



# **Report of The Southern African Chief Justices' Forum**

**On the fact-finding Mission to  
The Republic Of Seychelles**

**3 - 8 June 2018**



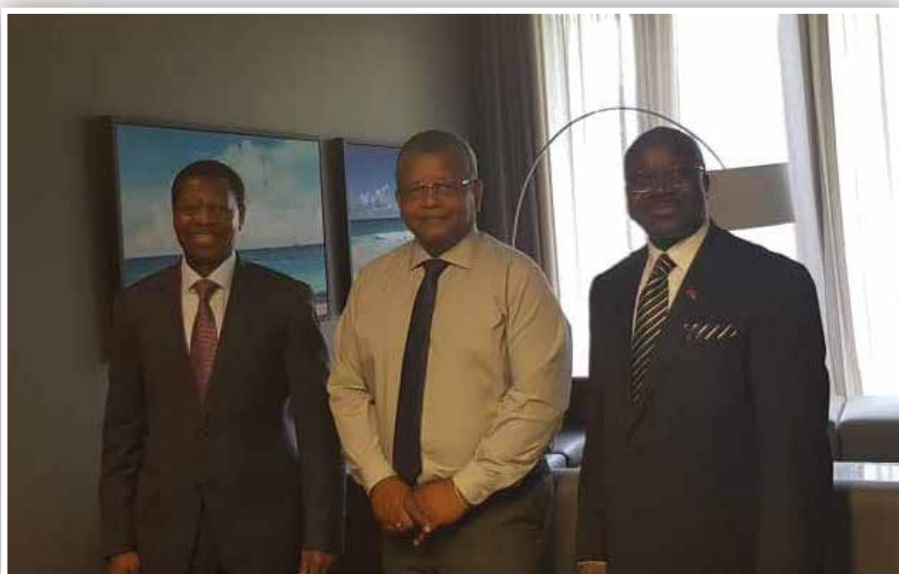
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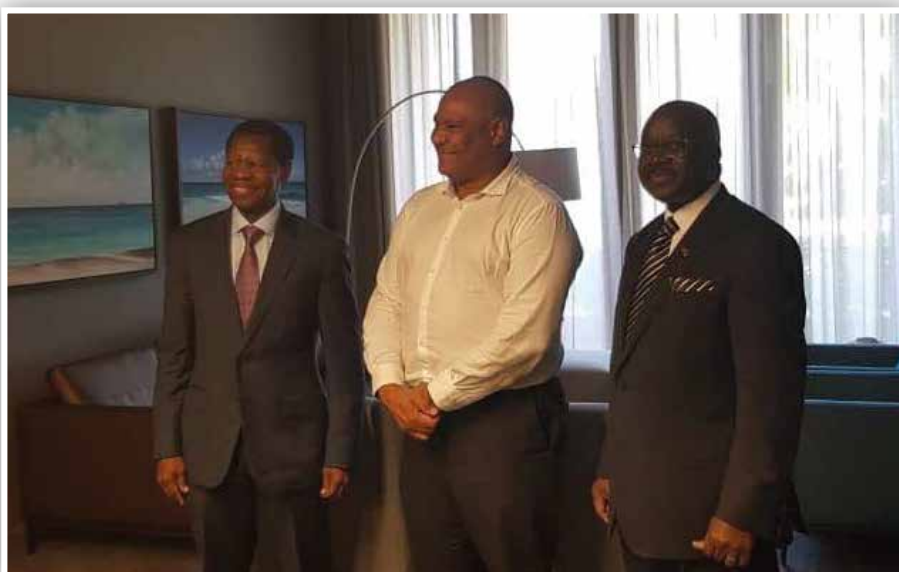
**3 - 8 June 2018**



*From left to right: Honourable Chief Justice Peter S. Shivute, His Excellency Mr. Danny Faure, President of the Republic of Seychelles and Honourable Chief Justice Andrew K.C. Nyirenda, SC.*



*From left to right: Honourable Chief Justice P.S. Shivute, Hon. Wavel Ramkalawan, Leader of the Opposition in the National Assembly and Honourable Chief Justice A.K.C. Nyirenda, SC*



*From left to right: Honourable Chief Justice P.S. Shivute, Honourable Frank D.R. Ally, Attorney General of the Republic of Seychelles and Honourable Chief Justice A.K.C. Nyirenda, SC.*



*Honourable Chief Justices with the support team. From left to right: Mr. S. Kandunda, Honourable Chief Justice A.K.C. Nyirenda, SC, Honourable Chief Justice P.S. Shivute, Dr. J. Mavedzenge, Mr. E. Pengele, Mr. T. Nyimba and Mr. W. Mwansa.*

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## Executive Summary

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1. At the invitation of the leadership of the Judiciary of Seychelles, a delegation of the Southern African Chief Justices' Forum (SACJF) conducted a fact finding mission on the state of the rule of law, independence of the judiciary and security of tenure of judicial officers against the backdrop of the two pending disciplinary matters concerning members of the judiciary.
2. The SACJF delegation met with several stakeholders who included His Excellency the President of the Republic of Seychelles, Leader of the Opposition in the National Assembly, Judges of the Court of Appeal and Supreme Court, members of the Constitutional Appointments Authority (CAA), representatives of a civil society organisation and the learned President of the Bar Association.
3. The findings of the mission are set out in detail in this report, along with recommendations.
4. The Republic of Seychelles is founded upon the principles of democracy, rule of law and justice for all. The Constitution embraces the doctrine of separation of powers. In this context, judicial independence and impartiality are also guaranteed by the Constitution. The Constitution further contains provisions that guarantee security of tenure of judicial officers and prescribes the grounds and procedure to be followed in the removal of a judge from office.
5. Institutional arrangements are set up in terms of the Constitution to safeguard the rule of law and independence of the judiciary. The CAA is entrusted with the power to recommend candidates for judicial appointments, consider complaints against judges and appoint the tribunal to investigate such complaints. Four out of the five members of the CAA are directly appointed by politicians.
6. It is worth noting that the legal profession and legal practitioners and matters connected therewith are not regulated by a designated statutory body.
7. Several concerns were raised by the stakeholders during the meetings. Some stakeholders expressed the view that the two pending disciplinary matters were politically motivated; and so, they tended to undermine the principle of separation of powers and the rule of law. Others disagreed with this view and put forth the view that the pending disciplinary matters were rather a manifestation of judicial independence and accountability. Others raised concerns of the composition of the CAA and the process of appointing members of the CAA. Those who align themselves with this concern questioned the existence of independence and impartiality of the members of the CAA. Some stakeholders expressed the opinion that the major threat to the independence of the judiciary is undue interference with judges and their work by some politicians. In support of this concern, the stakeholders cited incidents where some Parliamentarians have criticised judgments that were perceived to be against their political interests. Some stakeholders

noted that some politicians use the present governmental institutional arrangements to subject the judiciary to their influence and control.

8. We humbly make the following recommendations:

- (a) That the two pending disciplinary matters concerning members of the judiciary be handled fairly, speedily and in accordance with the principles of natural justice and in accordance with fair procedure.
- (b) That the other organs of the State respect the independence, integrity and dignity of the Judiciary.
- (c) That the Legislature should consider amending the Constitution to include the Head of the Judiciary as an ex officio member of the Constitutional Appointments Authority.
- (d) That the authorities should consider reforming the legal profession, including the establishment of a designated statutory body tasked with regulating matters of the legal profession, such as the granting of licences and disciplining of legal practitioners.



## Introduction

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1. The Southern African Chief Justices' Forum (SACJF) is a voluntary association of Chief Justices from countries in East Africa and Southern Africa.<sup>1</sup> Its objectives are to promote contacts and co-operation among the judiciaries in the East and Southern African Sub-Regions; promote the rule of law, democracy and the independence of the courts in the Sub-Regions; promote and protect the welfare and dignity of judges in the Member States; and generally, promote the interests of the judiciaries of Member States.
2. In pursuit of this mandate, SACJF will, when called upon, conduct fact-finding missions to inquire into issues such as the state of the rule of law and judicial independence in Member States. The purpose of such fact-finding missions is to afford SACJF the opportunity to learn and appraise itself with the facts on the ground instead of relying on secondary sources such as media reports. The singular object of such an exercise is to enable SACJF to find ways and means of assisting the Member State concerned to overcome any challenges it may be facing that has the potential to undermine the good name and dignity of the judiciary and disturb due administration of justice.
3. Seychelles is an active and committed member of the SACJF. In April 2018, the Honourable Dr Mathilda Twomey, Chief Justice of the Republic of Seychelles, notified SACJF that a decision had been made to set up a Tribunal of Inquiry in terms of article 134 of the Constitution of Seychelles to investigate whether she ought to be removed from office for misconduct.
4. SACJF successfully sought the kind permission from the Government of Seychelles to allow its delegation to conduct a fact-finding mission. The purpose of the mission was to inquire into the state of judicial independence, accountability and security of tenure of judicial officers in Seychelles in the context of not only the charges of misconduct levelled against the Honourable Chief Justice, but also the tribunal investigation initiated in 2016 and conducted in 2017 in respect of Judge Duraikannu Karunakaran.
5. The Fact-Finding Mission (hereafter referred to as 'the Mission') comprised of Honourable Chief Justice Peter Sam Shivute<sup>2</sup> and Honourable Chief Justice Andrew Kidcosta Chotcha Nyirenda, SC<sup>3</sup>. The two Chief Justices were given the mandate to carry out the fact-finding mission in their respective capacities as Chairperson and Deputy Chairperson of SACJF. They were supported

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1 Chief Justices of the following countries are members of SACJF: Kingdom of Lesotho, Kingdom of Swaziland, Republic of Angola, Republic of Botswana, Republic of Kenya, Republic of Malawi, Republic of Mauritius, Republic of Mozambique, Republic of Namibia, Republic of South Africa, Republic of Seychelles, Republic of Uganda, Republic of Zambia, Republic of Zimbabwe, United Republic of Tanzania and Zanzibar.

