

A LEGAL REVIEW

OF THE

REPORT OF THE COMMISSION OF NATIONAL INQUIRY [CONI] MALDIVES

06th September 2012

A LEGAL REVIEW

Foreword

This document has been prepared at the request of the Maldivian Democratic Party (MDP), as an independent legal REVIEW of the Report of the Commission of National Inquiry, Maldives [CONI].

It must be emphasized that, although the request for a legal REVIEW emanated from a party which is undoubtedly an involved participant in the events in question, this document itself is the result of an objective scrutiny of the contents of the Report and attendant facts and documents alone, and has eschewed partisan inclinations or predispositions.

At Colombo, Sri Lanka.
05th September 2012

Ms. Anita Perera

Attorney-at-Law

Supreme Court of the Democratic Socialist Republic of Sri Lanka

Mr. Senany Dayaratne

Attorney-at-Law

Supreme Court of the Democratic Socialist Republic of Sri Lanka

Mr. Shibly Aziz

President's Counsel

Democratic Socialist Republic of Sri Lanka

Former Attorney General of Sri Lanka

A LEGAL REVIEW

Table of Contents

Chapter 1

Executive Summary

Chapter 2

CONI's Mandate

Chapter 3

Procedural Aspects

Chapter 4

Evidentiary Aspects

Chapter 5

Rules of Natural Justice

Chapter 7

Legal Issues

Chapter 8

Conclusions

A LEGAL REVIEW

Chapter 1

Executive Summary

This Review focuses on the legal aspects of CONI Report, with a particular emphasis on the central issue as to whether CONI strayed from its mandate and purpose, and thereby produced a report which is flawed.

The main areas of inquiry, which forms the subject matter of this document, were,

- compliance of the mandate given to CONI;
- the procedure adopted by CONI in the exercise of its mandate;
- the process of evidence gathering;
- the adherence to the imperative dictates of natural justice; and,
- consequential legal issues.

The conclusions of the authors are given in the terminal chapter.

A LEGAL REVIEW

Chapter 2

CONI's Mandate

The Mandate granted to the Commission of National Inquiry (CONI) under its Rules of Procedure and under the Presidential Decree 2012/04 issued by President Mohamed Waheed Hassan Manik is in respect of those events that transpired between 14th January to 8th February 2012.

The said Decree specifically calls for an investigation of the change of government on 7th February 2012 (and) whether the resignation of the then President Mohamed Nasheed was obtained under duress, and whether the government changed legally on 7th February 2012.

The Rules of Procedure however, seem to provide that the events of 7th February should be considered as a separate issue and not just in relation to the events of 14th January to 8th February 2012 i.e., the Rules provide that the Commission should '*also explore the facts, circumstances and causes of the events of 7th February 2012 that resulted in the transfer of power in the Maldives.*'

The ambit of the mandate therefore, requires a wide consideration of the manner in which the change of power took place on 7th February at the first instance, and thereafter, the legality of the said power change. The legality in turn is in respect of two areas i.e., the resignation of the President, and the manner in which the change of government was effected.

In the light of the above, the Commission is required in terms of its mandate to consider the legal manner in which the government can be changed in the Maldives, which in turn, requires a consideration of the relevant constitutional provisions of the country. Secondly, the Commission is required to consider the legal manner in which the President can resign in terms of the Constitution and laws of the Maldives. Thirdly, whether the President resigned in terms of such laws or whether there are facts that indicate otherwise.

It must be emphasized that the mandate granted to the Commission, is not to investigate whether the ouster of President Nasheed is politically justified, nor is it an evaluation of the manner in which the President discharged his powers and duties during his period of office.

A LEGAL REVIEW

The Commission however, has unilaterally incorporated into its mandate, concepts such as ‘common good and public interest’, which although admirable principles, were not in any way part of the Commission’s mandate. The Commission however, has further unilaterally restricted its mandate by opining that the timely conclusion of its findings was required to ensure Maldivian people can ‘pursue political, economic and social development with general confidence.’ The Commission therefore, appears to have approached this investigation with an attitude of facilitating the country to move forward rather than determining the legality of the transition of power.

It is clearly borne out in its mandate that the Commission was called upon to investigate the event that occurred in the Maldives from 14th January to 8th February 2012 and the events leading to the change of Government on 7th February 2012 in order to determine whether the resignation from office of the then President Mohamed Nasheed was the result of duress and whether the change of Government on 7th February 2012 was illegal. Instead, the Commission has, without any explanation or rationale, restricted itself to consider only whether the President was physically threatened to tender his resignation and has not considered the entire context of pressures that were being exerted on the ability of the President to lawfully administer the country from 14th January to 7th February.

It is also worth noting that the period of consideration included in the Mandate extends beyond the date of resignation (i.e., includes 8th February). This could be to provide the Commission with the opportunity to not only evaluate the significant events preceding the said resignation but also the equally significant response shown to the said resignation, to further ascertain the context in which such resignation was obtained.

The Commission however, has once again, for unknown reasons, seemingly restricted, on its own, the mandate granted unto it and has failed and/or neglected to consider and/or refer in any way to the events of 8th February and the significance thereof to the change of government and President Nasheed’s resignation.

DETENTION OF JUSTICE ABDULLA

One of the issues the Commission appears to have considered critical is the detention of Justice Abdullah. Indeed while the said event was reported in the media as the principal trigger in the unrest that prevailed in the country, the mandate conferred on the Commission does not invite consideration of the same.

A LEGAL REVIEW

Although the mandate permits the Commission to consider ‘*facts, circumstances and causes of the events of 7th February 2012*’, such facts and circumstances cannot be considered as inviting an investigation into the justification for the change of government. Instead, given the other aspects of the mandate, it appears that the words ‘facts, circumstances and causes’ of 7th February 2012 are in relation to the facts, circumstances and causes which were directly attendant upon or surrounding the events of the 7th February 2012 and the purported resignation of President Nasheed, and not historical antecedents.

The attempt made by the Commission to examine the issue regarding Justice Abdulla and his detention appears to us as a one sided review shorn of any serious effort to investigate the entire circumstances surrounding it, and without any examination of the critical facts pertaining to it, and without giving any opportunity to the contending parties to place their side of the story, however unacceptable or devoid of merit such may be in the eyes of the Commission as the Report seems to suggest sans this. A serious failure indeed, particularly when the mandate did not permit a review of this and when the review undertaken in fact, fell far short of a judicious or fair evaluation of the issue.

