting this goal. Islamic legal principles insist on rooting out harm (dar' al-mafasid) and fostering well-being (jalb al-maslaḥah), which means the state has a clear duty to step in and shield vulnerable children from dangers we can see coming.

Second, protecting dignity and honor (ḥifẓ al-'ird) takes on special weight with sexual crimes. Historically, breaches of sexual integrity ranked among the worst offenses because they shred personal honor and moral standing. Through a maqasid lens, upholding dignity calls for tough deterrence, solid safeguards in procedures, and real accountability for those who offend.

Third, preserving lineage (hifz al-nasl) reaches further than just bloodlines - it covers nurturing children's moral, emotional, and social growth in a stable family setting. Abuse upends that foundation, endangering both the child's well-being and the wider social fabric. Scholars using maqasid reasoning in family and child protection reforms thus argue that state action to curb exploitation fits squarely within Islamic legal thinking.[7]

Fourth, safeguarding intellect and psychological integrity (*ḥifẓ al-ʿaql*) covers mental health and emotional wholeness. Today's psychological studies make it clear: child sexual abuse survivors often carry lifelong trauma and cognitive scars. In the Shariʿah's framework, these are precisely the kinds of harms the law must head off. This makes trauma-informed procedures and real support for healing not just desirable, but essential requirements of justice.

Taken together, these principles lay bare how child sexual abuse strikes at multiple maqasid all at once, marking it as one of the gravest harms in an Islamic normative framework. That overlapping damage calls for a legal response just as forceful and comprehensive. Islamic jurisprudence has long made room for adaptable tools like ta'zir penalties and discretionary state measures, letting authorities calibrate punishments and safeguards to fit the context. Today's maqasid thinkers, like Jasser Auda, take this further: they see maqasid as a living, systems-focused guide for overhauling institutions, governance, and policy - not just handing down isolated rulings.[8] (Auda,

[6] Muḥammad al-Ṭāhir Ibn ʿĀshūr, *Treatise on Maqāṣid al-Sharīʿah* (Mohamed El-Tahir El-Mesawi tr, International Institute of Islamic Thought 2006).
[7] Anisa and Sari, 'Role of Maqāṣid Sharīʿah Interpretation' (n 3).
[8] Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought 2008).

2008). This approach enables contemporary states to adopt specialised institutions, coordinated procedures, and preventive safeguards while remaining firmly grounded in Islamic legal principles.

The maqasid framework thus recasts child protection as a forward-leaning state obligation, not just a matter of cracking down after the fact. Safeguarding kids from abuse goes beyond punishment to embrace prevention, education, seamless institutional teamwork, and genuine rehabilitation. Here, Islamic legal philosophy lines up squarely with today's child protection ideals - both zero in on upholding human dignity and welfare. Identifying this overlap establishes a robust normative foundation for daring legal reforms, as illustrated in Figure 1.

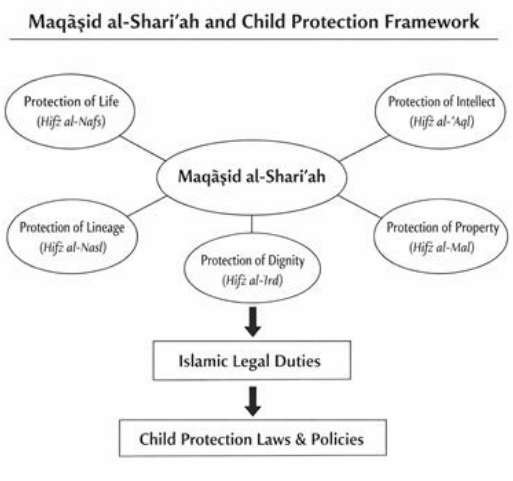

Figure 1. Conceptual Framework of Maqasid al-Shari'ah–Based Child Protection
Source: Author's own illustration.

Figure 1 maps out how the Shariʿah's core objectives intertwine with today's child protection duties. Preserving life, dignity, lineage, and intellect together imposes a layered state responsibility: to block harm, secure well-being, and build solid institutional safeguards. Framing child sexual abuse as a hit against multiple *maqasid* at once makes it clear that prevention, rehabilitation, and governance reforms aren't optional policies; they're legal imperatives straight from Islamic jurisprudence.

Integrating Maqasid al-Shari'ah into Contemporary Child Protection Law Reform

Recognizing child protection as a *maqasid* imperative means turning those lofty normative principles into real-world institutional setups. The Shariʿah's objectives can't just stay as abstract ideals - they've got to shape how we design investigations, procedural protections, and governance itself. Legal reform, at its core, is about syncing up today's regulatory tools with the protective aims baked into Islamic jurisprudence.