2 of the Republic of Namibia.

3 of the Republic of Malawi.

by a technical team comprising of Mr. Evaristo Pengele,<sup>4</sup> Dr. Justice Alfred Mavedzenge,<sup>5</sup> Mr. Sebastiaan Kandunda,<sup>6</sup> Mr. Tamanda Nyimba,<sup>7</sup> Mr. Lekeshya Kaunda<sup>8</sup> and Mr. Wencelous Mwansa.<sup>9</sup>

6. The Mission conducted its inquiry from 3rd to the 8th of June 2018. As part of this inquiry, the Mission conducted meetings with different stakeholders who included the President of the Republic of Seychelles, His Excellency Mr. Danny Faure, Leader of the Opposition in the National Assembly, Hon. Wavel Ramkalawan, the Secretary of State and Executive Head of the Department of Foreign Affairs, His Excellency Ambassador Barry J.J. Faure, the President of the Court of Appeal, Honourable Justice Francis MacGregor, Judges of the Court of Appeal, the Honourable Chief Justice Dr. Mathilda Twomey, Judges of the Supreme Court, Honourable Mr. Justice Duraikannu Karunakaran, the Honourable Attorney General, Mr. Frank D.R. Ally, the Chairperson of the Constitutional Appointments Authority (CAA), Honourable Mr. Michel Felix, and other members of the CAA, the Citizen Engagement Platform Seychelles (a local civil society organisation) and the President of the Bar Association.<sup>10</sup> At the end of its inquiry, the Mission issued an exit statement<sup>11</sup> and produced this Report.

## Legal and political context

7. After almost a decade and half<sup>12</sup> of being a one party State, Seychelles adopted a Constitution in 1993 which envisages the establishment of a multi-party democratic constitutional State, where governance is based on values and principles of the rule of law, separation of powers and constitutionalism.<sup>13</sup> In order to safeguard these values, it is a precondition that the judiciary in Seychelles is independent and that judicial officers are guaranteed security of tenure while remaining accountable for their conduct. The judiciary is responsible for enforcing the Constitution and the rule of law, and this must be done impartially and independently.<sup>14</sup> Judges can perform this function properly if they enjoyed independence to enforce the Constitution and the law impartially and their security of tenure was guaranteed and respected. The rule of law entails that no person including those who are entrusted with public power, are above the law and anyone who violates the law must be held accountable through a process which

4 Registrar, Supreme Court of Zambia and current Coordinator of SACJF.

5 Constitutional lawyer, academic and researcher at the Democratic Governance and Rights Unit of the University of Cape Town, Law Faculty.

6 Chief Legal Officer, Supreme Court of Namibia.

7 Assistant Registrar, High Court of Malawi.

8 Member of the SACJF secretariat.

9 Member of the SACJF secretariat.

10 See Annexure A for the full list of meetings conducted.

11 See Annexure B.

12 From 1979 to 1993.

13 See the preamble and article 6 of the Constitution of Seychelles.

14 See for instance article 122 of the Constitution of Seychelles.

is procedurally and substantively fair. Therefore, judges must be held accountable for their decisions and conduct in the performance of their judicial functions. However, the manner in which judges are held accountable should be such that their independence, impartiality, institutional integrity and security of tenure remain intact - guaranteed and respected.

8. The Constitution of Seychelles contains provisions safeguarding judicial independence, accountability, and security of tenure for judicial officers. Judicial independence is guaranteed by article 119(2), which provides -

‘The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.’

9. Security of tenure is guaranteed through article 134, which provides in peremptory terms the circumstances under which a judicial officer may be removed from office, and the procedures to be followed when removing a judicial officer from office. A judicial officer may be removed from office when he or she is unable to perform the functions of his or her office or when he or she has been found guilty of misconduct.<sup>15</sup> Before a judicial officer is removed from office, a complaint must be filed with the CAA.<sup>16</sup>
10. Upon receipt of a complaint, as aforesaid, the CAA should assess the complaint and decide whether the result of their assessment warrants the carrying out of investigations in respect of the judicial officer concerned.<sup>17</sup>
11. If the CAA takes the decision to have the judicial officer investigated, it should set up a tribunal to conduct the investigations and make a finding as to whether or not the judicial officer should be removed from office.<sup>18</sup> Where the tribunal recommends that the judge ought to be removed from office, the President of the Republic ‘shall remove the judge from office.’<sup>19</sup> The President has no discretion in the matter. The import of this provision is therefore that a judge cannot be removed from office for reasons that are not prescribed by the Constitution. Furthermore, the judicial officer concerned cannot be removed from office without the procedures provided in article 134 having been followed.
12. The CAA is a five - member body and is constitutionally required to perform its functions independently.<sup>20</sup> The President of the Republic and the Leader of the Opposition in the National Assembly each appoints two members to the CAA.<sup>21</sup> The Chairperson, who is the fifth member,

<sup>15</sup> See article 134 (1) (a) of the Constitution of Seychelles.

<sup>16</sup> See article 134 (2) of the Constitution of Seychelles.

<sup>17</sup> Ibid.

<sup>18</sup> See article 134 (2) (a) and (b) of the Constitution of Seychelles.

<sup>19</sup> See article 134 (3) of the Constitution of Seychelles.

<sup>20</sup> See article 139 (2) of the Constitution of Seychelles.

<sup>21</sup> See article 140 (1) (a) of the Constitution of Seychelles.

is appointed by the four members.<sup>22</sup> If the four members fail to appoint the fifth member, they are required to recommend between four to five persons for appointment by the President.<sup>23</sup> The President makes the appointment after consulting the Speaker of the National Assembly and the Chief Justice.<sup>24</sup> Article 141 of the Constitution provides:

‘A person is qualified to be a member of the Constitutional Appointments Authority if the person is a citizen of Seychelles who-

(a) has held judicial office in a court of unlimited original jurisdiction; or

(b) is of proven integrity and impartiality who has served with distinction in a high office in the Government of Seychelles or under this Constitution or in a profession or vocation.’

13. In short, the Constitution guarantees judicial independence; for, it provides that judges are independent and are subject only to the Constitution and the law. It also guarantees security of tenure of judicial officers because it provides expressly the grounds upon which, and the process through which, a judicial officer may be removed from office.
14. Events of the past two years involving tribunal inquiries into the fitness of judges to continue holding the office of a judge in Seychelles have put to test the efficacy of the aforementioned constitutional provisions. In 2016, a Tribunal of Enquiry was set up in terms of article 134(2) of the Constitution to inquire into allegations of misconduct of Judge Duraikannu Karunakaran, a Judge of the Supreme Court of Seychelles and the country’s former Acting Chief Justice. The allegations included that -
  - (a) he consistently acted without integrity or propriety and thereby threatened the reputation of the judiciary;
  - (b) he had poor collegial attitude; and
  - (c) he lacked competence and diligence in the performance of his judicial functions.<sup>25</sup>
15. Pending the inquiry by the Tribunal, Judge Karunakaran was suspended. The official report on the findings made by the Tribunal has to date not been published by the President of the Republic, because there is a pending constitutional challenge against the validity of the proceedings before that Tribunal.<sup>26</sup>

22 See article 140 (1) (b) of the Constitution of Seychelles.

23 See article 139 (3) of the Constitution of Seychelles.

24 Ibid.

25 See page 11 of “The Report of the Tribunal Set up Under article 134 (2) of the Constitution of the Republic of Seychelles to Inquire into the Inability of Judge Duraikannu Karunakaran to Perform the Functions of the Office of Judge on Grounds of Misbehaviour, August 2017”.

