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Two Tribunals and an Appeal in Seychelles: Monitoring and enforcement of legal ethics in a small jurisdiction.

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Abstract: On paper, the legal profession in Seychelles does appear to be governed by ethical rules of conduct backed up by appropriate mechanisms for enforcement. However, on closer inspection, it appears that in practice these mechanisms function erratically, if at all. This paper examines the regulatory gap between theory and practice, focusing on recent examples of enforcement actions against lawyers and judges in the jurisdiction. It goes on to discuss possible reasons for this gap, including a lack of ethical education, lack of peer pressure or other incentive to maintain ethical standards, and deficiencies in independence and impartiality of disciplinary tribunals. These reasons are discussed in the context of the small scale of the legal profession in a micro-jurisdiction.

***Keywords*:** legal ethics, ethical compliance, small states, judiciary, legal profession,

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Introduction

For a two-year period starting 1 October 2017, I was engaged as a Senior Lecturer in Law at the University of Seychelles (UniSey). My time in Seychelles coincided with UniSey's participation in the Scale in Seychelles research project, which investigated various aspects of living in a small-scale society, and in which I took part. As a lawyer, I was particularly interested in how the legal profession operates in such as small jurisdiction. To that end, I attended to observe legal proceedings at the Supreme Court and the Court of Appeal, and interacted with a number of judges and attorneys. I also conducted ten semi-structured interviews with legal practitioners in the Seychelles to get a better understanding of various aspects of legal work in the jurisdiction.

This paper relies primarily on legal and critical analysis of relevant case law and legislation together with an analysis of notes of my observations of court proceedings and interviews with members of the legal profession in Seychelles. Supporting material includes official governmental websites and websites of the Bar Association of Seychelles, as well as select comparative material from the jurisdiction of England and Wales. The English jurisdiction was chosen for comparative purposes because of its familiarity – both for myself and for the judges and attorneys of Seychelles.

While I initially cast my net wide to get an overall picture of legal practise, legal ethics – and in particular, the question of enforcement – quickly emerged as a major issue of my investigation. I had been a practising lawyer at one point in my career, and ethics are something that I am trained to pay attention to in the legal context – maintaining ethical standards is strongly emphasized in legal education and work culture of the English legal profession, with legal ethics seen as crucial in preserving the rule of law. While infractions of ethical rules by individual legal practitioners are far from rare, the English legal profession – represented by its

professional bodies – strives to maintain compliance with relatively robust monitoring and enforcement mechanisms. I was therefore quite shocked by what I perceived as a rather relaxed attitude towards ethical enforcement in the legal profession of the Seychelles, particularly given that the jurisdiction is so closely related to my own. This paper is my attempt to take a closer look at the issue of legal ethics in Seychelles, to discuss some of the reasons for the divergence I have found between the theory and practice of enforcement of legal ethics in the jurisdiction, and to address the question of smallness and role it plays in the operation of ethical enforcement.

Pirates (alleged) and a fair(ish) trial

On 17 September 2018, the case of *Republic of Seychelles v Ahmed and others [2018] SCSC 866* came on for trial at the Supreme Court of Seychelles. Six Somali nationals were alleged by the prosecution – led by the Deputy Attorney General of Seychelles, Mr. David Esparon - to have engaged in piracy, having been captured in November 2017 by the Italian navy operating as part of the joint EU anti-piracy task force. The case against them was circumstantial: they were discovered shortly after an attempted pirate attack against a merchant vessel, with a skiff that fit the general description of the attacking ship. They had no weapons on board at the time of capture and claimed to be fishermen, carried away from shore when their engine broke – on the face of it, not entirely an unreasonable claim, though aside from fairly dilapidated fishing nets, they did not appear to have much in the way of usual fishing equipment.

As the alleged pirates had not been caught red-handed (and being incompetent fishermen is not yet a crime), it was quite important for the prosecution's case that the evidence – including the descriptions of the appearance of the suspects and their boat – be consistent across witnesses. In an affidavit reproduced at paragraph 10 of the subsequent judgment in *Ahmed and others* (dated 28 September 2018 and available at https://seylii.org/sc/judgment/supreme-court/2018/866-0), a British legal officer with the EU Naval Force described how the prosecution worked to achieve this consistency. The officer, Lt. Commander Fane-Bailey, had been part of the operation that originally captured the six suspects and was now in Seychelles to observe the proceedings against them, as well as to support the members of the operation summoned as witnesses. It is in this last capacity that she attended at the National House offices of the Deputy AG in the morning of Tuesday 18th September 2018, where a scenario straight out of a legal ethics exam unfolded before her very eyes.

According to her affidavit, Mr. Esparon asked one of witnesses to testify to viewing footage that he did not see (thus encouraging the witness to lie to the court under Oath); gave the witnesses the exact form of words he wanted their testimony to take when describing the suspects' skiff ("white with a light blue band"); showed them photographs of the skiff taken by other witnesses; and emphasized the importance of one of the suspects wearing a red shirt. Lt. Commander Fane-Bailey attempted to stop him several times in the course of the meeting. However, as Mr. Esparon persisted, she could do nothing else but promptly report the whole matter to the Chief Justice of Seychelles, potentially throwing away a year's worth of her own and her team's hard work in bringing the suspects to trial. To her credit, she did not hesitate to do exactly that.

Coaching witnesses is a very serious infraction of legal ethics in most, if not all, developed legal systems. In Seychelles, it is specifically prohibited by Rule 17(4) of the Legal Practitioners (Professional Conduct) Rules 2013 ("the 2013 Rules"). The reason for the prohibition should be fairly obvious: giving witnesses the opportunity to compare stories, tailor

their accounts to fit with other evidence and iron out any inconsistencies puts the fairness of subsequent proceedings in serious jeopardy, thus clearly contravening the rule of law. Given the affidavit evidence – unchallenged by the prosecution – that witness coaching took place, it is not surprising that the judge presiding over the case dismissed the charges against the six suspects with the damning verdict that the evidence against them was "so manifestly unreliable that no reasonable tribunal could safely convict on it" (*Ahmed and others,* para. 20).

What was baffling about this whole affair was that – as apparent from the affidavit – Mr. Esparon made no attempt to conceal his unethical behaviour from a fellow lawyer, and persisted despite her repeated efforts to get him to stop. Was he not concerned that she would report him, despite their shared obligation – as lawyers – to report exactly such misconduct? Further, when her affidavit was produced to him, he did not reply to the allegations of his misconduct at all – not even to deny that he did anything wrong (*Ahmed and others, para. 14*). In many jurisdictions – including England and Wales, where most Seychellois lawyers have been trained – being caught in such a serious ethical violation would likely result in disbarment and loss of any future prospect of legal employment. Was the Deputy AG not concerned at all about the damage that these revelations could cause to his career prospects and professional repute?

As it turns out, Mr. Esparon had nothing to worry about, and probably knew it. However, to understand why this is the case, we must take a short tour of the Seychellois legal profession and explore the divergence between theory and practice in enforcement of legal ethics in the jurisdiction. Much of that gap, I will argue, is due to the smallness of its legal profession.

Legal ethics in the Seychelles: the rules

The legal system

The legal system in Seychelles is a blend of the English common law tradition with the French civil law and local customary law (Twomey, 2017). The procedure is adversarial and based on the English model, with many Seychellois lawyers and judges having studied for their law degree in England or Wales. Proceedings are conducted in English, although translation into Seychellois Creole is available and frequently used by litigants and witnesses. Overall, the whole process looks very much like what one would expect to see in the courts of England and Wales – down to lawyers dressed in wigs and gowns, and the ethical rules that the system purports to uphold.