A maqasid-driven reform agenda begins by shifting the law from punitive measures to proactive protection. For child protection, that means state bodies stepping in early - through public awareness drives, monitoring setups, and heads-up alert systems - to stop abuse before it starts. Things like school-based prevention programs, mandatory reporting rules, and community watch networks aren't just handy modern fixes; they're living expressions of the Shariʿah's call to head off harm. Prevention here isn't some nice add-on - it's delivering on legally binding religious goals.

Second, a *maqasid* lens insists on child-centered, trauma-aware investigations and procedures. Protecting intellect and psychological health (*ḥifẓ al-ʿaql*) demands legal processes that sidestep further harm to victims. Standard

adversarial setups, such as repeated grillings or stark courtrooms, can exacerbate trauma and undermine the law's intended welfare objectives. That's why specialized interview spaces, trained investigators, video statements, and shielding kids from the accused aren't imported gimmicks; they're natural outgrowths of the Shariʿah's protective spirit. This fits right in with today's reform thinkers, who see such child-friendly steps as vital for real justice, not just box-ticking[9] (Anisa & Sari, 2024).

Third, the *maqasid* viewpoint bolsters the case for specialized institutional setups. Child sexual abuse causes so many levels of harm that scattered responses are insufficient for effective protection. Islamic legal thought supports the state's (wilayah) right to use flexible administrative tools that benefit the public. That means that dedicated child protection teams, streamlined prosecution paths, and connected social services are all examples of good governance. Studies on family law in action have already flagged how poor coordination and skimpy resources gut the protective punch of Islamic rules[10] (Ismail & Hassan, 2023). A *maqasid*-driven reform model would thus put inter-agency collaboration and institutional muscle-building front and center as non-negotiable for living up to the Shariʿah.

Fourth, sentencing and accountability must match the profound harm done to children. Sexual offenses against minors don't just trample individual rights-they shake societal stability and moral foundations. Islamic jurisprudence has long allowed for tough *taʿzir* penalties, giving authorities room to scale punishments to the damage inflicted. Modern criminal law can thus embrace tougher sentences, mandatory oversight, and rehabilitation programs without straying from Islamic roots. In fact, strong enforcement becomes essential for upholding dignity and warding off future harm-both squarely in the maqasid's wheelhouse.

Finally, the maqasid-based model emphasises that protecting children is a moral obligation shared by the entire community. The Shari'ah's objectives target collective welfare, not just lone individuals. This wide-angle view backs policies reaching far beyond courtrooms - like social services, counseling, family supports, and victim reintegration efforts. Comparative cases show that weaving Islamic normative thinking into public policy blends religious credibility with modern rights protections seamlessly[11] (Anuar & Abdullah, 2025). Far from clashing, the maqasid framework reveals Islamic law and contemporary child safeguards as natural allies.

Taken together, these pieces point to a simple truth: real child protection demands a full-spectrum legal setup, rooted in prevention, trauma-aware procedures, tight institutional teamwork, solid accountability, and strong social supports. Far from clashing with Islamic law, this kind of framework is precisely what it calls for. Framing reforms squarely in maqasid terms lets Muslim-majority states beef up both the moral weight and on-the-ground impact of their child safeguards. For the Maldives - where the constitution locks in Islam alongside modern statutes - this hits home: it equips policymakers to push forward-thinking protections without drifting from Islamic roots.

Child Protection Law in the Maldives: Context and Reform Imperatives

The Maldives provides a compelling example for implementing this maqasid framework. With Islam baked into its constitution but modern laws very much in play, the country straddles that tricky line between religious roots and today's governance realities. Child offense laws have multiplied lately, yet stubborn rollout snags make plain that paper prohibitions don't guarantee children are truly safe.

Even with these steps forward, doubts linger about how well current setups actually work. Public reports and official data point to a steady rise in child abuse cases, including sexual ones - proof that legal prohibitions alone aren't stemming the tide. The disconnect between statutes and street-level execution, as in many other places, continues

[9] Anisa and Sari (n 3).
[10] Ismail and Hassan (n 1).
[11] Anuar and Abdullah (n 5).

to impede progress. Investigations into these cases get messy and resource-hungry, demanding specialized know-how, cross-agency teamwork, and gentle handling of traumatized young victims. When those pieces fall short, delays and rough procedures can corrode both justice for offenders and safeguards for those hurt.

Institutional silos make fighting child sexual abuse that much harder. Effective safeguards depend on real coordination between police, prosecutors, courts, and social services. But day-to-day, mismatched priorities and red tape often block info flow and swift responses. Lacking that unity, children end up enduring multiple interviews, erratic support, or endless court delays, which only deepens their trauma. The Maldives isn't alone; these are the same breakdowns plaguing other Muslim-majority countries, where strong laws exist but lack the coordinated institutional backbone to make them work.[12]

Moreover, when Maldivian policymakers debate legal reforms, they often zero in on child protection's practical nuts and bolts - fine-tuning procedures or hiking penalties. Those changes have their place, no question, but they rarely dig into the deeper ethical underpinnings that make a case for decisive, forward-thinking action. Islamic principles are deeply ingrained in the nation's constitutional fabric and everyday moral life, making reforms that feel like outside imports or blatantly "modern" overhauls difficult to garner support.That's why rooting child protection in the Shari'ah's ethical heart carries such potent symbolic and practical force.

