

Kouraz, mon pei (Courage my country) - Speech of Chief Justice Dr. Mathilda Twomey on the occasion of the ceremonial sitting in her honour

Held at Ile Du Port on 30 September 2020

In 2015, I received a letter. It was from a man on Praslin whose mother was a quadriplegic as a result of an accident in a tata bus. His lawyer had been successful in securing a settlement of her claim with SPTC, but had failed to pass that money to his client. He had retained the bulk of the money. None of the money had spent any time in the legally mandated clients' accounts. The clients were poor and trusted their lawyer. But the technicalities of law were unknown to the man, he wrote to the Chief Justice asking for her to intervene to obtain a packet of nappies that he needed to care for his mother. The letter itself was heartrending, but the indictment on justice in Seychelles left me reeling. I realized how desolate the judicial landscape was in Seychelles, that the Judges and the lawyers knew that this had been going on. The man had been in communication with multiple lawyers, two Presidents, the Bar Association and three former Chief Justices over this situation for nine years already, and yet here he was, humiliated, asking and hoping, again that a new face in the post of Chief Justice might, maybe, be able to do something to help him get their money.

Today I am speaking to a room of dignitaries, of sisters and brothers of the bench, mentors and peers on the Bar and other persons related to the legal field. But I also want to speak to the people in the market, on the streets, in the tata buses, in the offices and in the boats. The everyday people living in our country. The courts exist for you. We in this room are parts of the mechanisms of state that were designed to serve you. But so often we forget this. We act like these jobs and callings were designed to give us purpose, to give us honour, salaries, benefits and the like. But I have not forgotten, and we should not forget that the government, and its branches were built for the societal benefit and every ounce of power that we have is drawn from a document, called the Constitution which belongs to "We, the People."

Many of these people in this room knew the situation I talk about. We took steps to discipline the individual lawyer, but this was overturned and more and more promises were made, but despite my best efforts, I am not sure she ever received the money and she passed away. I am sorry, Mrs. Hetimier. We come to this room with unclean hands, and today I am not shaming us, as we deserve, but imploring us all to take a stand to do what's right. That is the essence of what I want to say today.

In 2014, the Bar Association wrote the following about the state of the Judiciary upon the end of the tenure of former Chief Justice Egonda-Ntende:

"It is hoped that whoever succeeds Egonda-Ntende can maintain the path he has put the judiciary on."

5 years ago, the Seychelles Judiciary was in shambles. The backlog of cases just kept on increasing due to bad practices, policies and resources. In one of his earlier speeches, Chief Justice Egonda-Ntende remarked that if the Seychelles Judiciary were a person, it was a patient in the Intensive Care Unit ("ICU") of a hospital.

It is perhaps safe to say that the patient has now been released from hospital but must still come in for regular check-ups. It is hoped that the impending change of his medical doctor does not put the patient back into ICU."

Unfortunately, Chief Justice Egonda-Ntende's departure and the 12-month gap, had created a leadership vacuum, and much of his work came undone. I was overwhelmed by the backlog and could not believe that people had waited so long for their cases and for their judgments. Transcripts of proceedings were not in files; files were in disarray. Staff morale was low. There were unnecessary and meaningless court hearings. Cases were regularly adjourned, judges were unprepared, or did not have the information in their case files to adequately prepare. The quantity of cases was high, but the quality of the adjudication was disappointingly low. A culture of apathetic mediocrity and professional protectionism on the Bench and at the Bar had stymied the judicial process.

We set to work. We revived the same objectives and recommitted ourselves to an agenda of change. We standardized procedures, and improved our record and case management. We recruited new magistrates and judges, researchers, a Public Relations Officer, specialists in the library and archives. We adjusted the management structure, giving greater autonomy to section heads. We appointed thematic committees, and attempted to devolve power and decision making to leaders within sections. I am so proud of the team that I have been able to work alongside – from the excellent judicial officers, the dedicated registry staff, management team and other support staff. We have worked so hard, but we have also had so many really enjoyable moments together.

