



人权理事会

第二十三届会议

议程项目 3

增进和保护所有人权——公民权利、政治权利、
经济、社会和文化权利，包括发展权

法官和律师独立性问题特别报告员加芙列拉·克瑙尔的报告

增编

对马尔代夫的访问* **

概要

法官和律师独立性问题特别报告员应马尔代夫共和国政府的邀请，于 2013 年 2 月 17 日至 24 日对该国进行了正式访问。她会见了政府、立法和司法机构，以及律师、公民社会组织和其他利益相关者。她访问了马累和阿杜城市。

特别报告员在报告中审查了马尔代夫为确保法官、检察官和律师独立性而采取的措施。她分析了自 2008 年通过民主宪法和其前任 2007 年访问以来，司法机关切实高效地执行司法和司法人员独立、公正和有效地履行职能所面临的挑战和障碍。

特别报告员在报告的开始阐述了近期的政治背景，与司法机关和司法机关内部的紧张关系导致局势动荡，对巩固民主造成了消极影响。报告还提到了(a) 法律制度的严重差距；(b) 对司法机关独立性和问责制概念的误解；(c) 法官的遴选和任命程序，以及司法服务委员会缺乏透明度和有效性；(d) 缺少对司法人员的

* 本报告内容提要以所有正式语文分发。报告本身载于本文件的附件内，只以原文印发。

** 迟交。

保护；(e) 司法系统内妇女地位不稳定；(f) 过去侵犯人权行为不受惩罚对司法系统的影响；(g) 公众对司法系统缺乏信任。

特别报告员还审查了司法和检察部门的预算和工作条件、案件管理的严重缺陷以及没有内部规章程序。她也审查了诉讼延迟和诉诸司法等相关问题。报告还专门分析了律师境况。最后，她谈到了对所有司法人员进行素质教育和持续培训，特别是人权、妇女权利和性别平等培训的迫切需要。

Annex

[English only]

Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Maldives

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I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, visited the Republic of Maldives (hereafter the Maldives) from 17 to 24 February 2013 at the invitation of the Government. The previous Government had also extended an invitation for an official visit in 2012. She wishes to note the efforts undertaken by the country to implement the recommendations formulated by her predecessor, Mr. Leandro Despouy, who undertook a visit in February 2007.

2. The Maldives' transition from an authoritarian regime to a democracy based on the rule of law and the separation of powers is commendable. Transitions, however, always come with challenges. These challenges have to be identified, assessed and addressed as a matter of urgency within the parameters laid down by the Constitution and international human rights law to allow for the consolidation of democracy.

3. In this context, the purpose of the Special Rapporteur's visit was to understand how the Maldives endeavours to strengthen the independence of the judiciary, prosecutors and lawyers, adequately provide for their protection, and ensure their accountability. The visit also aimed at identifying the obstacles that impede actors of the judicial system to discharge their functions effectively, adequately and appropriately, and deliver justice in a fair, independent and impartial way.

4. The Special Rapporteur visited Malé and Addu City. She met with the President of the Republic, the Minister of Foreign Affairs, the Attorney General, the Minister of Home Affairs, as well as other Government officials. She also held meetings with the Chief Justice, the Supreme Court, judges and magistrates from superior and magistrates' courts, members of the Department of Judicial Administration, the Prosecutor General, lawyers, the Judicial Service Commission, the Human Rights Commission, the Police Integrity Commission, and the Anti-Corruption Commission. She further met with members of the People's Majlis (parliament), including members of the Independent Institutions Committee, as well as representatives from various political parties, non-governmental organizations, and United Nations agencies.

5. The Special Rapporteur wishes to thank the Government and, in particular, officials at the Ministry of Foreign Affairs, for having facilitated a rich programme of meetings and visits with full respect for the independence of her mandate. She also thanks all those who dedicated their time to present their informed opinions and perspectives.

II. The justice system

6. The Maldives is an archipelago composed of more than 1,000 coral islands, 200 of which are inhabited, grouped into 26 atolls. The country is administratively divided into seven provinces and one municipality. Many islands are far and disconnected from the capital city and the population is scattered; as a result, the population's access to the different institutions of the State, including the judicial system, can be difficult and costly.

7. Up until 2008, autocratic Governments, where the President was the supreme executive and judicial authority, ruled the Maldives. Following mounting pressure from civil society and the population, democratic reforms were initiated and culminated with the adoption of a new Constitution on 7 August 2008, which enshrined the principles of separation of powers and independence of the judiciary. Mohamed Nasheed won the first democratic presidential elections in October 2008, and the first democratic and multiparty parliamentary elections were held in May 2009.

A. Constitutional provisions related to the judiciary

8. Chapter VI of the Constitution is dedicated to “the judiciary”. It contains provisions to ensure the independence of national courts and regulate their jurisdiction, functions and administration. It also lays down the qualifications of judges and magistrates, their mode of appointment, salary and allowances, security of tenure, and removal. These provisions are complemented by the Judges Act¹ and the Judicature Act² of 2010.

9. The Judicial Service Commission is established in the Constitution³ as an “independent and impartial institution” to, *inter alia*, appoint, promote and transfer magistrates and judges other than the Chief Justice and judges of the Supreme Court, investigate complaints and take disciplinary action against them, including recommendations for dismissal.

10. The Constitution also establishes the post of Prosecutor General, separate from the Attorney General. The Prosecutor General is appointed by the President after approval from the majority of the Majlis for a term of five years, which can be renewed upon approval of the Majlis for an additional term. S/he carries out her/his functions independently and impartially in accordance with the Constitution and the laws, but under the general policy directives established by the Attorney General. The functions of the Prosecutor General are to prosecute, oversee the legality of police arrests, oversee the legality of investigations by the police and other commissions, and order investigations when they so request.

11. The Attorney General is appointed by the President and acts as the advisor to the Government on all legal matters affecting the State. The Attorney General further represents the State in all court proceedings except for those matters under the responsibility of the Prosecutor General.

B. The court structure

12. The court system in the Maldives includes the Supreme Court, the High Court, and the superior courts and magistrates courts as established by law.

1. The Supreme Court

13. The Supreme Court has the final authority on the interpretation of the Constitution, the law, or any other legal matter dealt with by the courts. The Court has the power to assess the constitutionality of any statute enacted by the Majlis and may deliver advisory opinions upon request from the Majlis. It also has appellate jurisdiction regarding decisions of the High Court.

