

## **Seychelles**

### **Introductory Notes**

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#### **I. Origins and Historical Development of the Constitution**

The Republic of Seychelles is an archipelago of 115 islands in the West Indian Ocean, situated about 1,000 miles east of Mombasa, Kenya. The biggest island is Mahé, which is 17 miles long and 5 miles across at its widest point. The town of Victoria, on Mahé, is the capital of Seychelles and the seat of government. The only other islands of importance are Praslin and La Digue. Together with Mahé and 40 of the other islands, they have a unique geological feature – they are the only mid-oceanic islands of granite in the world. The remainder of the islands – the Amirantes, Aldabra, Farquhar, Alphonse, and Coëtivy groups – are all coralline.

The population of Seychelles is 89,700,<sup>1</sup> and is made up of a well-integrated mix of European, African, and Asian peoples. Seychelles had no indigenous peoples. Seychellois are the descendants of the early French settlers and African slaves brought to the islands in the 18th century; of Chinese who arrived as traders in the 19th century; and of Indians who settled in the early 20th century. Creole<sup>2</sup> is the native language; English and French are, however, commonly used. English remains the language of government and commerce. The Constitution of Seychelles states in Article 4: ‘The national languages of Seychelles shall be Creole, English and French.’

The International Monetary Fund intervened in October 2008 to bail out Seychelles, whose financial crisis was exacerbated by Somali marine piracy which today continues to impact negatively on the two stalwarts of its service-based economy: tourism and fisheries. In early 2012 the gross domestic product per capita was US\$10,727.50 and the public debt was at 70 per cent of GDP.<sup>3</sup>

Seychelles’ history is closely associated with that of Mauritius, of which it was initially a protectorate. Seychelles and Mauritius were French colonies before colonial control was taken by England. In 1742, the Governor General of Mauritius, Mahé de Labourdonnais, who was concerned about English ambitions in the Indian Ocean, decided to prevent any attempt by England to colonize other uninhabited islands in the area and despatched Captain Lazare Picault on a voyage of discovery.<sup>4</sup> He landed on Mahé, the main island of Seychelles, on 22 November 1742, but the islands were not settled by the French until 1770.<sup>5</sup>

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<sup>1</sup> 2011 Statistics, Seychelles National Bureau of Statistics [<http://www.nbs.gov.sc/> accessed 1 March 2013].

<sup>2</sup> Seychelles Creole is French-based. See Christina Tamaa Fleischmann, *Pour Mwan Mon Lalang Maternel i Al avek Mwan Partou: A Sociolinguistic Study on Attitudes Towards Seychellois Creole* (Peter Lang Pub Inc, 2008).

<sup>3</sup> 2011 Statistics (n1). See Government of Seychelles, ‘Debt Management Strategy For the Years 2010 – 2012’ [<http://www.finance.gov.sc/Downloads/DebtManagement/Debt%20Management%20Strategy.pdf> accessed 1 March 2013].

<sup>4</sup> John Bradley, *The History of Seychelles* (Clarion Press, 1940) 8.

<sup>5</sup> Deryck Scarr, *Seychelles since 1770: History of a Slave and Post-Slavery Society* (Hurst and Company, 2000)

Seychelles became a dependency of Mauritius and was administered locally by appointed administrators. News of the French Revolution temporarily changed this arrangement. The settlers, in the spirit of the Revolution, set up their own Colonial Assembly, drafted a Constitution without reference to Mauritius or France, invested the Assembly with both criminal and civil judicial powers, and declared Seychelles a separate colony from Mauritius. Two attempts to reject this self-assertion, to modify the self-imposed Constitution, and to bring Seychelles back under the control of Mauritius failed.<sup>6</sup> It was only the arrival in Seychelles in 1793 of Commandant Quéau de Quinssy which re-established formal control by Mauritius and marked the beginning of the governorship of Isidore Decaen, the then Captain-General of the French settlements beyond the Cape of Good Hope, and put an end to the Seychelles Colonial Assembly.<sup>7</sup>

By 1810, after several skirmishes and a series of capitulations to the British, the Union Jack was firmly planted on both Seychellois and Mauritian soil. Seychelles continued to be administered by Civil Agents and Commissioners under the direct orders of the Governor of Mauritius, and under Mauritian law, which was applicable by implication. However, the ultimate control of Seychelles lay with the Colonial Office in London. Pressure was brought to bear on the Colonial Office until it finally accepted the proposals for a Seychellois local legislature, with the Board of Civil Commissioners sitting for the first time in 1872. This was, in effect, the first Seychellois Constitution.<sup>8</sup>

Seychelles had to wait until 1903, however, to become fully independent from Mauritius and a fully-fledged colony of Great Britain.<sup>9</sup> The laws in force were preserved except where they were incompatible with legislation passed by the Seychelles Legislative Assembly. The white minority, who were descendants of the first white settlers and slave owners, would remain very much the ruling class until independence.

Two main political parties, the Seychelles Democratic Party (SDP) and the Seychelles People's United Party (SPUP), were to emerge and remain the two predominant parties for much of the 20th century. The legislative elections in April 1974, which were conducted on a 'first past the post' system, saw James Mancham of the SDP receive thirteen seats for 52.4 per cent of the vote and Albert René of the SPUP receive two seats for 47.6 per cent.<sup>10</sup> The elections had been fought by the SDP on the issue of integration with Britain, against the SPUP's call for independence. René's party felt robbed not only of power but of control of the larger population's basic needs in terms of education and economy.<sup>11</sup> With regard to integration with Britain, however, the writing was on the wall.

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<sup>6</sup> Guy Lionnet, 'Les Effets de la Revolution Française aux Seychelles' in Claude Wanquet and Benôit Julien (eds), *Révolution Française et Océan Indien: Prémices, paroxysmes, héritages et déviances* (L'Harmattan, 1996) 191.

<sup>7</sup> Albert Auguste Fauvel, *Unpublished documents on the history of the Seychelles Islands anterior to 1810* (Government Stationery Office, 1909) 189.

<sup>8</sup> Scarr (n5) 79.

<sup>9</sup> Letters Patent, 31 August 1903.

<sup>10</sup> African Elections Database [<http://africanelections.tripod.com/sc.html> accessed 1 March 2013].

<sup>11</sup> Scarr (n 5) 190.

Two constitutional conferences took place in London in 1975 and 1976 to discuss the future of the very small colony.<sup>12</sup> The first Constitution, dubbed the ‘Deverell Constitution’ after the constitutional adviser, Sir Colville Deverell, resulted in an interim Constitution to prepare the nation for independence. A second constitutional conference took place at Marlborough House, London, and adopted most of the Deverell provisions. Midway through negotiations, however, the basis of the Constitution changed dramatically from a government to be headed by a Governor General with the British Queen as head of state, to a republic with a President and a Prime Minister.

Independence was declared on 29 June 1976, with a coalition government in place to see through the new fledgling republic. The Constitution was one based on a presidential democracy, which was unusual given the fact that most British colonies adopted Westminster-style democracies after independence. This undeniably stems from the Deverell Report of 1967, which advocated a move away from the Westminster model, presumably because such a model would be too fractious for a young country and democracy. Its influence has permeated all three of Seychelles’ Constitutions, which have all provided for presidential systems of government.

Less than a year after independence, René had overthrown the coalition government in a coup in 1977. The Constitution of 1979, decreed after the coup, turned Seychelles into a one-party state, with political activity conducted only under the auspices of the Seychelles People’s Progressive Front. Seychelles was declared a Sovereign Socialist Republic. The Constitution was deemed the supreme law and any law inconsistent with it was invalid and ineffective. This Constitution of the Second Republic was to last for 18 years. During its term there were many human rights abuses, including disappearances and forcible expulsion of opposition activists, the suppression of political activity by the opposition, and compulsory land acquisitions. Nevertheless, there was also a social equalisation programme which saw investment in and access to public housing, health, and education. It is undeniable, however, that those members of society who identified with the ruling party fared better than those who opposed it or refused to pay it lip service.<sup>13</sup>

René attended the Commonwealth Heads of State Conference in Harare in October 1991 and, bowing to international pressure and that of Seychellois exiles, he agreed to return to a multi-party political system. There followed a transition period which saw the drafting of a new Constitution, referenda, and elections. The first draft of the Constitution was defeated by referendum in November 1992. The second draft was approved by 73.9 per cent of the population in a referendum held on 18 June 1993.<sup>14</sup> The constitution-making process was in many ways a transformational one, deriving from a period of deep division and distrust. The Constitutional Commission made sure that the major opposing sides were represented, and this did much to ensure that the deliberations were transparent, with wide public participation leading to public perception of legitimacy and ownership. The 1993 Constitution – founded

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<sup>12</sup> William McAteer, *To Be A Nation* (Pristine Books, 2008).