The lawyers

According to the website of the Bar Association of Seychelles, there are 56 attorneys and/or notaries eligible to practise in the jurisdiction, as well as 16 State Counsel and Assistant State Counsel together with one public prosecutor in the Attorney General's Office. Practising attorneys are those who are licensed to offer legal services to the general public and represent their clients in court. The licensing process is administered by the Registrar of the Supreme Court, who keeps a Roll on which the names of currently authorised attorneys appear. Not all eligible attorneys are in active practice: the judges and lawyers I interviewed in February and March 2019 estimated the number of active practitioners to be around 30, serving a population of 100,000 people. By comparison, Jersey – a small island off the coast of England with a population of a similar size to Seychelles – has just under 300 practising lawyers listed on The Law Society of Jersey website; though perhaps the island's popularity as an off-shore

jurisdiction has something to do with increased numbers. The members of the AG's Office – State Counsel, Assistant SC, and the prosecutor – act only on behalf of the government and do not offer their services to the general public.

All lawyers in Seychelles – whether attorneys, State Counsel, notaries, or even pupils – are bound by the ethical obligations set out in the 2013 Rules, made pursuant to the Legal Practitioners Act (Consolidated to 1 December 2014). The Rules include both the usual general duties – such as upholding the rule of law (4(1)), acting honestly in providing legal services (4(2)), and maintaining the integrity and reputation of the legal profession (6(1)) – as well as more specific rules usually found in legal codes, such as the prohibition on entering into intimate personal relationships with clients (11(4)), the duty not to mislead or deceive the court (14(3)) or the duty to report misconduct of another legal practitioner (22(1)).

Monitoring and enforcement falls to the Office of the Chief Justice, in accordance with sections 10 and 11 of the Legal Practitioners Act and the Legal Practitioners (Disciplinary Measures and Reinstatement) Rules 1995 ("the Disciplinary Rules"). The Disciplinary Rules set out the procedural steps of any disciplinary proceedings for suspension or removal from the Roll of attorneys-at-law, or taking any other disciplinary measures against members of the legal profession. Under Rule 2(1), the Chief Justice may initiate such proceedings upon "a complaint in writing made by any person or information received otherwise" – the latter being perhaps a reference to the duty of lawyers to report each other's misconduct under Rule 22 of the 2013 Rules. In theory, non-compliant lawyers are therefore in danger of having their misconduct brought to the attention of the Chief Justice both through the complaints of those they have offended, and through the reports of any fellow legal professional who becomes aware of it.

The judges

According to the most recent annual report on the judiciary of Seychelles available on seylii.org (2016/17, p. 6), there are five magistrates, eight judges of the Supreme Court (including a Master), and four judges of the Court of Appeal. In addition, the Chief Justice – currently Mathilda Twomey, appointed in 2015 and the first woman to hold the position – presides over the judiciary and sits on both the Supreme Court and the Court of Appeal. While there have been some arrivals and departures since the 2016/7 report, my informal head count – arrived at by attending court at the Palais de Justice in Victoria (the capital city) and talking to legal professionals at various times between July 2018 and March 2019 – confirmed that the overall number of judges hovers at around 20. The judges of the Supreme Court and the Court of Appeal sit at the Palais de Justice. The four magistrate courts are situated around the three main islands – two on Mahe (Victoria and Anse Royale), and one each on Praslin and La Digue.

All judges are subject to the Seychelles Code of Judicial Conduct 2010 (https://seylii.org/sychelles-code-of-judicial-conduct). The Code includes an array of usual judicial obligations needed to foster effective administration of justice: from independence and impartiality of decision-making to competence and diligence in carrying out judicial duties. Judges are required by the code to also accord equal treatment to all those who appear before them, and hold to high standards of integrity and propriety in both their professional and personal lives. There are no specific provisions concerning any procedures for enforcement or sanctions for non-compliance within the Code, and nothing to indicate a monitoring mechanism. However, its provisions appear to be taken into account in proceedings concerned with removal of a judge from office pursuant to article 134 of the Constitution of the Republic of Seychelles ("the Constitution").

Pursuant to article 134(1) of the Constitution, a judge (a Justice of Appeal or Judge) can be removed from office if they are unable to perform the functions of their office. This inability can arise "from infirmity of body or mind or from any other cause, or for misbehaviour." While it is only the President of Seychelles who can appoint or remove a judge under the Constitution, recommending suitable candidates for a judicial post as well as initiating removal proceedings are in the hands of the Constitutional Appointments Authority (CAA), a five-member body established via a political compromise process set out in articles 139 and 140 of the Constitution. While the CAA does not appear to monitor or police judicial behaviour specifically, it does receive and consider complaints about any constitutional appointees, including judges. Any person may lodge such a complaint, supported by an affidavit setting out the nature of complaint and substantiating facts. The procedure is set out on the CAA website at http://www.caaseychelles.com/index.php/lodge-a-complaint.

When a complaint is made about misbehaviour serious enough to warrant removal from a post, the CAA is required under article 134(2) to appoint a Tribunal "to inquire into the matter, report on the facts thereof … and recommend to the President whether or not the Justice of Appeal or Judge ought to be removed from office." If such a recommendation is made, the President is obliged under article 134(3) of the Constitution to remove the judge in question from office.

Monitoring and enforcement in practice

From July through September 2018 as well as during February/March 2019, I attended a number of hearings at the Palais de Justice, observing a variety of cases in the Supreme Court (including the pirate trial). I also conducted ten (10) semi-structured interviews with legal professionals knowledgeable about the jurisdiction's legal system: my interviewees were current judges, practising attorneys or lawyers working in an adjunct capacity. The interviewees were selected based primarily on their availability: they were mostly the people who had time to talk to me, responded positively to my attempts to arrange an interview, and actually showed up to be interviewed. The information they provided was helpful in explaining and supplementing the publically available case law on enforcement of legal ethics in the jurisdiction; much of the information and discussion below derives from both my interview and court observation notes.

Other than the constitutional mechanism for removal by the President following a Tribunal under article 134(2), there appear to be no disciplinary procedures or penalties available for judicial violations of ethics. I have been unable to find any publicly accessible information concerning the number of complaints the CAA receives about judges, or how those complaints are handled. I could find no indication that the CAA is investigating the complaints made and exercising any disciplinary measures for infractions that might not be sufficiently grave for the constitutional article 134 procedure. That procedure has thus far been used twice to convene tribunals to consider allegations of judicial misbehaviour. One resulted in suspension of Judge Karunakaran and the recommendation that he be removed from post; the other was based on "revenge" complaints made by Judge Karunakaran against the Chief Justice, which were rightly dismissed for lacking merit. Both cases are more fully discussed below.

Of the two avenues for reporting misconduct of lawyers – public complaints and peer reporting under Rule 22 – only the first is actually working. Between 20 and 40 complaints a month are submitted to the Office of the Chief Justice from former or current clients unhappy with a lawyer's work. These are many and varied, ranging from completely trivial or misguided

through serious complaints alleging unethical or even criminal conduct. However, as of February 2019, not a single report has ever been made under Rule 22 by a member of the legal profession. According to my informants – both lawyers and judges – it is highly unlikely that one will be made in the near future. When asked, the majority confirmed that they have witnessed a variety of unethical behaviour, some of it very serious and possibly criminal, such as fraud or money laundering. However, all of those to whom Rule 22 applies asserted that they would never report the misconduct witnessed. Some apparently misunderstood what it requires: they believed that reporting would be the same as making a complaint, which they would then have to pursue and litigate (which is incorrect). Others thought that they would have to have some direct evidence of misconduct before reporting (also incorrect). One person quite openly said that they would never make such a report, and they did not know of anyone else who would: it simply would not happen, as "the Bar is too small."