Here, the maqasid al-shari'ah framework laid out earlier fits especially well. By casting child protection as a built-in goal of Islamic law - tied to safeguarding life, dignity, lineage, and psychological wholeness - it flips reform from some foreign add-on into a true fulfillment of the state's religious and constitutional duties. Preventive steps, tailored procedures, and institutional teamwork then stand out as genuine carry-throughs of the Shari'ah's drive for welfare, not breaks from the past.

The Maldivian setting underscores the main point of this article: enhancing child protection requires more than simply enacting new laws. You need a solid normative anchor to guide how those laws are read, rolled out, and built into institutions. A maqasid-centered framework supplies just that - helping policymakers blend Islamic values with up-to-date child protection standards, while boosting both their punch and public buy-in. In that light, the Maldives emerges as a striking real-world example of how Islamic legal ideas can drive broad-gauged strategies to fight child sexual abuse.

Conclusion

The analysis above makes it clear: child sexual abuse demands more than post-harm criminal fixes. Through a *maqaṣid* lens, it strikes directly at the foundational interests Islamic law exists to protect. Child protection, then, isn't just allowable under the Shari'ah - it's unequivocally required.

This article demonstrates that child protection is fundamentally central to the objectives of the Shari'ah, drawing upon contemporary scholarship and classical fiqh. Sexual abuse against children hits preservation of life, dignity, lineage, and psychological wholeness all at once, breaching multiple essential *maqasid*. That makes safeguarding kids no optional policy - it's a binding legal and moral charge on the state. Islamic law thus calls for more than offender punishment: it insists on upfront prevention, seamless institutional collaboration, and victim-focused processes built to curb harm from the start.

By weaving together existing literature and *maqasid* theory, this study puts forward a reform-focused framework that reimagines child protection as a seamless system spanning prevention, trauma-aware processes, dedicated institutions, and strong accountability. Far from being outsider "modern" imports, these steps align fully with Islamic

[12] Ismail and Hassan (n 1).

legal principles. Rather than clashing with today's child rights standards, the Shari'ah's core objectives actually shore them up and provide them legitimacy.

Placing this framework in the Maldivian setting brings its real-world stakes into sharp focus. As a state where Islam holds constitutional primacy alongside growing statutory child protections, the Maldives stands ready to ground reforms in its religious and normative roots. Linking child protection to maqasid reasoning enhances their moral authority and practical effect, presenting change not as external imposition but as genuine adherence to Islam's imperatives for justice and welfare.

In the end, this article reframes how we view child protection in Muslim-majority societies. Instead of debating if Islamic law can "fit" modern safeguards, the real question is how the Shari'ah's ethical aims can lead and fortify them. Viewing child protection as a direct manifestation of *maqasid al-shari'ah* transforms the concept from mere compatibility to an absolute obligation. It insists that shielding children from sexual abuse isn't just legally smart – it's a religious and moral must. Going forward, reforms in the Maldives and like-minded places ought to weave *maqaṣid* principles right into lawmaking and institutional habits, keeping child safety at the heart of governance.

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Restoring Confidence in Justice: The Evolving State of Judicial Independence in the Maldives

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Abstract

In the Maldives, the judiciary has historically been accused of political influence and bias. A successful judicial system requires both judicial independence and public confidence, which together reinforces constitutional governance and the rule of law. While much has been written about the importance of judicial independence, less attention has been devoted to examining the structural and institutional factors that undermine it. This doctrinal study analyses the Maldivian constitutional framework for judicial independence, with particular focus on the 2008 Constitution, the three-tier court structure, and the role of the Judicial Service Commission (JSC). It draws primarily on earlier reports by international organisations, human rights bodies, and civil society, which documented concerns such as politicised appointments, executive influence, and variations in judicial competence. The study argues that these past evaluations reveal a gap between the constitutional promise of independence and the public perception of a judiciary vulnerable to political pressures, particularly in relation to lower courts and the JSC. The article concludes that strengthening judicial independence requires continued institutional reform, including restructuring the JSC, enhancing judicial training, increasing transparency and accountability, and protecting judges from undue influence while maintaining fair and impartial disciplinary mechanisms. Addressing these systemic issues is essential for ensuring that the Maldivian judiciary not only remains independent in law but is also perceived as independent by the public it serves.

Keywords: Judicial independence; public confidence; Maldivian judiciary; political influence; constitutional law.

