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**LEGAL MÉTISSAGE IN A MICRO-JURISDICTION:  
THE MIXING OF COMMON LAW AND CIVIL LAW IN SEYCHELLES**

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in the School of Law.

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For Aoibhín, my precious little light.

<b>CE QUE TU ES</b>	<b>WHAT YOU ARE</b>	<b>SA KI OU ETE</b>
Un mélange de sang	A blend of blood	En melanz disan
Accouplé d'une mêlée végétale....	Bonded with a tussle of vegetation ...	Bennyen dan en touf verdir...
Race ou peuple ou nation?	Race or people or nation?	Ras, pep ou nasyon?
Prends qui tu veux;	Take whoever you will;	Pran sa ki oule
Tourne-lui sa peau,	Unfold his skin,	Devir son lapo
Et tu verras	And you shall see	E ou ava vwar
Un brouillamini	An imbroglio	En melimelo
Un casier	A maze	En kazye
Un cosmos.	Outer space.	Lespas.
Les huttes,	The huts,	Bann kabann,
Les cases,	The houses,	Bann lakaz
Les toits coloniaux,	The colonial-styled roofs,	Bann twatir stil kolonyal,
Le parler,	The vernacular,	Fason koze,
Le langage	The language	Langaz
La langue	The tongue	Lalang
L'expression	The expression	Lekspresyon
La chaleur phonétique	The phonetic warmth	Lasaler fonetik
Un univers unique et varié	A world apart and multi-faceted	En monn inik dan son diversite
Un <u>métissage</u> de sons et de couleurs	A <u>métissage</u> of sounds and colours	En <u>metisaz</u> son ek kouler
Un arc-en-ciel dans un ciel.	A rainbow in the sky.	En larkansyel dan lesyel.
Bourré de soleils,	Full of many suns,	Ranpli avek soley
Et les températures qui alternent charnellement	And temperatures which alternate carnally	E tanperatir ki sanze sansyelman
Physiquement, psychiquement.....	Physically, psychically...	Fizikman, mantalman...
Une brassée,	An armful,	En bras,
Une envergure,	A wingspan,	En lanvergir,
Une coudée	A leeway	En marz liberte
De négritude perdue et retrouvée	Of negritude lost and regained	Negritid sove e retrouve
<b>Antoine Abel</b>	<b>Antoine Abel (Translated by Alain Butler-Payette)</b>	<b>Antoine Abel (Translated by Alain Butler-Payette)</b>

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## Abstract

This thesis is an exploration of the laws of Seychelles in terms of their genesis, evolution and status today. While all legal traditions are hybrids, so-called mixed legal systems where laws are explicitly the product of different traditions, provide a unique perspective on the process of the movements and mixing of laws. In the Seychellois national language, *kreol*, a *metis* is someone of mixed parentage. This *métissage* of race, culture and language is paralleled in its legal system.

These small islands, in the middle of the Indian Ocean, colonised twice, combine French and English legal ideas in a non-Western setting. Recently, the world recession has brought new challenges in the form of a third wave of quasi colonisation with the bail out of struggling economies, including Seychelles, by financial bodies like the World Bank and the International Monetary Fund which, as part of the aid packages, impose homogenous common law style legislation.

The research is a comparative analysis of the Seychellois legal tradition. Seychelles is also, given its small size, one of many micro-jurisdictions around the world. As with mixed systems, such small legal orders provide important information for general legal theory.

The thesis adds to the understanding of both mixed and micro-jurisdictions, and as a result, allows a reconsideration of the relevance of both to comparative law. It permits an examination of the utility of contemporary legal taxonomies, rooted in Western experiences, to non-European, post-colonial jurisdictions. The Seychellois experience may have important lessons for legal transplantation, reception and harmonisation of laws as well as relevance for colonialism (including neo colonialism) and culture and for the viability and sustainability of such mixed systems of law.

## Chapter 1 - The Past, the Present and the Future of the Seychellois Legal Tradition Within the Context of Other Legal Traditions.

“[The salmon is] an intriguing and ambiguous fish, at home in both fresh and salt water. It migrates thousands of miles to regenerate itself; it swims against the current rather than with it... And, after doing all this, it still has the energy and cunning to spawn something personal and new.”<sup>1</sup>

### 1. Introduction

Gavin Jantjes, an artist who works both in Africa and Europe, compares himself to a *cultural salmon*. A native of Cape Town, South Africa, he studied at the University of Cape Town’s Michaelis School of Fine Art and the Hochschule für bildende Künste, Hamburg, Germany where he received a master’s degree in 1972. Jantjes was designated by the apartheid regime as *Cape Coloured*. He felt that he had to become a determined all-rounder to pursue “the modernist thesis of questioning the world and the art produced in it.”<sup>2</sup> On reaching Europe however, he found that modernism was not the international, universalist movement it claimed to be. It did not initially welcome his kind of questions.<sup>3</sup> Modernism attempted to reduce him to merely an African artist who could not make statements about art which might be of global interest.<sup>4</sup> Jantjes continued to challenge this view emphasizing that one has to keep an open mind and “has to be aware that the world, as known, could be and will be re-formed, re-thought and redescribed...”<sup>5</sup> As a *cultural salmon*, he sought recognition of an in-between or liminal status or identity, at once rooted in place, but more than that place.

In parallel, African legal systems may be viewed as *legal salmon* which can swim against the current, adapt, remodel, and regenerate while also remembering<sup>6</sup> and imagining. Many African nations share a broadly common history of colonisation by European powers.<sup>7</sup> But before this occurred, African regimes, communities and tribes had their own norms, mores,

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<sup>1</sup> Gavin Jantjes, ‘The Artist as a Cultural Salmon’ (1993) 23 *Third Text* 103, 103.

<sup>2</sup> Catherine King, *Views of Difference: Different Views of Art* (Yale University Press 1999) 23.

<sup>3</sup> *ibid.*

<sup>4</sup> Gavin Jantjes, *In Fusion: New European Art* (South Bank Centre 1993) 53.

<sup>5</sup> Gavin Jantjes, ‘Good Practice and Creativity in Good, Better, Best’ (2001) 8 *Engage* 20.

<sup>6</sup> For a European context to *remembering* see Seán Patrick Donlan, ‘Remembering: Legal Hybridity and Legal History’ (2011) 2 *Comparative Law Review* 1.

<sup>7</sup> See for example A Adu Boahen, *African Perspectives on Colonialism* (The Johns Hopkins University Press 1989): “...all of Africa except Liberia and Ethiopia were seized and occupied by the European imperial powers of Britain, France, Germany, Belgium, Portugal, Spain, Italy...”

traditions, customs and indigenous laws or customs.<sup>8</sup> The fusion of these indigenous traditions with the imposed normative and legal traditions of Europe has spawned legal systems that have been labelled *exotic*, *mixed*,<sup>9</sup> *pluralist*<sup>10</sup> or *hybrid*.<sup>11</sup> Internally, however, there is considerable legal instability within those systems. In practice, African nations have to navigate complex crosscurrents of indigenous and customary laws<sup>12</sup> and inherited and infused<sup>13</sup> European colonial laws.

These African legal systems are attracting ever-greater attention from jurists. Most legal scholarship, however, seems to be written from the perspective of European or Western authors. In this writing, it is hard to hear the voice of the African comparative legal scholar.<sup>14</sup> In the twenty-first century, as decolonisation is nearly complete, African states have questioned and challenged their identities, as well as the West's view of them as the *Other*.<sup>15</sup> In this respect Edward Said's *orientalism* is equally applicable to Africa and it is just as incumbent on them, as other non-Western nations, to ignore the oversimplified view of their cultures as formulated by the West and to challenge the West's view of them as being extremely different and inferior, marginalised but also in need of intervention or rescue.

As a result, it is necessary that African jurists evaluate and articulate their social and legal traditions. They may even be seen to have a special role to play in comparative law. Given Africa's experience of native customs, the positive laws of Europe and the reconfigured laws after colonialism, its scholars can generally inform other jurists, free western legal scholars from *cognitive lock-in*<sup>16</sup> (where one limits oneself to appreciating another entity purely in terms of the measure of oneself) while contributing to the emerging, meaningful global

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<sup>8</sup> Sally Engle Merry, 'Law and Colonialism' (1991) 25(4) *Law & Society Review* 889, 889.

<sup>9</sup> René David and John Brierley, *Major Legal Systems in the World* (3rd ed., Stevens & Sons 1985).

<sup>10</sup> See Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869.

<sup>11</sup> Konrad Zweigert and Heins Kötz, *An Introduction to Comparative Law* (Tony Weir tr. Oxford University Press 1998) 29. Another notion of *hybridity* is explained in Seán Patrick Donlan, 'To Hybridity and Beyond: Reflections on Legal and Normative Complexity' in Vernon Palmer (ed), *Mixed Legal Systems, East and West* (Ashgate 2015) 17-32. This is meant to tap into the use of *hybridity* in post-colonial thought. See *hybrid* as a colonial concept and as a racial term in Anjali Prabhu, *Hybridity: Limits, Transformations, Prospects* (State University of New York Press 2007) xii. For a similar approach, see also Matteo Solinas, *Legal Evolution and Hybridisation: The Law of Shares Transfer in England* (Intersentia 2014).

<sup>12</sup> For a differentiation between indigenous laws and customary laws see Merry (n 10).

<sup>13</sup> The words *infused*, *suffused* and *diffused* are used by Esin Öricü to refer to the process by which laws are transposed from one legal system and inserted into another. See Esin Öricü, 'What is a Mixed Legal System: Exclusion or Expansion?' *Electronic Journal of Comparative Law* (2008) 12 (1) <http://www.ejcl.org/121/art121-15.pdf> 1,7.

<sup>14</sup> Chris Nwachukwu Okeke, 'African Law In Comparative Law: Does Comparativism Have Worth?' (2011) 16 (1) *Roger Williams University Law Review* 1.

<sup>15</sup> Edward Saïd, *Orientalism: Western Representations of the Orient* (Routledge and Kegan Paul 1978).

<sup>16</sup> Vivian G. Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 *American Journal of Comparative Law* 43. Esin Öricü calls it removing one's *Eurocentric spectacles*. See Esin Öricü (n 13).

perspective on laws. It is by showing difference to others, that identifying one's identity is possible.<sup>17</sup>

Seychelles has had a somewhat different legal experience from most its African neighbours. An archipelago far from the African mainland, it is geopolitically part of Africa. But it has no indigenous peoples. Its population was created through the encounter between white colonizers and African slaves. That experience must be explored, however, within the context of its complex colonial past. While clear-cut divisions existed historically between plantation owners and their slaves, time has assimilated the population into a *Creole*<sup>18</sup> people. There are no distinct races in Seychelles today: it is a state with an explicitly hybrid nation.<sup>19</sup>

This hybridity is paralleled in its legal system, caught in the conflicted identity of the law of the coloniser and the colonised. That legal tradition is complicated by the heritage of double colonisation by first France, then Britain. The result is a micro-jurisdiction that combines both the *civil law* of France and the *common law* of England. Caught between European, colonial legal traditions and the legacy of its African heritage, the Seychellois legal tradition is now seeking its own identity. This is complicated not only by its past, but by new global forces. The place of Seychelles at the nexus of this complex independence and interdependence between legal traditions is explored in this research,<sup>20</sup> including the question of the future sustainability and autonomy of its own legal system given powerful outside influences.

### 1.1 The Scope of the Research

Every legal system is the product of complex traditions: civil law, common law, Islamic law among others. Many studies have been carried out on systems that explicitly combine one or more of these traditions: for example, Scotland, Quebec, Louisiana and South Africa. Indeed, it is increasingly accepted that all legal systems are both mixed and mixing. For example, European law and the laws of different member states are mixed into the laws of other member states. What are less well-understood are the consequences of such mixing. This study aims specifically to research the explicit hybridity of Seychellois law and its relevance

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<sup>17</sup> Curran (n 16) 46.

<sup>18</sup> Also known in Seychelles as *kreol*, the term may denote its people, customs, traditions or cuisine. It also refers to the creole langue, the lingua franca of Seychelles and a national language alongside English and French.

<sup>19</sup> Prabhu (n 11).

<sup>20</sup> See Jean Marie Tjibaou, *L'indépendance c'est bien de calculer les interdépendances* (Independence is all about calculating the interdependences) as cited in James Clifford, 'Indigenous Articulations' (2001) 13(2) *Contemporary Pacific*. See also Eric Waddell *Jean-Marie Tjibaou, Kanak Witness to the World: An Intellectual Biography* (Centre for Pacific Islands Studies 2008).

as a micro-jurisdiction and to track its legal evolution. The objective is then to draw lessons, if any for other current mixes or for nominally uni-jural systems.

No previous substantial research has been carried out on the Seychellois mixed jurisdiction. This thesis articulates and theorizes the Seychellois legal tradition in a way that is practical and useful both to Seychellois and to the rest of the legal community, especially to comparative legal scholars. Seychelles is a micro-jurisdiction with apparently little or no influence on the rest of the legal world. But its experiences provide a useful, manageable laboratory for understanding the ramifications of changing legal traditions in an increasingly interlinked global context in which exterior forces have ever-greater effects on national laws.

The Seychellois legal tradition has changed and continues to evolve, as all legal traditions do. By looking at the past and the future in relation to those historic changes and the surrounding contemporary power dynamics and influences, this research explores these different connections. The potential contributions from the new global community are now leading to a developing if not enduring legal tradition though not in the shape or form in which it might have originally been conceived.

This research situates the Seychellois legal tradition within the language of *legal families*. Its theoretical approach acknowledges the difficulty in conceptualising law both generally and in the context of other concepts such as *legal traditions* and *legal culture*. It also recognises the limitations of legal taxonomy, the peculiarities and complexities of the associated vocabulary and linguistics of *legal pluralism*, and the numerous theories about the movement of legal traditions and receptions.

Academic literature on mixed jurisdictions, hybridity and pluralism is vast and continuously expanding. The theories surrounding these concepts are fluid and constantly evolving and it is sometimes difficult to keep up with such changes.<sup>21</sup> It is acknowledged that there is more than one possible definition or understanding of these concepts. For a comprehensible and efficient study of the Seychellois legal tradition, this research employs the traditional taxonomy of legal families (in particular, the common division of civil law and common law), together with the concepts of *mixed jurisdictions* and the *third legal family*.<sup>22</sup>

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<sup>21</sup> See Seán Patrick Donlan and Lukas Heckendorn Urscheler, 'Concepts of Law: An Introduction' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential and Social Science Perspectives* (Ashgate 2014) 1-16.

<sup>22</sup> Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn Cambridge University Press 2012).

Further, the examination of the substantive and procedural laws of Seychelles will be limited to the extent that the whole law of Seychelles cannot be explored in depth in this thesis. Only some important aspects are examined in detail and a tentative exploration of the future of the tradition reconnoitred.

## **1.2 Research Questions**

This thesis assesses the reasons for the mixing of laws in Seychelles and examines whether the incorporation of laws from two diverse legal traditions and their subsequent assimilation within the context of Seychelles has resulted in a distinctive and coherent set of laws. It analyses, in light of the growing scholarship on mixed legal systems, the past and present role of civil law and common law within the Seychellois system. It explores the inherent tension, the sustainability of the law, and queries whether Seychellois bi-juralism - if that is what it is - works as well as nominally uni-jural systems. It evaluates the adjudication mechanisms and jurisprudence of the system, in particular in specific areas of public and private law.

My research inquiry is therefore composed of the following questions:

- What is the law and legal system of Seychelles?
- How does adjudication take place in Seychelles?
- Is the legal tradition of Seychelles distinctive? If so, what is its taxonomical status?
- Is the Seychellois legal tradition sustainable, given both its status as a mixed jurisdiction and a micro-jurisdiction?
- Is the Seychellois legal tradition relevant for other jurisdictions where the mixing of laws is ongoing? If so, what lessons if any can be learnt from the Seychellois experience?
- Does Seychellois law offer anything new to the understanding of mixed and micro-jurisdictions?
- What is the significance of Seychellois law to comparative law?

## **1.3 Rationale**

Over a decade ago, George Gretton noted, in writing about Scots property law that “one can live and work in a system and still massively fail to understand it in context.”<sup>23</sup> Such peripheral blindness is common across a number of legal traditions and systems. And so it was in relation to my own personal experience of working as a legal practitioner in Seychelles. I oriented myself across the complex mixity of its laws without once stopping to

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<sup>23</sup> George Gretton, ‘Scots Law in a Golden Age’ in Anthony Kinahan (ed) *Now and Then: A Celebration of Sweet & Maxwell’s Bicentenary* (Sweet and Maxwell 1999) 163-172.

query its peculiarity. It was only in the recent past during the course of academic research in Europe, far away from my native shores, that I gained a new perspective into Seychellois law.

There appear to be very few legal systems like that of Seychelles in the world. Vernon Palmer identifies only sixteen such mixed jurisdictions worldwide, systems “where common law and civil law co-mingle and constitute the basic materials of the legal order.”<sup>24</sup> But the small mixed system of Seychelles is virtually unknown to western lawyers.

This research marks the beginning of a comparative investigation into Seychellois law and its legal institutions in the hope of bringing them into greater focus and understanding. It is a contribution not only to the ever expanding bounds of comparative law, but also as an outreach by this micro-jurisdiction to the *outside* world.

#### **1.4. Methodology**

No single methodology is adopted in this thesis. Generally, the study uses the comparative method of legal research which questions the role, function and value of legal traditions. Recognising the complexity of the analysis of a legal tradition, other methods are used for distinct elements of the study where they are judged best suited to the particular objectives of the different components of the research.

In terms of the theoretical framework of the thesis, an inquiry into the conceptual bases of the legal rules, principles and doctrines of the Seychellois legal tradition is made. It is undertaken through the lens of the comparative legal method, enquiring into the similarities and differences between major legal systems and that of Seychelles. Comparativists generally contend that this approach is the best tool for a deep understanding of legal systems.<sup>25</sup> It is utilised particularly to study legislative texts, jurisprudence and legal doctrines, especially of laws from other civil law and common law traditions. In this context, it allows a unique understanding of how the law works within Seychellois culture.<sup>26</sup>

In terms of the substantive and procedural laws of Seychelles, the doctrinal approach is used to provide a systematic exposition of the rules governing the legal categories concerned and to analyse relationships between legal rules. It also helps to explain areas of difficulty and in predicting the future development of the legal tradition.<sup>27</sup> Doctrinal research is also used to

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<sup>24</sup> Palmer (n 22) xiii.

<sup>25</sup> See Mark Van Hoecke and Mark Warrington ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 (3) *The International and Comparative Law Quarterly* 495.

<sup>26</sup> See the approach adopted by David Walker to explain the Scottish legal system in David Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (5th edn W. Green and Son Ltd 1981).

<sup>27</sup> In this context I have adopted a similar approach to that used by Mauro Bussani and Vernon Valentine Palmer

locate the law of Seychelles. Its case law and statutory law are examined for their consistency and certainty. The purpose and policy of some of the existing laws and legal institutions is scrutinised.

A qualitative analysis is used for identifying existing primary sources of information. The existing literature on comparative law and mixed jurisdictions was reviewed by accessing European, African and international electronic databases. Raw materials were accessed through the Hardiman Library in the National University of Ireland, Galway, the Glucksman Library in Limerick, the Seychelles Supreme Court Library and other libraries. A scrutiny of the colonial records in the Seychelles and Mauritian National Archives and Colonial Office papers housed at Kew, London and the Archives Nationales de Paris was also undertaken. Similarly, the papers of General de Caen at the Bibliothèque de Caen, France were examined and critically reviewed to explore the genesis of Seychellois law, and to lay the foundations for the research for the thesis.

Where the doctrinal method was not useful, the socio-legal method was used. This was particularly so in the case of identifying approaches in the practical application of the law in Seychelles. In general, the socio-legal method is useful to research the origins, operations and effects of legal traditions and the policies and practices necessary to understand law as a social phenomenon. In this sense it is used to look into the social dimension of Seychellois law and to identify the gaps, if any, between the *law-in-books* and *law-in-action*.<sup>28</sup> In addition, the systematic observation of law-in-action in Seychelles was undertaken through participation by the researcher in the Court of Appeal of Seychelles and in the work of the Law Revision Committee on the Civil Code of Seychelles.

Empirical legal research is carried out into two distinct aspects of Seychellois law: firstly, the mixing of laws within the constitutional, civil and criminal law contexts and secondly in the process of adjudication to analyse the weight of jurisprudence. This provides an insight into the trajectory of the developing Seychellois legal tradition. It delivers a basis for forecasting the nature of the tradition from the perspective of the mixing taking place.

This thesis explores Seychellois law with the backdrop of legal philosophy to evaluate the status and development of its laws. Micro and macro comparisons are used to assess the sustainability and legitimacy of the Seychellois legal system and assess its relevance to European and other jurisdictions where the mixing of law is ongoing.

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in Mauro Bussani and Vernon Valentine Palmer, *Pure Economic Loss in Europe : New Horizons in Comparative Law* (Taylor & Francis 2009).

<sup>28</sup> Roscoe Pound, 'Law In Books and Law In Action' (1910) 44 *American Law Review* 12, 15.

## 1.5 The Organisation of the Thesis

This thesis is composed of seven chapters. Chapter 1 lays the foundation for assessing the Seychellois legal tradition. The introduction puts Seychellois law within African and European law and ongoing legal developments. In this way, the legal tradition is located within the most commonly-used legal taxonomies. The fact that the Seychellois tradition, like other legal traditions, is a dynamic process and subject to change is explored briefly. Some of the limitations of undertaking research in such an area with little previous academic interest are also examined. The methodology employed is discussed with some explanation for the choice of the methods used in the study.

Before the legal tradition of Seychelles can be explored, it was necessary to define *law*, at least for the purposes of this study. Chapter 2 explores the meaning of law and describes some conceptualisations of law by both comparatists and jurists. It begins by distinguishing *law* and *norm* and the related concepts of *official law* (state or institutional law) and *unofficial law* (usually non-state normativities).<sup>29</sup> The contribution of Roscoe Pound<sup>30</sup> in identifying and articulating the gap between the *law-in-books* (statutes, regulations and law reports) and *law-in-action* (law as practised and experienced in the social arena) is explained. Recognition of the wider context of law outside the state, law that is other law-like normativities are then examined.

However, the difficulty of identifying a suitable vocabulary to describe non-state law is particularly challenging; there seems to be no inclusive terminology for different types of normativities outside the western concept of law. Rodolfo Sacco's *formants* of legal systems<sup>31</sup> and Eugen Ehrlich's idea of *living law*<sup>32</sup> challenging the centralism of official law are looked at. Different varieties of normative pluralism, including the definitions and expositions of William Twining, Jacques Vanderlinden, John Griffiths and Brian Tamanaha are compared together with a short exposé of *classical legal pluralism*, *new legal pluralism*, *global legal pluralism* and *critical legal pluralism*. Chapter 2 also surveys cultural, political and economic influences on law. Finally, the special status of micro-jurisdictions, language and post-colonial theory are briefly examined for their influence on the constitution of law.

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<sup>29</sup> Seán Patrick Donlan, 'Things being various: normativity, legality, state legality' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart 2014), 164.

<sup>30</sup> Pound (n 28).

<sup>31</sup> See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (Installment I of II) 1991(39)1*The American Journal of Comparative Law*, 1.

<sup>32</sup> See Eugen Ehrlich, *Principles of the Sociology of Law* (Walter L. Moll tr., Harvard University Press 1936).

Chapter 3 seeks to locate the Seychellois legal tradition within traditional or common legal taxonomies. However, before this enterprise can be undertaken, the use of the comparative approach to the study of jurisdictions is explored. This approach is broken down into the descriptive positivist, the functional and the contextual methods. These methods are briefly explored, after which the contextual comparative law methodology for this research is adopted. Chapter 3 then looks at the purposes of taxonomy generally together with the main methods of classification. This includes the better-known taxonomies of René David and John Brierly<sup>33</sup> and the expanded classification of Konrad Zweigert and Hein Kötz.<sup>34</sup> The distinction between the nomenclature of *legal system* and *legal tradition* is then addressed with a discussion of the approach taken by Patrick Glenn.<sup>35</sup> His definition of legal tradition, which conveys a continuous process of legal development, is radical. However, his reduction of these traditions into only seven classes (the chthonic, talmudic, civil, Islamic, common law, Hindu and Confucian traditions) is too limited. It does not for example provide an appropriate appreciation of the diverse African normativities. The approach of John Bell<sup>36</sup> in using the concept of legal culture as a method of classification is also addressed as is the novel approach by Ugo Mattei in moving away from both geographic and cultural taxonomies in his concept of *patterns of law*.<sup>37</sup> Chapter 3 also examines Boaventura de Sousa Santos' *metaphors of law*<sup>38</sup> and Esin Örüçü's *family trees*<sup>39</sup> approach to situating and understanding those legal traditions taking new shapes and forms.

Against this backdrop of taxonomies and groupings, a more focussed study is then carried out on two major legal traditions that were to be incorporated into the Seychellois legal tradition, namely the continental European legal tradition (civil law systems) and the Anglo-American legal tradition (common law systems). Chapter 3 also addresses the concepts of legal movement and reception, namely Alan Watson's theory<sup>40</sup> of legal *transplants* and William Twining's concept of legal *diffusion*.<sup>41</sup> These concepts are important tools in understanding

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<sup>33</sup> David and Brierley (n 9).

<sup>34</sup> Konrad Zweigert and Heins Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn. Oxford University Press 1998)15.

<sup>35</sup> Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2<sup>nd</sup> ed, Oxford University Press 2014).

<sup>36</sup> John Bell, 'English Law and French Law - Not So Different?' (1995) *Current Legal Problems* 69.

<sup>37</sup> Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *American Journal of Comparative Law* 1.

<sup>38</sup> Boaventura de Sousa Santos, 'Three Metaphors for a New Conception of Law: 'The Frontier, the Baroque, and the South'' (1995) 29 (4) *Law and Society Review* 569.

<sup>39</sup> Esin Örüçü, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 360.

<sup>40</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed. University of Georgia Press, 1993).

<sup>41</sup> Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

the formation of the Seychellois legal tradition, as is the discussion on mixed legal systems and mixed jurisdictions and their definitions. The classificatory limbo<sup>42</sup> and the distinguishing characteristics of such systems conclude Chapter 3.

With the definition and classification of legal systems and traditions established, Chapter 4 relates in some detail the genesis of the Seychellois legal tradition. Its historical foundation with the first settlement by the French in the early eighteenth century together with its links to Mauritius as *a colony within a colony* is narrated. French rule and the early imposed laws are examined. The application of different laws to different classes of people depending on race and status (the white settlers, the black slave and the coloured and freed slaves) is explained. A summary of the early laws is detailed, from the laws of the *Compagnie des Indes* to the royal decrees and the edicts published by the Colonial Assembly of Mauritius and the laws of Decaen. The Indian Ocean Wars between Britain and France which were part of the global wars of the eighteenth and nineteenth centuries, and the eventual capitulation of Seychelles to Britain in 1810 are described. British rule and the first laws, the *Code Farquhar* and the gradual superimposition of some British law onto the French laws of the colony are discussed. This initial mixing of laws was followed by a more pronounced form of legal transplantation both in the substantive and procedural law of Seychelles. The more pronounced common law traits in the law in the years after 1903, when Seychelles was detached from Mauritius and became a fully-fledged colony in its own right, is also considered. The journey of Seychelles to independence, recodification and a series of three constitutions as a republic is then examined. The present legal system and structures are also explored.

Chapter 5 is an in-depth study into the substantive and procedural law of Seychelles today. Aspects of the private law, namely elements of family law including descent and the distribution of property on termination of marriage and *en-ménage* relationships, are examined. This is followed by a study of the laws of succession and property law. Chapter 5 also includes a treatise on the Seychellois law of obligations comprising of contracts, delicts and unjust enrichment. Next, some elements of the corporate and commercial law are pointed out. The chapter then moves on to the examination of public law with an exposé of the constitutional and administrative law of Seychelles and the current development of democratic principles through the vindication of constitutional rights of citizens before the

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<sup>42</sup> This is the term used by Jacques du Plessis to explain the uncertainty in of mixed legal system within traditional taxonomies. See Jacques du Plessis, 'Mixed Legal Systems, Especially the South African Legal System, and the Study of Comparative Law' (2005) 9 (3) Electronic Journal of Comparative Law 9 (3) <http://www.ejcl.org/93/editor93.html> accessed 1st July 2015.

Constitutional Court and the Court of Appeal. The criminal law of Seychelles is scrutinised, with a description of some of the new measures introduced to combat modern day crime including anti-money laundering and marine piracy together with the rich case law it has already generated. Lastly, its mixed procedural laws, including the law of evidence and civil and criminal procedural rules are analysed. The chapter contains a discussion of the laws in the specific areas mentioned with some comparison to both English common law rules and French civil law rules when these have had or continue to have a bearing on the extant and developing laws of Seychelles.

Chapter 6 begins with a bird's-eye view of the Seychellois legal tradition, followed by a more detailed analysis of some particular aspects of the law. The mixing process uncovered through the preceding chapters is examined in more depth to understand the trajectory of the development of the Seychellois legal tradition. The complexity of both the laws and the domestic, regional and international forces at play are identified and viewed on the one hand through the lens of the official law, and then on the other hand through that of unofficial law. This is facilitated through two pieces of empirical research into the official law. The first element of research involves a study of citation patterns in the case law of Seychelles in constitutional, criminal and civil actions. The second piece of research examines the adjudication process in Seychelles in terms of the nature of the bindingness of precedent. Some reasons for confusion in the application of precedent are suggested and the findings and suggestions of the Committee reviewing the Civil Code of Seychelles are included. As a contrast to official law, the unofficial law of Seychelles reveals elements of African culture that have endured despite state legislation. Unofficial law has also become part of the fabric of the Seychellois legal tradition. Chapter 6 ends with a consideration of the modern influences on Seychellois law including cultural, political and economic forces. The part played by post-colonial thought, including the concept of *creolité*, (the interactional or transactional aggregate of European and African elements united on the same soil by the yoke of history)<sup>43</sup> is considered. Regional and internal influences, including the membership of Seychelles in the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC), and the role of foreign judges are also examined. Finally, the enduring legacies of socialism and one-party rule and the influences of globalisation are studied.

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<sup>43</sup> See Jean Bernabé, Patrick Chamoiseau and Raphael Confiant, *Éloge de la Creolité/ In Praise of Creoleness* (Gallimard 1993) 87.

Chapter 7 concludes the thesis. It briefly summarises and restates this thesis' findings about the complexity of the laws of the micro-jurisdiction of Seychelles. It opines on its living legal tradition and comments about its future. It does so based on the results of the research findings and an analysis of the global forces at play. It reflects on the research findings in light of the theoretical framework to explore the place of the Seychellois legal tradition within the wider context of the family of legal traditions and legal systems. It considers the legal and social changes that reflect the complexities of current politics and offers some lessons that may be learned from the mixing of laws in Seychelles. Finally, it proposes some areas that might benefit from further research and bring more clarity in the area of mixed jurisdictions.

### **1.6 Chapter Conclusion**

My greatest hope in articulating the Seychellois legal tradition is that it provides a better knowledge of the laws of this small jurisdiction. I recognise that there will be ongoing questions about aspects of its legal system but it is my belief that a lot is to be gained if at the very least it engages the wider community in discussions around creative and critical ways of thinking about mixed jurisdictions. The formation of such systems, either by design or accident, is fascinating in itself. Even more so, their development when viewed from an international perspective may result in some positive *interlegality*,<sup>44</sup> that is, where choices are made by a jurisdiction in adopting rules and norms of another jurisdiction where it deems it favourable to do so.

I have been guided in this research by certain factors: firstly, that the Seychellois micro-jurisdiction is important and needs to be appreciated and recognised as such even if only by the local practitioners and academics. Secondly, I have framed the Seychellois legal tradition in the context of some conventional theories about law. Thirdly, knowledge of the tiniest jurisdiction founded on two legal traditions, civil law and common law but interspersed with some indigenous law may bring rich comparisons and further understanding of law in general. Finally, the research sets out to bring greater clarity to legal traditions in general and specifically to the Seychellois legal tradition.

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<sup>44</sup> Boaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed Cambridge University Press 2002) 437. He expresses the concept of interlegality as “different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life.”

## Chapter 2 Conceptualisations of Law

“[T]he origin of law is an unsolvable problem, a wound healed with fictions...”<sup>1</sup>

### 2. Introduction

Before attempting to analyse a legal system and its laws, it is important to establish what law is. The difficulty is that despite different concepts of law being advanced, there is no definitive consensus on what it is. Defining law is expressed by E. Adamson Hoebel as a quest for the Holy Grail,<sup>2</sup> while the futility of the enterprise is acknowledged in Max Radin’s observation that “[t]hose of us who have learned humility have given over the attempt to define law.”<sup>3</sup> This difficulty is due to the fact that too many “unbelievably different things have to be included in a comprehensive definition.”<sup>4</sup> The obstacle in definition is compounded by a vocabulary that is not comprehensively utilised with the same meaning by jurists.

Law in the West has generally stood for the “norms of specific institutions structured in specific ways in specific times and places”.<sup>5</sup> As Seán Patrick Donlan has explained, the West sees law as “a subset of more general normativity, an institutional normative order”.<sup>6</sup> In this way:

“law (legality) is distinguished from both less organised- but no less meaningful or valuable- instances of social normativity and the narrower, derivative form of state law (state legality)”.<sup>7</sup>

For the purpose of this chapter and for the research of this thesis the following terms are adopted with the meaning ascribed to them as follows: the term *law* refers to a specific type

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<sup>1</sup> Alessio Lo Guidice, ‘The Concept of Law in Postnational Perspective’ in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014) 209.

<sup>2</sup> E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press 2009) 18.

<sup>3</sup> Max Radin, ‘A Restatement of Hohfeld’ (1938) 51 (7) *Harvard Law Review* 1045.

<sup>4</sup> Karl Llewellyn, ‘A Realistic Jurisprudence-the Next Step’ (1930) 30 (4) *Columbia Law Review* 431, 431.

<sup>5</sup> See Sean Patrick Donlan, ‘Things Being Various: Normativity, Legality and State Legality’ in Maurice Adams and Dirk Heirbault (eds) *The Method of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014) 164.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

of ordering or norm,<sup>8</sup> the term *official law* refers to the law sanctioned by the legitimate authority of a state (including state law, religious law and laws of minorities within the state),<sup>9</sup> the term *norm* indicates “standards of oughtness or appropriateness”, and “conventions with which the relevant community is familiar.”<sup>10</sup> While official law is typically equated with state law, Seán Patrick Donlan suggests that both in Europe and beyond, law was conventionally understood as distinct from other normativities without merely equating to state law.<sup>11</sup> Conceptually, it is a third category. Here, official law will be used to mean the positive law of the state.

Classical naturalists saw law as embodying reason,<sup>12</sup> an “ordinance of reason for the common good, made by him who has the care of the community,”<sup>13</sup> or “the set of principles of practical reasonableness in ordering human life and human community.”<sup>14</sup> In contrast, positivists define law as rules established by political superiors;<sup>15</sup> Marxists see it as a tool for the oppression of the proletariat by the capitalists<sup>16</sup> while some legal realists saw law as “prophesies of what the courts will do in fact”<sup>17</sup> or as “what officials do about disputes.”<sup>18</sup> Hans Kelsen described law as normative but saw it as devoid of societal, moral, political or sociological values or considerations.<sup>19</sup> Herbert Hart, however, saw law as a social construction, a system of social rules consisting of both primary and secondary rules.<sup>20</sup> He explained primary rules as those imposing a duty, for example the rules of criminal law. He defined secondary rules as those setting up the procedures through which primary rules can be introduced, modified, or enforced: rules of adjudication (that is, those rules which empower officials to pass judgment), rules of change (those rules which regulate the process of change to the primary rules, for example the power to legislate in accordance with certain procedures) and rules of recognition (those rules that enable us to know that a rule is a valid

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<sup>8</sup> *ibid* 161-175.

<sup>9</sup> *ibid*. See also Masaji Chiba, ‘Introduction’ in Masaji Chiba (ed) *Asian Indigenous Law in Interaction with Received Law* (Kegan Paul International 1986) 5.

<sup>10</sup> Donlan (n 5) 163.

<sup>11</sup> *ibid*.

<sup>12</sup> See Aristotle, *Politics* (Benjamin Jowett tr, Clarendon Press 1885), Plato, *The Republic* (Benjamin Jowett tr Collier 1901).

<sup>13</sup> Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province trs, 2<sup>nd</sup> edn, Burns, Oates and Washbourne Ltd.1912), Volume 2, Part II, q. 90, art. 4, 995.

<sup>14</sup> John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> edn, Oxford University 2011) 280.

<sup>15</sup> John Austin, *Province of Jurisprudence Determined* (first published 1832, Weidenfeld and Nicholson 1955) 3.

<sup>16</sup> Karl Marx, *Capital* (Samuel Moore and Edward Aveling trs, 3<sup>rd</sup> edn, The Modern Library 1906).

<sup>17</sup> Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 460-461.

<sup>18</sup> Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications 1930) 9.

<sup>19</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2<sup>nd</sup> edn, University of California Press 1967).

<sup>20</sup> Herbert Lionel Adolphus Hart, *The Concept of Law* (2<sup>nd</sup> ed, Oxford University Press, 1997) 79-99.

rule, for example rules contained in statutes).<sup>21</sup> He described any other system of rules made up exclusively of primary rules as *pre-legal* or *primitive*.<sup>22</sup> Hence the rules of these communities do not form a legal system:

“In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark...They will in this respect resemble our own rules of etiquette...[but] if doubt arises as what the rules are... there will be no procedure for settling this doubt...”<sup>23</sup>

Whilst Hart does not state that such societies are worse off than states with Western legal systems and laws, he does see them as being largely defective.<sup>24</sup> He also would not label the rules of such societies as *laws*. In this respect African norms that existed prior to, or at the time of, European pre-colonialism would not have been deemed *laws*.

Others see law as an institutionalised normative order.<sup>25</sup> However, both laws of the institutions within the Westphalian model and other normative orders such as traditional mores are also recognised as being law. Laws can be defined as “normativities”, which concept would include state and non-state norms but also non-legal normative traditions.<sup>26</sup> A possible consensus might be a definition that sees a “flexible working conception of law” which comprises “a species of institutionalized social practice that is oriented to ordering relations between subjects at one or more levels of relations and of ordering.”<sup>27</sup>

The purpose of this chapter is not to identify the true conceptualisation of law. It is clear from the very limited jurisprudential appraisal above that this is not resolvable. Instead, this chapter acknowledges the different conceptions of law and examines the difficulties associated with them, especially in defining the laws and legal system of any specific state. It enquires into the different manifestations of law and legal and quasi legal norms. It also addresses a further complexity in law, namely in the distinction or gap between the *law-in-books* and the *law-in-action*. The *living law* concept, as well as the related subject of legal pluralism is also examined as a useful construct for examining and appreciating unofficial

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<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*, 92.