14. Supreme Court judges are appointed by the President, after consultation with the Judicial Service Commission and with a confirmation of the appointee by a majority of members of the Majlis present and voting. At present, the Supreme Court consists of seven judges, including the Chief Justice.

2. The High Court

15. The High Court has appellate jurisdiction for decisions taken by lower courts and first instance jurisdiction in some cases as stated in the Constitution or laws. It also has

¹ Act No. 12/2010.

² Act No. 22/2010.

³ Articles 157 to 166.

jurisdiction to enquire into and rule on the constitutional validity of any statute enacted by the Majlis. The High Court consists of nine judges,⁴ appointed by the Judicial Service Commission.

3. Lower courts

16. Lower courts are divided into the magistrates courts and the superior courts. The so-called “Island courts”, which existed prior to the enactment of the Judicature Act in 2010, were transformed into magistrates courts. There is at least one magistrates court on each inhabited island, with the exception of Malé, where the superior courts sit.

17. Magistrates courts have jurisdiction over both criminal and civil matters, but their jurisdiction is limited *ratione materiae*. Serious criminal offences or civil cases where the amount or the subject matter in dispute exceeds a certain amount of rufiyaa (local currency) are dealt with by the superior courts.

18. Judges of both magistrates and superior courts are appointed by the Judicial Service Commission, which decides on the number of magistrates and judges sitting in each court.

19. The Judicature Act establishes four superior courts, namely the Civil Court, the Criminal Court, the Family Court and the Juvenile Court.⁵ Other superior courts can be created by law; such is the case of the Drugs Court, established by the 2011 Drugs Act. Superior courts only sit in Malé.

C. Legal framework

20. The current Maldivian legal system relies on a complex combination of common law and Islamic Shari’a. Several essential pieces of legislation are outdated or simply lacking and some have been pending before the Majlis for years. The judiciary needs to be given adequate tools, in line with the principles enshrined in the Constitution, to function properly and with legal certainty.

21. The Constitution of the Maldives guarantees a comprehensive set of fundamental rights and freedoms, which include both civil, cultural, economic, political and social rights. It also lays down a number of guarantees relating to the right to a fair trial, freedom from arbitrary detention and the right to a remedy. At the international level, the Maldives is a party to a number of human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

D. Recent political context and tensions with the judiciary

22. Despite the constitutional safeguards aimed at ensuring respect for the separation of powers, a number of incidents where both the executive and legislative powers have directly or indirectly interfered with the independence of the judiciary illustrate the difficulties encountered by the Maldives on its transition towards democracy and the rule of law. At the same time, the judiciary seems to have retreated behind closed doors, refusing to enter into a substantive dialogue with the other powers to address the situation.

23. The Constitution had set a two-year transition period for the Judicial Service Commission to screen and reappoint all judges, with the exception of the judges of the

⁴ Act No. 22/2010, article 27.

⁵ Act No. 22/2010, article 53.

transitional bench of the Supreme Court. The rationale behind this was to ensure that judges would be qualified to function under the new constitutional system. This vetting and re-appointment procedure prescribed by article 285 of the Constitution soon became a much politicized process, with many actors feeling their personal and political interests were at stake. As a result, disagreement quickly emerged over the criteria that the Commission should use in the process. Throughout this transition, the Government engaged in strong public criticism of the Commission, at one point even sealing its premises. By the 7 August 2010 deadline, the Commission had reappointed 191 of 197 judges and magistrates. Thirty-six judges and magistrates had been subjected to further review due to prior convictions and only six were ultimately disqualified (allegedly three of these judges were later reinstated).

24. The Constitution also established an interim Supreme Court consisting of five justices which would remain in place until the establishment of the new Supreme Court. On 8 June 2010, two months before the end of the transition period, the interim Supreme Court informed the President that all its members would permanently remain on the bench. There was reportedly no legal or constitutional basis for such an action.

25. In a supposed bid to pressure the Majlis, former President Nasheed unilaterally declared the transitional Supreme Court bench dissolved on 7 August 2010. He appointed a four-member appellate bench by decree and ordered the Maldivian Defence Forces to take control of the Supreme Court premises. In response, on 10 August 2010, the Majlis finally passed the Judges Act, which established the permanent Supreme Court, and approved the nominations made by the President. The five judges who had been sitting on the transitional bench were appointed to the seven-member permanent bench, leaving many with the perception that the Supreme Court was appointed in a politicized manner.

26. Political tensions between the Government and the opposition continued and culminated on 12 January 2012, when former President Nasheed ordered the arrest of Judge Abdulla Mohamed, Chief Judge of the Criminal Court. Judge Abdulla had allegedly shielded a number of powerful politicians in corruption cases by refusing to issue orders to investigate, and many complaints had been made regarding his conduct and supposed lack of ethics. The Judicial Service Commission had completed an investigation on him in November 2011, holding him guilty of misconduct. This decision was appealed to the Civil Court, which ordered that the Judicial Service Commission's complaint procedure be suspended. Although the Commission appealed the Civil Court's ruling, Judge Abdulla was allowed to continue in his functions.

27. The arrest of Judge Abdulla led to a domestic and international outcry and numerous calls on the executive to respect legal procedures set for the investigation of misconduct allegations against a judge.⁶ The crisis sparked by this event significantly precipitated the change of Government on 7 February 2012. In the opinion of many, former President Nasheed was forced to resign.

28. Former President Nasheed is now being tried under charges of illegal arrest and detention of Judge Abdulla. According to information received, the magistrates court before which the prosecution filed the case against Mr. Nasheed, namely the Hulhumalé magistrates court, was unlawfully constituted. The City of Malé includes the islands of Malé, Hulhumalé, and Villingili. In 2010, the Judicature Act determined that the City of Malé would not have magistrates courts like the other inhabited islands, but only superior courts. As a result, the Hulhumalé court ceased to exist and all its cases were transferred to

⁶ Urgent Appeal of the Special Rapporteur on the independence of judges and lawyers, sent on 3 February 2012, A/HRC/20/30.

the Civil Court and the Family Court. The Supreme Court decided to reopen the Hulhumalé court as a section of both Civil and Family Courts.

