The Judiciary of Seychelles

Celebrating 30 years of the Constitution and 120 years of Service

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A Look into the Rear-View Mirror and Through the Windscreen

Anniversaries always provide a great opportunity for reflection and for introspection. They also provide an opportunity to look to the future and see how we can improve on what exists.

The Seychelles judiciary may not be an old institution, but compared to the one next door which next month will be celebrating its 30th anniversary – and even if we added the previous Assemblies, would only be hovering somewhere around a half century – the judiciary at 120 years has attained a degree of venerability in a nation whose total existence is just double that span.

The 1903 Judicature Order in Council established the Supreme Court as a court separate from the Supreme Court of Mauritius, transmuting it from a district court of Mauritius into a court of unlimited jurisdiction with all the powers, privileges, authority and jurisdiction of the High Court in England, including equitable and admiralty jurisdiction. In this respect, as Sauzier J reminds us in the case of *Privatbanken Aktieselskab v Bantele (1975) SLR*, the Supreme Court of Seychelles is an institution of British inspiration, and not, as its Mauritian counterpart, a successor of the French Tribunal de Première Instance and Cour d'Appel. It was this Britishness which meant that, until Independence, all Chief Justices, as happened to their British counterparts, were knighted. And so, we had our own Sir France Bonnetard and Sir Georges Souyave, home-grown knights of the realm.

But we also had another – Sir Clement Nageon de Lestang. And this allows me to reflect a little on the chequered history of appeals from the newly established Supreme Court. Divorce from Mauritius was not a slam dunk. Although we had our Supreme Court, we had no appellate court. Until we got our own Court of Appeal at Independence, appeals from the Supreme Court were split between the Mauritian Court of Appeal (itself a court constituted of two or more Supreme Court judges) for civil appeals, and the East African Court for criminal appeals, with a further appeal to the Privy Council. It is in the East African Court that Sir Clement sat and where he

obtained his knighthood. If the link with East Africa was severed – although the Court of Appeal had for a while a member who had served on the ECA, the aptly-named Justice Law – the link with Mauritius remains strong, not only with several sitting judges and lawyers having trained there, but with a quasi-permanent representation from that country on our courts here.

But nature teaches us that things are never static. Not even in the Judiciary, that bastion of imperturbability and invincibility.

When I joined the Bar in 1978, the Attorney General was British. He was the last, and since about 1980 we have had a succession of mostly home-grown AGs. The Supreme Court had two judges, Sauzier J and Wood J, both non-Seychellois. Until Twomey J became Chief Justice, all subsequent CJs were foreign. The court of Appeal was a court of three judges, all foreign. It is comforting to see that the Supreme Court bench has now grown to close to ten, including a Master, and all are Seychellois. In the Court of Appeal, there is now a majority of resident judges. As we celebrate the 30th anniversary of the constitution of the Third Republic, these are causes for rejoicing. The Seychelles superior courts have come of age.

But, have they really?

The basic anachronisms that remain are already known to us all:

- We have a Supreme Court which is not supreme in hierarchy;
- We have a Constitutional Court which is not the apex court;
- Our head of the judiciary does not sit in our apex court;
- We enjoy a system of law which is drawn from two great legal traditions but which have difficulty mixing;
- Our Supreme Court retains referral jurisdiction from the former colonial power;
- Judges are nominated for appointment by an authority which is purely political in its structure;
- We belong to regional and international bodies with functioning courts but whose jurisdiction we barely recognise.

As we reflect on the last 120 years, it may be good to pause a little and examine these areas as ones where change may be required.

Hierarchy of Courts

First, the names and hierarchy of courts. Before getting into the subject, a word about the Constitutional Court. This is a product of the 1993 Constitution and came about from a sense that a new and comprehensive constitution needed a court dedicated all to itself. The title of the Constitutional Court Rules give an indication of what the court is intended to do: Application, Contravention, Enforcement or Interpretation. But, good intentions aside, has the court been placed in the correct place in the hierarchy? Although the practical problem has been resolved by the ad hoc court in the recent case of *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited SCA MA 35/2022*, the feeling that there is something odd about a Constitutional Court unable to determine a constitutional aberration by the Court of Appeal because of its position in the court hierarchy is as old as the cases of *Simeon v Republic Cr App 26/2002* and the more recent *Bristol v Rosenbauer SCA MA 28 of 2021 [2022] SCCA 23* . Then there is the old problem of reference by other courts to the Constitutional Court of constitutional problems spontaneously arising during the hearing of a case. Does the court make an assessment of whether the question is a constitutional one or not? Or are courts obliged to allow the Constitutional Court to make that determination as well as determining the constitutional problem? These were not issues in pre-Constitutional Court days where, in keeping with most Commonwealth countries, the trial court had jurisdiction to itself determine constitutional problems arising. A return to that method of adjudication would result either in the eradication of the Constitutional Court or its elevation beyond the Court of Appeal.

Head of the Judiciary

Unlike the other two branches of government, where the heads are clearly identified, the Judiciary is handicapped. The apex court is the Court of Appeal, but the Chief Justice is the head of the Judiciary. So long as the President of the Court of Appeal was non-resident, there was no issue. Now that both heads are resident, who should be the true head of the institution – the one who presides over the apex court or the one who presides over the larger court in terms of workload, budget, personnel and capacity? Nomenclature is key here. So long as a court is named the Supreme Court, the problem is easily solved. But, if the Supreme Court is not supreme in that it

has a court above it, what is the status of the person presiding over that court? Should therefore – whether or not the apex court should remain the Court of Appeal or become the Constitutional Court – the top court not be renamed the Supreme Court, with the Supreme Court adopting the more common and relevant name of High Court? And, if that happens, who will be the head of the institution?