<sup>23</sup> *ibid.*

<sup>24</sup> Māmari Stephens, ‘Māori Law and Hart: A Brief Analysis’

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548123](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548123) (accessed 1st July 2015)

<sup>25</sup> Neil MacCormick, *Institutions of Law* (Oxford University Press 2007).

<sup>26</sup> Donlan (n 5).

<sup>27</sup> William Twining, *General Jurisprudence : Understanding Law from a Global Perspective* (Cambridge University Press 2009)116-117.

law. Factors such as culture, politics, language and post-coloniality are also briefly surveyed for their influences on law. The purpose then would be to obtain a definition of law that would permit the analysis of the law of Seychelles in the subsequent chapters of the thesis.

## **2.1 The Complexity of *Official Law***

Law is most often viewed vertically as “a system of imperatives emanating from a hierarchically superior source”.<sup>28</sup> As has been pointed out, in this positivist context, law is a state’s legal philosophy, that is, law exclusively emanating from the state. Hence, such law consists of legislation, regulations and principles expressly enacted, adopted, enforced or recognized by a government body, including administrative, executive, legislative, and judicial bodies. This may be defined as *official law*.

Masaji Chiba treats law as a three-tiered structure consisting of *official law* (that is, the legal system which is sanctioned by the legitimate authority of a country), *unofficial law* (a norm that is sanctioned by the consensual practice of some group either within or outside of a country), and *legal postulates* (that is value principles or system serving rules).<sup>29</sup> He sees all three of these normativities interacting in any given state or community. This construct is progressively more recognised by legal scholars. However, it is increasingly difficult to clearly differentiate between official and non-official law, and between legal and non-legal normativities. The understanding of official law in some states, for example South Africa includes customary laws. Others include international or global norms into state law. This partly reflects the fact that people “seek justice in many rooms.”<sup>30</sup>

Nonetheless, within the strict confines of what is termed official law lies the further complexity of the law as appears in statute and law reports and the law that is applied by officials of the state.

### **2.1.1 Roscoe Pound: The *Law-in-Books* and the *Law-in-Action***

There is an obvious gap between the law-in-books, that is, statutes, regulations and law reports and law as practised and experienced in the legal arena generally. Roscoe Pound, the eminent American jurist of the first half of the twentieth century, was concerned with what he

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<sup>28</sup> Margaret Davies, ‘Feminism and the Flat Law Theory’ (2008) 16(3) *Feminist Legal Studies* 281.

<sup>29</sup> Masaji Chiba, ‘Introduction’ in Masaji Chiba (ed) *Asian Indigenous Law in Interaction with Received Law* (Kegan Paul International) 1986, 5.

<sup>30</sup> Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,’ (1981) 19 (1) *Journal of Legal Pluralism* 1.

saw as a narrow view of law which essentially had to be debunked, that is, that the law that existed in law books was not the law as manifested in fact in the decisions of judges.

In his seminal paper in 1906 he stated:

“...if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”<sup>31</sup>

His main focus was to express certain specific values in law not recognised in the law-in-books. In his view, law had to be recognised as a dynamic system influenced by society and vice versa. He saw a focus on the law-in-action as a means to remedy conflict and reconcile social relationships. Pound’s treatise was written at a time when the United States was emerging from an agrarian, individualistic nation into an industrial and collective society.<sup>32</sup> He saw jurisprudence as resistant to such change and still clothed in the “rags of the past century”.<sup>33</sup> His call to make law vibrant, responsive and topical is summarised in his plea to lawyers not to become legal monks and not to allow “legal texts to acquire sanctity and go the way of all sacred texts”.<sup>34</sup> His illustration of law’s fiction by using the Tom Sawyer and Huckleberry Finn analogy of calling a pick axe a case knife when digging a hole so as to adhere to principle<sup>35</sup> sums up the gap between the law-in-books and law-in-action.

Pound takes stock of the fact that although law must be stable, it cannot stand still.<sup>36</sup> The gap between law and society must somehow be acknowledged and bridged. Law must proceed by taking into account the social facts on which it is based.<sup>37</sup> A legal system must remain predictable but it must be flexible and responsive to change. In this context, he indicates that the spirit of the law rather than the letter of the law should be applied by judges. To coin a phrase of Walter Bagehot, the law-in-action must be permitted to break “the cake of custom.”<sup>38</sup> Equally, as Marc Galanter has pointed out, law can be *a* fact to be taken into

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<sup>31</sup> Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12, 15.

<sup>32</sup> Keith J. Bybee, ‘Law in Action’ (2006) 59 (3) *Political Research Quarterly* 415,416.

<sup>33</sup> Pound (n 31) 30.

<sup>34</sup> *ibid* 36.

<sup>35</sup> *ibid*, 12.

<sup>36</sup> Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press 1923) 1.

<sup>37</sup> Roscoe Pound, *Jurisprudence: Volume 2, The Nature of Law* (West Publishing Co. 1959) 324.

<sup>38</sup> Walter Bagehot, *Physics and Politics Or Thoughts on the Application of the Principles of “Natural Selection” and Inheritance, to Political Society* (Ivan R Dee, 1899) 32.

account rather than a normative framework that one is committed to uphold.<sup>39</sup> This also ties in with Oliver Wendell Holmes' claim that law is rooted in experience rather than in logic.<sup>40</sup>

In this respect, law must not be rigid or static but must respond to changes in society and human development. Pound summarises his vision of the law succinctly when he states

“There is no eternal law. But there is an eternal goal – the development of the powers of humanity to their highest point. We must strive to make the law of the time and place a means towards that goal in the time and place, and we do that by formulating the presuppositions of civilisation as we know it. Given such jural postulates, the legislator may alter old rules and make new ones to conform to them, the judges may interpret, that is, develop by analogy and apply, codes and traditional materials in the light of them, and jurists may organize and criticise the work of legislatures and courts thereby.”<sup>41</sup>

Pound rightly rejected Christopher Columbus Langdell's declaration that “law is a science, and... all the available materials of that science are contained in printed books.”<sup>42</sup> Pound's concept of law is however limited as he sees law essentially about rules in constitutions, legislation or legal decisions. He does not see law in action as embracing all the social norms at play, nor does he see customary rules or social practices as capable of giving birth to legal norms without the intervention of the state.<sup>43</sup>

### 2.1.2 Legal Polycentricity

Pound's “judge-oriented, common law-centric”<sup>44</sup> perspective largely ignores other norms co-existing with state law. Although he accepts that there might be law without any political organisation,<sup>45</sup> he does not expand on the possibility of the myriad of norms co-existing with state law. This shortcoming is partly addressed by *legal polycentricity*, a generic term used for non-statist legal systems in which *customary law* and *privately produced law* are subsets of state law.<sup>46</sup> It may also refer to non state norms co-existing with state law. The term

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<sup>39</sup> Galanter, (n 30) 12.

<sup>40</sup> Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co. 1881)1.

<sup>41</sup> Pound (n 31)148.

<sup>42</sup> Christopher Columbus Langdell, ‘Harvard Celebration Speeches’ (1997) 3 *Law Quarterly Review* 24.

<sup>43</sup> *ibid*, 64.

<sup>44</sup> Mitchell Lasser, ‘Comparative Readings of Roscoe Pound's Jurisprudence’ (2002) 50 (4) *The American Journal of Comparative Law* 719, 740.

<sup>45</sup> Pound (n 31), 299.

<sup>46</sup> Tom W. Bell, ‘The Jurisprudence of Polycentric Law’ Unpublished Manuscript University of Chicago School of Law, 1999 <http://www.tomwbell.com/writings/JurisPoly.html> accessed 1st July 2015.

*polycentric* was introduced to the social sciences by Vincent Ostrom, Charles Tiebout, and Robert Warren to describe centres of decision making that are formally independent of each other but which enter into cooperative undertakings within a metropolitan area and function coherently.<sup>47</sup>

Using Iceland as an example, David Friedman demonstrates that some legal systems emerged spontaneously, as an extension of customary rules and at the realisation of societal self-organisation.<sup>48</sup> Legal polycentricity is a well-established concept in Scandinavian legal science in which law is seen as being engendered in many different centres.<sup>49</sup>

Equally legal history also shows us that polycentrism was the norm in medieval Europe. As Donlan points out, after the fall of the Roman Empire “multiple contemporaneous normative and legal regimes coexist[ed] and overlapp[ed] in the same geographical space and at the same time.”<sup>50</sup> In many other parts of the world, similar complex systems antedate the colonial or modern state, for example the coexistence of religious and non-religious conceptions in Indonesia.<sup>51</sup>

In more modern terms, Randy Barnett calls polycentric law *nonmonopolistic law*<sup>52</sup> in contrast to monopolistic law where there is only one legal planner - the state. He predicts the growth of “private alternatives to governmental enforcement agencies” especially where these can be shown to be more “efficacious to provide law-making and adjudicative services.”<sup>53</sup>

Tom Bell asserts that unlike the common perception of legal positivists that the only alternative to stateless law is anarchy and chaos,<sup>54</sup> polycentric law permeates society and functions in “churches, clubs, trades, and countless other settings where people associate freely and regularly.”<sup>55</sup> We might in today’s world add global trading networks and the internet as other emergent orders with their own rules. Conversely, one might argue against

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<sup>47</sup> Vincent Ostrom, Charles M. Tiebout and Robert Warren, ‘The Organisation of Government in Metropolitan Areas: A Theoretical Inquiry’ (1961) 55 *American Political Science Review* 831, 831.

<sup>48</sup> David Friedman, ‘Private Creation and Enforcement of Law: A Historical Case’ (1979) (8) 2 *Journal of Legal Studies* 399.

<sup>49</sup> Hans Petersen and Henrik Zahle (eds) *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995) 8.

<sup>50</sup> Donlan (n 5) 166.

<sup>51</sup> Franz von Benda-Beckmann, ‘Who’s Afraid of Legal Pluralism and Unofficial Law’ (2002) 47 *Journal of Legal Pluralism* 37, 39.

<sup>52</sup> Randy Barnett, ‘Foreword: Four Senses of the Public Law-Private Law Distinction’ (1986) 9 *Harvard Journal of Law and Public Policy* 267, 271.

<sup>53</sup> *ibid.*

<sup>54</sup> See for example Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press 1980) 252.

<sup>55</sup> Bell (n 46).

pan-global law as essentially monopolistic and equivalent to super-statism. In the context of the European Union (EU) for example, the homogenisation of its laws will perhaps also develop into pan-European law which may not take advantage of individual national resources and knowledge although at present the preparatory stages of EU laws does involve studies of law, practices and experiences in Member States which are then built on.

Critics of the polycentric understanding of law argue that it fails to explain the enforcement of rules and the necessity in larger, more complex societies for a *juridical authority* system which therefore presupposes the existence of a state.<sup>56</sup> Itai Sened has argued that spontaneous orders cannot enforce compliance with rules as they do not have the mechanisms to do so or they do not acknowledge the underlying state law that generally governs their function.<sup>57</sup> He argues, for example, that property rights cannot exist without central government enforcement.<sup>58</sup> Polycentric law, it is therefore contended, builds on pre-existing state structures for compliance.<sup>59</sup> Hence, Geoffrey Hodgson concludes that “[l]aw relies to a large degree on custom, but law also depends on the existence of the state.”<sup>60</sup>

However, polycentricity is a concept that typically focusses on state legal pluralism. The issue of law is so entangled with the state that it continues to divert attention from wider categories of state law or other normativities outside those associated with the state. Finding a way to express normativities outside of the state is however a difficult enterprise as will be explored later in this chapter.

### **2.1.3 Rodolfo Sacco and *Legal Formants***

In his inspirational papers of 1991, Rodolfo Sacco<sup>61</sup> borrowed the phrase *formants* from phonetics to explain the complex forces at play in determining the laws of a particular state at a given time. Sacco identified legal formants, that is, factors present in determining how cases are resolved, such as statutory rules, judicial decisions but also a judge’s background and bias.<sup>62</sup> In an attempt to understand the deeper structure that characterises legal systems he

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<sup>56</sup> See for example, Geoffrey M. Hodgson, ‘On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering’ 2009 43(1), *Journal of Economic Issues*, 143; Itai Sened, *The Political Institution of Private Property* (Cambridge University Press 1997).

<sup>57</sup> *ibid*, Sened.

<sup>58</sup> *ibid*, Sened, 49.

<sup>59</sup> *ibid*, 10.

<sup>60</sup> Hodgson (n 56)159.

<sup>61</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (Installment I of II) 1991(39) 1 *The American Journal of Comparative Law*, 1.

<sup>62</sup> *ibid*, 23.

argued that “living law contains many different elements”.<sup>63</sup> In this respect he explained that:

“The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule.”<sup>64</sup>

However, there is neither one rule in any given legal system nor an identical comparable rule in another legal system as there is a certain element of incommensurability of rules given the fact that legal formants are equally incomparable, inconsistent and generally not uniform. Comparative law in general shows up how relative law in fact is. Neither statutes in civilist countries nor case law in common law countries are the whole of the law; these would be merely “legal flowers without stem or root, irrelevant to the actual law in force.”<sup>65</sup>

Sacco recognises that legal formants may not even be rooted in legal considerations alone; “[t]hey may be propositions about philosophy, politics, ideology or religion.”<sup>66</sup> In this sense they are declaratory and hortatory and can be contrasted with operational rules which are simply imperatives.<sup>67</sup> In describing some of these legal formants, Sacco reveals a wide range of sources for the content of law. In an exercise comparable to peeling back the skins of an onion, he finds that the influences behind statute and case law include scholarly doctrinal writings, sacralised rules,<sup>68</sup> legal fictions,<sup>69</sup> invisible or implicit rules,<sup>70</sup> borrowings from other legal systems<sup>71</sup> and innovations.<sup>72</sup>

Generally however, Sacco also focusses on official law. There is some acknowledgment of non-official law but this is limited to his recognition that implicit rules are those that play a role in what he calls the law of primitive societies.<sup>73</sup>

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<sup>63</sup> *ibid*, 22.

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid*, 27.

<sup>66</sup> *ibid*, 32.

<sup>67</sup> *ibid*.

<sup>68</sup> Sacralised rules are those elevated to a pedestal, seen as great social breakthroughs. Sacco gives the example of Roman Law perceived as law compiled by divine mandate (Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ Instalment II of II, (1991) 39 (2) *The American Journal of Comparative Law*, 343.

<sup>69</sup> *ibid*, 352. Sacco gives the example of a legal fiction as the silence of the offeree in a contract as a manifestation of his consent.

<sup>70</sup> *ibid*, 385. Invisible rules are the rules to which we are subject without us specifically perceiving them.

<sup>71</sup> *ibid*, 397.

<sup>72</sup> *ibid*, 400.

<sup>73</sup> *ibid*, 386.

## 2.2 The Significance of *Unofficial Law*

Marc Hertogh has defined *unofficial law* or non-state law as “a body of norms produced and enforced by non-state actors.”<sup>74</sup> Although this type of law may be seen as a heresy or not law at all,<sup>75</sup> it has nevertheless to be acknowledged as a body of norms that is extant and increasingly impinging on the legislature’s presumed monopoly or at least in diminishing its exclusive role in the generation of social norms. Progressively, jurists recognise the importance of unofficial law. Both McCormick<sup>76</sup> and Twining<sup>77</sup> accept that an acknowledgment of unofficial law is essential for a genuinely global perspective of law. Indeed, this unofficial law may better embody justice, the rule of law, democracy and even human rights than modern Western state law. A balanced world view is essential. However, a jaundiced or romantic view of unofficial law, one that extolls the virtues of primitive laws may be counterproductive if not dangerous.<sup>78</sup> The value of unofficial law is contextual, that is, important to people in a given time and place.

In Western democracies, non-state law permeates some fields of commercial law, international law, environmental law, tax laws and cyber law. Regulation, self-regulation or soft law have become major areas of expansion and debate, as have discussions on native or indigenous law. In the context of Africa on the other hand, the concept of *ubuntu*,<sup>79</sup> although perhaps a universal value, illustrates one aspect of custom that may have preceded and have equal value to the great democratic precepts of Western legal tradition such as the rule of law and the exercise of human rights and fundamental freedoms, especially equality; not as an individual human right but in a social or communal interest sense.<sup>80</sup>

However, in order to appreciate the law of any given state, its setting must also be explored; the *how* and *where* of law dictates that the researcher looks beyond official laws to understand the impact of non-state laws and the *living law*.<sup>81</sup> In other words, the context of

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<sup>74</sup> Marc Hertogh, ‘What is Non-State law? Mapping the Other Hemisphere of the Legal World’ in Hanneke Van Schooten & Jonathan Verschuuren (eds.) *International Governance and Law: State Regulation and Non- State Law* (Edward Elgar Publishing 2008) 11.

<sup>75</sup> *ibid.*

<sup>76</sup> McCormick (n 25).

<sup>77</sup> William Twining (n 27).

<sup>78</sup> See Marc Galanter (n 30) and Boaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed Cambridge University Press 2002) 114.

<sup>79</sup> “I am what I am because of who we all are”- see Tom Bennett, ‘Ubuntu: a New Doctrine of Equity in South African Law’ (2011) 57 *Loyola Law Review* 709.

<sup>80</sup> For a wider perspective of ubuntu, see Desmond Tutu, *No Future Without Forgiveness* (Image 2000).

<sup>81</sup> Eugen Ehrlich, *Principles of the Sociology of Law* (Walter L. Moll tr., Harvard University Press 1936) 493 : “The living law is the law which dominates life itself even though it has not been posited in legal

state law is important but equally important are the co-existing norms.

### 2.2.1 Eugen Ehrlich and the *Living Law*

Eugen Ehrlich wrote about what he called the *living law (lebendes Recht)* of the people of Bukowina, a community in a remote area of the Austro-Hungarian Empire (now Romania) in 1936.<sup>82</sup> Populated by ethnic groups of, inter alia, Jews, Gypsies, Germans, Hungarians, Romanians, Russians and Slovaks, this melting pot of culture and norms influenced his realisation that the law of legal doctrine was far removed from the norms that were in actual practice. He used this experience to explain that quite separate from state law, other social orderings akin to law take place. He challenged the centralism of official law arguing that:

“The centre of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time.”<sup>83</sup>

Law preceded the state and enquiry into its definition and development has to extend beyond purely state centred law norms. In this context, he stated:

“[I]t is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision.”<sup>84</sup>

He saw law not merely as a legislative, juristic or judicial concept but as a sociological phenomenon. Finding the law, then, takes a broader perspective than that contained in doctrinal expositions. It extends to local norms and shared practices even within familial associations.

Ehrlich’s contribution to the pluralist debate lies in his insistence that law is about social ordering, about rules of law emerging from the internal practices of human associations;<sup>85</sup> and that from these associations and norms of social control, law emerges.<sup>86</sup> This is a rejection of the monopoly of state-centred law, as Ehrlich’s theory sees living law as mainly developing independently from the state. However, Ehrlich’s elevation of orderings outside

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propositions.”

<sup>82</sup> Eugen Ehrlich, ‘Das lebende Recht der Völker in der Bukowina’ (1912) 1 *Recht und Wirtschaft* 273.

<sup>83</sup> *ibid*, 390.

<sup>84</sup> *ibid*, 24.

<sup>85</sup> *ibid*, 25.

<sup>86</sup> Baudoin Dupret, ‘Legal Pluralism, Plurality of Laws, and Legal Practices’ (2007) (1) *European Journal of Legal Studies*, 1, 3.

state law as *law* has produced much criticism.<sup>87</sup> It is viewed as equating custom with law and confusing social behaviour with legal values.<sup>88</sup>

Nevertheless, Ehrlich's *living law* remains significant, at least in the reinterpretation of his concept in the context of globalisation<sup>89</sup> and also in the transcendence of national law.<sup>90</sup> Specifically, Ehrlich's conception is utilised by Günther Teubner in his autopoietic theory of law<sup>91</sup> in which he sees law as the self-reproduction of specialized and organised networks of an economic, cultural, academic and technological nature.<sup>92</sup> In Teubner's view it is the decentred law-making process occurring in multiple sectors of civil society and not the global economic transactions or multinational organizations that create a global legal order.<sup>93</sup> Essentially, Ehrlich's contribution to conceptualising law is seeing it distinctively as a sociological way of understanding law's identity.<sup>94</sup>

### 2.2.2 The Varieties of *Legal* or *Normative Pluralism*

William Twining defines legal pluralism as "a state of affairs in which two or more legal orders co-exist in the same time-space context".<sup>95</sup> Pioneers of legal pluralism, such as Ehrlich, did much to begin the debate between the co-existence of the *law of the people* and the *law of the state*. Such legal pluralism states that more than one legal order or mechanism can exist within one social space.<sup>96</sup> But legal scholars also disagree on the boundary between normative orders that can and cannot be called law.<sup>97</sup>

Jacques Vanderlinden, like other legal pluralists in the 1970s at first saw legal pluralism as a plurality of norms administered by the state; then as just unitary systems "which "recognise"

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<sup>87</sup> See for example Max Rheinstein, 'Sociology of Law, A Propos Moll's translation of Eugen Ehrlich's *Grundlegung der Soziologie des Rechts*' (1938) 48 *Journal of Ethics* 232.

<sup>88</sup> See David Nelken, 'An e-mail from Global Bukowina' (2007) *International Journal of Law in Context* 189, 191.

<sup>89</sup> *ibid.*

<sup>90</sup> Lo Guidice (n1) 209-224.

<sup>91</sup> A theory of law that likens law to an organism with the ability to transform, adapt and stabilise itself from its own resources but with the influences of its environment. See Nicholas Luhmann, *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2<sup>nd</sup> ed, Routledge 2014) and Günther Teubner, *Law as an Autopoietic System* (ed. Zenon Bankowski, tr. Annie Bankowska and Ruth Adler, Blackwell 1993).

<sup>92</sup> Günther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Günther Teubner (ed) *Global Law Without a State* (Ashgate 1997) 7.

<sup>93</sup> *ibid.*, 3-28.

<sup>94</sup> Roger Cotterell, 'A Concept of Law of Global legal Pluralism?' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014) 193, 196.

<sup>95</sup> Twining (n 27) 70.

<sup>96</sup> Von Benda-Beckmann (n 51) 37.

<sup>97</sup> Melanie Forsyth, *A Bird That Flies With Two Wings: Kastom and State Justice Systems in Vanuatu* (Australian National University E- Press 2009) [http://epress.anu.edu.au/kastom\\_citation.html](http://epress.anu.edu.au/kastom_citation.html) accessed 1 July 2015.

special rules for specific persons and/or purposes.”<sup>98</sup> He affirmed that different devices applying to similar situations amount to “a plurality of legal mechanisms, not to legal pluralism”.<sup>99</sup> While Vanderlinden perceived non state laws and state laws as only different *mécanismes juridiques*<sup>100</sup> operating in identical situations,<sup>101</sup> Galanter’s emphasis was on the processes of law or dispute processing. He shifted the definition of pluralism to an understanding of a plurality beyond norms administered by the state, that is, one that acknowledged “the multiplicity of norms of varying levels”.<sup>102</sup>

In his seminal writing of 1986, John Griffiths also challenged the ideology of legal centralism. He acknowledged that the co-existence of state law and non-state law is usual, “the omnipresent, normal situation in human society.”<sup>103</sup> He concluded that whether one finds it possible to differentiate between different forms of law or not, *law* is present in every “semi-autonomous social field”,<sup>104</sup> and “since every society contains many such fields, legal pluralism is a universal feature of social organization.”<sup>105</sup> Sally Falk Moore acknowledged the operation of many of these social fields in any given society as semi-autonomous. She does not use the term *law* for these social fields, but sees them as units of social control.

Mariano Croce has observed that official law can appear as one social practice while other orderings could also be termed legal when they renegotiate social reality. Such orderings are engaged in a perennial struggle, competing “to affect both the special venue in which they enter when they need to solve disputes...” In this context, “legal pluralism can be regarded as a permanent condition of social reality”.<sup>106</sup>

In contrast, Brian Tamanaha distinguished between state law and other forms of normative social ordering, reserving the term *law* only for state law norms, including those instances where through recognition by the state, non-state law norms become incorporated into state

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<sup>98</sup> Jacques Vanderlinden, ‘Return to Legal Pluralism: Twenty Years Later’ (1989) 28 *Journal of Legal Pluralism and Unofficial Law* 149, 154.

<sup>99</sup> *ibid.*, 156.

<sup>100</sup> Juridical or legal mechanisms.

<sup>101</sup> Jacques Vanderlinden, ‘Le pluralisme juridique: essai de synthèse’ in John Gilissen (ed) *Le pluralisme juridique* (l’Université Bruxelles 1971)19, 20.

<sup>102</sup> Galanter (n 30) 34.

<sup>103</sup> John Griffiths, ‘What is Legal Pluralism’ (1986) 24 (1) *Journal of Legal Pluralism & Unofficial Law* 39

<sup>104</sup> The concept of a social field is attributable to Sally F. Moore in her paper, ‘Law as Process: An Anthropological Approach’ (1973) 7 *Law and Society Review*, 719. A social field can be scientific, religious, academic, political, medical or judicial. See also Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Routledge 1984).

<sup>105</sup> Griffiths (n 103) 38.

<sup>106</sup> Mariano Croce, ‘All Law is Plural. Legal Pluralism and the Distinctiveness of Law’ (2012) 65 *Journal of Legal Pluralism and Unofficial Law* 1, 27.

law.<sup>107</sup> Hence while the state may well claim to be the sole lawmaker, “legal pluralism highlights the multitude of partially autonomous and self-regulating social fields also producing legal rules.”<sup>108</sup>

Ralf Michaels warns against a linear genealogical view of pluralism<sup>109</sup> in which one sees a progression of pluralism from its *classical* legal construct in the 1970’s, to the 1980’s *new legal pluralism* concept and today’s *global legal pluralism*. The term pluralism may only have existed since the 1970’s but the fact is that pluralism, as he points out, existed in medieval Europe and in the *ius commune* long before the colonial engagement of Western and non-Western norms.<sup>110</sup> Martha-Marie Kleinhans and Roderick MacDonald have also pointed out that the legal pluralistic insight dates from at least Montesquieu.<sup>111</sup>

However, acknowledging legal pluralism across different times and spaces is only one step towards understanding law. Pluralist critics of modern monism often create strawmen, distorting the beliefs of contemporary jurists. Catherine Valcke has warned against caricaturing monism and has urged legal pluralists to recognise that despite their assumptions, state law theorists acknowledge relations between state law and other forms of normativity.<sup>112</sup> She illustrates such acknowledgment by English and US state courts in family dispute cases involving *Sharia* law where the courts reach decisions dictated by such laws but through means that are “commonplace under the municipal law.”<sup>113</sup>

### **2.2.2.1 Classical Legal Pluralism**

In the opinion of many, both within law and without, law is monist: exclusive, systematic, distinct and unique.<sup>114</sup> This is explicit vertically either in the Austinian sense from the top down or the Kelsenian model of basic norm to *grundnorm*. Early legal pluralists refer to this as “the classical view of law”,<sup>115</sup> though the latter only really dates from the nineteenth

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<sup>107</sup> Brian Tamanaha, ‘The Folly of the “Social Scientific Concept” of Legal Pluralism’ (1993) 20 *Journal of Law & Society*, 192.

<sup>108</sup> Beaudoin Dupret, ‘What is Plural in the Law? A Praxiological Answer’ <http://ema.revues.org/1869#tocto2n7> accessed 1st July 2015.

<sup>109</sup> Ralf Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 225, 227.

<sup>110</sup> *ibid.*

<sup>111</sup> Martha-Marie Kleinhans and Roderick MacDonald, ‘What is Critical Legal Pluralism’ (1997) 12 (2) *Canadian Journal of Legal Studies*, 25, 29.

<sup>112</sup> Catherine Valcke, ‘Three Perils of Legal Pluralism’ in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014) 123- 135, 127. She does question however whether this is indeed legal pluralism.

<sup>113</sup> *ibid.* Valcke refers to cases such as *Westminster City Council v IC* [2007] EWHC (Fam) 3096 and *Chief Adjudication Officer v Kirpal Kaur Bath* [2001] 1 FLR 8 [CA].

<sup>114</sup> Austin (n 14).

<sup>115</sup> See Griffiths (n103) 40.

century. In contrast, classical legal pluralism recognises the co-existence of legal orders. Classical legal pluralism largely focussed on the colonial setting, identifying imposed colonial laws and customary laws or norms of the colonised community. However, as Michaels points out, such legal pluralism was confined in two ways: first, geographically it only concerned the interplay of Western and non-Western laws in colonial and postcolonial settings and secondly, conceptually, it treated indigenous non-state law or norms as inferior to the official law superimposed by the colonising power.<sup>116</sup> This traditional view of pluralism is limiting not only in appreciating the true extent of pluralism within the colonised state but also in identifying the same competing orders in the colonising state.

### **2.2.2.2 New Legal Pluralism**

Sally Engle Merry distinguishes classical legal pluralism from *new legal pluralism*.<sup>117</sup> Relying on research carried out in the non-colonised states of Europe and/or industrial nations such as the United States of America she finds that

“Legal pluralism has expanded from a concept that refers to the relations between colonized and colonizer to relations between dominant groups and subordinate groups, such as religious, ethnic, or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks or institutions.”<sup>118</sup>

Hence, she finds legal pluralism in all societies. She does not see these different forms of law or orderings as competing but rather as participating in the same social field. One has to embrace Griffiths’ rejection of legal centralism<sup>119</sup> to fully appreciate these non-state orderings beyond colonial settings.<sup>120</sup> *New legal pluralism* thus sees legal pluralism as a universal concept.

Griffiths’ work, referred to above, depicts pluralism in all societies even those without a colonial past. He articulates the distinction between *strong legal pluralism* and *weak legal pluralism*. The former includes both state laws and non-state laws or norms; the latter focuses on the complexity of state laws or laws and norms officially validated by the state. In Griffiths’ view the latter is only a façade. State legal pluralism is of more importance. In

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<sup>116</sup> Michaels (n 109) 245.

<sup>117</sup> Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869,872.

<sup>118</sup> *ibid.*

<sup>119</sup> Griffiths (n 103) 40.

<sup>120</sup> Merry (n 117) 873-874.

contrast, Gordon Woodman recognises both *weak* (state) legal pluralism and *strong* legal pluralism as meaningful forms of legal pluralism.<sup>121</sup>

### **2.2.2.3 Global Legal Pluralism**

To the extent that it reifies those very persons in communities creating the norms, both *classical* and *new* legal pluralism have been criticised by critical legal pluralists as pitting state law against other normative orders and more importantly as ignoring the relevance of the individual and the impact of laws or orders on him/her.<sup>122</sup> In other words, the focus of legal pluralists should be on the narrative account of the legal subjects and not on the legal orders themselves.

If *new legal pluralism* reminds us of the complexity of law within the borders of the modern state, *global legal pluralism* recognises the interaction and engagement between different jurisdictional authorities within and outside the state. Boaventura de Sousa Santos describes this interface between

“the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations.”<sup>123</sup>

Hence, plurality extends beyond local borders, beyond national time-space.<sup>124</sup> He argues therefore, that whilst the pluralist debate was previously on “local infrastate legal orders co-existing within the same national time-space”, the present debate is focussed on “suprastate legal orders coexisting in the world system with both state and infrastate legal orders”.<sup>125</sup> In this area, Roger Cotterell argues that the concept of law applied “should be judged by its fitness for the specific purpose for which it was created.”<sup>126</sup> He concludes that it may be wise to be flexible about the social context when applying transnational doctrines and acknowledging the differing levels of institutionalisation of such concepts across different arenas.<sup>127</sup>

Paul Schiff Berman emphasises the complexity of this legal pluralism on a different level –

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<sup>121</sup> Gordon R Woodman, ‘Legal pluralism and the search for justice’ (1996)40 (2) Journal of African Law, 152, 158.

<sup>122</sup> See Martha-Marie Kleinhans and Roderick MacDonald (n 111), 35.

<sup>123</sup> de Sousa Santos (n 78) 94.

<sup>124</sup> *ibid*, 92.

<sup>125</sup> *ibid*, 96.

<sup>126</sup> Cotterell (n 94) 203.

<sup>127</sup> *ibid* 204-206.

that brought about by nation-states sharing legal authority with regional or international courts and other tribunals or regulatory authorities.<sup>128</sup> As he points out, the Project on International Courts and Tribunals<sup>129</sup> identified about one hundred and twenty-five international institutions issuing decisions that have some effect on state institutions.<sup>130</sup>

Equally, the movement and displacement of peoples and communities across national borders has resulted in bonds of ethnicity dictating norms across those communities and displacing national law to some extent. Other ties across national borders include those of religion, commerce and cyber technology which are observed over and above and sometimes simultaneously with state laws.

In this context, comparative law and the study of mixed legal systems is linked to that of legal pluralism with the focus on the interaction between different state laws. More generally, it is important to note, especially in the context of Seychelles that mixed legal systems are often a manifestation of state or weak legal pluralism.

#### **2.2.2.4 Critical Legal Pluralism**

In an influential article written in 1997, Martha-Marie Kleinmans and Roderick Macdonald deconstructed legal pluralism, arguing that law is not an external force to be exerted and whose rules are faithfully obeyed by legal subjects.<sup>131</sup> They observed that contrary to the traditional view that law and orders are social facts, *critical legal pluralism* “presumes that knowledge is a process of creating and maintaining myths about realities.”<sup>132</sup> Hence, legal subjects create law and generate their own legal subjectivity. They are active not passive actors in the legal field. As Macdonald went on to say, law lives in people. It is the legal actors’ “purposes which law serves and their behaviour through which law is revealed.”<sup>133</sup> As Macdonald states, legal pluralism is the:

“recognition of the inherent heterogeneity, flux and dissonance in the normative lives of human agents, the multiple trajectories of internormativity, and the fundamentally

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<sup>128</sup> Paul Schiff Berman, *Global Legal Pluralism : A Jurisprudence of Laws beyond Borders* (Cambridge University Press 2014) 6.

<sup>129</sup> The Project on International Courts and Tribunals (PICT) was established in 1997. It operates as a framework of collaboration between academic institutions in New York and London and has a network of researchers and practitioners involved in the study of international courts and tribunals. See <http://www.pict-pcti.org/> accessed 1st July 2015

<sup>130</sup> *ibid.*

<sup>131</sup> Martha-Marie Kleinmans and Roderick A. Macdonald (n 111).

<sup>132</sup> *ibid.*, 39.

<sup>133</sup> Roderick A. Macdonald and Thomas McMorrow, ‘Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships’ (2007) 1 *European Journal of Legal Studies* online <http://www.ejls.eu/1/15UK.htm> accessed 1st July 2015.

interactional nature of law itself- [...] a view of the place of human beings in constituting their social and legal reality.”<sup>134</sup>

In this new perspective, legal pluralism becomes an interaction, a dialogue between the multiple differences, norms and modes of law and a marriage of laws and orders of human relationships.<sup>135</sup> Critical legal pluralism has however come under attack for suggesting that legal subjects make or adhere to particular laws to suit their individual needs. Catherine Valcke has pointed out that law essentially governs individual interaction and transcends any one individual. Hence “legal pluralism cannot be recast as individual legality.”<sup>136</sup> Insofar as critical legal pluralism assumes that legal subjects choose their own individual law this reduces the concept of law to anarchy.

Donlan has argued that distinctions should be made between normative and legal orders. In his view, although neither are superior to the other, by terming non-Western normativities as *law*, one commits a “conceptual colonisation”, assimilating such normativities to a “hegemonic meaning linked to Western ideas and institutions and drains each of their significance.”<sup>137</sup>

In general, early theories of legal pluralism such as *classical* legal pluralism focus on state law as being dominant even where pluralism is acknowledged. Similarly, *new* legal pluralism views the state as the ultimate decision maker. Both *global* legal pluralism and *critical* legal pluralism do not pit official law against non-official law but rather they analyse the relations between the two types of laws or norms. It is the appreciation of the latter concepts that is adopted in the research on Seychellois law. Further, in the context of this thesis, it must be noted that in the formulation of Seychellois law, it is immaterial whether the mechanisms to be described are termed *legal* or *normative*. The distinctions are certainly important theoretically but not in practice.

### **2.3 Additional Cultural, Political and Economic Influences**

In addition to the complexities of official and unofficial law already described, there are other other influences at play such as culture, politics and economics. Both the legislation and case law of a nation reflect the values of groups of people within it. Equally, the philosophies and policies of a political party whilst in government will influence the laws of the country. These

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<sup>134</sup> *ibid*, XVII. ‘Final Blessing.’

<sup>135</sup> *ibid*.

<sup>136</sup> Valcke (n 112) 132.

<sup>137</sup> Donlan (5) 164-165.

political factors are closely linked to economic factors as political parties depend on voters to remain in government and are swayed by issues affecting the economy such as unemployment, taxes etc. Laws enacted or enforced reflect these influences at play. Equally, laws of economic and political unions or international associations have a transformative effect on national laws.

In this context the EU is an interesting entity to observe. On the basis of Union treaties, the legal orders of the member countries are constantly altered. The citizens of the EU are no longer mere citizens of member states but also Union citizens. Some sovereign rights of their nation states have been ceded to the EU. There is no denying the fact that the twenty-eight member states have autonomy on a large number of issues but it must be acknowledged that the fundamental ideas of the EU contained in Articles 2 (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights) and 3 (the promotion of peace, its values and the well-being of its peoples) of the Treaty of the European Union<sup>138</sup> have resulted in fundamental changes in the laws of individual member states. The fundamental freedoms have huge repercussions in terms, of inter alia, the freedom of movement of workers, goods and capital within the EU, as reflected in the laws enacted within the member states.

Equally, the European Convention on Human Rights and the European Court of Human Rights have far reaching consequences across the boundaries of member states. In this respect, inter alia, the right of ownership, freedom of opinion, the protection of the family, freedom of religion or faith as well as a number of fundamental procedural rights such as the right to due legal process have been enforced even when resisted by the courts of member states. Further, the Charter of Fundamental Rights is not only legally binding but also establishes the applicability of fundamental rights in EU law.

Most importantly where EU law conflicts with national law, the case of *Flaminio Costa v ENEL*<sup>139</sup> clearly established that EU law has primacy over any conflicting law of the Member States. The consequence of this precedent is that where there is a conflict of laws, contravening national law ceases to apply and only new national legislation in conformity with EU law may be enacted. Similarly, national law must be interpreted in line with EU law.

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<sup>138</sup> See Official EN Journal of the European Union 26.10.2012 'Consolidated Version of the Treaty on European Union' <http://eur-lex.europa.eu/legal-ntent/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN> accessed 1st July 2015.

<sup>139</sup> *Flaminio Costa v ENEL* [1964] ECR 585 (6/64).

Hence, a common and uniform system of law operates across member states of the EU in areas in which the EU has competence.<sup>140</sup> There is therefore, the development of a *novum ius commune Europaeum*<sup>141</sup> combining Anglo-American law, continental law, as well as Nordic law across the nation states of Europe in many areas of law.

