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Report of the special rapporteur on the independence of judges and lawyers¹

Mandate Holder

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Mandate

The mandate was established in 1994² to inquire into any substantial allegations transmitted; to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence. The Special Rapporteur makes concrete recommendations; studies, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers; and provides advisory services or technical assistance when they are requested by the State concerned. The Special Rapporteur acts on information submitted to his attention regarding alleged violations regarding the independence and impartiality of the judiciary and the independence of the legal profession by sending allegation letters and urgent appeals to concerned governments to clarify and/or bring these cases to their attention. The Special Rapporteur also conducts country visits upon the invitation of the Government. The terms of reference of the mandate include the structural and functional aspects of the judiciary and cover both civil and military justice, ordinary and exceptional jurisdictions and developments related to the International Criminal Court. The terms of reference have also been extended to other issues such as the right to truth, transnational justice and the problems posed by terrorism in relation to the administration of justice.

Activities

- Annual Report
- Mission to the Maldives from 25 February to 1 March 2007.
- Between 1 January and 8 December 2006, 97 urgent appeals, 39 letters of allegation and 9 press releases were issued. In response to these 145 communications, which concerned situations in 54 countries, the Special Rapporteur received 51 responses from 19 countries.
- In the reporting period, the Rapporteur participated in UN sessions in both Geneva and New York. He contributed to courses and seminars in Latin America and for the Inter-Parliamentary Union.

¹ Summary prepared by Hannah Klein, Intern, ISHR; edited by Gareth Sweeney, Information Program, ISHR.

² Commission Resolution 1994/41

Annual Report³

Scope

The report provides an overview of the main findings of the Rapporteur from the last 12 years. In the report, the Rapporteur first classifies the kinds of situations he has addressed throughout this period and then examines the rule of law in states of emergency and major developments in international justice.

Summary and Key Conclusions:

Classification of the situations addressed by the Special Rapporteur 1994-2006

- Circumstances affecting the independence of judges, prosecutors, lawyers or court officials:
 - The Rapporteur states that those who work in the judicial system face threats, harassment, intimidation, vilification, various forms of interference, physical attacks, abduction, enforced disappearance, arbitrary detention, torture, assassinations and summary executions.
 - He notes that those who work in the judicial system are particularly at risk if they are prominent defenders of human rights. This includes lawyers who specialise in sensitive fields, such as terrorism, and those who advocate for vulnerable groups, such as indigenous peoples. He adds that judges are also subjected to violations of their human rights because of their role in investigating the involvement of politicians or other well-connected figures in cases of serious human rights violations.
- Standards and practices relevant to the rule of law, jeopardising the smooth functioning of the judicial system and the right to a fair trial:
 - The Rapporteur identifies corruption of the judiciary as “one of the most pernicious threats to the rule of law and one of the most difficult to eradicate.” He lists contributing factors, including poor remuneration of judges and lawyers and judges’ ideological and political allegiances.
 - The Rapporteur notes pervasive violations of the right to judgement without undue delay, stemming from an excessive volume of cases reaching the highest courts and inadequate physical infrastructure.
 - The Rapporteur reported many complaints regarding unequal access to justice, particularly for vulnerable groups or those who are discriminated against on grounds such as their sexual orientation.
 - The Rapporteur examines institutional structures that can jeopardise the rule of law such as the appointment of judges by the head of State or excessively close relationships between the executive and the prosecutor’s office. He states that reforms affecting the judiciary often undermine judicial independence, particularly where there are significant institutional weaknesses or where legislation is rushed through by an executive authority responding to prevailing political imperatives.
 - The Rapporteur reports many complaints from lawyers regarding practices undermining their ability to defend their clients, such as lack of access to clients and changes of hearing dates without prior notice.
- Various specific challenges to the rule of law:
 - The trial of civilians before special courts and the trial of members of the armed forces accused of serious human rights violations by their peers as giving rise to some of the most serious complaints the Rapporteur has received.
 - Over the last three years, there has been a growing number of complaints regarding legislation to combat terrorism and legislation on national security and political asylum.
 - The Rapporteur notes the adoption of amnesty laws, spreading impunity and violating the right to truth.
 - The Rapporteur comments that the death penalty has been particularly controversial, and that many of his interventions have been aimed at preventing the infliction of the death penalty on juveniles, disabled persons or persons with mental health problems.

