CHIEF JUSTICE'S CHAMBERS
SUPREME COURT OF SEYCHELLES

Judicial Appointment in Seychelles – a study in what not to do.

The Seychelles approach to judicial selection is a study in how constitutional provisions can be implemented within the wording of the constitution but in such a way as to undermine the very rule of law the constitutional provisions were designed to strengthen. Today I want to focus my discussion not on the appointment of the Judges itself, but on the body responsible for appointing Judges and Justices in Seychelles. I wish to show the problematic implementation of the provisions of the Constitution and how this has been utilised to undermine the independence of constitutional appointees, particularly Judges.

In 1993, the Seychelles Constitution was adopted after 18 years of a one-party socialist regime where the President ruled by decree. Under the new Constitution an independent body called the Constitutional Appointments Authority ("CAA" or "Authority") was set up to make recommendations for appointments of all the individuals holding office under the provisions of the Constitution who are not selected by direct democratic process. Therefore, an authority would be responsible for recruiting, interviewing and making recommendations to the President for the appointment of the Justices of Appeal, Judges, Attorney General, Auditor General, Ombudsman, members of the Electoral Commission, the Public Service Appeal Board, and the committee advising the President on pardons. Over time, the list of individuals has increased to also include the Human Rights Commissioners, the members of the national broadcasting network, and other persons required to be appointed under Acts. Clearly, the importance of these individuals in the functioning of the democracy cannot be overstated. The constitutional provisions require

of each of these offices complete independence. It is worth noting that the CAA also appoints the members of the Tribunals set up to inquire into the removal of these persons.

The Constitution envisaged that the CAA itself would be completely independent - Article 139 provides that the Authority "shall not, in the performance of its functions, be subject to the direction or control of any person or authority." However, the appointment of its members is inherently political as the members are nominated equally by the ruling party and the Opposition with the members themselves agreeing a Chairperson between them. It was originally established with three members, which has now been increased to five after a constitutional amendment in 2017. The tension between the authority's independence and partisan political appointment was intended to be kept in check through carefully drafted requirements for the membership.

Members are appointed for a renewable seven year period, and under Article 141 a person is qualified to be a member of the Constitutional Appointments Authority "if the person is a citizen of Seychelles who—

> (a) has held judicial office in a court of unlimited original jurisdiction; or
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> (b) is of proven integrity and impartiality who has served with distinction in a high office in the Government of Seychelles or under this Constitution or in a profession or vocation."

The provision suggests that the members will be Judges or persons of judicial probitas.

At the time of the adoption of the Constitution, the entire Bench comprised of foreign judges and therefore none were qualified to sit on the CAA. So the second limb of Article 141 sought to enable persons who had judge-like character to sit on the CAA. To date a Judge has never been appointed to the CAA although there are now at least 12 current or previous Seychellois Judges who would be eligible to sit on the CAA.

Furthermore, the requirements of "proven integrity and impartiality" (which anticipates existing judge-like character) in the second limb have been interpreted broadly. By way of example, from 1993 to 2007 an active member of the ruling party chaired the CAA, and the most recent appointments of members of the CAA consists of a current Secretary-

General of the Opposition party; the former presidential running mate of the Leader of the Opposition, a previous member of the National Assembly for the ruling party and the former head of an agency falling under the Executive. The current Chairperson is a retired banker who has never held any office in Government to my knowledge. Furthermore, it should be noted that the membership of the CAA has often included an attorney-at-law, despite the fact that it is the Supreme Court (and not the Bar Association) which disciplines members of the legal profession under the Legal Practitioners Act.

The precedent of appointing persons to the CAA whom I would consider non-qualified under the provisions of the Constitution for failure to be "proven integrity and impartiality", has resulted in a complacency and acceptance of this practice.

Both the partisan appointment and the actual membership of the CAA has attracted negative international comment, which has remained largely unacknowledged domestically.