In this respect, the space for national law has shifted and remains amorphous. There are still nonetheless, clearly distinct country specific legal systems and laws especially where the EU has no competence. Where no conflict appears between EU law and national law, culture specific rules and norms and indigenous law remain in operation and undergo their own transformations and mutations outside the influence of the EU. The question remains as to what legal peculiarities remain country specific. Notwithstanding cultural, political or economic influences there is an increasing mixing of laws, cross fertilisation of different legal traditions from member states and the permeation of globalised legal instruments into national legal systems.

In the context of this study, similar influences on Seychellois law will be explored in Chapter 6. Suffice it to say at this juncture that specifically in terms of its geographic and economic location, interventions by financial bodies such as the World Bank and the International Monetary Fund (IMF) and political, international and regional associations result in homogenous common law style legislation, termed rule of law instruments, permeating and transforming Seychelles' national laws.<sup>142</sup>

### **2.3.1 The Experiences of Micro-Jurisdictions**

A further factor to be considered in law's complexity is whether micro-jurisdictions such as that of Seychelles are more amenable than bigger jurisdictions to cross-fertilisation and the absorption of the laws and norms of other legal systems, entities or fora. Perhaps the more specific question is whether micro-jurisdictions face stronger motivation to adopt or import laws without respect to local conditions. The issue that then arises is whether the economic vulnerability of small states, perhaps especially a small geographically isolated island state like Seychelles, makes the distinctiveness of its legal system vulnerable as well. In the

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<sup>140</sup> See Klaus-Dieter Borchard, 'The ABC of European Union Law' [http://europa.eu/documentation/legislation/pdf/oa8107147\\_en.pdf](http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf) accessed 1st July 2015.

<sup>141</sup> A new common law of Europe.

<sup>142</sup> See Iza Hussin, 'Circulations of Law: Colonial Precedents, Contemporary Questions' (2012) 2 (7) *Oñati Socio-Legal Series* 18.

words of Sue Farran, Esin Özücü and Seán Patrick Donlan, is such a system *endangered*?<sup>143</sup>

Adam Grydehøj argues that contrary to popular belief, the small economic size of micro states<sup>144</sup> may not be a disadvantage even in terms of international competitiveness. Instead, such states may even have competitive advantages in engaging in economic policy aimed at developing core competencies and nurturing economic diversity.<sup>145</sup> In other words, being forced to compete on an unequal platform microstates resort to innovative schemes to survive economically. Godfrey Baldacchino agrees. Having researched various small island sovereign states, including Seychelles, he has reiterated that despite many disadvantages, micro-jurisdictions use many devices including diplomacy, international relations and other jurisdictional resourceful ploys to sustain their economic and political independence and sustainability.<sup>146</sup> He points out, for example, that governments choose to surrender some of their sovereignty in terms of regulation to permit or encourage transnational capital. This is true, for example, with offshore business.<sup>147</sup> This sometimes results in sovereign bifurcation where microstates operate a heavily regulated set of domestic laws (onshore) in parallel with a lightly regulated regime offshore.<sup>148</sup> This fuzziness of sovereignty meets the threat of subjugation by larger legal entities or bigger economies (perhaps even the geopolitical hegemony of capitalism). It offers a viable mode of survival and development.

Although very often seen as legal curiosities, micro-jurisdictions have not only survived but have flourished in spite of globalisation and homogenisation. The legal narratives of these microstates may reflect increasing nationalism, particularism and cultural relativism.<sup>149</sup> They demonstrate enduring mechanisms of boundary maintenance common perhaps to communities throughout the world.<sup>150</sup> Micro-jurisdictions are compelled to offer something unique in order to be successful or even to survive politically and economically. Although change is inevitable, as it is for any legal tradition, the legal identity and uniqueness of these micro-jurisdictions may be maintained over time.

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<sup>143</sup> Sue Farran, Esin Özücü and Seán Patrick Donlan, *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Ashgate 2014) 241-247.

<sup>144</sup> Note that the terms micro-jurisdictions, micro states, small states seem to connote much the same meaning. No one definitive term seems to have been adopted so far.

<sup>145</sup> Adam Grydehøj, 'Making the Most of Smallness: Economic Policy in Microstates and Sub-National Island Jurisdictions' (2011) 15 (3) *Space and Polity* 183.

<sup>146</sup> Godfrey Baldacchino, *Island Enclaves: Offshoring Strategies, Creative Governance, and Subnational Island Jurisdictions* (2010 McGill-Queen's University Press).

<sup>147</sup> *ibid.*, 5.

<sup>148</sup> *ibid.*

<sup>149</sup> P. Christiaan Klieger, *The Micro-States of Europe: Designer Nations in a Post Modern World* (Lexington Books 2012) 2.

<sup>150</sup> *ibid.*

### 2.3.2 Language and Anglo-American Hegemony

Language is another factor to be taken into account in terms of its effect on both official and unofficial law. There are different ways in which language may have a disempowering effect on legal subjects. In this context, for example, the laws of a jurisdiction may be expressed in a language foreign to or rarely used by its indigenes. In Seychelles, the law is expressed in English but Seychellois speak Creole as their first language. In addition, the original sources of laws may be in a language different from the one in which they are expressed. In such a case, the laws may easily develop in a manner different from that intended by the original law-makers. Such slippage is, of course, common even where the language of the sources and practice is the same. But the likelihood of such slippage arguably increases where the two languages differ. Again, in the case of Seychelles, its civil laws originate from France but are now being interpreted by several English-speaking legal practitioners with little or no knowledge of French. Disempowerment may also occur where legal language is so technical and inaccessible that legal subjects are completely divorced from it or where one is so subjugated as to have no voice in law-making.

Globally, legal research is dominated by English language material and Anglo-American academics and institutions. In the field of human geography, Manuel Aalbers terms this phenomenon *creative destruction*<sup>151</sup>. While scholars are asked to be more international, the Anglo-American hegemony forces them “to write papers in UK and US journals - including journals that call themselves *European* or *International*”<sup>152</sup> J. R. Short, A. Boniche, Y. Kim and P. L. Li go further, defining linguistic hegemony as “a form of power that empowers some while disempowering others.”<sup>153</sup> Hemmed into thinking and articulating in a foreign language, the indication is that creativity is reduced and development thwarted. The same point is made by Jean Bernabé, Patrick Chamoiseau and Raphaël Confiant in relation to the lack of self confidence and creativity caused by the suppression or relegation of the Creole language in the Carribean, Guyana and the Indian Ocean.<sup>154</sup>

Legal language may also become a powerful tool for change. The arrogation of law by those in power is seen by Elizabeth Mertz as law operating as “the locus of a powerful act of

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<sup>151</sup> Manuel B. Aalbers, ‘Creative Destruction through the Anglo-American Hegemony: A Non-Anglo-American View on Publications, Referees and Language’ (2004) 36(3) *Area* 319, 321.

<sup>152</sup> *ibid.*

<sup>153</sup> J. R. Short, A. Boniche, Y. Kim and P. L. Li, ‘Cultural Globalization, Global English, and Geography Journals’ (2001) 53 *Professional Geographer*, 1-11.

<sup>154</sup> Jean Bernabé, Patrick Chamoiseau and Raphaël Confiant, *Éloge de la Créolité* (Gallimard 1993)105.

linguistic appropriation, where the translation of everyday categories into legal language effects powerful changes.”<sup>155</sup>

Another factor is the influence of Anglo-American English language legal instruments on the law of many *third world* nations. This comes at the expense of existing continental influenced law or indigenous law. Indeed, this is part of a larger global development in which Anglo-American law is seen to be both more just and more market friendly than other traditions, including the continental traditions.<sup>156</sup> In this context, the emulation of Anglo-American laws and concepts is tempting if only to attract foreign inwards investment. It may even be dictated by influential international donor organisations such as the World Bank and the IMF which make the adoption of such legal instruments a condition of their loans and grants.

### 2.3.3 Post-Colonial Thought and *Hybridity*

Legal theorists are generally reluctant to actively engage with postcolonial theory.<sup>157</sup> But it can be a useful lens through which the legal consequences and effects of colonialism may be viewed.<sup>158</sup> The generalisation of the term *colony* is in many ways problematic. A distinction is made between invader or territorial colonies and settler colonies. Anna Johnston and Alan Lawson distinguish the two concepts of European colonisation as *colonies of occupation* and *colonies of settlement*: In the former “military power (or its representative) subdued majority indigenous populations and the political regimes that followed imposed and maintained rule over them.”<sup>159</sup> *Settler colonies* are more multifaceted. Alpana Roy points out that:

“In general, historical definitions of settler colonies have relied on the presence of long-term, majority white racial communities, where indigenous peoples have been outnumbered and removed by colonial policies and practices.”<sup>160</sup>

The settler colony also features a model of development that sets it apart from the conquered and impoverished colonies of Asia, Africa and the Caribbean. It is deemed to have had a privileged linkage to the imperial power.<sup>161</sup> In this context, it might be appropriate to define

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<sup>155</sup> Elizabeth Mertz. ‘Legal Language: Pragmatics, Poetics, and Social Power’ (1994) 23 Annual Review of Anthropology 435, 441.

<sup>156</sup> Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46 (2) Journal of Economic Literature 285.

<sup>157</sup> See Eve Darian-Smith and Peter Fitzpatrick, ‘Laws of the Postcolonial: An Insistent Introduction’ in Eve Darian-Smith and Peter Fitzpatrick (eds) *Laws of the Postcolonial* (University of Michigan Press 2002).

<sup>158</sup> See Alpana Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 Adelaide Law Review 315.

<sup>159</sup> *ibid.*

<sup>160</sup> *ibid.*, 361.

<sup>161</sup> Frances Abele, Daiva Stasiulis, ‘Canada as a “white settler colony”’: What about Natives and Immigrants?’

countries such as Australia, Canada and New Zealand as settler colonies. It is more difficult to use the same definition for the islands of the Caribbean whose indigenous population was cleared away (in other words annihilated) by the Spanish invaders and settled with African slaves.<sup>162</sup> Similarly, it is difficult to see where Ireland would be placed within either of the two definitions.<sup>163</sup>

It is particularly difficult to situate Seychelles within those definitions since it had no indigenous peoples but began as settlements of French planters and African slaves. Seychellois people are therefore both the colonisers and the colonised, in the language of postcolonial theory: simultaneously dominant and subordinated.<sup>164</sup> This unique characteristic, a part of its *métissage*,<sup>165</sup> has implications for its laws. This will be explored later.

Homi Bhabha depicts the tortured identity of the simultaneous coloniser and the colonised as the double *inscription* of cultures that are both colonising and colonised; these produce two kinds of authority and two kinds of authenticity.<sup>166</sup> The concepts developed by Bhabha: *hybridity*, *mimicry*, *difference* and *ambivalence* are central to postcolonial theory and important to this study. This is reflected, too, in many mixed or hybrid legal systems or traditions.

In postcolonial jurisdictions, tenacious bonds remain with remnants of past colonial and legal systems which are difficult to erase. In cases where two different colonial powers administered a state, the legal tradition of each power leaves permanent patterns in the laws of the new nation state. In this context the same nation state may have a bi-jural system where two systems of law operate in different areas of its substantive and procedural law.

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in Wallace Clement and Glen Williams(eds) *The New Canadian Political Economy* ( McGill-Queens University Press 1989).

<sup>162</sup> See for example George E. Tinker and Mark Freeland, 'Thief, Slave Trader, Murderer: Christopher Columbus and Caribbean Population Decline' (2008) 23 (1) *Wičazo Ša Review* 25.

<sup>163</sup> See for example Declan Kiberd, *Inventing Ireland* (Harvard University Press 1997).

<sup>164</sup> For a similar exposé see also Mathilda Twomey, 'Legal Salmon: Comparative Law and Africa' in Salvatore Mancuso and Charles Fombad (eds) *Comparative Law in Africa* (Juta, forthcoming July 2015).

<sup>165</sup> For an overview of the dialogic concept of legal *métissage*, see Nicholas Kasirer, 'Legal Education as *Métissage*' (2003) 78 *Tulane Law Review* 481,489 -491. *Métissage* is the only politically correct word for inter-racial breeding as miscegenation is viewed by some contemporary scholars as being offensive. See Richard Newman in 'Miscegenation' in Kwame Appiah and Henry Louis Gates Jr (eds), *Africana: The Encyclopedia of the African and African American Experience* (Basic Civitas Books 1999) 1320.

<sup>166</sup> Homi Bhabha, 'Signs taken for wonders: Questions of ambivalence and authority under a tree outside Delhi, May 1817' in Homi Bhabha, *The Location of Culture* (Routledge, 1994)136, 140-142.

## 2.4 Chapter Conclusion

Conceptualising and understanding law is a difficult enterprise. In this chapter different precepts of law including legal positivism and social legal theory have been considered. As far back as 1748, Montesquieu recognised law as a social institution.<sup>167</sup> He was followed by historical jurists in his holistic vision of law within society.<sup>168</sup> Law's sociological prominence waned in the twentieth century and was taken over by legal scholarship that placed law exclusively and centrally with the state. Legal positivists argued that law is essentially what officials enforce as law. This was contested by Ehrlich's *living law* and by Pound's law-in-books and law-in-action.

Legal pluralism explores a different aspect of law by seeing official law as only one order within competing or non-competing norms or orders. There are also different types of pluralism exploring community, state, interstate and global norms and orders and their interactions and combinations.

Cultural, political and economic influences have also to be acknowledged in the constitution of law. Equally, legal language not only has a role in transforming and constituting society but it is also a powerful tool of subjugation or maintaining power.

Finally, conceptualisations of law may have acquired too much complexity, an unsolvable problem, perhaps "a law without a concept of law".<sup>169</sup>

The conceptualisation of law is not about finding one definition of law but rather about the different manifestations of law and norms in any given society. The use of tools of the imagination,<sup>170</sup> objectivity and flexibility will assist in the enterprise of understanding and gaining perspective into what law is and how it functions.

Before embarking on such an enterprise, it will be useful also to consider and differentiate between legal systems and legal traditions and to understand the use of comparative law in the study of specific systems or traditions. The movement of traditions and the mixing of laws generally as a universal concept is also necessary in order to understand such mixity in the context of Seychelles. The next chapter will explore some of these concepts to better equip the researcher in the study of the Seychellois legal métissage.

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<sup>167</sup> Charles Montesquieu, *The Spirit of the Laws* (Cambridge 1989) 8.

<sup>168</sup> Brian Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2013) Legal Studies Research Paper Series 1-44.

<sup>169</sup> Lo Guidice (n 1) 221.

<sup>170</sup> *ibid.*

## Chapter 3: The Evolution and Transferability of Law

*“Transplanting frequently, perhaps always, involves legal transformation”*<sup>1</sup>

### 3. Introduction

In the preceding chapter, the different conceptualisations of law were explored in order to gain a better understanding of what in fact law is. The laws of legal systems of different states, nations and communities are at some levels similar but at other levels very different. The comparative method allows for the evaluation of these different legal systems. In this chapter, the discipline of comparative law is considered, if only to gain an insight into how different legal systems operate. Different methods of the comparative approach will be considered as will the use of legal taxonomy to aid the comparative enterprise. Two major legal traditions, the civil law system of France and that of the common law tradition will be examined to provide some basis for exploring the Seychellois legal system which has adopted constituents of both traditions. Finally, the reasons for the birth of mixed legal systems will be explored. This insight will provide a foundation for the enquiry into the study of the Seychellois legal tradition in the subsequent chapters.

### 3.1 Comparative Law, Taxonomy and Legal Traditions

The codification movement of the nineteenth century ensured that foreign law became more accessible for study and comparison by jurists from other national systems. In 1900, the study of comparative law as a discipline was cemented by the first international conference on comparative law at the Congress of Comparative Law in Paris.<sup>2</sup> Marc Ancel has emphasized that part of the initial hostility to the discipline arose out of a fear that comparative law would lead to the creation of a *super law*<sup>3</sup> threatening national legal and distinct legal systems.<sup>4</sup> However, jurists both in Europe and in America supported comparative methods and soon comparatists devised legal taxonomies to classify legal systems both to clarify their work and demonstrate the distinction between different legal traditions. The notion of legal traditions as distinct from the concept of legal systems allowed an understanding of the relations of laws

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<sup>1</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (2nd ed, University of Georgia Press 1993)116.

<sup>2</sup> See Procès-Verbaux et Documents du Congrès International de Droit Comparé, Paris 1900 Vol 1 (Librairie Générale de Droit et de Jurisprudence 1905).

<sup>3</sup> Marc Ancel, *Utilité et méthodes du droit comparé* (Éditions Ides et Calendes 1971) 23. A super law (*droit mondial*) would signal the imposition of an international legal order both unique and uniform across all nations.

<sup>4</sup> *ibid.*

conceived as normative information.<sup>5</sup> The concept of legal *systems* was more limited, since viewed as a static phenomenon it could only provide information as to the current state of laws. On the other hand the broader concept of legal *traditions* which encompassed official state law, custom, legislative preparatory work, foreign law and comparative law,<sup>6</sup> could permit knowledge about the reasons for the existence and the development of a given legal system.<sup>7</sup>

### 3.1.1 Comparative Law<sup>8</sup>

The use of comparison as an instrument for understanding, conceptualising and thinking about legal systems and problems remains undervalued. Comparing is a universal act,<sup>9</sup> innate not only in lawyers but in all professions.<sup>10</sup> Comparative law in the context of a modern discipline took a descriptive positivist form. It is not however simply a means of comparing or just a method or approach to legal inquiry.<sup>11</sup> Its intrinsic simplicity belies the complexities of social, political, economic and customary forces lurking below the surface of its function. In this respect, comparative law has significantly intruded on legal thinking and theory and has become a field of study quite distinct from other branches of laws.<sup>12</sup>

Anne Peters states that the comparative legal tradition sprang from a decline in the universal belief in both natural law and the unity of the *ius commune Europaeum* and the conviction that historicism or the study of legal evolutionary patterns would assist in the search of the *right law*.<sup>13</sup> This view was also expressed by Raymond Saleilles at the Congress of Comparative Law in Paris in 1900 in which he emphasised that the purpose of comparative law was the discovery of concepts and principles that constituted a *droit idéal relatif*.<sup>14</sup> In that

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<sup>5</sup> See H. Patrick Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 McGill Law Journal 863, 872.

<sup>6</sup> *ibid*, 879.

<sup>7</sup> *ibid*, 884.

<sup>8</sup> This section is an excerpt from my article 'Legal Salmon: Comparative Law and Africa' in Salvatore Mancuso and Charles Fombad (eds) *Comparative Law in Africa* (Juta 2015).

<sup>9</sup> Annalise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 1- "Comparison... is one of the most ubiquitous and yet under theorized dimensions of modern knowledge." See also Jerome Hall, *Comparative Law and Social Theory* (Louisiana State University Press 1963) 9 : "To be sapiens is to be a comparatist."

<sup>10</sup> Vernon Valentine Palmer, 'From Leretholi to Lando: Some Examples of Comparative Law Methodology' Winter, 2005), (53) (1) *The American Journal of Comparative Law*, 261, 262.

<sup>11</sup> Robert Berring and Elizabeth Edinger, *How to Find the Law* (11th edn, West Group 2005).

<sup>12</sup> For an exposé of the journey of comparative law into becoming a discipline and the relationship between comparative law and legal theory see William Twining, *Globalisation and Legal Theory* (Butterworths 2000)176.

<sup>13</sup> Ann Peters, 'Universalist Assumptions and Implications of Comparative Law: Should They Be Deconstructed?' (1999) 93 *Proceedings of the Annual Meeting* (American Society of International Law).

<sup>14</sup> Raymond Saleilles, 'Conception et objet de la science juridique du droit comparé' in *Proces-Verbaux et*

sense, comparative law assumed a purpose beyond just positivism and acquired a scientific dimension. This new dimension to the discipline was firmly adhered to by eminent comparatists from all over the world including Henri Levy-Ullman (France), Ernst Rabel, Pierre Arminjon, Boris Nolde and Martin Wolff (Germany), Roscoe Pound, Hessel Yntema and Max Rheinstein (USA).

W.J. Kamba argued that “comparative law still lack[ed] a clearly formulated and widely accepted theoretical framework.”<sup>15</sup> However, in defining it as the study and research in law by the systematic comparison of two or more legal systems or branches or aspects of these systems,<sup>16</sup> he only highlighted the descriptive, positivist or structural approach to comparative law as had been adopted, for example in the *common core project*<sup>17</sup> of Rudolf Schlesinger<sup>18</sup> and enriched by Rodolfo Sacco’s legal formants.<sup>19</sup>

On the other hand, the definition of comparative law as a discipline apart not only from jurisprudence but also from other social sciences and humanities<sup>20</sup> offers a more holistic perspective. That view of comparative law has perhaps been best expressed by Annelise Riles as:

“a pocket of legal scholarship devoted to the larger questions of law in which research questions are defined in relation to certain internal debates such that a body of knowledge of some kind might ensue.”<sup>21</sup>

This type of comparative law seeks to place legal theory and jurisprudence within a much wider context than just that of positive law. As Mark Van Hoecke and Mark Warrington state:

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*Documents du Congrès International de Droit Comparé, Paris 1900 Vol 1* (Librairie Générale de Droit et de Jurisprudence 1905) 173.

<sup>15</sup> W. J. Kamba, ‘Comparative Law: a Theoretical Framework’ (1974) (23) *International and Comparative Law Quarterly*, 485.

<sup>16</sup> *ibid*, 486.

<sup>17</sup> The common core project developed from an initiative by Rudolf Schlesinger at Cornell University which used the Comparative Law methodology for the purpose of mapping the legal landscape in European private law.

<sup>18</sup> Rudolf B. Schlesinger and Pierre G. Bonassies, *Formation of contracts: a study of the common core of legal systems, conducted under the auspices of the General principles of law project of the Cornell Law School* (Oceana Publications, 1968).

<sup>19</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)’ (1991) 39 *American Journal of Comparative Law* 1.

<sup>20</sup> James Gordley, ‘Is Comparative Law a Distinct Discipline’ (1998) 46 (4) *American Journal of Comparative Law* 607.

<sup>21</sup> Riles (n 9) 3.

“...law cannot be understood unless it is placed in a broad historical, socio-economic, psychological, ideological context.”<sup>22</sup>

It is in this respect that comparative law may be most beneficial for the study and research into legal systems and traditions.

### 3.1.1.1 The Purposes of Comparative Law<sup>23</sup>

There remains, however, great unease about the discipline of comparative law, perhaps because it has become too many things to too many people.<sup>24</sup> Different purposes and objectives of comparative law have been enumerated by comparatists: it is seen *inter alia* as *une école de vérité*,<sup>25</sup> as providing a useful platform for the unification or harmonisation of laws,<sup>26</sup> as a means for “constant refinement and extension of our knowledge of law”,<sup>27</sup> as an independent scientific and educational discipline,<sup>28</sup> as a source of legal development and change,<sup>29</sup> and even perhaps in the era of increasing globalisation in providing “at least, a measure of common understanding”<sup>30</sup> or as a link and a tool to mediate between different legal systems of law to enable either their assimilation or “for empowerment to stand against [Western law’s] violent influx” into other cultures.<sup>31</sup> On the other hand there is also the disconcerting view that the term *comparative law* is without subject matter and definition,<sup>32</sup> a

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<sup>22</sup> Mark Van Hoecke and Mark Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 (3) *The International and Comparative Law Quarterly* 495.

<sup>23</sup> Twomey (n 8).

<sup>24</sup> See Catherine Valcke, ‘Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems’ (2004) 52 *The American Journal of Comparative Law* 713

<sup>25</sup> Konrad Zweigert and Heins Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3<sup>rd</sup> edn. Oxford University Press 1998)15. The authors see this *école de vérité* as one that extends and enriches the “supply of solutions” and offers the scholar of critical capacity the opportunity of finding the “better solution” for his time and place.” See also Rodolfo Sacco (n 19) 4.

<sup>26</sup> A useful summary of comparative law’s contribution to the unification and harmonisation of law is summarised by Peter de Cruz, *Comparative Law In A Changing World* (3rd edn, Routledge-Cavendish 2007) 23. An early definition of comparative law in the *Vocabulaire Juridique* published under the direction of Henri Capitant in 1935, states that it is a branch of science of law whose objective is to bring the legal institutions of different countries closer together.

<sup>27</sup> Hessel Yntema ‘Comparative Legal Research: Some Remarks on ‘Looking Out of the Cave’ (1956) 54 *Michigan Law Review* 899, 901.

<sup>28</sup> Djalil Kiebaev, ‘Comparative Law: Method, Science or Educational Discipline?’(2003) 7(3) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/73/art73-2.html> accessed 1st July 2015

<sup>29</sup> Watson (n1).

<sup>30</sup> Edward Eberle, ‘The Method and Role of Comparative Law’ (2009) 8 (3) *Washington University Global Studies Law Review* 450, 452.

<sup>31</sup> Hitoshi Aoki, ‘Nobushige Hozumi: A skilful transplanter of Western legal thought into Japanese soil’ in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 150

<sup>32</sup> H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, reprinted Wildy & Sons, 1971) 2.

misnomer,<sup>33</sup> not substantive law, perhaps merely a method.<sup>34</sup>

To rise above comparative law's unease or deep malaise<sup>35</sup> and to see it appropriately combined with legal philosophy would result in a substantially new discipline, *comparative jurisprudence*. This type of comparative law would be capable of furnishing a new kind of knowledge about foreign legal systems, as has been suggested by William Ewald,<sup>36</sup> and a "self-critical questioning of dominant Western assumptions about the nature of law itself."<sup>37</sup> In promoting a "plurality-sensitive, globality conscious legal theory",<sup>38</sup> this form of comparative law may have a significant role to play in burgeoning legal systems, especially those in Africa and those like Seychelles still in the process of discovering and mapping their own legal identities.

### 3.1.1.2 The Methods of Comparative Law

The methodology of comparative law is also a controversial subject.<sup>39</sup> It might be very limited if one was to accept Harold Gutteridge's approach: that it is just a methodology, the technique of which is common sense.<sup>40</sup> Gutteridge's disdain for the methodological debate was shared by Konrad Zweigert and Hein Kötz<sup>41</sup> who, while acknowledging that functionality should be the basic methodological principle in comparative law, also saw methodology as a distraction from the inspiration that comparison might deliver.<sup>42</sup>

The polemic about methodologies in comparative law was probably initially triggered by the work of Ernst Rabel,<sup>43</sup> Otto Kahn-Freund<sup>44</sup> and Rudolf Schlesinger<sup>45</sup> who, according to their critics, ignored contextuality in their work.<sup>46</sup> Their enterprises were more practical in nature

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<sup>33</sup> Rudolf Schlesinger, *Comparative Law: Cases - Text - Materials* (3rd edn. The Foundation Press, 970), 1.

<sup>34</sup> Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) *Harvard International Law Journal* 411.

<sup>35</sup> William Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' (1995) 143 (6) *University of Pennsylvania Law Review*. See also Valcke (n 24) 713.

<sup>36</sup> *ibid*, 1891.

<sup>37</sup> Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed Cambridge University Press 2006) xii.

<sup>38</sup> *ibid*, 13.

<sup>39</sup> For an overview of this controversy see Palmer (n 10).

<sup>40</sup> Gutteridge (n 32) 29.

<sup>41</sup> See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 339 and his reference to Zweigert and Kötz (n 22).

<sup>42</sup> *ibid*.

<sup>43</sup> Ernst Rabel, *The Conflict of Laws: A Comparative Study, Volume 1* (University of Michigan Press 1945).

<sup>44</sup> Sir Otto Kahn-Freund, *Comparative law as an academic subject* (Clarendon Press, 1965).

<sup>45</sup> Rudolf B. Schlesinger and Pierre G. Bonassies, *Formation of contracts: a study of the common core of legal systems, conducted under the auspices of the General Principles of Law Project of the Cornell Law School* (Oceana Publications, 1968).

and context was only important if it provided information about how principles and rules related to the facts of the legal problem under scrutiny.<sup>47</sup> Three main comparative methods have therefore emerged: the descriptive positivist, the functional and the contextual<sup>48</sup> methods. The descriptive positivist method, already explained, gave way to the functional method expounded by Zweigert and Kötz and which advocated a problem-solution approach to law:

“The legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.”<sup>49</sup>

It remains by far the most widely used method of comparative law. It claims that legal provisions create arrangements that serve particular functions in a system of governance. Hence, comparative legal study can help identify those functions and show how different legal provisions serve the same function in different legal systems.

Ralf Michaels<sup>50</sup> has pointed out however that the functionality debate has taken place because of the misunderstanding of what is meant by the functional approach. Michaels identifies no less than seven different concepts of functionalism across the disciplines.<sup>51</sup> He concludes that “oblivious of incompatibilities, the functionalist comparative lawyer uses all of these.”<sup>52</sup> There is some truth in Michaels’ position as evidenced by the ongoing debate between comparatists who understand different meanings of functionalism.<sup>53</sup>

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<sup>46</sup> But see Oliver Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2006-2007) 32 *Brook Journal of International Law* 405.

<sup>47</sup> Jaakko Husa, ‘About the Methodology of Comparative Law – Some Comments Concerning the Wonderland...’ (2007) 5 *The Maastricht Faculty of Law Working Paper* <http://dx.doi.org/10.2139/ssrn.1085970> accessed 1st July 2015

<sup>48</sup> ‘Contextual’ would include comparative legal history, legal sociology, the study of legal transplants and legal cultures.

<sup>49</sup> Zweigert and Kötz (n 25) 34.

<sup>50</sup> Ralf Michaels (n 41).

<sup>51</sup> *ibid.*, 345. These functional concepts are: “(1) finalism, a neo-Aristotelian functionalism based on inherent teleology, (2) adaptationism, an evolutionary functionalism in a Darwinian tradition, (3) classical (Durkheimian) functionalism, explaining institutions through their usefulness for society, (4) instrumentalism, a normative theory of using law for social engineering, (5) refined functionalism, a functionalist method that replaces certain postulates of classical functionalism with empirically testable hypotheses, (6) epistemological functionalism, an epistemology that focuses on functional relations rather than on the ontology of things, and (7) equivalence functionalism, building on these concepts but emphasizing the non-teleological, non-causal aspect of functional relations.”

<sup>52</sup> *ibid.*

<sup>53</sup> See for example David Nelken, ‘Using the Concept of Legal Culture’ (2004) 29 *Australian Journal of Legal Philosophy* 1, Pierre Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 *International and Comparative Law* 52, Günter Frankenberg (n 34).

Michaels' thesis would seem to address many of the pitfalls associated with the functional approach. It is limited however to the extent that although it does address culture, it does not fully address the problem of ethnocentrism. He states that a particular type of the functional approach might lead to the tolerance of foreign law<sup>54</sup> but this may not be sufficient in getting over the hurdle of addressing the fundamental difficulty of not allowing ourselves to be influenced by our perceptions of what *is*.<sup>55</sup> Context has to be taken more seriously especially if it is not to lead to bias and ethnocentrism. Further, tolerance in no way implies acceptance of difference.

Several solutions have been proposed to combat ethnocentrism. Nora Demleitner<sup>56</sup> has strenuously argued that the understanding of, respect for and engagement in foreign legal systems rather than their mere tolerance is essential in this context. She also calls for the approach of "an insightful traveller who gains insights on her home system through distance."<sup>57</sup> A similar solution is proposed in Roger Cotterell's law-and-community<sup>58</sup> approach which is based on mutual interpersonal trust and sensitivity and the acknowledgement of the reality of law's embeddedness in culture. In this context, recognising diversity in different cultures can lead to a better insight into one's own system.

Günter Frankenberg argues that employing local or internal methodology to compare one national system to another will result in failure to differentiate between home law and foreign law. What is needed is an empowering and liberating approach. He argues that the comparatist must adopt self-reflection and avoid legocentrism.<sup>59</sup> Pierre Legrand<sup>60</sup> regards each legal system as having a unique culture and *mentalité*.<sup>61</sup> As each system is unique, to compare would require an *organic* method of assessment. However, such an assessment or comparative enterprise may well involve prior immersion in the cultures to be compared.<sup>62</sup>

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<sup>54</sup> Michaels (n 41) 373.

<sup>55</sup> Valcke (n 24) 762.

<sup>56</sup> Nora Demleitner, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) 31 Arizona State Law Journal 737.

<sup>57</sup> *ibid*, 762.

<sup>58</sup> Roger Cotterell, *Living Law: Studies in Legal and Social Theory* (Dartmouth Publishers 2008).

<sup>59</sup> Frankenberg (n 34), 416. By legocentrism Frankenberg means "law [being] treated as a given and a necessity, as the natural path to the ideal, rational or optimal conflict resolutions and ultimately to social order guaranteeing peace and harmony", 445.

<sup>60</sup> Legrand (n 53).

<sup>61</sup> *ibid*.

<sup>62</sup> See for example, Vivian Grosswald Curran, 'Cultural Immersion: Difference and Categories in U.S. Comparative Law' (1998) 46 American Journal of Comparative Law 43.

There is however no clear or simple approach offered as an alternative to Ernst Rabel's methodology.<sup>63</sup> Although the functionalist approach is exposed for its lacunae, there is as yet no offer of a replacement that would present a plausible or practical methodology for comparatists. Equally, there are no guidelines for the legal practitioner who, immersed in a pluralistic system, needs to engage in the comparative enterprise on a daily basis. In any case, Mitchell Lasser cautions comparatists that they "should be deeply sceptical of the idea that there could be a comparative methodology or theoretical approach that could be safely applied in historically variable circumstances."<sup>64</sup>

The shortcomings of specific methodologies may also be seen in the added complexity of the extreme vulnerability of comparative law to both the postmodern and postcolonial critique.<sup>65</sup> Some of these critics do not see any role for comparative law. Their defeatist attitude is exposed by Anne Peters and Heiner Swencke, as the allegation that incommensurability of frameworks in one system implies failure of comparison.<sup>66</sup> But as they point out, objectivity is possible and is implicit in good scholarship which would include "scientific rigor, careful study, attention to detail and to context."<sup>67</sup> In any case, as Patrick Glenn<sup>68</sup> argues,

"incommensurability is incompatible with the fundamental nature of all legal traditions as it would have to establish the impossibility of human communication, radical untranslatability, and this is denied by all human experience, and possibly by the very idea of being human."<sup>69</sup>

The contextual approach<sup>70</sup> to comparative law seeks to understand why it is that a particular legal system has evolved in the way that it has. Unfortunately, although this approach provides additional material about legal systems, it complicates the comparative exercise as it provides too many variables and differences for legitimate comparison. Comparing pluralist

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<sup>63</sup> David J. Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 199.

<sup>64</sup> Mitchel de S.-O.-L'E. Lasser, 'The question of understanding' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).

<sup>65</sup> See Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (2000) 49 *International and Comparative Law Quarterly* 800.

<sup>66</sup> *ibid*, 802.

<sup>67</sup> *ibid*.

<sup>68</sup> Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, Oxford University Press 2010).

<sup>69</sup> *ibid*, 47.

<sup>70</sup> See further Pierre Legrand, 'The Impossibility of Legal Transplants,' *Maastricht Journal of European and Comparative Law* 4 (1997) 111, Antonios Emmanuel Platsas, "The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks" (2008) 12 (3) *Electronic Journal of Comparative Law*" <http://www.ejcl.org/123/art123-3.pdf> accessed 1st July 2015.

systems with unijudicial systems where, for example, custom plays a minimal role is not feasible. The reference to pluralist legal systems in this context refers to *deep legal pluralism*<sup>71</sup>, a holistic perspective incorporating “both state laws and non-state norms.”<sup>72</sup> Africa’s pluralism consists of a hybridity of imposed European laws, customary, religious and indigenous laws. Indigenous customary law poses an even bigger challenge for comparative law given the Western-centric perceptions of African law. These include the human rights debate (in that “human rights are the right to be the same and the right to be different”<sup>73</sup>), the assumption that Africa’s adherence to and practices of indigenous African traditions is evidence of cultural backwardness and lack of development,<sup>74</sup> a refusal to see a distinctive African *bran-tub*<sup>75</sup> and the fact that lawyers continue to refuse to see custom or indigenous African law as law.<sup>76</sup> A new methodology has to be explored which will have to take into account not only classical legal systems but also classical mixed jurisdictions and exotic hybrids.<sup>77</sup>

Palmer’s observations in this context offer a way forward:

“there should be a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs.”<sup>78</sup>

This is supported by Jakko Husa, who claims that “[i]n sum, we should have rules and contexts.”<sup>79</sup> The comparatist should therefore not be afraid to perform a *bricolage*<sup>80</sup> of sorts. This is not so fundamentally different from Sacco’s structural methodology.<sup>81</sup> Bearing in mind the competing formants within each legal tradition’s setting, we can understand and analyse the law produced. This approach is endorsed by Geoffrey Samuel, who encourages comparatists to look beyond rules and into the structure that make up the dimensions of

<sup>71</sup> See Seán Patrick Donlan, ‘Remembering: Legal Hybridity and Legal History’ (2011) 2 Comparative Law Review 1.

<sup>72</sup> *ibid.*, 5.

<sup>73</sup> Abdullahi An-Na’im, *Cultural Transformation and Human Rights in Africa* (Zed Books 2002).

<sup>74</sup> Menski (n 37) 466.

<sup>75</sup> Glenn (n 69) 13. By *bran-tub* Glenn refers to a social stock of knowledge that is continuously and constantly changing.

<sup>76</sup> M. D. A. Freeman, *Lloyd’s Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 914.

<sup>77</sup> See for example Esin Özücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ in Esin Özücü (ed), *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill, 2010).

<sup>78</sup> Palmer (n 10) 29.

<sup>79</sup> Husa (n 47) 17.

<sup>80</sup> Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 (6) *The Yale Law Journal* 1225.

<sup>81</sup> Sacco (n 19) and Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)’ (1991) 39 (2) *The American Journal of Comparative Law* 343.

problem solving.<sup>82</sup> The comparatist has to be reassured that it is worthy to enquire into the societal forces (the “meta legal formants”)<sup>83</sup> that inform law.

The holistic comparative approach comprising law’s function and purpose within its cultural, economic and political contexts is especially useful for Africa and African comparatists as it allows for the possibility of new solutions chosen from a menu of available conceptual alternatives. This may well echo Roger Cotterell’s idea of *law’s community*; of the importance of the link between legal regulation and community, and of resituating law within the sociological, plural and community contexts.<sup>84</sup> Similarly, it may well lead to “interpretative legal communities”<sup>85</sup> as opposed to globalised law and the understanding that commonalities do not necessarily mean normativity.

In terms of this thesis, a contextual comparative law approach will be used as a technique or tool to examine Seychellois law. In this respect, external patterns of law will be examined to establish how they have been interiorised within the Seychellois setting and to consider whether this has resulted in a distinct Seychellois law.<sup>86</sup>

### **3.1.2 Taxonomy**

The comparative method is not possible unless one can utilise comparators. These comparators will consist of elements to be compared across legal systems; in a sense providing a general toolbox that will permit the comparative enterprise. In this respect, taxonomy provides a way of obtaining an overview of law generally, although it must be borne in mind that it is a somewhat contrived exercise and does not necessarily produce an absolute, realist or perfect categorisation of legal systems or traditions. What must also be remembered is the futility of taxonomy for taxonomy’s sake. As Ugo Mattei states:

“...taxonomy is not an end in itself. Instead it is a means to enrich our comparative understanding of legal systems.”<sup>87</sup>

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<sup>82</sup> Geoffrey Samuel, ‘Comparative Law and Jurisprudence’ (1998) 47 *International and Comparative Law Quarterly* 817.