³ A/HRC/4/29, 19 February 2007.

- A significant number of complaints have related to the difficulties States have in reconciling modern law and religious, traditional or tribal law. The Rapporteur notes that many of these issues have clear gender implications.

The rule of law and states of emergency

- Legal regulation of states of emergency:
 - At present all legal systems in the world allow a state of emergency to be declared, but only to maintain constitutional order and safeguard institutions when organised community life is threatened.
 - Prior to the establishment of the UN, the declaration and maintenance of a state of emergency were associated with the exercise of State sovereignty, and what little legislation existed on the matter was generally confined to establishing a governing authority. The Rapporteur states that establishing a legal framework to change this situation has been one of the main challenges facing international human rights law.
 - The basic text dealing with this issue is Article 4 of the *International Covenant on Civil and Political Rights*. This has been subject to extensive comments by the Human Rights Committee. The Subcommission and the Commission also established a special procedure on this matter.⁴

- The 8 principles governing states of emergency in international law:
 - The principle of legality relates to the need to observe clear provisions relating to the state of emergency. It also calls for monitoring mechanisms, including the judiciary, to ensure that the state of emergency is in keeping with the law.
 - The principle of proclamation refers to the need to publicise the declaration of, grounds for and duration of the state of emergency. The judiciary is required to verify whether the formal and substantive requirements applying to the act of proclamation are met.
 - The principle of notification dictates that the state of emergency must be publicised within the international community.
 - The principle of temporality implies a close connection between the duration of the state of emergency and the circumstance leading to its introduction. This prevents the state of emergency becoming permanent in nature. The judiciary plays an important role in questioning the lawfulness of successive extensions to the state of emergency.
 - The principle of exceptional threat refers to the nature of the danger or alleged event that enables the state of emergency to be declared. It must be an exceptional danger, current or imminent, real and specific, which affects the entire nation to the extent that the measures for restricting or limiting rights allowed under normal circumstances are clearly inadequate.
 - The principle of proportionality aims to strike an appropriate balance between the measures applied and the gravity of the situation. Judicial bodies must have the authority to suspend emergency measures which are unnecessary or go beyond what is allowed under domestic law and international treaties.
 - The principle of non-discrimination derives from the general principle of non-discrimination in international law. It provides, for example, that provisions which differentiate between nationals and foreigners in terms of employment of their rights, may contravene the principle of non-discrimination.
 - Many international precedents have identified many other non-derogable rights, such as the right to be informed of the reasons for arrest and the right to a fair trial.

- Impact of states of emergency and other exceptional measures:
 - There are still many cases in which improper conduct by State institutions has an adverse effect on the exercise of human rights. The Rapporteur lists the most blatant violations as being those against the rights to: *habeus corpus*; legal assistance of one's own choosing; and appeal before an independent court. He also notes measures adopted to prevent the judiciary from acting as a counterweight to executive power.

⁴ See E/CN.4/Sub.4/1997/19 and Add.1

- The Rapporteur argues that new threats have justified new ways of suspending human rights. He notes exceptional measures are used under ordinary circumstances, in disregard of the principles discussed above. These measures generally relate to laws on national security, anti-terrorism and immigration.
- Terrorism is increasingly presented as the justification for declaring a state of emergency, when it very often is not. In this connection, some State have even created parallel systems for the administration of justice which completely ignore universally applicable standards, by describing the accused as “terrorists”, “subversives”, or “enemy combatants”.