Once a complaint is received, the Chief Justice will consider it, and decide whether it is serious enough to ask the lawyer in question to respond to the allegations. She will then consider both sides, and either close the matter, ask for more information, or inform the persons concerned of any action she intends to take. If ultimately she decides that there is some merit in the complaint, she will refer it to the Legal Practitioners' Discipline Committee, composed of three senior judges other than the Chief Justice. The tribunal thus formed will then investigate the matter, make findings of fact, and recommend a penalty. Under s10 of the Legal Practitioners Act, the available penalties include suspension or even removal from the Roll of attorneys: a sanction that should constitute a significant incentive for obeying the rules, given that it deprives the lawyer in question of the right to practise the profession that is their livelihood.

Unfortunately, as of 2018, this sanction has been somewhat neutered by the case – and more specifically, the result of the Appeal – of a Mr. William Herminie.

The appeal

In 2016, Mr. Herminie made history as the first member of the Seychellois legal profession to be subject to disciplinary proceedings under s10 of the Legal Practitioners Act. It appears that he had a number of complaints against him, which were not resolved due to his reluctance to translate into action his undertakings to the court promising to remedy the conduct complained of. His intransigence led to a Tribunal finally being appointed, which found a number of complaints against Mr. Herminie factual. The Supreme Court judgment concerning Mr. Herminie's punishment for his various transgressions, *In the matter of William Herminie (Attorney-at-Law Disciplinary Measures)* [2016] SCSC 621, records the Tribunal findings at paragraph 14.

According to those findings, Mr. Herminie:

- Breached undertakings to the Court (repeatedly);
- Repeatedly helped himself to his clients' money: he kept the money awarded to some of his clients, sometimes for years. In one particularly horrible case, the client he appropriated money from was a disabled woman; the funds she had won would have made her last years bearable. Instead, she died not having benefited at all "from the settlement money paid on her behalf during her lifetime due to the professional misconduct of counsel." Mr. Herminie was finally coerced into paying back her estate after she was already dead;

- Did not do work he was paid for (didn't show up to court, failed to file documents, etc.);
- Charged clients fees to which he was not legally entitled;
- Pursued an intimate relationship with one of his clients;
- Practised without a license for some time;
- Had eight cases pending against him for non-payment for goods and services, dishonouring a cheque, and professional misconduct, at the time of the disciplinary tribunal
- Assisted a client in committing tax evasion.

It was clear what penalty had to be imposed for this litany of misdeeds and dishonesty, and the Supreme Court – in the person of the Chief Justice – did not shy away from imposing it: Mr. Herminie was struck from the Roll, and thus barred from practising law. Chief Justice Twomey allowed in her judgment for a possibility of his reinstatement, provided that prior to making an application he completed two years of pupillage – a type of apprenticeship that all new lawyers normally go through to be qualified. However, the judgment made it clear that completion of pupillage was merely a prerequisite for making the application for reinstatement, rather than a condition for reinstatement itself. For that, Mr. Herminie would still have to persuasively argue and give reasons for why, despite his many past transgressions, he should be restored back to the Roll. In light of the gravity of his misconduct, it is difficult to imagine what possible grounds could be found sufficient.

Whatever his other faults, Mr. Herminie is clearly not a quitter. He appealed his ejection from the legal profession to the Court of Appeal on two grounds, only one of which was relevant to his reinstatement. In it, he argued essentially that the Chief Justice was a little too harsh on him:

> *The Honourable Chief Justice erred in principle in ordering the Appellant to serve a further term of two years pupillage with an approved Chambers as part of the stated rehabilitation programme. Appellant humbly submits that the supervision in an approved Chambers for a shortened period would be lawful as Appellant has undergone pupillage as granted, lawfully by the former Chief Justice V. Alleear.* para. 4, *William Herminie v Registrar, Supreme Court* [2018] SCCA 11.

Those readers who are also lawyers should at this point be scratching their heads – how is this a real ground of appeal? That is a very good question: a higher court is not normally allowed to interfere with an exercise of a lower court's judicial discretion – such as an imposition of a penalty or condition – if the discretion is properly exercised. It does not matter if a judge is harsh and a less onerous condition could have also been "lawful," so long as the judge did not exceed their discretion in imposing what they did. In his appeal, Mr. Herminie does not allege that the Supreme Court exceeded its discretion or that it did not exercise it properly – on the contrary, in asking for a shorter period of pupillage before he is able to apply for reinstatement, he is acknowledging that the court had the right to impose such a requirement on him in the first place. He is just saying that it could also have been shorter. Legally speaking, as a ground of appeal, this is nonsense – it should have been tossed straight out of court.

And yet, the Court of Appeal not only seriously entertained but actually allowed this ground of appeal; not only tossing out the requirement of pupillage imposed by the SC, but also taking the extra step of restoring the victorious Mr. Herminie to the Roll (subject to some minor conditions). The judgment in the case gives no real clue as to why this happened, and

the reasoning leading up to Mr. Herminie's restoration is practically incoherent. The relevant passage is found at paragraph 11:

> *11. The broad question for the Committee and the learned Chief Justice was whether the Appellant was a fit and proper person to practise law and whether all professional conduct complaints against the Appellant have been resolved to the satisfaction of the individual clients involved and pursuant to the Legal Practitioner's Act. The learned Chief Justice found that he was unfit to practice as an attorney-at-law or a notary. Under section 10 of the LPA, the Supreme Court may suspend or remove from the roll an attorney-at-law in such circumstances. Therefore, in our considered judgment, the issue of serving a new 2 year period of pupillage in terms of section 10 of the LPA strictly does not arise. However, semantics aside, we are of the considered view that the seriousness of the actions and/or omissions of the Appellant are such that this court will not condone. The term "pupillage" used by the learned Chief Justice connotes a requirement that the Appellant must go through a "process of rehabilitation" to ensure that he appreciates the necessity of properly conducting himself as an attorney. The Appellant himself recognized that necessity when he stated in ground 1 of his appeal inter alia that – "Appellant humbly submits that the supervision in an approved Chambers for a shortened period would be lawful …." We hold similar views albeit not necessarily serving pupillage as such.*

In the next paragraph, they simply allowed his appeal and restored him to the Roll "for reasons stated above." What are the reasons they might be referring to is anyone's guess, given that para. 11 does not come even close to stating or supporting grounds for restoration. In the first few lines of the above passage, it appears as though the CA considered the imposition of the pupillage requirement as being outside the Supreme Court's powers; but then the paragraph goes on to equate it with a requirement to undergo a "process of rehabilitation," which was squarely within what an application for reinstatement demanded. They therefore appear to have conceded that the Supreme Court did have the discretion to impose this requirement, and then gave no reason for why they decided to interfere with it – they just did.