A LEGAL REVIEW

Chapter 3

Procedural Aspects

EXERCISE OF DISCRETION

It is to be observed that in the exercise of its mandate, as more fully stated hereinbefore, CONI appears to have strayed from the issues and principles critical to the due exercise of its discretion, and the parameters in which this discretion should be exercised in terms of its mandate.

The Commission should not only have considered the required issues, but should have done so in a manner that attracts sufficient credibility, *inter alia* by adhering to the imperative dictates of good administrative practice, in order to be acceptable to all stakeholders, even if not all stakeholders may agree on the final outcomes/findings. As such, while a Commission is afforded more flexibilities than the more procedurally constrained function of a court of law, the Commission must apply such flexibilities in a manner that is in keeping with the principles of natural justice, and administrative practice.

Prof. H. W. R. Wade states in **Wade & Forsyth in *Administrative Law* (7th Ed, Clarendon Press, Oxford: 1995)** at page 315: *'Thenotion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon a trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.'*

In the renowned case of *Roberts vs. Hopwood* (1925) AC 578, Lord Wrenbury made the following pertinent observation:

A LEGAL REVIEW

A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

Prof. Wade goes on to cite with approval the dictum of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation [1948] 1 KB 223* ‘It is true that discretion must be exercised reasonably...a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’.

In Coke’s words in *Rooke’s Case* (1598) 5 Co. Rep. 99b,

... and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern ..., between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit.

REASONABLENESS

Wade & Forsyth (*vide ante* at 400) state that unreasonableness has become:

a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as ‘irrelevant considerations’, and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question.

A LEGAL REVIEW

It can be said therefore, that any mistakes in evidentiary omissions and/or misunderstandings as to its mandate or the issues that should be considered thereunder, can render the conclusions arrived at by the Commission as ex facie unreasonable.

GIVING OF COGENT REASONS

The Commission of National Inquiry was appointed pursuant to Presidential Directive 2012/4 to investigate the legality of the recent change in power in the Maldives. It is respectfully submitted that the Report, which was compiled and released in less than two months, cannot be relied on as a credible analysis of the legality of the change of power as it has, inter alia, not provided objective reasons for the way in which it has selected or afforded weight to the evidence considered for its conclusions; has deviated from the critical issues it was required to consider in terms of its mandate and appeared to have conferred on itself an objective of ascertaining a political justification for the change of government rather than analyzing, as it was required to do, the legality of the said change.

It further has failed to give due consideration of key witnesses and has allowed its analysis to be cluttered with irrelevant legal principles and definitions that are inapplicable to the issues it was required to consider.

Wade and Forsyth in *Administrative Law* (8th Ed, Oxford University Press: 2000) observe at 517 that:

There is no closed list of circumstances in which fairness will require reasons to be given but the more important examples may be given here. First, decisions that appear aberrant without reasons have to be explained, so that it may be judged whether the aberration is real or apparent.

A LEGAL REVIEW

It must be re-iterated that a party is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision may be condemned as arbitrary and unreasonable.

A LEGAL REVIEW

Chapter 4

Evidentiary Aspects

It is a cardinal principle of the Law of Evidence that if the best evidence that can be given is available, the secondary or inferior evidence will generally be rejected. This rule has often been regarded as the one great cardinal principle underlying the Law of Evidence. There are three chief applications of the principle.

1. Evidence, in order to be receivable, must come through proper instruments. Thus, the judge must not import his personal knowledge, except in the case of judicial notice. The fact must be established by legal evidence or by legitimate inferences from it.
2. It must, in general, be original. This rule rejects derivative evidence and prescribes that no evidence shall be received which shows, on its face, that it only derives its force from some other that is withheld.
3. It must be proximate. The law requires a visible and open connection between the principle and evidentiary facts. The connection need not be necessary, but it must be reasonable.

Given the foregoing, the observation of the two International Advisers to CONI, at Appendix XVI, page one, that ‘...*For the evidence collecting exercise to have value all witnesses had to be questioned and challenged about their recollections of events and the basis for them. Equally they had to be confronted with alternative evidence so that they had the opportunity to comment upon it. Some found this process unsettling. Many were familiar and only comfortable with making assertions and not being required to justify or explain how they had reached their view...*’ (emphasis added), is troubling at the very least. These observations suggest that some of the recorded evidence was untested and unreliable. It is further perturbing, that there is no indication on the part of the International Advisers, as to which witnesses they were referring to, or which side of the divide they represented, in the above observation.

A LEGAL REVIEW

Compounding this concern, is the fact that there are numerous glaring omissions in the Report, which irresistibly leads one to the legitimate and reasonable conclusion that the ‘Best Evidence’ was not resorted to, or lost sight of.

A sampling of these instances is given in the following schedule.

No.	CONI Report Page Number	Omissions
1.	sub-heading ‘C’ on pg. 32	The Report reads ‘conflict with the judiciary’ but fails to take into account the surrounding circumstances that led to the detention of Judge Abdulla Mohammed. This is described in the document ‘A Dossier on the Maldivian Judiciary’. CONI also fails to acknowledge the receipt of the said document (<i>appendix X of CONI Report</i>)
2.		Operation ‘Liberty Shield’ which was launched on 16 th January 2012 from Male Area Command to prepare for any unrest created by the opposition political parties in the wake of the arrest of Judge Abdulla Mohammad is not mentioned in the Report. It also fails to mention the outcome of the operation’s report, which provides that on the night of 6 th February 2012 some policemen joined the protesters, and that on the morning of 7 th February 2012 MNDF (Maldives National Defence Forces) forces joined the protesters. The Report also fails to mention that the security guards at the President’s Residence (Muleeaage) had left the building on the morning of 7 th February. (<i>Operation Liberty Shield Daily Report</i>). This document was part of the annex of the Human Rights Commission Report.
3.		The Report fails to consider the evidence that ten senior police officers had on 17 th Jan 2012 met with the Police Commissioner, and had openly declared their opposition to President Nasheed. (<i>Page 10 - Report ‘Police and Military backed Coup D’etat</i>)
4.	Sub heading D on pg35	The Report fails to mention the destruction and the unlawful activities that the protesters committed. It was broadcast live on local television channels. <i>Page 10 - Report ‘Police and Military backed Coup D’etat</i>