29. The Judicial Service Commission later decided that the Hulhumalé court should exist as a magistrates court, in contradiction with the Judicature Act, but limited its jurisdiction to family and civil matters only. This decision was appealed before the Civil Court in late 2010, but the Supreme Court issued a writ ordering the court not to proceed with the case. In 2012, after the Commission filed a case with the Supreme Court regarding the legality of the Hulhumalé magistrates court, the Supreme Court finally decided that the latter was legal. The Special Rapporteur was informed that the judge of the Supreme Court who cast the deciding vote in this case also sits as a member of the Judicial Services Commission, whose decision to establish the Hulhumalé court as a magistrates court was under review.

30. In this context, the Special Rapporteur notes that, according to article 14 of the International Covenant on Civil and Political Rights, all persons are equal before the courts and tribunals, and everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. In her view, the trial of the former President raises serious concerns regarding the fairness of proceedings. She believes that the constitutionality of the Hulhumalé Court is questionable and that the bench of judges which was constituted to hear Mr. Nasheed's case also seems to have been set up in an arbitrary manner, without following procedures set by law.

31. According to the law, the Prosecutor General's office should have filed the case of Mr. Nasheed with the Criminal Court. While the concerns of the Prosecutor General's office regarding the evident conflict of interests in this case are understandable, since Judge Abdulla sits in this court, it is not for the Prosecutor to decide if a judge is impartial or not. The Prosecutor should act according to the law when filing a case, as it is the duty of judges to recuse themselves if they cannot be impartial in a particular case.

32. All allegations of unfair trial and lack of due process in Mr. Nasheed's case need to be promptly investigated, including the claims that the trial is being sped up to prevent Mr. Nasheed's participation in the 2013 elections.

III. Challenges to the independence and impartiality of the judiciary and to the proper administration of justice

A. Lack of a comprehensive legal framework

33. As mentioned above, the Special Rapporteur is seriously concerned about inconsistencies and gaps in the Maldives' legislation. Judges have been relying on laws and acts that were passed before the Constitution of 2008 and may be in contradiction with it, such as the Penal Code and the Evidence Act, which are mostly incomplete and outdated and do not reflect the modern living conditions of the Maldives. There exist no Criminal Procedure Code, no Sentencing Act and no Civil Procedure Code. A draft Penal Code, including sentencing guidelines, an Evidence Bill and a Criminal Procedure Code have been pending for years before the Parliament. As regards the civil justice system in particular, concerns were expressed that not enough attention is given to the development of commercial, corporate and other regulations, which are most needed in the current economic environment. New and revised legislation is urgently needed in order to create a comprehensive, consistent and uniform legal system, whereby the rule of law can be enforced in a fair, equal and impartial manner, with respect for the principle of legality.

34. The Constitution stipulates that, when deciding matters on which the Constitution and the laws are silent, judges must consider Islamic Shari'a. This raises concerns regarding legal certainty and compliance with fundamental rights; there is, indeed, no certainty as to which interpretation of Islamic Shari'a will be applied in each case and therefore no assurance that what will be applied is in compliance with human rights enshrined in the Constitution and international instruments. It was reported that, in practice, Shari'a is widely applied by lower courts, giving rise to serious inconsistencies in jurisprudence.

35. The Special Rapporteur is preoccupied about reports that Shari'a has sometimes been applied in contradiction with the fundamental human rights protected in the Constitution and international instruments to which Maldives is a party. Recent examples include cases of children sentenced to flogging in September 2012 and February 2013, and a person sentenced to death in December 2012 for a crime committed while she was below 18 years of age.

36. When interpreting and applying constitutional fundamental rights, judges shall promote the values of a democratic society and consider international treaties to which the Maldives is a party.⁷ The Special Rapporteur wishes to underline that relying on and applying international human rights law at the domestic level is particularly important in a context such as that of the Maldives, where legislation is missing. Although it was reported that the Supreme Court has relied upon treaty bodies' jurisprudence in some of its decisions, judges and magistrates at other levels of the judiciary essentially lack sufficient knowledge of international human rights law to do the same.

37. The Special Rapporteur strongly believes that a uniform legal system respecting the principles enshrined in the Constitution and the international obligations of the Maldives is necessary to create consistency in the administration of justice, avoiding difficulties for litigators to seek justice and judges to render decisions that are impartial and fair. When essential legislation is lacking, it is almost impossible to monitor the quality and consistency of justice delivery. Passing laws is imperative to implement the Constitution and the People's Majlis should bear in mind how their actions or inaction affects the establishment of the rule of law.

B. Independence, impartiality, integrity and accountability

38. The concept of independence of the judiciary has been misconstrued and misinterpreted in the Maldives, including among judicial actors. The requirement of independence and impartiality does not aim at benefitting judges, but rather the court users, as part of their inalienable right to a fair trial. As stated in the *Commentary on the Bangalore Principles*: "Judicial independence is not a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressures or influence and without fear of interference from anyone." Independence is not synonymous of isolation either. While the judiciary is to decide matters before it without any restrictions, improper influences, inducements, or threats, it is bound by the powers granted by the Constitution and the laws and must function in a system of check and balances with the other powers of the State.

39. It was reported that the Supreme Court has been deciding on the constitutionality of laws *ex-officio*, without following appropriate examination procedures, under the understanding that they are the supreme authority for the interpretation of the Constitution

⁷ Article 68.

and that any document bearing their stamp is binding on all. The Special Rapporteur is concerned that the Supreme Court is perceived as not following due process in many of its decisions. It is also troublesome that some of the Supreme Court's interventions are perceived as arbitrary and as serving the judges' own personal interests.

40. Such misinterpretation of the independence of the judiciary needs to be urgently resolved both with regard to the public perception of the judiciary and the internal functioning of the justice system. The Special Rapporteur heard several complaints about internal tensions in the judiciary, where lower courts are left with the feeling that the Supreme Court only works for its own interests, without taking into account the situation of other judges and magistrates.

41. In addition to independence, the right to a fair trial requires judges to be impartial. As noted by the Human Rights Committee: "The requirement of impartiality has two aspects. First, judges must not allow their judgements to be influenced by personal bias or prejudices, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."⁸ On several occasions during her visit, the Special Rapporteur was told that conflicts of interests and their effects on judges' impartiality are important issues of concern in the Maldives. It seems that judges, and other actors of the State, do not want to fully acknowledge and understand this concept, leading to the dangerous perception from the public that the justice system is politicized and even corrupted. She was further shocked to hear that many members of the judiciary, including in the Supreme Court, hold memberships in political parties.