26 The Constitutional Court was expected to hand down a judgment on this matter on 19 June 2018.

16. Between June 2017 and March 2018, Judge Karunakaran filed three complaints<sup>27</sup> against the Chief Justice, Honourable Dr Mathilda Twomey. A Tribunal has been set up to investigate the allegations.
17. The following are the allegations contained in the charge sheet against the Chief Justice:
  - (a) she is alleged to have interfered with the investigations conducted by the Tribunal against Judge Karunakaran in 2016;
  - (b) she is alleged to have usurped the powers of the President of the Republic by publishing, or causing to be published, on Seylil.org the report of the findings made by the Tribunal of Inquiry of Judge Karunakaran at a time when the President of the Republic had decided to keep the report confidential until the finalisation of the constitutional challenge against the validity of the proceedings conducted by the Tribunal;
  - (c) she is alleged to have destroyed evidence or abused her authority by replacing a judgment allegedly written by Judge Karunakaran with her own judgment in a case upon which Judge Karunakaran had allegedly adjudicated before his suspension; and
  - (d) she is alleged to have acted with heavy handedness when she effected Judge Karunakaran's suspension.<sup>28</sup>
18. Based on the meetings held, the Mission notes that there are two dominant perceptions or views regarding the charges against Judge Karunakaran and Chief Justice Mathilda Twomey. On the one hand is the view that the charges in both cases are politically motivated. Those who hold this view submitted that the charges against Judge Karunakaran were motivated by the desire on the part of the ruling party to remove him from office, because he had delivered certain judgments which upset the ruling party's interests. It is alleged that the ruling party sought to use the CAA and Chief Justice Dr. Mathilda Twomey to remove Judge Karunakaran from office. Similarly, it was submitted to the Mission that the opposition, which now enjoys majority in Parliament, is seeking to remove Chief Justice Dr. Mathilda Twomey from office because she handed down certain judgments which hurt the interests of the opposition party.
19. New members of the CAA have been appointed, and it is alleged that the opposition had gained control over those members and is using them to initiate proceedings to remove the Chief Justice from office, in the same way a similar attempt was made to remove Judge Karunakaran in 2017 by the CAA differently constituted. It was also submitted to the Mission that the Chief Justice was being investigated as punishment for having acted with firmness against certain lawyers in her efforts to enforce discipline, ethics and professionalism of legal practitioners.

<sup>27</sup> See Annexure C for the full list of the complaints.

<sup>28</sup> See Annexure D for a detailed list of the charges

20. The Mission was informed that the Office of the Chief Justice was responsible for regulating the legal profession. This function includes issuing practising certificates and disciplining lawyers. The other view is that the charges against Judge Karunakaran and Chief Justice Dr. Mathilda Twomey were legitimate and solely informed by the need to ensure that members of the Judiciary are held accountable for any alleged misconduct.
21. The Mission does not have the mandate to inquire into the merits and veracity of these differing views. Nevertheless, the Mission has given careful consideration to these views in order to assess properly the state of judicial independence, accountability and security of tenure of judicial officers in Seychelles and to offer due recommendations to the various stakeholders on how to safeguard and enhance the rule of law and judicial independence. Thus, the Mission is of the view that the events described above, concerning both Judge Karunakaran and Chief Justice Dr. Mathilda Twomey, are a test of the efficacy of the existing constitutional provisions relating to judicial independence, accountability, and security of tenure of judicial officers in Seychelles. These events have brought to the fore the following questions:
  - (a) Whether the judiciary in Seychelles enjoys independence.
  - (b) Whether security of tenure is guaranteed to judicial officers.
  - (c) Whether there are adequate mechanisms to ensure judicial accountability without undermining the independence and impartiality of judicial officers and their security of tenure.
22. Incidental to these questions is the issue of whether the legal profession in Seychelles is independent and efficient enough to effectively assist in attaining due administration of justice.
23. In the following paragraphs, we have provided an assessment of these issues in the light of the views gathered during the fact-finding mission.

## Issues relating to judicial independence

24. One of the concerns raised during the consultations is that judicial independence is at risk in Seychelles. Some went as far as to allege that there was no longer judicial independence in Seychelles. The need for an independent judiciary has been underscored in various international instruments, including the Universal Declaration of Human Rights of 1948;<sup>29</sup> the United Nations Basic Principles on the Independence of the Judiciary of 1985; the Bangalore Principles of Judicial Conduct of 2002; and the Latimer House Principles.<sup>30</sup> Further, the African Commission

<sup>29</sup> See article 10.

<sup>30</sup> Principle IV – Independence of the Judiciary Commonwealth Latimer House Principles



on Human and People's Rights Resolution<sup>31</sup> on the Respect and the Strengthening on the Independence of the Judiciary obliges Member States to guarantee the independence of the judiciary. Seychelles subscribes no doubt to these noble international principles and is bound to implement them in its domestic legal system.

25. Judicial independence has multiple facets. The first facet is institutional independence, which is the idea that the judiciary as an institution must be autonomous from the other organs of the State and must perform its judicial functions without interference and influence from anyone. The second facet is individual independence, which is the principle that individual judicial officers must not be interfered with by fellow judges and other external persons when carrying out their judicial functions. The other side of the facet of individual independence - which is often overlooked - is that judicial officers should not bring along in the exercise of their judicial functions their particular way of thinking on political, social and economic matters. Related to the above is the concept of decisional independence and financial independence. Decisional independence is the idea that the judge must be independent to deliver a judgment of his or her own that conduces to due administration of justice in the implementation of the Constitution and the law. Financial independence concerns the notion that the judiciary ought to exercise control over its budget and finances in order to avoid the situation where the performance of its functions are hampered and manipulated by the other organs of State.
26. Although judicial independence is a multi-faceted concept, its core value is that the judiciary must enforce the Constitution and the law without undue interference and influence. This principle finds expression in the Constitution of Seychelles through article 119(2), which stipulates that the judiciary shall be independent and subject only to the Constitution and laws of the country. This means that members of the other organs of the State or any other person are prohibited from interfering with judicial officers in the exercise of their judicial functions.
27. The majority of stakeholders consulted were of the opinion that the major source of threat to the independence of judges is the behaviour and attitude of some politicians. They indicated that some politicians expect judges to deliver judgments which conform to their wishes and interests as opposed to the precepts of the Constitution and the law. It was alleged that when judges deliver judgments that are not received well by certain politicians, such judges are threatened with victimisation. It was submitted that the most common forms of victimisation include being subjected to public criticism, being reported to the CAA for possible removal, and in worst cases, threat of physical violence. It was also reported that at times the judiciary is punished by some politicians in the National Assembly by being provided with inadequate funding.
28. Other stakeholders submitted that judicial independence is undermined from within the judiciary itself, by some judges who have the tendency of delivering judgments that align with political interests rather than the rule of law. It was pointed out that certain judges previously

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31 The African Commission on Human and People's Rights Resolution, based in Banjul, The Gambia since 1989, has jurisdiction over the interpretation of the African Charter and hears cases from the 53 states of the African Union, except for South Sudan.



held office in their political parties and this might constrain them from being impartial and independent when exercising their judicial functions. By virtue of the political position a judge held in the past, such judge is often viewed by litigants, lawyers and the public as lacking independence and impartiality.

29. Whilst it is difficult for it to establish the veracity of these submissions, the Mission established that although the Constitution of Seychelles guarantees judicial independence,<sup>32</sup> institutional arrangements in place and the manner in which judicial independence is protected require re-consideration. In terms of international best practices<sup>33</sup>, for the judiciary to be independent, there is the need for judges to be appointed by an independent body, and through a transparent process which ensures that only suitably qualified persons are appointed.
30. In Seychelles, judges are appointed by the President from a list of persons recommended by the CAA.<sup>34</sup> This means that the CAA shortlists candidate for judicial appointment. As mentioned earlier, four of the members of the CAA are directly appointed by politicians. Whether real or perceived, there is a legitimate concern that the CAA may not be impartial, fair and objective when shortlisting candidates for appointment as judges. International standards<sup>35</sup> require that members of bodies such as the CAA should be appointed through a process which is independent of partisan political influences and such bodies must be inclusive of all stakeholders. In other jurisdictions<sup>36</sup>, judicial appointment bodies comprise leaders of the judiciary, eminent jurists and representatives of the legal profession, and eminent persons who are appointed by political parties.
31. The Mission is of the view that Seychelles needs to re-consider the composition of the CAA to deal with the perception that it lacks independence. Mechanisms should also be provided in the Constitution to enhance financial independence for the judiciary. Such mechanisms may include ring fencing annual budgets for the judiciary. This would mean that a specified percentage of the national budget must be allocated to the judiciary every financial year. That way, the Legislature and the Executive are prevented from deliberately under resourcing the Judiciary in order to intimidate or penalise the judges for performing their functions independently and in accordance with their oath of office.

## Issues relating to judicial accountability

32. As we have stated previously, one of the views expressed during the consultations was that the tribunal investigation of Judge Karunakaran and the one initiated against Chief Justice

32 See article 119 (2) of the Constitution of Seychelles.

33 See Guideline II.1 of the Latimer House Principles.

34 See articles 124 (2) and 128 (2) of the Constitution of Seychelles.

35 See paragraph 28-29 of Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Doc A/HRC/11/41 (2009)

36 For example in Zimbabwe, Kenya and South Africa

Dr. Mathilda Twomey were a way of enforcing accountability of judicial officers. The Mission was therefore interested in assessing the efficacy of the mechanisms for effecting judicial accountability in terms of article 134 of the Constitution of Seychelles.