A LEGAL REVIEW

		gives a brief description of the damage caused by the protesters, which shows that it was not a peaceful demonstration.
5.		<p>On 23rd January 2012 Deputy Leader of Progressive Party of Maldives (PPM), Umar Naseer publicly called to revolt and siege of MNDF Head Quarters. Excerpts of his 23rd Jan 2012 speech is included on <i>Page 11- Report 'Police and Military backed Coup D'etat</i>.</p> <p>Also, in a PPM rally on 12th Feb 2012, Umar Naseer publicly proclaimed his role in the coup. An excerpt of his speech is on <i>page 19, Resignation Under Duress</i>.</p> <p>Umar Naseer, after 7th Feb 2012 gave an interview to Special Broadcasting Service, a prominent Australian news channel re-asserting his role. (<i>Vide: Resignation Under Duress</i>)</p> <p>Umar Naseer did not appear to give his testimony to the newly constituted CONI, nor is his role or public statements mentioned anywhere in the Report. His non-appearance is however mentioned in passing on pg 10, para 2 of the Report.</p>
6.	Last Para, Page 31	<p>The opposition met with the then Vice President (VP) Mohamed Waheed Hassan Manik in the early hours of 30th Jan 2012. The details of the actions that the VP agreed to undertake at this meeting, and the appeal made by the opposition are not mentioned in the Report. This is described in <i>page 11 and page 12 - Report 'Police and Military backed Coup D'etat'</i>.</p> <p>Role of the VP on 7th Feb 2012, which are described in the following documents, have been omitted in the Report. (<i>Page 6, Resignation Under Duress, Page 22- Report 'Police and Military backed Coup D'etat, Page 3, 2nd para President Nasheed's Statement to CONI, CONI Timeline page 8, number 90</i>)</p> <p>At 2:30 am on 7th Feb 2012, the VP released a press statement containing material that was supportive of the actions of the revolting officers.</p> <p>After he released his statement, he completely disappeared from the events of the day and President Nasheed himself was not able to contact him.</p>
7.		Sheik Imran Abdulla of the opposition Adalat Party was not called to

A LEGAL REVIEW

		the newly formed CONI, nor is he mentioned in the Report. However, he played a central role in the nightly protests including on 6 th and 7 th Feb 2012 as events unfolded. In the early hours of 7 th Feb 2012, via television, he appealed to the public to aid the police gathered at Republic Square. Page 23 (number 255) of the old CONI time line mentions his presence at MNBC, and also he was amongst the first to appear on TVM after the taking over of the channel by opposition.
8.	2 nd para of page 41	President Nasheed met with the police officers gathered at Republic Square and assured the <i>safety and security</i> of the officers gathered there. The report fails to mention this even though this was one of the two key demands of the officers gathered. Even though their main demand was agreed to, the Report gave no consideration as to why they refused to disperse peacefully.
9.	Last para of page 41	The brutality of the police towards pro-government civilians as President Nasheed helplessly watched on 7 th morning is described in detail on <i>page 26, 'Police and Military backed Coup D'etat'</i> .
10.	Subheading H, Page 46	What is described in the Report is inaccurate and even contradicts CONI timeline (<i>page 22- page 24</i>). Taking over of MNBC is described in depth at <i>page 47, 'Police and Military backed Coup D'etat'</i> .
11.	2 nd last para, page 36, 2 nd last para of Page 40	The Report doesn't analyze the reasons why President Nasheed decided to go into MNDF HQ early morning of 7 th February.
12.	Last para, Page 37	The Report fails to gauge the extent and magnitude of damage caused to the MDP Meeting place (Haruge) on 6 th February night and 7 th February morning. It also failed to highlight the fact that while Haruge was destroyed, one of the senior members of the Government who was severely beaten at Haruge was the State Minister of Home Affairs. (<i>Page1, Resignation Under Duress.</i>)
13.	Para 1, Page 39	Report fails to mention in the right context, President Nasheed's efforts at MNDF HQ to consult with the Vice President, Speaker of the Parliament, Chief Justice, Parliamentarians and members of the National Security Council the state of the nation on the 7 th February morning. (<i>Page 3, para 2 President Nasheed's Statement to CONI, Page 4, Resignation Under Duress.</i>)

A LEGAL REVIEW

14.	Para 3, Page 40	Report gives no prominence to the fact that the military never intended and also failed to fulfil their statutory duties to halt the mutinying Police. (para 2, Page 5, <i>Resignation Under Duress.</i>)
15.		<p>The report fails to mention that on the 7th morning, leaders of the opposition political parties had openly joined and were participating in the revolt. Together with these political leaders, senior police officers were also addressing the people gathered at the Republic Square. (pages 51-54, <i>'Police and Military backed Coup D'etat'</i>.)</p> <p>The Report also omits the fact that later in the morning the senior opposition political figures were inside the Police HQ conspiring alongside certain senior police officers. (CONI Timeline page 25, number 280, page 55, <i>'Police and Military backed Coup D'etat'</i>.)</p>
16.	Subheading H, page 46	On 7 th morning, various state institutions were attacked and taken control of by renegade officers (Police and MNDF) including MNBC1, 2 nd Chance Office (this was the office of the prisoner reintegration program started by President Nasheed, which appears to have faced great hostility from the police and the opposition), Department of Immigration and Emigration, Ministry of Foreign Affairs and Airport Immigration. Police HQ and MNDF HQ were thought to have been vandalized and attacked by the renegade officers. (Page 5, last para <i>President Nasheed's Statement to CONI</i> , page 56, <i>'Police and Military backed Coup D'etat'</i> , Page 3, <i>Resignation Under Duress.</i>)
17.	Sub-Heading I, page 46	CONI's report fails to address the circumstances that led to his decision to resign. No rationale or reasoning is given even to negate President Nasheed's statement to CONI. Steps leading to President Nasheed's resignation described in the Report only briefly mentions his movements after his decision to resign was announced. (Page 11 and 12, <i>Resignation Under Duress</i> , Page 6, para 5 to para 8, and page 7, para 1 and para 2, <i>President Nasheed's Statement to CONI</i> , page 62, <i>'Police and Military backed Coup D'etat'</i>)
18.		<p>CONI has not considered at all the account given by President Nasheed's spouse, Madam Laila Ali's, which is a significant omission given that the basis adopted by CONI of whether there is coercion or not, was if there was a threat to the person or family of President Nasheed.</p> <p>On 7th Feb 2012 morning, Madam Laila fearing for safety of herself and her children left the official residence (Muleeage para 6, page 3,</p>

