



## CHIEF JUSTICE'S CHAMBERS SUPREME COURT OF SEYCHELLES

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### **Without Fear or Favour – Speech by Chief Justice Mathilda Twomey on the occasion of the re-opening of the Supreme Court for 2019**

[Protocol] President of the Court of Appeal, Commissioner of Police, my brother and sister Justices of the Court of Appeal, my brother and sister Judges of the Supreme Court, Magistrates, Ombudsman, Chairman of the, Constitutional Appointments Authority [CAA], Chairman of Public Service Appeal Board [PSAB], Secretary of State, Cabinet Affairs, Bishops, Fathers, Deputy Attorney General, Superintendent of Prison, Members of the Diplomatic Corps, Chief Executive Office of the Anti-Corruption Commission Chief Executive Officer of the National Council for Children [NCC], President of the BAR Association, Attorneys at law, Distinguished guests, Ladies & Gentlemen

Good morning everyone and welcome back once again.

I hope you enjoyed the ecumenical service as much as I did. Straight away let me thank the organizing committee for all their hard work in putting together the service today. I also thank Bishop Wiehe 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.

Once again we have an opportunity to consider the year past and the year to come, to acknowledge the difficulties and successes and to translate our hopes for 2019 into words, and actions.

As I have sat to consider 2018, I found it difficult to put into words the range of experiences that the year brought. Last year I ambitiously 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.” We set the theme for the year as “A judiciary you can trust” a theme which continues to reflect our commitment to integrity, transparency and accountability.

This commitment was tested again and again throughout last year in a much more public way than I had anticipated when I penned my speech. However, we were not found wanting. Allegations against the judiciary as a whole and individuals personally fell flat and were found unsubstantiated. Observers scrutinized the workings of the judiciary in the national and international realms, and our institution held up under the pressure of this scrutiny. I would like to thank my colleagues and all of the staff of the Judiciary, for their sterling jobs carried out under tremendous pressure.

2018 was also the 25<sup>th</sup> year of the Constitution and it gave us pause to consider the changes that have been effected by the adoption of this most fundamental of legal documents in Seychelles and our roles in relation to the politics and the citizens of Seychelles. We operate in accordance with the Constitution. We fiercely guard our independence because it is required of us by the constitution framers themselves. And our efforts to modernise, to reduce backlog, to train our judicial officers and everything we do or the actions we take are in order to fulfil our constitutional obligations. Specifically, it enables us to uphold the “inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity”.

During 2018 we saw significantly less movement of judges and magistrates than in the previous years, but were delighted when our Master, Ellen Carolus was appointed a Judge, Senior Magistrate Adeline joined us at Ile du Port as the Master and Mr. James Camille as a magistrate.

We were pleased to announce and lay the first stone for the new magistrates’ courthouse for which construction has begun and which will hopefully be completed during next year.

We benefited from new IT infrastructure and were able to upgrade the recording system in the courts. We will be rolling out the new recording system in the magistrates’ courts and in time in the Supreme Court. This will mean that all of our court proceedings are

recorded, and copies of the recordings will be available, particularly for the purpose of appeals.

We had two sessions of training for the judicial officers organized by our Judicial College. The first was a judgment writing session with the support of the Judicial Institute for Africa facilitated by Dame Linda Dobbs and Prof Penny Andrews. The emphasis of this session was on addressing unconscious bias and writing coherent and reasoned judgments. The second training concerned the Protection of Child and Vulnerable Witnesses and we benefited from the experience of Judge Roger Coventry who facilitated a workshop for all relevant stakeholders. The presence of the prosecution, the police, social workers and members of the bar added a meaningful depth to the discussion. The recommendations from that seminar will be implemented in our courts and will ensure that witnesses and victims of sexual assault are not revictimised through the court process.