Major developments in international justice

- Supreme Iraqi Criminal Tribunal:
 - Describing the legal problems with this tribunal, the Rapporteur notes the Geneva Conventions prohibit the occupying power from establishing courts *ex novo*, and notes that this was the case here.
 - The Rapporteur notes that the tribunal does not rule out confessions obtained as a result of torture or arbitrary detention; includes as offences acts which were defined as such only after their commission by Saddam Hussein’s regime; and does not protect the right not to testify against oneself.
 - The Rapporteur lists numerous problems with the trial relating to the Al-Dujail massacre. One judge, several proposed judges, three defence lawyers and a court employee were assassinated during this trial. For several months, the accused were refused access to a lawyer of their choosing, and when they were allowed access, the lawyers in question complained so much of threats against them and interference in their work that they were expelled from the trial.
 - Regarding the death sentence imposed on several of the accused, the Rapporteur states that there is a broad consensus even among those who support this type of sentence that it cannot be handed down unless all judicial safeguards have been respected, and this was not this case for this trial. He argues that these sentences would “shatter the foundations on which the new Iraq is to be built.”
- Extraordinary Chambers in Cambodia:
 - In this case, the Rapporteur applauds the transparency of the procedure established.

Key Recommendations:

States should:

- Bring their domestic legislation and practices into line with international principles, judicial practice and standards relating the application of states of emergency. Legislation should prevent:
 - Measures which invalidate the provisions of the Constitution or basic law and legislation relating to the appointment, mandate and privileges and immunities of members of the judiciary, and their independence and impartiality.
 - Measures which limit the jurisdiction of the courts to consider the validity of the state of emergency, to challenge measures imposed, or to try criminal cases.

The Human Rights Council should:

- The Human Rights Council should establish a mechanism to draft an international declaration whose purpose is to ensure the observance of human rights during states of emergency.

The United Nations should:

- Promote the theme of justice, especially with respect to countries which are in transition or are recovering from an armed conflict.
- Take account of the input and experience of the judiciary in its technical cooperation and other activities.

Other Recommendations:

- The Iraqi authorities should be urged to seek the assistance of the United Nations in the establishment of an independent tribunal which complies with international human rights standards; and should also refrain from imposing the death penalty.

- The judges involved in the Tribunal in Cambodia should ensure trials are conducted in full compliance with international standards.

Mission to the Maldives⁵

Scope:

The mission took place from 25 February to 1 March 1 2007. The Special Rapporteur had been invited by the Government to assess the situation of the judiciary and to assist the authorities in following the Road Map towards a Reform Agenda as adopted by the President in March 2006. The Rapporteur held detailed discussions with government and judicial officials and met freely with a variety of other interlocutors. He also interviewed detainees in the Maafushi prison. The present report aims to provide an overview of the judicial system of Maldives and the challenges currently facing the main actors in the administration of justice.

Summary and key conclusions:

- The principle of separation of powers and the independence of the judiciary is not enshrined in the Constitution. The President is the head of the judiciary. The Maldivian legal system is a combination of sharia law and codified common law. Statutory law is embryonic or absent in many areas.
- In December 2003, the President set up a Human Rights Commission and in February 2004 decided to revise the Constitution in order to establish a separation of powers. In March 2006, the Government adopted a Road Map for the Reform Agenda which includes commitments to strengthening governance and the protection of human rights, enhancing the independence of the judiciary, developing a multiparty system and holding the first multiparty elections in 2008, and enhancing the role and freedom of the media.
 - Concerning the judiciary, proposed reforms include the adoption of a new Constitution which will include the principle of an effective separation of powers, the establishment of a Supreme Court, and the tabling before Parliament of a new Penal Code.