A LEGAL REVIEW

		<i>President Nasheed’s Statement to CONI, page 17, Resignation Under Duress)</i>
19.		<p>The Report fails to consider the statement of the Speaker of Parliament regarding the unrest (<i>CONI Timeline pg 19 no 218</i>)</p> <p>“The Maldivian nation is currently facing a frightening and tragic situation. I appeal to all the people of the Maldives and to its institutions to wholly obey the Constitution and the laws of the land. I also call upon all the people and the institutions not to engage in any unlawful activities under any circumstances...what we are seeing today is not something that any one of us want to see us in our beloved land. None of us want people to damage the life and property of others or the property of the State.”</p>
20		<p>Leaders of opposition DQP Dr. Hassan Sayeed and Dr. Mohamed Jameel Ahmed, PPM MP Ahmed Mahloof, all have in different instances publicly stated that the events of 7th Feb 2012 was a coup. Report shows no mention of their statements.</p>
	Page 32	<p>Report does not mention the Judicial Service Commission at all. No analysis of the Judicial Service Commission is made while examining the <i>Conflict with the Judiciary</i>.</p> <p>There is no mention of the ‘<i>Journey to Justice</i>’ campaign run by MDP, prominent lawyers and general public across the Country. This was a campaign launched due to wide disarray amongst wider spectrum of the public over the judiciary and delivery of justice.</p>
21		<p>Acting head for the Police and MNDF were appointed and announced by current Minister of Defence, Mr. Nazim on 7th Feb 2012, before President Nasheed, Chief of Defence and Police Commissioner resigned.</p> <p>The report did not analyze why a civilian and a former military personal was in charge of giving orders and making decisions on behalf of state intuitions that day.</p>
	Para 2, page 1	<p>- Report states that CONI interviewed a total of 293 witnesses. Number 7 (3) (f) of the Rules of Procedure, an addendum of the Decree states that CONI should <i>undertake rigorous deliberation to draw conclusions from the evidence obtained</i>. However, initial draft was prepared by the Co-Chair of CONI, and presented to CONI on the 25th Aug 2012, just 5 days prior to the publication of the Report. Some of the very key witnesses were called to the reconstituted CONI on the 26th and 27th</p>

A LEGAL REVIEW

		<p>Aug 2012 for the first time. On the 29th Aug 2012, a commissioner resigned from CONI citing various irregularities, including non examination and deliberation of witness statements, audios, video footage and photos.</p> <p>Statements of key personnel like Male' Area Commander on 7th Feb 2012 Ibrahim Didi, Commissioner of Police Ahmed Faseeh, Col. Mohamed Ziyad, Ahmed Nilam were taken only on the 27th Aug 2012.</p> <p>Statements of key personnel like Chief of Defence Brg. Gen. Moosa Ali Jaleel, Special Envoy to the President Ibrahim Hussain Zaki, Deputy Police Commissioner Ahmed Muneer's was not taken by the reconstituted CONI. Deputy Police Commissioner Ismail Atheef 's statement was not taken at all.</p> <p>These persons are considered as key personnel as their positions in service would clearly mean they were privy to necessary information on what transpired at the relevant period of consideration.</p>
		<p>On 6th Feb 2012 night, opposition MP Dr. Afrasheem Ali called to obtain President Nasheed's resignation even by arresting him, if necessary. (This was telecasted live on local TV Channel DhiTV). However, CONI failed to take his statement or enquire on the matter. <i>(para 2, page 19, Resignation Under Duress, Appendix IX- Report)</i></p>

Further concerns of inadequacies and/or inefficiencies in the gathering of evidence arise in the light of the contents of Commissioner Ahmed Sayeed's letter dated 26th August 2012, which has been made available to the authors, wherein the Commissioner has highlighted the fact that there has been,

- a withholding of crucial evidence;
- non-examination of witnesses;
- witness intimidation and obstruction;
- non-review of testimonies and evidence and
- poor organization by CONI secretariat.

A LEGAL REVIEW

Of particular concern is that the Commissioner expresses that CCTV footage was not made available to the Commission. Video footage would have corrected any inconsistencies in testimonies or imperfect or emotional recollections of events. It is these authors' view therefore, that every effort should have been made to obtain such footage, regardless of the conclusions that they may have allowed to be drawn. Failing obtaining such footage, the Commission should have qualified its findings accordingly so as to indicate the limitations in the accuracy or scope of its examinations.

In view of the totality of the foregoing, it is submitted that CONI failed, and/or neglected, to take such steps as are necessary to ensure a full evaluation of all relevant evidence and/or expressly account for any limitations therein. The failure to do so therefore, may adversely affect the acceptability of the report by all stakeholders and prevents an objective determination of best evidence.

A LEGAL REVIEW

Chapter 5

Rules of Natural Justice

THE RIGHT TO A FAIR HEARING

There has been failure to adhere to **procedural propriety**, inasmuch as President Nasheed has not been given the opportunity to see and/or refute and/or challenge **adverse material**, which in this instance includes evidence given to state that President Nasheed was not subjected to duress. This failure is tantamount to a disregard of his **right to be heard** in support of his version of events, which is the very foundation of the principles of natural justice.

Megarry, J., in *John v. Rees* famously stated that ‘*As everybody who has anything to do with the law will know, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change*’.

H. W. R. Wade & C. F. Forsyth in *Administrative Law (Eighth Edition)* states at page 469 that ‘*It is fundamental to fair procedure that both sides should be heard: audi alteram partem, ‘hear the other side’.* This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process...’

The authors also state at page 506 that ‘*A proper hearing must always include a ‘fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view*’.

Lord Denning in *Kanda v. Government of Malaya [1962] AC 322* held that ‘*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them*’.

A LEGAL REVIEW

It is further observed that the Commission has identified difficulties in verifying the accuracy and/or credibility of witness testimonials. It is worth noting that this is a concern addressed by Commissioner Sayeed as well, in that he raises concerns of possible coaching of witnesses and logistical difficulties and administrative shortcomings of ensuring sufficient time to carry out adequate examinations of witnesses. Presumably because of such issues of credibility and snowballing of allegations, the Commission appears to have rightly adopted a practice of recalling witnesses for further examination. It is disconcerting however, that this practice has not been extended to certain crucial witnesses nor has the Commission identified its basis of selection of those witnesses it chose to recall.

President Nasheed is undeniably a crucial witness. In our view, from a reading of the Report he alternates from being a mere witness to being the complainant and then, in the major part of the Report, as the accused. However, he has been afforded only an (one) opportunity of giving evidence. It may be argued that given the prevailing time constraints it was not practically possible to corroborate all testimonies and/or recall as many witnesses as would be ideal. Such an argument would have been plausible had not the Commission devoted a significant part of its report to findings on allegedly unlawful conduct of President Nasheed. It is a requirement of natural justice and indispensable to the appearance of credibility, that if the Commission was going to execute its mandate and forward findings on the legality or otherwise of the conduct of President Nasheed in the discharge of his office as President, the Commission had to then also make the effort to afford President Nasheed an opportunity to defend himself against such allegations.