33. In order to consider what judicial accountability entails, it is important to refer to the Commonwealth (Latimer House) Principles on the Three Branches of Government. Seychelles is a member of the Commonwealth and subscribes to these principles and values. Judicial accountability is described in these terms in the Latimer House Principles:

‘Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.’<sup>37</sup>

34. It is important to make a distinction between the accountability of individual judges and accountability of the judiciary as an institution. The former, concerns *inter alia*, the idea that individual judges must account for personal conduct which may have negative impact on the performance of their judicial functions.<sup>38</sup> Individual accountability also encompasses the duty of judges to give full reasons for their decisions.<sup>39</sup>
35. On the other hand, the judiciary as an institution must be accountable. This is what is known as “institutional accountability”. As an institution, the judiciary may have to account for such aspects as the number of cases filed and disposed of, backlogs, the spending of funds allocated by the budget.<sup>40</sup> Both individual and institutional accountability must not be enforced in a way that undermines the independence, impartiality and integrity of the judiciary as an institution and the individual judges. On the contrary, it must be done in a way that enhances those values.

37 Guideline VII(b) of the Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003

38 Arghya Sengupta, *Judicial accountability: a taxonomy*, P.L. 2014, Apr, 245-266

39 Ibid.

40 Ibid.

36. The Mission notes that there is a general feeling among judicial officers that some politicians in Seychelles expect judges and the judiciary to be accountable to them. One judge expressly his view candidly thus:

‘Politicians are undermining the judiciary and interfering with judges’ adjudicatory functions because they want certain individuals who can dance to their tune. They want to have judges who they would be able to instruct to take certain positions. This is wrong and improper.’

37. Other judges said that whenever they delivered judgment that is unfavourable to certain politicians, there is the tendency amongst litigants and lawyers to come up with frivolous charges and report them to the CAA, instead of appealing to the Court of Appeal. Most of the stakeholders consulted by the Mission were of the view that the CCA is a political body which does not enjoy independence especially from politicians. They view the CAA as being used by some politicians to persecute and intimidate judges under the guise of enforcing judicial accountability. It was also reported that some politicians make unsavoury criticisms of court judgments publicly and indiscriminately in the National Assembly and sometimes on social media.
38. Although a lot of the accusations were directed at politicians, the Mission also noted that some stakeholders accused certain judges of lacking an independent mind. It was submitted to the Mission that some of the judges were of the view that they should align their decisions with the vision and goals of the ruling party or the opposition as the case maybe, as if the judiciary was accountable to politicians.
39. The Mission further notes that, some of the stakeholders expressed confidence that the current CAA was doing a good job in the manner in which it is enforcing judicial accountability. For instance, it was pointed out that the present CAA has developed rules to ensure procedural and substantive fairness in disciplinary hearings involving judicial officers. The rules are said to have been distilled from the Latimer House Principles. The stakeholders concerned pointed to the fact that in the investigation against the Chief Justice, the President and other members of the Tribunal as well as counsel for the Tribunal were sourced externally by the CAA as opposed to the Tribunal that investigated the allegations against Judge Karunakaran. The latter Tribunal consisted of two judges of the Supreme Court of Seychelles and a former Chief Justice of Seychelles. Some stakeholders, however, dismissed these efforts as a mere window dressing of the real intentions of the CAA, which they said was to remove from office judges who do not protect and promote the interests of politicians.
40. The accusations and counter-accusations described previously reveal that the Constitution of Seychelles does not provide adequate and viable mechanisms to enforce judicial accountability in the manner required by international standards, including the Latimer House Principles. To their credit, we should say, the framers of the Constitution provided procedures to be followed in order to hold judges accountable, especially where there are allegations of misconduct, and

clear reasons for so doing. These procedures are contained in article 134. However, in practice those procedures are undermined by the fact that the majority of the members of the CAA are appointed directly by politicians and the judiciary is not represented on that body. Whether perceived or real, this raises a legitimate concern that the CAA might not be independent, objective and impartial when exercising their functions. The CAA is responsible for determining whether the complaints reported to them against judges warrant a full investigation by a tribunal, as we have said previously. The CAA has the mandate to appoint members into the tribunal which conduct those investigations. Even though the CAA may indeed be objective, impartial and independent, the very fact that the majority of its members are appointed by politicians creates a legitimate concern that they might not be independent, impartial and objective. This is why one judge asked the following rhetorical question:

‘Why should I be confident that a CAA member who belongs to a party against which I ruled in one of my decisions will be fair and impartial when they receive a complaint of misconduct against me and when they appoint a tribunal to investigate me?’

41. We reiterate the point that international<sup>41</sup> and regional best practices show that members of bodies such as the CAA should not be appointed directly by politicians. They should be appointed through a process that has in-built checks and balances to ensure that the persons appointed into such bodies are independent and objective in both substance and appearance. International and regional best practices<sup>42</sup> further require that the body entrusted with the powers of selecting, appointing and removing judicial officers should be representative of stakeholders, including the judiciary and the legal profession, that is, the organised legal profession. The Mission is of the view that the current composition of the CAA falls short of these standards because neither the judiciary nor the organised legal profession is represented on this body. It is for these reasons that the authorities in Seychelles may wish to consider amending the Constitution to address this aspect.

## Issues relating to the security of tenure of judicial officers

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42. Lack of security of tenure emerged as a matter of grave concern for most of the stakeholders consulted by the Mission. Security of tenure is essentially the idea that judicial officers must be guaranteed that they will not lose their judicial positions and benefits if they perform their functions independently, impartially and without fear or favour and if they did not commit any act of misconduct that are clearly spelt out in the Constitution or any written law.

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41 See paragraph 28-29 of the Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc A/HRC/11/41 (2009)

42 See the Judicial Services Commissions in South Africa, Namibia, Zimbabwe and Kenya

43. Security of tenure for judicial officers is indispensable to the existence of an independent and impartial judiciary. It is primarily for this reason that international and regional best practices require that the tenure of office for judicial officers should be adequately secured and guaranteed. The Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003, enjoin signatories to put in place the necessary legislative mechanisms for appropriate security of tenure of office of judicial officers. In order to secure tenure of office of judicial officers, it is critical that judicial officers are appointed by an independent and impartial body and are given a constitutionally secured term of office. Judicial officers should only be removed from office on grounds set out in the Constitution of the country. To this effect, the Parliamentary Supremacy and Judicial Independence: Latimer House Guidelines for the Commonwealth states:

‘Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial service commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendations of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative judicial service commissions, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.<sup>43</sup>

44. As already noted in this report, security of tenure of judicial officers is provided in article 131 of the Constitution. According to this article, a Judge vacates office on death; removal of office in terms of article 134; resignation; in the case of a citizen of Seychelles, on attaining the age of seventy years; and in the case of a non-citizen of Seychelles, at the end of the term for which he or she was appointed. A Judge may also vacate office if the Judge’s office is abolished with the Judge’s consent. In the case of a person who is not a citizen of Seychelles, that person may be appointed Judge for only one term of not more than seven years. The President may renew the contract of employment in exceptional circumstances and on the recommendation of the CAA.<sup>44</sup>
45. Removal from office in terms of article 134 can be done on grounds of inability to perform the functions of office or misbehavior. The institution reposed with powers of appointing a Tribunal of Inquiry to investigate the possible removal of a Judge from office is the CAA, as we have said more than once. According to article 134(2) of the Constitution, where the CAA considers that the question of removing a Judge from office ought to be investigated, it should appoint a tribunal consisting of a President and at least two other members, all of whom should be persons who hold or have held the office of a Judge or persons who are eminent jurists of proven integrity. The tribunal should inquire into the matter, report on the facts to the CAA

43 Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, adopted in June 1998.

44 Article 131(4) of the Constitution of the Republic of Seychelles, 1993 (as amended by Act No. 5 of 2017).

and recommend to the President whether or not the Judge ought to be removed from office.<sup>45</sup> If the tribunal recommends that a Judge ought to be removed from office, the President should accordingly remove the Judge from office.<sup>46</sup>

46. We are pleased to note that the President of the Republic of Seychelles told the Mission that his presidency has focused on promoting transparency, accountability and good governance. He stated that he does his best to ensure that there is full respect for security of tenure of judicial officers and separation of powers. As noted above, in most of the subsequent discussions held by the Mission with other stakeholders, concerns were raised that the present composition of the CAA was highly politicised and that had become a major threat to the security of tenure of judges. Others applauded the current members of the CAA for doing a good job, when compared to the previous members. Nevertheless, they underscored the need to reform the composition and procedures for appointing members of the CAA.
47. It is equally pleasing to note that members of the CAA told the Mission that they were committed to ensuring the preservation of the security of tenure of judges. They indicated that after taking office, they started a process of putting in place measures aimed at ensuring that the procedures for removal of a judge from office afford the concerned judge due process. They stated further that they had looked at international best practices and that unlike the previous members of the CAA, they had established rules which guarantee the right of a judge to be heard on the allegations before they decided whether to establish a tribunal to inquire into the allegations.
48. The progressive reforms which the current members of the CAA have instituted to ensure due process in judicial disciplinary proceedings are to be applauded. However, the major concern still remains; it is that the current composition and procedures for appointing members into the CAA are politically tilted and that is a concern as mentioned previously. International and regional best practices require that the process of removing judges from office must be initiated and conducted by an independent and impartial body. In its current composition, there is a pervasive perception that the CAA does not meet this criterion as the majority of its members are appointed directly by politicians.