އަދުލު އިންސާފުގެ ނިޒާމަށް އިތުބާރު އިއާދަކުރުން: ދިވެހިރާއްޖޭގެ ޝަރުޢީ ދާއިރާގެ މިނިވަންކަން ބަދަލުވަމުން އައިސްފައިވާ ގޮތް.

މުޙައްމަދު ޠޯހާ

އެބްސްޓްރެކްޓް

ދިވެހިރާއްޖޭގެ ތާރީޚުން ބަލާއިރު، ޝަރުޢީ ދާއިރާއަކީ ސިޔާސީ ނުފޫޒާއި ވަކި ފަރާތަކަށް ޖެހިފައިވާ ކަމުގެ ތުހުމަތުތަކެއް އަބަދުވެސް އަމާޒުވަމުން އައިސްފައިވާ ދާއިރާއެކެވެ. ކާމިޔާބު އަދި ހަރުދަނާ ޢަދުލުއިންސާފުގެ ނިޒާމެއް ޤާއިމުވުމަށް އުސޫލުތަކަކީ، ޝަރުޢީ ދާއިރާގެ މިނިވަންކަމާއި އާ ނިޒާމަށް ރައްޔިތުން ކުރާ އިތުބާރަކީ ކޮންމެހެން ބޭނުންތެރި ދެ އަސާސެވެ. މިއީ ދުސްތޫރީ އަދި ޤާނޫނުގެ ވެރިކަން ހަރުދަނާކޮށްދޭ ކަންކަމުގެ ބޭނުންތެރި ދެ އަސާސްތަކެވެ. ޝަރުޢީ ދާއިރާގެ މިނިވަންކަމުގެ މުހިންމުކަމާ ގުޅޭގޮތުން ގިނަ ލިޔުންތަކެއް ލިޔެވިފައިވީ ނަމަވެސް، މީގެ ކުރިން ކުރެވިފައިވާ ދިރާސާތަކުން ފާހަގަކޮށްފައިވާ ގޮތުގައި، ޝަރުޢީ ދާއިރާގެ މިނިވަންކަމަށް ހުރަސްއަޅާ އޮނިގަނޑުތަކާއި މުއައްސަސާތަކުގެ ތަފާތުގައި ހުރި މައްސަލަތަކަށް ދެނެގަތުމަށް ދެވިފައިވާ ސަމާލުކަން ކުޑައެވެ. ޑޮކްޓްރިނަލް ދިރާސާއެއްގެ މައްޗަށް ބިނާކޮށް ކުރިއަށްގެންދެވިފައިވާ މިދިރާސާގައި ދިވެހިރާއްޖޭގެ ޝަރުޢީ