<sup>13</sup> Scarr (n 5) 199.

<sup>14</sup> Available at [<http://www.eisa.org.za/WEP/sey1992constitution.htm> accessed 1 March 2013].

therefore on genuine compromise – is ambitious, and is intended to reflect the diverse aspirations of a sharply and politically divided, but racially harmonious, nation.

## II. Fundamental Principles of the Constitution

As has been outlined above, Seychelles has a written Constitution, the third in force since independence from Britain in 1976. The Constitution is the supreme law of Seychelles and is also the most authoritative source of its laws.<sup>15</sup> The Constitution opens with a chapter on ‘The Republic’, which outlines the governance dimension – ‘Seychelles is a sovereign democratic Republic.’<sup>16</sup> It defines the territory of Seychelles, the national symbols, and languages. It provides for the rules of interpretation of the Constitution.

Chapter II sets out the provisions relating to citizenship, and was amended to deal with the eligibility of persons born outside Seychelles between Independence Day on 29 June 1976 and the 5 June 1979 revolution, and persons married to citizens of Seychelles wishing to become citizens of Seychelles in their own right.<sup>17</sup>

Chapter III contains the Seychellois Charter of Fundamental Human Rights and Freedoms, (‘Charter of Fundamental Rights’) which in many respects is a verbatim reproduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’). The Charter is progressive in that it provides for the enforcement of first generation rights, such as freedom of expression and the right to a fair trial, but also for the rights to work and to health care, and even third generation rights, for example the rights to a safe environment and cultural life and values. It also includes a device of modern constitutionalism, by setting out fundamental duties. It also provides for remedies for the breach of these rights.<sup>18</sup> It is disappointing, however, that the Charter does not feature at the start of the Constitution. This would perhaps have given it more prominence and conformity with the widely-accepted view that the structure of a constitution determines its understanding and acceptance; the more appealing the structure is to the citizens, the more likely is their effective inclusion in forming the political community, on the basis of *their* constitution.<sup>19</sup>

The Constitution then outlines the distribution of powers and the legislative jurisdiction of the National Assembly. It provides for the main organs of state power: Chapters IV and V contain extensive provisions relating to the status of the President and the executive,<sup>20</sup> and Chapter VI outlines the rules pertaining to the functions of the legislature, including the composition of the Assembly, the qualification and election of its members, and their

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<sup>15</sup> Article 5, Constitution of the Republic of Seychelles.

<sup>16</sup> Article 1 of the Constitution.

<sup>17</sup> Constitution of Seychelles Amendment Act, 19 March 1995.

<sup>18</sup> Article 46 of the Constitution.

<sup>19</sup> Markus Kotzur, ‘Recent developments in International Constitutional Thinking: Reform Perspectives for the Seychelles Constitution’, paper given at a symposium which took place in the European Parliament on 7 October 2008 [[www.europarl.europa.eu/committees/en/afco/studiesdownload.html?languageDocument=EN&file=29707](http://www.europarl.europa.eu/committees/en/afco/studiesdownload.html?languageDocument=EN&file=29707) accessed 1 March 2013].

<sup>20</sup> Articles 50 to 76 of the Constitution.

legislative power. It also provides for the sessions and dissolution of the National Assembly.<sup>21</sup>

The judicial power of Seychelles, the appointment and terms of office of judges, and the organisational structure and jurisdiction of the courts are set out in Chapter VIII.

In addition to the central state structure, Chapter VII sets out the electoral areas, and Chapter IX covers the Constitutional Appointments Authority, which is charged with the appointment of several key public authorities. The remaining Chapters X, XI, XII, XIII, XIV, and XV deal with the Ombudsman, the Public Service Appeal Board, Finance, the Police Force, the Defence Forces, and miscellaneous provisions, respectively.

### **A. Constitutional Goals and Values**

The goals and values of the Constitution can be set out as follows:

1. To build a just, fraternal, and humane society;
2. To recognise the inherent dignity and inalienable rights of all Seychellois;
3. To build a society based on freedom, justice, welfare, fraternity, peace, and unity;
4. To recognise and endorse citizens' rights to life, liberty, and the pursuit of happiness, free from all types of discrimination;
5. To maintain Seychelles as an independent state, both politically and economically;
6. To uphold the rule of law based on the Charter of Fundamental Rights enshrined in the Constitution;
7. To develop a democratic society;
8. To ensure a progressive social order guaranteeing food, clothing, shelter, education, health, and a steadily rising standard of living for all Seychellois; and
9. To promote the sustainable economic and social development of Seychelles.

These goals and values are endowed with a considerable degree of enforcement potential, as they are further underpinned in substantive provisions of the Constitution, namely the Seychellois Charter of Fundamental Rights and the enforcement provisions of Article 46. The potential for enforcement of the values and objectives of the Constitution is also reiterated and made possible by Article 130(1) of the Constitution, which states that a person may apply for redress to the Constitutional Court where any provision of the Constitution has been contravened.

The goal of developing democracy, insofar as setting out legal limitations on government and ensuring a multi-party system, is not explicitly incorporated in the Constitution. There are no

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<sup>21</sup> Articles 77 to 111 of the Constitution.

provisions, for example, to ensure the rights of the opposition or to guarantee participatory democracy, apart from Article 24, which provides for the right to participate in government.

## **B. Constitutional Principles**

The Constitution provides for a democratic multi-party sovereign republic, with the President as head of the executive. The Constitution's Preamble proclaims a commitment to developing a democratic system and upholding the rule of law. Legislative power is vested in a unicameral assembly consisting of twenty-five members. A judiciary is provided for, comprising a Court of Appeal, a Supreme Court, a Constitutional Court, and subordinate courts and tribunals. Each branch of government has clearly delimited functions.

Although the Preamble states a commitment to the upholding of the rule of law, that principle is not mentioned anywhere else in the text of the Constitution. Similarly, the principle of separation of powers is not enunciated. Nevertheless, they are both recognised as 'unenumerated' principles by the courts and inferred from Article 1, which provides that Seychelles is a democratic republic, and Article 49, which interprets democratic society as one in which there is, inter alia, 'the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary'.

Judgments of the courts have been explicit in emphasizing the rule of law. In the unreported case of *Servina v Speaker*,<sup>22</sup> the Court of Appeal held that the powers vested in the President had to be exercised in accordance with the Constitution and the laws of Seychelles. In the recent case of *Bradburn v The Superintendent of Prison and anor*, the Constitutional Court was keen to distinguish between what it saw as confusion between the rule of law and equality of protection before the law as contained in Article 27. It stated that

[t]he Constitutional principles of 'equality before law' and 'equal protection of laws' emanate from two different concepts. The first is a negative concept which ensures that there is no special privilege in favour of anyone; that all are equally subject to the ordinary law of the land. All are equal before law and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean (sic) concept of the Rule of Law in Britain. The second concept 'equal protection of laws' is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have universal application within the country irrespective of difference in circumstances. Equal protection of law does not mean or postulate equal treatment of all persons without distinction. What it postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that like should be treated alike without discrimination. In other words the equals should be treated equally.<sup>23</sup>

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<sup>22</sup> Civ A 4/2001 SCA. There have been no published Seychelles Law Reports (reports of Supreme Court (SC) cases) since 1993 and no Seychelles Court of Appeal (SCA) Reports since 1987. There are no reports of the Seychelles Constitutional Court (SCC). Where there are no published reports, neutral citations are provided in this text. Some of the cases may be available at the Seychelles Legal Institute website [ [www.seyllii.org](http://www.seyllii.org) ].

