

Courage and commitment – Speech by Chief Justice Mathilda Twomey on the occasion of the re-opening of the Courts for 2020

[Protocol] Hon. Vice President Mr. Meriton, President of the Court of Appeal, my brother and sister Justices and Judges of the Court of Appeal and Supreme Court, Attorney General, Master, Registrar, Magistrates, Ombudsman, Chairman of the, Constitutional Appointments Authority [CAA], Chairman of Public Service Appeal Board [PSAB], Bishops, Fathers, Superintendent of Prison, Members of the Diplomatic Corps, Chief Executive Office of the Anti-Corruption Commission Chief President of the BAR Association, Attorneys at law, Distinguished guests, Ladies & Gentlemen all protocol observed.

Good morning everyone and welcome back. Once again it is a privilege and honour to stand here. This is my fifth speech for the Opening of the Court, my first alongside my brothers and sisters from the Court of Appeal, and my final as Chief Justice of the Supreme Court.

I hope you enjoyed this year's ecumenical service. For years it has puzzled me that we would open the Supreme Court and Magistrates Courts but neglect the Court of Appeal, and I was delighted by my brother, the President of the Court of Appeal accepting our invitation to develop a new, but better, practice of the whole Judiciary coming together once a year to open the Courts. After all, we share a building, a budget and a constitutional mandate.

I would like to begin by thanking the organising committee for all their hard work in putting together the service today. I also thank the interfaith leaders for hosting this year's mass and for all who were involved in the celebration. I also wish to thank all those who prepared the court house and grounds for today's opening. I wish to thank the Army Brass band and the guard of Honour and the Police.

Once again, I would like to take an opportunity to reflect on the years past and the year ahead – like light through a prism, we consider the facets – what were looming challenges and imminent successes and how these transformed through our learned

experiences and equipped us to formulate our objectives for 2020. We are in the final year of our strategic plan, we need to make provision for the next five years.

In 2016 our focus was on improving “Access to justice for all” – “how we could ensure that each person in Seychelles could get into court and when at court, get justice, real justice within the rules of the law.” We undertook widespread institutional change –we recruited qualified, specialized staff, we opened more courts, we changed internal court policies and processes, we implemented mandatory training. From the very start we questioned “obsolete and impractical” traditions, processes and mentalities.

In my very first speech, I spoke about the “hard and controversial” decisions that we had already taken, not knowing the choices that stood before us. Three Judges were required to determine whether an incredibly popular politician had broken the law. Standing together they determined that he had. There were legal implications to political acts and these affected the whole nation. The Constitutional Court case and the subsequent Court of Appeal case were important for our maturing democracy, showing that even the most politically charged disputes can be resolved in a transparent and public manner.

In that same controversial year, I, as Chief Justice, had to choose whether to ignore unacceptable behaviour from a brother Judge, who was a colleague and a friend from my days at the Bar. It would have been easier to ignore it. It would have been easier, but it would have also been wrong. The Judge had to face a Tribunal to determine whether my concerns were valid. This decision had far reaching ramifications, even resulting in counter-allegations against me. But again these were resolved firmly within the constitutional process. This is the rule of law in action, that Courts and Tribunals can be a forum for the fair resolution of matters even when it involves one of their own.

At that time, with the new year upon us, our focus shifted to “Unity in diversity” in the Judiciary and my decision certainly threatened that very notion. We were minded of the words of Sir James Mancham who passed away that year, when he urged for a partnership that comes from “the heart and less from political maneuvering”... for greater “harmony... dialogue and social contacts among the players on the national stage.” But we had work to do, and our focus was on introducing changes designed to

address the weaknesses in our structure and processes which would not allow any room for corrupt or inefficient practices. We adopted a newly drafted strategic plan and implemented changes under it. We persisted with ensuring that legal practitioners and Judicial Officers were held accountable for their conduct, even when this was unpopular. We strengthened partnerships in government and in that spirit, that year saw the first time that the Judiciary, Executive and Legislature issued a joint press statement confirming our commitment to each other and to our separation of powers. We cleared the highest number of cases in 2017, and greatly reduced the unacceptable levels of backlogged cases.

As we started to focus on how to build a “Judiciary that you can trust” we invited “our supporters and our cynics to scrutinise our work thus far and reassure themselves that we are indeed a Judiciary fit to perform its role.” Our theme reflected our commitment to integrity, transparency and accountability. Somewhere along the line the Judiciary had lost its confidence and the trust of the public. Since 2010, we have struggled to get back on track. At the beginning of 2018 as we launched our Annual report, and to this day, we are able to say that we have regained our confidence because: Our courtrooms are open, our transcripts are available, our files can be viewed at the registries but cannot be tampered with; our decisions are public and give full reasoning. And we committed ourselves steadfastly to our judicial oaths, aware that we would be held accountable if we allowed our own ambitions to taint our actions.