I have bored you endlessly with discussions of backlog and progress over my five court opening speeches. We have made tremendous progress, and I have found the last week of reminiscence with the Judiciary staff a pleasant time of reflection on the changes that have been made. But, I would be lying if I said things were all good. We have not achieved all of our goals. We have not even come close. Our Annual Reports, our statistics and our judgments, are indicative of positive changes, however, we remain the most vulnerable arm of government and my hope is that my successor will manage to remain vigilant to the challenges that threaten the Judiciary.

Today I am ending my term, not for any of the speculated reasons, and I have heard so many, but rather because I am a person of my word. I agreed to take up this position, for a limited period, to build on the progress of my brother, Former Chief Justice Frederick Egonda-Ntende. I now make way for a new Chief Justice, whom I hope will be able to build on what I consider successes, and achieve those things I was not able to. I committed to leave the Office of Chief Justice after five years because I believe that long periods of service, particularly in positions of leadership and

power, are a key way in which a public servant forgets their mandate and loses their vigour, and the role becomes less about the noble office, but the individual that holds it.

Seychelles is small, but it has a seat at the international table that it could take up if it were willing to rise above its self-set limitations. I believe that we currently underachieve – we sell ourselves short with petty in-fighting, political bargaining and hostility to much needed foreign capacity building. We should be humbled by the importance of the roles that we get to play, and remain inspired by our potential. And so today I wish to make five calls to action (one for each year I have been Chief Justice).

1. A call for constitutionalism

The first call to action is that we insist on adding meaningful and practical constitutionalism to our written Constitution. It is the people of Seychelles, who 27 years ago voted to adopt a new Constitution; we came together as a nation and agreed to start to build a new Seychelles, one where the rule of law is upheld, where fundamental human rights and freedoms of all are valued, and where accountability and transparency are the norm, and not the exception. We put into motion a blueprint for a society in which the inherent dignity of all human beings is recognised and respected. We embarked on a journey to entrench constitutionalism into the fabric of Seychelles society.

To borrow the words of Etienne Mureinik, in 1993 Seychelles endeavoured to shift from "*a culture of authority*" to "*a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command [where] [t]he new order must be a community built on persuasion, not coercion.*"¹

By “constitutionalism” I do not mean abstract values, lofty aspirations and principles but rather the permeation of its principles felt at all levels of society.

I cannot help but feel that not everyone has been allowed to cross the bridge to constitutionalism. And one of the reasons for this is that the very persons responsible for its construction, maintenance and implementation are also in the position to pull it down, and sometimes those trying to hold it up, receive little to no support.

I know that I can be a little impatient, and that transformation is never quick. However, we are no longer a young democracy, we are approaching our 30s, but yet the very instrument that should define who we are as a nation, on paper and in practice, is often an afterthought. Our immaturity is oftentimes reflected in the Constitution’s selective invocation to suppress progress, not advance it. Its application manipulated, and compliance often superficial. It is used to further self-interest, or is simply ignored if it threatens vested interests. Our Charter of Fundamental Rights, are not

¹Etienne Mureinik, ‘A Bridge to Where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31-48.

treated as rights, but rewards for good behavior or to win votes, and the Courts infrequently called to deliberate on rights violations.

I am concerned by the underutilization of the Courts for breaches of human rights. Outside of the courthouse, I am aware of the gaps in the protection of some groups of people in Seychelles, these include people with mental health difficulties, disabled persons, children from broken homes, abused women, foreigners – especially unskilled labourers, and persons who are LGBTI. Consciously or unconsciously, our society treats these groups as less deserving of the equality promised by our Constitution. We use, abuse and marginalize these groups. We cannot build a just society by leaving certain persons on the margins. I do not know what gives us the authority to choose whose rights to vindicate and whose rights to ignore.