Even if that is incorrect and the CA decided that imposing the pupillage requirement was outside the powers of the Supreme Court, that in itself is not a ground for restoring Mr. Herminie to the Roll. CA specifically acknowledged that Mr. Herminie was found not fit to practice, and they did not question that finding. They further acknowledged that he was removed from the Roll pursuant to a properly exercised power of the Supreme Court – so the discretion exercised in Mr. Herminie's removal was not impugned at all. It was therefore up to Mr. Herminie to apply to be restored, giving reasons for why he should be; and for the CA (if such an application came before them) to consider whether those reasons were adequate. No such application was made, and no reasons for reinstatement given. Removing the pupillage requirement only meant that they could substitute something else to serve as a "process of rehabilitation" prior to applying for reinstatement – it could not be a reason for reinstatement. And yet, as if by magic, it was.

I have asked those I interviewed for their explanation of the Herminie case. On the whole, most people thought that he was restored because the original penalty – striking him from the Roll – was too harsh. One person suggested that he had served his time, as it were, in that he was barred from his profession for two years between the Supreme Court decision and the Appeal judgment. Another suggestion was that the CA worried that, if they came down too hard on Mr. Herminie, quite a few other lawyers – whose conduct was also not quite up to

scratch – might then have been vulnerable. Or that it was unfair to single out Mr. Herminie for punishment and there was something else that motivated the institution of the Tribunal against him. These last two explanations seem rather alarming: it would be a truly sad state of affairs for the Seychellois legal profession if a significant proportion of their members turned out to be as badly behaved as Mr. Herminie. But perhaps the first explanation – that the Court of Appeal considered the penalty imposed to be too harsh – has some chance of making sense of their seemingly bizarre decision, if we interpret it to mean that the penalty imposed was well outside the limits of the range of penalties normally imposed for the sort of transgressions that Mr. Herminie was found to have committed.

Was the penalty "too harsh?"

This could be a legally sound explanation if some standards against which the penalty imposed could be evaluated existed at the time – such as official guidance or past case law giving examples of types of misbehaviour and the range of penalties applicable. Unfortunately, Mr. Herminie was the first lawyer in modern Seychelles to face disciplinary action, so no form of such guidance was available. However, it is perfectly acceptable to look to other jurisdictions when there is a gap in the local law – for instance, consulting English jurisprudence is common practice in Seychelles. The English (and other foreign) decisions are not binding on the Seychellois courts, but they provide persuasive guidance for how to tackle a particular issue by looking at how similar jurisdictions deal with the same problem.

When it comes to guidance on penalties for misconduct by the English legal profession, finding it is relatively straightforward. The Bar Tribunals and Adjudication Service website (https://www.tbtas.org.uk) helpfully provides a searchable database of findings and sanctions against misbehaving lawyers (barristers, in this case) in England and Wales. With very little effort, one can discover the range of behaviours considered worthy of disbarment (the barrister version of striking off the Roll), and compare it to that of Mr. Herminie to ascertain whether the penalty imposed on him really was outside acceptable limits.

Consulting the database in March 2019, these recent examples of disbarment were found:

- Stealing £400 from petty cash (Mahnoor Choudhury, 19 April 2017);
- Misappropriation of monies from a conveyancing transaction (Rajesh Babajee, 20 April 2016);
- Posting 7 racist/anti-semitic tweets (Ian Millard, 27 October 2016);
- Tax evasion (Mohammed Shaikh, 10 October 2016);
- Repeated or persisted fare evasion on the London Underground (Peter Barnett, 26 September 2016)
- Lying on a job application (Merilyn Brown, 20 June 2014)
- Breach of undertaking to pay a listing fee; failing to pay £50 by the time ordered by a judge (John O'Callaghan, 12 November 2013);
- Failing to release money due to a client (Ann Ng, 11 September 2013).

A common theme in most of these examples is that the misconduct in question involved some form of dishonesty, which is, according to the Sanctions Guidance 2019 of the Bar Tribunal and Adjudication Service, "not compatible with practice in a profession which requires exceptional levels of integrity" (BTAS, 2019, p.42). Dishonesty is punished harshly, because without honest conduct on the part of the officers of the court – lawyers included – the rule of law becomes a joke. The administration of justice, to be effective, relies on the legal

profession to be, by and large, prepared to honestly carry out their duties. So if a barrister is caught doing anything dishonest, the starting point is disbarment. Unless there are strongly mitigating circumstances, they are banned from practising law.

It seems clear that, by these standards, Mr. Herminie's penalty was fully justified; his misconduct was more than sufficient to warrant barring him from the legal profession for life. Whatever the real reason for the Court of Appeal's decision to set this penalty aside, the judgment therefore set a truly unfortunate precedent. Instead of taking this opportunity to signal ethical conduct as important, the Appeal judges instead signalled that even very serious misconduct will be tolerated rather than appropriately penalised. If even Mr. Herminie cannot be barred from practice, who can? Removal from the Roll has thus possibly been reduced to a purely theoretical sanction.

The judgment leaves an unpleasant impression that dishonesty is just not that big a deal, and even egregiously unethical conduct can be forgiven. Several of the people I spoke to also did not seem to be particularly troubled by Mr. Herminie's behaviour, at least not to the extent that I would expect fellow lawyers to be. This is, I believe, where the smallness of the profession becomes important. While several reasons for this apparent ethical apathy will be discussed in the next section, the small number of practitioners will be pointed out as a root cause of why unethical behaviour continues to be tolerated.

Why size matters

The reasons that my informants advanced for why enforcement of ethics remains problematic in practice boil down to three main areas: (1) lack of ethical education in the legal profession; (2) lack of incentive to behave ethically; and (3) interdependence and lack of impartiality, both in the profession and in Seychellois society generally. While on the face of it, all three have little to do with smallness – lack of ethical education, for example, could also be a problem in a much more populous legal profession – in the particularly Seychellois context, all three can at least partially be traced to smallness.

Education

The first ethics module in the preparatory course for students taking the Seychellois Bar Exam was implemented around two years ago. It consists of ten hours of instruction (one hour per week for ten weeks), concentrating on ethical theory for four weeks, and six weeks of having students work out practical application of ethical rules to various scenarios. Technically, the course is still not compulsory for future lawyers – students can take the Bar Exam without taking the preparatory course - but in practice, the exam is hard enough that most people who pass it have taken the course. Therefore, future lawyers should be able to start their careers with at least a basic grounding in legal ethics.

Prior to the ethics module being implemented, there was no ethical education available for Seychellois lawyers, compulsory or otherwise. Therefore, unless they had studied ethics elsewhere, the current crop of lawyers and judges would have had no ethical education that they could use to guide their professional conduct. Indeed, all of the practising attorneys and judges I interviewed confirmed that they have had no ethical education as preparation for practice or judicial office. There was therefore no stage of their legal education at which ethics were emphasized as important.

While both lawyers and judges were aware of their respective general rules of professional conduct, real-life ethical dilemmas tend to be complicated and involve conflicting loyalties or conflicts between personal interests and professional duties. Even in as straightforward a scenario as that which arose in the pirates case – witness coaching – it can be difficult to know what to do when, for example, one's commitment to ensuring a fair trial clashes with a year's worth of one's own work and the desire to see perpetrators behind bars. Without appropriate training and support, it is not easy to resolve it merely from general principles, and the temptation to let standards slide can become irresistible.