<sup>83</sup> Palmer (n 10) 18.

<sup>84</sup> Roger Cotterell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995).

<sup>85</sup> See John Gillespie, ‘Towards a discursive analysis of legal transfers into developing East Asia’ (2008) (41(2)) *New York University Journal of International Law and Politics* 101.

<sup>86</sup> On this point see Czarba Varga, *Comparative Legal Cultures* (New York University Press 1992) 14.

<sup>87</sup> Ugo Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ (1997) 45 *American Journal of Comparative Law* 1, 8.

What is perhaps achieved by the taxonomical enterprise is the evincing of classes or groups of legal systems that display similar characteristics or functions which might assist the comparative research exercise.

### **3.1.2.1 The Purposes of Taxonomy**

Although taxonomies inevitably produce an incomplete picture of the objects they classify, they can assist by providing an analytical framework for comparison. To quote Peter Birks: “[b]etter understanding of law depends upon a sound taxonomy of the law”<sup>88</sup> and to use an analogy of Patrick Glenn:

“...you do not really need to read books to talk about them; you should rather know their place in the “collective library; since relations among ideas (books) are more important than the ideas (books) themselves.”<sup>89</sup>

The taxonomy which may provide for the theoretical underpinnings of this thesis is twofold: first, it is the classification of legal systems, and secondly, it is the doctrinal categorisation which may provide a basis for research into mixed jurisdictions and particularly that of Seychelles. The development of the legal system of Seychelles or indeed the positing of legislative and judicial rules generally may well depend on its place within the systemic legal taxonomy and more specifically in the doctrinal taxonomy. There is an obvious distinction between for example the use of judicial decisions in France and England. Seychelles, largely because of its inheritance of elements from both systems, has had an interesting but inconsistent method of dealing with judicial decisions which is explored in Chapter 4. Understanding Seychelles’ position at the intersection of two legal systems assists in exploring its current approach to judicial decisions in the public and private law spheres and in sketching how *remixing*<sup>90</sup> may provide alternatives in the future.

### **3.1.2.2 Methods of Classification**

Comparatists have used different classification methods to describe and study the sum of legal rules and institutions in a given country. These are grouped according to their common characteristics. However, each classification method has its shortcomings as they depend

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<sup>88</sup> Peter Birks, *English Private Law* (Oxford University Press, 2000) li.

<sup>89</sup> Glenn (n 68) 22, quoting Pierre Bayard, *How to Talk About Books You Haven’t Read* (Jeffrey Mehlman tr, Ganta 2007) 10.

<sup>90</sup> See Jane Matthews Glenn, ‘Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing’ in Esin Örüçü (ed) *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill, 2010). Glenn describes mixing as the process of reception of laws, unmixing as the assimilation of laws and remixing as “considering possible non-traditional forms of mixity”.

very much on the criteria selected for their ordering. Some of these include geography, race, language, religion, or official ideology. Rose-Marie Belle Antoine states that the grouping of laws or systems into limited and distinct categories oversimplifies the types of laws and legal systems which exist.<sup>91</sup> Early classifications emphasized the common-civil law dichotomy whereas more modern groupings are sophisticated in their search for true legal identity.<sup>92</sup> It must also be noted that generally classifications focus on state legal orders and do not take into account non state legal orders, customs or other norms.<sup>93</sup> Nevertheless, the groupings are necessary and relevant for the comparing exercise and provide indications into how law has originated, developed and is evolving. A brief exploration of these major classifications is provided below.

### 3.1.2.2 (a) Systems and Families

William Tetley<sup>94</sup> states that a legal system:

“refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.”<sup>95</sup>

Adhémar Esmein,<sup>96</sup> the French scholar of comparative legal studies, devised an early classification of legal systems. He proposed a division based on the laws or culture of different nations into Roman, Germanic, Anglo-Saxon, Slavic and Islamic legal systems. Pierre Arminjon, Boris Nolde and Martin Wolff<sup>97</sup> followed with their classification of seven legal systems *des peuples de civilisation moderne*<sup>98</sup>: Germanic, French Scandinavian, English, Russian, Islamic and Hindu.

René David<sup>99</sup> charted much the same classification: the Romano-Germanic family, the family

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<sup>91</sup> Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (Routledge - Cavendish 1998) 36.

<sup>92</sup> Mariana Parglender, ‘The Rise and Decline of Legal Families’ (2012) 60 (4) *American Journal of Comparative Law* 1043.

<sup>93</sup> See Esin Örucü ‘Family Trees for Legal Systems: Towards a Contemporary Approach’ in Mark van Hoecke (ed.) *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004).

<sup>94</sup> William Tetley, ‘Mixed Jurisdictions : Common Law vs Civil Law (Codified and Uncodified)’ (2000) 60 (3) *Louisiana Law Review* 678.

<sup>95</sup> *ibid*, 682.

<sup>96</sup> Adhémar Esmein, ‘Le Droit Comparé et L’Enseignement du Droit’(1900) 24 *Nouvelle Revue Historique de Droit Français et Étranger* 489.

<sup>97</sup> Pierre Arminjon, Boris Nolde and Martin Wolff, *Traité de Droit Comparé, Tome I* (Librairie Générale de Droit et de Jurisprudence 1950).

<sup>98</sup> *ibid*, 47 - Of peoples of modern civilizations.

<sup>99</sup> René David & John Brierley, *Major Legal Systems in the World* (3rd ed., Stevens & Sons 1985).

of the common law, family of socialist laws and *other systems* of philosophical and religious principles. He outlined the general characteristics which lie behind the development of these main legal families and makes it clear that his nomenclature is only about *models* “representative of a family which groups a number of laws.”<sup>100</sup> David’s taxonomy, as pointed out by Seán Patrick Donlan,<sup>101</sup> lacks precision and is confusing in the interchangeability of the terms legal systems and legal families. David was certainly aware of the shortcomings of his taxonomy, acknowledging that “the idea of *legal family* does not correspond to a biological reality: it is no more than a didactic exercise”.<sup>102</sup> In shaping his classification system, David uses as the differentiating factors the *constant elements*<sup>103</sup> of a particular family but his taxonomy remains very Eurocentric.

Konrad Zweigert and Hein Kötz<sup>104</sup> expanded and refined David’s classification of legal systems by grouping together styles of dominant thought. Their taxonomy is therefore expanded into eight legal families: Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern, Islamic and Hindu.<sup>105</sup> As William Twining points out, although this looks more like “a muddle than a systematic taxonomy”,<sup>106</sup> it is still acknowledged as being the “least unsatisfactory”.<sup>107</sup> It also takes cognisance of extra-European legal systems but only insofar as the Far East is concerned. Thus African legal systems remain outside these early taxonomies.

### 3.2.1.2 (b) Traditions

John Henry Merryman and Rogelio Perez-Perdomo<sup>108</sup> did not attempt a new taxonomy but distinguished the nomenclature, *legal system* from *legal tradition*. They stated that while a legal system is “an operating set of legal institutions, procedures and rules”<sup>109</sup> a legal tradition is:

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<sup>100</sup> *ibid*, 1.

<sup>101</sup> Seán Patrick Donlan, ‘Comparative Law and Hybrid Legal Traditions – An Introduction’ in Eleanor Cashin-Ritaine, Sean Patrick Donlan, and Martin Sychold (eds) *Comparative Law and Hybrid Legal* (Swiss Institute of Comparative Law 2010).

<sup>102</sup> David and Brierly (n 99) 20.

<sup>103</sup> *ibid* 19.

<sup>104</sup> Zweigert and Kötz (n 25).

<sup>105</sup> *ibid*, 63.

<sup>106</sup> Twining (n 12) 180.

<sup>107</sup> *ibid*.

<sup>108</sup> John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3<sup>rd</sup> edn, Stanford University Press 2007).

<sup>109</sup> *ibid* 1.

“a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.”<sup>110</sup>

Acknowledging that the civil law tradition and the common law tradition are not only the two main traditions but are also both of European origin, they claim that their dominance is due to western imperialism just as Roman law’s dominance was a direct product of Roman imperialism in the early ages.<sup>111</sup> Donlan points out that this distinction between *system* and *tradition* results in a “richer, more culturally sensitive concept...”.<sup>112</sup> Arguably this approach would meet the more holistic conceptual methodology of comparative law as outlined above.

Patrick Glenn has expanded on this concept in his classification of legal traditions pointing out however that

“Traditions have fuzzy edges; they can only be identified in relation to other traditions; they contain within themselves elements of opposition; they are linked to one another by lateral or cross traditions which are defined otherwise than by the criteria of definition of a main or principal tradition.”<sup>113</sup>

He defines legal tradition in terms of “an extension of the past into the present”,<sup>114</sup> “a network of information.”<sup>115</sup> His taxonomy however is reduced to the following traditions: chthonic, talmudic, civil, Islamic, common law, Hindu and Confucian.<sup>116</sup> There are some grave deficiencies in this classification, including the total disregard of Scandinavian law and the confusing insertion of socialist law in his chapter on the Confucian legal tradition. Apart from addressing the laws of *chthonic people*<sup>117</sup> generally, Glenn does not mention present African legal systems.

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<sup>110</sup> *ibid.*, 2.

<sup>111</sup> *ibid.*, 5.

<sup>112</sup> Donlan (n 101) 10.

<sup>113</sup> Patrick Glenn, ‘Legal Cultures and Legal Traditions’ in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing) 2004, 19-20.

<sup>114</sup> *ibid.*, 12

<sup>115</sup> *ibid.*, 21-22

<sup>116</sup> Glenn (n 68).

<sup>117</sup> *ibid.*, 91.

### 3.1.2.2 (c) Cultures

Attempts at taxonomy and their individual deficiencies have prompted further classifications or refinement of concepts associated with them. Some of these include the concept of *legal culture*.<sup>118</sup> Legal culture represents that “cultural background of law which creates the law and which is necessary to give meaning to law.”<sup>119</sup> John Bell defines legal culture as “a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.”<sup>120</sup> This resonates with extended or sociological views of law in the context of the links between positive law and its application in society. These have been expressed in Eugen Ehrlich’s *living law*<sup>121</sup> or Roscoe Pound’s *law in action*.<sup>122</sup> Although their concepts are different,<sup>123</sup> they both emphasize the distinction between *dead law*, that is, the law on paper, and law as lived by citizens, that is, the dynamic law within our daily lives.<sup>124</sup> By parallel, it is important to note the different approaches to and definitions of legal culture. Ralf Michaels<sup>125</sup> compares attitudes by different legal sociologists or academics who view culture as values, ideas and attitudes with respect to society or as modes of thinking, *mentalité*, law in the minds.<sup>126</sup> John Bell undertakes at an intra-state level to make comparisons between cultures of nation states such as France and Great Britain to expose substantial differences, for example, in institutional applications of law.<sup>127</sup> Mark van Hoecke and Mark Warrington distinguish differing legal cultures or legal families subdividing them into four large cultural families: African, Asian, Islamic and Western<sup>128</sup> and a second subdivision within each of these cultural families on the basis of “paradigmatical similarities and differences”.<sup>129</sup> They warn, however, against the arbitrariness of such divisions and urge comparatists to “take into account the cultural identity as perceived by the people and the lawyers belonging to some community”.<sup>130</sup>

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<sup>118</sup> John Bell, *French Legal Cultures* (Cambridge University Press 2001).

<sup>119</sup> Ralf Michaels, ‘Legal Culture’ in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012).

<sup>120</sup> John Bell, ‘English Law and French Law-Not So Different?’ (1995) *Current Legal Problems* 69.

<sup>121</sup> Eugen Ehrlich, *Principles of the Sociology of Law* (Walter L. Moll tr., Harvard University Press 1936).

<sup>122</sup> Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12 .

<sup>123</sup> See David Nelken, ‘Law in Action or Living Law?: Back to the Beginning’ in *Sociology of Law* 1984 (4) *Legal Studies* 157.

<sup>124</sup> *ibid*, 169.

<sup>125</sup> Michaels (n 119).

<sup>126</sup> *ibid*.

<sup>127</sup> Bell (n 118).

<sup>128</sup> Mark van Hoecke and Mark Warrington (n 13) 502.

<sup>129</sup> *ibid*, 536.

<sup>130</sup> *ibid*.

### 3.1.2.2 (d) Patterns

Ugo Mattei moves away from both geographic and cultural taxonomies in his framework of *patterns of law*,<sup>131</sup> recognizing three main sources of social norms: politics, law and philosophical or religious tradition.<sup>132</sup> He emphasizes systemic characteristics relating to different phases of historical evolution and states that at any given time a legal system can combine elements of all of the systems simultaneously, the “only difference is in terms of quantity, acceptability, and, most importantly, hegemony.”<sup>133</sup> The kind of law that predominates in a system should be the basis for its classification into three crude categories: the rule of professional law (western legal traditions) in which the rule of law is the main mechanism for resolving disputes; the rule of political law (the law of development and transition) in which legal institutions are weak and the separation between law and politics is minimal; and the rule of traditional law (religion or transcendental philosophy) where there is a lack of separation between law and religion/ or traditional transcendental philosophy.<sup>134</sup>

This taxonomy is also problematic: Mattei acknowledges that all legal systems are evolving (they “never are [t]hey always become”)<sup>135</sup> but indicates paradoxically that all patterns may coexist within any one legal system. He states that no pattern should be regarded as superior but he does not consider the possibility that the rule of professional law (the rule of law) may be more desirable than the rule of political law with its many known shortcomings. Further, his taxonomy fails to address marginalised legal systems or to place them into the mainstream of comparative law.

### 3.1.2.2 (e) Metaphors

Boaventura de Sousa Santos proposes a “re-enchanted common sense approach” to looking at legal systems.<sup>136</sup> In his work he outlines three metaphors for his postmodernist conception of law: *the frontier, the baroque and the south*.<sup>137</sup> While this is strictly speaking not a taxonomy, it is nevertheless an attempt to forge an understanding of postmodern legal structures or what he calls “the construction of postmodern subjectivities”,<sup>138</sup> “the forms of knowledge that

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<sup>131</sup> Ugo Mattei (n 87).

<sup>132</sup> *ibid*, 12.

<sup>133</sup> *ibid*, 16.

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*, 14.

<sup>136</sup> Boaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed Cambridge University Press 2002 ) Preface.

<sup>137</sup> Boaventura de Sousa Santos, ‘Three Metaphors for a New Conception of Law: “The Frontier, the Baroque, and the South”’ (1995) 29 (4) *Law and Society Review* 569.

<sup>138</sup> *ibid*, 574.

individuals and communities create and use to give meaning to their practices.”<sup>139</sup> The metaphors: the frontier (the margins and new forms of sociability),<sup>140</sup> the baroque (hybridity, new forms of constellations)<sup>141</sup> and the south (systemic exploitation and human suffering caused by globalisation)<sup>142</sup> all exist outside the classical dominant political, economic and legal traditions.

### 3.2.2.2 (f) Family trees

Esin Öricü has stated that there are no pure systems in the legal world and that instead the hybridity arising from different layers of the crossing and intertwining of legal traditions produce roots and branches between family trees.<sup>143</sup> She has emphasised the fact that legal systems are not static and that since they shift from one cluster to another, fixed classifications can only have a limited lifespan. She has proposed instead a taxonomy where legal systems are “classified according to parentage, constituent elements and the resulting blend, and then grouped on the principle of predominance.”<sup>144</sup> Such taxonomy will involve relooking at legal systems and placing them on appropriate branches of the intermingling trees.<sup>145</sup> In this context no legal system can be regarded as pure but rather as traditions taking new shapes and forms.<sup>146</sup> Further, law is becoming so globalised that the concept of legal families is becoming less important or useful.<sup>147</sup>

There have been other taxonomies attempted as it becomes generally accepted that both internal and state-centred theories of law are inadequate to describe and explain legal norms.<sup>148</sup> It must be pointed out however, that the legal families approach remains useful for the comparative exercise on the macro level if only to show a common historical background and the interrelations between systems.<sup>149</sup> In the context of this thesis it will serve as a starting point for the analysis of Seychellois law, with the caveat that it may be inaccurate, limiting and culturally narrow in some areas.

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<sup>139</sup> Twining (n 12)202

<sup>140</sup> de Sousa Santos(n 137) 575.

<sup>141</sup> *ibid*, 578.

<sup>142</sup> *ibid* 579.

<sup>143</sup> Esin Öricü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in Esin Öricü and David Nelken, *Comparative Law: A Handbook* (Hart Publishing 2007) 169, 174.

<sup>144</sup> Esin Öricü, ‘Family Trees for Legal Systems: Towards a Contemporary Approach’ in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 360.

<sup>145</sup> *ibid*, 375.

<sup>146</sup> *ibid*, 361.

<sup>147</sup> *ibid*.

<sup>148</sup> See for example Jacques Vanderlinden, ‘Is the Pre-20<sup>th</sup> Century American Legal system a Common Law System: An Exercise in Legal Taxonomy’ (2011)4 (1) *Journal of Civil Legal Studies* 1.

<sup>149</sup> See Jaakko Husa, ‘Legal Families’ in Jan M. Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2nd ed Edward Elgar Publishing 2012) 382.

### 3.1.3. Major Legal Traditions

The use of the comparative approach with the grouping of legal traditions may be beset with problems but it also has methodological benefits. Its outcomes show clear variations both in the historical and present contexts. Before examining the specificities of the Seychellois legal tradition, it is important to outline the main characteristics of the two European traditions from which it is derived: the civil law tradition and the common law traditions. These are by far the two most highly influential legal traditions in the world.<sup>150</sup> The evolution of these traditions and some of their aspects where they have been transferred, their role and relevance will be examined in Chapters 4 and 5 of this thesis. In the next section, their main similarities and differences are emphasized.

#### 3.1.3.1 The Civil law Tradition

Reinhard Zimmerman claims that the civilian legal tradition has "a fundamental intellectual unity created by a common tradition".<sup>151</sup> However, as Merryman and Perez-Perdomo state, it is not as simple as that since the civil law tradition is a composite of several sub traditions: Roman civil law, canon law, commercial law, the revolution and legal science.<sup>152</sup> In discussing the civil law tradition, more detail is provided about the French civil law tradition for it is this particular tradition that continues to have considerable influence in the Seychellois legal system.

##### 3.1.3.1 (a) Legal Origins

Roman law as compiled under Justinian in the sixth century AD in the Corpus Juris Civilis is the oldest sub-tradition of civil law.<sup>153</sup> It included four parts: the Institutes, the Digest, the Code and the Novels. By far the most important was the Digest, which has influenced the civil law tradition in areas such as personal status, property, contract, tort, unjust enrichment and remedies. The rise of nation-states in Europe in the eleventh century, the power of kings and the proliferation of universities all assured Roman law as the common law (*ius commune*), formally received in legal systems across a large part of Western Europe.<sup>154</sup> Later, in the nineteenth century the principal states of Western Europe adopted civil codes, "of

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<sup>150</sup> See Merryman and Perez-Perdomo (n 108) 1.

<sup>151</sup> Reinhard Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press 2001) XI.

<sup>152</sup> Merryman and Perez-Perdomo (n 108) 6.

<sup>153</sup> Charles M. Radding and Antonio Ciaralli (eds) *The Corpus Iuris Civilis in the Middle Ages: Manuscripts And Transmission from the Sixth Century to the Juristic Revival* (Brill 2007).

<sup>154</sup> Merryman and Perez-Perdomo (n 108) 10.

which the French Code Civil of 1804 is the archetype.”<sup>155</sup> The second important component of the civil law tradition is the canon law of the Roman Catholic Church, contained in the Decretum compiled by the jurist Gratian in the twelfth century.<sup>156</sup> It contained rules and procedures for the church and its communicants in the Middle Ages but these were accepted by the secular tribunals long after the church had lost its civil jurisdiction.<sup>157</sup> Such rules included those of family law and succession.<sup>158</sup> A certain overlap between Roman law and canon law was inevitable as royal courts and ecclesiastical courts were staffed by university jurists trained in both. Both were also to form part of the *ius commune*.

There was also a certain amount of local law consisting of both custom and legislation by Germanic invaders or ruling local lords but these were eventually to converge as scholars were convinced of the superiority of Roman civil law.<sup>159</sup> In the seventeenth century, Jean Domat<sup>160</sup> expounded principles rooted in Roman law, holding them out as a coherent body of legal rules in accordance with the principles of natural law. Similarly Robert Pothier<sup>161</sup> wrote several treatises on private law which were to influence the drafters of the Civil Code in 1804. Hence, after the French revolution, the customs (*coutumes*) of the various regions of northern France became subsumed within a unified centralized legal order (codified law) together with the *droit écrit* of the southern region.

Of note and in addition to Roman civil law, canon law and customary law was commercial law (*lex mercatoria*) emanating from the rules of the medieval Italian guilds developed for the conduct of commercial affairs. This merchant law was pragmatic and administered by judges who were merchants but who nonetheless consulted educated jurists for their decisions.<sup>162</sup>

The American and French Revolutions, the Italian Risorgimento, the wars of independence in Latin America, the unification of Germany under Bismark and the liberation of Greece from Turkish control also played a crucial role in further shaping the civil law tradition.<sup>163</sup>

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<sup>155</sup> *ibid.*

<sup>156</sup> Anders Winroth, *The Making of Gratian's Decretum* (Cambridge University Press, 2000).

<sup>157</sup> Mary Ann Glendon, Michael W. Gordon and Christopher Osakwe *Comparative Legal Traditions: Text, Materials and Cases* (West Publishing Co., 1982) 48.

<sup>158</sup> *ibid.*

<sup>159</sup> Merryman and Perez-Perdomo (n 108) 12.

<sup>160</sup> Jean Domat, *Les lois civiles dans leur ordre naturel* (Coignard 1691).

<sup>161</sup> Robert-Joseph Pothier, *Traité des obligations, selon les règles tant du for de la conscience, que du for extérieur* (Debure l'aîné 1764).

<sup>162</sup> See Leon E Trakman, *The Law Merchant: The Evolution of Commercial Law* (F.B. Rothman 1983).

<sup>163</sup> Merryman and Perez-Perdomo (n 108) 15.

Different ways of thinking about government and governance in terms of the revolutionary philosophies of equality, liberty, democracy, separation of powers and human and property rights emerged.<sup>164</sup> The French Civil Code was mainly born out of three of these ideological pillars: private property, freedom of contract and the patriarchal family; with the primary role of the state to protect, enforce and secure these ideals.<sup>165</sup> The tripartite nature of the Code (Of Persons, Of Property and the Different Modes of Acquiring Property) is identical to the first three books of Justinian, preserving the direct link with Roman law. The substantive rules contained in the provisions are drawn from both custom and the *ius commune*.<sup>166</sup>

Lastly, insofar as the German Civil Code (enacted in 1896 and put into effect in 1900) is concerned, much inspiration was drawn from legal science. Two schools of thought collided in Germany after the enactment of the French Civil Code: one was led by Friederich Carl von Savigny and the other by Anton Friedrich Justus Thibaut. Savigny advocated a respect for cultural diversity and for the discovery of law by historical research while Thibaut urged the introduction of a general German Civil Code, similar to the French Civil Code, which would pave the way towards political unity.<sup>167</sup> Savigny and his Historical School succeeded in delaying codification in Germany leading to the research into Germanic laws and indigenous laws but also in rediscovering classical Roman law. The Historical School invested time and effort in the study of the Digest and became known as the Pandectists. The German Code (Bürgerliches Gesetzbuch (BGB)) enacted nearly a century after the French Code was therefore neither Romanist nor Germanic but Pandectist.<sup>168</sup> It was worked out with technical precision never hitherto used in legislation and consisted of elaborate cross references, “all parts of the code interlocked to form a logically closed system.”<sup>169</sup>

The similarities of these two Codes are in the fact that they are suffused with the same principles: individual autonomy, freedom of contract and private property. In terms of family law however, women have more power and the authority of husbands and fathers much less absolute in the BGB.<sup>170</sup>

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<sup>164</sup> *ibid* 15-19. See also Francois Olivier-Martin, *Histoire du droit français, des origines à la Révolution* (Editions du Centre National de la Recherche Scientifique, 1992).

<sup>165</sup> Glendon et al (n 157) 53.

<sup>166</sup> *ibid*, 54.

<sup>167</sup> Werner F. Ebke, Matthew W. Finkin, *Introduction to German Law (Kluwer Law International, 1996)*. See also Mathias Reimann, ‘Nineteenth Century Legal Science’ (1990) 31 *Boston College Review* 837.

<sup>168</sup> Glendon et al (n 157) 56. See also John Dawson, *The Oracles of the Law* (University of Michigan Law School 1968).

<sup>169</sup> *ibid*.

<sup>170</sup> Glendon et al (n 157) 57.

### 3.1.3.1 (b) Legal Structures

Legal structures in civil law countries differ from those of common law countries but there are also significant differences in the legal structures of France and Germany, for example. Most civil law countries have parliamentary systems of government although these differ greatly and some especially France have a hybrid system of government with features of both presidential and parliamentary systems. As the links between France and Seychelles are obvious, it is the current legal structure of France that is looked at in this section.

The French President possesses substantial powers under the constitution: He nominates the prime minister, ministers and other senior figures in the government and can dissolve parliament. He can organise referenda on laws or on constitutional changes. On the other hand, parliament has little control over the president's powers but it does have the theoretical power to remove him from office if he is deemed to be failing to carry out his duties.<sup>171</sup>

In terms of the so-called *separation of powers*, the French Revolution dictated a different doctrine to that of America. The French concept arose from a reaction against the judiciary which had maintained the oppressive *ancien régime*<sup>172</sup> and resisted reform in order to preserve their own privileges and prerogatives or to maintain the way of life or social order.<sup>173</sup> Hence, as Tetley points out:

“French civil law adopts Montesquieu’s theory of separation of powers whereby the function of the legislator is to legislate, and the function of the courts is to apply the law.”<sup>174</sup>

The restriction on the judicial power explains the collegiate concept of the judiciary in France. Judgments are those of courts not of particular judges, who are not individually “cultural heroes or parental figures.”<sup>175</sup> They also play no part in overseeing administrative power. The *lois* of August 16-24 1790, which remain in force today stipulate that:

“Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de

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<sup>171</sup> See David S. Bell, *Presidential Power in Fifth Republic France* (Bloomsbury Academic 2000).

<sup>172</sup> The *ancien régime* is the name given to the political regime preceding the French Revolution of 1789.

<sup>173</sup> Dawson (n 168) 263.

<sup>174</sup> Tetley (n 94) 701.

<sup>175</sup> Merryman and Perez-Perdomo (n 108) 37.

quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions."<sup>176</sup>

This explains, at least in part, why the judiciary, unlike their common law counterpart, is not charged with powers of administrative review. A separate body, the administrative court and its appellate body, the *Conseil d'État*<sup>177</sup> has the function of examining complaints made by citizens adversely affected by improper administrative functions,<sup>178</sup> while the *Conseil Constitutionnel*<sup>179</sup> reviews the constitutionality of parliamentary legislation.<sup>180</sup> The civil and criminal courts are headed by the *Cour de Cassation*<sup>181</sup> which reviews findings of law and can quash the decision of a lower court but has to send the case back for adherence to the view it has expressed. There is therefore a marked distinction between public law adjudication administered by the *Conseil d'État* and its subordinate courts and that of private law adjudication by the *Cour de Cassation* and its subordinate courts. The *Tribunal des Conflits*<sup>182</sup> stands to resolve any conflicts of jurisdiction that might arise between the two.

### 3.1.3.1 (c) Legal Roles

Judges in the civil law world are civil servants (*fonctionnaires*). The system of training for a judicial career in France involves the law graduate attending a special school for judges. A state examination is undertaken and if successful the candidate is appointed a junior judge. Advancement in the judiciary is dependent on ability and seniority. The role of civil law judges can be traced back to the late Roman *iudex* and *praetor*,<sup>183</sup> “a kind of expert clerk”,<sup>184</sup> whose function is to find the right legislative doctrinal response to the facts presented in the

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<sup>176</sup> Loi des 16-24 Aout 1790, Title II, Article 13: “Judicial functions are and should remain distinct from administrative functions. Judges may not, on penalty of forfeiture of office, interfere in any manner with the functions of administrative bodies nor challenge administrators in the execution of their duties.

<sup>177</sup> Council of State.

<sup>178</sup> The Conseil d'État also had the important function of advising the government generally but also on draft bills, decrees and ordinances, i.e executive legislation, under article 38 and 39 of the 1958 Constitution. Note that article 34 of the Constitution provides that statutes are enacted by Parliament and article 37(1) gives the Government a residuary power to legislate.

<sup>179</sup> Constitutional Council.

<sup>180</sup> Article 61 of the Constitution of France 1958.

<sup>181</sup> Court of Cassation – *casser* meaning to break.

<sup>182</sup> The Court of Jurisdictional Conflict. It was established by the 1848 Constitution. In the seminal case of Blanco (TC 8 février 1873) where a father claimed damages for injury to his daughter by a state employee, it decided that the claim should be heard by the Conseil d'Etat, the litmus test being whether the injuries resulted from the activities of a *public service*, the case being regarded as the corner stone of administrative law in France.

<sup>183</sup> James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (Cambridge University Press 2006).

<sup>184</sup> Merryman and Perez-Perdomo (n 108) 36.

case at issue and to deliver a decision based on the ensuing logic. Hence, “[t]heir image is that of a civil servant who performs important but essentially uncreative functions.”<sup>185</sup>

In terms of other careers in the administration of justice, a law graduate can also choose between different professions: public prosecutor, government lawyer, advocate or notary. The training is different for each of these and there is little flexibility in moving from one to the other. Public Prosecutors are, unlike those with the same title in Anglo-American jurisdictions, also civil servants presenting the state’s case in criminal actions. They also intervene in proceedings between private individuals as guardians of general interest and of public policy (*Ministere Public*).<sup>186</sup> Typically these would be in cases involving personal status and family law matters.

Advocates traditionally practice in law offices headed by senior lawyers. The distinctions between *avocats*, *avoués* and *conseillers juridiques* have been abolished and there is now a fused system in operation.<sup>187</sup> Notaries serve three main functions: they draft legal documents such as wills and conveyances of land, they authenticate documents, which cannot be challenged save in exceptional circumstances as laid out in the Civil Code. Lastly they act as a public record office and are required to retain the originals of every document they prepare.

Law professors in universities deserve a mention if only to point out that they establish schools of thought, the doctrines of which may have strong but not binding influence in court decisions.

### **3.1.3.1 (d) Sources of Law.**

In theory, the written law in the civilian tradition reigns supreme, negating the need for judge-made law. Hence, case law in France is said to be of secondary importance.<sup>188</sup> As explained,<sup>189</sup> the judge’s role is limited to interpreting the law and filling the lacunae in statutes. The primary sources of law, specifically those by which the judges are bound,

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<sup>185</sup> *ibid*, 37.

<sup>186</sup> George A. Bermann and Etienne Picard, *Introduction to French Law* (Kluwer Law International 2008)130.

<sup>187</sup> In France the Law n° 2011-331 of 28 March 2011 on the modernisation of French legal professions has merged representation by the *avoués* with the *avocats* before the Courts of Appeal. Rights of audience before the Cour de Cassation are still restricted to specialist advocates that are accredited to argue cases before the Cour de Cassation and the Conseil d’État, referred to as *avocats au Conseil d’État et à la Cour de Cassation*.

<sup>188</sup> Dawson (n 168) 337, states that case law was used by the judiciary until the revolution and that “between 1600 and 1750 it had far outstripped England” in its use.

<sup>189</sup> See pages 18-19

include the codes, other legislation and treaties. The *travaux préparatoires*<sup>190</sup> serve as an important interpretive aid for legal provisions.

The civilian tradition focusses on legal principles or doctrine (*la doctrine*).<sup>191</sup> Understood in this way, doctrine enjoys great authority in France and is based on the opinions of academic lawyers as expounded in textbooks, legal journals but also in the reports on cases and the accompanying notes, constituting the extrajudicial writing on the law. David states that the function of civil law doctrine is

"to draw from this disorganised mass [cases, books and legal dictionaries] the rules and the principles which will clarify and purge the subject of impure elements, and thus provide both the practice and the courts with a guide for the solution of particular cases in the future."<sup>192</sup>

*Jurisprudence*, the equivalent of Anglo-American law reports or case law, enjoys a position in French law that is different from their Anglo-American counterparts. Although the decisions of the courts are cited in arguments by counsel, judicial determination on an issue of law even by the highest court has no binding force in any other case.<sup>193</sup> Article 5 of the Code Civil specifically provides:

“Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.”<sup>194</sup>

Equally article 1351 of the code civil also provides:

“L’autorité de la chose jugée n’a lieu qu’à l’égard de ce qui a fait l’objet du jugement...”<sup>195</sup>

This not only expresses the rule of *res judicata* but is a powerful expression of the non-binding authority of particular authority on a subsequent case. One must however not

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<sup>190</sup> Records of public discussion accompanying the legislative text.

<sup>191</sup> See on doctrine, Philippe Jestaz and Christophe Jamin, *La doctrine* (Daloz-Sirey 2004)

<sup>192</sup> David and Brierly (n 99) 94.

<sup>193</sup> F.H. Lawson, A.E. Anton, L. Neville Brown, *Amos and Walton’s Introduction to French Law* (3<sup>rd</sup> edn Oxford University Press 1967) 9.

<sup>194</sup> Translated by Georges Rouhette, as follows: “Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions”.

<sup>195</sup> The authority of a matter judged or the force of *res judicata* is limited to the subject matter of the decision.

disregard the persuasive weight of *jurisprudence constante*, that is, the expression in adjudication and law reports of a consistent and common judicial attitude on a point of law.<sup>196</sup>

In terms of hierarchy and importance in the decision making process, the structure from the top downwards is briefly as follows: the Constitution, international treaties that have been ratified, community law, the codes<sup>197</sup> and laws, doctrine and jurisprudence.

### **3.1.3.1 (e) Substantive and Procedural Law.**

It is not the purpose of this thesis to explore in depth the procedural and substantive law of either the civil or common law tradition. It is necessary however to outline briefly some of the more fundamental differences in both the procedural and substantive law of each system. Where a more in depth exploration is required this will be done in Chapter 5 of this thesis in reference to the specific legal principles in their application to the Seychellois legal tradition. In no particular order some examples of substantive and procedural rules of the two major western legal traditions are set out below.

There is no substantive and procedural distinction in French law that parallels that between common law and Equity in the Anglo-American tradition. That division is explained by English history and the requirement for the development of a remedial jurisdiction to make more equitable decisions than were possible within the narrow guidelines of English writs. Given its own legal inheritance, France had no need for such a development.<sup>198</sup> Hence the equitable remedy of specific performance or *exécution en nature* where the court issues an *astreinte*<sup>199</sup> was developed since the nineteenth century outside the provisions of the codes. Similarly, there is also no concept of the *trust* in French law.<sup>200</sup>

In civil law there are no contracts without a lawful cause.<sup>201</sup> Cause is the reason why a party enters a contract and undertakes to perform contractual obligations. The concept of cause is different from that of consideration and is further explored in Chapter 5.<sup>202</sup>

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<sup>196</sup> The weight of jurisprudence in Seychelles is explored in depth in Chapter 6.

<sup>197</sup> The five main ones are the Code Civil, the Code de Commerce, the Code Pénal, the Nouveau Code de Procédure Civile, the Code de Procédure Pénale.

<sup>198</sup> Lawson et al (n 193) 17.

<sup>199</sup> Compelling order obliging a party to perform. Article 11 of Le Nouveau Code de Procédure Civile empowers courts to issue *astreintes*. See also G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press 1998).

<sup>200</sup> See Michael Milo and Jan Smits, 'Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law' (2000) *European Review of Private Law* 477.

<sup>201</sup> Article 1131 of the Code Civil.

<sup>202</sup> See F. P. Walton, 'Cause and Consideration in Contracts' (1925) 41 *Law Quarterly Review* 306. See also

Another characteristic of French law is the general principle that in cases of delayed or non-performance of a contract, the creditor must put the debtor in default by a notice of default (*la mise en demeure*.)<sup>203</sup> Also, in order to recover damages for breaches of contract, the innocent party must prove fault or at least negligence on the part of the party who has committed the breach.<sup>204</sup> The strict liability for breaches of contract in the common law is not present in French law.

In terms of procedural law, there is a marked difference between the judge-centred approach of the civilian tradition and the advocate-centred approach of the common law. Insofar as civil proceedings are concerned there are three separate stages of the process of a case: the brief preliminary stage in which the pleadings are submitted and the *instructing* judge appointed, an evidence-taking stage which involves the receiving of counsel's written and oral arguments and the decision making stage in which a judgment is rendered by the judge.<sup>205</sup> There is no tradition of a trial in civil proceedings by jury, let alone a trial as such as a "single concentrated event... [but rather] a series of isolated meetings of and written communications between counsel and the judge."<sup>206</sup> Questions to witnesses are done most often by the judge. Cross-examination is non-existent, the emphasis being on the obtaining of the relevant facts to determine a judgment.

Insofar as criminal procedure is concerned there are also three phases in the proceedings: the investigative phase, the examining phase and the trial.<sup>207</sup> The investigative and examining phases are directed by the Public Prosecutor who is supervised by the examining judge. The judge investigates the matter thoroughly and prepares a record of the proceedings including the evidence gathered. If he determines, based on this evidence that a crime has been committed the case goes to trial. The trial allows the public prosecutor and the defence counsel to argue their cases before the trial judge and jury.<sup>208</sup>

### **3.1.3.2 The Common Law Tradition**

This section is a brief synopsis of the origins of English common law and does not provide an in-depth study or survey of other common law jurisdictions.

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Chapter 5 of this thesis on the Seychellois law of contract.

<sup>203</sup> Article 1146 of the Code Civil.

<sup>204</sup> Article 1147 of the Code Civil. See also Arthur Von Mehren and James Gordley, *The Civil Law System* (2nd ed, Little Brown 1977) 1106.

<sup>205</sup> See Merryman and Perez-Perdomo et al (n 108) 113.

<sup>206</sup> *ibid*, 113.

<sup>207</sup> *ibid*, 130.

<sup>208</sup> *ibid*. 130-131.