<sup>23</sup> *Bradburn v The Superintendent of Prison and another* (unreported) SCC 9/2010.

Democracy implies a separation of powers providing checks and balances for each arm of government. The independence of both the legislature and the judiciary are crucial to ensuring that the executive does not rule absolutely. This is especially true for Seychelles, with its history of one-party rule during eighteen years under President Albert René. It may even be more important, given that its Constitution is one providing for a presidential democracy as opposed to a parliamentary democracy.<sup>24</sup>

Although, as pointed out, the separation of powers is unwritten in the Seychelles Constitution, distinct provisions deal with the powers of the President and the executive, the legislature, and the judiciary, and hence the separation of these arms of government can be implied from the fact that their duties and powers are distinct and separate. Moreover, Article 1 clearly proclaims Seychelles as a democratic republic, and democratic society is defined in Article 49 as a 'pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary.'<sup>25</sup>

Case law has also reiterated that the principle of separation of powers is implicit in the provisions of the Constitution.<sup>26</sup> In the case of *Napoléon v Republic*,<sup>27</sup> the Constitutional Court stated that the legislature must operate within the framework of the Constitution and that it could neither usurp the judicial powers of the judiciary nor the executive powers of the executive. Checks and balances are also a feature of the Constitution; hence the power of the legislature is further checked by the fact that Article 87 grants the President the power to refer Bills to the Constitutional Court and Article 130 allows any person to act similarly for any alleged breach of the Constitution if their interest is likely to be affected by the contravention.

Equally, the courts have been vociferous in underlining the separation of powers and the duties of the different branches of government. In the case of *Poonoo v R*,<sup>28</sup> the Court of Appeal refused to have its powers of discretion in sentencing curbed by a legislative provision that imposed a presumptive mandatory sentence without any inbuilt discretion in the provision allowing a departure from the mandatory sentence for reason of substantial or compelling circumstances. It found that in its blanket application the provision might breach the separation of powers. The Court stated:

In the practical application of article 1 and article 48 of the Constitution of the Republic of Seychelles, Courts may not dictate to Parliament not to impose mandatory minimum penalties in appropriate cases any more than Parliament may dictate to Courts not to go below the mandatory minimum in appropriate cases. While the power of Parliament to legislate remains

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<sup>24</sup> See for example Juan J Linz, 'Presidential Democracy or Parliamentary Democracy: does it make a difference?', in Juan J Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy: Comparative Perspectives*, Vol 1 (Johns Hopkins University Press, 1994). For opposing views see Donald Horowitz, 'Comparing Democratic Systems' (1990) 1(4) *Journal of Democracy* (Fall 1990) 73 and José Antonio Cheibub and Fernando Limongi, 'Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered' 2002 (5) *Annual Review of Political Science* 151.

<sup>25</sup> Article 49 of the Constitution.

<sup>26</sup> See for example *Hans Josef Hackl v The Financial Intelligence Unit and another* (unreported) SCA 10/2011.

<sup>27</sup> *Napoléon v Republic* (unreported) CC 1&2/1997.

<sup>28</sup> *Poonoo v R* (unreported) SCA 38/2010.

absolute, likewise the power of the Court to interpret the law and mete out sentence remains absolute.<sup>29</sup>

Further limitations are imposed on the legislature by the entrenched provisions in the Constitution, namely Chapter I (relating to sovereignty and democracy), Chapter III (containing the Charter of Fundamental Rights), and Articles 110 and 111 (concerning the power of the President to dissolve the Assembly).

The constitutional state also has the important functions of acting lawfully and reasonably and not capriciously. This has been articulated in the recent case of *Government of Seychelles v Moulinié*,<sup>30</sup> in which land had been acquired from a private landowner purportedly in the national interest but on which no development had been carried out for decades. On appeal by the land owner for the return of the land, the Court of Appeal stated that the government cannot be seen to be benefiting from a circumvention of the law – in this case from a land acquisition which had not been in the national interest and for which compensation was yet to be adequately paid.

### **III. Fundamental Rights Protection**

#### **A. The Charter of Fundamental Rights and its interpretation**

The Seychellois Charter of Fundamental Human Rights and Freedoms is set out in Chapter III of the Constitution. Essentially, the Charter is its centrepiece. It provides for the enforcement of the three generation of rights. First generation rights (the civil and political rights), which include, inter alia, the right to life (Article 15), the right to liberty (Article 18), and freedom of expression (Article 22), are expressed in positive terms and hence impose positive obligations on the state for their protection. A person alleging that these obligations have been breached is further aided by provisions of the Constitution in terms of the evidentiary burden in proving such breaches. In this respect Article 46(7) of the Constitution provides:

Where in an application under clause (1) [for breach] or where a matter is referred to the Constitutional Court under clause (7) [for breach arising during court proceedings], the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

Second generation rights are also contained in the Charter: for example, the right to health care (Article 29) and the right to education (Article 33). Third generation rights are also provided for: for example, the right to a safe environment (Article 38).

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<sup>29</sup> Ibid, p12 [48]. For a contemporary debate on the constitutionality of mandatory sentences and separation of powers see, for example, Kent Roach, ‘Searching for Smith: The Constitutionality of Mandatory Sentences’ (2001) 39 Osgoode Hall Law Journal Review 367; Russell Goldflam and Jonathon Hunyor, ‘Mandatory Sentencing and the Concentration of Power’ (1999) 24(5) Alternative Law Journal 211; Kieran Riley, ‘Trial by Legislation: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine’ (2010) 19 Public Interest Law Journal 28; and France’s Conseil Constitutionnel Décision No 2011 – 625 DC du 10 Mars 2011.

<sup>30</sup> *Government of Seychelles and another v Charles Alfred Paul Moulinié* (unreported) SCA 16/2012.

Some affirmative action by the state is recognised in Articles 30 (rights of working mothers), 31 (rights of minors), and 36 (rights of the aged and disabled).

The principles of interpretation of the Constitution are set out in Articles 47 to 49 and in Schedule 2 of the Constitution.

Article 48 instructs the courts to interpret the Seychellois Charter of Fundamental Rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms, and to take judicial notice of international instruments and cases.

Section 8 of Schedule 2 of the Constitution provides:

For the purposes of interpretation–

- (a) the provisions of this Constitution shall be given their fair and liberal meaning;
- (b) this Constitution shall be read as a whole; and
- (c) this Constitution shall be treated as speaking from time to time.

In *Servina v Speaker*,<sup>31</sup> the Constitutional Court held that the Constitution provided its own general principles of interpretation, and where they were adequate, resort to other principles or aids was not justifiable. In *Frank Elizabeth v The Speaker of the National Assembly and another*,<sup>32</sup> Domah JA stated, with the other members of the panel concurring:

42. We have had a couple of occasions in the recent past to state that the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See John Atkinson v Government of Seychelles and Attorney General SCA 1 of 2007. The Constitution is not to be treated as legislative text. The Constitution is a living document. It has to be interpreted ‘sui generis.’ In the case of Paul Chow v Gappy and Ors 2007 SCA, we also emphasised the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such. In as much as the Constitution enshrines the freedoms of the people, the Constitutional provisions have to be interpreted in a purposive sense.

## **B. The spectrum of rights**

The Constitution protects all fundamental rights, freedoms, and civil liberties as contained in the Seychelles Charter of Fundamental Rights. The Charter is largely inspired by the European Convention on Human Rights. Generally, the limitations and exceptions to these rights are expressed in the Seychelles Charter as ‘necessary in a democratic society’ and have resulted in the courts applying the proportionality test and using the balancing approach to determine whether individual rights have been breached.

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<sup>31</sup> *Servina v Speaker* (unreported) CC 4/2001.

<sup>32</sup> *Frank Elizabeth v The Speaker of the National Assembly and another* (unreported) SCA 2/2009.