## Issues relating to the independence of the legal profession

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49. One of the issues that emerged from the consultations is that the legal profession in Seychelles is not independent from the judiciary and political parties. International and regional best practices<sup>47</sup> require members of the legal profession to be independent and objective when

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45 Article 134(2)(a) of the Constitution of the Republic of Seychelles, 1993 (as amended by Act No. 5 of 2017).

46 Article 134(2)(b) of the Constitution of the Republic of Seychelles, 1993 (as amended by Act No. 5 of 2017).

47 See Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc A/



executing their functions as legal practitioners. The rationale for this view is that such independence will enable the legal practitioners to pursue their clients' cases without fear, while remaining objective and thereby effectively helping the courts to promote due administration of justice. In order to ensure independence of lawyers, most countries<sup>48</sup> allow lawyers to regulate themselves through a statutory designated body, which is not directly under the control of the judiciary, except that the decisions of such bodies are subject to judicial review or control. In order to enforce professionalism and accountability, statutes are enacted<sup>49</sup> which require lawyers to adhere to a set of code of good conduct and ethics. Where a lawyer violates those ethics, he or she is subjected to a disciplinary hearing presided over by an independent body and the decision of any such hearing is subject to judicial review or control.

50. One of the concerns raised by the stakeholders consulted by the Mission was that legal practitioners in Seychelles were not independent from the judiciary. The Office of the Chief Justice is responsible for initiating disciplinary proceedings against legal practitioners, as well as issuing them with practicing licenses, as we mentioned previously. There is the need to separate some of these functions from the Office of the Chief Justice. While, the Chief Justice should continue to be involved in the admission and authorization of a person to practise as a legal practitioner, legal practitioners in Seychelles should regulate themselves through a statutory designated legal society or association.

## Conclusion

51. We reiterate the point that Seychelles is an independent and democratic State governed by the rule of law. It has subscribed to several international and regional principles which call for an independent judiciary. From our consultations, it emerged that judicial officers are in great need of protection from political influence so as to prevent victimisation and encourage decisions made in the spirit and letter of the Constitution and in accordance with the rule of law. Stakeholders must work towards the establishment of strong internal institutions and mechanisms aimed at protecting all facets of judicial independence, and promoting transparency and judicial accountability. Other institutions that are already in existence need to be reformed and brought in conformity with established international and regional standards and best practices to which Seychelles has agreed to be bound.
52. Judicial officers need to feel a real sense of security in the execution of their duties. The removal or suspension of a judge must be exercised in terms of the Constitution of Seychelles and upon observing due process in judicial disciplinary proceedings that is conducted in accordance with the rules of natural justice. Finally, it is important to establish by legislation an independent

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HRC/11/41 (2009).

48 For instance, South Africa, Namibia, Zambia, Malawi and Kenya.

49 See, for example, the various Legal Practitioners Acts of Namibia, Zambia and Zimbabwe.



and objective body which is independent of the judiciary to regulate the legal profession and legal practitioners. This approach has several benefits as stated above. Considering the issues dealt with in this report, the following recommendations are made in our genuine effort to give guidance and offer advice to the stakeholders involved.

## Recommendations

53. Upon the foregoing findings, the Mission is pleased to make the following recommendations:

- (a) There must be an expeditious finalisation of the investigations of Judge Duraikannu Karunakaran and Chief Justice Dr. Mathilda Twomey, in accordance with the dictates of natural justice and fairness.
- (b) Judicial officers must continue to be vigilant in ensuring independence of the Judiciary and their own independence in accordance with the Constitution and the law.
- (c) Lawyers must continue to act in a professional manner and continue to assist the Judiciary in their efforts to attain due administration of justice.
- (d) The Legislative and the Executive branches of Government must respect and promote the independence of the Judiciary;
- (e) The legislative authorities should consider amending the Constitution to include the Head of the Judiciary as an *ex officio* member of the Constitutional Appointments Authority.
- (f) The authorities should consider introducing legal reforms to promote the independence of the legal profession in accordance with international and regional best practices.



Hon. Peter S. Shivute  
**CHIEF JUSTICE OF NAMIBIA &  
CHAIRPERSON- SACJF**



Hon. Andrew K.C. Nyirenda, SC  
**CHIEF JUSTICE OF MALAWI &  
DEPUTY CHAIRPERSON- SACJF**

## ANNEXURES

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## Annexure A

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### LIST OF STAKEHOLDERS

#### **1. The political sector**

1.1 The President of the Republic

1.2 Leader of the Opposition in the National Assembly

1.3. Secretary of State and Executive Head of the Department of Foreign Affairs

#### **2. The Judiciary**

2.1 The Chief Justice

2.2 The Deputy Chief Justice

2.3 President of the Court of Appeal

2.4 Other senior judges

#### **3. The Bar Association**

President/Secretary of the bar

#### **4. Civil society**

The Citizen Engagement Platform Seychelles

## Annexure B



**Southern African Chief Justices'  
Forum**

**C/o Supreme Court of  
Namibia**

Rev. Michael Scott Street  
Private Bag 13398, WINDHOEK  
NAMIBIA

Tel: +264 61 279901  
Fax: +264 61 224979  
Email: [cpasstant@jud.gov.na](mailto:cpasstant@jud.gov.na)

### **STATEMENT ON THE FACT-FINDING MISSION TO THE REPUBLIC OF SEYCHELLES BY A DELEGATION OF THE SOUTHERN AFRICAN CHIEF JUSTICES' FORUM**

8 June 2018

The Southern African Chief Justices' Forum (SACJF) is a voluntary association of Chief Justices from countries in East and Southern Africa. It was formed in 2003 with the object of promoting contact and co-operation among the judiciaries in the East and Southern African region; promoting the rule of law, democracy and the independence of the judiciaries in the region; promoting and protecting the welfare and dignity of judges in the member countries and generally promoting the interests of judiciaries of member countries.

The Judiciary of the Seychelles is a proud and active member of the SACJF. The leadership of the judiciary of Seychelles extended an invitation to SACJF to undertake a fact-finding mission on the recent developments concerning the country's judiciary. The principal purpose of the mission was to meet stakeholders and gather information pertaining to the rule of law and independence of the



judiciary, and offer suggestions towards enhancing the rule of law, independence of the judiciary, security of tenure for judges and access to justice for all.

The SACJF delegation consisted of Chief Justice Peter S Shivute, Chief Justice of Namibia, who is also the Chairperson of SACJF and Hon. Chief Justice Andrew C.K. Nyirenda SC, Chief Justice of Malawi, who is serving as Deputy Chairperson of SACJF.

The Mission extends its profound gratitude to His Excellency, Mr Danny Faure the President of the Republic of Seychelles and the Government for the courtesies extended to the delegation. The Mission further conveys its gratitude to the Government of the Republic of Seychelles, the Leader of Opposition in the National Assembly, Hon. Wavel Ramkalawan and other stakeholders for agreeing to meet with the delegation and for their cooperation.

The delegation undertook the mission from the 4<sup>th</sup> to 8<sup>th</sup> June, 2018 and met with His Excellency, the President of the Republic of Seychelles and other members of the Executive, Leader of the Opposition, the Judiciary, the Constitutional Appointments Authority, the Bar Association and Citizens Engagement Platform Seychelles (Non-Governmental Organisation).

The SACJF affirms the principle of independence, impartiality and accountability of the judiciary without which there cannot be effective separation of powers. The principle of separation of powers provides society with the checks and balances

necessary for maintenance of a democratic system of government. The SACJF also affirms the principle of equality before the law as sacrosanct for the maintenance of public confidence in the administration of justice.

SACJF therefore urges the authorities in Seychelles to ensure that the two pending disciplinary matters concerning members of the judiciary in Seychelles are handled fairly, speedily and in accordance with the principles of natural justice and due process. Above all the matters should be handled in accordance with the law and in a way that preserves the independence, integrity and dignity of the courts and one that reinforces rather than undermines the principle of separation of powers and the rule of law. Public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

SACJF stands ready to offer its counsel to the authorities to help in resolving these matters and offer its professional expertise towards the necessary legal reforms.