ދާއިރާގެ މިނިވަންކަން ކަށަވަރުކުރުމަށްޓަކައި ޤާނޫނުއަސާސީގައި ކަނޑައެޅިފައިވާ ގަރަންޓީތަކާއި، ދިވެހިރާއްޖޭގެ ބޭރު-ބަޔަކު ކޯޓު މަރުޙަލާގެ ނިޒާމުގެ
އިތުރުން ޖުޑީޝަލް ސާވިސް ކޮމިޝަން (ޖޭ.އެސް.ސީ) ގެ ދައުރަށް ބަލާލެވިފައިވާނެއެވެ. މި ދިރާސާ މައިގަނޑު ގޮތެއްގައި ބިނާކޮށްފައިވަނީ ބައިނަލްއަގުވާމީ
ޖަމްޢިއްޔާތަކާއި، އިންސާނީ ޙައްޤުތަކާ ބެހޭ އިދާރާތަކުގެ އިތުރުން މަދަނީ ޖަމްޢިއްޔާތަކުން ދީފައިވާ ނަތީޖާތަކާއި ރިޕޯޓުތަކުގެ މައްޗަށެވެ. އަދި ދިރާސާތަކުގައި
ފާހަގަކޮށްފައިވާ ގޮތުގައި ކޯޓުތަކުގެ މިނިވަންކަމަށް ސިޔާސީ ނުފޫޒު ފޯރާތީ، ސަރުކާރުން ނުފޫޒު ފޯރުވުމާއި، ފަނޑިޔާރުންގެ އިޚްލާޞް އަދި ފަރުދީ ޤާބިލުކަމާ ބެހޭ ކުރި
ކަންބޮޑުވުންތައް ފާހަގަކޮށްފައިވެއެވެ. ޖުޑީޝަލް ސާވިސް ކޮމިޝަނަށް ކަނޑައަޅާ މިނިވަންކަން، ޝަރުޢީ ދާއިރާގެ ސިޔާސީ ނުފޫޒުން ސަލާމަތްކޮށްފައިވާ ތަނެއް
ނޫން ކަމަށް އާންމުން ދެކޭކަން މި ދިރާސާއިން ހާމަވެއެވެ. ވަކިން ފާހަގަކޮށް، ދައުރު ކޯޓުތަކާއި ޖޭ.އެސް.ސީ ގެ މަސައްކަތާމެދު ގާއިމުވެފައިވާ ކަންބޮޑުވުން
ބޮޑުކަން ފާހަގަކުރެވިއްޖެއެވެ. މި ދިރާސާގައި ނިންމާލާފައިވަނީ، ޝަރުޢީ ދާއިރާގެ މިނިވަންކަން ވަރުގަދަކުރުމަށްޓަކައި އިންސްޓިޓިއުޝަނަލް މަސައްކަތްތަކާއި
މުދަނީ ރިފޯމްތަކެއް ކުރިއަށްގެންދަވަނީ ޖޭ.އެސް.ސީ ގެ ބޯޑުގައި ތިބޭ މެމްބަރުންގެ ބައިވެރިވުން، ފަނޑިޔާރުންނާއި ބެހޭ ޤާނޫނީ ނިޒާމު ބެލެހެއްޓުމަށް،
ދަރުމަ ފެންނަ އަދި ޖިނާއީ ނިޒާމެއް ފާހަގަކުރުމުން ހިފެހެއްޓުމެވެ. އަދި ފަނޑިޔާރުންނަށް ކުރިމަތިވާ ސިޔާސީ ނުފޫޒު ކަނޑައަޅާ ގޮތާއި
ދަރަޖައިގެ ކުރިއަރުވާލުމާއި، އިންސާފުވެރި އަދި ވަކިފަރާތަކަށް ނުޖެހޭ ސިޔާސަތު ފިޔަވަޅު އެޅުމާ ނިޒާމުގެ ދިފާޢީ މިނިވަންކަމުގެ ކަމަށްވާ ކަނޑައަޅާފައިވެއެވެ.
ދިވެހިރާއްޖޭގެ ކޯޓުތަކަށް ހަމައެކަނި ފަންނީ ގޮތުން މިނިވަން ތަނަކަށް ވުމުގެ ބަދަލުގައި، އާންމުން ދަރުމަވެރިކަމުގެ އިތުބާރު އޮތް މުއައްސަސާތަކަކަށް
ހެދުމަށްޓަކައި، ނިޒާމުގައި ހުރި ދަތިތަށް އަސާސީ މުއައްސަސާތަކަށް ހަރުދަނާ ހެދުމަކީ ކުރަންޖެހޭ ބޭނުންތެރި ކަމެކެވެ.

ގުޅޭބަސްތައް: ޝަރުޢީ ދާއިރާގެ މިނިވަންކަން؛ އާންމުންގެ އިތުބާރު؛ ދިވެހިރާއްޖޭގެ އަދުލު އިންސާފުގެ ނިޒާމު؛ ސިޔާސީ ނުފޫޒު؛ ދުސްތޫރީ ޟަމާން.

Introduction

Judicial independence is a central pillar of any functioning justice system. Yet even where formal guarantees exist, a judiciary cannot operate effectively without the confidence of the public it serves. Public trust is indispensable to the legitimacy of judicial institutions and, by extension, to democratic governance and the rule of law. As Lord Hewart famously observed, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[1] This underscores that judicial independence must be both substantive and perceptible.

The Bangalore Principles of Judicial Conduct identify three essential conditions for an independent judiciary: security of tenure, financial security, and institutional independence. Although the Maldives has a comparatively small judiciary, concerns over judicial independence have been documented in previous reports and assessments. The Constitution of the Maldives 2008 provides explicit guarantees of judicial autonomy. Article 141(c) prohibits interference with judicial functions, while Article 141(d) mandates that state bodies protect the independence, impartiality, dignity, and effectiveness of the courts.

Despite these constitutional protections, numerous reports by international bodies have documented structural and political challenges that undermine judicial independence. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has highlighted persistent issues including politicised judicial appointments, opaque procedures, and judgments perceived to be influenced by political actors.[2] Such concerns have fuelled longstanding public criticism that the judiciary was, at the time, viewed as vulnerable to political interference and pressure from powerful individuals.

Yet despite widespread discourse, no comprehensive study has examined public perceptions of where judicial independence is most lacking in the Maldives. This research seeks to fill that gap. It explores the public's views on the state of judicial independence, clarifies the conceptual importance of an autonomous judiciary, assesses current

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1 R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256.

2 Gabriela Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* (UN Human Rights Council, 21 May 2013).

conditions within the Maldivian judicial system, and offers targeted recommendations for reform. By identifying areas of perceived weakness, this study aims to contribute to ongoing efforts to strengthen judicial independence and enhance public trust in the Maldivian judiciary.

Significance of judicial independence

Public confidence is fundamental to the legitimacy and effective functioning of any judiciary. Judicial independence must not only exist internally but must also be *visible* to the public. If the courts are not perceived as impartial, fair, and free from external influence, trust in the justice system erodes, and the authority of judicial decisions is weakened. Ensuring both the reality and appearance of independence is therefore essential for maintaining respect for the rule of law.