The most basic of the Charter provisions, the right to life, expressly abolished the death penalty by Article 15(2), which states that no law shall provide for a sentence of death to be imposed by any court.<sup>33</sup>

The right to dignity, including the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment, is not subject to any stated derogation. Actions for its breach have been brought in respect of terms of imprisonment imposed by the court, but the Constitutional Court has ruled that terms of imprisonment are neither cruel nor inhuman or degrading if they are proportionate to the seriousness of the offence.<sup>34</sup>

Perhaps the right that has attracted the most court activity has been the right to liberty. The provisions relating to arrest, detention, questioning, and treatment by police generally are contained in the Seychelles Criminal Procedure Code. The Code, however, is silent on a number of issues, including bail. Prior to the 1993 Constitution, the courts relied on the English Judges Rules and Administrative Directions 1964 to decide on issues relating to arrest, detention, and bail. Although these rules were eventually codified in England in the Police and Criminal Evidence Act 1982, the original Judges Rules continue to be applied in Seychelles by a Practice Direction issued in 1971. Article 18 of the Constitution now not only provides for the right to liberty and security of the person, but also stipulates permissible exceptions to those rights, such as arrest and detentions.

As there is no Bail Act in Seychelles, a number of constitutional cases have been brought in relation to bail and unlawful detention under Article 18 of the Constitution, the most important being *Beehary v R*.<sup>35</sup> In that case the Court of Appeal stated that the bail provisions in the Constitution ought to be interpreted in a purposive manner, taking into account the decisions of the European Court of Human Rights and courts in democratic jurisdictions. Continued detention can only be justified in a given case if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule requiring respect for individual liberty.

The personal rights of an arrested person have also been clearly laid down in the case of *Serret v Karunakaran*.<sup>36</sup> In that case the appellant was arrested on suspicion of murder and remanded in custody by a magistrate for 14 days and then for a further period of 7 days. He was subsequently charged, tried, and sentenced to life imprisonment for murder in the Supreme Court. He was, however, released on appeal, and he brought a case before the Constitutional Court claiming that that his right to liberty had been breached by the remand orders of the magistrate. The Constitutional Court held that the remand orders had not breached the Constitution. On appeal the Court of Appeal found that the right to liberty is not breached by a competent court declining to release a person and ordering their remand in custody, bearing in mind that a person charged with an offence must be tried within a reasonable time. The Court also specified the circumstances in which one's liberty may be

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<sup>33</sup> See also section 194 of the Penal Code, which provides that the maximum penalty is imprisonment for life.

<sup>34</sup> *Simeon v Attorney General* (unreported) SCC 28 September 2010.

<sup>35</sup> *Beehary v R* (unreported) SCA 11/2009.

<sup>36</sup> *Serret v Karunakaran* (unreported) SCA 12/1996.

infringed: on arrest on the reasonable suspicion of having committed an offence or of being about to commit an offence, for the purposes of investigating an offence, to prevent the commission of an offence, or if it is necessary for the offender to appear before a competent court. The frequency of cases before the Constitutional Court and the Court of Appeal in respect of arrest, detention, and bail has raised the question of whether specific matters relating to these issues should not have been better dealt with under separate legislation rather than in the Constitution itself.

Other breach of Charter cases have included the right to a fair and public hearing, contained in Article 19 of the Constitution. In *Lai-Lam v R*,<sup>37</sup> the Court of Appeal found that the absence of a defendant at his trial contravened his constitutional right to a fair trial. The terminology ‘within a reasonable time’ qualifying one’s right to a fair hearing has resulted in what may be perceived as an abuse of process by both the police and the courts. The Constitutional Review Committee Report of 2009 found that ‘[t]he courts persistently interpret ‘reasonable time’ very elastically and in a way that seems to condone and justify the prolonged delays with which the police and prosecution undertake the prosecution or disposal (as the case may be) of criminal cases.’<sup>38</sup>

Freedom of expression has been vigorously tested, most notably in the case of *Mancienne v Government of Seychelles (No 2)*.<sup>39</sup> In that case the defendant was subject to an injunction preventing him from publishing a letter which was damaging to the integrity and dignity of the court. He nevertheless published the letter in defiance of the injunction and faced contempt of court proceedings for disobeying the order. The Court of Appeal ruled that freedom of expression, although of fundamental importance, was not absolute, and that in interpreting that right, the court should balance all other competing rights and values, and that contempt of court proceedings are a justifiable limit to the right to freedom of expression. Other permissible limitations to the right to freedom of expression have been the public interest and other pressing social needs (*Seychelles National Party v Michel*<sup>40</sup>). In this case the court found that the right to freedom of expression does not guarantee the right of access to broadcast media, and that although there is a guarantee of a right to expression in available media, there is no right to advertise political views or to own or operate a media platform.

The right to property has been successfully vindicated in a number of cases. In *Talma & Anor v Michel & ors*,<sup>41</sup> the Constitutional Court found that this right included the right to develop one’s property, and damages were granted to the appellant for the breach of her rights. The Court also stated that the infringement of a constitutional right is a serious matter and may justify an award of exemplary damages where the actions of the government are oppressive, arbitrary, and unconstitutional.

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<sup>37</sup> *Lai-Lam v R* (unreported) SCA 5/2004.

<sup>38</sup> Constitutional Review Report 21 December 2009

[[http://www.statehouse.gov.sc/docs/Constitutional\\_Review\\_Report.pdf](http://www.statehouse.gov.sc/docs/Constitutional_Review_Report.pdf) accessed 1 March 2013].

<sup>39</sup> *Mancienne v Government of Seychelles (No 2)* (unreported) SCA 10(2)2004.

<sup>40</sup> *Seychelles National Party v Michel* (unreported) SCA 4/2009.

<sup>41</sup> *Talma & Anor v Michel & ors* (unreported) SCC 02/2010.

The right to be free from all forms of discrimination is provided for in Article 27, which states that every person has a right to equal protection of the law, including the enjoyment of the rights and freedoms set out in the Charter, without discrimination on any ground except as is necessary in a democratic society. This is reaffirmed by a provision in the Preamble of the Constitution which reaffirms the rights free from all types of discrimination. There is, however, no explicit prohibition of discrimination based on specific factors. In *Napoléon v Republic*,<sup>42</sup> the Constitutional Court held that dissimilar treatment does not necessarily offend the right to equality before the law, but stressed that what is prohibited is invidious or hostile discrimination that is arbitrary, irrational, and not reasonably related to a legitimate objective.

While it is generally believed that second and third generation rights are largely unenforceable, Seychelles has grappled with their implementation. The right to work was defined in *Nolin v Attorney General*<sup>43</sup> as meaning a right to practice one's profession and to engage in trade, business, and economic activities of one's choice and not to be deprived of the freedom to continue working for a willing employer. The court was careful to point out that the right did not mean that a person has the right to a job if unemployed. In the case of *Pool v Michel*,<sup>44</sup> the Constitutional Court found that the right to work has corresponding duties and, specifically, the right to work in a chosen occupation, profession, or trade involves a duty to safeguard the health and moral, social, and financial rights of fellow citizens.

In *Regar Publications v Lousteau-Lalanne*,<sup>45</sup> the Court of Appeal stated that the Constitution granted the people of Seychelles the right to an ecologically balanced environment, and in *Eliza v PUC*<sup>46</sup> the right to clean water was considered. The Court in the latter case found that the constitutional right to a safe environment could be breached where there is *force majeure* precluding a party from meeting its obligations under the Seychellois Charter of Fundamental Rights.

While challenges in relation to breaches of Charter rights have demonstrated their clear vertical application, there have been very few actions between private individuals or between private individuals and companies establishing their horizontal application. The recent case of *Maureen Ugo Sala and another v Sir Georges Estate (Proprietary) Limited*,<sup>47</sup> which concerned a breach of the right to enjoy property, does indicate that parties are willing to challenge constitutional breaches even between individuals or, as in this case, between a private individual and a company. As is discussed in the next section, the imposition of duties on all Seychellois citizens also underscores the horizontal dimension of duties towards fellow citizens.