42. The Special Rapporteur wishes to underline, in this context, that integrity and accountability are essential elements of judicial independence and impartiality and are intrinsically linked to the implementation of the rule of law. The establishment of mechanisms of accountability for judges, prosecutors, and court staff is therefore imperative and must guarantee that the investigation of any actor in the judicial system safeguards the person's right to a fair hearing. Investigations should be based on objective criteria, the process should respect the basic principles of fair trial, and an independent review of all decisions should be available.

43. The Special Rapporteur is satisfied that a code of conduct for the judiciary largely inspired from the Bangalore Principles of Judicial Conduct was adopted by the Judicial Service Commission on 30 December 2009, but its fair and impartial implementation remains to be seen. As mentioned above, the Commission is in charge of taking disciplinary proceedings and measures against judges and can recommend dismissal to the Parliament. She was nevertheless informed of several issues that affect disciplinary actions against judges and the accountability system as a whole.

44. First, the interlocutors of the Special Rapporteur almost unanimously declared that the current composition of the Judicial Services Commission is inadequate and politicized. The Human Rights Committee also expressed its concern at the composition and functioning of the Commission, stating that it compromises the realization of measures to ensure the independence of the judiciary as well as its impartiality and integrity.⁹ Because of this politicization, the Commission has allegedly been subjected to all sorts of external influence and has consequently been unable to function properly. While usually such a body should preferably be composed entirely of judges, retired or sitting, some

⁸ CCPR/C/GC/32, para. 21.

⁹ CCPR/C/MDV/CO/1, para. 20.

representation of the legal profession or academics could be advisable. No political representation should be permitted.

45. Second, the modalities of work of the Judicial Service Commission are also problematic. The Commission meets three times a week, but many of its members have other functions they have to attend to with priority. Criteria used to initiate proceedings, proceedings themselves, and the decisions made lack transparency; this nourishes serious allegations of selectivity in the management of complaints.

46. Several judges expressed concerns that disciplinary procedures before the Commission lead to public humiliation and damages to their reputation. Some even said that, when summoned by the Commission, the principle of presumption of innocence is not respected and they do not have appropriate time and access to information to prepare for their cases. Judges are also often not told for what allegations they are being investigated. It is common that, after an appearance before the Commission, judges are not informed if their case was dropped, if a decision was taken, or if it is still pending. The Special Rapporteur is worried that disciplinary proceedings before the Judicial Services Commission are not in line with international law and principles, and may sometimes be used to expose and question the integrity of judges and magistrates before the media and the general public before the conclusion of a proper investigation into the allegations. She wishes to underline that, according to the Basic Principles on the independence of the judiciary, judges are entitled to a fair hearing under an appropriate procedure, which should be subject to an independent review.

47. Of concern to the Special Rapporteur is also the significant backlog of complaints with the Judicial Service Commission that are not dealt with or at least are perceived as not being dealt with. Some judges that have several complaints and cases for misconduct against them are still sitting.

C. Selection and appointment of judges

48. The Special Rapporteur heard serious concerns regarding the system of appointment of judges. An appointment body acting independently from both the executive and legislative branches of Government should be established with the view to countering any politicization in the appointment of judges and their potential improper allegiance to interests other than those of a fair and impartial justice. When selection criteria are objective, clear, based on merit, transparent, and well-publicized, public understanding of the process increases and the perception of unfair selection or appointments can be avoided.

49. The concerns regarding the selection and appointment of judges seem to result from two main issues: (a) the process of vetting and re-appointment prescribed in the transitional measures of the Constitution was seriously flawed; and (b) the composition of the Judicial Service Commission, which is in charge of the selection and appointment of judges, is largely perceived as being inadequate and highly politicized, as mentioned above.

50. The rationale behind the vetting and reappointment process was, as some sources put it, “to get rid of bad apples” and thereby regain the public’s trust in the judiciary which, under the former regime, was not independent. There were fears that the country may not have had enough qualified persons to fill in vacant seats if judges were to go through a tough screening process. Others pushed for starting “afresh” with a young and open judiciary, which would not have had strong ties to the old regime. As mentioned previously, political tensions arose around the criteria that the Judicial Service Commission should apply in the process. In the end, the Commission opted for interpreting article 285 of the Constitution in a rather symbolic way and did not scrutinize judges’ qualifications thoroughly. For instance, not all criminal allegations pending against judges were

investigated. This resulted in a seemingly rushed reappointment of all sitting judges but six, which in the opinion of many interlocutors corrupted the spirit of the constitutional transitional provision.

51. The 2008 Constitution completely overturned the structure of the judiciary, yet the same people who were in place and in charge, conditioned under a system of patronage, remained in their positions. The Special Rapporteur considers that such an abrupt transformation of the justice system requires time, careful management, revised legislation, and training, in order to successfully change mindsets and culture. In addition, many believe that some judges who are currently sitting lack the proper education and training. While for practical reasons restarting a vetting and reappointment process does not seem possible at this point, the Special Rapporteur believes that there are some pragmatic measures that could be taken to assess the quality of judges' work and decisions.

D. Budget and conditions of work

52. To deliver justice and uphold the rule of law, the judiciary must be properly equipped and adequately financed. Regrettably, the percentage of the budget allocated to the judiciary is reportedly minimal and has been facing further reductions every year. No clear portion of the State budget is allocated to the judiciary. Of 5 per cent of the total budget requested from the Majlis for 2013, approximately only 2 per cent was allocated. Budget cuts were allegedly not decided in a participatory way, which raises concerns regarding how priorities were established.

53. These budget cuts are severely affecting the administration and functioning of the courts, especially at the lower level. Additionally, the Special Rapporteur witnessed a growing level of frustration and resentment in some magistrates courts, whose budgets are administered by the Department of Judicial Administration, as they feel left out and treated differently from the courts in Malé.

54. The immediate implications of the budget cuts on the judiciary are appalling. For instance, the Department of Judicial Administration only has funds to pay staff salaries until November 2013 and it had to cancel training this year. The Civil Court reported that it would not have sufficient funds to pay its staff salaries after October 2013; furthermore, existing budgetary resources would not be sufficient to pay for utilities and facilities after June 2013.