Maintaining the Integrity of the Rule of Law

The Maldives adheres to a constitutional separation of powers among the legislative, executive, and judicial branches. One of the judiciary's central roles is to act as a check on the other two branches, ensuring that state power is exercised within constitutional bounds.

According to the Parliament of the Maldives, the judiciary must operate without undue influence from either the executive or the legislature, as independence is essential to fair and unbiased decision-making. If judges are pressured to favour government officials or powerful private actors, the rule of law is compromised and constitutional principles are undermined.

The judiciary also safeguards the rule of law by reviewing the constitutionality of legislation and governmental actions. As the People's Majlis explains, *"the judiciary has the power to determine the constitutionality of laws or actions of any person or body performing a public function."*[3] This function positions the courts as protectors of constitutional governance.

International standards reinforce this duty. The United Nations' *Basic Principles on the Independence of the Judiciary* stress that judicial independence must be constitutionally guaranteed and continuously protected by state authorities.[4] Independence is not only an internal institutional requirement but also a matter of public perception—society must believe that judges decide cases free from political pressure. Griffith describes this ideal in a celebrated passage:

> *"They see governments come like water and go with the wind. They owe no loyalty to ministers, not even the temporary loyalty which civil servants owe… Judges are also lions under the throne but that seat is occupied in their eyes not by the Prime Minister but by the law and their conception of the public interest."*[5]

His words illustrate that judicial legitimacy depends on unwavering allegiance to the law and the public interest, not to transient political authorities.

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[3] People's Majlis Secretariat, *Understanding 3 Parts of the State* (online) accessed 21 September 2025.

[4] United Nations, *Basic Principles on the Independence of the Judiciary* (6 September 1985) accessed 22 September 2025.

[5] JAG Griffith, *The Politics of the Judiciary* (3rd edn, Fontana Press 1985) 199.

Judicial independence is also essential for the protection of fundamental rights. Judges who are secure, autonomous, and free from improper influence are more likely to adjudicate cases impartially, resist pressure from powerful actors, and uphold constitutional guarantees. This confidence, in turn, encourages citizens to trust and rely upon the judicial system.

Conversely, where judges are susceptible to corruption or political manipulation, courts may become biased in favour of influential individuals, political elites, or corporate interests. Such a judiciary cannot protect rights effectively, leading to public distrust and the erosion of constitutional freedoms.

The Bangalore Principles of Judicial Conduct (2002) emphasise the importance of both actual and perceived independence. Article 1.1 provides that: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom." [6]

This principle underscores that the judiciary must *demonstrate* independence in a way the public can observe and trust. In previous assessments, concerns were raised regarding the judiciary's protection of the right to a fair and speedy trial. Allegations of bias—particularly in politically sensitive cases—have been widely reported. According to the U.S. Department of State, numerous detainees have been held in pre-trial detention for more than a year, and instances of intimidation or bribery involving judges and attorneys have been documented.[7] Such findings suggest shortcomings in both judicial independence and public confidence, highlighting the need for structural reforms.

Judicial independence in the Maldives

The Maldivian legal system faces numerous challenges in the consistent application of laws and regulations. Whether motivated by political or personal interests, such interference can pose significant threats to the impartiality of courts in any legal system. Allegations of judicial bribery and misconduct were reported frequently in earlier periods of public discourse and media coverage.[8]

While the Constitution and statutory frameworks guarantee judicial independence, earlier evaluations have pointed to practical difficulties in achieving this ideal. These assessments have noted issues such as political influence, structural vulnerabilities, and institutional limitations. Even so, the 2008 Constitution establishes robust protections intended to uphold judicial autonomy.[9]

Key Constitutional Safeguards of Judicial Independence in the Maldives

Article (2008 Constitution)	**Subject**	**How it ensures Judicial independence**
141 (a-d)	Establishment and independence of the Judiciary	Declares the judiciary an independent branch of the state and prohibits interference by the executive or legislature in judicial functions.

[6] UNODC, *The Bangalore Principles of Judicial Conduct* (2002) accessed 22 September 2025.

[7] US Department of State, *2023 Country Reports on Human Rights Practices: Maldives* (2023) accessed 22 September 2025.

[8] Ahmed Sharuhaan, 'Police: Detained Maldives Supreme Court Judges Took Bribes' (2018) <https://apnews.com> accessed 5 November 2025.

[9] *Constitution of the Republic of Maldives* (2008) arts 141, 142, 146, 151, 152, 154 and 157.