It is also observed that by focusing on evaluating the tenure of President Nasheed, presumably with the original, albeit misguided, intention of justifying the resignation and change of government, the Report appears to depict the President as the accused in an investigation that however, was never designed or intended to place any culpability on anyone, unless the Commissioners so misconceived their writ.

THE RULE AGAINST BIAS

The Rules of the Commission requires the Report to have as appendices the full list of witnesses who gave evidence (although the testimonials given may be kept confidential); 15(3).

The Commission is further required to ensure that the Report itself “carefully consider(s) and accurately represents the evidence received.”

As regards the events of 8th February the report only acknowledges that there were acts of police brutality which need to be further investigated and fails to consider the significance of

A LEGAL REVIEW

such events in illustrating the context and unlawful pressures under which the resignation of president Nasheed was elicited just a day before. The documents pertaining to the events of 8th February refer to brutal attacks on the MDP but the Report fails to consider whether this is a manifestation of the political climate under which Nasheed resigned; whether it indicates the duress, pressure and intimidation that had been prevailing upon him; and/or whether it indicates the MDP's resistance/failure to accept his resignation thereby demonstrating the lack of consent to so resign.

The Commission concludes, inter alia, that the events of 6th and 7th February were 'reactions to the actions of President Nasheed' thereby seemingly condoning whatever that had transpired on the said dates as justified and further seemingly representing that President Nasheed deserved what he got. Such conclusions are therefore, tainted with manifest bias and furthermore, exceed the mandate granted. As mentioned earlier, the Commission was never granted a mandate to evaluate the tenure of office of President Nasheed and therefore, the pivotal question to be answered by the Commission is not whether transfer of power/change of government was justified but rather whether it was lawful.

The report identifies an exhaustive mechanism to ensure transparency and professionalism in the manner in which evidence was collated, but regrettably does not appear to have considered all such evidence and their implications in the context in which President Nasheed tendered his resignation.

The report also appears to have effectively ranked the credibility of the various forms of evidence obtained, recognizing that 'videos, photographs and other evidence' failed to corroborate certain witness testimonies, without any reasonable basis for this and it appears that such evidence has not even been looked at. Commissioner Sayeed's letter confirms this.

The report further purports to create a strange burden of proof that no evidence is required to prove or disprove allegations, if the Commission is of the opinion that the allegation is lacking in substance or reality. The report reads 'Many people seem to think that because an allegation has been made, someone is under an obligation to counter or undermine it. When the allegation lacks substance or reality, nothing is required in response.' It is unclear therefore, as to the basis adopted by the Commission in determining whether an allegation is lacking in substance or reality without considering any evidence pertaining to the same. It appears therefore, regrettably, that the Commission appears to have adopted the whims of its preconceived notions, rather than the requirements of its mandate, in determining the evidence it will consider in compiling the Report. This attitude is particularly alarming given

A LEGAL REVIEW

that the Commission itself sought an extension for its deliberations so that it could consider the evidence of all witnesses.

Given the significance of the Report as being a determinant of the legality of the removal of the first democratic leader of a sovereign nation, it is very disappointing that any preconceived notions were permitted to dilute the thorough investigation and/or consideration of evidence tendered to the Commission.

The extent of these preconceived notions is further borne out by the constitutional provisions that the Commission has sought to consider and the conclusions arrived therefrom. The Report seeks to cite those constitutional provisions that identify the limitations of the powers vested in the President, whereas its mandate was in respect of the manner in which the President may tender his resignation. The report reads, ‘the President of the Maldives possesses no autocratic, dictatorial or authoritarian powers. His powers are limited.’

The Commission thereafter, proceeds to identify the constitutional limitations of the President’s powers in respect of a state of emergency. The report reads ‘In other words, the Maldives being a sovereign, independent and democratic State, even when a validly declared state of emergency is in force, does not become a totalitarian state and the rule of law remains.’

It is respectfully submitted that the limitations to the powers of the President is not the central question for consideration nor should the rule of law be primarily considered in the light of the citizens of the Maldives. Although such freedoms and limitations are undeniably important in a democracy and have been rightly incorporated into the Constitution of the country, they are not of foremost importance as regards the objectives of the deliberations of the Commission. Therefore, while the Commission should consider the applicability of the rule of law, it should be considered in the light of the manner in which the President tendered his resignation and the government changed power. For example, was there an infringement of the rule of law when the President resigned under duress to do so? Was there an infringement of the rule of law when power changed in the administration of the Maldives – was the government changed unlawfully.

A LEGAL REVIEW

Once again therefore, it regrettably appears that the Commission is purporting to imply a political justification for removal of President Nasheed, and is evaluating the removal of the President not from the disposition he was under when he resigned but rather what the Commission envisages as the justification, if any, to call for the removal of President Nasheed. It is respectfully submitted that such considerations are wholly outside the ambit of the mandate conferred on the Commission, and may be perceived to be tainted with bias, on an application of the established test for bias.

The test to determine bias, as propounded by Lord Denning M. R. in *Metropolitan Properties Co. (F. G. C.), Ltd. v. Lannon and Others* (1968) All ER 304 at 310, is as follows;

*In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, **if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.** (Emphasis added)*

The rationale for this test is stated at page 183 as follows:

The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; the judge was biased.

Further concerns of real or perceived bias arise in the light of the contents Commissioner Ahmed Sayeed's letter dated 26th August 2012, as morefully submitted hereinbefore.

A LEGAL REVIEW

Chapter 6

Legal Issues

APPLICABLE LAW

In terms of the Rules of Procedure, the Commission is required to act in accordance with the laws of the Maldives i.e. ‘in the performance of functions act in accordance with the Constitution and the Laws.’

The Commission has failed to consider all relevant legal provisions in Maldivian law. The Penal Code has been purportedly relied upon by the Commission to establish that Maldivian law does not provide a definition for ‘coup d’etat’. These authors observe however, that the version referred to as comprehensively reviewed in the Report, is the Penal Code 2004, which is a draft piece of legislation that has not as yet been adopted. It is unclear therefore, whether the Commission’s search for a definition of the word ‘coup d’etat’ was restricted to official legislation or also includes draft statutes.

COERCION AND DURESS

The Report provides that the legal principle that is considered is coercion, even though its mandate is in respect of duress and not coercion. The word ‘duress’ was the term used consistently in all official documentation and it is difficult to understand how the term was interchanged with ‘coercion’ or ‘illegal coercion’ as the Commission repeatedly does in their Report.