During the year we also benefited from travelling to several international events and training sessions. Each year two of our judges or magistrates attend the Core Skills for Judges Training Workshop and another two, the Specialist Human Rights Training Course with the Judicial Institute for Africa in Cape Town. Judicial representatives also attended conferences in Mauritius, Australia, Madagascar and Malawi to reinforce our relationships with and learn from the experiences of our sister and brother Judges from other jurisdictions. We have been asked to host the South African Chief Justices' Forum and the Southern African Judiciaries Administrators Association Annual General Meeting in October this year, and we look forward to returning the hospitality that we have enjoyed in their countries.

Internally, our staff have benefited from a number of local training sessions including an executive leadership training which was very well received by all of our heads of Divisions and sections. Our Court interpreters have benefited greatly from lectures on Human Anatomy and from an intensive French Course. Our Registrar travelled and learned from both Spain and the United Kingdom.

In our courtrooms we saw a reduction in the number of filed cases during the year which allowed us to focus on further reducing the backlogged cases in line with our strategic plan. By the end of the year we saw an overall reduction in the percentage that our

backlogged cases make up of our total cases. We define a case as backlogged if it was filed during a year three or more years prior to the current year, in other words cases filed in 2016 or earlier constitute our “backlog” in 2019. Of the 3705 cases which were completed across our courts in 2018 (this amount does not include the Family and Employment Tribunals) 258 were backlogged cases. As of January 2019 we only have 282 backlogged cases on the cause list, which is significantly down from the 409 backlogged cases pending in January 2018. Furthermore, during the year we saw that on average, our courts were completing more cases than were filed. For a court to be deemed “healthy”, according to the matrices on which the global community measures court performance<sup>1</sup>, the goal is to reach a plateau where our backlog is a nominal percentage of the total cases, and our number of completed cases is largely on par with the number of cases filed. We are excelling in both of the fields, performing better with each year. This is largely due to the hard work being put in by each of our Judges and magistrates.

In this achievement, we cannot overlook the special efforts put in by the members of the bar. I wish to thank each and every one of you for embracing our new way of working, this despite occasional inconsistencies and teething problems in implementing our programmes. Thank you for bearing with us and working with us.

This year I also wish to again acknowledge the selfless work of the members of our Tribunals who continue to deal with too many delicate and complicated matters.

Through our ongoing dialogue with our stakeholders we have seen a marked improvement in our ability to efficiently administer our cases. I would therefore like to thank the Attorney General’s Chambers, the Police Force, Prison Services, Probation Services and the Social Workers for their engagement with us this past year. Additionally we rely on medical experts and professional experts namely land surveyors, quantity surveyors, civil engineers and auditors who give up time from their jobs to ensure the accuracy and completion of our cases. I thank them.

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<sup>1</sup> See in this regard the *International Framework for Court Excellence* to which Seychelles subscribes, available at <http://www.courtexcellence.com>.

A final word of thanks goes to our Senior Management Team who miraculously keep the system running and the court house standing despite the daily onslaught from our resident pigeons.

We asked Seychelles to see whether the Judiciary is fit and able to do its job and we remain 100% convinced that it is. Our commitment to integrity, transparency and accountability is reflected in the little changes that we make as much as in the big ones. Our impressive statistics and track record suggests that we are firmly on track towards modernizing our system and truly becoming the fit-for-purpose institution that our Constitution anticipated.

And so for 2019 we are shifting our focus from the institutional and physical into how we make decisions. We are focusing this year on a fundamental tenet of constitutionalism – the requirement of a functioning democracy that Judges and Magistrates make decisions Without Fear or Favour.

The Oath of Allegiance and the Judicial Oath we take as Judicial Officers originate from the 1215 Magna Carta:

“...and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God.”

The main reason for the Magna Carta was to prevent the abuse of power by King John. Ultimately, the Great Charter recognised for the first time that everyone including the King was subject to the law and gave all freemen the right to justice and fair trial.