The present court system

- The Constitution provides that the President is both the head of the judiciary and the final arbiter of appeals. The President determines the number of courts and their location.
- Currently, the judicial system is organised in a two-level court system. First instance courts, the “Island Courts,” are distributed among the 200 inhabited islands, and specialised courts, known as “Malé’s Courts,” are situated on the Malé atoll. The specialised courts are composed of the Civil Court, the Criminal Court, the Family Court, and the Juvenile Court. A High Court of Justice functions as the sole appeals court and the court of first instance for politically sensitive cases which are prosecuted by the Attorney-General’s Office. There is no Supreme Court.

Recent reforms and developments

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

⁵ A/HRC/4/25/Add.2

Summary prepared by Christopher Lee, Intern, ISHR; edited by Gareth Sweeney, Information Program, ISHR.

- The reform of the criminal justice system addresses specific areas such as criminal procedure, police powers, use of evidence in court, juvenile justice, strengthening of the penal system, jail management, and the judicial system.
- Foreign consultants have been making a substantial contribution to the drafting of the new texts. In particular, the new Penal Code was drafted by Professor Robinson of the University of Pennsylvania. The Government hopes that this new code will be seen as an example in the Islamic world of how to harmonise Islamic law and modern law in line with international standards.

Political difficulties

- In general, the President's proposed reforms have had broad support among institutional actors. However, there are difficulties within the Special Majlis, the special constitutional assembly in charge of the constitutional reform. Discussions within the Majlis are at a stalemate due to political divergences and a lack of parliamentary experience.
- The Rapporteur is seriously concerned about this impasse that threatens the adoption of the new Constitution. The reformed Constitution is the centrepiece of the entire reform process and its adoption must be an absolute priority.

The judiciary

- Presently, all judges are appointed by the President. However, the Constitutional Amendment proposes "to divest the presidency of its role as the head of the judiciary."
- Judges lack sufficient training before taking office and during their tenure, as they are recruited with very limited or no practical legal experience. The urgent need for legal training and education for lawyers, judges, and prosecutors is recognised by all actors.
- The salaries for judges are far too low: they earn approximately 60 per cent of the average national income. The low salary has been partially to blame for the corruption of the judiciary and the judiciary's susceptibility to external pressures.
- As a consequence of the powers of the executive over the judiciary, judges are strongly discouraged from issuing judicial decisions that contradict the executive and effectively refrain from ruling against the Government.

The Attorney-General

- Prosecutors are present in only 9 of the 20 atolls provided with Island Courts
- According to the reform proposal, the President will retain his exclusive power to appoint and dismiss the Attorney-General.
- The police became a civilian force on 1 September 2004. Major efforts will need to be undertaken to train the police as a civilian force. There is still no legislation regulating the powers and responsibilities of the police. Police brutality in general has been a serious problem.
- Investigations of crimes are primarily the responsibility of the police, as no rule exists to allow prosecutors from the Attorney-General's Office to be present during an investigation. Prosecutors can generally only review the conclusions of a police investigation once the case reaches their office. Similarly, they cannot launch their own investigations. The Rapporteur emphasises that the absence of intervention by either prosecutors or judges in police investigations clearly affects respect of the applicable fair trial and procedural rules during the investigations.

The legal profession

- There is a serious shortage of lawyers in the country (there are only an estimated 272 registered lawyers in the entire country).
- There is currently no legal requirement for qualification as a legal practitioner. Legal education in Maldives is provided by two law institutions which only offer diplomas in sharia law. There is no bar association.
- Lawyers reported limited legal resources available to them to undertake legal research. Lack of clear written regulations and procedures is a major obstacle to their work.