### **C. Fundamental Duties**

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<sup>42</sup> *Napoléon v Republic* (unreported) CC 1-2/1997.

<sup>43</sup> *Nolin v Attorney General* (unreported) SCA 30/1995.

<sup>44</sup> *Pool v Michel* (unreported) SCC 06/1996.

<sup>45</sup> *Regar Publications v Lousteau-Lalanne* (unreported) SCA 25/2006.

<sup>46</sup> *Eliza v PUC* (unreported) SCA 20/2009.

<sup>47</sup> *Maureen Ugo Sala and another v Sir Georges Estate (Proprietary) Limited* (unreported) CC 17/2011.

While all citizens benefit from rights contained in the Charter, it would perhaps have been disproportionate not to impose duties in return, as is increasingly more common in modern constitutionalism and as perhaps dictated by the experience of socialism in Seychelles under the second Constitution. Article 40 of the Constitution imposes duties on every citizen of Seychelles in a number of areas, including the duty to uphold and defend the Constitution, to further the national interest and foster national unity, to work conscientiously, to contribute to the well-being of the community, and to protect, preserve, and improve the environment. The provisions of the Preamble of the Constitution are imported into Article 40(f), where the duty is imposed on the citizen to strive towards the fulfilment of the aspirations contained in the Preamble. Most of the duties articulated, however, are vague and to that extent, perhaps unenforceable.

#### **D. The Enforcement of Constitutional Rights**

In circumstances where breaches of the Constitution occur, Articles 46 and 130 provide for means of redress. Article 46 specifically applies to breaches of the provisions of the Charter of Fundamental Rights. Where these occur or are likely to occur by any law, act, or omission, the person or another person acting on his behalf may bring an application to the Constitutional Court. Similarly, if in the course of any proceeding in any court a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court has to refer the matter for determination to the Constitutional Court as long as the question is not frivolous or vexatious.

Article 130 relates to breaches of provisions of the Constitution other than those under the Charter. Applications are brought before the Constitutional Court for these breaches provided that the Court is satisfied that the applicant has not obtained redress for the contravention under any other law. Hence the applicant has to exhaust other avenues in the first place. The remedies for such breaches are those generally available to the Supreme Court. As the Courts Act<sup>48</sup> confers the Supreme Court of Seychelles with the same powers, privileges, authority, and jurisdiction of the High Court of England, the remedies include the power to grant injunctive relief and to award damages.

#### **E. Limitations of Rights**

Article 47 states that where a right or freedom is subject to any limitation, restriction, or qualification then the latter shall have no wider effect than is strictly necessary in the circumstances and shall not be applied for any purpose other than that for which it is

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<sup>48</sup> Section 5 of the Courts Act, Cap. 52, Laws of Seychelles, provides that the Supreme Court shall ‘continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be brought or may be pending before it, whatever may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.’

prescribed. *Khaidoo and ors v Director General of Immigration*<sup>49</sup> underscored this principle in a case balancing the right to family life with immigration restrictions. The first applicant had been declared a prohibited immigrant to Seychelles in 2000. He subsequently married the second applicant, a Seychellois, in Mauritius in 2001. They failed to have the first applicant's status revoked by the Director General of Immigration and claimed that such refusal contravened their rights to be protected as a family as enshrined in Article 32 of the Constitution. The court found that the family could exercise its right to 'family life' in the first applicant's country of origin, Mauritius, and that the right to 'family life' also involved a consideration of the safeguard of the right of the state to control the entry of non-nationals into the country and that no attempt to circumvent that right would be permitted.

The *leitmotiv* running through the Seychellois Charter of Fundamental Rights is the phrase 'the rights are subject to restrictions as may be prescribed by law and necessary in a democratic society'.

The term 'necessary in a democratic society' is defined in Article 49 as 'a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary'.

In interpreting 'democratic society' in *Pool v Michel*,<sup>50</sup> the Constitutional Court stated that individuals in a democratic society have no absolute or unfettered right in any matter, as they are members of the collective society, and that citizens have to compromise their individual rights for the interests of the society to which they belong.

Further, as pointed out previously, the interpretation of such rights and freedoms must be consistent with the international obligations of Seychelles. This represents a further important protection for fundamental rights, and highlights the significance of the ratification by Seychelles of the major international human rights instruments.

#### **IV. Separation of Powers**

The Constitution provides for three separate branches of government – the executive, the legislature, and the judiciary – but the formal separation of powers is qualified by the principle of balance of powers in other provisions of the Seychellois Constitution.<sup>51</sup> Article 1, for example, states that Seychelles is a sovereign democratic republic, and Article 49 defines democratic society as 'a pluralistic society in which there is ... the rule of law and where there is a balance of power between the Executive, Legislature and Judiciary'.

Hence, although the underlying principle of separation of powers operates to ensure the functional independence of each branch of government and to allow their distinct and largely exclusive functions – in that the executive branch proposes laws, the legislative branch approves laws, and the judiciary applies them through the courts – there is a recognition that

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<sup>49</sup> *Khaidoo and ors v Director General of Immigration* (unreported) CC 11/2001.

<sup>50</sup> *Pool v Michel* (unreported) CC 24/1998.

<sup>51</sup> Articles 1, 49, 66, 77, and 119 of the Constitution.

some overlap is often necessary or desirable for the sake of expediency.<sup>52</sup> There is in effect little overlap between the legislature and the executive because Cabinet Ministers are not permitted to be members of the National Assembly. Article 89 of the Constitution, however, does permit persons to make subsidiary legislation, and this includes Cabinet Ministers. The President encroaches on the judicial function only insofar as he has the power of pardon.<sup>53</sup> Separate Chapters of the Constitution deal with the President (Chapter IV), the executive (Chapter V), the legislature (Chapter VI), and the judiciary (Chapter VIII).

### **A. The Executive**

Chapter IV of the Constitution provides for the executive branch of government. The executive power of Seychelles is shared by the President and the Cabinet. The President is the Head of State, Head of Government, and Commander-in-Chief, and is elected by the people<sup>54</sup> on the basis of universal adult suffrage and by secret ballot for a term of five years.<sup>55</sup> The executive authority is vested in the President and extends to the execution and maintenance of the Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has power to make laws.<sup>56</sup> Article 66A<sup>57</sup> of the Constitution provides for the appointment of a Vice-President, who performs functions assigned to him by the Constitution, an Act, or the President. This may include the responsibility of one or more Ministries. His term of office is the same as that of the President.<sup>58</sup> The Cabinet of Ministers, comprising not less than seven or more than fourteen persons, is appointed by the President subject to the approval of a majority of the members of the National Assembly.<sup>59</sup> A Minister has such title, portfolio, and responsibility as may be determined from time to time by the President, and may be assigned the responsibility of more than one Ministry at any one time.<sup>60</sup>

The President, together with the Leader of the Opposition, is responsible for appointing members of the Constitutional Appointments Authority which, in turn, appoints a number of key public authorities (such as judges, the Attorney-General, the Ombudsman, and the Auditor-General).<sup>61</sup> The number of mandates that the President may serve is three (that is, three five-year terms).<sup>62</sup>

Finally, it must be noted that the Attorney-General, as the principal adviser to the Government, is also a member of the executive. There is no provision for a Director of Public

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<sup>52</sup> See for example Ronald Krotoszynski, 'The separation of legislative and executive powers', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publications, 2011) 234.

<sup>53</sup> Article 60 of the Constitution.

<sup>54</sup> Articles 50 and 66 of the Constitution.

<sup>55</sup> Articles 51(1), 51(2), 52(1) and Schedule 3 of the Constitution.

<sup>56</sup> Article 66(2) of the Constitution.

<sup>57</sup> This was the Third Amendment to the Constitution, passed on 3 April 1996.

<sup>58</sup> Article 66A(2) of the Constitution.

<sup>59</sup> Article 69(1) of the Constitution.

<sup>60</sup> Article 70(1) of the Constitution.