Mixed Jursidiction

Edith Wong and I are currently engaged in advising the opposing parties in an international arbitration before the Hong Kong Arbitration Centre. One of the elements which we have to advise on is our peculiar system of law derived from both English common law and French civil law, a system which has been described by Venchard, Glover and Angelo in the preface to their work *The Law of Seychelles through the Cases* as '*a classic among mixed jurisdictions*'. And here is the first problem. What is the most exact way of defining our system? Professor Chloros has coined the phrase '*mixed jurisdiction*'[1]. Twomey, in *Legal Metissage in a Micro-Jurisidction* calls it legal '*metissage and creolised entity*'; a '*mixity'*.[2] Venchard and others prefer to describe it as a '*hybrid system*'. Perhaps our system is all of the above, assuming there is a difference between them. This mélange has caused some confusion, and not only between Ms Wong and I. If it is accepted as correct that the system does not permit a choice of law in the sense that one cannot in a case of delict look for solutions from the English law of Tort,[3] what have we done to incorporate a mixed jurisdiction instead of entertaining a system of two parallel jurisdictions where the twain are destined never to meet? To compartmentalise the mixing into separate French Civil and English Common law cadres offends against the basic notion of mixing. Ours is not one of two separate systems co-existing in one jurisdiction. It is, rather a morphing of both into a new system which has traits of both French Civil and English Common law; of an overlapping of systems. But this has not happened universally yet and the desire of Chloros, Twomey et al has not been realised. *Metissage* has not progressed as broadly as it has and the system today may more properly be

[1] A.G. Chloros, *Codification in a Mixed Jurisdiction*, 1977. He says, at page 3, '*In a sense, the new Civil Code of Seychelles may be seen not only as a body of rules offering practical solutions, but also as an experiment in Franco/British codification.*'
[2] Twomey, *Legal Metissage in a Micro-Jurisidction: The Mixing of Common Law and Civil Law in Seychelles*, 2017. Speaking of the same events, Twomey says at page 18: '*But it is also at this juncture that the erosion of French law would begin and mixing with English law would accelerate…*'
[3] *Civil Construction Company Limited v Leon & Ors SCA 36/2016*

classified as a dual-law system rather than a mixed jurisdiction, the two systems being used in parallel rather than allowed to overlap and merge. Venchard et al have reserved a particular criticism for the lack of more mixing: they say in the preface to *The Law of Seychelles* that our law reports have conflicting decisions resulting from the failure to recognise that the law applicable in Seychelles is neither English nor French '*but that of a mixed jurisdiction where a hybrid system prevails.*'

English Jurisdiction

As we have seen earlier, the genesis of the Supreme Court meant that it was invested with all the powers, privileges, authority and jurisdiction of the High Court in England. This is now entrenched in section 4 of our Courts Act. Whether 30 years into our new constitution and in the sixth decade of our independence from Great Britain such a provision is still relevant has been the cause of much discussion, not least in the 2017 Court of Appeal case of *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited SCA 15/2017*. As we embark on a review of the last 120 years and look forward to the next 120, this is a subject that we will have as a Judiciary to grapple with.

Interestingly, when in 1981 Mauritius came to revise its equivalent of section 4 of our Courts Act, it borrowed from the New Zealand Judicature Act 1908 the phrase '*judicial jurisdiction necessary to administer the laws of Mauritius*' to replace '*powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England*.' This allowed resort to a broader range of jurisdictions than simply English law and would more conveniently fit in with the concept of our mixed jurisdiction, as it has done for the similarly-parented Mauritian system.

Judicial Appointments

The constitution invented a novel procedure for choosing judges for appointment. In deciding that, in a modern democracy with a constitutional framework of a balance of power between the three branches of government, it was not appropriate for judicial appointments to be in the gift of the President, who is also head of the Executive branch, the framers of the constitution decided not to follow Commonwealth best practice and create a Judicial Services Commission but chose to create a body whose membership would be determined by two politicians. Not only that, but the body has no representative from the Judicial branch. Is it time to review the system, as suggested by the

Constitutional Review Committee of 2008, or should the old adage 'if it is not broken, don't fix it' hold?

Regional Courts – Second Appeal Tier

In two years' time I will retire at the end of my second 5-year term as a judge of the COMESA Court of Justice (CCJ). During my tenure, I have come to appreciate the peculiar position of regional courts, such as the CCJ. Regional courts have a singular role and the best examplars of these are the – now defunct – SADC Tribunal and the very alive East African Court of Justice (EACJ), the successor of the court on which Sir Clement served. *Nul n'est prophete dans son pays*, Scripture reminds us, and my tenure on the CCJ has not afforded me the handicap of recognition in Seychelles.

Nonetheless, as we celebrate this 120th anniversary, one item which should not be left unconsidered is the possibility of having a second appellate tier. Mauritius has retained the Privy Council and is the richer for it. The Privy Council is an expensive option. Nearer home are excellent courts (including the one on which I serve) which are free to access and which could serve as a second-tier appellate court. All East African nations now have recourse to the EACJ in Arusha, and soon the new SADC Tribunal, once its jurisdiction is agreed, may be the final stop for countries of that block, at least in matters of human rights and the rule of law.

On the occasion of the signing of the AfCFTA five years ago I was accorded the privilege of addressing lawyers in Rwanda on the seminal cases decided by regional courts. This showed that the African mainland is committed to the notion of regional courts. Should we show the same interest?

So, there we are, some musings from a person who has not only enjoyed a long career at the Bar but who has also had the advantage of looking at the Judiciary from the perspective of the Legislative branch and service on the CCJ. For obvious reasons, I provide no answers, but offer these few questions, not as criticisms, but for further reflection as we look forward and wonder whether we are where we would like to be, or whether the next 120 years promise us as much evolution as the last 120.

Bernard Georges