Coercion has been translated by the Commission to amount to illegal duress under American jurisprudence and intimidation under English law. The Report fails and/or neglects to consider the applicability of the principle of duress, as per the mandate granted to the Commission.

A LEGAL REVIEW

The significance of this omission is not a mere matter of semantics. The term coercion, as construed by the Commission, is considered in the light of threat to life, limb or liberty.

Duress on the other hand, has a much broader scope and includes all facts and circumstances that vitiates the consent of a person and denies all voluntariness. Further the Commission purports to use the words illegal coercion interchangeably with intimidation and illegal coercion interchangeably with illegal duress. In their respective jurisdictions, the definitions afforded and standard of proof required to be dispensed for each of these words is different.

The burden of proof according to the Commission for ‘illegal duress or intimidation’ is on the allegor and is beyond reasonable doubt.

In English law, the concept of duress has developed beyond threat to life, limb or liberty and has been construed as arising where two specific elements are satisfied i.e. compulsion of will or absence of choice and illegitimacy of the pressure i.e. "... the pressure must be one of a kind which the law does not regard as legitimate;" *Barton v. Armstrong* [1976] A.C. 104, and *Pao On v. Lau Yiu Long* [1980] A.C. 614.

Lord Scarman has held in *The Universe Sentinel* (1983) 1 AC 366 that "The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him."

This definition is particularly astute in considering duress in a political context such as the one considered by the Commission. The question is then did President Nasheed believe at the time of resignation that there was no practical choice open to him.

It may be argued that this is the basis of most resignations – persons with authority resign when opposition to their continuation in office cannot be placated in any way. However, the difference between such resignations and resignation under duress is the second limb i.e. the legitimacy of the pressure wielded on the person. The practical lack of choice arises therefore, not from political or moral justification, but rather from illegal pressure. It is not a question therefore, of what the people want or whether change is required for the betterment of the country. The Commission was called upon to consider instead only the legality of the way in which the change was obtained and effected.

A LEGAL REVIEW

Further, illegal pressure in a political context as this, clearly cannot be restricted to physical threats and includes unconstitutional pressure.

This is further borne out by Lord Hoffman in the Privy Council case of *R v Attorney General for England and Wales* [2003] UKPC 22: "The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support: Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, that fact that the threat is lawful does not necessarily make the pressure legitimate. As Lord Atkin said in *Thorne v Motor Trade Association* [1937] AC 797, 806: 'The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened ... What he has to justify is not the threat, but the demand of money.' "

Given the foregoing, the observation of the two International Advisers to CONI, at Appendix XVI, page two, that '*...The evidence that unfolded described a national obsession with street demonstrating at an alarming level. Some would want to call an example [sic] of the rights of freedom of expression and assembly. In reality it is rather more bully-boy tactics involving actual and threatened intimidation by a violent mob...*' [emphasis added] is telling and very significant, especially when taken in conjunction with contents of the statement made by President Nasheed to CONI (which was a summary of the five-hour oral statement made by him), and more particularly the specific statement that '*... At this instant the cries of "bring the ropes to hang him" and to "bring the ropes to tie him" became louder and more threatening. I then asked MNDF to take me back to Muleeaage, but they refused to take me there or anywhere else. I wanted to see if I could leave the building but the Special Protection Group (SPG) of MNDF who was guarding me refused to take me anywhere and in fact when I attempted to leave, they at one instance physically held me. They insisted that I stay in MNDF, even though they did not protect the building from mutinying officers. It was then very obvious to me that there was no way out for me, but to die or do their bidding...*' [Emphasis Added].

It is curious as to why very little weight is given to President Nasheed's statement, more particularly given the repeated references to President Nasheed's detractors being in possession of weapons, or being overtly menacing in word or deed.

A LEGAL REVIEW

It is submitted that the foregoing, amongst other evidentiary support, gives strong credence to the claim that President Nasheed was under duress when he tendered his resignation. We would go further. Even by the yardstick of ‘coercion’ or illegal coercion which the Commission has incorporated for reasons one cannot fathom- given the clear mandate- , *ex facie* the events accepted by the Commission and without anything more, does strongly and convincingly establish the ‘coercion’ or ‘illegal coercion’, the yardstick chosen by the Commission.

COUP D’ETAT

As regards the coup d’etat, the Report concludes that that there was no unconstitutional change that took place. President Waheed is considered to have succeeded ‘properly’ and in accordance with the ‘electoral prescription’. The offered rationale for this is that since both Waheed and Nasheed contested on the same ballot, the people were aware of who they were and what they could offer as political candidates.

The Report fails to recognize that there is no constitutional or legal provision in the Maldives corroborating such a rationale as legitimizing appointments of Vice Presidents as Presidents.

The Report further purports to use the said rationale as a basis to establish that a coup d’etat didn’t take place. The Report reads “Accordingly, there appears nothing contestable in constitutional terms under the generic notion of a 'coup d’etat' that is alleged to have occurred – quite to the contrary, in fact.” It appears therefore that the finding of the Commission is that because President Nasheed was replaced by a Vice President who had contested on the same ballot as he, a coup could not have been considered to have taken place.

The limitations of such an argument lie in the fact that it is purports to construe the change of power or justify the change of power in terms of what had transpired 3 years ago rather than what had transpired in the present. Such an analysis restricts itself to the context of the President and Vice President participating in an election held three years ago and does not consider the context in which the transition of power in fact, took place on 7th February 2012.

A LEGAL REVIEW

Further, in considering whether a coup had in fact taken place, the Commission purports to apply Kelsen's pure theory of law. The theory provides that validity of law is derived from the grundnorm or apex in the hierarchy of legal validity. For most legal orders, the grundnorm or apex source of validity for the legal order is the constitution. A grundnorm will change based on the acceptability of the new source of law by the members of a legal order. As such, in a revolution, the new legal order that replaces the old legal order will be valid if the new legal order is accepted by the persons whose behavior it purports to govern.

A change of grundnorm need not be through violence or by obtaining control of communications and defense organs/institutions in the country. Therefore, a coup d'état does not always result in the change of grundnorm; but a change of grundnorm usually results from a change in the constitution. A change of president will amount to a change in grundnorm only if the president was a dictator i.e. the repository of ultimate power or source of validity to the legal order of the country. Also the fact of occurrence of a coup d'état is independent of the fact of change in grundnorm. A coup is marked by control over telecommunications and defense, so that the functional level of a country is subject to control by persons other than the government of the day. But such functional control does not translate to legal control or confer legal validity to the prevailing legal order— hence the distinction between de facto and de jure control.