In 2007, the Chairperson of the CAA, an active politician in the party of the President who had been appointed as the first Chairperson, resigned following an article written by Bruce Baker and Roy May from the University of Coventry. Baker and May wrote "[j]udicial abuse now arguably constitutes the single most serious governance issue requiring reform… France Bonte who is on the Central Committee of the SPPF, is also the Chairman of the CAA, a body responsible for appointing Judges…we find such a conflict of interest indefensible."

The African Commission on Human and People's Rights argued the same thing in its July 2004 Report when they remarked "members appointed to the CAA should not be active members of any political party. It is vital that the Seychellois should perceive the CAA to be independent in order for them to have confidence in the persons that the CAA recommends for appointment".

In 2018, a SACJF report following a fact-finding mission to the Republic of Seychelles stated "Four of the members of the CAA are directly appointed by politicians…Whether real or perceived there is a legitimate concern that the CAA may not be impartial, fair and objective when shortlisting candidates for the appointment of Judges. International

standards require that members of bodies such as the CAA should be appointed through a process which is independent of partisan political influences…Seychelles needs to reconsider the composition of the CAA to deal with the perception that it lacks independence".

This criticism has fallen on deaf ears. In Seychelles, there has recently been a challenge to the appointment of the current members of the CAA, which was dismissed by the Constitutional Court on the grounds of standing and is pending appeal so I will make no further comment about it.

There are two practical vulnerabilities created by the current practice of appointing under the second limb (Article 141(b)):

The first is a concern regarding the inherently political nature of the Authority which undermines the likelihood of apolitical appointments even if the members are equally balanced from the opposite poles of the political spectrum. Where the members of the CAA have gained their position on the CAA through party nomination, it is possible that they will feel beholden to that party. This creates the possibility that the positions for which they recommend may be used for political bargaining at the highest level of the society with appointments being made according to a compromise between the ruling party and the Opposition, especially in circumstances where the majority in the National Assembly and the Presidency are from different parties, as is the present case of co-habitation government in Seychelles. If the members of the CAA included Judges or persons with proven judge-like character, this likelihood would be reduced, although the perception might not be eliminated.

The second concern relates specifically to appointments requiring a high level of skill in the role, such as the Auditor General, Attorney General and the appointment of Judges. An authority of persons without any specific expertise or understanding of the field undermines the authority's ability to determine the competency of applicants to perform the roles and can lead to appointments of inappropriate persons. To make it very basic, a fisherman cannot be expected to know how to recruit an engineer, so why would a banker be suitable to select a Judge? This knowledge gap is exacerbated by the failure

under the constitutional provisions to require any consultation with stakeholders, including the Judiciary for judicial appointments.

Since I became Chief Justice there have been at least eight judicial officers appointed by two differently comprised CAAs. The experience from the Judiciary's point of view has been mixed. We find ourselves at the whims of the CAA due to the lack of representation of the Judiciary in the membership of the CAA, and the non-requirement of consultation. In this regard, initially I had enjoyed an informal consultation with the CAA, however this has become tokenistic or non-existent in the past year.

My relationship with our current CAA has been strongly affected in the past 18 months by the CAA itself raising allegations of my misconduct in recommending a Judge for discipline. After that Judge was suspended, the CAA wrote to the President recommending that the "misunderstandings" between the Judge and I be resolved by promoting him to the Court of Appeal. They also petitioned the President and the Tribunal of Inquiry to cease the investigation into his conduct for no given reason. He was ultimately found guilty of gross misconduct and recommended for removal. However, even after this finding, a member of the CAA swore an affidavit in a court case alleging "unbecoming" "unprofessional" behaviour on my part prior to the establishment of the Tribunal of Inquiry into the Judge. This complaint was adopted by the aggrieved suspended Judge, and recast as his own complaint and relied on by the CAA as the basis of setting up a Tribunal of Inquiry by the CAA into my conduct. The CAA were of the opinion that there was evidence of my misconduct to such a degree that my removal ought to be considered. In the ultimate finding of the Tribunal, it was held that there was not even misconduct, let alone gross misconduct. This further illustrates the need for the CAA to have enough expertise in legal matters to appropriately identify acts of misbehaviour.