As such we moved from strengthening the infrastructure to focusing on the strength of the institution itself. “Without fear or favour” became our motto and rang out through all of our activities in 2019, even being the theme of an international conference that we hosted.

In this context all judges were refreshed on judicial ethics in a two-day training, we reminded ourselves about the rule of law to which we are all subject. During this year we saw the highest number of constitutional court cases filed. The Constitutional Court was required to determine difficult and sensitive matters including whether the failure to pass new regulations under the Misuse of Drugs Act, 2016 breached a right to healthcare? Whether a Tourism Department Policy Statement breached the right to property? Whether Art 920 of the Civil Code, which imposes forced heirship, violates

the Charter of Rights; and whether the National Assembly acted lawfully in quashing subsidiary legislation created by the Executive. These are not easy questions to resolve. And more so when the decision is made under the public microscope. It is good to see that the Constitutional Court is being turned to with greater frequency, having proved itself through handling so many sensitive cases with national implications over the past years and without shying from making the hard choices.

These cases represent increased trust in the Judiciary. It is cases like these that provide practical and substantive content to the provisions of the Constitution, and which lay the foundation for the resolution of future cases. They also demonstrate the independence and accessibility of the judiciary. Although some cases will inevitably have political implications, or be unpopular in the “court of public opinion,” the separation of powers is alive and well with the courts attentive to the executive’s and legislative sphere of power whilst not seeking to overextend its own. We welcome the reforms that the Constitutional Appointments Authority have adopted to their processes for the recruitment of Judges and the processing of complaints.

We have also seen an increase in the use of mediation, which when done in good faith can be a quicker and more amicable way of resolving disputes.

We are launching our Report for the period 2018 and 2019 which will give you all of the details of court performance during the past years, and the strides that we have made towards eliminating our backlog. I am proud to state that four of our twelve divisions across the Judiciary have completely eliminated their backlog. In the past two years, the Courts have reduced the remaining backlog by close to three-quarters from 400 backlogged cases pending on 1 January 2018 to 112 cases on 31 December 2019. In 2019 alone, 146 backlogged cases were cleared and the average age of our pending cases has dropped across the board. Presently, in the Supreme Court the average age of the cases on the Civil cause list is 389 days (just over a year), down from 499 at the beginning of last year. In the Criminal division it is 328 days (less a year) down from 427 the year before. In the Magistrates Court the average age has reduced, except for several specific cases which skew the statistics, and have been identified. In the absence of those cases, the average age of criminal cases is 344 in 2019, and the average age of civil cases is 485 days. These are within the agreed timeframes for case disposal.

Across the Judiciary, 4239 cases were filed in 2019 and 4043 were completed. This excludes statistics from the Family Tribunal which had 1170 cases filed in the year, and 722 cases completed and which does not include cases that remain open for review. The Courts experienced a decrease in the case clearance in 2019 and an increase in the number of cases filed, the overall clearance rate dropped from 123% in 2017, to 103% in 2018 and 95% in 2019. This is caused by the inevitable plateauing as easier backlogged cases have been cleared quickly at the beginning of the strategic plan as well as periods of vacancies on the bench. The Courts are aiming to achieve 100% disposal rates, however the 95% disposal rate is still excellent performance. With the reduction of the backlog in the system there is less need for the Courts to achieve over 100% clearance and as the courts sit close to the target, the Judiciary is satisfied with the progress made. The ability to complete cases is still dependent on the availability of the Bar and the willingness of the Bar and external stakeholders (the police, the medical profession, land surveyors and other expert witnesses) to participate in the court cases, without which the Courts cannot conclude matters.

Special mention should be made of the dedication of the Family Tribunal members who hear harrowing details of family life and domestic disputes and dysfunctionality of the social fabric of Seychelles. I particularly wish to thank Magistrates Asba and Burian and Mrs. Aglae who sat as chairperson and vice-chairpersons over the past three years.

This year I will also look at the court processes in the Magistrates Courts and the applications and petitions in the Supreme Court. With the dramatic increase in constitutional cases, I will also consider whether to extend the court sittings. We need to address the elements of the Supreme Court Practice Directions that are not functioning as planned. I will continue to ensure that Judges and lawyers are held accountable through the correct channels. We will look to formalise the structure of our judicial and legal practitioner's training. We are required to review the functioning of the judicial committees and specifically to address ongoing difficulties with our use of technology and our digital case administration system. We will be launching a new Judiciary website in 2020, to improve public access to the courts and ensuring we are in compliance with the Access to Information Act. We have drafted and will adopt new allowances for legal aid services and a more relevant means test for applicants. We

have completed the drafting of new court fees and costs schedules which will be gazetted this month.