55. The Special Rapporteur is alarmed by this financial situation and calls upon the Government and the Majlis to take urgent measures to provide the judiciary with the means to function adequately. Such circumstances are not conducive to improvements in the administration of the justice system and may jeopardize the positive achievements reached so far.

56. Budget cuts also pose difficulties with regard to the lack of human resources, especially qualified clerical staff, and the lack of adequate facilities and court rooms. The courts should have enough funds to deal with their workload and deliver justice in a prompt and appropriate manner, and their budgets should be managed in a transparent manner.

E. Case management, internal regulations and procedures, judicial delays and access to justice

57. The Department of Justice Administration was re-established by the Judicature Act of 2010 and is responsible for (a) court management; (b) training of judges; (c) providing for structures, facilities and archiving systems; (d) public and media relations; and (e)

providing security to the judiciary. When the Department was formally established, it functioned under the authority of the Judicial Council, a body which was later abolished by the Supreme Court. Since then, the Department has been functioning as a body under direct supervision of the Supreme Court.

58. The Judicature Act also constituted a Judicial Council, comprising the Chief Justice, a judge from the Supreme Court, the Chief Judge of the High Court, the Senior Judges of the Civil, Criminal, Family, and Juvenile Courts, one magistrate from the North region, and one from the South region. The responsibilities of the Judicial Council included the formulation of regulations on court procedures and the general administration of courts, the standardization of courts rules and regulations, and the determination of rules on case admissibility. This Council was abolished in a ruling of the Supreme Court and, as a consequence, the only platform for internal communication within the judiciary where difficulties, challenges, experiences and opinions could be exchanged, disappeared. Many interlocutors reported that the dissolution of the Judicial Council and the direct control of the Supreme Court over the Department of Judicial Administration have had the effect of centralizing administrative decisions in the hands of the Supreme Court. This has undoubtedly contributed to the strong impression that lower courts are excluded from the administration of justice and decision-making processes.

59. Moreover, the Supreme Court is said to have taken away cases directly from the superior courts before they were adjudicated, without explaining which criteria or procedures were applied. The absence of a genuine judicial career between the different tiers of the justice system further contributes to perceptions of injustice, resentment, and frustration in the lower courts, in particular since people without judicial experience can be appointed to the High Court and Supreme Court.

60. The Special Rapporteur also heard specific concerns about the apparent lack of transparency in the assignment of cases, as well as in the constitution of benches, within all courts, including the Supreme Court, with the notable exception of the Civil Court. When cases are assigned in a subjective manner, the system becomes much more vulnerable to manipulation, corruption, and internal and external pressure. Information on the assignment of cases should be clearly available to the public in order to counter suspicions of malpractice and corruption.

61. Furthermore, a unified procedure for case management seems to be lacking. Judges are said to be still following outdated regulations set previously by the now-defunct Ministry of Justice. These rules present many contradictions and are not consistent with the current justice system established under the 2008 Constitution. The Judicature Act established new regulations regarding the filing of cases and how they must be heard, but no uniform comprehensive procedures are in place. Data on case management and court decisions are also lacking. In this context, the Special Rapporteur wishes to highlight that it is necessary to know how much is invested in the justice system and what the outputs are, so that it is possible to come up with appropriate solutions to the obstacles encountered.

62. Very little court information, including case reports and case law, is publicly available, with the notable exceptions of the websites of the Supreme Court, the High Court and the Civil Court concerning cases adjudicated by these courts. As a result, it is difficult to analyse cases and study the courts' decisions in a comprehensive manner. According to information received, even lower courts are sometimes not informed of higher courts' decisions; this leads to inconsistencies in the jurisprudence and in the application of precedents set by higher courts.

63. Transparency in public administration is not an option, but a statutory and obligatory requirement that is fundamental to a democracy. Yet, transparency remains a challenge for the judiciary in the Maldives.

64. The country's geography and the fact that the High Court and the superior courts only sit in Malé raise serious accessibility problems for the justice system, since travelling to the capital can be very costly. Furthermore, the lack of lawyers in the islands impairs people's access to justice. Legal aid is mandated in the Constitution, but only in serious criminal cases where the accused cannot afford to pay for legal representation. It is also very important to note that access to justice can become especially difficult for vulnerable members of the society, such as children, women, migrant workers, trafficked persons, or persons with disabilities, who have to face difficulties compounded with discrimination.

65. This combination of challenges and obstacles in the administration of justice produces delays in the delivery of justice generating frustration in the population, as justice is not seen as being served.

F. Lack of protection, threats, and attacks

66. Several judges, especially judges working on criminal cases, indicated that their work environment is tense as they receive threats, including death threats. Some judges are said to be reluctant to sit in the Criminal Court because of such intimidation. When judgments do not go the way people want, judges are pressured and publicly berated. Judges have been threatened with reprisals, greeted by mobs in front of courts, and threatened with calls for lynching. The Special Rapporteur is worried that such gatherings calling for violence are sometimes justified under the umbrella of freedom of assembly. Security concerns seem higher for magistrates in islands and, although judges can request protection from the Department of Judicial Administration, there is no permanent system of protection.

67. In February 2012, in the context of the crisis leading to the change of Government, three courthouses and a police station were burnt down in Addu City. The Special Rapporteur is concerned because this feeling of insecurity is apparently also due to impunity for such attacks against the judiciary. The investigations on the criminal fires were completed, but the cases are still pending before the Criminal Court due to the reported lack of budget to conduct the case, which involves bringing about 190 witnesses to Malé. As long as such acts can be carried out with impunity, the judiciary will be mindful of the way their decisions and actions can affect their own security or that of their families.

68. The lack of victim and witness protection mechanisms also has a strong negative effect on the efficiency of the justice system, particularly as regards criminal cases. While setting up appropriate victim and witness protection mechanisms represents a financial challenge, it is a basic requirement indispensable to any functioning criminal justice system.