Until the Norman invasion in England, law was administered by the feudal shire and hundred courts. Local units were villages, groups of villages were called hundreds, and such hundreds were associated within counties or shires. Assemblies of free men within the hundreds or shires administered the laws.<sup>209</sup> The Norman invasion saw a common law tradition emerging largely from the necessity to establish centralised rule at Westminster for the effective governance of these units by William the Conqueror.<sup>210</sup> Hence, matters of royal concern were resolved at Westminster, whilst local disputes remained in the hands of local feudal courts. However, advisors and administrators in William's court, the *Curia Regis*<sup>211</sup> within Westminster transformed themselves into specialist bodies of law and finance; the Exchequer dealt with taxation and finance, the Bench dealt with petitions from subjects affecting the King's interest, the Common Pleas dealing with common litigation between subjects.<sup>212</sup>

### 3.1.3.2 (a) Legal Origins

These three courts lasted until 1875 and the case law they issued over the centuries is known as the common law.<sup>213</sup> It must be remembered that these courts competed with the old shire and hundred courts, the latter losing out eventually to the common law courts.<sup>214</sup> Magna Carta in 1215 provided for the further demise of the feudal courts.<sup>215</sup> Access to justice depended on the availability of a specific writ, an administrative precedent involving a strict formula of limited actionable types of disputes: trespass, debt, detinue, case, ejectment contained in the Register of Writs. These limited writs provided not just procedure but English legal thought itself.<sup>216</sup> As Glenn puts it, "outside the writs, there was no common law, no way to state a case or get before a judge"<sup>217</sup> or to use a phrase of Maitland's "where there is no remedy there is no wrong."<sup>218</sup>

Litigants whose actions fell outside the writs could however petition the king directly for justice. These petitions were passed by the King to his Chancellor and the court developing out of this procedure became known as the Court of Chancery and its case law "Equity". It

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<sup>209</sup> Harold J Behrman, *Law and Revolution: the Formation of the Western Legal Tradition* (Harvard University Press 2009).

<sup>210</sup> Glendon et al (n 157) 440.

<sup>211</sup> Royal Council.

<sup>212</sup> Geoffrey Samuel, *A Short Introduction to the Common Law* (Edward Elgar Publishing Limited 2013) 7-8.

<sup>213</sup> *ibid*, 8.

<sup>214</sup> Glendon et al (n 157) 441.

<sup>215</sup> *ibid*, 442.

<sup>216</sup> Samuel (n 212) 12.

<sup>217</sup> Glenn (n 68) 243.

<sup>218</sup> Frederick William Maitland, *The Forms of Action at Common Law* (A. H. Chaytor and W. J. Whittaker, eds Cambridge University Press 1936) 4.

developed remedies outside the writ system such as specific performance and in the Middle Ages developed the institution of the trust to facilitate the holding of property for the benefit of a third person. This was later to transform into different forms of property rights and ownership.<sup>219</sup> Importantly, however, as pointed out by Zweigert and Kötz, the rules of equity did not seek in any way to contradict those of the common law but only to add “marginalia, glosses and supplements to the Common Law.”<sup>220</sup>

Ecclesiastical courts also operated alongside the royal courts applying canon law, rooted, in part at least, in Roman law. They assumed civil jurisdiction over family issues including marriage and succession. However, the jurisdictional clash of the church and the state and especially the question of clerical immunity from secular jurisdiction provoking the murder of Thomas à Becket in Canterbury Cathedral in 1170 resulted in reform in which the church forfeited much of its judicial role.<sup>221</sup>

However, during the reign of the Tudors and Stuarts in the 16<sup>th</sup> and 17<sup>th</sup> centuries, at a time of great conflict between the parliament and the English kings, Roman-canon law somewhat filled a gap within the common law in a series of new royal courts established, the most notable being the Star Chamber, dealing with political crimes.<sup>222</sup> This, however, did not result in the wholesale reception of civil law<sup>223</sup> and the common law and the parliamentarians eventually won out.<sup>224</sup>

The *Age of Settlement*<sup>225</sup> which succeeded this period of upheaval also led to the creation of an independent judiciary removable only by Parliament. It no doubt also had a positive effect on the development of the Common Law and Equity by eminent judges and jurists such as Edward Coke, William Mansfield and William Blackstone.<sup>226</sup> Coke’s view of custom as independent of the command of the King and his reliance on century old precedents for his judicial decisions together with his *Institutes*<sup>227</sup> and *Reports*<sup>228</sup> assured the development of the

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<sup>219</sup> Glendon et al (n 157) 443.

<sup>220</sup> Zweigert and Kötz (n 25) 190.

<sup>221</sup> Glendon et al (n 157) 442. See also Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* (first published 1929, The Lawbook Exchange 2001)17-18.

<sup>222</sup> See Christopher W. Brooks *Law, Politics and Society in Early Modern England* (Cambridge University Press 2009).

<sup>223</sup> See William Searle Holdsworth, *A History of English Law, Volume IV* (Methuen and Company 1903).

<sup>224</sup> Zweigert and Kötz (n 25) 196.

<sup>225</sup> This refers to the period after the Act of Settlement of 1701 which settled succession to the English and Irish crown to Sophia of Hanover, a granddaughter of James VI of Scotland and I of England, as there were no surviving heirs to William and Mary.

<sup>226</sup> Zweigert and Kötz (n 25) 197.

<sup>227</sup> See Steve Sheppard, *The Selected Writings of Sir Edward Coke* (Liberty Fund 2003).

common law.<sup>229</sup> His work was clearly continued in the eighteenth century by William Mansfield's championing of the intrinsic value of the common law over legislation<sup>230</sup> while at the same time developing "a cosmopolitan jurisprudence based on equitable principles and foreign analogies".<sup>231</sup> Mansfield's contemporary, Blackstone and his *Commentaries*<sup>232</sup> in the same century, based on his lectures on English law made the law "comprehensible to the educated layman"<sup>233</sup> They were the first methodological treatises of the common law. Blackstone's chapter on Equity, though brief, set out the parallel system addressing some of the lacunae in the common law<sup>234</sup> and recognising that the distinction between law and equity was arbitrary and that courts of law could also be courts of equity.<sup>235</sup>

There was however much dissatisfaction with the court administration and process: three courts of common law with equivalent jurisdiction operated, different legal rules relating to law and equity applied and no proper appeal structure existed; legal form rather than substance persisted.<sup>236</sup> Limited reform came in 1830 with the establishment of the first appeal court, a Court of Exchequer Chamber. Other reform would come in 1851 with the setting up of the Court of Appeal in Chancery and the abolition of the writ system in 1852.<sup>237</sup>

Despite the urging of Jeremy Bentham for codification of laws to introduce certainty and better access to the law,<sup>238</sup> reform only came with slow and incremental parliamentary legislation in some areas to reflect the social and commercial changes.<sup>239</sup> The Judicature Acts of 1873-1875 introduced a new court system and fused law and equity. A High Court was established consisting of the amalgamation of the three common law courts. It had three divisions: the Queen's Bench Division, the Chancery Division and the Probate, Divorce and Admiralty Division. Appeals from these three divisions were to a newly established Court of

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<sup>228</sup> *The Reports of Sir Edward Coke 1572-1617* (first published 1777).

<https://archive.org/details/reportssiredwar04cokegoog> accessed 1st July 2015.

<sup>229</sup> See William Holdsworth, 'Sir Edward Coke.' (1935) 5 (3) *Cambridge Law Journal* 332, 343.

<sup>230</sup> See generally, James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press 2004).

<sup>231</sup> Julian S. Waterman, 'Mansfield and Blackstone's Commentaries' (1934) 1(4) *The University of Chicago Law Review* 552, 569.

<sup>232</sup> William Blackstone, *Commentaries on the Laws of England* (Harper 1852).

<sup>233</sup> Zweigert and Kötz (n 25) 197.

<sup>234</sup> On the development of the common law see generally, John Hamilton Baker, *An Introduction to English Legal History* (London, 2002).

<sup>235</sup> Waterman (n 231) 570.

<sup>236</sup> Samuel (n 212) 17.

<sup>237</sup> Common Law Procedure Act 1852.

<sup>238</sup> Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf, and Others* (John Polhemus, 1882).

<sup>239</sup> See for example the Bills of Exchange Act 1882, the Sale of Goods Act 1893.

Appeal and ultimately to the House of Lords, the name of the latter to change again to the Supreme Court in 2005.<sup>240</sup> It must also be mentioned that alongside the House of Lords, the Privy Council, which originally formed part of the Curia Regis was reformed in 1833 with a distinct Judicial Committee with jurisdiction over colonial appeals.

### 3.1.3.2 (b) Legal Structures

Unlike France, the United Kingdom is both a constitutional monarchy and a parliamentary democracy. The Queen is the head of state but her powers are limited by constitutional rules including parliamentary independence.<sup>241</sup> There is no single constitutional document.<sup>242</sup> The fact that there is no written constitution has meant that it is not possible to challenge an Act of Parliament on the basis that it is unconstitutional. Moreover, as pointed out by A.V. Dicey, “the very keystone of the law of constitution”,<sup>243</sup> that of parliamentary sovereignty, holds that Parliament is the supreme legislative authority, in that it may make and repeal any law, and no other body may repeal or question the validity of its Acts.<sup>244</sup> Parliament also elects the government and chooses the Prime Minister. The successor to the Curia Regis, the House of Lords, an unelected body of bishops, peers and law lords can also introduce Bills of law but its main role is to oversee legislation introduced by the House of Commons. In this respect, it has some delaying power and the ability to revise laws to a minor degree.<sup>245</sup> The United Kingdom’s membership in the European Union (EU) has however also meant that British legislation may be scrutinized to ensure that it complies with EU law. The House of Lords Select Committee on the Constitution established in 2001, considers “the constitutional implications of all public Bills.”<sup>246</sup> Equally, the European Convention on Human Rights incorporated into the United Kingdom by the Human Rights Act 1998 also gives the courts power to call Acts of Parliament into question and to make a “declaration of incompatibility” which leads to the provision or the Act being amended.<sup>247</sup>

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<sup>240</sup> Constitutional Reform Act 2005.

<sup>241</sup> See William and Mary, 1688, An Act for Establishing the Coronation Oath in which they “solemnly Promise and Swear to Govern the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same...” <http://www.british-history.ac.uk/report.aspx?compid=46292> accessed 1st July 2015.

<sup>242</sup> Walter Bagehot, *The English Constitution* (first published 1867 Oxford Paperbacks 2009).

<sup>243</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1867 8th ed Liberty Fund Inc 1982) 68.

<sup>244</sup> *ibid.*

<sup>245</sup> See Bagehot (n 242).

<sup>246</sup> See Select Committee on Constitution, First Report <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1102.htm> accessed 1st July 2015.

<sup>247</sup> See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

The structure of the courts today remains a pyramid with inferior courts at the base, for example the County Courts, and with the Supreme Court at the apex of all courts, exercising civil and criminal jurisdiction. In terms of civil jurisdiction, the lowest echelon is the County Courts dealing with the simplest matters, followed by either of three divisions of the High Court: the Chancery Division hearing a range of matters, largely of an equitable nature, from commercial disputes to wills and trust; the Family Division with original jurisdiction of matrimony, adoption and various disputes between spouses; and the Queen's Bench Division having original and appellate jurisdiction in civil matters such as contracts and torts. There is the possibility of an appeal to the Court of Appeal on points of law, Civil Division or a *leap frogging*<sup>248</sup> appeal directly to the Supreme Court subject to certain conditions being met.<sup>249</sup>

In terms of criminal jurisdiction the lowest tier is the Magistrates Courts, hearing trials of summary offences and committals, followed by the Crown Court which hears trials of indictable offences and appeals from Magistrates Courts. There is then an appeal to the High Court on both conviction and sentence and to the Court of Appeal on points of law and again the rare possibility of a *leap frogging* procedure from the High Court to the Supreme Court. Appeals to the Supreme Court in criminal proceedings in England and Wales or Northern Ireland are subject to special restrictions limiting such appeals to exceptional cases of general public importance.<sup>250</sup>

Unlike France, it is the judiciary in common law systems who are empowered to subject the decisions of the executive to an independent review of lawfulness which may result in their decision being quashed. Judicial review in common law countries is largely attributable to the great deference afforded to judges within a context of the separation of powers and the system of checks and balances where the judiciary checks the powers of the executive. It may be defined as "the rule of law in action."<sup>251</sup> Judicial review is heard in the Administrative Court of the Queen's Bench Division and its regional venues. Permission for judicial review

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<sup>248</sup> A direct appeal to the House of Lords now, Supreme Court, bypassing the Court of Appeal, see section s 12 of the Administration of Justice Act 1969.

<sup>249</sup> See sections 12 -16 of the Administration of Justice Act 1969.

<sup>250</sup> See sections 33 and 34 of the Criminal Appeal Act 1968, sections 1 and 2 of the Administration of Justice Act 1960, sections 31 and 32 of the Criminal Appeal (Northern Ireland) Act 1980 and section 41 of and schedule 1 of the Judicature (Northern Ireland) Act 1978. See also generally *A guide to bringing a case to The Supreme Court* <http://supremecourt.uk/docs/a-guide-to-bringing-a-case-to-the-uksc.pdf> accessed 1st July 2015.

<sup>251</sup> See, Ministry of Justice, 'Judicial Review: Proposals for Further Reform, Consultation Paper,' September 2013, paragraph 21.

must be sought and granted before it can proceed.<sup>252</sup>

### 3.1.3.1 (c) Legal Roles

Judges in the UK are appointed from among the rank of barristers. This is unlike France where the profession is a career choice or the United States<sup>253</sup> and Ireland<sup>254</sup> where it is by political appointment or election. The Judicial Appointments Commission created on 3 April 2006 as part of the reforms following the Constitutional Reform Act 2005 took over the responsibility of selecting suitable candidates which was previously reserved to the Lord Chancellor. Candidates are selected purely on merit but the Lord Chancellor retains responsibility for appointing the selected candidates.<sup>255</sup> He can accept, reject or seek reconsideration of the Commission's candidate up to three times for each vacancy.<sup>256</sup> The criticism remains that despite the concept of parliamentary supremacy and sovereignty, parliament still has no role to play even in the confirmation of the appointment of judges.<sup>257</sup>

The other main actors in the common law systems are the barristers and solicitors. The United Kingdom like Ireland,<sup>258</sup> Australia,<sup>259</sup> and New Zealand<sup>260</sup> continue to observe a split in the legal profession. Today both barristers and solicitors generally begin their legal education at university. On completing a law degree, the graduate must either complete the Legal Practice Course to become a solicitor or the Bar Professional Training Course to be a barrister. The professional qualification is then followed by a two year training contract and a professional skills course for the solicitor and for barristers the completion of a pupillage with

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<sup>252</sup> Supreme Court Rules Order 54.4

<sup>253</sup> See Article II, Section 2, Clause 2 of the United States Constitution.

<sup>254</sup> See Courts and Court Officers Act 1995.

<sup>255</sup> See Constitutional Reform Act 2005, Part 4.

<sup>256</sup> *ibid*, section 29. See also Kate Malleon, 'The New Judicial Appointments Commission in England and Wales' in Peter H. Russell, Kate Malleon (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) and Mary L Clarke, 'Advice and Consent vs. Silence and Dissent - The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments' (2010-2011) 71 *Louisiana Law Review* 451.

<sup>257</sup> See for example Kate Malleon, 'Parliamentary Scrutiny Supreme Court Nominees - a view from the UK' (2006) 44 (3) *Osgoode Hall Law Journal* 557.

<sup>258</sup> See Solicitors Acts 1954-2002 and Bar Council of Ireland [www.kingsinns.ie](http://www.kingsinns.ie) accessed 1st July 2015. Barristers are self-regulated. There are no statutes or government-imposed controls governing their conduct, discipline or education. The Bar Council of Ireland regulates practising barristers, while the Honorable Society of King's Inns controls entry into the profession and is the monopoly provider of the professional course leading to the qualification of Barrister-at-Law. Only holders of the Barrister-at-Law degree can be called to the Bar of Ireland and admitted to practise in the Courts of Ireland as members of the Bar of Ireland.

<sup>259</sup> Different states regulate the legal profession locally. In the Australian states of New South Wales and Queensland, there is a split profession. In South Australia, Victoria, and Western Australia and the Australian Capital Territory, the professions of barrister and solicitor are fused, but an independent bar nonetheless exists.

<sup>260</sup> See Lawyers and Conveyancers Act 2006.

a set of chambers.<sup>261</sup>

The work of the solicitor is mostly concentrated in the areas of conveyancing, probate and litigation preparation. Barristers specialise in advocacy, drafting documents and rendering opinions. Legislation has broken up the monopoly of barristers in their traditional fields of expertise. Section 27, Part II of The Courts and Legal Services Act 1990 has extended the right of audience in the higher courts to solicitors and other legal professionals. Section 36 of the Act has also opened up conveyancing work to persons other than solicitors such as barristers, licensed conveyancers and notaries, as well as any companies and incorporated bodies included in Section 9 of the Administration of Justice Act 1985.

It must be noted that the legal academic in the UK plays a much smaller part in the practice of law than does his French counterpart. This has led to what Samuel calls the sectioning off or divorce of legal scholarship away from the analysis of the common law into high level theory.<sup>262</sup>

### 3.1.3.2 (d) Sources of Law

The cornerstone of modern English common law is binding precedent.<sup>263</sup> This is generally referred to as the concept of *stare decisis*,<sup>264</sup> where the single decision of an earlier court will be treated as binding on a subsequent court, if the former is superior to (sometimes coordinate with) the latter in the judicial hierarchy. This concept is very much tied to law reporting<sup>265</sup> and therefore came to full flower during the late eighteenth and early nineteenth centuries.<sup>266</sup> The hierarchy of the court system consolidated the doctrine.<sup>267</sup> Both vertical and horizontal binding are applied in England.

But precedent operates in different ways at different levels of the courts. In *Young v Bristol Aeroplane*<sup>268</sup> the Court of Appeal had established that it was not bound to follow its own decisions only in three specific cases: where there were two conflicting decisions, where its decision could not stand with that of the House of Lords and where a decision was given per

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<sup>261</sup> See Andy Boon, John Flood and Julian Webb, 'Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession' (2005) 31 (3) *Journal of Law and Society* 473.

<sup>262</sup> Samuel (n 212) 76.

<sup>263</sup> See Lewis T. Ellis, 'The History of Judicial Precedent' (1932) 48 *Law Quarterly Review* 230.

<sup>264</sup> Abbreviated form of *stare decisis et non quieta movere* of which the literal translation is to "stand by decided matters and not to disturb settled matters."

<sup>265</sup> Ellis (n 263) 230. The first orderly law reports were that of Sir John Borrow in 1765; before it some cases were reported in the Year Books.

<sup>266</sup> Samuel C. Damren, 'Stare Decisis: The Maker of Customs' (2000) 35 *New England Law Review* 1, 2.

<sup>267</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 56.

<sup>268</sup> *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 (CA).

incuriam. In 1966, the House of Lords issued an important Practice Statement<sup>269</sup> in which it overruled its decision of 1898<sup>270</sup> that it was bound by its own decisions stating that:

“the use of precedent [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so...This announcement is not intended to affect the use of precedent elsewhere than in this House.”<sup>271</sup>

Lord Denning tried to apply the same principle to the Court of Appeal in the case of *Davis v Johnson*<sup>272</sup> but this was firmly rejected by the House of Lords which stated that the rule in *Young* still applied and that the Court of Appeal, unlike the House of Lords, was bound by its own decisions.<sup>273</sup> In *Arthur J. Hall*,<sup>274</sup> while recognising that judges are not legislators, the House of Lords expressed reservations about the court’s failure to develop the law on the basis that it was more appropriate for Parliament to do so, Lord Steyn expressing the view that to do so would be an abdication of the House of Lords responsibilities.<sup>275</sup> However, the circumstances where it is right to depart from previous precedent are limited and exceptional.<sup>276</sup> In any case all English courts, including the Supreme Court, are bound by decisions of the European Court of Justice on EU law.<sup>277</sup>

It is important to note that it is not the reported judgments as a whole that bind. Instead, the elements of the judgment that are binding are referred to as its *ratio decidendi*, the principles for which it stands. This was explained in *R v Brent London Borough Housing Benefit Review*

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<sup>269</sup> Practice Statement (Judicial Precedent) HL 1966 <http://www.uniset.ca/other/cs2/19661WLR1234.html> accessed 1st July 2015.

<sup>270</sup> *London Tramways v London County Council* [1898] A.C. 375.

<sup>271</sup> *ibid.*

<sup>272</sup> *Davis v Johnson* [1979] AC 264.

<sup>273</sup> *Davis v Johnson* [1979] AC 317.

<sup>274</sup> *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

<sup>275</sup> *ibid.*, 683.

<sup>276</sup> See for example *R v R (Rape Marital Exemption)* [1991] 4 All ER 481 and *Arthur J S Hall* (supra) regarding professional immunity of barristers.

<sup>277</sup> See section 3(1) of the European Communities Act 1972. It is not bound by its own previous decisions.

*Board, ex parte Khadim*.<sup>278</sup> In contrast, *obiter dicta*, the remaining text of a judgment, have merely persuasive authority.

As in France, however, legislation is also a primary source of law in the UK. The methodology of interpretation of statute has been controversial. The concept of the supremacy of parliament has resulted in the courts' reluctance to look at *travaux préparatoires*, unlike their French counterparts when interpreting legislation. This has often resulted in taking a literal approach to interpreting the provisions.<sup>279</sup> The *mischief rule* and *golden rule* provide alternatives. Of late, the court has accepted that it is proper in some limited circumstances to look at *Hansard*.<sup>280</sup> The Human Rights Act of 1998 brought important changes in its provisions that legislation "must be read and given effect in a way which is compatible with the Convention rights."<sup>281</sup>

### 3.1.3.2 (e) Procedural and Substantive Law.

Some distinctive aspects of the common law in relation to procedural and substantive law are outlined below. David sees the common law generally as a law of remedies and civil law as a law of rights.<sup>282</sup> The history of this distinction was explored above. While the division is not as stark in modern times, it is still true that to a large extent the substantive and procedural law of England continues to place considerable emphasis on the process of law. Fair trial and due process remain important considerations although they have been transferred to the forum of human rights.<sup>283</sup>

Up to the 1980s, there was no stark distinction between private law and public law in English common law. In more recent times the development of administrative law in England<sup>284</sup> together with the Human Rights Act 1998 has brought a more distinct division between the two fields of law. There is however no distinction in terms of a different hierarchy of courts for the hearing of judicial review cases as there is in France.<sup>285</sup> The development of administrative law has meant that one may seek the judicial review of a decision or action of

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<sup>278</sup> [2001] QB 955.

<sup>279</sup> See for example *Pepper v Hart* [1993] AC 593. See also Seán Patrick Donlan and Rónán Kennedy, 'A Flood of Light? Comments on the Interpretation Act 2005' (2006) 6(1) *Judicial Studies Institute Journal* 92.

<sup>280</sup> *ibid.*

<sup>281</sup> Section 3 (1) Human Rights Act 1998.

<sup>282</sup> David and Brierly (n 99) 8 - 9.

<sup>283</sup> See for example Adam Gearey, Wayne Morrison, Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge 2013).

<sup>284</sup> See especially the Law Commission Report of 1976, the Rules of Court 1977 and section 31 of the Supreme Court Act 1981 giving the courts power to grant any administrative relief appropriate.

<sup>285</sup> Glendon et al (n 157)752-755.

a public body in the High Court. Administrative law itself is grounded in the rule of law principles that

“all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”,<sup>286</sup>

Acknowledging that this definition of the rule of law is essentially Dicey’s,<sup>287</sup> Lord Bingham expands on the principle by laying down eight fundamental principles including the accessibility of law, equality of all before the law, the fair exercise of power by the executive, the right to a fair trial, the application of law, rather than discretion, when deciding questions of legal right and liability and the protection of fundamental human rights.<sup>288</sup>

In terms of the law of contract, a substantive difference to French law is, as pointed out previously, in the concept of consideration: a contract has no binding effect unless supported by consideration. The doctrine of consideration stipulates that a contract must not only be supported by a return promise but something of value must be given by both parties to a contract.<sup>289</sup> Mindy Chen-Wishart sees this as a “deep instinct for reciprocity” and as representing “the terms of engagement between equals who are deserving of respect.”<sup>290</sup> Gunther Treitel sees the purpose of consideration as putting limits on the enforceability of agreements.<sup>291</sup> Be that as it may, the concept continues to be complex and has attracted much criticism from both judges and academics.<sup>292</sup>

In terms of breach of contract, the concept of fault is necessary in French civil law to trigger the award of damages. This is not so in common law where strict liability is the rule and where one of the main differences between contract and tort law is the fact that tort liability is fault-based. In contrast, contract law is not concerned with why a defendant was not able to perform his obligations.<sup>293</sup> Non-performance of a contract may only be excused for reasons

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<sup>286</sup> Lord Bingham, ‘The Rule of Law’ (2007) *The Cambridge Law Journal* 66, 69.

<sup>287</sup> Dicey (n 243).

<sup>288</sup> Bingham (n 286).

<sup>289</sup> See for example Mindy Chen-Wishart, *Contract Law* (Oxford University Press 2012).

<sup>290</sup> Mindy Chen-Wishart, ‘Reciprocity and Enforceability’ in Mindy Chen-Wishart, Lusina Ho, Puja Kapai (eds) *Reciprocity in Contract* (Faculty of Law, University of Hong Kong 2010) 10.

<sup>291</sup> Edwin Peel and Guenter Treitel, *The Law of Contracts* (13 ed Sweet & Maxwell, 2011) 73.

<sup>292</sup> See Lord Wright, ‘Ought the Doctrine of Consideration to be Abolished from the Common Law?’ (1936) 49 *Harvard Law Review* 1225 and Law Revision Committee Sixth Interim Report (1937) 1 (2) *The Modern Law Review* 97, 100.

<sup>293</sup> See Lord Edmund Davies in *Rainieri v Miles* [1981] AC 1050, 1086.

beyond the control of the party to the contract.<sup>294</sup> Frustration of contract however, developed in England, is unknown to French law which relies on the doctrines of *force majeure*<sup>295</sup> and *cause*. The doctrine of frustration was expounded by Lord Radcliffe in *Davis Construction Ltd v Farnham UDC*<sup>296</sup> as where “without default of either party, a contractual obligation has become incapable of being performed.”<sup>297</sup> The doctrine however, operates in very limited circumstances.<sup>298</sup>

Another very peculiar feature of the common law is the concept of trust, an effect of equity manifested in the areas of property and contract law.<sup>299</sup> With regard to property the trust has divided its ownership into different entities so that they have become different estates or interests between separate people, the beneficiary and the trustee.<sup>300</sup>

There are also conspicuous differences between English and continental law in the law of torts, the English approach being one based on forms of actions. In other words, rather than the law being expressed in broad, general provisions, English law has developed a more limited approach linked to its unique procedural, writ-centred history. Hence, for example, the specific and nominate torts: negligence, nuisance, trespass and their consequences constitute tortious liability.

In terms of procedure, the most distinctive aspect of common law jurisdictions is that trial proceedings are generally oral with witnesses giving their evidence and then subjected to cross-examination. The judge is more or less a referee of that process making sure the questions put to the witnesses are relevant and that the cross-examination is fair. In criminal trials, the judge sums up the evidence at the end of the trial and directs the jury on the relevant rules of law. Common law also has a preference for publicity over privacy and for oral testimony over written proof in direct contradiction to French civil law which as pointed out above prefers written proof over oral testimony.<sup>301</sup>

The only substantially codified law in England are the rules of civil procedure for the Supreme Court and County Courts which were overhauled and applied in 1998<sup>302</sup> and again

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<sup>294</sup> See Stephen A. Smith, *Contract Theory* (Oxford University Press 2004) 378.

<sup>295</sup> *Force majeure* can be introduced into contracts in common law by express clauses.

<sup>296</sup> *Davis Construction Ltd v Farnham UDC* [1956] AC 696.

<sup>297</sup> *ibid*, 729.

<sup>298</sup> See Ewan McKendrick *Force Majeure and Frustration of Contract*, (2<sup>nd</sup> ed CRC Press, 2013 ) 33-37.

<sup>299</sup> Antoine (n 91) 170.

<sup>300</sup> Samuel (n 212) 127.

<sup>301</sup> See above 3.1.3.1 (d) Sources of Law.

<sup>302</sup> Lord Woolf, ‘Access to Justice: Interim Report and Consultation Paper’

in 2013<sup>303</sup> and the rules for criminal proceedings.<sup>304</sup> It must however be noted that in its colonies the British advocated the wholesale codification of procedural rules and also of criminal law partly as a result of Bentham's influence but mostly as a result of a need to make the administration of the colonies more efficient and stable.<sup>305</sup> These codes though modified, survive to this day in most of these countries despite their independence from Britain.<sup>306</sup>

### 3.1.4 The Movement of Legal Traditions and Legal Receptions

Imperialism and colonisation throughout the ages has resulted in European legal traditions travelling to countries far from where they originated. In expanding on her theory that law is a travelling phenomenon, Iza Hussin explains that this has been the case for centuries first by the extension of imperial law making, accompanied by the extension of trade routes to the present global imperium where the expansion of legal orders are inseparable from the movement of people, goods and services.<sup>307</sup> As she goes on to explain, people travel with baggage and these accompanying commodities are themselves shaped by the voyage and by the local conditions of their destination.<sup>308</sup>

The movement of law has exercised many comparative lawyers who have attempted to rationalise, extensively define and theorize the resulting legal systems. This section explores some of these theories and poses the following questions: What is the result of transporting law to destinations very different from where they were conceived and formed? What factors mould or change the tradition received and how does the law develop in its new milieu or how is it received, assimilated and reworked.<sup>309</sup> How does local culture, custom, tradition or *mentalite*<sup>310</sup> withstand or adapt to these foreign legal impositions or imports?

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<http://www.info.gov.hk/archive/consult/2002/FullReport.pdf> accessed 1st July 2015.

<sup>303</sup> See Lord Jackson, Review of Civil Litigation Costs  
<http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf> accessed 1st July 2015.

<sup>304</sup> See Nicholas Moss, 'A Managed Case: Using the Criminal Procedure Rules,' *Speed to London Crown Prosecution Service*, March 5<sup>th</sup> 2013.  
<https://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/nicholas-moss-speech-cps-london-050313.pdf> accessed 1st July 2015.

<sup>305</sup> See Barry Wright, 'Codification of English Law, Imperial Projects, and the Self-Governing Codes: The Queensland and Canadian Examples' (2007) 26 (1) *University of Queensland Law Journal* 39, 45.

<sup>306</sup> *ibid.*

<sup>307</sup> Iza Hussin, 'Circulations of Law: Colonial Precedents, Contemporary Questions' (2012) 2 (7) *Oñati Socio-Legal Series* 18, 21.

<sup>308</sup> *ibid.*

<sup>309</sup> See Matthews Glenn (n 90). In her vocabulary, mixed, unmixed and remixed describes the processes of the transposition of law.

<sup>310</sup> See Legrand (n 53).

### 3.1.4.1 Alan Watson and *Legal Transplants*

In the early 1970s, Alan Watson used the term *legal transplant* to indicate the movement of a rule or a system of law from one country to another.<sup>311</sup> He was in agreement with Roscoe Pound that law is largely a history of borrowings and assimilations of legal materials from one system into another.<sup>312</sup> Watson's main argument was that imitation was the main engine of legal change.<sup>313</sup>

Controversially however, he also advanced other theories: that transplanting is the most fertile source of development for legal process,<sup>314</sup> that law is rooted in the past, that the transplanting of legal rules is socially easy and that these have little impact on individuals; whatever rule "is adopted is of restricted significance of general human happiness."<sup>315</sup> He conceded that the reception of rules or laws, especially in the case of major transplants, involves changes in the law. He also stated that no area of private law can be resistant to change as a result of foreign influence. He conceded that while it is possible to have only one world legal system, there might be psychological value in having one's own legal system.<sup>316</sup>

While Watson's attempt to explore how legal transplants bring legal systems in contact with each other and result in change is to be complimented, his conclusions have been roundly criticised.<sup>317</sup> Much of the criticism has centred on his assertion that there is little correlation between society and the law. As pointed out above, law's partial embeddedness in culture and community is undeniable. His nescience of *legal culture*<sup>318</sup> is surprising and its absence in legal transfers is not empirically correct.<sup>319</sup> As pointed out by Legrand, Watson's theory (or non-theory)<sup>320</sup> assumes that law's travels are unsullied by "historical, epistemological, or cultural baggage" and completely segregated from society. Legrand differentiates between laws and legal rules, arguing that the former can be transferred but that the latter because of

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<sup>311</sup> Watson (n 1).

<sup>312</sup> Roscoe Pound, *The Formative Era of American Law* (Little Brown and Company 1938) 94.

<sup>313</sup> Watson (n 1) 95.

<sup>314</sup> *ibid.*

<sup>315</sup> *ibid.*, 96.

<sup>316</sup> *ibid.*, 101.

<sup>317</sup> For a summary of his critics, see Marie Seong-Hak Kim, *Law and Custom in Korea: Comparative Legal History* (Cambridge University Press 2012) 5-6.

<sup>318</sup> See Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation 1975) Friedman defines legal culture as understanding law as a system, a product of social forces and a conduit of these same forces (223). See also Legrand (n 55 and 71) and Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 55.

<sup>319</sup> J. W. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative* (Oxford University Press 1996) 4.

<sup>320</sup> See Richard L. Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785, 793: "Perhaps the most serious problem with Watson's theory is that it is not a theory at all."

their cultural embeddedness cannot.<sup>321</sup> In any case as he argues *legal transplants* are not possible, because formally identical rules are differently interpreted and applied in different legal systems, so that they do not survive the journey from one legal system to another unchanged.<sup>322</sup> Watson's and Legrand's theories are irreconcilable. While Legrand is of the view that law is deeply connected to society and the idiosyncrasies of individual societies makes legal transfer impossible,<sup>323</sup> Watson espouses the view that law is somewhat autonomous of context and society.<sup>324</sup>

Kahn-Freud<sup>325</sup> has also argued that only some rules are transferable and that some law or rules are so bound to society and so organic that they cannot be moved. The transplantation of such rules could therefore be suspect and may well depend on the power structure at play.<sup>326</sup> Guenther Teubner<sup>327</sup> in this context has argued that meaningful transfers are possible where the transplanted rules are loosely tied to social processes from where they originate but will only be *irritants* in their new environment when they are closely interwoven with the societal, political, economic or technological forces from where they were created.<sup>328</sup> He has also pointed out that globalising processes has confused the unique development of law within the national sphere as they have created "a worldwide network of legal communications."<sup>329</sup> He therefore sees the transfer of laws as "direct contact between legal orders within one global legal discourse."<sup>330</sup> Esin Örüçü prefers the term *transposition* for the process and finds the term *transplantation* objectionable as the "transplanted institution continues to live on in its own habitat as well as [in the ] new one."<sup>331</sup>

Legal transplant remains the predominant terminology. The concept of legal transplants however, needs to be distinguished from the reception of foreign law as a solution to a local legal problem. These are voluntary borrowings to solve specific legal issues and differ greatly from imposed transplanted law such as colonial law. Ugo Mattei describes this process of reception as where the features of a legal system are "considered, discussed, copied, or

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<sup>321</sup> Legrand (n 53) 120.

<sup>322</sup> Legrand (n 319).

<sup>323</sup> Legrand (n 53) 111.

<sup>324</sup> Alan Watson, 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 335.

<sup>325</sup> Otto Kahn-Freud, 'On Uses and Misuses of Comparative Law' (1974) 34 *Modern Law Review* 1.

<sup>326</sup> *ibid.*

<sup>327</sup> Guenther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

<sup>328</sup> *ibid.*, 21-8.

<sup>329</sup> *ibid.*, 16.

<sup>330</sup> *ibid.*

<sup>331</sup> Esin Örüçü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 206.

adopted.”<sup>332</sup> This is the process of intellectual leadership, the influence of scholarly opinion over domestic positive law.

### 3.1.4.2 William Twining and *Diffusion*

William Twining sees the interaction of legal traditions as inevitable and isolation as exceptional.<sup>333</sup> Using related discussions in the social sciences, he refers to this phenomenon as *diffusion*, though it is important to understand that he uses that word as a term of art. In this context, *diffusion* is understood as a reciprocal process rather than one that is merely one-way.<sup>334</sup> He outlines several general propositions which he states can serve as warnings of complexity in the diffusion of laws. These include law’s sources, prior conditions and arrangements, formal acts of reception, time scales, implementation and impact.<sup>335</sup>

Twining points out that because of the gap between the social science literature on diffusion and the legal literature on reception and transplantation, no specific theory of diffusion of law exists.<sup>336</sup> He calls for a coherent framework that has to stray beyond “the *Country and Western* tradition of comparative law and a naive model of diffusion.”<sup>337</sup> He explains the naïve model of diffusion by the bipolar relationship and one-way traffic between the exporter and receptor countries in which the latter accept the laws from the former in order to replace existing local laws or to fill in gaps. This is naively done in the name of modernisation and assumes that if the imported law survives for a considerable amount of time then it is proof that law works.<sup>338</sup>

Twining insists however that law is to some extent culture specific. For both diffusionism and globalization to take place meaningfully would therefore involve “the construction of a conceptual framework and a meta-language of legal theory that can transcend legal cultures.”<sup>339</sup> Indeed such a framework for those who talk of harmonisation would be desirable but its achievement remains debatable. He also argues that diffusion processes as an aspect of

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<sup>332</sup> Ugo Mattei, ‘Why the Wind Changed’ (1994) 42 *American Journal of Comparative Law* 195, 201.

<sup>333</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 272.

<sup>334</sup> See James Morris Blaut, *The Colonizer’s Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).

<sup>335</sup> Twining (n 333), 292. Twining’s diffusionism is the polar opposite of what James Blaut (n 334) terms Eurocentric diffusionism, that is, the long-held belief that Europe or the West has some unique superior advantage in race, culture, mind, spirit or even law.

<sup>336</sup> William Twining, ‘Social Science and Diffusion of Law’ (2005) 32(2) *Journal of Law and Society* 203.

<sup>337</sup> *ibid*, 204. Watson would have been an exponent of *Country and Western* legal theory.

<sup>338</sup> *ibid*, 205.

<sup>339</sup> William Twining, *Globalisation & Legal Theory* (Cambridge University Press 2000) 53.

interlegality are too varied and complex to be reduced to a single model.<sup>340</sup>

### 3.2 Mixed Legal Systems

The discussion on transplant, reception and diffusion points to the fact that there are no pure legal systems and that to some extent all legal systems are mixed. Some are mixed in ways that are more meaningful or significant in the present period. Others are historically mixed or are still mixing. There is also the view that both “Western and non-Western legal traditions are deeply plural or mixed, though this is frequently obscured by the rise of the modern state and common national laws.”<sup>341</sup> Donlan also insists that the concept of hybridity extends beyond its meaning in post-colonial studies and should be extended to the “relational analysis of the legal-normative complexity of time-spaces.”<sup>342</sup> Hybridity then should be viewed both in terms of mixes of laws and mixes of laws and norms.