Clearly there has not been a change effected to the constitution in Maldives, but rather an ousting of presidential and governmental power. This may not therefore, fall within the ambit of a change of grundnorm but just because the constitution has not been changed, does not mean that the change of power has been constitutional. Further, in any event even if a change of President was considered a change of grundnorm, if the events of 14th January to 7th February and also 8th February, were considered the Commission could easily deduce that there was a clear division in the Maldives as to the acceptability of any new legal order. Without clear acceptability, there cannot be a change in grundnorm.

As such, quite simply, the purported voyage of philosophical considerations of legal jurisprudence has once again deflected the focus of the Commission from the core issues that are required to be considered under its mandate. The simple question that it needed to answer to ascertain whether there was a coup was who controlled the communications and defense functions of the country – who was the police and military personnel listening to, who was occupying the national television promises immediately before President Nasheed's resignation.

A LEGAL REVIEW

It is respectfully submitted that even the Commission's consideration of U.S. law, Offences Against the State Act (1939), once again, is in relation to what may transpire after a coup or what may transpire if a new country was unlawfully carved out of an existing one. The report, citing the said statute, reads, "*Usurpation of functions of government. 6.—(1) Every person who usurps or unlawfully exercises any function of government, whether by setting up, maintaining, or taking part in any way in a body of persons purporting to be a government or a legislature but not authorised in that behalf by or under the Constitution, or by setting up, maintaining, or taking part in any way in a purported court or other tribunal not lawfully established, or by forming, maintaining, or being a member of an armed force or a purported police force not so authorised, or by any other action or conduct whatsoever, shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding ten years or to imprisonment for a term not exceeding two years.*"

The Report considers the Maldivian Penal Code sections as to removal of the President. Sections 30 and 31 are in respect of removal of the President or of Government by use of weapons. There are even offences in the Act that are in relation to causing injury to the life of the President.

It is clear from the above therefore, that the law being considered is that which is in relation to intimidation or fear for personal safety or safety of others. The Report doesn't appear to fully consider the laws relevant to the broader concept of duress nor those provisions that are in relation to coups.

The Report specifically cites section 29 of the Penal Code and mentions section 33. Section 29 reads "Whoever attempts to commit or participates in or facilitates the commission of an act against the State shall be punished with imprisonment for life or exile for life or imprisonment or exile for a period between 10 years and 15 years."

The said section 33 reads 'All forms of rebellion or insurrections shall be included within the provisions of section 29, 30, 31 and 32'

A LEGAL REVIEW

The Commission appears to conclude that none of the said sections (29, 30, 31 and 32) are applicable as they are in reference to ‘situations before the execution of a coup d’état, treason or assassination.’

It is respectfully submitted that the Commission appears to have misadvised itself at this juncture. Firstly, the Commission was not called upon to establish whether there was a coup d’état specifically but rather whether the change of power was unlawful. No doubt, if a coup did exist, the change of power would be unlawful but the Commission did not have to restrict itself to identify an exhaustive definition of coup d’état in order to ascertain whether the transition of power was unlawful. As such any finding that Maldivian law did not provide a definition of coup d’état is irrelevant.

It is worth mentioning however, that the Divehi language includes the word ‘Baghaavaaiy’ which directly translates to ‘treason’ but could also be understood to mean conspiracies in the nature of a coup d’état, mutinous conduct, insubordination, rebellion and insurrection.

Secondly, the finding that Maldivian law does not provide a definition of coup d’état does not in any way mean that Maldivian law does not prohibit a coup d’état. The Penal Code itself, contains a number of provisions preventing unauthorized challenges to Government authority.

Article 29 of the Penal Code for example, provides for Acts against the State. Although this term is not defined, it could be easily construed that unlawful acts against the elected President is an Act against the State and therefore, falls within the ambit of Article 29. It seems strange therefore, that CONI did not consider this constitutional provision as CONI itself was referring to events which took place prior to the resignation of the President and this article is clearly critical to determining the legality of the transfer of power.

The Penal Code effectively prohibits in section 38 an unconstitutional challenge to the authority of the Government and even provides a limitation to the exercise of fundamental rights of expression, where such expression seeks to cause instability in the country. The said section provides “It shall be an offence for a Maldivian or a foreign national within the territory of the Maldives to excite by written or oral representation, any enmity contempt, or disharmony amongst any section of the Maldives population towards the Government established by Law in the Maldives. It shall also be an offence to cause, any enmity contempt, or disharmony by such oral or written representations even between different sections of the Maldives population.”

A LEGAL REVIEW

The said section therefore, includes a challenge to Government that can arise through rebellion and/or insurrection and/or insubordination from specific groups in society and/or any other act of treason.

The extent of intolerance in the Maldivian legal order to such efforts of destabilization of legitimate authority, is further seen in section 37.

The said section reads *'Whoever while within or outside the Maldives commits an act that can cause detriment to the Government of the Maldives, its independence or sovereignty or cause a part of the Maldives in terms of territory or population to be divested from the jurisdiction of the Government of the Maldives shall be death. Whoever abets in this offence shall also be subjected to the same punishment. However the person who facilitates the commission of this offence or conceals the design to commit this offence shall be punished with imprisonment or exile for a period between 10 years and 15 years.'*

Thirdly, the said sections which the Commission appears to have considered to be irrelevant, specifically prohibit either the commission or attempted commission of acts against the state and/or use of weaponry to remove the President or the Government and further provides the punishments that can be meted against such persons. The said offenses therefore, clearly anticipate the actual commission, or an attempted commission of a coup d'état and further provides the consequences that will transpire after such a coup against its perpetrators. It is unclear therefore what the Commission meant when it concluded such sections only govern situations 'before the execution of a coup...' In any event, even if the interpretation of the Commission was accepted in relation to the said sections, it is unclear as to why sections that pertain to event that take place before the execution of a coup would be irrelevant as such sections would clearly be helpful, in assisting in the much sought definition of what ultimately would create a coup.

The Report further considers legal provisions in relation to mutiny under the Penal Code and concludes that 'The word "mutiny" under the law of the Maldives is an internal matter within the military. Its aim is not to remove the President from office or to overthrow the government.'