<sup>61</sup> Articles 139, 140, 76, 123, 127, 143, and 158 of the Constitution.

<sup>62</sup> Article 52 of the Constitution.

Prosecutions in the Constitution, as the power to institute criminal proceedings before any court is also vested in the Attorney-General.<sup>63</sup>

## **B. The Legislature**

The legislative power of Seychelles is vested in the National Assembly. The National Assembly is made up of twenty-five directly elected members (on a first-past-the-post system) and up to ten members elected by a scheme of proportional representation based on the results of a general election held at least every five years.<sup>64</sup> The Members of the National Assembly elect a Speaker and Deputy Speaker from among their own numbers.<sup>65</sup> A Minister cannot be a member of the Assembly; if he is, he ceases to be a member on his appointment as Minister.<sup>66</sup> In recent times Ministers have been appointed who are not members of the party in government. In the case of Alain St Ange, he was in fact a retired member of the opposition party, the Seychelles National Party.

The Leader of the Opposition is elected from among the members of the Assembly who are not members of the political party which nominated the incumbent President for election.<sup>67</sup> The legislative power vested in the National Assembly is exercised by the passing of Bills by the Assembly by a majority of members present and voting.<sup>68</sup> Bills are assented to, or deemed to have been assented to, by the President, whereupon they become laws of Seychelles.<sup>69</sup> The deeming provision comes into effect where the President has withheld his assent because he is of the opinion that the Bill infringes the Constitution.<sup>70</sup> In such circumstances the President refers the matter to the Constitutional Court, which decides on the issue. If the Court finds that the Bill does not infringe the Constitution the President has fourteen days to assent to the Bill, failing which the Bill is deemed to have been assented to.<sup>71</sup>

There are entrenched provisions in the Constitution, namely Chapter I (relating to sovereignty and democracy), Chapter III (the Charter of Fundamental Rights), and Articles 110 and 111 (relating to the power of the President to dissolve the Assembly), that may not be altered by Bills of the Assembly unless these have been approved in a referendum by not less than sixty per cent of the votes cast in the referendum and also passed by the National Assembly by a two-thirds majority.<sup>72</sup>

There have been several cases before the Constitutional Court involving the vacation of seats, their replacements, and the right to appeal the decision of the Speaker of the National

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<sup>63</sup> Article 76(4)(a) of the Constitution.

<sup>64</sup> Article 79(1) of the Constitution.

<sup>65</sup> Article 83(1) of the Constitution.

<sup>66</sup> Article 69(3) of the Constitution.

<sup>67</sup> Article 84(1) of the Constitution.

<sup>68</sup> Article 86(1) of the Constitution.

<sup>69</sup> Article 86 of the Constitution.

<sup>70</sup> Article 87 of the Constitution.

<sup>71</sup> Article 88 of the Constitution.

<sup>72</sup> Article 91(1) of the Constitution.

Assembly on these matters to the Court.<sup>73</sup> In terms of the computation of votes for proportionally elected members of the Assembly, the Court of Appeal had to interpret the definition of Article 78 of the Constitution and its Schedule 4. Section 2 of Schedule 4 of the Constitution provides:

A political party which has nominated one or more candidates in a general election and has polled in respect of the candidates in aggregate 10% or more of the votes cast at the election may nominate a proportionately elected member of each 10% of the votes polled.

In *PDM v Electoral Commission and others*,<sup>74</sup> the Electoral Commissioner, in computing the number of votes for a candidate at a parliamentary election, found that he had only obtained 7.4 per cent of the seats, and thus denied him a seat. The candidate argued successfully before the Court of Appeal that in determining the number of proportionally elected members in National Assembly elections, the Electoral Commission should interpret the phrase *votes cast* as only meaning *valid votes cast*, and that *invalid votes* should not be taken into account for such computation. When *invalid votes* were excluded, the candidate had obtained 10.89 per cent of the *votes cast*, thus obtaining a seat in the Assembly.

In terms of the dissolution of the Assembly, the case of *Chow v Michel*<sup>75</sup> established that the dissolution of the Assembly by the President was done in his capacity as head of the executive and not as head of state, and was therefore subject to judicial review.

### C. The Judiciary

The judicial power is vested in the judiciary,<sup>76</sup> which consists of the Seychelles Court of Appeal, the Seychelles Supreme Court, and the Magistrates Courts and tribunals.

The concept of the separation of powers, as defined by the Constitution,<sup>77</sup> guarantees the independence of the judiciary, but that fact is further emphasised by Article 119(2), which provides that ‘[t]he Judiciary shall be independent and be subject to this Constitution and the other laws of Seychelles.’

The Supreme Court has both original jurisdiction and supervisory jurisdiction over subordinate courts, tribunals, and adjudicating authorities. The word ‘supreme’ is now an anomaly; it is not supreme in the sense of being a court of final resort. Historically, it was supreme in Seychelles, as it was the court of last resort on Seychelles territory. Appeals from it were only heard outside Seychelles: in civil matters, in Mauritius until 1976; in criminal matters, in East Africa until 1954 and ultimately to the Privy Council until 1976. Unlike the Supreme Court of Mauritius, which in some respects has more similarities with French courts, the jurisdiction of the Supreme Court of Seychelles is exercised in practice by a single

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<sup>73</sup> See for example *Elizabeth v Speaker* (unreported) CC 2/2009 and *Ramkalawan v Republic* (unreported) CC/2001, *Carpin v Seychelles National Party and Others*, *Ramkalawan v Carpin and Others* (consolidated) (unreported) CC 7/2011.

<sup>74</sup> *PDM v Electoral Commission and others* (unreported) SCA 16/2011.

<sup>75</sup> *Chow v Michel* (unreported) CC 5/2007.

<sup>76</sup> Article 119(1) of the Constitution.

<sup>77</sup> See Articles 1 and 49 of the Constitution.

judge, although Article 125(4) does provide that a bench of more than one judge can exercise the jurisdiction of the court. When it sits as a Constitutional Court, its jurisdiction and powers have to be exercised by at least two judges. The Supreme Court has unlimited jurisdiction at first instance. It has all the powers, privileges, and jurisdiction of the High Court of Justice of England and is also a court of equity, having power to dispense justice when there is no remedy at law.<sup>78</sup> It hears the more important civil and criminal cases and in cases of murder or treason, it sits with a jury of nine. The death penalty was abolished in Seychelles in 1993 by virtue of Article 15(2) of the Constitution.

The Court of Appeal of Seychelles consists of a President, two or more Justices of Appeal, and other judges who are *ex-officio* members of the Court (drawn from the Supreme Court in certain circumstances). Decisions of the Supreme Court in civil and criminal matters given at first instance or on appeal are subject to appeal to the Court of Appeal, as are the decisions of the Constitutional Court.

The Magistrates Court is a subordinate court established by the Courts Act. Its jurisdiction in both civil and criminal proceedings is exercised by a bench of one magistrate sitting alone. Its civil jurisdiction is limited both in subject matter and in the value of the claim: the Senior Magistrate may entertain civil claims of up to SR 350,000<sup>79</sup> in value; the limit for other magistrates is SR 250,000. Its criminal jurisdiction is limited to less serious crimes. Senior magistrates have the power to sentence a convict to a maximum of ten years' imprisonment and other magistrates, up to seven years. Magistrates are fully qualified lawyers.

Other courts include juvenile courts, tribunals, and public authorities which exercise quasi-judicial functions: for example, the Employment Tribunal, the Family Tribunal, and the Rent Control Board.

Judges in Seychelles are appointed by the President from nominees recommended by the Constitutional Appointments Authority, which is comprised of a Presidential appointee, an appointee of the Leader of the Opposition party, and a Chairman elected by the two members of the Authority.

As mentioned above, the biggest criticism relating to the appointment of judges has been the practice of appointing judges who are not Seychellois, with little knowledge of the political, economic, and cultural traditions or the intricacies of the mixed legal system of Seychelles. The Constitution provides that a Seychellois judge may remain in office until the age of 70 but a non-Seychellois judge may only serve one term of seven years, except in 'exceptional circumstances'. There have been two cases of non-Seychellois judges obtaining Seychellois nationality through naturalisation during their first term of office.