The patent mixity of some legal systems have however baffled comparatists and taxonomists in that they occupy an anomalous position in the classification of legal systems.<sup>343</sup> These systems have distinctive characteristics which defy their pigeon-holing into traditional legal classifications.<sup>344</sup> Jacques du Plessis states that they are condemned to “classificatory limbo”.<sup>345</sup> That they pose a challenge to the legal family approach is undeniable<sup>346</sup> but the question does arise that if they cannot be so easily classified how then can they be identified? A working definition of a mixed legal system is provided by Joseph McKnight as one that is made up of at least two diverse components having substantive attributes (and those of method) derived from two or more systems generally recognised as being independent of the others.<sup>347</sup> In current comparative research the term has been defined as referring to “jurisdictions that contain significant and explicitly segregated, but non-overlapping elements of different legal traditions.”<sup>348</sup>

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<sup>340</sup> Twining (n 333) 291.

<sup>341</sup> Seán Patrick Donlan, ‘Mixed and Mixing Systems Worldwide: A Preface’ (2012) 15 (3) Potchefstroom Electronic Law Journal [http://www.nwu.ac.za/webfm\\_send/58703](http://www.nwu.ac.za/webfm_send/58703) accessed 1st July 2015.

<sup>342</sup> Seán Patrick Donlan, ‘Things being Various: Normativity, Legality, State Legality’ in Maurice Adams and Dirk Heirbault, *The Method of Comparative Law- Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014) 169.

<sup>343</sup> K. D. Anthony, ‘The Identification and Classification of Mixed Systems of Law,’ in Gilbert Kodlinye and P. K. Menon *Commonwealth Caribbean Legal Studies* (Butterworths 1992) 179, 181.

<sup>344</sup> See Zweigert and Kötz (n 25) 67 and David and Brierly (n 103) 24.

<sup>345</sup> Jacques du Plessis, ‘Editorial- Comparative Law and the Study of Mixed Legal Systems’ in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 480.

<sup>346</sup> See Jan M. Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2<sup>nd</sup> ed Edward Elgar Publishing 2012) 500.

<sup>347</sup> Joseph McKnight, ‘Some Observations on Mixed Legal Systems’ (1977) *Juridical Review* 177.

<sup>348</sup> Sue Farran, Esin Örüçü and Seán Patrick Donlan, ‘Endnote’ in Sue Farran, Esin Örüçü and Seán Patrick

The writings of several Scotsmen in the late nineteenth and early twentieth century are important in the first description and study of mixed systems. As early as 1899, Frederick Parker Walton recognised the community of mixed legal systems.<sup>349</sup> He was followed by Robert Warden Lee who coined the phrase *mixed jurisdiction* on a map he entitled “The Civil Law and the Common Law - A World Survey” in 1915.<sup>350</sup> He was joined by other comparatists in studies into mixed legal systems such as Maurice Sheldon Amos<sup>351</sup> and F. H. Lawson.<sup>352</sup> The study gained further revival and momentum with the work of Thomas Brown Smith<sup>353</sup> who is certainly seen as the father of mixed systems in that he both cultivated an audience and catalysed further scholarship into mixed jurisdictions.<sup>354</sup>

### 3.2.1. *Mixed Jurisdictions*

It is difficult to define and distinguish a mixed legal system from a mixed jurisdiction. Most comparatists would see mixed jurisdictions as a subset of mixed legal systems although, as shown above, the phrases are used interchangeably. Donlan states that writers tend to use the phrase mixed legal system “more broadly to cover any legal system with explicit and discreet elements of other traditions.”<sup>355</sup> The phrase *mixed jurisdictions* may also be used more narrowly to indicate those jurisdictions with mixtures of Anglo-American and Continental laws.<sup>356</sup> Vernon Valentine Palmer has used this phrase to describe his *third legal family concept*, those legal systems of mixed jurisdictions sharing cohesive traits and tendencies.<sup>357</sup>

Palmer gives a vivid physical description of such jurisdictions: they live in physical and intellectual isolation, cut off from other family members around the world; they are born one of a kind, an only child; they develop introspectively conscious of their *otherness* and cross

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Donlan (eds), *Mixed Legal Systems: Endangered, Entrenched, Blended or Muddled?*(Ashgate, 2014) 242.

<sup>349</sup> Frederick Parker Walton, ‘The Civil Law and the Common Law in Canada’ (1899) 11 *Juridical Review* 282,291.

<sup>350</sup> Robert W. Lee, ‘The Civil Law and the Common Law-A World Survey’ (1915) 14 *Michigan Law Review* 89.

<sup>351</sup> Maurice Sheldon Amos, ‘The Common Law and the Civil Law in the British Commonwealth of Nations’(1937) 50 *Harvard Law Review* 1249.

<sup>352</sup> F.H. Lawson, ‘The Field of Comparative Law’ (1949) 61 *Juridical Review* 16.

<sup>353</sup> Thomas Brown Smith, *Studies Critical and Comparative* (W. Green and Son 1962). For a description and evaluation of the mixed legal systems” beginning and development see Kenneth G.C. Reid, ‘The Idea of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 5.

<sup>354</sup> Smith used the phrase mixed legal systems and mixed jurisdiction interchangeably. See T. B. Smith, ‘The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’ in A. N. Yiannopoulos(ed) *Civil Law in the Modern World* (Louisiana State University Press 1965).

<sup>355</sup> Donlan (n 101) 14.

<sup>356</sup> Farran et al (n 348) 242.

<sup>357</sup> Vernon Valentin Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2<sup>nd</sup> ed Cambridge University Press 2012) 3.

breeding.<sup>358</sup> Kenneth Reid sees mixed jurisdictions as the products of failed colonialism, settled by one colonial power and lost to another.<sup>359</sup> An early definition of mixed jurisdiction was that of Frederick Walton in which he stated that mixed jurisdictions are those in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law.<sup>360</sup>

In 1966 T. B. Smith<sup>361</sup> referred to mixed jurisdictions as a:

“basically civilian system [which] has been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”<sup>362</sup>

In fairness however, he did allude to other mixed jurisdictions, “even more complex based on the fact that law is not partitioned between the heirs of Rome and of Westminster.”<sup>363</sup> Nevertheless, the classic definition of a mixed jurisdiction is one which examines mixed systems from a formal internally legal perspective.<sup>364</sup>

### **3.2.2 Classical Mixed Jurisdictions**

Palmer distinguishes between the traditional view of mixed jurisdictions - an early twentieth century identification of a dozen jurisdictions whose private law was a Western hybrid characterized by a core of civil and common law elements and the pluralist conception of a mixed legal system.<sup>365</sup> He sets out three distinguishing characteristics of classical mixed jurisdictions. First, they are specific in that they are “built upon dual foundations of common law and civil law materials.”<sup>366</sup> Secondly, they have a quantitative and psychological trait in that the mixture has to reach a sufficient proportion and the legal actors have cognizance of the bijurality of the laws. Thirdly, their structure is characterised by the civil law being cordoned off to the field of private law “thus creating the distinction between private continental law and public Anglo-American law.”<sup>367</sup> Palmer states that these common

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<sup>358</sup> *ibid.*

<sup>359</sup> Reid (n 353) 5.

<sup>360</sup> Frederick Parker Walton, *The Scope and Interpretation of the Civil Code* (Wilson & Lafleur Ltée 1907 Butterworths 1980) 1.

<sup>361</sup> Thomas B. Smith, ‘The Preservation of the Civilian Tradition in “Mixed Jurisdictions”’ (1966) 35 *Revista Juridica de la Universidad de Puerto Rico*, 263.

<sup>362</sup> *ibid.*, 265.

<sup>363</sup> *ibid.*

<sup>364</sup> See Nir Kedar, *Law, Culture and Civil Codification in a Mixed Legal System* (2007) 22 (2) *Canadian Journal of Law and Society* 177.

<sup>365</sup> Vernon Valentine Palmer, ‘Two Rival Theories of Mixed Jurisdictions’ (2007) *Electronic Journal of Comparative Law* <http://www.ejcl.org/121/art121-16.pdf> accessed 1st July 2015.

<sup>366</sup> Palmer (n 357) 8.

<sup>367</sup> *ibid.*, 9.

denominators set apart *classical* mixed jurisdictions from other hybrid and pluralist systems.<sup>368</sup>

The traditional mixed jurisdictions in order of age were Scotland, Quebec, Malta and Louisiana - “islands of the civil law surrounded by an ocean of common law”<sup>369</sup> and then expanded to include South Africa. They now include sixteen political entities: Scotland, Quebec, Malta, Louisiana, South Africa, Sri Lanka, Israel, Puerto Rico, the Philippines, Zimbabwe, Namibia, Lesotho, Swaziland, St. Lucia, Mauritius and Seychelles.<sup>370</sup> The French group, that is, those jurisdictions where the Napoleonic Code was introduced, is thought to be more resistant to common law incursions than uncodified civil law systems such as those of Scotland and South Africa. The debate about the mixity of other mixed jurisdictions, both where the mix is intra legal and where the mixity is legal/cultural (political or customary) would only emerge later in the twenty-first century.<sup>371</sup>

### 3.2.3 The *Third Legal Family*

In 2001, Vernon Palmer published his seminal work on mixed jurisdictions<sup>372</sup> in which he argued that the expression *mixed jurisdiction* had become identified with countries or provinces whose legal systems comprised a mixed and mixing of civil law and common law traditions. He stated that the result was a new distinctive legal family- *the third legal family*.<sup>373</sup>

Indeed the jurists from the family, as enunciated by Palmer, felt their legal systems validated within their shared community, understood each other easily and did not feel alien in the other’s culture.<sup>374</sup> The nine overarching traits of these jurisdictions are summarised by Palmer and can be paraphrased as follows:

One, their founding or origin comprises an intercolonial transfer between a civil law and a common law power; two, the cultural voices or orientation of their jurists are purists, pollutionists or pragmatists in their struggle to preserve or promote either tradition;<sup>375</sup> three,

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<sup>368</sup> *ibid*, 11.

<sup>369</sup> Reid (n 353) 10.

<sup>370</sup> Palmer (n 357) 5-6.

<sup>371</sup> E. Örüçü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ [2008] 1 Electronic Journal of Comparative Law 12.

<sup>372</sup> Palmer (n 357).

<sup>373</sup> *ibid*, 15.

<sup>374</sup> Vernon Valentine Palmer, ‘Salience and Unity in the Mixed Jurisdiction Experience : Traits, Patterns, Culture, Commonalities’ in Palmer (ed.), ‘Collectif, First Worldwide Congress on Mixed Jurisdictions’ (2003) 78 Tulane Law Review 1.

<sup>375</sup> Palmer (n 357) 40-4. He defines *purists* as “those who seek to keep the civil law coherent, unsullied by

their court structure, procedure and practice are peculiar in that they meld substantive civil law to an Anglo-American institutional framework; four, a crucial part is played by language both in the founding and evolution of the system, typically two source languages maintain and sustain the bijural systems; five, precedent is accepted in terms of vertical and horizontal binding but also as a superior source of law; six, their common law was a process of second reception and mingling with civil law; seven, distinctive legal creativity beyond the simple mixing of the legal components has resulted in *sui generis* norms or autonomous law; eight, Anglo-American procedure and evidence rules are melded onto the substantive civil law leaving visible imprints and nine, commercial law being moulded to suit the dominant economy.<sup>376</sup>

It is Palmer's assertion that the conception of the third legal family has the purpose of providing better insights in the mixed jurisdiction experience<sup>377</sup> and 'to make comparisons fruitful and generalizations worthwhile.'<sup>378</sup> Others see his work as providing a better awareness into the development of international law,<sup>379</sup> and of providing an insight into the harmonisation of laws inside the European Union and the world generally.<sup>380</sup> Further, as pointed out by Reid, whereas the early work on mixed jurisdictions was born out of a fear of the future of the civilian tradition, current studies "seems founded more on national self-discovery and self-confidence."<sup>381</sup>

### 3.2.4 The Expansion of the Debate

As pointed out above, Palmer recognised that there was a wider class of mixed legal systems,<sup>382</sup> of other mixes of laws. Mixity however is more complex as it may arise at two different levels: at the level of legal hybridity but also in the wider context of normative pluralism. The latter arises from the fact that law is whatever people consider as law:<sup>383</sup>

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encroachment and true to its sources," *pollutionists* as Anglo-Americans (or English speaking nationals) or who may "have only common law training" and "favour reception of common law rules or even the overthrow of civil law" and *pragmatists* as those who "may regard interaction of the two laws and its institutions as an inevitable process that permits the judge or legislator to blend the best features of both worlds and to create better rules than either system could offer on its own"

<sup>376</sup> Palmer (n 357) 19-92.

<sup>377</sup> *ibid*, 16.

<sup>378</sup> *ibid*, xiv

<sup>379</sup> See for example Colin B. Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008) 41(4) *Vanderbilt Journal of Transnational Law* 1093.

<sup>380</sup> See Jan M. Smits, 'Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures' (2007) 67 *Louisiana Law Review* 1181 and Jan M. Smits, 'Mixed Jurisdictions: Lessons for European Harmonisation?' *Journal of Comparative Law*'3 (2008), 15. See also Reid (n 326)18.

<sup>381</sup> Reid (n 353) 18.

<sup>382</sup> Palmer (n 357) 11.

<sup>383</sup> See Baudoin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) *European Journal of*

“norms of non-state law, folk law and customary law, remembering that the law is global, national and local.”<sup>384</sup> Hence, as pointed out by Donlan, both legal and normative hybridity are universal facts; hybridity is ubiquitous.<sup>385</sup>

In the first instance, it is important to note the difference between mixed legal systems and legal pluralism. The anthropologist, John Griffiths, in his seminal paper on legal pluralism,<sup>386</sup> defined legal pluralism as a situation where two or more legal systems co-exist.<sup>387</sup> He did not expand on his definition of law as such but distinguished between two types of pluralism: *strong legal pluralism* resulting from the fact that not all law is state law although administered by a single set of state-sponsored institutions and *weak legal pluralism* resulting from situations in which a state or sovereign recognizes different bodies of law for different groups in the population.<sup>388</sup> He acknowledged that both types of pluralism may coexist in one state. In this context, to use alternative terminology there is a coexistence of state law pluralism (weak legal pluralism) and *deep* legal pluralism (strong legal pluralism).<sup>389</sup> Donlan notes that this type of pluralism is omnipresent in society.<sup>390</sup>

For comparatists, the paradigm of legal and normative pluralism further muddies the water of legal taxonomy. Pluralism not only defies monism but complicates the comparative process. While it may have been challenging previously to study the different facets of the joining of European law with traditional or customary forms of law,<sup>391</sup> it is infinitely more difficult to ponder and analyse living law<sup>392</sup> with its pluralist complexities and to place it in legal families for taxonomic purposes.<sup>393</sup> A broad definition of legal pluralism which includes all types of normative orders runs the risk of rendering the comparative exercise impossible.

Örücü working generally within the context of legal positivism, suggests “a scheme that regards all legal systems as mixed and overlapping and groups them according to the proportionate mixture of ingredients”<sup>394</sup> as a way forward in the taxonomic exercise. Hence,

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Legal Studies.

<sup>384</sup> Esin Örücü, ‘Developing Comparative Law’ in Esin Örücü and David Nelken (eds) *Comparative Law: A Handbook* (Hart Publishing 2007) 61.

<sup>385</sup> Donlan (n 102) 16.

<sup>386</sup> John Griffiths, ‘What is Legal Pluralism?’ (1986) 32 (24) *Journal of Legal Pluralism and Unofficial Law*, 5.

<sup>387</sup> *ibid*, 1.

<sup>388</sup> *ibid*, 5.

<sup>389</sup> See Donlan (n 101).

<sup>390</sup> *ibid*, 4.

<sup>391</sup> See Sally Engle Merry, ‘Legal Pluralism’ (1988) 22(5) *Law and Society Review* 869,871.

<sup>392</sup> See Donlan (n 101) 17.

<sup>393</sup> Örücü (n 144).

<sup>394</sup> *ibid*, 172.

it may be possible to acknowledge that with any state or entity there may well be competing and contemporaneous legal orders. Her conclusion that more and more systems will be mixed and mixing and that the study of this mixedness may lead to an understanding of current or future patterns of legal development<sup>395</sup> provides a theoretical and holistic basis for analysing any system of law, including that of Seychelles. It may well be that the study of complex relationships between the different and competing layers of law and norms may reveal much more about one's legal tradition.

Finally, the contribution of Jan Smits in terms of *legal choice*<sup>396</sup> may also be a useful theoretical concept when looking at the Seychellois legal tradition. Smits contends that people are able and free to choose other legal regimes and engage in *legal tourism* to obtain the best possible option for a given circumstance.<sup>397</sup> Using examples from the European Union and other parts of the world, he illustrates examples of parties opting for particular laws other than those in their place of residence in contract law, family law and civil status.<sup>398</sup> He proposes, in conclusion, a set of essential laws that cannot be opted out of by a national or resident of the country and state tolerance for different options by its citizens in non-essential matters.<sup>399</sup> Smits' proposition may be counterintuitive for mixed jurisdictions that may, for national or other reasons, such as globalization, have a bias towards one legal tradition over the other.<sup>400</sup> This will be explored in the context of Seychelles.

### 3. 3 Chapter Conclusion

This chapter examines the theory and concepts associated with comparative law and mixed legal systems. It identifies the different purposes and methods of comparative law and explores the difficulties associated with the comparative legal discipline. It concludes that the comparative enterprise is worthwhile in providing an understanding of any given legal system. It advocates comparison that bears in mind plurality, context, culture and flexibility in terms of methodology- in short a holistic approach.

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<sup>395</sup> *ibid*, 185.

<sup>396</sup> Jan Smits, 'Beyond Euroscepticism: On the Choice of Legal regimes as Empowerment of Citizens'(2010) 6(3) *Utrecht Law Review* 68.

<sup>397</sup> *ibid*, 70.

<sup>398</sup> *ibid*.

<sup>399</sup> *ibid*, 74.

<sup>400</sup> Jan M. Smits, 'Mixed Jurisdictions: Lessons for European Harmonisation?' (2008) 12 (1) *Electronic Journal of Comparative Law* 5.

Legal taxonomy is explored to identify its purposes and to aid the comparative enterprise. It is acknowledged that there are unsatisfactory methods of classification, the shortcomings of some of the systems and concepts devised are analysed: legal systems and families, traditions, cultures, patterns, metaphors and family trees. The conclusion is that taxonomies inevitably fail because it is difficult to include legal hybridity and normative pluralism within a commensurate classification which also takes into account the plasticity, dynamism and adaptive evolutionary quality of legal systems. Nevertheless, taxonomy is useful in providing a descriptive, practical shorthand approach to examining legal traditions. In this respect as long as warnings of its shortcoming are heeded, the comparative enterprise can proceed.

The origins, description, broad similarities and differences of two major legal traditions, that of Continental Europe, specifically France and that of the common law tradition are examined with the purpose of providing a useful yardstick in comparing the Seychellois legal tradition which has adopted components of both traditions.

The chapter also proceeds to analyse the movement of legal traditions and its reception in terms of the theory of legal transplantation and diffusion. It is reiterated that transplantation may not fully explain the development of law in receptor countries and is suspect given its Eurocentricity. It is recognised that there is validity in a diffusionism that transcends one-way traffic between exporter and receptor countries and legal cultures.

A discussion of mixed legal systems and mixed jurisdictions and their definitions is explored highlighting their classificatory limbo and their distinguishing characteristics. A scrutiny of Palmer's third legal family in which the Seychellois legal tradition has been placed is explored within the wider context of legal hybridity and normative pluralism. It concludes nonetheless, that the adoption of Örüçü's theory of ubiquitous mixedness may provide a useful approach in examining the competing layers of law within the Seychellois legal tradition and that Smits' concept of legal choice is valuable in examining options for Seychelles.

## Chapter 4 - The Creation of the Seychellois Legal Tradition

*“For the study of Seychellois, many of whose ancestors were either slaves or slave owners, history is particularly important. Their past is not dead; it informs present attitudes and present social arrangements.”*<sup>1</sup>

### 4. Introduction

The historical foundation of Seychelles has not only played an important role in the creation of its legal tradition but has left a huge imprint on its subsequent development. The experiences of both slavery and colonialism have shaped the direction and manifestation of the different facets of its law. Some of these factors continue to influence and shape the form of its laws to this day; indeed they may even be responsible for some of the deficiencies apparent in the system. These deficits are the result, according to some critics, of an enduring *colonial mentality*<sup>2</sup> i.e. one that is subservient to the western hegemony and is neither independent nor assertive or relevant enough given the islands’ peculiar social make-up and present day circumstances. Yet another explanation may be that they are the consequences of the reception of civil law and common law, the resulting imbroglio and the lack of a clear legal identity or entity.

Law’s journey is paradoxically both the author and the emulation of Seychellois society: on the one hand pluralistic and distinctive and on the other hand a *métissage* and creolised entity which has melded into one amorphous mass. Nevertheless, law has also been an instrument of change and social reform. While initially used to institute and maintain a slave system, it has changed dramatically within two hundred years to produce the democratic system of government today.

This chapter is an overview and exploration of the Seychellois legal tradition in terms of its genesis, evolution and status today. The formation of a slave society, the subsequent layering of civil law and common law onto a small island state, a dependency of Mauritius, a colony of France and then Britain and finally independence has created a distinct and unique tradition.

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<sup>1</sup> Marion Benedict and Burton Benedict, *Men, Women and money in Seychelles* (University of California Press, 1982), 115.

<sup>2</sup> See for example Nasser Hussain *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003).

## 4.1 The Past

### 4.1.1 Discovery and Settlement<sup>3</sup>

Seychelles is a small island nation, an archipelago of 115 islands, lying 4 degrees south of the Equator in the western part of the Indian Ocean, approximately 1600 kilometres off the east coast of the continent of Africa.

There is no record of its ancient history. Navigators visited, made observations and charted some of the 115 islands of the archipelago which they marked as uninhabited. The Cantino World Map of 1502 does show Seychelles but the first authentic records are charts made by Pedro de Mascaregnas (1544) and the celebrated Vasco de Gama. In their charts, Mahé (the main island), and the adjacent islands were called *as sete irmanes* (the seven sisters), a name they kept until 1742.<sup>4</sup> There is a record of a landing in 1609 by the crew of an English East India company vessel, the *Ascension*, but no settlement by the English.<sup>5</sup> There is no doubt, however, that the islands were a pirate retreat as they had ideal conditions: they were uninhabited; they had good water, plentiful trees for masts, numerous creeks where ships could be repaired, plenty of food and no men-of-war to interrupt the nefarious activities. Indeed during the administration of General Decaen in Mauritius and the battle for the supremacy of the Indian Ocean, corsairs were encouraged to operate and were furnished with ships and arms for this endeavour.<sup>6</sup>

Seychelles' history is intricately bound with that of Mauritius. Mauritius had been discovered by the Portuguese but not settled; the Dutch settled in 1638 and gave it its name (after Prince Maurice of Orange) but they abandoned the island in 1712. The French took possession of Mauritius in 1715 and renamed it *Isle de France*. It was administered by the *Compagnie des Indes* (French East India Company) from 1722. In 1742, after it was ceded to France, the Governor General of Mauritius, Mahé de Labourdonnais, concerned about English ambitions in the Indian Ocean, decided to prevent any attempt by them to colonize other uninhabited islands in the area and despatched Captain Lazare Picault on a voyage of discovery.<sup>7</sup> On

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<sup>3</sup> See also Mathilda Twomey, 'The Parts That Make a Whole? The Mixity of the Laws of Seychelles' in Vernon Valentine Palmer, Mohamed Y. Mattar and Anna Koppel, *Mixed Legal Systems, East and West* (Ashgate 2015) 55.

<sup>4</sup> John Bradley, *The History of Seychelles* (Clarion Press 1940) 1.

<sup>5</sup> Council of the Hakluyt Society, *The Journal of John Jourdain, 1608-1617* (Cambridge University Press 1905) 349.

<sup>6</sup> Bradley (n 4) 8.

<sup>7</sup> Guy Lionnet, *The Seychelles* (David and Charles Publishers 1972) 57.

“Thursday 22 November at 4... [he] approached the shores of an unknown island, lowered [his] boats...”<sup>8</sup> and landed on Seychelles.

Picault named the island *Isle d’Abondance*. Another journey was made to the islands in 1743 and the island renamed, *Mahé*<sup>9</sup> after the Governor General of the Mascareignes. As the French then turned their attention to India there is a hiatus in the history of Seychelles until 1756 when René Magon, then administering Mauritius on behalf of the French, received information that the English were sending ships to discover any uninhabited islands in the Indian Ocean. To forestall his enemies, he sent an Irish sailor, Captain Cornelius Nicolas Morphey, to take formal possession of the islands for the French King. The islands were renamed *Séchelles*, perhaps after the French Controller General of Finances.<sup>10</sup>

No settlement was made on the islands by the French however until 1770.<sup>11</sup> Poor white families and landowners with slaves took up *habitations*,<sup>12</sup> planting maize, rice, bananas, coffee, cotton and spices including nutmeg, pepper and cinnamon. On 5 November 1788, during the administration by Malavois, the first law of Seychelles was decreed, putting an end to the freebooting life of the settlers.<sup>13</sup>

#### 4.1.2 French Rule

It is important to point out that there were no indigenous peoples in Seychelles and that two parallel or hybrid histories can be written in the period of colonisation- one for the French settlers and one for the slaves. This hybridity contributes to the character and nature of its legal tradition.

Altogether, the first settlers comprised of 15 whites, 7 slaves, 5 Indians and 1 *negress*.<sup>14</sup> By 1774 there were 775 slaves and a further 200 slave children born in the colony. There were still fewer than 50 white families.<sup>15</sup> White settlers were to come from Mauritius and also the

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<sup>8</sup> Bradley (n 4)10.

<sup>9</sup> Pierre Crépin, *Mahé de la Bourdonnais, gouverneur général des îles de France et de Bourbon (1699-1753) Société de l’histoire des colonies françaises* (Editions Leroux, 1922).

<sup>10</sup> Vicomte Moreau des Séchelles. Bradley (n 4) 10.

<sup>11</sup> Deryck Scarr, *Seychelles since 1770:History of a Slave and Post-Slavery Society* (Hurst and Company 2000) 2.

<sup>12</sup> An *habitation* was a free concession of land given to settlers consisting of 108 arpents (an arpent being a little larger than an acre), see Bradley (n 2) 171.

<sup>13</sup> Bradley (n 10) 34-35 The decree, a list of dos and don’ts in terms of the taking of tortoises, firewood , coconuts and land concessions represents a first Constitution of the Republic of Seychelles. Original document in the museum of Caen, France.

<sup>14</sup> Lionnet (n 7) 70.

<sup>15</sup> Bradley (n 4) 24.

French *métropole*, including seventy Jacobin deportees.<sup>16</sup> Historical records mostly describe the laws from the French settler's point of view. Reports of the lived experiences of slaves in Seychelles are virtually non-existent<sup>17</sup> but they could not have been very different from the conditions imposed on their brethren in Mauritius as recorded by Charles Grant in 1801:

“Their manner of life is as follows; at day-break, the smacking of the whip is the signal that calls them to their work; and they proceed to the plantation, where they labour in a state of almost entire nakedness, and in the heat of the sun. Their nourishment is ground maize boiled in water, or leaves of the manioc; and a small piece of cloth is their only covering. For the least act of negligence, they are tied hand and foot to a ladder, when the overseer gives them a certain number of strokes on their back with a long whip; and with a three pointed collar clasped round their necks, they are brought back to work. It is not necessary to describe the severity with which these punishments are sometimes inflicted... There is a law subsisting in favour of slaves, called the *Code Noir*; which ordains that they shall receive no more than thirty strokes at each chastisement that they shall not work on Sundays; that meat shall be given to them every week, and shirts every year; but this law is not observed.”<sup>18</sup>

Seychelles was a dependency of Mauritius, administered locally by appointed administrators. News of the French Revolution changed this arrangement temporarily. The settlers, in the spirit of the Revolution, set up their own Colonial Assembly, drafted a constitution without reference to Mauritius or France, invested the Assembly with both criminal and civil judicial powers and declared Seychelles a separate colony from Mauritius. Two attempts to reject this self-assertion, to modify the self-imposed constitution and to bring Seychelles back under the control of Mauritius failed.<sup>19</sup> Commandant Esnouf, of the Pondicherry regiment who had been sent to retake control, was snubbed, more than likely because he tried to enforce the abolition of the *Code Noir*,<sup>20</sup> something which found little support among the colonists, the visiting corsairs and slavers. It was only the arrival in Seychelles in 1793 of Commandant Quéau de Quinssy (also from the Pondicherry regiment and in his youth a page to Louis

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<sup>16</sup> Lionnet (n 7) 87. See also M Frescourt, *Histoire de la double conspiration de 1800* (Guillaume 1819).

<sup>17</sup> Benedict and Benedict (n 1).

<sup>18</sup> Charles Grant, *The History of Mauritius* (W. Bulmer 1801) 77.

<sup>19</sup> Guy Lionnet, ‘Les Effets de la Révolution Française aux Seychelles’ in Claude Wanquet and Benôit Julien (eds) *Révolution Française et Océan Indien: Prémices, paroxysmes, héritages et déviations* (L’Harmattan 1996) 191.

<sup>20</sup> Decree defining conditions of slavery. For some of these conditions see Burton Benedict, ‘Slavery and indenture in Mauritius and Seychelles’ in James L. Watson *Asian and African Systems of Slavery* (University of California Press, 1980).

XV)<sup>21</sup> which re-established formal control by Mauritius.<sup>22</sup> The beginning of the governorship of Decaen, the then Captain-General of the French settlements beyond the Cape of Good Hope, put an end to the Seychelles Colonial Assembly.<sup>23</sup> De Quinssy's administration saw the flourishing of the colony but also a series of seven capitulations<sup>24</sup> in total to the British (1794, 1801, 1804, 1805, 1806, 1807 and 1810) with the French flag rehoisted as soon as the British had sailed (earning de Quinssy the nickname of the *Talleyrand of the Indian Ocean*). The terms of these capitulations, however ephemeral their duration, ensured that French laws would remain in force even after the Capitulation of 1804:

“... [Les habitants] observeront pendant la durée de la capitulation une exacte neutralité et ils se régiront pendant toute sa durée, quant au civil sous les lois françaises, sans que les dits habitants pendant ce terme puissent rien innover...”<sup>25</sup>

In summary, the laws of Seychelles during French rule had four distinct periods: first, the laws of the Compagnie des Indes from 1722 to 1766,<sup>26</sup> second, the royal decrees promulgated by the King of France from 1766 to 1790 including the *Code Noir*<sup>27</sup>, third, the edicts published by the Colonial Assembly of Mauritius from 1790 to 1803 and fourth, the laws of Decaen from 1803 to 1815.<sup>28</sup> It is important to distinguish in these laws those that applied to the whites, those to the free blacks and those to the slaves: civil law for the white population consisted of the *Coutume de Paris* and the *Code Louis*<sup>29</sup> for civil procedure and the *Code Noir* for the population of slaves.

The *Code Noir*, inspired by Roman law, equated slaves with moveables, the ownership and sale of which were regulated by ordinances and customary practices applied to other moveables. The main dispositions of the Code prohibited both marriage and concubinage with whites, stated the incapacity of the slave to possess or inherit property, to contract or to

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<sup>21</sup> Scarr (n 11) 22.

<sup>22</sup> Albert Auguste Fauvel, *Unpublished documents on the history of the Seychelles Islands anterior to 1810* (Government Stationery Office 1909)189.

<sup>23</sup> *ibid* 324-325.

<sup>24</sup> The term *capitulation* refers to the surrender of Seychelles as a colony of France to Britain.

<sup>25</sup> Article 3, Capitulation of Seychelles, 22 November 1804. (The inhabitants will, during the period of capitulation, observe strict neutrality and will govern themselves during said period with respect to civil matters according to French law, no amendments to it being permitted...)

<sup>26</sup> There was little legislation apart from those relating to slavery. These in any case ceased to have effect after 1788. See Sir Victor Glover 'Legislative Drafting in Mauritius: A Developing Discipline' [http://www.opc.gov.au/calc/docs/Loophole\\_papers/Glover\\_Aug2011.pdf](http://www.opc.gov.au/calc/docs/Loophole_papers/Glover_Aug2011.pdf) accessed 1st July 2015.

<sup>27</sup> The Code Noir formed part of Louis XIV's edict of 1685 providing for the policing of slavery.

<sup>28</sup> Glover (n 26).

<sup>29</sup> The Code Louis XIII also known as 'Grande Ordonnance de Procédure Civile' of 1667, was a comprehensive legal code attempting a uniform regulation of civil procedure throughout France.

initiate legal action.

The coloured and freed slaves (*les affranchis*) existed in an uncertain in-between legal regime, the rules of which were sometimes those applicable to the white citizens, while at other times those applicable to slavery, this despite the fact that an edict of 1723 had provided that they were to enjoy the same rights and privileges as those persons born free.<sup>30</sup> In any case Captain-General Decaen decreed their legal incapacity once again in 1804, maintaining that it was not possible to extend such principles to the freed slaves in order to maintain good conduct.<sup>31</sup>

The *Code Noir*, though softened somewhat by Decaen's amendment, maintained a rigid and ruthless regime for the slave. An account of one of the most brutal applications of its provisions is that recorded for the trial of a slave named Pompée, who was accused of murdering his overseer, Pierre Michel Isnard. He argued in his defence that he had been beaten and badly *commanded*.<sup>32</sup> In finding Pompée guilty and condemning him to death the tribunal ordered that he be burnt "as it is not possible on this island to find an executioner;" and it is further noted that the sentence was executed near the sea, close by the Moosa River on July 29, 1810 at 3.30am.<sup>33</sup>

A *Code Pénal* was published on 15 October 1791 and adopted by the Colonial Assembly of Mauritius in 1793. The *Code Civil* was promulgated in Mauritius on the 25 September 1805 as was the Law of 3 September 1807, which was in effect a new edition of the Civil Code under the title of *Code Napoléon*. Decaen published the French *Code de Procédure Civile* on 20 July 1807 and after several modifications the *Code de Commerce* on the 1 October 1809 and the new *Code Pénal* in 1810. Some of the provisions of these Codes remain in force in Seychelles to this day. During Decaen's administration, litigants in Seychelles had the right of appeal to the Supreme Court in Mauritius. That court was composed of a President, Vice-President, three judges, four clerks, and a Government Commissioner with his clerk and the clerk to the court. There was no jury. Seychelles was only allowed a Justice of the Peace and

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<sup>30</sup> Raymond Marrier d'Unienville, *L'Evolution du Droit Civil à L'Île Maurice (1721-1968)* (Best Graphics 1994) 37-40.

<sup>31</sup> Law of 3 pluviôse an XII ( 24.01.1804) : "Il convient de rétablir aux colonies orientales les principes qui tendaient à y maintenir les bonnes moeurs et l'ordre des fortunes."

<sup>32</sup> The proceedings of his trial note: "À Répondu que C'étoir parsku le sieur Isnard le commandoirs mal et qu'il le battoirs, es qu'il netoirs pas contens d'être commandé par un blanc..."

<sup>33</sup> His trial is recorded and preserved in the Seychelles National Archives. The transcript reads : "... pour réparation de quoi le condamne à la peine de mort. Comme il n'ess pas possible de trouver en cette isle un boureau pour décoler le coupable, le tribunal ordonne que le dis coupable sois brulé."

a clerk to the Justice and to the Court. Criminal affairs were judged by French laws of 1670 until they were repealed in the revolution of 1793.<sup>34</sup> Two notaries, appointed from Mauritius, were allowed to Seychelles. Even today in cases of land disputes and ownership of properties, deeds of these former notaries continue to be consulted.

Mauritius and Seychelles were fought over by the British because they commanded the route between India and the Cape and piracy by the French corsairs was a menace to the British East India Company ships sailing from India.<sup>35</sup> By 1806 however, the Union Jack had been firmly planted on Seychelles soil and the ever pragmatic de Quinssy flew the Capitulation flag on all ships travelling from Seychelles.<sup>36</sup> The ships thus protected passed without interference to the blockaded port of Port Louis in Mauritius. This assured not only the continuation of trade but the prosperity of Seychelles even during the worst hostilities.<sup>37</sup>

By July 1810, de Quinssy had received a copy of the proclamation of Sir Robert Farquhar, the first governor of the nearby Isle de Bourbon (Réunion), captured from the French, inviting Mauritius to surrender to British rule. On 3 December of the same year, after a short battle, Mauritius finally fell to the British and because of its dependency on its mother colony, so did Seychelles. The terms of the Mauritian Capitulation again ensured the continuation of existing laws, specifically Article VIII, “que les habitants conserveront leur religion, leurs lois et coutumes.”<sup>38</sup>

In 1814, when the Treaty of Paris was under consideration, the question of returning the islands to France came up for discussion. England was prepared to exchange them for its remaining French possessions in India but France refused this proposal. Bourbon (Réunion) was returned to France and remains a French *département d’outre-mer* to this day. Seychelles, a dependency of Mauritius, stayed with the British. These three countries, cheek by jowl in the Indian Ocean, today share the same gene pool, speak very similar Creole languages and yet have different legal regimes.

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<sup>34</sup> Bradley (n 4)122-123.

<sup>35</sup> Michael Franda, *The Seychelles, Unquiet Islands* (Gower Publishing Company 1982) 13.

<sup>36</sup> Jean-Louis Guébourg, *Les Seychelles* (Karthala 2004).

<sup>37</sup> *ibid.*

<sup>38</sup> Article VIII, Capitulation of Mauritius, 1810. (The inhabitants will retain their religion, their laws and customs...)

### 4.1.3 British Rule and the *Inter Colonial Transfer*

#### 4.1.3.1 The Effects of Capitulation

At the time of capitulation to Britain in 1814, the composition of the population would have been more or less the same as recorded by a census taken in 1804: 215 whites, 86 coloured and 1820 blacks making a total population of 2121.<sup>39</sup>

The first English governor was Sir Robert Townsend Farquhar, residing in Mauritius. Despite the appointment of Lieutenant Bartholomew Sullivan of the Royal Marines as British Civil Agent in Seychelles, de Quinssy remained as the juge de paix until 1815. French laws continued to be applied unchanged.<sup>40</sup>

The Capitulation of 1810 was formalised by a Proclamation on 5 December 1810<sup>41</sup> but at the Treaty of Paris in 1814<sup>42</sup>, no allusion was made either to the terms of the Seychellois and Mauritian Capitulations preserving French law or to the fact that the islands were ceded to Britain “in full right and sovereignty.”<sup>43</sup> Justice Wood Renton,<sup>44</sup> in this context, argues that since the Treaty was never confirmed by any Imperial statute, the maintenance of French law depended solely on the Capitulation and Proclamation and the rule in *Campbell v Hall*.<sup>45</sup> Hence, in his estimation, the laws preserved were those enacted up to 1787 (the *Code Delaleu*),<sup>46</sup> those passed between 1787 and 1803, and the *Code Decaen* containing the French Civil and Commercial Codes and the Code of Civil Procedure, but not the Napoleonic *Code Pénal* or the Criminal Procedure Code which had never been promulgated. In consequence, until 1831 the old French Criminal Ordinance of 1671 still obtained, as did the French Penal Law of 1791, until 1838.<sup>47</sup>

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<sup>39</sup> Bradley (n 4) 124.