2019 was a year of transition. We bade farewell to Judge Nunkoo who returned to Mauritius, we laid to rest Justice Fekna, and were sad to see Justice Renaud retire. His charm and good nature is missed in the Palais de Justice. We have welcomed a new sister Justice of Appeal, Mrs. Lillian Tibatemwa-Ekirikubinza and look forward to her contribution to our jurisprudence.

In the administration Mrs. Claudia Antat, after 39 years in the public service, took her retirement. Mrs Anne Kautsky, our first public relations officers and Mr. Eric Savy, the Director of Administration and Human Resources also left us. However, we took the opportunity to restructure the senior management creating new directorships and promoting members of staff into these positions. We also welcomed Mr. Marcus Labiche as the Director of Operations and Logistics, Mr. Alan Wallis in the Legal Research team and Kevin Etienne-Cummings to oversee the Library and Archives.

In 2020, there are further transitions. Ms. Joelle Barnes has stepped back from the position of Director of Legal Affairs to concentrate on further studies and is replaced by Mr. Alan Wallis. And there will be a need for recruitment at both Court of Appeal and Supreme Court level.

Finally, at the end of this month, our beloved President of the Court of Appeal Francis MacGregor will be retiring after 12 years at the helm of the apex court. He has been committed to the advancement of the Judiciary and a great personal support in times of need. His personal motto, you will never walk alone, is inspiring for us all, and is apt for our theme this year.

“Courage and commitment” reflects the transition from the institutional to the individual. We shift from the institutional integrity we have sought to entrench in previous years to a personal and individual approach.

What is courage? After the coup d’etat in 1977, Chief Justice O’Brien-Quinn was deported and the courts were forcibly closed. When President Rene was attempting to

reopen the courts to legitimize his regime, he approached the late Judge Andre Sauzier with an offer that most judges would not turn down. He wanted him to become Chief Justice. Judge Sauzier acknowledged that the courts had to be reopened and committed himself to do so on behalf of the Judiciary, but refused the post that would have given legitimacy to Rene's coup, at the inevitable cost to any of his own ambitions on the Bench. Even as Acting Chief Justice at a particularly threatening time, he continued to question breaches of human rights. In Rene's biography, it acknowledges that Rene was forced to release 20 detainees held without trial after "pressure from Acting Chief Justice Sauzier".¹

Sauzier's acts were courageous precisely because he stood up when others were too scared. I remember people were too scared to come to court, yet he fulfilled his judicial responsibilities without wavering in his personal convictions. The rule of law is often the first victim of an unjust regime. Courts are used to justify conduct, in a court room judges say this was right or this was wrong. Judicial endorsement is a stamp of approval. And during times of pressure, so often people will not resist nor overtly support the wrongs. They are complicit when they blind themselves to excesses of power. They go into modes of self preservation, to preserve their position, their status, their livelihoods, and their family members. Self sacrifice is not an attractive option. And this applies just as much to Judges and members of the Bar. This is the type of courage that we are speaking about.

The word 'courage' is from the latin 'cor' or French 'coeur' - the heart. It literally means to act from the heart with bravery and passion. Michael Greco, the President of the American Bar Association said that "the most direct and compelling determinant of judicial independence," is "the degree of judicial courage the judge has or demonstrates in her work."²

But we do not need to be living in a one-party state to face situations that require us to be courageous. The past five years have shown me that every day. We are all required

¹ Kevin Schillington, *Albert Rene – the Father of Modern Seychelles, A Biography* (UWA Publishing, 2014) at 227.

² Michael S Greco, 'Judicial Courage in the 21st century' presented at the Massachusetts District Court – 2007 Judicial Educational Conference at 3.

to raise our heads about the parapet, to stick to our guns. It is courageous to find against a litigant that you might like or admire. It is courageous to file cases against the government or to represent a monster. It is courageous to write a decision that attracts public censure and it also courageous to disagree with, or even publicly support, your colleagues. And sometimes it takes courage to admit that you are wrong – as judges and lawyers sometimes are.