The Mission will in due course produce a report containing its findings and recommendations.



Peter S. Shivute

**CHIEF JUSTICE OF NAMIBIA & CHAIRPERSON:  
SOUTHERN AFRICAN CHIEF JUSTICES' FORUM**

## Annexure C

### CONSTITUTIONAL APPOINTMENTS AUTHORITY

#### OFFICE OF THE CHAIRMAN

La Ciotat, Ground Floor  
P.O Box 1087  
Victoria  
Mahé



Tel: 4322504 Fax: 4323112 Email: [caa.seychelles@gmail.com](mailto:caa.seychelles@gmail.com)

Your Ref:

Our Ref:

Date: 16<sup>th</sup> April, 2018

Dr Mathilda Twomey  
Chief Justice  
Ile du Port

Dear Chief Justice,

1. COMPLAINT LODGED BY JUDGE DURAI KARUNAKARAN DATED 26 June 2017
2. COMPLAINT LODGED BY JUDGE DURAI KARUNAKARAN DATED 15 September 2017
3. COMPLAINT LODGED BY JUDGE DURAI KARUNAKARAN DATED 27 October 2017

The above complaints have been made to the Authority by Judge Durai Karunakaran against you. All the complaints were forwarded to you with a request that you provide the Authority with a response. We thank you for the responses the Authority has received from you personally and from your Attorneys.

#### COMPLAINT 1

The first set of complaints from Judge Karunakaran is set out under five headings: Perjury. Giving false information, Abuse of Authority of Office/ Destruction of Evidence. Multiple interferences by the Chief Justice with the Judicial Process and Proceedings and the Misappropriation of a certain sum of money.

COMPLAINT 2 relates specifically to your decision to make public the Report of the Tribunal appointed under Article 134 (2) of the Constitution of the Republic of Seychelles to inquire into the inability of Judge Durai Karunakaran to perform the functions of the office of Judge on grounds of misbehaviour even before the President of the Republic made any pronouncement under Article 134 (2) (b) of the Constitution following the Tribunal's recommendation to him.

COMPLAINT 3 is set out under two headings: Abuse of Authority of Office and Conspiracy. This complaint relates more specifically to the contents of a number of emails between yourself, the Chairperson of the Authority as then constituted and one Mr. Marc Guthrie from the



Commonwealth Secretariat following complaints lodged by you against Judge Durai Karunakaran with the Authority.

As we did indicate in our letter of 1<sup>st</sup> of February 2018 the Authority was of the opinion that the complaints were substantial enough for a full investigation to be carried out in respect of all the complaints, singularly and collectively.

We wish to inform you that after giving a factual and legal consideration to the complaints, the responses from you and your Attorneys and all the documents that have been adduced by the parties, the Authority has concluded its investigation in the various complaints lodged before it.

The Authority is satisfied that a prima facie case has been established for misbehaviour under Article 134 (1) (a), in respect of Complaints 2 and 3 above.

In respect of Complaint 1 above the Authority is satisfied that some, but not all, of the complaints need to be investigated. The Authority is satisfied that a prima facie case has been established for misbehaviour under Article 134 (1) (a) in respect of the complaints made under the heading "Abuse of Authority of Office/Destruction of Evidence".

We write to inform you that, pursuant to Article 134 (2) of the Constitution, the Authority will be appointing a Tribunal to inquire into the complaints.

You will be formally notified of the specific charges once the Tribunal will have drafted its own Rules of Procedure and a Counsel has been appointed to assist the Tribunal. You will be served with all the documents that will be placed before the Tribunal in order to allow you the time required to prepare your case.

Yours Faithfully,



Michel Felix  
Chairman  
Constitutional Appointments Authority

### The Tribunal Rules of Procedure

- 1 The Rules are enacted to ensure that:
  - (a) all persons affected or likely to be affected by the findings ("interested persons"). recommendations or decisions of the Tribunal have full and fair opportunity to be heard; and
  - (b) the proceedings of the Tribunal are to be conducted as efficiently as practicably possible.
- 2 Subject to these Rules, the Tribunal shall follow the Seychelles Code of Civil Procedure with such modifications and adaptations as may be necessary.
3. The Inquiry is an inquisitorial process with the object, so far as is reasonably possible, to ascertain the truth about the facts relevantly placed before it for the purpose of reporting on them to the Constitutional Appointments Authority and recommending or not a Judge ought be removed from office for inability to perform its functions.
4. The proceedings of the Tribunal shall be open to the public unless the Tribunal decides, in the public interest, that some part of the proceedings shall be in private hearing.
5. The Tribunal is empowered to ascertain the relevant facts and accordingly:
  - (a) it has the power to require persons who may have knowledge of those facts to attend to give evidence as to them; and
  - (b) to require the production of documents (including electronic records) or things that may be relevant.
6. Every person who:
  - (a) refuses or omits, without sufficient cause, to attend at the time and place mentioned in the summons served on that person
  - (b) attends but leaves the Tribunal without the permission of the Tribunal.
  - (c) refuses to be sworn or to make an affirmation or declaration, as the case may be.
  - (d) refuses without sufficient cause to answer, or to answer fully and satisfactorily, to the best of his knowledge and belief all questions put by or with the concurrence of the Tribunal.
  - (e) refuses or omits without sufficient cause to produce any books, plans or documents in his possession or under his control, and mentioned or referred to in the summons served on him.
  - (f) at any sitting of the Tribunal wilfully insults any Member or the secretary, or wilfully and improperly interrupt the proceedings of the Tribunal, or be guilty of any contempt of any Member.

shall be in contempt of the Tribunal and be dealt with according to law provided always that no person giving evidence before the Tribunal shall be compelled to incriminate himself, and every such person shall, in respect of any evidence given by that person before the Tribunal, be entitled to all the privileges and immunities to which a witness giving evidence before the Supreme Court is entitled in respect of evidence given before that Court.



- 7 Issues shall be determined by at least two of the Members of the Tribunal
- 8 Summonses for the attendance of a witness or production of a document or thing shall be in the form prescribed by the Code amended as appropriate, and provided by Counsel Assisting to the President for signature. Service shall be in accordance with the general law of the Republic of Seychelles.
- 9 The Tribunal is not bound by the laws of evidence and may receive evidence in whatever form it thinks it appropriate, giving the evidence such weight as it considers is warranted provided that, unless there are good reasons for not doing so, it shall take evidence orally under oath or affirmation, giving interested parties (including where relevant Counsel Assisting) a fair opportunity of testing the evidence by cross-examination.
10. Persons interested may, by leave of the Tribunal, be represented by counsel
11. (1) Persons interested may by leave of the Tribunal seek to have witnesses called witnesses to give relevant evidence
  - (2) Where a person interested seeks to have a witness called to give such evidence, (unless otherwise decided by the Tribunal) he or she is to provide a statement, signed by the witness, as to the evidence sought to be adduced to Counsel Assisting who shall apply for a summons for that witness' attendance. A dispute, if any, as to the relevance of the proposed evidence will be determined by the Tribunal.
  - (3) Where a person interested seeks the production of any document or thing, the procedure specified in paragraph 11(2) is to be utilised, *mutatis mutandis*
- 12 Counsel Assisting the Tribunal shall, unless these Rules otherwise provide or the Tribunal otherwise directs, sign, issue, and receive process for the Tribunal unless otherwise directed by the Tribunal, as well as lead evidence before the Tribunal
13. (1) Subject to paragraph 13(2), the matters of complaint specified by the Resolution of the Constitutional Appointments Authority and the Consideration Report under which the Tribunal was instituted sufficiently set out the particulars of complaint requiring investigation by the Tribunal.
  - (2) On application by Counsel Assisting or a person interested, the Tribunal may give further particulars of the matters of complaint, providing that such particulars are consistent with or rationally connected to the substance of the matters determined by the Constitutional Appointments Authority as justifying investigation.
14. The Tribunal may give directions having the effect of a *pro tanto* amendment of these Rules, if it deems it necessary or desirable to do so and may give directions as to any matter of procedure not provided or not adequately provided for by these Rules.

14 May 2018

The Hon M F Adams QC,

President,

Tribunal of Inquiry

## Annexure D

### CONSTITUTIONAL APPOINTMENTS AUTHORITY

#### OFFICE OF THE CHAIRMAN

La Ciotat, Ground Floor  
P.O Box 1087  
Victoria  
Mahé



Tel: 4322504 Fax: 4323112 Email: [caa.seychelles@gmail.com](mailto:caa.seychelles@gmail.com)

Your Ref:

Our Ref:

Date: 16<sup>th</sup> April, 2018

## Constitutional Appointments Authority Resolution

We, the undersigned members of the Constitutional Appointments Authority hereby certify that the following is the resolution duly adopted at its meeting held on Friday the 13<sup>th</sup> April 2018 at 10.30 am.