Dignity and equality before the law are inalienable – if you read the Constitution you will see that these apply to every person in Seychelles and not just its citizens. Dignity and equality are not nice-to-haves, these are legal entitlements under the Constitution we have adopted. We cannot justify the denial of rights, because something makes us feel uncomfortable. Dignity and equality are not to be promised or denied by a politician. This was given to all, 27 years ago, and cannot be taken away, and must be demanded.

I think we all know that change is necessary. If we do not use the Constitution to confront racism, patriarchy, inequality, homophobia, xenophobia, corruption and the daily injustices so many face, we risk squandering the possibility of building the society we dreamed of 27 years ago.

And in addition to human rights, constitutionalism demands the entrenchment of principles of good governance. A constitutional democracy threatens the accumulation of power, authority and wealth of the select few. Our colonial and post-independence experience might lead us to an Orwellian stagnation that maintains that we are all equal, but some are more equal than others and each new regime might see the assuming of power as the opportunity to take its turn to feed at the trough. We need to demand fundamental change, not merely a shuffling of power. And real change is not often welcomed. Change disrupts the status quo. Niccolò Machiavelli's observations in 1592, continue to be relevant

“It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than a new system. For the initiator has the enmity of all who would profit by the preservation of the old institution and merely lukewarm defenders in those who gain by the new ones.”²

Our past, is still very much part of our present. The Constitution gives everyone the right to be an initiator, not just a “lukewarm defender” - whether in your home, your school, your workplace, the National Assembly and State House, we are entitled to demand that constitutionalism becomes the norm.

² Machiavelli, Niccolò, 1469-1527, *The Prince* (first published 1532, George Bull tr, Penguin 1981)

This brings me to my second call to action. As a society we face a severe accountability deficit.

2. A call for accountability

During my tenure, we have seen the establishment of the Anti-Corruption Commission, the Human Rights Commission and the Information Commission. Progressive laws have been passed giving citizens the right to ask for information from the state. We have new laws to combat money laundering, and respond to organized crime. Yet, ask a person on the street what is wrong in Seychelles and they will say that there is corruption and that administrative transparency is the exception and not the norm.

You see, as a society we demand harsh sentences for a person who steals a pair of shoes, or a drug addict who breaks into a house to get enough money for his next fix, but we turn a blind eye to suspicious and missing transactions amounting to millions of dollars, to notaries who permit forgeries, to judges who change transcripts, to public servants who take bribes and make policy-breaking miracles happen. We need to start to hold people to account – even when they are people who are well loved, or wealthy or powerful. White collar crime is as serious as the possession of drugs or theft of coconuts, or driving without a seatbelt. Fraud and embezzlement go to the very character of the individual, and where these individuals are persons in positions of trust, the lack of integrity threatens the fabric of our community. We should demand that leaders are people of untouchable integrity. The rich and powerful who facilitate crimes, and those who “merely” turn a blind eye to crimes, ought to be dealt with like any other citizen. We have a double standard. This accountability deficit threatens to delegitimize our institutions.

People ask me why the Courts don’t do anything. The Courts don’t investigate crimes, they adjudicate them. If these crimes are not before the Courts, they are not being reported, investigated or prosecuted. If this is the case, we need to ask why.

However, “accountability” should not be used to penalize persons who are brave enough to whistle blow. We live in such a small community that this deters persons from coming forward to report misdeeds by persons who will inevitably be their neighbours, friends or family. If they do come forward, it is at great personal risk and they place their trust in the institutions to do right by them. But historically, we have let them down.

Accountability involves a chain of responsible persons, each as important and as vulnerable as the next. And each person needs to play their part despite the risks.

As a court we are not naïve to the personal and institutional risks, and face them ourselves – as individual judges and as an institution as a whole. At one point, having performed my judicial duties, a high profile politician publicly said that “I would be made to pay” for my judgment. When one MNA uttered misleading and defamatory statements about the Judiciary and judicial officers, we had to confront the then Speaker of our constitutional right of reply in the National Assembly. We have faced countless other threats and bullying over the past five years. But during this time, no one came to the defence of the Judiciary. Not one politician in the whole Assembly, not one

member of the Executive. The Judiciary cannot defend itself, its legitimacy and justification lies in its decisions, which are public documents for all to see. When attacked, the victim is not only the judge at the receiving end of these attacks, but future judges, future litigants and the Constitution itself.