This is why the main institutions of the English legal profession invest so much in both the ethical education of young lawyers and in on-going ethical support for the profession. Ethics are a key component of the Bar Professional Training Course (BPTC), the vocational stage of training for every aspiring barrister. Students must not only pass an exam in professional ethics, but under the "Red Light Rule" can also be failed in other modules (such as advocacy or conference skills) if they fail to spot and successfully resolve any ethics issue that comes up: even if, otherwise, they would have passed the exam (BPTC Handbook 2018-19, pp. 36, 61-65; BPTC Syllabus). Passing the ethics exam requires knowledge of the continuously revised and updated BSB Handbook (the Bar's code of conduct rules) and the associated Code Guidance, on issues ranging from confidentiality through contacts with the media to the duty to report the serious misconduct of others (as well as one's own). Following completion of the BPTC, ethical education continues during the aspiring barrister's pupillage year (e.g.: https://www.innertemple.org.uk/education/), in the practice management course delivered by the four Inns of Court (one of which every barrister must be a member of). Newly qualified barristers are then required to complete an additional three hours of ethical education in their first three years of practice (as part of their 45-hour continuing professional development [CPD] requirement). While more experienced barristers are not required to include ethics in their 15 hour a year CPD requirement, they may do so; and should an ethical problem arise at any stage of their practice, they may avail themselves of a confidential Bar Council ethics helpline to help them resolve the difficulty.

The above effort to instil ethical values in new lawyers requires considerable manpower, consisting not only of employed personnel – who design courses, teach ethics to students, work out details of ethical rules and continuously update the Handbook, write additional Code Guidance, etc. – but also of a number of volunteers, lawyers and judges both practising and retired, who attend to assist with activities organized by the Inns of Court and the Bar Council, as well as help out with the ethics hotline. There is arguably insufficient qualified personnel in Seychelles available to staff such an extensive system of ethical education and support. Given the small number of legal practitioners, all of whom appear to be very busy, the Seychellois Bar might simply not have the resources – in terms of finances or time – to set up and operate a comparable ethical education model.

On the other hand, there are also only one or two new attorneys who pass the Bar Exam in Seychelles per year. Surely, it should be possible to deliver some kind of ethical induction training to such a small pool, with the goal of at least improving over the current situation? At minimum, the bar ethics module could be made compulsory; a specific ethics test could be instituted as part of the Bar Exam; and a more practical ethical education could be delivered during the new lawyer's pupillage year when they are apprenticed to a more experienced practitioner, perhaps by way of weekend workshops. While the limited number of qualified personnel available to deliver an ethical education could therefore be part of the problem, it

certainly seems that the profession could do more than it currently does to instil ethical values in its next generation.

Lack of incentive

As discussed above, following the *Herminie* judgment, fear of formal enforcement is unlikely to form much of an incentive to act ethically. But even aside from this unfortunate decision, it seems that fear of penalty is insufficient to motivate good behaviour, to the point where certain types of misconduct have become normalised in practice. Most notably, failing to show up for scheduled court appearances, showing up late, and showing up unprepared are shockingly common and readily apparent – despite a clear obligation to appear and act competently on behalf of clients contained in Rule 8 of the 2013 Rules. The only penalty for failure to appear is SCR500 – around €35 – and even that is not regularly imposed, despite the disruption and delay such misconduct causes in case management and the potentially severe consequences it may have for clients. The overall impression is that legal professionals in general have little to fear from the law, even when openly breaching their professional duties.

Another problem is a lack of any perceptible peer pressure to comply with ethical standards: peer pressure that would otherwise provide a strong incentive for members of the legal profession to abide by their ethical obligations (or at least appear to do so), particularly given the small size of the community in question. That no such pressure operates on the Seychellois Bar seems evident not only from the nonchalance with which the Court of Appeal judges have treated Mr. Herminie's misconduct or the failure by lawyers to report unethical conduct under Rule 22 (discussed above), but also by the seemingly complete absence of any formal or informal censure from the legal profession when fellow lawyers are caught committing serious ethical breaches. The local Bar Association has no formal regulatory function and seems completely uninterested in policing its members' ethical standards – to date, it still does not even have a code of conduct, let alone a disciplinary procedure (its website directs anyone unhappy with a lawyer to complain to the Supreme Court). Judging from both its website and its Facebook page (https://www.facebook.com/barassociationsc/) it is not a particularly active organization. Even so, it has been known to issue press releases – most recently on 17 May 2018, concerning the appointment of a Tribunal to investigate the Chief Justice (see below) – as well as lobby the CAA to recommend more local attorneys for judicial office (about which they posted on 1 March 2017). One would expect it to show some interest when one of its members is found to have committed serious ethical misconduct; but there is no reaction to either Mr. Herminie's striking off or subsequent restoration on the BA's websites.

Absent leadership on the issue of ethics from their professional body, or any other source of peer pressure, the local Bar remains remarkably tolerant of even very serious ethical infractions. For example, after his restoration, Mr. Herminie was quickly able to find chambers to practise from, meaning that at least one other lawyer apparently had no fear of their own reputations becoming tainted by association with his many ethical failures. Mr. Esparon – of the pirate trial fame – was apparently so relaxed about his reputation that he did not even bother to respond to the allegations of witness coaching raised against him. He also faced no visible consequences at work – he retains his position and continues to appear in court.

While a lack of ethical education (discussed above) surely plays a role in this tolerant attitude, the small size of the legal profession is partly responsible for it as well. There are so few practising lawyers available, that everyone is needed to handle the volume of casework before the courts. That awareness of limited numbers might also motivate a greater reluctance

to pursue misbehaving lawyers and impose strict penalties: if you start out with 30 practitioners and start suspending or striking off the Roll for unethical behaviour too readily, you might quickly run out of people needed to run the legal system.

Interdependence and lack of impartiality

In the context of evaluating the functioning of democracy in micro-jurisdictions, Veenendaal (2013, p. 9) noted that the small size of a population appears to have a toxic effect on impartiality of democratic institutions, due to the much closer personal connections between politicians and citizens. As a result, such institutions "are commonly ignored or circumvented" by citizens going around the proper channels and exerting personal influence through a network of patron-client linkages. In the context of disciplinary procedures for breaches of legal ethics, this intimate societal interdependence leads not only to perceived lack of impartiality amongst the decision-makers ostensibly entrusted with monitoring and enforcement, but also seemingly to a tendency for the public to view allegations of misconduct as mere extensions of the personal or political disputes of the persons involved.

Independence and impartiality are essential for any system of adjudication, including one concerned with monitoring and enforcement of ethics. A disciplinary tribunal, for example, needs legally qualified personnel to investigate allegations, as well as to prosecute, defend and adjudicate the matter. It is usually important that all those involved not be connected with any of the parties to the dispute, and that they all are and appear to be impartial. Otherwise, the process could be undermined by bias; and the resulting decision would be open to accusations that it was reached less on merits and more on the basis of personal likes or dislikes that have little to do with the case at hand.

Unfortunately, in a population as small as that of the Seychelles, finding sufficient staff for a tribunal that both is, and appears to be, independent and impartial is all but impossible. All of the members of the legal profession know each other quite well: they all have personal, business or political connections with each other, either friendly or rival, going back years or even decades. Even looking outside the law, the pool of professionals in Seychelles is very small, and many of them hold multiple offices. For example, as of February 2019, three practising attorneys were also members of the Assembly (the local parliament). Most of the people I interviewed described the difficulties that operating in such a small society creates: finding yourself having to cross-examine friends or people they know; running into litigants outside of work; having their personal life restricted by not being able to go to certain places connected with the litigation they are involved in (in a country with a strictly limited number of restaurant dining options and only two supermarket chains, this could be quite a problem). It seems that virtually everyone is connected with everyone else in Seychelles: through their extended families, their political alliances, their business dealings or their friends. Finding someone who is both independent and impartial would therefore be a struggle; finding someone who both <u>is</u> and <u>appears to be</u> completely independent and impartial probably cannot be done.