G. Prosecutorial services

69. The establishment of the post of Prosecutor General was a positive step towards ensuring the independence, autonomy, objectivity and impartiality of prosecution services. The Prosecutor General is subjected only to policy guidelines issued by the Attorney General. It seems, nevertheless, that these guidelines have been used on several occasions against the Prosecutor General, and this could constitute undue interference into the independence of the prosecution. Some politicians, Ministers and Members of Parliament, many of whom are under investigation for allegations of corruption, make derogatory statements against the Prosecutor General in the press or in public, which also undermines the authority and work of the Prosecutor General.

70. The Prosecutor General is accountable to the Independent Institutions Committee of the Parliament; yet, there are no formal procedural rules or guidelines on how hearings of

the Committee are to be held. There is also no specific code of conduct for prosecutors. So far, the practice has been to summon prosecutors with little notice (often one day before the hearing) without providing them with any information regarding the reasons for their summons. The Special Rapporteur notes that disciplinary proceedings against prosecutors shall be determined in accordance with the law, the code of professional conduct, or other established standards, and that prosecutors shall have the right to a fair hearing, as well as to seek an independent review of the decision.

71. Prosecutors cannot fully carry out their functions because of serious financial and human resources constraints. As a result, priority is given to prosecutions, while the legality of police arrests is overseen on a limited scale and the legality of investigation only once or twice a year. The huge workload that prosecutors have to deal with leads to delays in prosecutions. It was reported that there are currently 40 prosecutors to handle more than 3,000 cases around the country. Prosecutors often have to travel because they do not have a representative in every island, and this is both time- and resource-consuming.

72. The remuneration of prosecutors also seems to be an issue. Senior prosecutors earn less than magistrates in the islands and do not have the same security of tenure. Consequently, it is very difficult for the Prosecutor General to retain qualified and competent persons in her/his office.

73. The Special Rapporteur heard worrying allegations concerning the selectivity and bias of prosecutions services in prosecuting cases. To complicate the context further, the Prosecutor General is said to be very reluctant to give explanations to the media on actions taken, which generates public mistrust.

74. While they can oversee the legality of investigations, prosecutors have no investigative powers, so they have to rely heavily on the police. This dependence sometimes creates tensions. For instance, sources reported that when prosecutors use their discretionary function to order a particular investigation, such orders are often not followed or are followed with considerable delay. The Prosecutor General has no direct control over the investigative police, which further complicates her/his work.

75. The relationship between prosecutors and the judiciary can also be difficult. The Special Rapporteur is seriously concerned about allegations that some courts use the threat of contempt of court and disbarment to impose their decisions and superiority over prosecutors. The lack of a centralized case-management system does not facilitate their tasks either. In some places, such as Addu City, one prosecutor covers four courts and is often called to different hearings at the same time.

76. The relationship with other independent institutions can also be tense at times and collaboration difficult. For instance, frustration was expressed to the Special Rapporteur that of the 100 or so cases sent by the Anti-Corruption Commission to the Prosecutor General, only two or three cases were adjudicated so far. The relationship with the Judicial Service Commission is also complicated, as the Commission considers that it has exclusive jurisdiction over all complaints against judges, including over criminal allegations, while the Prosecutor General understands that the criminal investigation agencies have the competence to investigate criminal conducts by anyone. In this sense, the Special Rapporteur wishes to underline that judges and magistrates, as well as other actors of the justice system, are criminally accountable for their actions. Criminal actions entail consequences and penalties that are different from those resulting from disciplinary or administrative investigations.

H. Women in the justice system

77. During her visit, the Special Rapporteur paid particular attention to the integration of a gender perspective and women's rights in the justice system. She noted that, while there has been progress since 2008 when the first woman judge was appointed to the bench, there are currently no women sitting in the Supreme Court and only eight women sitting in the High Court, the superior courts, and the magistrates courts in the entire country. It seems that these women reached their positions through sheer determination and dedication since there is no policy or strategy to increase women's representation on the bench. The gap in the equal representation of women in the judiciary remains huge.

78. Women who do sit on the bench often suffer discrimination or patronizing attitudes from the other actors of the justice system, including from their peers, the Judicial Service Commission, and the public. There is no woman sitting in the Criminal Court, and it is reported that the one woman sitting in the High Court is not assigned cases dealing with criminal jurisdiction. The Special Rapporteur was told that nowadays the Judicial Service Commission, when appointing new judges and magistrates and when competences are equal, would give preference to a woman candidate. However, it is unclear whether such preferential treatment reflects an official policy or is applied on an *ad hoc* basis.

79. The approach of the judiciary in general is quite conservative and representative of a very traditional and patriarchal societal structure. Gender biases and discriminatory attitudes and practices are widespread within the judiciary and the administration of justice. In this light, sustained and comprehensive sensitization and awareness-raising programmes on gender equality and women's rights are urgently needed for all State institutions, including the judiciary, prosecutors and lawyers, in order to push for a change regarding patriarchal and discriminatory attitudes and practices and make access to justice a reality for women in the Maldives.

80. In turn, women are not properly educated about their own rights. They are subjected to strong social pressure and stigma, especially concerning sexual violence, which prevents them from denouncing violations and bringing their cases to the courts. In addition, women do not trust the courts to provide them with justice. Yet, violence against women and domestic violence is alarmingly high in the Maldives.¹⁰

81. Despite the adoption of the Domestic Violence Act in 2012, a major breakthrough in the prevention and protection of victims of violence, positive progress in the realm of prosecution is yet to come. Judges, magistrates, prosecutors, lawyers, and the police need to be urgently trained on the content of the Act and what it entails for their work. The Special Rapporteur was very surprised to hear that some magistrates in the islands were still unaware of the existence of this Act. The Ministry of Gender, Family and Human Rights should receive strong support and take a more proactive role in advocating for the protection and promotion of women's rights.

I. Impunity

82. The Special Rapporteur is deeply concerned that if the serious violations of human rights committed during the 30-year dictatorship are not addressed, more instability and unrest could be generated in the country. It is indeed difficult to understand why one former President is being tried for an act he took outside of his prerogative, while another has not had to answer for any of the alleged human rights violations documented over the years.

¹⁰ CCPR/C/MDV/CO/1, para. 11, CEDAW/C/MDV/CO/3, para. 19.

83. Impunity affects democracy, the rule of law, and the enjoyment of human rights in a radical way, and undermines people's trust in State institutions. States bear a responsibility not only to investigate violations of human rights, but also to ensure the right of victims to know the truth, to provide adequate reparation and to take all reasonable steps to ensure non-recurrence of the said violations.¹¹ Addressing past violations could help the Maldives move forward and develop the justice system intended in the Constitution of 2008.