Conduct of judicial proceedings

- One of the main obstacles to the conduct of fair and transparent judicial proceedings is the lack of codified civil and procedural rules on which judges, lawyers, and the accused can rely. A draft Criminal Procedure Code has been tabled in parliament, while a Civil Procedure Code still needs to be drafted. The Rapporteur notes that the Government has indicated that it sees both of these texts as a priority.
- Prolonged and arbitrary pre-trial detentions are still common. The Criminal Procedure Bill, if adopted, will introduce significant changes, such as the right to habeas corpus: within 24 hours of arrest, a detained person will have to be brought before a judge and will have to be assisted by a lawyer. However, a concern is that outside of Malé, due to the general lack of lawyers, detainees would still not have access to them.
- Many lawyers in the country are unwilling to work on criminal cases, citing the absence of procedural rules and the consequent difficulty in building a strong case. Also, those who do work on criminal cases practice in tense circumstances, spending much time with police officers. Lawyers cannot communicate with their clients during the investigation: they can be present, but cannot speak. The same applies to interrogations.
- Without a lawyer attending a criminal investigation, the police are said to be able to obtain false statements through coercion, mistreatment and torture. The police reportedly do not apprise persons of their basic rights and put pressure on accused persons not to seek legal representation.
- Currently, trial proceedings consist of a series of short hearings, leading to delays in adjudication. The accused and the lawyers are informed of the hearings only shortly before they take place (sometimes the same day).
- The right of appeal can only be exercised before the High Court in Malé, creating the problem of timely delivery and, due to its geographical centralisation, a problem of affordability for those who would need to travel.
- Sentences are usually disproportionate, in particular with regard to drug-abuse-related cases. Trafficking and consumption of drugs is a serious problem, and the Rapporteur observed that very little has been put in place with regard to rehabilitation programmes or centres.

Juvenile justice

- The vast majority of current offenders started at the age of 12 to 16.
- The current juvenile justice system does not effectively address the problem, as it does not provide for adequate options or programmes to guide young offenders out of the system through rehabilitation. There is only one Juvenile Court, located in Malé.
- Another issue of concern is the low rate of prosecution and punishment of child sexual abuse cases. The testimony of a child is not sufficient for initiating a prosecution process.

Gender-based violence in the judicial system

- Gender-based violence is underreported within the judicial system. Acknowledging being a victim of such violence is seen as a shameful act.
- In several cases where women had the courage to report domestic violence, their husbands filed a complaint against them for abandonment. In other cases, women who had been victims of domestic violence were ordered to go back to their homes.

Key Recommendations:

The Government of the Maldives should:

- Implement the constitutional reform that is currently being discussed as soon as possible. With regard to human rights and the administration of justice, the new Constitution should include at a minimum the following:
 - A real separation of powers and a clear recognition of the independence of the judiciary.
 - Provisions for democratic multiparty elections.
 - The establishment of a Supreme Court.

- The establishment of the post of an independent Prosecutor-General
- A bill of rights that conforms to international human rights treaties ratified by Maldives, as well as relevant international human rights principles.
- An independent Judicial Services Commission, with decision-making power for the appointment, dismissal and discipline of judges, and for the financial management of the courts
- An independent human rights commission
- Promptly adopt the new Penal Code, the Sentencing Bill, the Criminal Procedure Code, the Bill of Evidence, and the Police Bill.
- Establish a procedure for the appointment of the Chief Justice and the judges of the newly established Supreme Court which guarantees their independence.
- Invest resources in capacity-building activities to improve the number of trained judges and lawyers. The Rapporteur strongly supports the establishment of a university Faculty of Law in Maldives.
- Raise the salaries of judges in order to attract more jurists and guarantee their independence.
- Establish an appeals court on every atoll.
- Allow judges and prosecutors to be involved in police investigations in order to monitor and guarantee respect for human rights.
- Establish a system of legal aid to allow persons who cannot afford a lawyer to receive free of charge the assistance of a lawyer assigned by public authorities. Lawyers are also encouraged to establish an independent bar association.
- Decentralise the current juvenile judicial and protection system.
- Approve new legislation to enable prosecution of child sexual abuse cases on the basis of reasonable evidence. Also, spousal assault, and non-consensual sex should be considered separate and specific criminal offences.

The international community should:

- Become involved in the reform process and provide adequate support, both substantial and financial, to allow for the reform process to be completed and for the reforms to be implemented.

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