142	Independence in decision-making	Requires judges to decide cases solely according to the Constitution, the law, and their conscience, free from coercion or influence.
152	Funding of the Judiciary	Mandates a separate state budget for the judiciary, reducing financial dependence on other branches.
154	Security of tenure of judges	Ensures judges may be removed only for gross misconduct or incompetence and only through a formal and lawful process.
157	Judicial Service Commission (JSC)	Establishes an independent body responsible for appointing, promoting, and disciplining judges, thereby limiting executive control.

These constitutional provisions demonstrate a clear commitment to judicial autonomy in theory. However, earlier reports highlighted gaps between these constitutional ideals and the judicial reality at the time.

Challenges to Judicial Independence in the Maldives:

Politicization of the Judicial Service Commission (JSC)

Despite the constitutional protections for judicial independence, numerous international reports have highlighted systemic problems within the Maldivian judiciary. One of the most frequently cited concerns is the politicisation of the Judicial Service Commission (JSC)—the body responsible for appointing, promoting, and disciplining judges. The JSC has been criticised in various earlier assessments for making decisions that appear influenced by political pressures rather than objective, merit-based criteria.[10]

The International Commission of Jurists (ICJ) has noted that the structure of the JSC itself enables political influence because its membership includes representatives appointed by the President, Parliament, and the general public.[11] This composition creates a body vulnerable to partisan manipulation.

Another major issue relates to Article 285 of the 2008 Constitution, which required that all sitting judges undergo a professional evaluation within two years of the Constitution's enactment. However, the JSC reappointed nearly all judges without conducting meaningful competency assessments.[12] Many of these judges reportedly lacked formal legal training, increasing their susceptibility to external pressure and further undermining judicial independence.

Given these concerns, the ICJ and other bodies have recommended structural reforms to the JSC, including establishing merit-based appointment processes and reducing political influence to safeguard judicial tenure and independence.[13] The UN Universal Periodic Review (UPR) in 2015 similarly urged Maldives to improve judicial

[10] Transparency Maldives, *Issues in the Maldivian Judiciary* (December 2015).

[11] International Commission of Jurists (ICJ), *Maldives: Securing an Independent Judiciary in a Time of Transition* (February 2011).

[12] Ibid, no.11

[13] ICCPR, *Consideration of Reports Submitted by States Parties* (31 August 2012) 5.

selection processes, revise the oversight body's composition, and implement recommendations made by the UN Special Rapporteur on judicial independence.[14]

Executive Influence and Politicised Trials

Following the introduction of the multi-party political system in 2005,[15] the judiciary faced increasing allegations of political interference. Courts were frequently accused in earlier periods of issuing rulings shaped by government pressure or partisan interests.

Supreme Court Overreach and Judicial Intimidation

Concerns extend beyond political interference into issues of judicial overreach—particularly by the Supreme Court of the Maldives. Observers have reported that the Supreme Court, in earlier periods, used its authority to influence or control lower courts and judicial administration.

The ICJ notes that the Supreme Court "has used and appears ready to use again undue influence over the lower judiciary… and often exercises this power arbitrarily."[16]

The Supreme Court has also relied on its **suo motu** powers to discipline institutions critical of judicial conduct. In the case *Supreme Court v Human Rights Commission of the Maldives* (2014),[17] the Court ordered the Human Rights Commission of the Maldives (HRCM) to follow its guidelines when preparing reports about the judicial system. This arose after the HRCM submitted a UPR report stating that the judiciary was influenced by the Supreme Court, weakening the autonomy of other courts.[18]

These actions fueled public and international concerns that, at the time, the Supreme Court was functioning not as an independent constitutional guardian but as an institution exercising political influence and suppressing criticism.

Public perception of the judiciary in the Maldives

Public perception is a critical component of judicial independence. Since the 2008 democratic transition, trust was reported to have eroded during the post-2008 period.

Loss of Public Trust After Democratization (Post-2008)

Although the 2008 Constitution promised renewed judicial independence, its implementation was flawed—most notably when the JSC failed to remove incompetent judges during the constitutional transition. This failure significantly damaged public trust. The ICJ (2011) reported that the judiciary had "lost the confidence of the public due to its failure to act independently and impartially."[19]

[14] Human Rights Watch, *An All-Out Assault on Democracy* (August 2018) 41.

[15] Elections Commission, *Political Parties: Beginning of Political Parties in the Maldives* accessed 6 November 2025.

[16] International Commission of Jurists, *Judicial Adrift* (August 2015) 30.

[17] *Supreme Court Suo Motu Case* 2014/SC-SM/42.

[18] SunOnline International, *Supreme Court Sets Guidelines for the HRCM* (16 June 2015).

[19] ICJ, *Maldives: Securing an Independent Judiciary in a time of transition* (2011).