The values laid down in the Magna Carta have been repeated and espoused for centuries in other declarations and treaties: the French Declaration of Rights (1789), the Universal Declaration of Rights (1948), The European Convention on Human Rights (1950), The African Charter on Human and People’s Rights (1986) and the Seychelles Constitution (1993).

But what does it mean today to dispense justice without fear or favour according to law?

In the famous or perhaps infamous second trial of the Scottsboro Boys Trial in Decatur, Alabama in 1933, (the inspiration for the novel *To Kill a Mocking Bird*) in which 8 black

youths, the youngest being only 13 years of age, had been charged and convicted of the rape of two white women and which decision was subsequently reversed by the Supreme Court on grounds of lack of legal representation for the youths, the press welcomed with great enthusiasm the appointment of Judge James Horton to preside over the second hearing. He was viewed as being of "unusually equable nature, great legal ability, and fairness." As the trial progressed it became clear that the prisoners were innocent; the white community planned a lynching of the prisoners. Judge Horton, normally soft spoken, raised his voice to a near shout and issued the warning that he had absolutely no patience with the mob spirit, "and that he had ordered police guards to shoot to kill if necessary in defense of the black prisoners." Addressing the jury he implored them:

"So far as the law is concerned it knows neither native, nor alien, Jew nor Gentile, black nor white. This case is no different from any other. We have only to do our duty without fear or favor."<sup>2</sup>

The jury nevertheless returned a verdict of guilty. Yet, dispensing justice without fear or favour in the face of his ostracisation by the influential white community to which he belonged and with the knowledge that he would not be reelected as judge the following year at the end of his five year term, Judge Horton, did what is seldom done though permitted in such circumstances, he courageously set aside the jury's verdict on the grounds that the evidence could not meet the legal standard required for a conviction. He commented later that a judge must do his duty:

"Justice fiat coelum ruat – Let justice be done though the heavens may fall".

Judge Horton dealt with a case that was no less political than many we Seychellois judges have to deal with today. We run the same gauntlet of criticism and censure, fearing being overlooked for promotion and defamed and humiliated. Nevertheless, like Judge Horton

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<sup>2</sup> Scottsboro: An American Tragedy Transcript Source URL:  
<http://www.pbs.org/wgbh/amex/scottsboro/filmmore/pt.html>

we are asked to exercise moral courage and not to do anyone's bidding but what the law requires.

Every judicial officer can give examples of occasions on which persons have tried to approach them about a case whether innocently or purposefully. But they will refuse to grant such favours. At a time when our courts are more than ever subject to considerable scrutiny by the media, both mainstream and social, there continues to be a misunderstanding of the role of the judiciary and what the court can do and cannot do and what judicial officers may do and may not do. Society may think that there is a real risk that Judges might favour one litigant for whatever personal reason. In a society as small and interconnected as ours, it is difficult for us to protect ourselves against the perception that there may be links between us and certain litigants. Our oaths are taken seriously and misbehaviour, corruption and bias by any of our legal fraternity in any respect will be sanctioned. We must fiercely guard our independence, erring strongly on the side of caution.

Conversely, we cannot be afraid to fulfil our duty. Taking the correct decision may threaten our comfort. We might be afraid for our personal security or the political ramifications of our decisions including the risk of having our purse strings controlled by the entities we may find against. Similarly, whilst the threat for removal for our own misbehavior and even "concocted" misbehaviour is real, we must nevertheless remain true to our oaths; this despite our personal distress, suffering and hardship. As the eminent Judge John Toohey who presided over the famous Mabo trial in Australia and ruling in favor of the indigenous Meriam community for their land rights in the Torres Straits stated:

"A judge true to the judicial oath will not allow [the consideration for removal] to intrude upon judgments, but the judge whose decisions are thought to be adverse to government will almost certainly pay the penalty when the time comes for the renewal of appointment. When we speak of the independence of judges and when we say, 'without fear or favour, affection or ill will', we are asserting the independence of judges in all situations. But history and experience, including contemporary experience in other countries, teaches us that a judiciary, which is dependent upon the goodwill of the government of the day, must inevitably lose

the confidence of the community. And when that happens, the administration of the law is brought into disrepute and one of the two bastions against excess of governmental power (the media is the other) loses its force.”<sup>3</sup>

There is also within our legal system an ongoing tension between justice and the rule of law: Often when litigants have weak legal arguments they attempt to beguile judges by appealing to their sense of “justice.” What is often ignored by the judge, who being tempted, ventures down this path is that there is no universal and objective standard of substantive justice outside the rule of law. Justice outside of the law is unknowable and subjective and when meted out in this fashion bodes uncertainty and is a recipe for a chaotic legal system. As the American essayist, Ralph Waldo Emerson stated:

“One man's justice is another's injustice; one man's beauty, another's ugliness; one man's wisdom, another's folly; as one beholds the same objects from a higher point.”<sup>4</sup>

A person's rights and their enforcement ability must be premised on the certainty of law. Our job is to blindly apply the facts of situations to the legal principles that have been laid down by the statute makers. We are not free to impose our own nebulous and subjective notions of justice. It is why our Constitution and our laws provide for official state norms, which we have sworn to uphold. As has been pointed out:

“The rule of law is neither form for form's sake, nor a second best approximation of true justice. Rather, the rule of law is what makes possible the knowledge and enforcement of justice in a social setting.”<sup>5</sup>

When the judicial oath speaks of doing right 'according to law', that law is in our Constitution, the statute book and the decisions of courts. If the law is unjust but not unconstitutional, we are unable to change it. While we have the last word in interpreting the Constitution and the laws, the executive and the legislature may change the law,

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<sup>3</sup> Judge John Toohey, 'Without Fear or Favour, Affection or Ill-Will': The Role of Courts in the Community” - Public lecture in Perth in April 1998.

<sup>4</sup>The complete works of Ralph Waldo Emerson: Essays. 1st series [Vol. 2] Circles 315-316

<sup>5</sup> Randy E. Barnett, *Can Justice and the Rule of Law Be Reconciled?* (1988) 11 Harv. J.L. & Pub. Pol'y 597, 623.



which results from the decisions of the courts. And parts of our Constitution may be changed either by legislature or by the will of our people through referendum.

One of our primary safeguards is the requirement that we produce clear and reasoned judgments laying out our reasons for our decisions and the laws on which our decisions are made. Our judgments must be able to withstand scrutiny and criticism. I want to take this opportunity to caution attorneys against relying on so many references to external, non-binding law as if it were binding even when there is binding Seychellois law on the matter. For too long we have looked to the laws of other countries as if they have better answers to our problems than our own decided case law. As Judges we need to be very cautious of the “a-systematic ‘cherry-picking’” of comparative legal citations<sup>6</sup> and remember that they are as deeply embued in the legal and political context in which they were decided as our judgments are in our legal context. I would therefore challenge us to take an academic approach to our judgments, challenging our assumptions, presumptions and sources. We must subject our own judgments to a rationality test.

The theme of Without Fear or Favour applies not only to the judges and lawyers, but also to all judiciary staff. I would ask you to anxiously challenge yourself to ensure that all litigants and lawyers walking down our halls get the same level of treatment and that you do your job with all diligence to the best of your ability. The Judiciary commits itself to ensuring that *en dimoun ki sorti Anse Etoile i ganny menm kalite tretman devan nou Palais de Justice ki en dimoun ki sorti Eden Island.*

We are entering the last two years of our strategic plan. We have put in place the structures to enable us to achieve the many objectives we set out. We commit ourselves to consolidating our achievements and ensuring their sustainability. We recommit ourselves to our judicial oaths which we will uphold ‘though the heavens may fall.’

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<sup>6</sup> See generally Ran Hirschl *Comparative Matters* OUP2014 p 41