### Resolution

**Therefore the Constitutional Appointments Authority unanimously resolved after consideration that the letter of the 16<sup>th</sup> April 2018 to Dr. Mathilda Twomey should be issued to her in pursuance of its decision that the complaints against her were substantial enough for a full investigation to be carried out in respect of the complaints by a Tribunal of Inquiry.**

The said letter should be attached to the resolution and the minutes of meeting for the record.

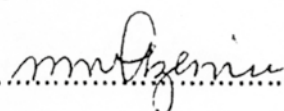
Michel Felix

Chairman

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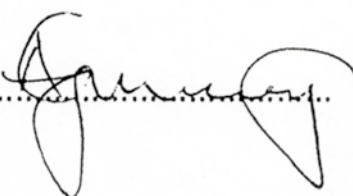

Marie Nella Azemia (Mrs)

Member

.....  


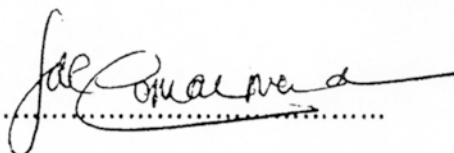
Annette Georges (Mrs)

Member

.....  


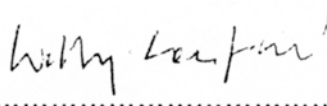
Simone de Comarmond (Ms)

Member

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Willy Confait

Member

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**CONSIDERATION REPORT OF CONSTITUTIONAL APPOINTMENTS  
AUTHORITY FOLLOWING COMPLAINTS LODGED BY JUDGE DURAI  
KARUNAKARAN AGAINST THE CHIEF JUSTICE, DR MATHILDA TWOMEY**

The Constitutional Appointments Authority (CAA) received three complaints between the period 26 June 2017 and 9 March 2018. All three complaints were lodged by Judge Durai Karunakaran against the Chief Justice, Dr Mathilda Twomey. All three complaints revolved around the circumstances surrounding an initial set of complaints lodged by the Chief Justice, Dr Mathilda Twomey, against Judge Durai Karunakaran which resulted in the appointment of a Tribunal of Inquiry on 7 October 2016 by the then differently constituted CAA.

The three complaints were preceded by the filing, on 25 May 2017, of a Petition by Judge Durai Karunakaran before the Constitutional Court against the Constitutional Appointments Authority (*Constitutional Petition No. 3 of 2017*). He alleged that the appointment of the Tribunal was unconstitutional and that he had been deprived of his right to a fair hearing, invoking the alleged breach of the audi alteram partem rule at the consideration stage by the former members of the CAA. The case has been heard by the Constitutional Court. Judgment has been reserved for 19 June 2018.

The former Chairperson and a former member of the CAA were granted leave, on appeal from a decision of the Constitutional Court to the Court of Appeal to be added as Interveners to the Petition.

*Constitutional Petition No. 3 of 2017* is relevant because certain documents, principally an exchange of emails between the Chief Justice, Mr Mark Guthrie from the Commonwealth Secretariat and the former Chairperson of the CAA were produced in Court by both the 1<sup>st</sup> Respondent (the CAA) and the Interveners. The contents of these emails became the subject of a third complaint (and an additional complaint to the third complaint) by Judge Karunakaran against the Chief Justice, as and when the emails were produced before the Constitutional Court.

**COMPLAINTS:**

**COMPLAINT 1**

- A. On 26 June 2017, the Constitutional Appointments Authority (CAA) received the **first** set of complaints from Judge Durai Karunakaran against the Chief Justice, Dr Mathilda Twomey.

The Complaints came under several headings:

1. Perjury by the Chief Justice whilst giving evidence before a Tribunal of Inquiry that had been appointed by the CAA (as then constituted) to investigate complaints lodged by the Chief Justice against Judge Karunakaran in September/October 2016.
2. Giving false information to the CAA (as then constituted) in respect of an order made by Judge Karunakaran in October 2015 in a specific case he was hearing.

3. Abuse of Authority of Office/Destruction of Evidence.
4. Multiple interferences by the Chief Justice in *the complainant's* independent judicial functioning as a Judge and interference with judicial process and proceedings.
5. Suspected misappropriation of USD 10,000 given by a foreign donor/UNODC for the Judiciary SEYLII project, and subsequent cover up.

## **COMPLAINT 2**

B. On 15 September 2017, the Constitutional Appointments Authority received a **second** complaint from Judge Durai Karunakaran against the Chief Justice, Dr Mathilda Twomey.

This complaint was in relation to the Chief Justice's decision, on 11 September 2017, to make public the findings and recommendations of the Tribunal appointed to investigate complaints made by the Chief Justice against Judge Karunakaran and presented to the President of the Republic, Mr Danny Faure, on 28 August 2017.

The complaint was fourfold:

- (i) The report was still under "review" by the President;
- (ii) The matter was sub-judice because of a case filed by Judge Durai Karunakaran before the Constitutional Court (*Constitutional Petition No. 3 of 2017*);
- (iii) Blaming the President in public for the delay in publicising the Tribunal's findings and recommendations, and
- (iv) Usurping the functions of the President under Article 134 (3) of the Constitution.

## **COMPLAINT 3**

C. On 27 October 2017, the Constitutional Appointments Authority received a **third** complaint from Judge Durai Karunakaran against the Chief Justice, Dr Mathilda Twomey. The complaint was in relation to the contents of emails between the Chief Justice and Mr Mark Guthrie of the Commonwealth Secretariat and forwarded by the Chief Justice to the Chairperson of the CAA (as then constituted) with the Chief Justice's observations and produced by the CAA/1<sup>st</sup> Respondent in *Constitutional Petition No. 3 of 2017*.

The complaints in relation to the contents of the emails were set out under two headings:

1. Abuse of Authority of Office.
2. Conspiracy.

On 9 March 2018 the CAA was given a copy of another email. This was an email from Mr Mark Guthrie to the Chief Justice and forwarded by the Chief Justice to the Chairperson of the CAA (as then constituted) with the Chief Justice's observations. This document was obtained in *Constitutional Petition No. 3 of 2017* following its production by the Interveners.



## **BACKGROUND HISTORY**

In its consideration of the complaints by Judge Karunakaran against the Chief Justice, the CAA did bear in mind the following preceding facts:

In a letter of complaint, dated 30 September 2016, the Chief Justice, Dr. Mathilda Twomey, had lodged a number of complaints against Judge Duraikanu Karunakaran, a sitting Judge, to the Constitutional Appointments Authority (as constituted then) pursuant to Article 134 of the Constitution of Seychelles.

On 7 October 2016, Judge Karunakaran was informed by the CAA that a Tribunal had been appointed to inquire into the complaints. On the same day the CAA (as then constituted) wrote to the President (former President James Michel) informing him that a Tribunal had been appointed.

On 10 October 2016 Judge Karunakaran was suspended from office by former President Michel, pending the findings/recommendations of the Tribunal appointed to hear the complaints.

On 7 February 2017 the Tribunal commenced its proceedings, and immediately adjourned to 14 February 2017. Proceedings were again adjourned following various motions for stay of proceedings pending applications for Judicial Review. On 22 May 2017 the hearing proper commenced and continued until 5 June 2017, in the absence of Judge Karunakaran who had chosen not to participate in the Tribunal's proceedings.

On 25 August 2017 the Tribunal decided unanimously, on some but not all the complaints, that the conduct of Judge Karunakaran amounted to misbehaviour under Article 134 of the Constitution

On 28 August 2017, the Chairman of the Tribunal submitted the Report of the Tribunal to the President (Mr Danny Faure) under Article 134 with its recommendations, and submitted a copy of the same to the Constitutional Appointments Authority on 29 August 2017.

The President, Mr Danny Faure, has to date not publicly disclosed the recommendations of the Tribunal of Inquiry. In a public press conference he has stated that he was awaiting the ruling of the Constitutional Court before doing so and making public the Tribunal's recommendations

## **CONSIDERATION BY CAA**

The above Complaints were considered as and when they were received by the CAA, and referred to the Chief Justice for a response. Responses were received from both the Chief Justice in her individual capacity and from her Attorneys and have all been taken into consideration in all the deliberations of the CAA.

In its considerations of the complaints, the CAA addressed its mind to the following:

1. The relevant Articles of the Constitution of Seychelles.
2. The Seychelles Code of Judicial Conduct.
3. The Commonwealth Latimer House Principles.
4. The Rules of Procedure formulated and adopted by the CAA, as presently constituted, with regard to complaints received against Justices of Appeal and Judges.
5. The substance of the complaints and annexes from Judge Karunakaran.
6. The substance of the replies from both the Chief Justice and her lawyers and annexes provided.