Perception of Corruption and Political Influence

Transparency Maldives' 2013 survey indicated that the judiciary was among the three institutions perceived as most corrupt in the country.[4] Judges were widely believed according to earlier reports to be influenced by political parties, wealthy business actors, and senior officials, particularly in high-profile cases.[5] The UN Human Rights Committee likewise described the judiciary as suffering from "pervasive public perception of bias, favouritism and susceptibility to executive influence."[6]

Media, Civil Society, and Public Criticism

Media outlets and civil society organizations have, in various reports, highlighted judicial misconduct, lack of transparency, and corruption. However, criticism is often met with judicial intimidation. In 2014, the Supreme Court charged the Human Rights Commission with contempt for criticising judicial conduct.[20] This deepened public fear and frustration, reinforcing the perception that the judiciary lacks accountability.

The way forward

To improve public perception of the judiciary in the Maldives, judicial independence must not only exist internally but must also be clearly demonstrated across all organs of the judicial system. The Maldivian judiciary is composed of three tiers: the Supreme Court, which serves as the apex court and final appellate authority responsible for constitutional interpretation; the High Court, which reviews appeals from both superior and magistrate courts; and the lower courts, which include the Criminal Court, Civil Court, Family Court, Juvenile Court, Drug Court, and the magistrate courts located on each inhabited island. For these institutions to operate effectively and independently, several interrelated reforms are essential.

A critical first step is the reform of the Judicial Service Commission (JSC). Reducing political influence within the Commission is necessary to ensure the integrity of judicial appointments and disciplinary procedures. This can be achieved by revising the composition of the JSC to include a greater number of independent legal professionals and civil society representatives. The introduction of transparent, merit-based processes for the appointment, promotion, and discipline of judges would further enhance public confidence. Moreover, publishing JSC decisions would promote transparency and reinforce accountability.

Strengthening judicial education and professionalism is equally important. All newly appointed judges should possess formal legal qualifications, ensuring a uniform baseline of professional competence. Continuous legal education programmes focusing on constitutional law, judicial ethics, human rights obligations, and international standards would enhance judicial reasoning and reduce susceptibility to external pressures. Establishing a Judicial Training Institute—operating under the guidance of the Supreme Court and in collaboration with international partners—would centralize professional development and improve judicial performance across the country.

Enhancing transparency and access to justice is another essential component of reform. Making court judgments, schedules, and disciplinary outcomes publicly available online would foster greater institutional openness. Creating effective complaint mechanisms would empower citizens to report instances of corruption or misconduct, thereby increasing accountability. Additionally, public information campaigns aimed at educating citizens about their rights and judicial procedures would strengthen civic engagement with the justice system.

Judges must also be protected from political pressure to uphold the integrity of their decisions. This requires strengthening constitutional safeguards related to security of tenure and financial independence. Informal

[20] Ibid, no.10

communications or directives from political actors regarding ongoing cases should be explicitly prohibited, ensuring that judicial decisions are grounded solely in law. A strict and effectively enforced code of judicial ethics would help prevent conflicts of interest and eliminate improper political affiliations.

Accountability mechanisms must be improved without compromising independence. Establishing an independent Judicial Integrity Unit capable of investigating judicial misconduct free from political influence would help restore public trust. Disciplinary actions should be applied only in cases of proven misconduct and must never be used as tools of political retaliation. Additionally, the Supreme Court should exercise restraint in its administrative authority over lower courts and the Department of Judicial Administration to avoid perceptions of hierarchical intimidation or overreach.

Finally, strengthening public engagement is vital. Including civil society organizations, the media, and academic institutions in judicial reform discussions would ensure broader participation and transparency. Allowing journalists, international observers, and non-governmental organizations to monitor court proceedings can help demonstrate openness and fairness. Increasing the availability of mobile courts or expanding legal services in remote atolls would further enhance access to justice and strengthen public confidence in the judiciary.

Through these reforms, judicial independence in the Maldives can become a lived reality rather than a constitutional aspiration. Enhancing institutional transparency, reducing political interference, and improving judicial professionalism together form the foundation for restoring trust and building a judiciary that genuinely serves the Maldivian people.

Final Reflections

Judicial independence in the Maldives has, according to earlier assessments, been hindered by political pressures, institutional weaknesses, and diminished public trust—despite the strong protections enshrined in the 2008 Constitution. These concerns contributed to a widespread perception that the judiciary had not consistently operated as an impartial guardian of the rule of law. Reform of key institutions such as the Judicial Service Commission, together with improvements in judicial professionalism and administrative transparency, therefore, remains essential. Because judicial independence and public confidence are mutually reinforcing, progress in one area is likely to support gains in the other.

Earlier studies reported a decline in public trust during the years following the 2008 democratic transition, largely due to allegations of political influence and structural shortcomings. Under President Dr Mohamed Muizzu, however, the government has articulated a clear commitment to allowing the judiciary to function without interference. His pledge to respect judicial autonomy signals a potential turning point, marking the beginning of what many view as a more conducive climate for strengthening judicial independence.

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