<sup>40</sup> Scarr (n 11) 39.

<sup>41</sup> Robert Townsend Farquhar, *Code régissant la législation aux Seychelles* (Government Press 1822).

<sup>42</sup> The Treaty of Paris, dated the 30 May 1814 and ratified by the Vienna Congress on the 9th June 1815 provided inter alia that France hand over to Britain Monarchy a number of its colonies including Mauritius and its dependencies inclusive of Seychelles.

<sup>43</sup> Justice Wood Renton, ‘French law within the British Empire’ (1909) 10 (1) *Journal of the Society of Comparative Legislation*, 105.

<sup>44</sup> *ibid.*

<sup>45</sup> *Campbell v Hall* [1558-1774] All ER 252, 255 “The articles of capitulation on which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.”

<sup>46</sup> M. Delaleu *Code des Isles de France et de Bourbon* (L’imprimerie Royale 1777). The Code Delaleu, also known as the Code Jaune, regulated the regime under which slaves were kept in Reunion, Mauritius and its dependency Seychelles.

<sup>47</sup> Justice Wood Renton (n 43)106.

The laws enacted from 1810 to 1840 are collectively referred to as the *Code Farquhar*. In this respect, French law continued to operate but in an English context. Both the English language and English law were introduced tentatively. During those first thirty years of British colonial rule, local ordinances, the Governor's Proclamations, and other Public Acts or Notices of the Executive Government were usually promulgated both in English and French and both versions deemed authoritative.<sup>48</sup> After 1841, all laws, including those that amended the French Codes, had thereafter to be written in English.<sup>49</sup> However, in the case of *Ramjan Mirza*,<sup>50</sup> in considering the English and French versions of the Penal Code, the Supreme Court of Mauritius stated that the accused was entitled to benefit from a contradiction or a difference between the two texts, where any existed. Unlike Seychelles, later legislation in Mauritius<sup>51</sup> reversed this restriction, authorising the Mauritian legislature to legislate in the French language with regard to amendments to Codes which were drafted in French or in English and French.

As for the retention of French law, the Privy Council in the case of *Lang & Co. v Reid & Co.*<sup>52</sup> accepted that French law was preserved on the islands by the capitulations. More emphatically, in 1902, the Supreme Court of Mauritius unanimously held in the case of *Colonial Government v Widow Laborde* that:<sup>53</sup>

“The provisions in the Capitulation of 1810, ceding Mauritius to England, that the religion, laws, and customs of the inhabitants should be preserved was not abrogated by the Treaty of Paris 1814, either because the treaty was silent as to it, or because the treaty ceded the colony to England in full right and sovereignty.”

But academic disputes about the effects of capitulations in international law have continued.<sup>54</sup> In 1952 when the Bill for the new Penal Code of Seychelles was first moved in the Legislative Assembly, Gustave de Commarmond, the member for Praslin and La Digue, objected strenuously on the grounds that it contravened the terms of Capitulation. The new Code was eventually adopted on the recommendation of the committee of lawyers who had

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<sup>48</sup> This had given rise to difficulties as to whether the English or French version would be regarded as the original and authentic version.

<sup>49</sup> Order in Council, 25 February 1841.

<sup>50</sup> *R v. Ramjan Mirza* (1891) MR 9.

<sup>51</sup> Order in Council, 25 January 1962.

<sup>52</sup> *Lang & Co. v Reid & Co.* (1858) 12 Moo. PCC 72, 88.

<sup>53</sup> *The Colonial Government v Widow Laborde & ors* (1902) MR 19.

<sup>54</sup> J. W. Bridge, ‘Judicial Review in Mauritius and the continuing Influence of English law’ (1997) 46 I.C.L.Q. 787

received the advice of Sir Sydney Abrahams, a member of the Privy Council.<sup>55</sup> In contrast, in 1961 Sir Rampsesad Neerunjun, the Chief Justice of Mauritius, went as far as to state that the *Code Napoleon* had survived through an erroneous interpretation of the Treaty.<sup>56</sup> In 1997, the Privy Council in the case of *Matadeen v Pointu*<sup>57</sup> had to consider whether *La Déclaration de Droit de l'Homme et du Citoyen*,<sup>58</sup> more specifically the concept of *égalité* (equality) contained therein, adopted in 1793 by the Colonial Assembly of Mauritius, had survived Capitulation. It found that it had but that the provisions of the Declaration could not curtail the application of the provisions of the Constitution of Mauritius which was supreme law.

#### 4.1.3.2 The Initial Mixing of Common Law and Civil Law

Raymond d'Unienville<sup>59</sup> argues that it was the personal efforts of Farquhar, who was sympathetic to the plight of the settlers, which led to the maintenance of French laws in the colony. Farquhar travelled from Mauritius to London and for a period of two years negotiated with Lord Bathurst, the Colonial Secretary, his Undersecretary, Goulburn and the astute legal adviser, James Stephen, to persuade them not to impose English law on the colony and its dependencies.<sup>60</sup>

A letter from Bathurst dated 28 March 1820<sup>61</sup> certainly confirms the retention of French laws and infuses in the mix the first English legal doctrines.<sup>62</sup> This was confirmed by an Order in Council in 1831, namely that the Civil, Commercial and Civil Procedure Codes would be preserved except where modification was necessary, but that English criminal law would henceforth be applied. A jury would be empanelled for criminal cases, civil courts would be presided over by a judge and two assistants; the Court of Appeal would be reduced to four judges, two of whom would be English and the Court would be invested with powers of a Court of Equity as well as that of a Court of Law and Civil Commissioners would be invested with the powers of Justices of the Peace.<sup>63</sup>

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<sup>55</sup> Lionnet (n 7) 122-123.

<sup>56</sup> Marrier d'Unienville (n 30).

<sup>57</sup> *Matadeen v Pointu* [1998] UKPC 9.

<sup>58</sup> The Declaration of the Rights of Man and the Citizen.

<sup>59</sup> Raymond Marrier d'Unienville, 'Capitulation Revisited : Ce que nous devons a Farquhar' (2012) Mauritius Law Review 17.

<sup>60</sup> *ibid.*

<sup>61</sup> Colonial Office Papers 168/6, National Archives Kew London.

<sup>62</sup> Charles Clark, *A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies* (S. Sweet 1834) 586.

<sup>63</sup> Colonial Office Papers (n 59).

The integration of the black population with the white settlers was a gradual but fraught process. The ambiguity in terms of the status of the freed slaves resulted from the fact that the terms of Capitulation had emphasised that Mauritius and Seychelles were to retain their laws and customs. The white population supported by Farquhar equated slavery with custom.<sup>64</sup> Hence, despite the fact that an Act of Parliament in Britain had abolished the slave trade in 1811, the status quo did not change in the Indian Ocean colonies. Even in terms of the freed slaves the Order in Council of 22 June 1829, ordering that they be given the same rights as the white population, did not achieve much in practice.<sup>65</sup> The abolition of slavery itself, although promulgated in February 1835, did not take place until 1838 as the liberated slaves had to undergo an apprenticeship for their new life and to enable their previous masters to reorganise the labour force.<sup>66</sup> The emancipation of the slaves caused friction between the French settlers and the English administration. Webb states that:

“It has been said that the colony started badly during the epoch of the French Revolution (1790-1794), was transformed to affluence under the able administration of De Quincy (1794-1827) and died by the act of emancipation of the slaves (1835).<sup>67</sup>

Unable to make a living after the abolition of slavery, a number of families with some three hundred slaves left Seychelles. Those that remained blamed the British for depriving them of slave labour and instilling idleness in the liberated Africans. Webb states that in the face of mounting demand to force the freed slaves to return to work, eventually it had to be explained to them that “idleness is a vice, but it is not a statutable offence.”<sup>68</sup>

The abolition of slavery did catalyse the change that saw the previous rigid social hierarchy with the white, rich and powerful at the top and the black, poor and impotent at the bottom gradually disintegrate.<sup>69</sup> The British administered Seychelles but, unlike the French, did not settle English people on Seychelles soil. The British expatriates that came as part of the administration fathered children with Creoles to a very limited extent. As Seychelles entered the twentieth century its population was about 20,000, composed:

“of French and Anglo-Saxon elements, with blacks of different sorts from India, Madagascar, and every part of Africa; a few Chinese shopkeepers... In the *society*

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<sup>64</sup> Marrier D’Unienville (n 30) 42.

<sup>65</sup> *ibid*, 45.

<sup>66</sup> Lionnet (n 7) 98.

<sup>67</sup> A.W. T. Webb, *The Story of Seychelles* (Seychelles Government Printer 1966) 49.

<sup>68</sup> *ibid*, 53.

<sup>69</sup> Benedict and Benedict (n 1).

of the islands [in 1907, were found those] as have continued to keep their families untarnished - there are remarkably few that have done so- together with the pure-blooded descendants of such English officials and planters as have settled on the islands since their annexation.”<sup>70</sup>

In the eyes of Stanley Gardiner, Seychelles society then was quite racially distinctive. The blacks had evolved into four classes:

“those who own land, separated further into those who have and those who have not Western blood, and those who have no land, enfants des îles, and foreigners.”<sup>71</sup>

The *foreigners* were recently freed slaves, still with their tribal markings.<sup>72</sup> Those with land had mostly acquired it because of the *Code Napoléon* which provided for shares in their white landowner parent’s property if their illegitimacy had been recognized by him before his death.<sup>73</sup> M.T. Reid, the Financial Commissioner from Britain who visited Seychelles in 1933, records that the population had risen to 27,444 but, by then, the métissage of race was already well underway. He states that the composition of the population can no longer be recorded because “it would be difficult to do so where there are many of mixed blood making no claim to be pure white.”<sup>74</sup>

Of their identity, he states:

“[t]hey are French in outlook, politically Seychellois first though British subjects as well. They resemble French people in many ways, but a tropical environment has done its work... [producing] a disposition to a feckless hedonism...”<sup>75</sup>

Seychelles continued to be administered by Civil Agents and Commissioners under the direct orders of the Governor of Mauritius and under Mauritian law applicable by implication. Although an Order in Council in 1888 created both a Legislative Council and a Supreme Court in Seychelles, in the case of the former it reserved legislative power to Mauritius and in the case of the latter it was subordinate to the Supreme Court of Mauritius.

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<sup>70</sup> J. Stanley Gardiner, ‘The Seychelles Archipelago’ (1907) 29 (2) *The Geographical Journal* 148.

<sup>71</sup> *ibid* 156.

<sup>72</sup> *ibid*.

<sup>73</sup> Articles 756 and 760 of the Code Civil.

<sup>74</sup> Bradley (n 4) 346.

<sup>75</sup> *ibid*.

By 1900, there was still only one court in Seychelles, which had jurisdiction over both civil and criminal matters not necessitating a jury. In cases of appeal and serious criminal offences recourse was had to the Supreme Court of Mauritius.<sup>76</sup> The digest of decisions of the Court of Appeal<sup>77</sup> from 1870 to 1902 shows that the judicial style of decision writing had already changed from the French short-style to that of English reasoned judgments.

#### 4.1.3.3 Vigorous Mixing in the Twentieth Century

It took a number of constitutional steps to upgrade the status of Seychelles from a dependency and it was only in 1903 that it became a fully-fledged colony,<sup>78</sup> detached from all control by Mauritius. The laws in force were preserved except where they were incompatible with legislation passed by Seychelles.<sup>79</sup> But it is also at this juncture that the erosion of French law would begin and mixing with English law would accelerate more rapidly than in the case of Mauritius, whose laws developed separately from Seychelles from then on.

The following examples illustrate the potent mixing that took place and the various problems that were encountered:

Section 21 of the 1903 Order in Council (preserved by section 12 of the current Evidence Act, Cap. 74 of the Laws of Seychelles) states that “except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.”

In *Paul Gardette v R*,<sup>80</sup> a case of fraud, the Court of Appeal of Eastern Africa<sup>81</sup> in an Appeal from Seychelles on whether oral evidence could be admitted despite the prohibition in article 1341 of the *Code Napoleon* (as the principle had been extended to criminal trials in France), stated that it was the English law of evidence that applied, at least in criminal trials. In 1969 in the case of *Kim Koon & Co. Ltd. v R*,<sup>82</sup> the question arose as to whether section 12 of the Evidence Act meant the English law of evidence *from time to time* or as in force on the date of the enactment of section 12 of the Evidence Act. The Court held that it meant the law as it

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<sup>76</sup> Matthew Murat, ‘Gordon’s Eden or, The Seychelles Archipelago’ (1900) Foreign and Commonwealth Office Collection, 14.

<sup>77</sup> Paget Bourke, *A Digest of the Ruling Decisions of the Supreme Court of Seychelles from 1903 to 1933 and the Reported Cases on appeal therefrom to His Majesty’s Privy Council from 1870 to 1902* (Government Press Seychelles 1934).

<sup>78</sup> Letters Patent, August 31, 1903.

<sup>79</sup> Seychelles Legislature in Council 1903.

<sup>80</sup> *Gardette v R* (1959) SLR Vol 2 191.

<sup>81</sup> Criminal Appeals from Seychelles were subject to jurisdiction of the Court of Appeal of Eastern Africa until 1954.

<sup>82</sup> *Kim Koon & Co. Ltd. v R* (1969) SCAR 60.

stood only at the time of the enactment of the Evidence Act. Sauzier J<sup>83</sup> suggests that this limitation applies only to statute law and not to courts interpreting common law. The question does arise however (and this has not been decided) as to whether this would include new concepts of the common law.<sup>84</sup>

In civil cases, the English law of evidence prevails except where special laws exist; and such special laws are numerous in terms of the provisions of the Civil Code. They can sometimes go not only to proof but to the validity of transactions as in the case of gifts, wills, leases and mortgages.<sup>85</sup>

Another example of mixing is the 1904 Penal Code. This was in effect a patchwork of the previous French Code with some importations from the British Indian Penal Code.<sup>86</sup> It was to remain in force until 1955 when it was replaced by a new Penal Code, this time based on the Penal Code of East Africa which was itself derived from English law.<sup>87</sup> In deciding criminal cases to this day in Seychelles, English, East African, Mauritian and Indian precedents are referred to. Lately cases from other common law countries have also been relied on.<sup>88</sup>

The Seychelles Code of Criminal Procedure and the Seychelles Code of Civil Procedure were promulgated respectively in 1919 and 1920. In the case of the latter, again because of the retention of the *Code Napoleon*, several provisions of the original French Civil Procedure Code were also saved. This includes the quaint but useful French procedure of *interrogatoire sur faits et articles*<sup>89</sup> contained in sections 169-170 of the Code (sections 162-167 of the present Seychelles Code of Civil Procedure). In such circumstances, the party called to testify does not do so on oath, and is treated as an adverse witness for the purpose of obtaining an admission or statement prejudicial to his cause or to substantiate his opponent's case. It is most commonly used to obtain an *aveu judiciaire*<sup>90</sup> or to get around the rule against oral

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<sup>83</sup> André Sauzier was a former Attorney General, Supreme Court and Court of Appeal judge of Seychelles, an author and legal expert on the laws of Seychelles. He died in 2014.

<sup>84</sup> André Sauzier, *Introduction to the Law of Evidence in Seychelles* (2nd edn City Print 2011) 2.

<sup>85</sup> *ibid* 5.

<sup>86</sup> Scarr (n 11) 149. For the antecedents of the Seychelles Penal Code, see Mathilda Twomey, 'Mongrel Laws or Model Code? The Antecedents of the Penal Code of Seychelles' (2015) *Journal of Comparative Law in Africa* (forthcoming).

<sup>87</sup> *ibid*, Twomey.

<sup>88</sup> For examples see reported cases in Anthony Angelo, *Leading Cases of Seychelles 1988-2010* (Law Publications 2010).

<sup>89</sup> Translated in the Seychelles Code of Civil Procedure as "examination of parties on personal answers." See Chapter 5 of this thesis on procedure.

<sup>90</sup> Judicial admission.

evidence in article 1341 of the Civil Code of Seychelles, where a party to a suit is unable to provide adequate proof of the averments in the pleadings.

Section 327 of the present Seychelles Code of Civil Procedure expresses the status quo with regard to French provisions that have survived and those that are obsolete by stating that:

“Articles of the French Code of Civil Procedure repealed by any law which is repealed by this Code shall remain repealed.”

Finally, some Napoleonic Code provisions, notably in relation to the law on domicile<sup>91</sup> and the law of defamation<sup>92</sup> were also amended with the introduction of English law concepts.

#### **4.1.4. Independence**

##### **4.1.4.1 Recodification**

In the years preceding the independence of Seychelles from Great Britain, the colony was groomed for the event. It was determined that several aspects of its legal system had to be modified or tweaked if it was to meet the challenges of nationhood. In addition, the construction of new shipping facilities and Seychelles International Airport in 1971 awakened the islands to the economic realities of the twentieth century. Sauzier J summarises the position thus:

“This event had the same effect as the kiss of Prince Charming on Sleeping Beauty. Seychelles opened up to the world and experienced an immediate economic boom. This change required an updating of the law, especially the Civil and Commercial Codes, in order to bring them in line with the economic reality of Seychelles.”<sup>93</sup>

To modernize and equip Seychelles with the requisite economic and legal tools to meet the new challenges of a young nation, it was felt necessary to redraft the Code of Commerce. The work was undertaken by the English expert, Professor Robert Pennington, who had done similar work for Trinidad and Tobago. The Code of Commerce was largely replaced by the Companies Ordinance 1972, which was based on English company law. Few provisions of the French Code of Commerce promulgated in 1809 survived the revision but the original numbering is preserved although the provisions are translated into English. The most

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<sup>91</sup> Domicile Act, Cap. 66, Laws of Seychelles.

<sup>92</sup> Defamation Ordinance, 1948, repealed and replaced by Article 1383-3 of the Civil Code of Seychelles.

<sup>93</sup> André Sauzier ‘The Influence of the French Judicial Model on the Seychelles’ (Nichole Tirant-Gherardi tr.) <http://www.bas.sc/law-journal-1/theinfluenceofthefrenchjudicialmodelontheseychelles> accessed 1st July 2015.

important provisions that remain are those regulating commercial books, pledges, the sale of goods and arbitration.

The most dramatic change to the legal landscape came in the work of Professor A.G. Chloros who was charged not only with the revision of what remained of the Code of Commerce after the promulgation of Pennington's new company law but more importantly with the Napoleonic Code. He preserved the shell of the Napoleonic Civil Code which had been introduced in 1808, maintaining the 2281 articles, although in effect not all the 2281 articles remained in existence.<sup>94</sup> Some interesting parallels with other jurisdictions may be made. Article 1, largely borrowed from the Louisiana Code, states: "Law is a solemn and public expression of legislative will."<sup>95</sup>

Other innovations concern judicial appointment of guardianships.<sup>96</sup> In changing the law substantively on this issue, Chloros argued that neither the English nor French notions of guardianship were applicable in Seychelles as these were far too sophisticated "for the very different society of an African country"<sup>97</sup> and that "substantial injustices were done in the name of the very persons whom the law intended to protect."<sup>98</sup> This has drawn sharp criticism from legal practitioners in Seychelles who not surprisingly have found those comments condescending and unfounded<sup>99</sup> and the new provisions problematic in practice.

Another innovation to the law is the concept of trusts partially introduced in cases of co-ownership of property.<sup>100</sup> While Chloros claims to have acknowledged that the concept of trusts did not exist in Seychelles and borrowed from Scots law for this provision, he introduces the concept of a fiduciary.<sup>101</sup> The fiduciary (whose duties seem similar to that of a

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<sup>94</sup> A.G. Chloros *Codification in a Mixed Jurisdiction: The Civil and Commercial law of Seychelles* (North Holland Publishing 1977) 7.

<sup>95</sup> *ibid.* See also Michael Bogdan, *The Law of Mauritius and Seychelles* (Juristförlaget i Lund 1989) 44-46. Article 1 of the Civil Code of Louisiana refers to the 1870 Revised Civil Code of Louisiana. This provision was substantially changed in the revision of 1987. See A.N.Yiannopoulos 'The Civil Codes of Louisiana' (2008) 1 Civil Law Comment 1, 1. [http://www.law.tulane.edu/uploadedFiles/Institutes\\_and\\_Centers/Eason\\_Weinmann/v01i01-Yiannopoulos\(1\).pdf](http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Eason_Weinmann/v01i01-Yiannopoulos(1).pdf) accessed 1st July 2015.

<sup>96</sup> Article 402- 422, 429 - 437 Civil Code of Seychelles.

<sup>97</sup> Chloros (n 92) 52. Chloros states, "The administration and the control of a minor were very complicated indeed. These features are still retained in France, However, it is doubtful at the very least, tradition apart, they are suitable for the very society of an African country."

<sup>98</sup> *ibid.*

<sup>99</sup> See for example Hodoul J in *Louise v Barbier* SCA 14/2005 (unreported).

<sup>100</sup> Article 818 of the Civil Code of Seychelles states " If the property subject to ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act."

<sup>101</sup> Articles 824-835 Civil Code of Seychelles. See also A. G. Chloros, 'The Projected Reform of the Civil Law of the Seychelles: An Experiment in Franco/British Codification' (1974) 48 Tulane Law Review 815, 839.

trustee) is the only person through whom the co-owners may act but the redacted provision seems to do away with co-ownership altogether:

“When a property ...is transferred to two or more persons, the right of co-ownership shall be converted into a claim to a like share in the proceeds of sale of any such property.”<sup>102</sup>

This is not helped by Article 817-2 which seems to be an afterthought and does nothing in terms of solidifying either the notion of trusteeship or co-ownership:

“Paragraph 1 of this article regulates the exercise of the right of co-ownership. It does not affect the rights of co-ownership itself.”

There have been several court challenges on this issue but it now appears to be established that the fiduciary provision only affects the exercise of the right of co-ownership and not the transfer of the right.<sup>103</sup>

Professor Chloros is also much criticised for his translation of *titre* to *instrument of title*.<sup>104</sup> While the word *titre* in French law has a variety of meanings, including an authentic deed or a right, Professor Chloros limits the application of the concept in the law of property of Seychelles and leaves no room for interpretation when he translates the word into *instrument of title*, especially since section 5 of the Civil Code of Seychelles Act provides that:

“The text of the Civil Code of Seychelles as in this Act contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text.”

Another innovation of the Code concerns the provisions relating to floating charges,<sup>105</sup> a concept hitherto unknown in Seychelles or France.

#### **4.1.4.2 Ramifications of the End of Colonialism**

The hybridisation of the law in this period was paralleled by a progressive melding and mixing of race and language. By Independence Day on 28<sup>th</sup> June 1976 the once

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<sup>102</sup> Article 817 (1), Civil Code of Seychelles. This is further explored in Chapter 5 of this thesis.

<sup>103</sup> *Michel v Vidot No. 2* (1977) SLR 214 and *Legras v Legras* (1983-1987) SCAR 356.

<sup>104</sup> Article 690, Civil Code of Seychelles. See Sauzier (n 91) “...the translation has resulted in some cases in a complete betrayal: sometimes even a total change of the ambit and application of the original text. For example, the word *titre* was translated by the expression *instrument of title* which effectively means a written document whereas we do know that in French Law the expression *titre* carries with it a much wider meaning.”

<sup>105</sup> Article 2091, Civil Code of Seychelles.

heterogeneous population had fully hybridised into one homogenous Creole people. This progression may be explained and mapped out by the concept of *transculturation* as articulated by Fernando Ortiz.<sup>106</sup> This is a process that begins initially with hostility by whites against blacks, then progresses to a compromised co-existence followed by adaptation to each other's cultures and eventually to integration.<sup>107</sup> In Seychelles it was a gradual vindication of *négritude*<sup>108</sup> over white supremacy to unification under *creolité*.<sup>109</sup> The decision by the socialist government of 1981 to make Creole the first language taught in schools, with English taking over subsequently and French taught later as a foreign language<sup>110</sup> would complete the creolisation of the Seychellois nation.

However although Independence opened a new chapter in Seychelles history, enabling the nation to forge its own destiny, it did not afford a complete break with the past. Independence, paradoxically, engineered both a frenzied sense of alienation and a reflective identity in the national psyche, language and even law.<sup>111</sup> One cannot properly speak of a lost native cultural originality or the embrace of the culture of the mother country in the Seychellois context. That part of the identity that was African had no cultural or national whole as the slaves “[u]prooted as individuals and not as social groups...rapidly lost their cultures of origin.”<sup>112</sup> Moreover, they did not emanate from one distinct region of Africa but from the disparate reaches of the Horn of Africa, East Africa, Madagascar, Mozambique, Burundi, Malawi, Zaire, South Africa, Zambia and Zimbabwe. This arises from the fact that they were brought to Seychelles mainly for transshipment as Seychelles was one of the slave *entrepôts*.<sup>113</sup> Hence there was no common cultural identity among them. Similarly, for the European part of the identity there was no single mother country or *métropole* (in Chantal

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<sup>106</sup> Fernando Ortiz, *Etnia y Sociedad* (Editorial de Ciencias Sociales 1993).

<sup>107</sup> Supriya Nair, 'Creolization, Orality and Nation Language in Caribbean' in Henry Schwarz and Sangeeta Ray (eds) *A Companion to Postcolonial Studies* (Blackwell Publishing 2005) 238.

<sup>108</sup> *Négritude* refers to the positive sense of the word as ascribed to it by “les trois pères”: Aimé Césaire, Léopold Sédar Senghor and Léon-Gontran Damas. See for example Belinda Elizabeth Jack, *Négritude and Literary Criticism: The History and Theory of Negro-African Literature in French* (Greenwood Press, 1996).

<sup>109</sup> Creolité is similar but more developed than the concept of Caribbeaness as espoused by Frantz Fanon. See Fanon, *Peau Noire. Masques Blancs* (Les Éditions du Seuil 1952) and in contrast Jean Bernabé, Patrick Chamoiseau, Raphaël Confiant, *Éloge de la Creolité/ In Praise of Creolness* (Gallimard 1993). See also Chapter 6 of this thesis at Section 6.4.2 Post-Colonial Thought, Language and Legal Hybridity.

<sup>110</sup> Liam Campling, Hansel Confiance and Marie-Thérèse Purvis, *Social Policies in Seychelles* (Commonwealth Secretariat 2011).

<sup>111</sup> See Fanon (n 109).

<sup>112</sup> Jean Houbert, 'The Indian Ocean Creole Islands: Geo-Politics and Decolonisation' (1992) 30 (3) *The Journal of Modern African Studies* 465,468.

<sup>113</sup> Depot for transshipment. See Joseph E. Harris Evanston, *The African Presence in Asia: Consequences of the East African Slave Trade* (Northwestern University Press, 1971).

Mouffe's terminology *the friendly enemy*<sup>114</sup>) to mimic, emulate or even hate. Seychelles was first and foremost a dependency of Mauritius and in that sense the *métropole* (France) was twice removed as the mother country. This was only to last until 1814 when England became the new colonial master. Even then Seychelles did not gain full colonial status until 1903. In the search for the Seychellois identity the *multiness* of African, French and English personalities creates an almost schizophrenic individuality. This is what renders the subsequent search for Seychellois identity and authenticity tense and complicated in the national and legal context. It is the resolution of this tension, the excision of this multi vision engendered by colonialism that may produce the new identity.

#### **4.1.5 Three Republics and Three Constitutions**

Since achieving independence from Great Britain on the 29 June 1976, Seychelles has known three constitutions. Two main political parties, the Seychelles Democratic Party (*SDP*) led by James Mancham and the Seychelles People's United Party (*SPUP*) led by Albert René were to emerge and remain the two main parties for much of the twentieth century. They replaced the Seychelles Taxpayers' and Producers' Association, until then the only Seychellois political representation in the colony. Both parties pressed Britain for the establishment of a Westminster system of government. A constitution was granted in 1970, but not one based on the Westminster model. Elections followed, as a result of which Mancham became the Chief Minister, essentially the chief executive of the colony until independence.<sup>115</sup>

The build-up to independence had started with the granting of partial self-government and the newly appointed Legislative Assembly of fifteen elected members replacing the Governing Council. The powers of external affairs, defence, internal security, the public service and the media were reserved to the British Governor. The legislative elections of 1970 were bitterly fought and ended badly for the *SPUP* who managed only five seats having gained 44% of the vote under the first past the post electoral system. They fared no better in the next elections in April 1974 which saw Mancham of the *SDP* receive thirteen seats for 52.4 per cent of the vote against the *SPUP*'s two seats for 47.6 per cent.<sup>116</sup> Those last elections had been fought principally on integration with Britain for the *SDP* against the *SPUP*'s call for independence. The resulting electoral defeat meant that René's party felt robbed not only of power but of

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<sup>114</sup> Chantal Mouffe, *The Democratic Paradox* (Verso 2000). The friendly enemy is a paradoxical concept where the adversaries are friends because they share a common symbolic space but enemies in that they want to organise the shared symbolic space differently.

<sup>115</sup> Franda (n 35) 15.

<sup>116</sup> African Elections Database <http://africanelections.tripod.com/sc.html> accessed 1st July 2015.

control of the larger population's basic needs in terms of education and economy.<sup>117</sup> In terms of integration with Britain, however, the writing was on the wall. Two constitutional conferences took place in London in 1975 and 1976 to discuss the future of the small colony.<sup>118</sup> The first, dubbed the Deverell Constitution after the constitutional adviser, Sir Colville Deverell, resulted in an interim constitution to prepare the nation for independence. The second subsequent Constitutional Conference took place at Marlborough House, London and adopted most of the Deverell provisions. Midway through negotiations however, the basis of the Constitution changed dramatically from a government to be headed by a Governor General with the Queen to a republic with a President and a Prime Minister.

#### **4.1.5.1 The 1<sup>st</sup> Republic 1976-1977**

Independence was declared on 29th June 1976 with a coalition government in place to see through the new fledgling republic. That a coalition had been agreed was itself a miracle considering the bitterness that had preceded the constitutional talks stemming from elections conducted under a democratically unfair electoral system. The Constitution of 1976 was doomed to failure from the start with its provisions maintaining the status quo as far as power was concerned. The President was given wide powers in respect of foreign affairs, defence and internal security. Although the Prime Minister was the Principal Minister, he was presided over by the President who could prorogue, dissolve and summon the Assembly at will. In his absence his duties would be undertaken not by the Prime Minister but by a Minister chosen by him.<sup>119</sup> The Constitution provided for an independent judiciary but both the Chief Justice and the President of the Court of Appeal were to be appointed solely by the President. Representation in the Assembly was increased to twenty-five. The hopes and dreams of the two main political protagonists were very different. While Mancham wanted to exploit speculators and capitalists wishing to invest in Seychelles, René wanted to change the emphasis to one of providing opportunities for the poorer classes and of providing a balance in the economy between agriculture, tourism and fishing.<sup>120</sup> This sharp division between the coalition partners did not bode well for the future.

Of huge importance in the legal context was the coming into effect of the new Civil Code of Seychelles on 1<sup>st</sup> January 1976 and the Land Registration Act 1976. Both brought changes to Seychellois society but some of the provisions of the new Code were resisted and in some

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<sup>117</sup> Scarr (n 11) 190.

<sup>118</sup> William McAteer, *To Be A Nation* (Pristine Books 2008) 281.

<sup>119</sup> *ibid*, 373.

<sup>120</sup> Scarr (n 11) 190.

cases the Seychelles courts applied their own version of what they understood the provisions to mean and in so doing laid down some important precedents which seemed to bridge the divide between English law and French law, creating perhaps a Seychellois solution.

In, the case of *Corgat v Maree*<sup>121</sup> which involved a promissory note, the Court had to decide whether the new provisions introduced the doctrine of *consideration* into the law of contracts and whether the meaning of *cause* was changed. Sauzier J refused to accept that it did.<sup>122</sup>

Further innovation to the law came with the case of *Desaubin*.<sup>123</sup> The case, perhaps the first in *nuisance*, involved the plaintiff, the owner of a dwelling house averring that the defendant's stone crushing factory emitted dust during the south east monsoons rendering his house uninhabitable. He had claimed that the defendant had committed a trespass and a *faute* by not stopping the escape of granite dust. As the case had been filed in September 1976 after the coming into force of the new Code, Sauzier J had to distinguish between the law that applied under the old provisions of the *Code Civil* and the new Civil Code of Seychelles. He found that under the old provisions there was recognition of the principle that there is *faute* if the damage suffered exceeds the measure of the ordinary obligations of the neighbourhood. After examining the new provisions of article 1382, he concluded that although an attempt had been made to restrict the definition of *faute* it had only succeeded in expanding its definition.<sup>124</sup>

#### 4.1.5.2 The 2<sup>nd</sup> Republic 1979-1993

Less than a year after Independence the Prime Minister had overthrown the government. The *SPUP* reconstituted as the Seychelles People's Progressive Front (*SPPF*) stated their main objective as the creation of "a socialist state wherein all citizens, regardless of colour, race, sex or creed, shall have equal opportunities and be afforded the basic needs of life in a modern society."<sup>125</sup> The Constitution of 1979,<sup>126</sup> decreed after the coup, turned Seychelles into a one-party state with political activity conducted only under the auspices of the *SPPF*. Seychelles was declared a Sovereign Socialist Republic. The Constitution was deemed the supreme law and any law inconsistent with it invalid and ineffective. The Supreme Court was expanded to include the Chief Justice and an additional Puisne Judge, making a total of three

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<sup>121</sup> *Corgat v Maree* (1976) SLR 109.

<sup>122</sup> For a more in-depth discussion on *cause* see Chapter 5 of this thesis, 'Object, Cause and Consideration.'

<sup>123</sup> *Desaubin v United Concrete Products of Seychelles* (1977) SLR 164.

<sup>124</sup> On *nuisance*, see further Chapter 5, 'Nuisance' of this thesis.

<sup>125</sup> Economic Intelligence Unit, *Quarterly Economic Review of Madagascar, Mauritius, Seychelles, Comoros – Annual Supplement 1983* (Economist Intelligence Unit 1983) 30.

<sup>126</sup> Constitution of the Republic of Seychelles Decree 1979.

judges. The composition of the Court of Appeal remained unchanged with its jurisdiction exercised by a bench of at least three members.

Initially most of the legislation was by way of presidential decree. The achievements of the René government in the area of social development, and particularly housing, health and education are undeniable but the list of human rights contained in the Constitution was unenforceable as they were stated merely as “the intention of the people of Seychelles.”<sup>127</sup> This accounted in many respects for numerous human right abuses, including the disappearance of at least a dozen persons.<sup>128</sup> The 1978 Public Security Act was used for the indefinite detention of persons constituting a threat to public security. Judicial review was not included in the Constitution as it had been rejected by the Constitutional Commission, headed by the West Indian, Philip Telford-Georges. In the words of the Georges Commission:

“...there would be the real risk of creating a confrontation between the judiciary and a united political authority from which neither is likely to emerge without damage [and] if oppressive laws are passed, the courts will have to apply them.”<sup>129</sup>

The era also saw the passing of some interesting socialist laws, sometimes potentially in conflict with provisions of the Civil Code. One of these was the Tenant’s Rights Act,<sup>130</sup> the purpose of which is described in its section 4:

“... to assist in enabling every Seychellois family to own its own home by giving security of tenure to Seychellois who own and occupy a home on another person’s land or who are residential tenants, and by enabling those Seychellois to purchase the land or premises and, in the administration of this Act, regard shall be had to that object.”

Other laws in the same vein include the People’s Housing Mortgages Act<sup>131</sup> and the Lands Acquisition Act.<sup>132</sup> Some cases arising from the application of these Acts make for interesting reading. In the case of *Nageon de l’Estang v Government of Seychelles*,<sup>133</sup> where the

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<sup>127</sup> *ibid*, Section I, 70-73.

<sup>128</sup> See Bruce Baker, ‘Seychelles: Democratising in the Shadows of the Past’ (2008) 26(3) *Journal of Contemporary African Studies* 279, 280.

<sup>129</sup> Philip Telford-Georges, *Charting Our Course: Report of the Constitutional Commission to President F.A. René and Draft Instructions* (Government Press, 1978) 4-5

<sup>130</sup> The Tenant’s Rights Act 1981, Cap. 235 Laws of Seychelles, repealed the Tenant’s Rights (Repeal) Act, 1992 (Act 7 of 1992).

<sup>131</sup> People’s Housing Mortgages Act 1981, Cap. 164, Laws of Seychelles.

<sup>132</sup> Lands Acquisition Act 1977, Cap. 104, Laws of Seychelles, repealed.

<sup>133</sup> *Nageon de l’Estang v Government of Seychelles* (1986) SLR 50.

valuation for compensation arising from an acquisition was challenged, the Supreme Court found that the method of valuation of the land and building was contrary to the *fair compensation* provision of article 545 the Civil Code.

The Civil Code survived completely unscathed from the socialist era and many of the socialist laws were repealed or substantially amended after the 1993 Constitution.

#### **4.1.5.3 The 3<sup>rd</sup> Republic of Seychelles 1993-**

Excesses of the party and hostility to an open economy resulted in US\$32,000,000 “outstanding in advances to politically-advantaged individuals as well as state-owned enterprises”<sup>134</sup> by the financial year 1988-1989. The socialist dream was starting to unravel and by the end of 1991 foreign currency reserves were down further. Seychelles was increasingly under pressure from London, Paris, Washington and Bonn to return to democracy.<sup>135</sup> Finally it was René’s attendance at the Commonwealth Heads of Government conference in Harare, Zimbabwe on 20 October 1991 which led him to initiate the move from a single-party government to a multi-party democracy. The Assembly duly passed the Constitution of the Republic of Seychelles (Preparation and Promulgation) Act in April 1992 to provide for the establishment of a Constitutional Commission for the purpose of preparing the draft of a new constitution; the composition and regulation of the proceedings of the Commission; and the submission of the draft constitution to the people of Seychelles for their approval through a referendum.

The 1993 Constitution provides for a democratic multiparty sovereign republic with the President as head of the Executive. Legislative power is vested in a unicameral assembly consisting of twenty five directly elected members and up to ten proportionally elected members. A judiciary comprising of a Court of Appeal, a Supreme Court, a Constitutional Court, subordinate courts and tribunals is provided for. The Constitution contains and entrenches “The Seychelles Charter of Fundamental Rights and Freedoms.”<sup>136</sup> This has made for a busy Constitutional Court and has also resulted in numerous appeals to the Court of Appeal.

The President is both Head of State and head of government as well as the Minister of Defence, and is elected by popular vote for a five year term. The Council of Ministers serves

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<sup>134</sup> Scarr (n 11)197.

<sup>135</sup> *ibid*, 199.