Throughout this process of the Tribunal of Inquiry, I became aware of my own helplessness given the appointment of the Tribunal itself by the same persons who had originally formulated some of the complaints against me. The difficulty lies in the fact that there is no restriction on their powers to set up Tribunals where they consider, in their own discretion, that conduct ought to be investigated. As the Judge being investigated I

felt that it would have been inappropriate and harmful for the Judiciary as a whole if I initiated legal action to challenge this process.

During the process of their preliminary investigation into my conduct, the tone of the CAA's communications with me about other matters relating to the Judiciary became so curt as to indicate a complete breakdown in the relationship between their office and mine. Since then, persons have been appointed against my recommendation, and against the recommendation of the Bar. Persons have been appointed without any sufficient planning. With one judge who was promoted from the Supreme Court to the Court of Appeal – a sitting judge with a full diary of cases- I was informed of the appointment the day before the swearing in. That Judge was expected to assume office that same day, leaving behind unfinished cases and administrative chaos. In one instance where I was requested to comment on a list of applicants for appointment to the Supreme Court, the candidate ultimately appointed by the President was not even on the list submitted to me.

Furthermore, we have no deputy Chief Justice and so when I leave the jurisdiction there is an established practice of the President appointing another Judge to be the acting Chief Justice, this is triggered by the recommendation of a Judge by the Chief Justice. I have a practice of rotating the nomination to enable all of the Bench opportunities. However, for the first time since 1993, recently my recommendation was rejected and overridden by the CAA without notice or explanation to me.

We currently have no capacity needs for, or resources for, additional judicial officers, and yet I discovered that the CAA are already interviewing for a new Judge. This highlights another challenge that we face. There is a disjuncture between the needs of the Judiciary and the CAAs recruitment process. For example we may have specific requirements for persons conversant in the French Civil code which underpins our private law, and they may appoint a common law trained Judge. We cannot challenge that appointment in Court without harming the reputation of the Judiciary and that of that appointee.

With regard to the recruitment process, the system adopted by the CAA lacks transparency. There is no independent criteria for candidates, no public knowledge of the process or shortlist, and no apparent skills requirement for candidates. Furthermore, interviews, if they are held, are in private and the shortlist never disclosed. When Judges

are promoted from the Magistrate Court or Supreme Court there is no consultation regarding their suitability and previous conduct in their role.

Moreover, there are widespread rumours that persons have been pre-selected for roles or are told that they will be given roles due to the fact that they were overlooked in the choice of other appointments or are being rewarded for certain politically favourable conduct.

I use these examples to illustrate the experience of judicial appointment in Seychelles, and show how the very independence of the Judiciary can be threatened by the failure to require independence of the appointing committee. The well-meaning constitutional provisions, designed to suit the time and size of the country, can ultimately undermine the very institutions it was meant to strengthen.

And how do we remedy this situation? I believe that appointing appropriate persons to the CAA, according to the provisions of the Constitution, would be a good step in the right direction. But will not eliminate all risks. We have seen that international pressure has had limited success. Political options are unlikely to be effective given the current political nature of the appointment process. As far as legal options, the Constitutional Court is the only *legal* forum to challenge the actions of the CAA, and Judges might be reluctant to make findings against the CAA where their own future promotion or disciplinary action is dependent on the arbitrary discretion of the CAA. We are in a difficult position.

We require constitutional *reform* of the provisions establishing the CAA in order to remove the inherent politics from the appointment of the members, as well as constitutional *enforcement* of the provisions that are enacted.

This is not to say that we haven't had excellent persons appointed to the Court, or even that the persons who have been appointed are tainted by this process. I make these criticisms aware of the fact that my own appointment was by this mechanism. Moreover, I have every faith in the integrity of the Judges of the Supreme Court despite these institutional vulnerabilities in the appointment process. However, the shortcomings of the

process creates vulnerabilities which could be abused and have no place in a truly democratic society committed to the rule of law.