A LEGAL REVIEW

The report provides “Section 33 Mutiny within the Armed forces ‘It is an offense for any serviceman under this Act to create a mutiny within the Armed forces, or to create discord, or to conspire to commit such an act, or to incite the commission of such an act, or to have knowledge of other persons committing such an act, or conspiring to commit such an act and fails to inform a superior of the same or delays in conveying such information.’ ”

The consideration of the concept of mutiny, therefore, is clearly displaced. Mutiny is defecting superior authority in the armed forces, and in the Maldives, the Commander-in-Chief is the President. Therefore, disobedience of authority within the military can amount to disobedience of the President and can be reflective of the ‘illegal coercion’ or ‘intimidation’ that the Commission was looking for. Further, inability of the President to control his army, is one of the universally accepted hallmarks of a coup and further corroborates the incidence of duress, that the Commission, was in fact, called upon to investigate.

THE CONSTITUTIONAL IMPLICATIONS OF PRESIDENT NASHEED’S RESIGNATION

CONI has set out in its Report that it has restricted itself to considering the transfer of power in terms of articles 121(a) and 114 of the Constitution and observed that the said articles were complied with and accordingly, “there is no question but that each step prescribed by the Constitution regarding resignation of the President and assumption of office by an incoming President was fulfilled. This is subject only to the caveat about the possible non-compliance of protocols.”

The constitution provides in article 121(a) “The President may resign from office by writing under his hand submitted to the Speaker of the People’s Majlis, and the office shall become vacant when the resignation is received by the Speaker.”

Article 114 provides “An incoming President or Vice President shall assume office upon taking and subscribing, before the Chief Justice or his designate, at a sitting of the People’s Majlis, the relevant oath of office set out in Schedule 1 of this Constitution.”

A LEGAL REVIEW

The said articles clearly govern therefore, the procedure that must follow the permanent resignation of a President in the Maldives. This read together with article 112(d) provides that upon such permanent resignation of the President, it is the Vice President who should assume office as President.

It is clear therefore, that where a resignation is a permanent resignation, as has transpired in this event, the oaths clearly that must be taken by the person who assumes office of President in such event, must be done at a sitting of Parliament, as expressly provided in article 114. Contrary to what is observed by the Commission, however, the swearing of the Vice President as President after the resignation of President Nasheed did not take place before a sitting of Parliament and as, even borne out in the press release of Parliament itself, instead took place under Article 126.

Article 126 provides “Any person temporarily discharging the duties of the office of the President or Vice President shall take and subscribe before the Chief Justice or his designate, the relevant oath of office set out in Schedule 1 of this Constitution.”

The said Article is clearly applicable only when the office of the President is temporarily vacant and should accordingly be read only in terms of Article 123 or Article 124. Articles 123 and 124 arise where the President or Vice President as the case may be, believe themselves to be unable to discharge their respective offices. The resignation that took place on 7th February therefore, may not fall within the ambit of the said Articles in that the resignation that took place is not a temporary resignation but a permanent resignation under article 121(a) and as such the oath to swear in the new President must be in terms of article 114. .

Although the oath that is taken under Article 126 and 114 is the same, the significant difference is that an oath in terms of Article 126 can be administered without a sitting of parliament. These authors observe that the fact that the oath of the Vice President was administered without a sitting of Parliament, seems to be inconsistent with constitution and a matter which may have to be determined by the appropriate forum that has the necessary expertise to determine such matters. This apparent inconsistency may be a further indicator of the confusion and/or possible mala fides that surrounded the resignation and transfer of power on 7th February.

These authors observe therefore, that CONI could not have conclusively arrived at a finding that all constitutional provisions were duly complied with and further observe that such inconsistency cannot in any way be dismissed as a failure to comply with a mere protocol.

A LEGAL REVIEW

More importantly this also confirms the state of affairs that may have prevailed at the time of resignation where the persons who were desirous of bringing a change in the presidency were willing to sidestep constitutional requirements to replace President Nasheed.

A LEGAL REVIEW**Chapter 7**

Conclusions:

- The Report defeats the rationale of establishing a Commission of National Inquiry, and amounts to a dangerous and severe erosion of the electoral franchise and mandate of the people.
- The Report patently exceeds its mandate and makes determinations on matters which was not within it and or in respect of which no investigations or inquiry was called for under the mandate.
- This appears to have been done for reasons of an extraneous nature and patently on very untested and conflicting material and evidence hastily gathered without due regard to the basic and fundamental safeguards which should be followed and acted upon in by an important Commission of this nature.
- The material and the evidence has been selectively acted upon put together and without any opportunity being given to any of the affected parties to contest such material or evidence.
- Material and evidence of vital significance has been disregarded without any examination thereof or without any reasons been given for their failure to consider such material and evidence which deeply flaws the conclusions reached.
- The Report, the procedures adopted and the conclusions reached, vitiates the principles of Reasonableness and Fairness, in the specific circumstances of this case.
- The Report is not based upon a due and proper exercise of CONI's powers vested by the Constitution, but is instead, appears to be based upon extraneous considerations.

A LEGAL REVIEW

- The Report offends the fundamental tenets of natural justice, transparency and good governance, including the right to see adverse material, which undermines the salutary tenets of the Rule of Law.
- CONI appears to have abdicated its duty to objectively and reasonably bring its collective mind to bear on attendant relevant considerations, and satisfy itself, on strictly objective criteria, whether or not there was duress involved in the purported resignation of President Nasheed.
- In view of the above, there is an error in respect of the jurisdictional question, i.e., was there an element of duress in the resignation of President Nasheed, which in turn vitiates the validity of the Report, and is a classic ground of review in administrative law.
- CONI has failed to manifest in the Report, an adequate addressing of its collective mind to the matters in issue, or to the fundamental premise on which it could have justifiably arrived at a defensible decision that there was no duress involved in the purported resignation of President Nasheed, and has thereby effectively abdicated and/or failed its primary duty in law, which is an excess of jurisdiction.
- There is evidence to demonstrate that there was in fact adequate evidence to suggest that duress (or even ‘coercion’ and/ or illegal coercion as used by CONI) is attributable to the resignation of President Nasheed, and as such, CONI could not have reasonably satisfied itself on objective criteria, that the specific pre-conditions necessary for a determination that President Nasheed resigned of his own free will, have been met.

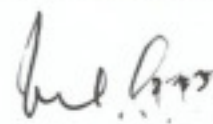
A LEGAL REVIEW



.....
Ms. Anita Perera
Attorney-at-Law
Supreme Court of the Democratic Socialist Republic of Sri Lanka



.....
Mr. Senany Dayaratne
Attorney-at-Law
Supreme Court of the Democratic Socialist Republic of Sri Lanka



.....
Mr. Shibly Aziz
President's Counsel
Democratic Socialist Republic of Sri Lanka
Former Attorney General of Sri Lanka