In 2007 the Constitutional Court stated that its role was to ensure that public affairs were carried out within the framework of the Constitution and to prevent the abuse of power, and that the Court had the power to check the executive and legislative branches of government,

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<sup>78</sup> *Casino des Seychelles v Compagnie Seychelloise* (unreported) SC 1/1994 established that it has the powers of the High Court of England at 29 June 1976 (Seychelles Independence Day).

<sup>79</sup> A euro is equivalent to approximately 16 Seychelles Rupees.

although in so doing they had to ensure that such checks did not amount to judicial dictatorship.<sup>80</sup>

## **V. Federalism/Decentralisation**

Seychelles is very much a centralised and unitary state. Perhaps one of the biggest shortcomings of the Constitution is its failure to provide effectively for local government. Article 167 does state that laws may provide for local government, but so far none have been passed to replace the Local Government Act of 1991, which was suspended in 1993 when the new Constitution was promulgated. It seems that the de facto situation which operated under the 1991 Act has more or less continued, because under the aegis of the ministry responsible for local government, a district administration operates in each of the twenty-five electoral districts. District community councils were reintroduced in 1999, with the Minister of Local Government appointing the members of each district community council for a two-year term. As the Minister is invariably from the ruling government party, the appointed district administrator is also a member of the same party. It is she or he who convenes and chairs meetings and supervises operations, although in theory the local member of the National Assembly (MNA) sits, in principle, on the council. The result of this arrangement is that in terms of local government, the district officials are accountable to the party and not to the government, which is a major blow to democracy in Seychelles.

## **VI. Constitutional Adjudication**

The Constitution makes provision for the Supreme Court to sit as a Constitutional Court in respect of matters relating to the application, contravention, enforcement, or interpretation of the Constitution, the jurisdiction being exercised by not less than two judges sitting together.<sup>81</sup> In practice, however, three judges sit on the Constitutional Court.

The independence of the judges has been tested on many occasions. Much of the term of Albert René's presidency saw the judiciary subjected to severe criticism for what was perceived as its bias in favour of the Government, and this was despite the fact that the President appoints judges only on the recommendation of the Constitutional Appointments Authority, the make-up of which is for all intents and purposes quite democratic compared to other jurisdictions. The main criticism in relation to the appointment of judges has been due to the fact that the small size of the Seychellois population makes it difficult to appoint the quota of judges needed from the local pool of legal practitioners and which has resulted in Seychelles having to recruit judges externally. They are drawn from Commonwealth countries and their independence is constitutionally ensured by the fact that foreign judges are only appointed for one term not exceeding seven years and they are only reappointed in 'exceptional circumstances'.<sup>82</sup>

Seychellois judges remain in office until they attain the age of 70 or are removed from office for misbehaviour. There have been two challenges to reappointments. In the first case of *Bar*

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<sup>80</sup> *Chow v Gappy* (unreported) CC 10/2007.

<sup>81</sup> Article 129 of the Constitution.

<sup>82</sup> Article 131(3) of the Constitution.

*Association of Seychelles & another v The President of the Republic and others*,<sup>83</sup> the Court of Appeal did not define the ‘exceptional circumstances’ which would warrant the reappointment of a foreign judge, but was mainly concerned with the powers of review of the Court for such reappointments. In the second case of *Michel and Others v Dhanjee and Others*,<sup>84</sup> the Court of Appeal found that the definition of ‘exceptional circumstances’ could only be decided by analysis of the existing facts in each individual case. It found that the exceptional circumstances contemplated under Article 131(4) should be given a liberal interpretation so as to encompass all circumstances which are reasonable and relevant to the appointment in question.

Constitutional adjudication is provided for in two separate sections of the Constitution: Article 46 for remedies for the infringement of the Charter, and Article 130 for all other constitutional issues. Any aggrieved citizen can bring such actions under these Articles, with the possibility of an appeal to the Court of Appeal.

In both circumstances the Constitutional Court can declare the act or omission a contravention of the Constitution, declare any law which contravenes the Constitution as void, and award damages, grant any remedy, or make any order appropriate in the circumstances.

The courts have until recently adopted a strictly individualistic approach to the concept of *locus standi* of the person seeking redress under Article 46(1). The right to complain seems to have been limited to the person claiming that a provision of the Charter had been, or was likely to be, contravened in relation to him or her.

In 1995, one of the biggest challenges to democracy in Seychelles came in the form of the second amendment to the Constitution. Article 86(1)(B) was inserted, which provided as follows:

A Bill presented to the Assembly which provides that it may not be amended or it or any of its provisions repealed unless the Bill which seeks to do so is approved by a special majority of the votes of the members of the Assembly or, prior to the Bill being presented to the Assembly for it to be so approved, it has been approved by a specified majority of votes in a referendum shall, when it becomes law, not be amended or repealed except in accordance with that law.

After the amendment of the Constitution was passed, the Assembly passed the Economic Development Act 1995, Section 5(7)(a) and (b) of which made it possible for foreign investors to be granted immunity from prosecution for certain criminal offences, protection against seizure of their assets, and in *some* cases the grant of diplomatic passports if they placed US\$10 million in ‘approved’ Seychelles investments. Two cases were brought challenging the constitutionality of the Act. In the first, a case brought by the main opposition party<sup>85</sup> on the issue of the provisions of the Act breaching the right to equal protection of the

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<sup>83</sup> *Bar Association of Seychelles & anor v The President of the Republic & ors* (unreported) SCA 7/2004.

<sup>84</sup> *Michel & ors v Dhanjee & ors* (unreported) SCA 5&6/2012.

<sup>85</sup> *United Opposition v Attorney General* (unreported) SCA 14/1996.

law, the Court of Appeal held that it was constitutional for Bills to entrench themselves. In the allied case of *Roger Mancienne v Attorney General*<sup>86</sup> the petitioner challenged Section 5(7)(a) and (b) of the Economic Development Act 1995 on the ground that those provisions contravened Article 27 of the Constitution, which guaranteed the right to equal protection of the law. It was argued that the granting of immunity from prosecution to investors for certain criminal offences under the Act made them superior to the petitioner and diminished their equality before the law. The Constitutional Court adopted a narrow interpretation of Article 46(1) and held that the petitioner had failed to establish that he belonged to the class of investors, and therefore had no *locus standi*. The Court of Appeal disagreed with that finding and held that what was challenged was the legislative classification itself, and hence the Court ought not to have adopted a narrow view when it looked for the standing of the petitioner as an investor. It stated that in terms of Article 27(1) of the Constitution, the right to equal protection of the law inheres in every person. On the merits of the application, however, the Court most controversially found that deference must be given in a democratic society to the judgment of the legislature and the executive, and that judges should refrain from judicial activism. Subsequently, however, due to international and local pressure, Article 86(1)(B) of the Constitution was repealed in July 2000.

In the case of *Dhanjee v Michel*<sup>87</sup> the question of *locus standi* was again visited by the Court of Appeal, this time in relation to an application under Article 130 of the Constitution. The Court of Appeal held that a distinction must be made between breaches of Charter rights under Article 46, which are actionable *per se*, and breaches of other provisions of the Constitution, under Article 130(2).

Article 130(7) provides

Where in an application under clause (1) the person alleging the contravention or risk of contravention establishes a *prima facie* case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

The Court was of the view that these provisions indicated that in all cases of this nature the petitioner must demonstrate that his or her interest is likely to be affected in some way. Twomey J established the following test to decide if a *prima facie* case was made out:

- (a) there is a contravention or is likely to be a contravention of the Constitution;
- (b) the person has a personal interest that is being or is likely to be affected by the contravention (in other words, he or she has *locus standi in judicio* to seek redress);
- (c) the person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law; and

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<sup>86</sup> *Roger Mancienne v Attorney General* (unreported) SCA 15/1996.

<sup>87</sup> *Michel and ors v Dhanjee and ors* (unreported) SCA 5&6/2012.