Because of these interconnections – between lawyers, between lawyers and judges, between lawyers, judges and other members of society – the legal profession embedded within them seems to look not so much at the conduct of a particular lawyer accused of misconduct, but rather more broadly at the dispute that the conduct forms part of. Their evaluation of the problem seems to be directed at ameliorating the dispute – trying to resolve it so that everyone goes away more or less satisfied – rather than objectively evaluating the disputed conduct from an ethical perspective and taking appropriate action. This means that the question of whether a

particular lawyer acted ethically, regardless of any complaint against him or her, seems to be rarely answered; instead, the focus is taken away from the impugned conduct and shifted onto the people involved. This might partially explain why lawyers are so determined not to report on each other: if the focus is on the dispute, making a report would make them seem to be one of the parties to it, leaving them open to "revenge" allegations.

This dearth of independence and impartiality, and the problems it causes, was demonstrated in two recent tribunals convened to investigate alleged judicial misconduct under article 134(2) of the Constitution.

Two Tribunals

On 30 September 2016, a complaint alleging a number of breaches of rules of judicial conduct on the part of Judge Durai Karunakaran was lodged with the CAA by the Chief Justice. Given the serious nature of the breaches complained of, on 7 October 2016 the CAA appointed a panel of three judges to form a Tribunal to inquire into Judge Karunakaran's fitness for office. The President of Seychelles – James Michel at the time – suspended Judge Karunakaran from office, pending the determination of the complaints against him, as of 10 October 2016.

It appears from the procedural history summarised on pp. 5-8 of the subsequently issued 2017 Report of the Tribunal's proceedings that, from the outset, Judge Karunakaran had done nothing to refute the substance of the allegations against him. He was granted an extension of time to 7 February 2017 to file his reply on the merits of said allegations, and does not appear to have done so. Aside from a bare denial of allegations (contained in his letter to the Tribunal dated 28 November 2016), the Judge in fact appears not to have troubled himself to address the substance of the complaint at all.

He concentrated instead on attacking the process itself, seeking to delay Tribunal proceedings, applying for recusal of its judges and alleging lack of impartiality and constitutional impropriety. When that did not work, on 24 May 2017, he delivered a "two-minute statement" via his Counsel, and simply walked out – he "failed to participate and attend any further proceedings" of the Tribunal (2017 Report, p. 7). It should be noted that he went on to appeal the constitutional validity of the decision to institute a Tribunal against him all the way to the Court of Appeal. That appeal was recently dismissed by the CA in *Duraikannu Karunakaran v The Constitutional Appointments Authority & Ors (Constitutional Appeal SCA CP 04/2018)* [2019] SCCA 17, delivered on 21 June 2019. The decision is worth reading both because it provides a fascinating insight into judicial decision-making (the five Appeal judges wrote four separate judgments in support of their respective positions), and because it illuminates some of the background of the CAA's decisions in respect of the two Tribunals.

In the Judge's absence, the Tribunal proceeded to hear oral evidence from 17 witnesses and to review a large volume of documentation in support of the allegations, including court records of proceedings before Judge Karunakaran (2017 Report, pp. 7-8). Having walked out of the Tribunal, Judge Karunakaran declined to take the opportunity given to him to present any evidence in his defence, so the record is by necessity somewhat one sided. Even so, given the sheer volume and reliability of the evidence against him – some of which was taken from his own judgments and official court records - it is difficult to see how he could have refuted the charges against him. The Tribunal found the allegations against Judge Karunakaran substantiated, and decided that several of them were grave enough to warrant recommending removal under s134(2)(b) of the Constitution. They made the recommendation to the President accordingly (2017 Report, pp. 72-75).

Both the sheer number and variety of misbehaviour exhibited by Judge Karunakaran is impressive. It includes pervasive sexism, exemplified by his expressed dissatisfaction that a woman had been made the Chief Justice (an appointment to which he clearly felt entitled), followed by blatant disrespect towards the Chief Justice and repeated attempts to undermine her authority; as well as his remarks in his written judgments in at least two cases, in one of which he referred to the alleged "frailty of modern women, who is [sp.] observably, more susceptible to emotional disturbances than her counterpart, I mean the other sex" (2017 Report, p. 70). His misconduct further included inordinate delays, of up to fourteen years, in case management and delivering judgments (pp. 58-64), to the point where some litigants simply gave up (and in one case, died waiting); forcing litigants to settle cases (pp. 67-69); and substantively altering the content of transcripts of court proceedings, including the content of orders made in court – conduct which, as the Tribunal pointed out, amounts to forgery contrary to ss.331 and 333 of the Penal Code (pp. 50-56).

One particular account of Judge Karunakaran's misbehaviour is important for our discussion: his conduct, described at pp. 33-36 of the 2017 Report, in the case of *Linyon Demokratic Seselwa v Electoral Commission* MC 86/2016 (thereafter "the LDS case"), concerning the 2016 national elections. LDS is one of the parties that competed in said elections, and currently holds the majority in the Assembly. Prior to the elections, LDS sought to challenge the decision of the Electoral Commission that allowed registration of a party that LDS alleged had a name too similar to their own – the fortuitously named "LSD," Lafors Sosyal Demokratik.

It appears that, rather than file for a review of the Commission's decision in accordance with proper procedure and have it assigned to Judge Renaud (who was to hear all election cases in accordance with the instructions of the Chief Justice), the lawyer for LDS, a Mr. Anthony Derjacques, first went to speak to Judge Karunakaran, who proceeded to allocate the case to himself, taking advantage of the fact that he was the duty judge during court vacation time. When later confronted with this irregular behaviour, Judge Karunakaran at first reportedly denied that he saw Mr. Derjacques in chambers prior to the case being filed; however, upon being reminded of the existence of cameras in the courthouse, he admitted receiving Mr. Derjacques (2017 Report, p. 33).

He heard the matter the same afternoon it was filed (17 August 2016), and granted an interim injunction prohibiting, among other things, the Electoral Commission from registering LSD as a party to the election. He also ordered the parties to be served with the order he had just made, and set the case down for a "mention" on 21 September 2016 – the first opportunity the EC as well as the party affected were to have to have their say on the matter (*Linyon Demokratik Seselwa v Electoral Commission* (MA 258/2016 arising in MC 87/2016) [2016] SCSC 597). Conveniently, the date he set was after the election was scheduled to take place on 8-10 September 2016 – thereby effectively excluding LSD from participating.

Once notified of what has been happening behind its back, LSD issued its own petition, to intervene in the proceedings and asking for the order striking them off the electoral register to be set aside. That petition was heard on 25 August 2016, with the judgment delivered the same day (*Linyon Demokratik Seselwa v Electoral Commission* (MC 87/2016) [2016] SCSC 617). Mr. Derjacques once again appeared for the LDS, with Mr. Rajasundaram appearing for LSD. The Electoral Commission, represented by Ms. Aglae, also appeared to argue that the injunction issued against it without notice was both procedurally and legally unsound. The

Judge, having indulged himself in ridiculing Ms. Aglae and Mr. Rajasundaram, apparently for the entertainment of the rowdy LDS supporters present in court to cheer him on (2017 Report, pp. 34-36), affirmed his decision to remove LSD from the electoral register, without giving either one of them much of a hearing. While Mr. Rajasundaram successfully appealed to the Court of Appeal, the appeal did not come in time for LSD to participate in the 2016 election – they were barred from participating. LDS took the majority of seats in the Assembly.