The Judiciary is happy to account for its actions. During these past five years we have taken every step to improve the transparency of our processes. We call on others to improve the transparency within their organisations. And I implore those of you in this room, who are from time to time the people responsible for determining whether a matter gets further investigation, or whether it gets swept under the rug, to stand firm in your duty.

3. A call for dismantling patriarchy

Let us turn to talk about my third call for action.

In 1981, when I was working as a court interpreter, waiting to go overseas to start studying, it was incomprehensible that there would be a woman on the bench. The thought that women could hold such important positions, was simply not an option.

Throughout my career and that of my female peers, my qualifications and ability have been a footnote to my gender. People say, “for a woman, she’s a good lawyer”.

During my time on the Constitutional Commission, as the only female lawyer there, I was called *en ti fanm araze* an “angry little woman”. I have never heard of a man being called an “angry little man”. If I were a man, I would probably have been revered for being firm, no-nonsense and committed.

Fast forward to 2015, and the patriarchy was alive and well. I stepped into a male-dominated court. The Judiciary and legal profession have been extremely slow to transform, after all I was the first female Judicial Officer in a Superior Court in Seychelles’ history, when I was sworn in as Justice of the Court of Appeal in 2011. Although now better represented, all 5 female judges were only appointed in the last 9 years. I hope that these appointments set a trajectory for other women. We need to keep advocating for transformation and greater gender representation in this profession. I strongly align myself with the late Justice Ruth Bader Ginsburg’s belief that, “*Women belong in all places where decisions are being made.*”³ And yet there were no women in this court house making decisions 9 years ago. ” Seychelles is a little late to the party on this one.

Looking back, I knew it would be difficult, but I do not think I fully appreciated how incompatible many found my gender to be with the Office of the Chief Justice. It was used to direct and amplify criticism towards me and question my credentials. This came from within the Judiciary, from the Bench, from the Bar, from the public, from leadership in Seychelles and included many women. I distinctly remember being told by a former Judge, “that I will not answer to a woman”. In fact, some even publicly said that I was only appointed because I had slept with the President. This is

³ Joan Biskupic, ‘Ginsburg: Court needs another woman’ USA Today 5 May 2009.

something a man will never understand, and simply cannot relate to. It is sickening to have your suitability questioned, based solely on your gender, where the act of sex is seen as your only currency for professional growth and worth.

During the last 5 years, a number of women have joined the legal profession, at the Bench and the Bar. I have watched them develop their legal skills in the Courts, take on experienced lawyers and hold their own.

They are not good *women* lawyers. They are not good *women* magistrates. They are not good *women* judges.

They. Are. Good. Lawyers, Good Magistrates, Good Judges.

However, I have also seen them belittled and condescended to, I have seen women lawyers chided for being “aggressive”, when arguing or objecting. I have seen them ignored and talked over. I have seen women labeled emotional and immature when they call out favouritism or bad behavior of their male counterparts. This is unacceptable.

Patriarchy and sexism are not limited to the legal profession. Gender based violence, and sexual abuse committed against women and children are at epidemic proportions. The abuse, violence and depravity committed against women and children is unacceptable. We need to stop blaming women - for being drunk, for dressing provocatively, for flirting. I am grateful to be on the Child Law Reform Committee, which I will continue to serve on, and we have made it a priority to review sexual offences.

And so I’m calling for the dismantling of patriarchy in all of its forms – from men and women – until we don’t even think twice about having a full bench of women judges, until antiquated, chauvinistic mentalities have been banished from our law reports, until people stop asking the Chief Justice about her gender.