J. Public perception and trust

84. The Special Rapporteur was particularly struck to hear how little trust the public has in the justice system in the Maldives. Justice must not merely be done; it must also be seen to be done. Judges must not only be actually impartial; they must appear impartial to the public.

85. The mindsets of the public and the authorities, including judicial authorities, have not yet assimilated the changes brought by the 2008 Constitution. This created a disconnection between the promises of the Constitution and people's expectations, and how justice is delivered and the separation of powers implemented. The perception that the justice system is a remnant of the old regime, equally authoritarian, archaic and corrupt, should be overturned by concrete actions based on the democratic concepts and values introduced by the Maldivian Constitution.

IV. Lawyers

86. While lawyers are not expected to be impartial in the same way as judges, they must be as free from external pressures and interferences as judges are. When guarantees are not in place to enable lawyers to discharge their duties in an independent manner, the door is open to all sorts of pressure and interference, whether from private or public actors, including judges, who seek to have an impact on or control over judicial proceedings.

87. The Special Rapporteur is seriously concerned about the absence of an independent self-regulating bar association or council that oversees the process of admitting candidates to the legal profession, provides for a uniform code of ethics and conduct, and enforces disciplinary measures, including disbarment. Such an organization would not only provide a mechanism of protection for its members against undue interference in their legal work, but also monitor and report on their members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner.

88. It is contrary to the Basic Principles on the role of lawyers that licences to practice law, as well as disciplinary measures, lay in the hands of the executive, as in the case of the Maldives, where the Attorney General is the authority who regulates the legal profession. The enforcement of compulsory registration of lawyers with the courts is also unacceptable. The regulation of disciplinary measures against lawyers falls outside of the prerogative of the judiciary or any other branch of power and contradicts the principle of independence of the legal profession. During her visit, the case of a lawyer who had been indefinitely suspended by the Supreme Court for allegedly criticizing one of its judgements in public was reported to the Special Rapporteur. Such a suspension leaves no avenue for appeal and review and it represents a violation of the rights of the lawyer.

¹¹ Updated set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1.

89. The Special Rapporteur is also concerned about reports regarding threats of contempt of court used to muzzle the freedom of expression of lawyers. The Supreme Court reportedly passed a regulation that includes restrictions on the possibility of lawyers to give their opinions on decisions taken by the Courts. Lawyers, like all other citizens, are entitled to freedom of expression and, in particular, they have the right to take part in public discussions concerning the law, the administration of justice, and the protection and promotion of human rights, without suffering professional restrictions.

V. Education, training and capacity-building

90. All stakeholders met during the visit agreed that quality education, in-profession training, and capacity-building programmes for all actors of the judicial system are essential to ensure the independence and impartiality of the judiciary and the smooth administration of justice. The lack or inadequacy of education available to the actors of the justice system in the Maldives is extremely troublesome. A simple judicial certificate, obtained through part-time studies, is the only educational requirement to become a judge. Access to quality institutions of higher education is also problematic for Maldivians who wish to study law. Indeed, there is only one faculty of Shari'a and law and one faculty of Islamic law in the country. No institution provides for in-depth studies in constitutional law, common law, or international law.

91. Professional and vocational training possibilities are also lacking, in particular trainings on international principles and human rights law, the Constitution, new legislation, and specific deontological principles such as judicial independence, integrity and accountability. Many judges and magistrates who met with the Special Rapporteur expressed the will to pursue training and capacity-building and to engage in academic activities, but unfortunately such opportunities are scarce. Facilities to host a training centre are now finished, but the centre is not running yet. More work needs to be done on the syllabus and courses offered and financial resources to launch the centre and keep it running may prove to be a challenge.

92. The Special Rapporteur was struck to hear about the lack of legal literature in Dhivehi. Judges, prosecutors, and lawyers should have access to a wide range of legal literature in their native language, including reference books on international human rights law and legal principles. Self-education is an important part of the qualification of the actors of the justice system. Besides, the availability of literature in Dhivehi would not only benefit judicial actors, but could also be used by parliamentarians, students, non-governmental organizations and the public, who in their turn can hold the judiciary accountable to these principles.

93. In addition, all actors in the justice system, in particular judges, prosecutors and lawyers must be properly educated and trained on their respective codes of ethics and standards of conduct. Available, accessible, appropriate, and quality education and training can over the longer term contribute to changing attitudes that could otherwise be susceptible to corrupt conduct and lead to unfair trial or the improper application of the law, and pave the way for strengthening both the integrity of the justice system and its independence.

VI. Conclusions

94. **The Maldives finds itself at a difficult crossroad, where the democratic transition is being tested, while remnants of its authoritarian past are still hovering,**

threatening its young democracy. The political debate seems to have become sterile and has lost sight of the lofty goals of the Constitution.

95. According to the democratic principle of separation of powers, all branches of the State are equally important and none should be above the other or above the law. All institutions have responsibilities regarding the consolidation of democracy. The lack of understanding in the delimitation of the respective competences, and the ensuing power struggle that the Special Rapporteur witnessed during her visit, have serious implications on the effective realization of the rule of law in the Maldives. Dialogue, respect for the Constitution, transparency, access to information, and accountability are key to a better and more coherent functioning of the institutions of the State.

96. The new Constitution created high expectations, but it seems that the challenges for its implementation have been more difficult than expected and people have become frustrated. The Special Rapporteur believes that with time Maldivian institutions will be able to grapple the full meaning and extent of their roles under the new democratic regime and to adapt to the new reality.

97. In this light, the Government should show strong and nonpartisan leadership. It should push for a constructive dialogue aimed at establishing clear priorities for the country, the adoption of necessary core legislation, and policy measures to consolidate the democracy. Such leadership should be guided by the Maldives' obligations under international human rights law, which provide for a sound and sustainable foundation for democracy. The delicate issue of accountability for past human rights violations also needs to be addressed.

VII. Recommendations

A. The Constitution and the courts

98. A constitutional review should be envisaged, with the view to consolidating the democratic system. Such a review should be generated through broad consensus after in-depth discussions with all stakeholders, including the judiciary, and members of the public.