After prolonged discussions and deliberations the members unanimously agreed on the following:

#### COMPLAINT 1

1. Under the heading of "Perjury" (knowingly making a false statement) and the complaints made in relation thereto, the CAA was not satisfied that a prima facie case had been established. Perjury requires a high degree of proof that a person has knowingly and wilfully lied under oath rather than mistakenly assuming certain facts in the, albeit wrong, belief that they were correct.
2. Under the heading of "Giving False Information" the CAA was not satisfied that this was a matter that needed an investigation by a Tribunal of Inquiry. The incident arose in October 2015. The matter was sorted out and closed following the intervention of Justice of Appeal, Anthony Fernando. Even though the Chief Justice raised it again in the Tribunal Hearing against Judge Karunakaran under the Complaint of Poor Collegial Attitude, the Tribunal did not find the behaviour so gross as to warrant removal from office.
3. Under the heading "Abuse of Authority of Office Destruction of Evidence" the CAA came to the following findings:

#### Abuse of Authority of Office:

- (i) The serving of an envelope, containing the suspension order from former President James Michel at 10.00 am on 10 October 2017, on Judge Karunakaran in open Court during the hearing of a case;
  - (ii) A memo from the Chief Justice to Judge Karunakaran handed to him by the Registrar of the Court, 20 or so minutes after he had adjourned his case and was re-reading the letter of suspension in his office, requesting him to hand over all the files allocated to him and the keys to his office "immediately";
  - (iii) The blocking of access by Judge Karunakaran to all his emails on the day of his suspension with the assistance of the Principal Secretary from the Department of Information, Communication and Technology (DICT), bypassing the IT Manager of the Judiciary;
  - (iv) The response of the Chief Justice in her letter of 7 July 2017 to the CAA.
- are all matters that were considered by the CAA, especially given the subject matter of the third complaint made by Judge Karunakaran against the Chief Justice.



The CAA also noted that the Chief Justice, in her response to Judge Karunakaran's complaints which had been referred to her by the CAA, made no mention and gave no explanation as to how/why the letter of suspension came to be served on Judge Karunakaran in open court and how, 20 minutes after service of the letter of suspension from former President James Michel, the Registrar was already in possession of a memo from the Chief Justice to Judge Karunakaran to hand over files and keys.

The circumstances surrounding the suspension of Judge Karunakaran do evoke misgivings as to the propriety of the Chief Justice's decisions and behaviour sufficient, in the CAA's opinion, to amount to the kind of misbehaviour envisaged under Article 134 (1) (a) and that should be investigated.

The CAA was of the opinion that the complaints made under the heading of "Abuse of Authority of Office" could not be dismissed as they did support and re-enforce the complaints made in COMPLAINT 3.

#### Destruction of Evidence:

Under this heading the CAA was primarily concerned with the case of *Francois Octobre v. Government of Seychelles CS 17/2002*.

Under this complaint, Judge Karunakaran alleged that a written judgment of his had been written and delivered to the Chief Justice for pronouncement of his findings in Court but that the Judgment had been destroyed by the Chief Justice.

The material that the CAA had before it, and which it took into consideration in its decision, was the following:

- (i) The allegations made by Judge Karunakaran;
- (ii) The Affidavit of Quincy Dufrène, Senior Court Orderly to Judge Karunakaran;
- (iii) The Press Release of 24 June 2017 from the Judiciary to daily newspaper "Seychelles Nation" denying receipt of a judgment in the case of Francois Octobre;
- (iv) The Chief Justice's response on 7 July 2017 to the CAA: "*There was a document which was brought to my attention by the court orderly which was delivered to me, separate of the file, after the Judge was suspended. ... I refused to allow the document to be put on file in case it caused confusion.*";
- (v) The response of the Chief Justice of 7 July 2017 to that particular complaint;
- (vi) The Chief Justice's own words in her letter of 7 July 2017 to the CAA: "*The only contact that Mr Octobre has had with my Office was ..... with my Personal Assistant and the Registrar. I have not had any personal contact with Mr Octobre*";
- (vii) The statement of the Chief Justice at p.47 of the Record of Proceedings of 25 May 2017, in the course of her testimony before the Tribunal appointed to investigate her complaints against Judge Karunakaran (a copy of which was served on the CAA on 29 August 2017) where she states: "*He (Mr Octobre) came regularly to me to complain that he was awaiting judgment in this case and could I do anything for him*";

- (viii) The statement of Francois Octobre at p.38 of the same Record of Proceedings of 31 May 2017, in an answer to a question from the Attorney appointed to assist the Tribunal to him: "*Q. Did you have any occasion to visit the current Chief Justice to make a complaint about this case? A. Yes*".
- (ix) The judgment (the allegedly destroyed judgment) of Judge Karunakaran giving judgment in favour of the Respondent, the Government of Seychelles;
- (x) The judgment of the Chief Justice, who took over the case, in favour of the Petitioner (Francois Octobre) – a judgment that went contrary to current jurisprudence.

The CAA was of the opinion that the afore-mentioned complaints did raise matters for concern and that the complaints made by Judge Karunakaran could not be dismissed as they did raise issues that could only be decided by a Tribunal appointed to fully inquire into these matters.

4. Under the heading of "Multiple Interferences by the Chief Justice...", the CAA was of the opinion that, whilst some allegations made by Judge Karunakaran could be interpreted as "interferences" by the Chief Justice in proceedings in which he was involved and, to use the Chief Justice's own words, her actions in her "administrative oversight role" could have been more "tempered", the CAA did not believe that the complaints were of a nature that called for the appointment of a Tribunal to investigate the complaints.
5. Under the heading "Suspected misappropriation of USD10,000 given by a foreign donor/UNODC for the Judiciary SEYLII project" the CAA was satisfied with the explanation given by the Chief Justice that the funds had been used to pay her former Executive Legal Assistant (Ms. Kerr) to upload judgments onto the SEYLII website. The issue of whether payment ought to have been made to another employee of the Judiciary for uploading the judgments and any other administrative possible misfeasance are matters for the Board of SEYLII and not the CAA.

## COMPLAINT 2

In its consideration of that complaint, the CAA addressed its mind to the response given by the Chief Justice's team of lawyers on 6 March 2018. The CAA noted that updates of the Tribunal proceedings had indeed been "regularly and comprehensively televised on local 'news'" and indeed excessively so in the opinion of many individuals.

The issue that the CAA had to consider was not the manner of coverage of the Tribunal proceedings but the decision of the Chief Justice, as head of one branch of Government, to decide to usurp the functions of the President under Article 134 (2) (b) and (3) of the Constitution and be seen to be acting in violation of the constitutional principle of separation of powers.

The CAA bore in mind the contents of a joint declaration on 9 May 2017 between President Danny Faure, Speaker of the National Assembly Patrick Pillay, Chief Justice Mathilda Twomey and President of the Court of Appeal Francis Mac Gregor underlining this separation.



The CAA also addressed itself to the contents of the recordings and the interviews given by the Chief Justice to the Seychelles Broadcasting Corporation (SBC) television station as to why she had decided to make public the findings and recommendations of the Tribunal.

The CAA also bore in mind a Presidential Press conference of 23 November 2017. In answer to a specific question put to him by a reporter as to why he had not made the report and recommendations made by the Tribunal of Inquiry public, the President said that he had chosen to await the decision of the Constitutional Court, before which the constitutionality of the Tribunal was being questioned, before making the findings and recommendations of the Tribunal public.

The CAA unanimously agreed that the second complaint received on 15 September 2017 from Judge Karunakaran against the Chief Justice was serious enough to be investigated by a Tribunal of Inquiry.

This complaint, the CAA believed, could not be dismissed as, not only did it disclose that the Chief Justice exceeded her authority and powers under the Constitution, and that the decision she took to pre-empt the President's duty to publicise the findings could amount to the type of misbehaviour envisaged by Article 134 (1) (a) of the Constitution on the part of the Chief Justice, but that it again supported and re-enforced the complaints made in COMPLAINT 3.

#### COMPLAINT 3 (and ADDITIONAL COMPLAINT OF 9 MARCH 2018)

In its consideration of this complaint the CAA addressed its mind to the following:

- (i) The contents of the emails of 2 and 3 October 2017 between the Chief Justice, Mr Mark Guthrie of the Commonwealth Secretariat and the former Chairperson of the CAA which were on the CAA's office computer;
- (ii) The contents of emails of 5 and 6 October 2017 which were produced by the Interveners in *Constitutional Petition No. 3 of 2017* and not on the CAA's office computer or any files of the CAA;
- (iii) An email dated 10 October 2017 from the Chief Justice to the then Chairperson of the CAA attaching a Press Release to be issued following the suspension of Judge Karunakaran by President James Michel;
- (iv) Our letter of 8 August 2017 to the Chief Justice seeking an explanation as to what appeared to be inappropriate interference by her in the performance of the workings of the CAA ;
- (v) The Chief Justice's reply of 28 August 2017;
- (vi) The response given by the Chief Justice's team of lawyers on 6 March 2018.

At the end of its deliberations the CAA was of the unanimous opinion that the complaints did raise sufficient concern of inappropriate behaviour sufficient to amount to misbehaviour under Article 134 (1) (a) such that the matter ought to be properly investigated by a Tribunal under Article 134 (2) (a) of the Constitution.