4. A call to vigilance

Over the last 5 years I was constantly reminded of the words of slavery abolitionist, Wendell Powell, who said that:

“Eternal vigilance is the price of liberty—power is ever stealing from the many to the few.... The hand entrusted with power becomes ... the necessary enemy of the people. Only by continual oversight can the democrat in office be prevented from hardening into a despot: only by unintermitted Agitation can a people be kept sufficiently awake to principle not to let liberty be smothered in material prosperity.”⁴

The maintenance and realisation of the Constitution requires eternal vigilance from us all. As guardians of the Constitution, the Courts (and Judges) are looked to and tasked with ensuring constitutional compliance – in a democracy vigilance will often, and should, manifest itself in

⁴ Wendell Power, *Speeches Before the Massachusetts Anti-Slavery Society* (R. F. Wallcut 1852, Boston).

cases before the Court. As a result, Courts are more vulnerable to external forces, because as judges we have far reaching powers to determine whether conduct falls within the parameters of the Constitution. For Courts and Judges to discharge their constitutional mandate, their independence must be vehemently guarded. This is a necessity in a functional constitutional democracy.

In this sense, we have found ourselves needing to be vigilant against the threats to our independence. I do not think I was prepared, when I took the role, of the toll that eternal institutional vigilance takes – the need to fiercely protect the institution itself and its values and ethos against the gradual erosion of the rule of law or the capture of the institution by those that seek to legitimise their actions through a weakened and malleable judicial branch.

The need to be vigilant stifles progress. It means you are constantly on the defensive, time and energy is spent trying to get through the basics – fighting for resources, calling out actions that undermine the Judiciary, demanding reasons for adverse decisions. The Judiciary needs your support. The support, respect and deference of those who exercise power, the legal profession and we the people.

Our vigilance is set up against all manner of attacks on the Judiciary. Constitutional provisions need to be taken seriously. As Judges we depend on the Constitution to provide an environment that protects our independence. However, when principles of constitutionalism are tampered with, when judicial appointments are politicized, when budget cuts are unilaterally imposed without consultation, when we do not insulate our Courts and Judges from undue interference – we risk the life of the watch dog of the Constitution.

A central tenet of judicial independence is an independent appointment process. Despite improvements made over the last year, the appointment institution itself is not fit for purpose. Seychelles continues to fall short of international best practice and remains the only country in Africa without a dedicated Judicial Services Commission. That is, a judicial-led, body with members of the bench, the bar, stakeholders and civil society, to handle judicial appointment, performance, discipline and removal.

Furthermore, we have active members of political parties recommending the appointment of and initiating disciplinary processes against Judges. But not only in our Courts, we have active members of political parties recommending the appointment of and initiating disciplinary processes against also the Attorney General and the Ombudsman, and the Auditor General, and the Electoral Commission, and the Anti-Corruption Commission, and the Human Rights Commission and the Truth, Reconciliation and National Unity Committee and the Information Commission and the Seychelles Broadcasting Corporation.

This is despite the constitutional demand for members of ‘proven... impartiality’. And to make matters worse, we have a current practice that only one name is given to the President for the

purpose of appointment of Judges. This fundamentally undermines the check and balance process in the very constitutional design. I am horrified that we have gotten to this.

I am not in any way imputing the character of any individual appointee. However, a constitution is designed to prevent the abuse of power, and dilute the concentration of power. Constitutional provisions need to be taken seriously.

Politics need to be removed from the Courts. It is a societal concern when politics begin to influence the courts. And the media has a particularly important role to play in uncovering the threats to the institutions of our society.

Yet, we need to address the role that the media plays in this country. We should no longer tolerate unfounded allegations drawn from poorly put together assumptions. I encourage the people – demand factfulness. Do not accept newspapers that print statements as fact without giving verifiable sources, without naming the authors of the articles or giving the other side of the story an opportunity to comment. These sorts of articles harm the country more than the individuals targeted in the articles. I cannot express to you how often the newspapers have been completely wrong and blatantly lied to the public over these past years. I call on my fellow judges to remain vigilant in their roles and to rise above the anonymous ramblings of the gutter press.