99. In particular, the composition and functioning of the Judicial Service Commission should be revised in line with international principles of independence and accountability of the judiciary.

100. A dialogue should be engaged between the three branches of Government to address the challenges to the independence of the judiciary and the proper functioning of the justice system. In this context, a round table or seminar on the justice system, with the participation of a large representation of domestic judiciary as well as some eminent international experts, could provide an avenue to start such a discussion and show a more concrete commitment on the part of all actors.

101. A forum or platform allowing all courts to communicate and discuss their particular issues, such as the dissolved Judicial Council, should be reinstated.

102. The establishment of a proper judicial career, which allows promotion between the different tiers of the court system, is strongly encouraged.

103. Constitutional principles need to be explained and awareness should be raised, so that all political parties can rally under this exercise. The justice system itself needs

to make efforts to render its functioning transparent and its decisions understandable to the public.

B. Integrity and accountability

104. All allegations of misconduct in the judiciary, including corruption, should be properly investigated under previously set, clear and transparent rules, and with respect for fundamental guarantees of a fair trial and due process of the accused.

105. The Judicial Service Commission should take appropriate measures to enforce the code of conduct of judges in a transparent and consistent manner, with full respect for the fundamental guarantees of fair hearing and bearing in mind the importance of the reputation of judges and magistrates.

C. Legislation

106. The People's Majlis should urgently pass all essential pieces of legislation, such as the Penal Code and Sentencing Bill, the Criminal Procedure Code, the Civil Procedure Code and the Evidence Act, and ensure that these laws are in line with the provisions of the Constitution and the international human rights obligations of the Maldives.

107. In the criminal justice context, the relevant authorities should establish adequate victim and witness protection mechanisms.

D. Budget and conditions of work

108. The financial and human resources of the judiciary should be substantially increased, in particular at the level of the magistrates and superior courts, so as to ensure that the judiciary is properly equipped and adequately financed.

109. When budget cuts are warranted by the economic context, participatory discussions should be held with all the institutions concerned to assess the potential impact of reductions on their work.

E. Administration of and access to justice

110. Courts' internal rules, regulations and procedures should be harmonized and publicized. Court staff should receive training on issues related to the administration of justice.

111. An integrated system of case management, which includes jurisprudence and data from all courts, needs to be swiftly elaborated, including through international assistance and technical cooperation. Such a system needs to be accessible in all courts of the Maldives, with the view to render the functioning of the justice system more consistent and transparent. Where data is available, technical assistance in analysing and interpreting them is needed. The use of new technologies is encouraged in this context.

112. With the technical and financial assistance of the international community, performance indicators should be established to assess the administration of justice and the performance of courts in a credible way and to propose tailored solutions.

113. Such assistance should also be available to put in place a centralized and searchable case database, which will be user-friendly, publicly available and accessible.

114. A comprehensive programme of free legal aid should be institutionalized at the national level and sufficient funds should be allocated to it, with the technical and financial support of the international community.

115. Outside of Malé, new technologies can offer new possibilities, such as the development of virtual courts or hearings and mobile courts. These are avenues to be explored to render justice more accessible and at the same time more cost-effective for the State.

116. The State should set up a specific mechanism for the protection of judges, as well as court officials, prosecutors, and lawyers, in consultation with them and the Department of Judicial Administration.

117. Any acts of harassment, threats or physical assault against judges, prosecutors, lawyers and other judicial actors should be promptly and carefully investigated and perpetrators sanctioned.

F. Women in the justice system

118. Measures to improve the representation of women in the judiciary need to be urgently taken. In particular, competent women lawyers should be encouraged to consider a judicial career. The presence of women in the legal profession and prosecution should be encouraged and a clear policy to this intent should be adopted.

119. Gender discrimination in the justice system must be eliminated, including by training judges, magistrates, lawyers, and prosecutors on gender equality and women's rights.

120. Awareness-raising on women's rights, including the newly adopted Domestic Violence Act, should be carried out promptly and reach all groups of the society, including judges, prosecutors, and lawyers.

G. Prosecution services

121. Prosecutors should be provided with adequate financial, human and technical resources to effectively perform their tasks.

122. Objective criteria for ordering investigations and prosecuting cases should be established by the Prosecutor General's office.

123. A unified code of ethics for prosecutors should be established and compliance with its provisions should be monitored and accounted for.

124. Complaints of misconduct against prosecutors shall be processed expeditiously and fairly under appropriate and previously set procedures. Prosecutors' right to a fair hearing shall be respected.

H. The legal profession

125. The Majlis should pass comprehensive supporting legislation for the legal profession. Such legislation should only be adopted after comprehensive and substantive consultations with lawyers and should be in line with international principles. The Special Rapporteur believes that the current draft bill on the legal

profession needs a lot of revision as it centres on the creation of a Bar Council and neglects other necessary aspects, such as examination procedures to get a licence to practice and continuing education and training.

126. A self-regulating independent bar association or council should be urgently established to oversee the process of admitting candidates to the legal profession, provide for a uniform code of ethics and conduct, and enforce disciplinary measures, including disbarment.

127. Complaints against the professional conduct of lawyers should be processed expeditiously and fairly under appropriate procedures, which respect the right to a fair hearing.

128. The Bar Association should, as a matter of priority and in accordance with international standards and norms, develop a code of ethics applicable to all lawyers, which it should vigorously and coherently implement and enforce.

129. Measures should be taken to improve the quality and professionalism of the legal career, including the introduction of a uniform written bar examination as requirement for admission to the legal profession.

I. Education, training and capacity-building

130. Judges, magistrates, prosecutors and lawyers should have access to quality education, including continuing education and specialized training on international human rights law and mechanisms, constitutional law, comparative law, women's rights and gender equality, among others.

131. Training opportunities must be equally accessible to all judicial actors, regardless of the instance at which they operate and how far from the capital they sit.

132. Basic human rights law training should be made compulsory for all judges, prosecutors and lawyers.

133. A library of documents, texts, and legislation translated into Dhivehi, including texts and documents on international human rights law and jurisprudence, should be established and be also accessible from a distance. In this context, funding should be provided for the translation of important legal documents into Dhivehi.

134. United Nations specialized agencies and programmes and the donor community should provide financial assistance and technical support to national training institutions for developing quality education curricula and professional training designed for the actors of the justice system.