Yet, there can be a dark side to courage, and we are aware that the “scariest of all” are “the judges with low integrity and ample courage.”³ In summoning his judicial brethren to act courageously, Justice Luc Martineau cautioned against judges going rogue under the guise of judicial courage, he said:

“Detractors of a strong judiciary may label courage as analogous to what they would call judicial activism or interventionism: a Court that makes its own laws while ignoring the forest that stretches far beyond the trees. Such fears are perhaps understandable, though they fail to see judicial courage for what it truly is. A judge who strikes down a law (or upholds it) by succumbing to pressure does not act with courage, for judicial courage becomes a virtue only when it is coupled with judicial integrity and impartiality.”⁴

Courage needs to be a constant, especially for judges. It takes courage to wake up every day, and know that you will be tested, personally, professionally and intellectually. We are servants of an institution – not individuals. We do not have the privilege of choosing when to do the right thing and when to stay quiet. There can be nothing more cowardly than judicial footwork to avoid taking a difficult decision.

Commitment is therefore essential. Commitment to the law; to our colleagues and ourselves. Courage is translated into reality through this commitment. Commitment is dedicating yourself to something, following through on a pledge, in our case our oath, and demonstrates a willingness to get involved. In French there is no literal translation

³ David Pimentel, “Reframing the Interdependence v Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity” (2009) 57 *Cleveland State L Rev* 1 at 20.

⁴ Justice Luc Martineau, ‘Address on Judicial Courage at the Joint Annual Meeting of the Supreme Court and Nova Scotia Court of Appeal,’ White-Point, Nova Scotia, October 12, 2018.

of commitment - no word specifically – it is translated as *engagement*, this is a willingness to take part, to become enmeshed with the values you uphold. Our jobs – judicial and in the legal practice - require dedication, individually and corporately.

Our personal commitment gives our *group* its strength. But it also gives us our *individual* strength. I wonder whether any of you have ever thought about why a manhole is round? And it is not so that a person can fit down the man-hole. The reason is because a circular shape is the best for any structure taking load from all sides. In the case of a manhole, earth and underground water pressure acts all around it and its circular shape serves to reinforce it by spreading the pressure across the surface. It is the same in the Judiciary. All of us – judicial officers and administrative staff members will face pressure on all sides, and it is important that we can mutually reinforce each other. I draw my strength to stand individually through the knowledge that others are standing with me. This is also an element of commitment – the commitment to each other and to the overall institution of Justice. This is why we have chosen to have on the cover of the 2018/2019 report the faces of the staff members of the Judiciary. This represents the strength of the collective that makes up the institution.

In 2020, it is my hope that each and every one of us will commit ourselves to being brave and courageous and meet our duties and obligations head on. This is particularly important as 2020 is an election year and we have seen that the courtroom becomes an important place to resolve political disputes. We must not shirk our responsibilities for fear of criticism. But each and every day, Judges must prepare for cases and when they set dates they should honour them. Lawyers must turn up, and come prepared. You must offer your clients the honest, legal position and not give them false hopes. Lawyers who are engaged in other businesses need to seriously consider whether they are able to perform their obligations as legal practitioners diligently. And if not, must choose whether to remain in practice. We must redouble our efforts to complete the work we have started and be bound by the principles that we have adopted.

Judges, I challenge you to hold each other accountable, and have each other's backs. Apply the rules and play by them. Attorneys, I would honestly recommend that you consider getting more support - we see on a daily basis that those working in partnerships or chambers are better able to make their deadlines and hearings. There

are 12 new lawyers who have passed the Bar examination looking for pupillage. A younger generation is the lifeblood of legal practice – engage with them!

And most importantly, if there is a wrong in the system, do not turn a blind eye - even if you might feel that you are compromised because you appear before that judge, because the complaint is against your lawyer or colleague and even if it might affect a future appointment. The enemy to “courage” is indifference and to “commitment” is exhaustion. We must actively guard against both.

At the beginning of the speech I said that this is my last speech. When I was asked to take up the position as Chief Justice I did it on condition that it would only be for a five year period and that we would get all of the institutional support we needed to make the changes. It was a condition of my appointment that the necessary legal and constitutional changes be made to address the idiosyncrasies of our legal structure and system. We have been hindered in our work by outdated, unreformed laws. Seychelles needs a Law Reform Commission, and I hope that this need will be addressed by the relevant branches of government.

And so this year I am going to honour my commitment and step down from the position as Chief Justice, and concentrate my efforts as Justice of Appeal. I believe that change is important, it brings with it fresh impetus. Another Chief Justice might have different ideas for new reform and maybe make further improvements to our Judiciary.

It has been quite a journey thus far, and I am sure 2020 has its own surprises and challenges in store. In Star Wars, the final instalment of which I watched with my family over Christmas, the Jedi adhere to a code of chivalry, bravery and courage. They are committed to vanquishing the dark forces. And they do this in a united way. As frivolous as this analogy may seem, their motto is a rallying cry to courage and commitment, and so I would like to end with it. May the force be with you.