- (d) the question raised by the petitioner is not frivolous or vexatious.

She went on to find that such actions are not tools for ‘busy bodies’ or opportunist litigants to challenge the decisions of decision-making bodies simply because one does not agree with them, but stated that it must be possible for genuinely concerned citizens to bring actions for breaches of democratic rights, and that this was a balancing exercise that must be performed by the Court in each individual case.

The Court came close to pronouncing that the provisions of parts of legislation were unconstitutional in the case of *Poonoo v R*.<sup>88</sup> In that case the appellant, a first time offender, had received a minimum mandatory sentence of five years for breaking and entering a building and stealing a pair of shoes. He appealed on the grounds of the constitutionality of section 27A (1)(c)(i) and section 291(a) of the Penal Code, which the court had relied on to impose the mandatory minimum penalty of 5 years’ imprisonment. The provisions contained no inbuilt discretion which would allow the court to depart from the mandatory sentence for reason of substantial or compelling circumstances.<sup>89</sup> In the final appeal before the Court of Appeal, Domah J, delivering the unanimous judgment of the Court, stated:

The question came as a legal challenge of the mandatory minimum of 5 years imposed by 27A (1)(c)(i) and section 291(a) of the Penal Code and its constitutionality or otherwise in the light of provisions under Article 1, Article 119(2) and Article 16. That is unfortunate. The results might well have been different if the appellant had invoked that his punishment in a democratic society resting on the rule of law under the Constitution had been decided by Parliament rather than by a Court of law which had heard his case and the manner in which the sentencing Court had felt bound by the legislative diktat.<sup>90</sup>

The Court of Appeal did not strike down sections 27A(1)(c)(i) and 291(a) of the Penal Code as unconstitutional, but ruled that the mandatory sentence meted out was disproportionate and had not allowed for judicial discretion. It stated that the Penal Code could not be said to have contravened Article 1 of the Constitution *in abstracto*, but there was a breach *in concreto* by the manner in which the appellant’s sentence was determined: in this case, the magistrate passing sentence had stated that she had no discretion to pass a lesser sentence given the mandatory provisions of the Penal Code.

It is unfortunate that neither Article 46 nor Article 130 of the Constitution, which allow challenges for infringement by any law of the Charter of Fundamental Rights or the Constitution before the Constitutional Court, contain a provision forcing the legislature to act on a declaration of unconstitutionality made by the Constitutional Court in respect of any law. This, in effect, may result in the law that is struck down as being unconstitutional remaining on the statute books, and the possibility of further contraventions of the Constitution committed in pursuance thereof.

## VII. International Law and Regional Integration

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<sup>88</sup> *Poonoo v R* (unreported) SCA 38/2010.

<sup>89</sup> See n28 and accompanying text for another discussion of *Poonoo*.

<sup>90</sup> *Poonoo v R* (unreported) SCA 38/2010, p 3, para 10.

## A. International Law

Seychelles is a mixed jurisdiction, and in this respect its Constitution does not lend itself either to a classical monist or dualist system in terms of international law. Articles 64 and 48 of the Constitution bear out this ambiguous position.

Article 64(4) gives the President the power to execute treaties, agreements, and conventions in the name of Seychelles. These treaties, agreements, and conventions do not bind the Republic unless they are ratified by an Act or passed by a resolution of a majority of members of the National Assembly.<sup>91</sup> However, Article 64(5) provides that treaties will nevertheless bind Seychelles ‘where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention’.

Article 48 of the Seychelles Constitution, on the other hand, defines the status of international human rights law in Seychelles domestic law. It instructs the courts to interpret the Seychellois Charter of Fundamental Rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms, and to take judicial notice of:

- (a) the international instruments containing these obligations;
- (b) the reports and expression of views of bodies administering or enforcing these instruments;
- (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;
- (d) the Constitutions of other democratic states or nations and decisions of the courts of the states or nations in respect of their Constitutions.

Article 5 also states that the Constitution is the supreme law, and any other law found to be inconsistent with it is, to the extent of the inconsistency, void. What is not clear – and the issue has not been tested – is whether obligations at international law which have not been ratified locally can be implemented in circumstances when the provisions of the treaty in question are not inconsistent with Seychellois domestic law.

In general, because of its mixed jurisdiction and the habit and readiness of the courts in referring to jurisprudence from both common law and civil law jurisdictions, there has been much ease on the part of the courts in relying on international instruments and cases, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as cases from the European Court Human of Rights. In both *Ah-Wan v Republic*<sup>92</sup> and *Beeharry v Republic*,<sup>93</sup> the Court of Appeal stated that the Constitution is to be interpreted taking into account the decisions of the European Court of

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<sup>91</sup> Article 64(4) of the Constitution.

<sup>92</sup> *Ah-Wan v Republic* (unreported) SCA 1/2002.

<sup>93</sup> *Beeharry v Republic* (unreported) SCA 11/2009.

Human Rights and other courts in democratic jurisdictions, and that the Court can also take judicial notice of reports, decisions, and opinions of regional and international institutions.

In *Hans Hackl v FIU and another*,<sup>94</sup> a case relating to an offence under the Proceeds of Crime (Civil Confiscation) Act 2008 where the appellant had challenged the confiscation of his property which the state claimed constituted the proceeds from the sale of heavy graphite to Iran (an offence in the states of the European Union, but not in Seychelles), Twomey J relied on Article 48 to bring into consideration the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons and the United Nations Human Rights Charter, both of which Seychelles had ratified. She stated

We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty. We find that there are. In this context we state that the rule of law and international human rights law may well override a state's claim to sovereignty... The present case concerns the export of components for nuclear warheads and the public, national and international interest far outweighs the principle of sovereignty.

## **B. Regional Integration**

The Constitution of Seychelles does not expressly deal with regional and international integration mechanisms, but Seychelles is a member of many international and regional organisations, including the Organisation for the Harmonisation of Business Law in Africa (OHADA), the Economic Community of West African States (ECOWAS), and the Common Market for Eastern and Southern Africa (COMESA). Since independence in 1976, Seychelles has been a member of the Commonwealth, but is also a member of the Organisation Internationale de la Francophonie. It is also a member of the Organisation of African Unity, established in 1963, and the Southern African Development Community (SADC), established in 1980. Seychelles adheres to the principles and motivations underlying the formation of many of these organisations, including sovereign equality; solidarity, peace, and security; human rights, democracy, and the rule of law; equity and mutual benefit; and the peaceful settlement of disputes. Recently, Seychelles has played an important role in trying to secure the SADC's vision of freedom and social justice, and peace and security for the peoples of Southern Africa. In its participation in the SADC's mediation of Madagascar's political crisis, it hosted talks in Seychelles between the ousted President Marc Ravalomanana and his political rival Andry Rajoelina, averting an all-out conflict in Madagascar.

Seychelles is also a member of other international organisations, such as the United Nations and the Commonwealth. Recently it has been a leader in the fight against maritime piracy and, together with Kenya, is the world's main centre for the prosecution of Somali pirates, supported by the United Nations Organisation for Drugs and Crime. It also hosts the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre.

## **VIII. Concluding Remarks**

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<sup>94</sup> *Hans Hackl v FIU and another* (unreported) SCA 1/2009.

The Seychelles Constitution is progressive and modern. Undoubtedly there are issues that merit consideration for reform, especially in terms of governance, accountability, and the rule of law. There are, however, very positive developments in the field of human rights, and of late, the courts have been bold in asserting their independence and pronouncing on difficult political issues. There continue to be shortcomings in terms of political participation and the independence of the media and local government, which together with the sharp polarisation in politics have contributed to the fact that the same political party has remained in power since the promulgation of the Constitution in 1993. However there is no denying the huge strides made in terms of democracy, given Seychelles' history of one-party rule for eighteen years after the coup of 1977. The challenge for the incumbent President, James Michel, in the wake of the world economic crisis, from which Seychelles has not been spared, is to manage the complex political and social demands of the country and to maintain the nation's commitment to democracy.

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