For the purposes of this paper, this incident serves not only to illustrate the gravity of Judge Karunakaran's misconduct, but also to provide a background for the events that followed. Before the Tribunal even issued the decision recommending his removal, Judge Karunakaran started flooding the CAA with a flurry of complaints against the Chief Justice, by letters dated 26 June 2017, 26 July 2017, 15 September 2017, 24 October 2017 and 9 March 2018. The CAA met to consider these complaints (together with the Chief Justice's replies) on 13 April 2018, and resolved to appoint a new Tribunal to investigate the Chief Justice's fitness for office pursuant to article 134(2) of the Constitution. Three experienced legal professionals from abroad were appointed to the panel: a retired judge of the New South Wales Supreme Court who was at the time the Chief Commissioner of a body charged with investigating allegations of law enforcement misconduct; a Judge of the High Court of South Africa, who also sat on the Labour Appeal Court and the UN Appeal Tribunal; and a retired Chief Judge of the High Court of Lagos State, Nigeria. Assisting the Tribunal was a Mr. Redding SC, a South African lawyer (see paras 4-9, 17 of the 2018 Report). A long list of issues arising from Judge Karunakaran's complaints was presented for their consideration (2018 Report, para. 15).

Having heard evidence in June 2018, and carefully considered the issues presented to it, the panel issued a 130-paragraph decision dismissing all of the complaints – not only did the Tribunal find no impropriety on the part of the Chief Justice, it concluded (at para. 130) that "the only conclusion reasonably open on [the] evidence is that she acted with complete propriety on all the occasions called into question." Their analysis of the complaints submitted by Judge Karunakaran shows them to be so clearly without merit, that it is clear that on any objective assessment they could never have led to the institution of the Tribunal against the Chief Justice.

So: why was the Tribunal appointed to investigate the Chief Justice? The explanations of some of my interviewees, combined with the matters discussed in the 2019 judgment of the President of the Court of Appeal, Judge MacGregor (*Duraikannu Karunakaran v The Constitutional Appointments Authority & Ors*) paint the following picture. It seems that following the electoral victory of the LDS (to whom Judge Karunakaran was so accommodating in the LDS case, described above), the President - at this point Danny Faure - found himself in need of their political cooperation as the majority party in the Assembly. Not long after the election, the CAA membership was increased to five, and by April 2017, new members – more sympathetic to the LDS – were being appointed. Thereafter, the newly constituted CAA dramatically altered course, now supporting Judge Karunakaran's efforts to have proceedings against him dismissed and declared null and void. They went so far as asking the President, by letter dated 12 May 2017, to revoke the Judge's suspension and to consider appointing him to the Court of Appeal (paragraph 38 of MacGregor J's judgment) – a truly shocking suggestion, in light of cogent allegations (of which they were fully aware) of gross and persistent misconduct on the part of the Judge in question. They followed this up by issuing a press release on 21 May 2017, in terms "similar to the press release published in the newspaper affiliated to the LDS" (paragraph 39 of MacGregor J), alleging essentially that their predecessors failed to consider the Chief Justice's complaints properly before appointing the

Tribunal against Judge Karunakaran. Given that the said Tribunal proceeded regardless, this manoeuvring appears to have been thwarted.

By the time the newly constituted CAA was considering the complaints against the Chief Justice (in April 2018), they had a lawyer on retainer to advise them on the legal merits of the complaint, and whether they warranted the institution of a Tribunal. Unfortunately, that lawyer was Mr. Anthony Derjacques: the same Mr. Derjacques who also works for the LDS, and whose friendly private chat with Judge Karunakaran in chambers led to the Judge's highly improper intervention in the electoral process, described above. In the circumstances, it is difficult to imagine a more biased individual than Mr. Derjacques to evaluate the merits of Judge Karunakaran's complaints. It has been suggested to me that he was the only lawyer in Seychelles willing to take the job; however, it seems clear to me that given the choice between (1) this particular lawyer; and (2) no lawyer at all, the only proper course of action before the CAA would have been to opt for (2).

Against this background, the institution of proceedings against the Chief Justice appears to be nothing more than a politically motivated witch-hunt, enabled by the newly appointed LDS-sympathetic members of the CAA. A more generous interpretation, suggested by one of my interviewees, takes into account the difficult position the CAA found itself in, given the optics of the situation. Most non-lawyers would be unable to reliably distinguish a meritorious complaint of judicial misconduct from one that is not, and there was literally no one in Seychelles at the time with sufficient appearance of both independence and impartiality and whose assessment of the matter this small society would reliably trust; especially given the identity of the main protagonists. As the complainant was Judge Karunakaran, to simply reject his complaints might have appeared unfairly one sided in light of the complaints against him having been properly investigated. The CAA might therefore have decided to try to appear impartial by treating the problem before them as a sort of dispute, in which they felt obliged to ensure that both parties were equally treated: as Judge Karunakaran was put before the Tribunal on the basis of the Chief Justice's complaints, so should Judge Karunakaran's complaints about the Chief Justice be evaluated by a Tribunal as well. They further signalled their virtuous intentions by – to their credit – going to some trouble to appoint a panel of eminent foreign lawyers, whose independence and impartiality could not be seriously put in question.

Of course, this apparent attempt at "equal treatment" does not take into account the fact that the merits of the respective complaints against each Judge were far from equal; nor does it detract from the fact that the CAA appears to have failed to attempt any objective assessment of the substance of Judge Karunakaran's complaints, as is their constitutional duty. After all, if they felt themselves unequal to the task of making such an assessment without legal help and were thus prepared to hire an independent lawyer to aid them, why not turn to the English, Australian or South African Bar if no one suitable could be found in Seychelles? Instead of having to import lawyers for the Tribunal, it surely would have been much cheaper and more sensible to hire an experienced and fully independent foreign legal expert (or even a panel of them) to examine Judge Karunakaran's complaints and issue a reasoned opinion on whether they merit the institution of a Tribunal in the first place.

Perhaps the lesson here is that, instead of attempting real enforcement of ethical standards, all that the relevant decision-makers strive for achieving is a veneer of impartiality in managing "disputes" between complainants, aiming to resolve or tone down conflict with the least amount of disruption to established social and political networks. Judging from the conduct of the CAA, especially their absurd attempt to "resolve the dispute" between Judge Karunakaran

and the Chief Justice by having the former appointed to the Court of Appeal, they appear to prefer matters of ethical misconduct to be swept under the carpet instead of having such breaches openly and objectively investigated and punished. That this attitude might be shared by at least a section of the legal profession is suggested by the comments of one of my interviewees, who implied that the Chief Justice did something improper in bringing the misconduct of Judge Karunakaran into public view. They suggested that the situation could have been handled "more discreetly," and that the public airing out of dirty judicial laundry - by a Tribunal whose impartiality Judge Karunakaran and his supporters loudly questioned – polarised the local Bar. If this is true, and even lawyers cannot be relied upon to put aside their political and personal loyalties to examine the evidence and make an honest and public distinction between serious and spurious allegations, then it would be difficult to demand the same from a body as apparently politically compromised as the CAA.