5. A call to courage

In 2015, I received a letter. It was from a man on Praslin whose mother was a quadriplegic as a result of an accident in a tata bus. I did all that I thought I could to help him. I spent five years affected by the content of that letter, the response of the people around me, the political ramifications of the decisions that I took in trying to improve the Judicial system in order to help people like that man. But now I am handing over this fine red robe, my lovely office and massive desk space. And I am hoping that my brothers and sisters that I leave behind will be inspired, and encouraged as they continue the work.

Seychelles may be a small country, but our voice should be loud and principled on the global stage. We have a skilled and committed team on the bench and in the courthouses.

My advice is to find a private, honest space to ground you and support you as you take steps in the public space.⁵ Stand secure in your own integrity and values. Know them and know what you stand for. Learn to be a bit deaf to the allegations made against you. And most of all learn to rest when you can – because the fight is ongoing.

My most under-celebrated sisters and brothers, Magistrates, Registrar and registry staff and all support staff of the Judiciary far and wide – thank you very much for your hardwork and support over the past five years. Thank you for pushing yourselves to be the best and for giving so much effort into the judicial system. My friends on the bar, I will fondly miss our sparring at the prelims,

⁵ I am indebted to my South African brother Dinkgang Moseneke for verbalising this important point in a discussion held online by the University of Cape Town Graduate School of Business on Tuesday, 15 September 2020.

haggling over dates and submissions and signing those blue letters. Thank you for your support too and for engaging with the work that we have done. The Attorney General's Chambers have engaged, challenged and supported the judiciary and I am grateful especially with their willingness to adopt the new case management system and for rounds and rounds of consultation on draft rules and processes. The President's office and the Speaker of the National Assembly have supported our work, and I will miss our early morning meetings. I am most grateful, too, for the institutional support we have received from our stakeholders – the prison services, the police, the medical profession, the UNODC and our friends and supporters from the diplomatic corps.

We have done something worthwhile together these last few years. I have missed my friends and my family. My little daughter was 12 when I started and now she is almost a grown woman. I have given up many milestones to hear cases, chastise lawyers, write judgments and counsel the mistreated litigants. But I believe that this has been worthwhile because of the gains we have made which should affect the day to day of all of Seychelles. And by gosh our statistics speak for themselves. I am proud of the proactive approach to case management taken by the courts.

I encourage you to be courageous!

Turning a blind eye to petty corruption, tardy behavior, lack of transparency and accountability delegitimizes our institution. We need to stride towards achieving human rights and not dismantle what has been built. Our judges need to be brave and act justly all the time. How can we trust any judge if they are willing to look the other way when a lawyer steals client money, when a notary notarises a forged document, when a politician commits an election offence, when a fellow judge rushes through a political case without notice to opposing counsel. For the past five years, it has been my responsibility to decide whether or not to take action in each of these cases. I believe I can hold up my head and say that I did what was morally and legally required and in the public interest.

Do not give up. Do not shake your heads and accept the status quo. We need to rally ourselves, grasp the nettle and stand up for what is objectively better for everyone. For those that try, and fail, do not be disheartened. Treat every opportunity for change like it is the first.

And do not be afraid to dissent! Borrowing again from my American sister, the notorious RBG, "The dissenter's hope is that they are writing not for today, but for tomorrow."⁶ Speak today, so that we can win the fight tomorrow. And in the words of Dr Seuss:

"Unless someone like you cares a whole awful lot, Nothing is going to get better. It's not."⁷

So, I sit here before you with mixed emotions. I am proud. I am tired. I am angry. I am sad. I am disappointed. I am sorry that Judiciary is not more, but I promise I will support. I will encourage. I will remain vigilant and I will join you in the fight as you continue with the work we have started.

⁶ This quotation is widely attributed to the late Supreme Court Justice Ruth Bader-Ginsburg, source unknown.

⁷ Dr. Seuss, *The Lorax* (Random House, 1971).