Conclusion

I met quite a few hard working lawyers and judges in Seychelles who diligently try to do their best despite heavy caseloads, a lack of ethical education and the apparent absence of leadership and support from their professional body. Many of the people I spoke to had a positive view of legal work: two called it a "noble profession;" and several others spoke warmly about the rewarding nature of their legal or judicial practices, in spite of the difficulties encountered. Some were clearly interested in bettering themselves professionally, attending legal conferences and trainings organised by the judiciary. It would seem that, outside of a core of five to eight practitioners who are consistently unprofessional and unethical (as several of my interviewees have indicated), many legal professionals do care about the law and their own conduct and reputation in relation to their practices, at least sufficiently to try to maintain standards even in the absence of a properly functioning regulatory framework.

Unfortunately, in the absence of robust and visible enforcement, it is far too easy to let ethical standards slip. Even those lawyers who strive to abide by their ethical obligations would find it difficult to maintain standards in a situation where guidance on ethical behaviour is lacking, the temptation to get away with a small (or not-so-small) breach or two is not tempered by any contrary incentives, and the ability to effectively pick and choose which ethical rules one complies with is combined with absence of any official or social censure. This is the situation that the legal profession is Seychelles appears to find itself in, and the result is a normalisation of certain misconduct: such as the pervasive problem with lawyers failing to turn up to court hearings on time or at all, as well as a complete failure to report misconduct witnessed, in breach of Rule 22. An aura of tolerance for even gross ethical breaches appears to have developed; even those who have been caught in serious ethical violations face few, if any, consequences, legal or social. Mr. Herminie has been embraced back into the profession; Mr. Esparon appears to have gotten away with alleged witness coaching without much trouble; and Judge Karunakaran was allowed to resign two years after his Tribunal, instead of being removed from office in accordance with the Tribunal's recommendations (arguably leaving the President in breach of his constitutional duty under article 134(3)).

It seems evident that the small size of the profession – only about 30 practising attorneys and around 20 judges – plays a fundamental role in maintaining this unsatisfactory state of affairs. The smallness of the pool of available professionals makes the establishment of an ethical regulatory framework an uphill struggle: everything from developing and updating ethical rules, guidance and education, through staffing enforcement tribunals, requires both manpower and financial resources, both of which may be in short supply in a micro-jurisdiction.

Moreover, the smallness of the profession means greater interpersonal entanglements and more reluctance to engage in effective enforcement due to fear of retaliation – everyone knows everyone else, and where their skeletons are buried. It might also appear that objectivity in assessment of misconduct and imposition of appropriate penalties is a pipe dream, given the difficulties of finding independence and impartiality in both the small legal profession and the small society in which it is embedded.

Still, effective administration of justice requires a legal profession regulated by an ethical code of conduct that is actually enforced – not merely subject to individual compliance on a voluntary basis. The apparent difficulties faced by the legal profession of Seychelles in building an effective monitoring and enforcement mechanism must be acknowledged – but they should not serve as an excuse to do nothing. There is more that the profession can do to raise ethical compliance, starting with adjusting their own tolerant attitudes towards misconduct. This would involve a commitment to stricter observance of the rules that are currently being openly flouted (such as the rule mandating showing up for hearings on time), as well as a willingness to objectively evaluate the conduct of others, criticise one's peers for their misbehaviour, and report the ethical breaches witnessed. I am certain that creating a robust enforcement framework will require creative solutions given the smallness of the jurisdiction: this may involve reaching out for assistance to the legal professions of other common law jurisdictions. However, a willingness to shake off the culture of tolerance and apathy towards misconduct must be seen as a first step towards creating a legal profession that can be confident in its ethical reputation, and in whose integrity the Seychellois public can fully trust.

References

Twomey, M. (2017). *Legal metissage in a micro-jurisdiction: The mixing of Common Law and Civil Law in Seychelles.* New Zealand: City Print.

Veenendaal, W. P. (2013). Democracy in microstates: why smallness does not produce a democratic political system. *Democratization*, *22*(1), 1-21.

Reports:

Judiciary of Seychelles Report 2016/17. Available at: https://seylii.org/sc/speeches/Judiciary%20Annual%20Report%202017_Spreads%281%29.pdf,

Report of Tribunal set up under Article 134(2) of the Constitution of 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 (August 2017). Retrieved from: https://seylii.org/content/report-tribunal-set-under-article-134-2-constitution-republic-seychelles-inquire-inability

Report of Tribunal of Inquiry in terms of Article 134 of the Constitution regarding Chief Justice Mathilda Twomey (2018, October 12). Retrieved from: https://seylii.org/content/report-tribunal-inquiry-terms-article-134-constitution-regarding-chief-justice-mathilda

Web Desk (2019, March 28). Resignation of Judge Duraikannu Karunakaran. *Seychelles News Gazette.* Retrieved from: https://www.seychellesnewsgazette.com/resignation-of-judge-duraikannu-karunakaran/

Judgments:

Duraikannu Karunakaran v The Constitutional Appointments Authority & Ors (Constitutional Appeal SCA CP 04/2018) [2019] SCCA 17.

In the matter of William Herminie (Attorney-at-Law Disc. Measures) [2016] SCSC 621.
Linyon Demokratik Seselwa v Electoral Commission [2016] SCSC 597.
Linyon Demokratik Seselwa v Electoral Commission (MC 87/2016) [2016] SCSC 617.
Republic of Seychelles v Ahmed and others [2018] SCSC 866.
William Herminie v Registrar, Supreme Court [2018] SCCA 11.

Legislation and Statutory Instruments:

Constitution of the Republic of Seychelles
Legal Practitioners Act (Consolidated to 1 December 2014)
Legal Practitioners (Disciplinary Measures and Reinstatement) Rules 1995
Legal Practitioners (Professional Conduct) Rules 2013
The Seychelles Code of Judicial Conduct 2010

Websites:

Bar Association of Seychelles. Retrieved from: https://sites.google.com/site/barassociationsc/legal-practitioners
Bar Association of Seychelles (Facebook). Retrieved from: https://www.facebook.com/barassociationsc/
The Bar Council of England and Wales. Retrieved from: https://www.barcouncil.org.uk/supporting-the-bar/ethical-enquiries-service/
Bar Standards Board (2018/19) *Bar Professional Training Course Handbook 2018/19.* Retrieved from: https://www.barstandardsboard.org.uk/uploads/assets/c9ff8c6b-ec16-478f-9e3420882944a6ae/BPTC-Handbook-September-2019b.pdf
Bar Standards Board (2019/20) *BPTC syllabus and curriculum 2019/20.* Retrieved from: https://www.barstandardsboard.org.uk/uploads/assets/2bec1a1c-b97e-43c1-a7a1b61583901b1d/2019-20-BPTC-Syllabus-FULL-SYLLABUS-August-2019b.pdf
Bar Standards Board, Continuing Professional Development. Retrieved from: https://www.barstandardsboard.org.uk/for-barristers/cpd.html
The Bar Tribunal and Adjudication Service. Retrieved from: https://www.tbtas.org.uk/hearings/findings-and-sentences-of-past-hearings/
BTAS (2019) *Sanctions Guidance: Breaches of the BSB Handbook, Version 5.* Retrieved from: https://www.tbtas.org.uk/wp-content/uploads/2019/10/BTAS-Sanctions-Guidance-2019.pdf
BSB Handbook, Version 4.3 (2019). Retrieved from: https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html
The Honourable Society of the Inner Temple. Retrieved from: https://www.innertemple.org.uk/education/
The Law Society of Jersey. Retrieved from: https://www.jerseylawsociety.je/index.php/public/lawyersearch/?form_post=&first=&last=&firm=0&submit=Search+Database+»

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