<sup>136</sup> Constitution of the Republic of Seychelles 1993, Chapter III, Part I.

as a cabinet. The new Constitution of 1993 introduced a multiparty system. The National Assembly has a potential thirty-five seats; twenty five of which are elected by popular vote on a first-past-the-post system and a maximum of ten allocated on a proportional basis to parties winning at least 10% of the vote. The presence of the Opposition in the parliament has remained constant since 2002, although it is presently split with the largest opposition party, the Seychelles National Party boycotting the last elections. The country remains, in practice, governed by the ruling party now called *Parti Lepep (PL)*<sup>137</sup> and there continues to be insufficient separation of powers between the ruling *PL* and government. As a result, the Assembly does not have the most conducive environment and the means to effectively perform its role of independent control over the Executive.<sup>138</sup>

## **4.2 The Present**

### **4.2.1 Legal Training and the Legal Profession**

The different influences on the formation of the Seychellois legal tradition have produced in the twenty-first century a hybrid legal system that is still evolving. Since it exhibits the traits, trends and tendencies of both civilist and common law traditions it is essential that its legal practitioners are familiar with both legal systems. It may even be an advantage to have closer links with those countries like Seychelles who have experienced double colonisation by France and Britain such as Quebec, Louisiana, Mauritius and Saint Lucia. In this respect Seychelles has continued to nurture its ties with Mauritius and still recruits members of its judiciary from Mauritius. A glance at members of the Bench in the past decades shows judges from many other mixed jurisdictions such as Trinidad and Tobago, Dominica, St. Lucia, Hong Kong, Sri Lanka but also from Africa (Kenya, Tanzania, Uganda, Nigeria, Ghana, Swaziland, Lesotho, South Africa, Botswana) and Great Britain. There has been much criticism from the local bar about the recruitment of non-Seychellois judges and there is some validity in the criticism. Seychellois legal practitioners are better trained and more legally attuned to the vagaries of the practice of Seychellois law, given its peculiarity. However one cannot underestimate the wealth and strength of experience, diversity and novelty that judges from other jurisdictions have imbued in the legal system of Seychelles which in many ways could have remained an insular micro-jurisdiction.

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<sup>137</sup> The PL is the successor of the SPUP and the SPPF.

<sup>138</sup> Partnership Agreement, Seychelles-EU Country Strategy Paper and National Indicative Programme for the period 2008-2013 [http://ec.europa.eu/development/icenter/repository/scanned\\_sc\\_csp10\\_en.pdf](http://ec.europa.eu/development/icenter/repository/scanned_sc_csp10_en.pdf) accessed 1st July 2015.

#### 4.2.1.1 Legal Training

Previously under the Barristers and Attorneys Act, the Law Officers Act and the Queen's Counsel Act 1971, those admitted to the Bar of England and Wales and who had obtained a law degree were entitled to practise in Seychelles. These Acts have been repealed and those with a law degree and equivalent from the UK, France, Mauritius or Seychelles are now eligible to be attorneys.<sup>139</sup> A law degree from another Commonwealth or common law country may also be acceptable. Degrees from any other country are not acceptable. Alternatively, those who have not passed the Bar examination are required to pass the Bar Examination in Seychelles. The present requirements are set out in section 5 of the Legal Practitioners Act 2014:

Section 5 (1) A person shall not be admitted as an attorney-at-law

- (a) unless he -
  - (i) has been called to and stands enrolled or registered at the Bar in a country or jurisdiction designated by the Minister after consultation with the Chief Justice and the Bar Association of Seychelles;
  - (ii) has been admitted to practice and stands enrolled or registered as an advocate, attorney-at-law or solicitor in a country or jurisdiction designated by the Minister after consultation with the Chief Justice and the Bar Association of Seychelles;
  - (iii) has been admitted to practice and stands enrolled or registered in a country or jurisdiction designated by the Minister after consultation with the Chief Justice and the Bar Association of Seychelles as a person holding a professional status equivalent to an attorney-at-law in Seychelles;
  - (iv) holds a degree in law, of a level prescribed by the Minister, awarded by an institution designated by the Minister after consultation with the Chief Justice and the Bar Association of Seychelles and has successfully completed such professional or vocational examination or training as the Minister may, after

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<sup>139</sup> See Schedule, Part I of the Legal Practitioners Act <http://greybook.seylli.org/se/CAP111#!fragment/zoupio-Toc384967203> accessed 1st July 2015.

consultation with the Chief Justice and the Bar Association of Seychelles, by regulations prescribe; or

- (v) has passed the admission examination prescribed under section 20;
- (b) subject to subsection (3), (4) and (5), unless he has, after having been called to the Bar or admitted to practice, or completed the professional or vocational examination or training, or passed the final examination, as provided under paragraph (a), served as a pupil in an approved chambers or as Registrar of the Supreme Court for an aggregate period of at least two years...”

It is also possible to gain admission by training as an articled clerk with approved chambers for six years and then sit for the Seychelles Bar examination. Following completion of the Bar examination, the candidate must apply for pupillage at an approved Chambers which lasts for two years. If pupillage is undertaken at the Attorney General’s Chambers, the pupil has a right of audience which is not the case at other approved chambers. An approved Chambers is one that is headed by an attorney at law of at least five years call. Pupillage in another jurisdiction is not accepted. After completion of pupillage, one then petitions the Chief Justice to be admitted as an attorney-at-law.

In 2010, the University of Seychelles opened its doors to law students for the first time. The policy of the state previous to this had been to send law students for training either to Mauritius or to the UK. The advantages of Mauritius, which is affiliated to both the University of Kent (UK) and the University of Aix-Marseilles (France), was that its syllabus had components of both English and French law with the degree taught in both the English and French languages. On the other hand, the Seychellois syllabus, perhaps because of accreditation solely with the University of London, offers only English law components through the English language and poses substantial threats to Seychellois mixity. However, graduates of the law programme still have to sit the Seychelles Bar Exams, which require an extensive knowledge of the Civil Code and Seychellois law. The University of Seychelles in 2014 undertook the teaching of this course. This may result in redressing some of the imbalance caused by the purely English law components of its law degree. More importantly, it may have put into motion forces that will strengthen the mixity of the legal system.

It is worth querying whether at this stage of its legal development a comparative law curriculum would not be best suited to Seychelles given its peculiar legal make-up. This would perhaps not only create better lawyers but may assist in deciding where Seychellois law is going. It is undeniable that its legal system is unique and has absorbed a wide array of laws and doctrines from diverse countries with common law or civil law traditions. Hence, for example, Seychellois tax laws are inspired by Australian provisions, the anti-money laundering provisions and Proceeds of Crime (Civil Confiscation) Act are adapted from similar legislation in Ireland and the offshore banking and investment provisions including international commercial trusts are copied from largely Anglo-American legal instruments.

In many ways Seychelles stands at a crossroads in terms of its legal structure. Having journeyed under the aegis of first an exclusive civilist tradition and then with the co-existence of both the civilist and common law traditions, it struggles in the twenty-first century to survive the world recession and exploitation by foreign donors and creditors; it also faces the challenge of adapting its existing legal tradition to meet demands mainly from the Anglo-American hegemony. In trying to meet its international financial commitments it has to borrow and adapt rules from many different sources. It may see this as a quest for a distinctive and unique body of laws appropriate to its needs but the same exercise may ultimately also undermine the core fundamental legal regime that has moulded its very structure, values, beliefs, traditions and culture. In other words this exercise may provide either its legal, political, economic, cultural undoing or its survival.

The challenge for Seychelles in trying to achieve economic and legal viability is to walk the tight rope between neo-colonialist influences and to maintain its unique legal tradition and identity. If it succeeds it may be a model for the successful cohabitation of two legal systems and the adaptation of rules from different systems in forging a new distinctive tradition.

#### **4.2.1.2 The Legal Profession**

Legal practitioners operate within a fused system. There are no distinct professions of solicitors and barristers as operated during French colonial rule where the three distinct professions of *avoués*, *avocats* and *notaires*<sup>140</sup> existed. There is also no separation in terms of audience before the courts as far as solicitors and barristers are concerned. There are a

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<sup>140</sup> The three distinct professions continue to operate in Mauritius. In France the Law n° 2011-331 of 28 March 2011 on the modernisation of French legal professions has merged the professions. See Chapter 3 - The Civil Law Tradition, above.

handful of law firms, but the majority of lawyers are sole practitioners. Those entitled to practise are termed attorneys-at-law.

Section 8 of the Legal Practitioners Act 1994, as amended in 2013, provides that an attorney-at-law is entitled to:

- “a) assist and advise clients;
- (b) appear, plead or represent a person in every court, tribunal or other institution established by law for the administration of justice where the person has a right to be heard and be represented by legal practitioner; or
- (c) appear and represent a person who has a right to be heard and be represented by legal practitioner before any other person or tribunal exercising quasi-judicial functions.”

The Act permits in certain circumstances other persons, sometimes non-Seychellois, to:

“... appear and practise before a court or a tribunal or other institution established by law for the administration of justice in respect of any proceedings or for any period not exceeding six months.”<sup>141</sup>

There have been several applications of this provision, the most notable being the permission granted for A. R. Kapila QC to appear in the *Guy Pool* bomb trial<sup>142</sup> and also in the case of the Scottish former Solicitor-General Nicholas Fairbairn in the trial of mercenaries charged with treason in 1983.<sup>143</sup>

The main other legal practitioner in Seychelles is the notary. Section 3 of the Notaries Act<sup>144</sup> defines a notary as:

- “... a public official whose duty shall be -
- (a) to draw up any document which a person is required by law, or desires, -
    - (i) to invest with the character of authenticity which is attached to a document of a public authority; or

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<sup>141</sup> Section 12 Legal Practitioners Act 2014.

<sup>142</sup> *Guy Pool v R* SCAR (1965-1976) 88.

<sup>143</sup> *R v Robert Charles Sims and ors* SC 4/1982.

<sup>144</sup> Notaries Act, Cap. 149, Laws of Seychelles.

- (ii) to establish a fixed date for the document in terms of the Civil Code;
- (b) subject to this Act -
  - (i) to keep custody of the original of documents referred to in paragraph (a);
  - (ii) to furnish executory or authenticated copies of documents referred to in paragraph (a) under this Act.

Although attorneys are also empowered to carry out conveyancing work, they have to complete five years of practice before they can apply to become a notary. The Notaries Act provides for the manner of drawing up deeds, the contents of deeds and the witnessing thereof and their safe keeping. The notary is bound by section 26 of the Act to deposit all original deeds drawn up each year with the curator of Seychelles Archives for safe keeping and section 27 provides for the transmission of these notarial documents to another notary on his death.

Seychelles does not impose a limit on the number of practitioners allowed to practise in the jurisdiction which is different to Mauritius, where for example the present limit for the number of notaries practising is 100.

Section 13A of the Legal Practitioners Act allows some persons in certain circumstances who meet specific criteria to provide legal advice and assistance for a limited period but these individuals have no rights of audience before any Seychellois court or lesser tribunal.

The Legal Practitioners (Amendment) Act 2013 provided for the setting up of a Law Council. Among its main functions, the Council is mandated to formulate and publish a Code of Conduct for legal practitioners and to enquire into breaches of the Code. This Code has now been published.<sup>145</sup>

The latest addition to legal practitioners in Seychelles has been firms specialising in the new offshore business industry. The agents for incorporating and maintaining International Business Corporations, International Trusts and Foundations are called corporate service providers or trustee service providers.<sup>146</sup> These are corporate entities licensed and regulated by the Seychelles International Business Authority Act (*SIBA*) 2005. Presently they number

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<sup>145</sup> See Legal Practitioners (Professional Conduct) Rules, 2013  
[http://greybook.seylli.org/se/CAP111#!fragment/zoupio-\\_Toc384967217](http://greybook.seylli.org/se/CAP111#!fragment/zoupio-_Toc384967217) accessed 1st July 2015.

<sup>146</sup> See Corporate Service Providers Act 2003 and International Trust Act 1994.

about fifty.<sup>147</sup> The criteria for being granted a licence is that the entity is a “fit and proper person” as defined under the Corporate Service Providers Act, 2003, Schedule 2. The only reference in the Act to the legal training that may be required for such providers is section 3(d) and (e) in that in determining whether the provider is a fit and proper person under the Act, regard is had to:

“(d) the person’s educational and professional qualifications and membership of professional and other relevant bodies

(e) the person’s knowledge and understanding of the legal and professional obligations to be assumed or undertaken.”

The criteria are rather vague and probably leave room for much discretion on the part of *SIBA*. The list of providers registered reveals that most of them are Seychellois attorneys while others are international business firms with legal expertise. There are other entities however, both local and international with no legal expertise. There is rigorous supervision of the activities of these providers especially since the creation of the Financial Intelligence Unit in 2006, since the membership of Seychelles of the Eastern and Southern Africa Anti-Money Laundering group and its associate membership of the Financial Action Task Force (FATF)<sup>148</sup> and the *FATF 40 + 9 Recommendations*<sup>149</sup> which includes the criminalising of money laundering.

#### **4.2.2 Political and Legal Structures**

The Constitution provides for a democratic republic and its Preamble proclaims a commitment to developing a democratic system and upholding the rule of law. Democracy implies a separation of powers providing checks and balances on each arm of government. The independence of both the legislature and the judiciary are crucial to ensuring that the executive does not rule absolutely. This is especially true for Seychelles with its history of one-party rule during eighteen years under President Albert René. It may even be more

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<sup>147</sup> Divino Sabino, ‘Introduction to Economic, Trade and Investment Laws of Seychelles, 2012’ Seychelles Law Journal <http://www.bas.sc/law-journal-1/introductiontoeconomictradeandinvestmentlawsofseychelles> accessed 1st July 2015. See also List of International Corporate Service Providers. <http://www.siba.net/index.php?s=links-icsp> accessed 1st July 2015.

<sup>148</sup> The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. It sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. See <http://www.fatf-gafi.org/> accessed 1st July 2015.

<sup>149</sup> The FATF Recommendations are the internationally endorsed global standards against money laundering and terrorist financing. See <http://www.fatf-gafi.org/topics/fatfrecommendations/> accessed 1st July 2015.

important given that its Constitution is one providing for a presidential democracy as opposed to a parliamentary democracy.<sup>150</sup> All Seychellois constitutions have been presidential constitutions, a surprising development given the fact that most British colonies adopted Westminster style democracies after independence. This undeniably stems from the Deverell<sup>151</sup> report of 1967 which advocated a move away from the Westminster model. It is difficult to understand the reason for this decision other than a vague notion that such a model would be too fractious for a young country and democracy. Its influence has permeated all three of Seychelles' constitutions.

#### 4.2.2.1 The Executive

Chapter IV of the Constitution of the Republic of Seychelles provides for the executive branch of government. The Head of State, Head of Government and Commander-in-Chief is the President of the Republic who is elected by the people.<sup>152</sup> He is elected on the basis of universal adult suffrage and by secret ballot for a term of five years.<sup>153</sup> The executive authority is vested in the President and extends to the execution and maintenance of the Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has power to make laws.<sup>154</sup> Article 66A<sup>155</sup> of the Constitution provides for the appointment of a Vice-President who performs functions assigned to him by the Constitution, an Act or the President. This may include the responsibility of one or more Ministries. His term of office is the same as that of the President.<sup>156</sup> The Cabinet of Ministers, comprising not less than seven or more than fourteen, is appointed by the President subject to the approval of a majority of the members of the National Assembly.<sup>157</sup> A Minister has such title, portfolio and responsibility as may be determined from time to time by the President and a Minister may be assigned the responsibility of more than one Ministry at any one time.<sup>158</sup>

The President is responsible together with the Leader of the Opposition for appointing members of the Constitutional Appointments Authority which, in turn, appoints a number of

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<sup>150</sup> See for example Juan J. Linz, 'Presidential Democracy or Parliamentary Democracy: Does It Make A Difference?' in Juan J. Linz and Arturo Valenzuela (eds) *The Failure of Presidential Democracy: Comparative Perspectives, Vol. 1* (Johns Hopkins University Press 1994). For an opposing view see José Antonio Cheibub and Fernando Limongi, 'Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered' 2002 (5) Annual Review of Political Science 151.

<sup>151</sup> See page 100 above.

<sup>152</sup> Articles 50 and 66 of the Constitution of the Republic of Seychelles, 1993.

<sup>153</sup> Articles 51(1), 51(2), 52(1) and Schedule 3 of the Constitution of the Republic of Seychelles.

<sup>154</sup> Article 66(2) Constitution of the Republic of Seychelles.

<sup>155</sup> This was the third amendment to the Constitution passed on 3<sup>rd</sup> April 1996.

<sup>156</sup> Article 66A (2) Constitution of the Republic of Seychelles.

<sup>157</sup> Article 69 (1) Constitution of the Republic of Seychelles.

<sup>158</sup> Article 70 (1) Constitution of the Republic of Seychelles.

key public authorities (e.g. judges, the Attorney-General, the Ombudsman and the Auditor-General).<sup>159</sup> The number of mandates that the President may serve is three (i.e. three five-year terms).<sup>160</sup>

Finally, the executive power of the government is also exercised by the Attorney-General who is the principal legal adviser to the Government and who has the power to institute criminal proceedings before any court in respect of any offence alleged to have been committed by that person.<sup>161</sup>

#### **4.2.2.2 The Legislature**

The legislative power of Seychelles is vested in the National Assembly and is exercised subject to and in accordance with the Constitution.<sup>162</sup> The National Assembly is made up of 25 directly elected members<sup>163</sup> (on a first past-the-post system) and up to 10 members elected by a scheme of proportional representation<sup>164</sup> based on the results of a general election held at least every five years.<sup>165</sup> The Members of the National Assembly elect a Speaker and Deputy Speaker from among their own numbers.<sup>166</sup> A Minister cannot be a member of the Assembly; if he is, he ceases to be a member on his appointment as Minister.<sup>167</sup> In recent times Ministers who are not members of the party in government have been appointed as Minister. In the case of Alain St. Ange, the present Minister for Tourism, he was in fact a retired member of the opposition party, the Seychelles National Party.

The Leader of the Opposition is elected from among the members of the Assembly who are not members of the political party which nominated the incumbent President for election.<sup>168</sup>

The legislative power vested in the National Assembly is exercised by Bills passed by the Assembly and assented to or deemed to have been assented to by the President whereupon the Bill becomes a law of Seychelles.<sup>169</sup> Bills are passed by a majority of members present and voting.<sup>170</sup> There are however, entrenched provisions in the Constitution, namely Chapter

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<sup>159</sup> Articles 139, 140, 76, 123, 127, 143, 158 Constitution of the Republic of Seychelles.

<sup>160</sup> Article 52 Constitution of the Republic of Seychelles.

<sup>161</sup> Article 76 (4) (a) Constitution of the Republic of Seychelles.

<sup>162</sup> Article 85 Constitution of the Republic of Seychelles.

<sup>163</sup> Articles 112, 116 Constitution of the Republic of Seychelles and the Constitution of the Republic of Seychelles (Electoral Areas- Mahé and Praslin), 1996.

<sup>164</sup> Article 78(b) Constitution of the Republic of Seychelles.

<sup>165</sup> Article 79(1) Constitution of the Republic of Seychelles.

<sup>166</sup> Article 83(1) Constitution of the Republic of Seychelles.

<sup>167</sup> Article 69 (3) Constitution of the Republic of Seychelles.

<sup>168</sup> Article 84 (1) and 84 (2) Constitution of the Republic of Seychelles.

<sup>169</sup> Article 86 Constitution of the Republic of Seychelles.

<sup>170</sup> Article 86 (1) A) Constitution of the Republic of Seychelles.

1, Chapter 111, (relating to sovereignty and democracy and the Charter of Human Rights); and articles 110 and 111 (relating to the power of the President to dissolve the Assembly), that may not be altered by Bills of the Assembly unless these have been approved on a referendum by not less than sixty percent of the votes cast in the referendum and passed also by the National Assembly by a two-thirds majority.<sup>171</sup>

In the second amendment to the Constitution, article 86(1) (B)<sup>172</sup> made it possible for Bills or their provisions to entrench themselves. The constitutionality of this provision was challenged and in the controversial decision of *United Opposition v Attorney General*,<sup>173</sup> in relation to the Economic Development Act 1995, the Court of Appeal held that it was constitutional for Bills to entrench themselves. In the allied case of *Roger Mancienne v Attorney General*<sup>174</sup> again most controversially, the Court of Appeal found that deference must be given in a democratic society to the judgment of the legislature and the executive; that judges should refrain from judicial activism. This again concerned the Economic Development Act of 1995 which granted incentives and concessions to certain investors, including immunity from criminal proceedings and immunity from acquisition of assets. Subsequently, in July 2000 Article 86 (1) (B) was repealed.

Several cases have been brought in relation to proportionally elected members of the Assembly focussing on vacancies of their seats, their replacement and confirming their right of appeal to the Constitutional Court.<sup>175</sup> In terms of the computation of the votes for proportionally elected members of the Assembly, the Court of Appeal unanimously held in the case of *PDM v Electoral Commission and others*,<sup>176</sup> that in determining the number of proportionally elected members the Electoral Commission should interpret the phrase ‘votes cast’ as valid votes cast and hence invalid votes should not be part of the computation.

In terms of dissolution of the Assembly, the case of *Chow v Michel*<sup>177</sup> established that the

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<sup>171</sup> Article 91(1) Constitution of the Republic of Seychelles.

<sup>172</sup> Article 86(1) provided: “A Bill presented to the Assembly which provides that it may not be amended or any of its provisions repealed unless the Bill which seeks to do so is approved by a special majority of the votes of the members of the assembly or, prior to the bill being represented to the assembly for it to be so approved, it has been approved by a specified majority of votes in a referendum shall, when it becomes law, not be amended or repealed except in accordance with that law.” It was repealed on the 2<sup>nd</sup> of July 2000.

<sup>173</sup> *United Opposition v Attorney General* SCA 14/1996 (unreported).

<sup>174</sup> *Roger Mancienne v Attorney General* SCA 15/ 1996 (unreported).

<sup>175</sup> *Elizabeth v Speaker of the National Assembly and anor* CC 2/2009 (unreported) and *Carpin v SNP* (2011) SLR 327.

<sup>176</sup> *PDM v Electoral Commission and others* (2011) SLR 385.

<sup>177</sup> *Chow v Michel* (2011) SLR 1.

dissolution of the Assembly by the President was within his capacity as head of the executive and not as head of state and was therefore subject to judicial review.

#### **4.2.2.3 The Judiciary and the Courts**

The judicial power is vested in the Judiciary,<sup>178</sup> consisting of the Seychelles Court of Appeal, the Seychelles Supreme Court, The Magistrates' Courts and Tribunals.

The concept of the separation of powers, as defined by the Constitution, guarantees the independence of the Judiciary and that fact is emphasised in article 119(2) which provides that the judiciary shall be independent and be subject to this constitution and the other laws of Seychelles.”

The Supreme Court has both original jurisdiction and supervisory jurisdiction over subordinate courts, tribunals and adjudicating authorities. The word “supreme” is now an anomaly; it is not supreme in the sense of being a court of final resort. Historically it was supreme in Seychelles, as appeals from it in civil matters were heard in Mauritius until independence in 1976; appeals from it in criminal matters were heard in East Africa until 1954 and ultimately referred to the Judicial Committee Privy Council until 1976. Unlike the Supreme Court of Mauritius, which in some respects has more similarities with French courts, the jurisdiction of the Supreme Court of Seychelles is exercised in practice by a single judge, although Article 125(4) does provide that a bench of more than one judge can exercise the jurisdiction of the court. When it sits as a Constitutional Court its jurisdiction and powers have to be exercised by at least two judges. The Supreme Court has unlimited jurisdiction at first instance. It has all the powers, privileges and jurisdiction of the High Court of Justice of England and is also a court of equity having power to do justice when there is no remedy at law. It hears the more important civil and criminal cases and in cases of murder or treason it sits with a jury of nine. The death penalty was abolished in Seychelles in 1993 by virtue of Article 15 (2) of the Constitution.

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

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<sup>178</sup> Article 119(1) Constitution of the Republic of Seychelles.

The Magistrates Court is a subordinate court established by the Courts Act. Its jurisdiction in both civil and criminal proceedings is exercised by a bench of one Magistrate sitting alone. Its civil jurisdiction is limited both in subject matter and the value of the claim: the Senior Magistrate may entertain civil claims of up to SR 350,000<sup>179</sup> in value; the limit for other Magistrates is SR 250,000. Its criminal jurisdiction is limited to less serious crimes. Senior Magistrates have the power to sentence a convict to a maximum of ten years' imprisonment and other Magistrates, up to seven years. Magistrates are fully qualified lawyers.

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

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

As mentioned previously, the biggest criticism relating to the appointment of judges has been the practice of appointing judges who are not Seychellois with little knowledge of the political, economic and cultural traditions or the intricacies of the mixed legal system of Seychelles. The fact that the Constitution provides that a Seychellois judge may remain in office until the age of 70 but a non-Seychellois judge may only remain up to a term of seven years except in exceptional circumstances led Phillippe Boullé, a practising senior barrister, to comment that “while Seychellois aspired to become judges even before independence, today it is the judges who aspire to be Seychellois.”<sup>180</sup> Indeed, there have been two cases of non-Seychellois judges obtaining Seychellois nationality through naturalisation during their first term of office. One still remains on the bench of the Supreme Court, the other has retired as a judge but is now the Law Reform Commissioner.

There have been two cases in which the qualification of justices of appeal has been challenged: *Bar Association of Seychelles and anor v The President of the Republic and ors*, SCA7/2004 and *Michel and ors v Dhanjee and ors*.<sup>181</sup> In both cases the Court of Appeal

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<sup>179</sup> A euro is equivalent to approximately 14.50 Seychelles Rupees.

<sup>180</sup> Phillippe Boullé, ‘The Evolution of the Legal System of Seychelles.’ Address delivered at the conference ‘Understanding Legacies’ at the National Institute of Education, 22nd March 2003.

<sup>181</sup> Unreported judgments may be accessed on the Seychelles Legal Institute Information database <http://www.seylii.org/> accessed 1st July 2015.

found that the Court cannot usurp the function of the Constitutional Appointments Authority and substitute its own decision for that of the Authority and that it can only set aside the decision in judicial review proceedings for breaches in the decision making process.<sup>182</sup>

In terms of the jurisdiction of the Supreme Court it has been established that it has all the powers, authority and jurisdiction of the High Court of England as at June 1976 (Seychelles Independence Day).<sup>183</sup>

In 2007, the Constitutional Court stated that its role was to ensure that public affairs were carried out within the framework of the Constitution and to prevent the abuse of power. It also stated that the Constitutional Court had the power to check the executive and legislative branches of government although in so doing they had to ensure that such checks did not amount to judicial dictatorship.<sup>184</sup>

#### **4.2.2.4 Political Institutions**

Seychellois political institutions are relatively new given the islands' colonial history. Politics prior to independence only consisted of the Seychelloisation of government and the extension of the right to vote.<sup>185</sup> The first pressure group or lobby was the Seychelles Taxpayers' Association which appeared just before the First World War and grew to become the first effective political party in Seychelles.<sup>186</sup> Elected representation in the Council however did not come in until 1948 and even then those with the right to vote numbered 2000; their right being based on literacy and ownership of property.<sup>187</sup> Members in the Assembly consisted of six *official* members (in effect government employees), six elected *unofficial* members and two nominated unofficial members. The Legislative Council was reconstituted in 1960 with a widened franchise and equal numbers of official and unofficial members.<sup>188</sup>

In 1964 the two main political parties which were to dominate much of twentieth century politics in Seychelles were formed: the *SPUP*, advocating independence and the *SDP*,

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<sup>182</sup> *Michel and ors v Dhanjee and ors* (2012) SLR 258 [14] the court has to consider “ whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did. The Court cannot substitute its opinion for that of the public authority.”

<sup>183</sup> *Casino des Seychelles v Compagnie Seychelloise* SC 1 /1994 (unreported).

<sup>184</sup> *Chow v Gappy* SCA 10/2007 (unreported).

<sup>185</sup> Franda (n 35) 14. See also T. V. Bulpin, *Islands in a Forgotten Sea* (H.B. Timmins 1958).

<sup>186</sup> Scarr (n 11) 131.

<sup>187</sup> Franda (n 35) 14.

<sup>188</sup> Colin Allan, 'The Transfer of Power : Ministerialization in Island Countries' (1983) *International Review of Administrative Sciences* <http://ras.sagepub.com/content/49/1/49.full.pdf> accessed 1st July 2015.

advocating autonomy within the British Empire. Other political parties played a much smaller role. These were Dr. Hilda Stevenson-Delhomme's Parti Seychellois and Finley Roselie's Seychelles Christian Labour Party. The formation of political parties and trade unions had been facilitated by the Associations Ordinance 1959.

Trade Unions were also important players in the political struggle from 1964 onwards. They numbered about fourteen and apart from two unaligned unions, they were split fifty fifty in terms of alignment with the two main political parties.<sup>189</sup> The more radicalised unions were those aligned with the *SPUP*. The biggest trade union in Seychelles was the Seychelles Transport and General Workers' Union, led by Rosélie. Today, the Seychelles Federation of Workers' Unions, which is associated with the ruling party, has been the only active trade union since the Seychelles National Trade Union associated with the SNP ceased operations in 2007. The Seychelles National Union, formed in 2009 does not seem to be active.

The development of political parties began in earnest in 1967 with the Deverell Constitution introducing universal adult suffrage. This saw the electorate expand from 2000 to almost 20,000.<sup>190</sup> In elections for the colonial Legislative Assembly, 4 *SDP*, 3 *SPUP* and 1 Independent member were returned. Dr. Hilda Stevenson-Delhomme, the Independent member who was elected was also the first woman parliamentarian.

These first political parties survived until the coup in 1977 which then saw the imposition of a one-party state. During that rule the only party allowed to exist in Seychelles was the *SPUP*, which changed its name to the Seychelles People's Progressive force (*SPPF*)<sup>191</sup> in 1978.

After the return of multi-partyism in 1993, the *SDP* was revived but it lost its predominance to the Parti Seselwa registered in 1993 which, after a makeover and a name change became the *Seychelles National Party (SNP)*. It is now the most important political party in opposition. Its ideology is centre-left liberal and it has formal links with the British Liberal Democratic Party.<sup>192</sup> In elections in 2007 the main political parties participating were the *PL* (the new name for the *SPPF*) and an alliance of the *SNP* and the *SDP*. The 2011 parliamentary elections were boycotted by the *SNP* and the only parties taking part were the

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<sup>189</sup> Campling (n 110)15, McAteer (n 116) 458 n 13.

<sup>190</sup> James Mancham, *Paradise Raped* (Methuen 1983) 73.

<sup>191</sup> SPPF, 'Onward to socialism: SPPF policy statement adopted at the Second Congress of the Seychelles People's United Party, 31st May to 2nd June 1978' (SPPF 1978).

<sup>192</sup> Campling (n 110) 32.

*PL* and the newly formed splinter group from the *SNP* the Popular Democratic Movement.<sup>193</sup>

Two private human-rights related organisations, namely Friends for a Democratic Society and the Centre for Rights and Development, continue to operate together with other non-governmental organisations.

A difficulty with the present Constitution and the continuing superiority of power of *PL* can be seen for example in local government. There are no constitutional provisions for local government in Seychelles. Article 167 of the Constitution provides that a law may provide for it but none have been promulgated to replace the Local Government Act of 1991 which was suspended in 1993. It seems that the de facto situation which operated under the Act has more or less continued as under the aegis of the ministry responsible for local government a district administration operates in each of the twenty five electoral districts.<sup>194</sup> District community councils were reintroduced in 1999 with the Minister of Local Government appointing the members of each district community council for a two-year term. As the Minister is invariably from the ruling government party the appointed district administrator is a member of *PL*. It is she/he who convenes and chairs meetings and supervises operations although in theory the local member of the National Assembly (MNA) sits on the council. The result of this arrangement is that in terms of local government, the district officials are accountable to the party and not the government, a major blow to democracy in Seychelles.

### **4.2.3 Sources of Law**

#### **4.2.3.1 The Constitution**

As has been outlined previously, Seychelles has a written constitution, the third in force since independence from Britain in 1976. The Constitution is the supreme law of Seychelles and also the most authoritative source of its laws.<sup>195</sup> The Constitution opens with a chapter on “The Republic” which outlines the governance dimension – “Seychelles is a sovereign democratic Republic.”<sup>196</sup> It declares the territory of Seychelles, the national symbols and languages. It provides for rules of interpretation of the Constitution. These include the stipulation that the provisions of the Constitution shall be given their fair and liberal meaning

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<sup>193</sup> See for example the Court of Appeal’s decision in *PDM v Electoral Commission and others* (2011) SLR 385. (n174) relating to the allocation of seats to the PDM.

<sup>194</sup> See the website of the Ministry of Community Development, Social Affairs and Sports <http://www.egov.sc/governmentagencies/ministry/mincomdevyouth.aspx> accessed 1st July 2015

<sup>195</sup> Article 5, Constitution of the Republic of Seychelles.

<sup>196</sup> Article 1, Constitution of the Republic of Seychelles.

and that the Constitution is to be read as a whole and treated as a living document.<sup>197</sup>

Chapter II contains the provisions relating to citizenship and was amended to deal with the eligibility of persons born outside Seychelles between Independence Day<sup>198</sup> and the 5<sup>th</sup> June Revolution<sup>199</sup> and persons married to citizens of Seychelles wishing to become citizens of Seychelles in their own right.<sup>200</sup>

Chapter III contains the Seychellois Charter of Fundamental Human Rights and Freedoms which in many respects is a verbatim reproduction of the European Convention on Human Rights. The Charter is progressive in that it provides for the enforcement of first generation rights such as the freedom of expression and the right to a fair trial, but also for the rights to work and to health care, and even third generation rights, for example the rights to safe environment and cultural life and values. It also contains a technique of modern constitutionalism in providing for fundamental duties. It further provides for remedies for the breach of these rights.<sup>201</sup> The principles for interpretation of the Charter include the provision that any interpretation shall not be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and that judicial notice shall be taken of international instruments containing these obligations and the reports, decisions or opinions of international and regional institutions administering or enforcing human rights and freedoms.<sup>202</sup> These provisions are an effective means of guaranteeing the implementation of the rights and have been utilised in decisions of both the Constitutional Court and the Court of Appeal.<sup>203</sup>

It is disappointing however, that the Charter does not feature at the start of the Constitution. This would perhaps have given it more prominence and conformity with the widely accepted view that the structure of a Constitution determines its understanding and acceptance. The more appealing the structure is to the citizens the more likely they are to feel a sense of involvement in the political community on the basis of *their* constitution.<sup>204</sup>

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<sup>197</sup> Section 8 of Schedule 2 of Article 6, Constitution of the Republic of Seychelles.

<sup>198</sup> Independence Day of Seychelles, 29th June 1976.

<sup>199</sup> 5<sup>th</sup> June Revolution 1977.

<sup>200</sup> Constitution of Seychelles Amendment Act 19th March 1995.

<sup>201</sup> Article 46, Constitution of the Republic of Seychelles.

<sup>202</sup> Article 48, Constitution of the Republic of Seychelles.

<sup>203</sup> See for example. *Hackl v Financial Intelligence Unit* (CC) (2010) SLR 98 and *Hackl v Financial Investigative Unit* (CA) (2012) SLR 225.

<sup>204</sup> Markus Kotzur, 'Recent Developments in International Constitutional Thinking: Reform Perspectives for the Seychelles Constitution,' Paper given at a symposium which took place in the European Parliament on 7 October 2008 <http://www.europarl.europa.eu/committees/en/afco/studiesdownload.html?languageDocument>

The Protection of Human Rights Act 2009 provided for the appointment of a Human Rights Commission for better protection and promotion of human rights in Seychelles. The Commission comprises of three members, including a chairperson who is the person appointed as the Ombudsman.<sup>205</sup> The two other members of the Commission is either a person who has been a Judge or is a barrister of more than five years standing; and a person having knowledge of, or practical experience in, matters relating to human rights.<sup>206</sup>

The Constitution then outlines the distribution of powers and the legislative jurisdictions of the National Assembly. It provides for the main organs of State power: Chapters IV and V contains extensive provisions relating to the status of the President and the Executive;<sup>207</sup> while Chapter VI outlines the rules pertaining to the functions of the legislature including the composition of the Assembly, the qualification and election of its members and their legislative power. It also provides for the sessions and dissolution of the National Assembly.<sup>208</sup>

The judicial power of Seychelles, the appointment and terms of office of judges, together with the organisational structure and jurisdiction of the courts are provided for in Chapter VIII.

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

The Seychellois Constitution does not lend itself either to a classical monist or dualist system in terms of international law. Articles 64 and 48 of the Constitution bear out this ambiguous position.

Article 64(4) gives the President the power to execute treaties, agreements, and conventions in the name of Seychelles. These treaties, agreements, and conventions do not bind the Republic unless they are ratified by an Act or passed by a resolution of a majority of members of the National Assembly.<sup>209</sup> However, Article 64(5) provides that treaties will

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[=EN&file=29707](#) accessed 1st July 2015.

<sup>205</sup> Section 3(1) 3, Protection of Human Rights Act 2009.

<sup>206</sup> Section 3 (1) 4, Protection of Human Rights Act 2009.

<sup>207</sup> Articles 50- 76, Constitution of the Republic of Seychelles.

<sup>208</sup> Articles 77-111, Constitution of the Republic of Seychelles.

<sup>209</sup> Article 64(4) of the Constitution.

nevertheless bind Seychelles ‘where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention.’

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

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

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

In general, because of its mixed jurisdiction and the habit and readiness of the courts in referring to jurisprudence from both common law and civil law jurisdictions, there has been much ease on the part of the courts in relying on international instruments and cases, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as cases from the European Court Human of Rights. In both *Ah-Wan v Republic*<sup>210</sup> and *Beeharry v Republic*,<sup>211</sup> the Court of Appeal stated that the Constitution is to be interpreted taking into account the decisions of the European Court of Human Rights and other courts in democratic jurisdictions, and that the Court can also take judicial notice of reports, decisions, and opinions of regional and international institutions.

In *Hans Hackl v FIU and another*,<sup>212</sup> a case relating to an offence under the Proceeds of Crime (Civil Confiscation) Act 2008 where the appellant had challenged the confiscation of his property which the state claimed constituted the proceeds from the sale of heavy graphite to Iran (an offence in the states of the European Union, but not in Seychelles), Twomey J relied on Article 48 to bring into consideration the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons and the United Nations Human Rights Charter, both of which Seychelles had ratified. She stated:

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<sup>210</sup> *Ah-Wan v Republic* (2002) SCAR 1.

<sup>211</sup> *Beeharry v Republic* (2010) SLR 470.

<sup>212</sup> *Hackl v FIU and another* (CA) (2012) SLR 225.

*“We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty. We find that there are. In this context we state that the rule of law and international human rights law may well override a state’s claim to sovereignty... The present case concerns the export of components for nuclear warheads and the public, national and international interest far outweighs the principle of sovereignty.”*<sup>213</sup>

Seychelles is party to eight core international human rights instruments: the Convention on the Elimination of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of Discrimination Against Women; the Convention Against Torture; the Convention on Migrant Workers; and the Convention on the Rights of Persons with Disabilities. At the regional level it is a party to the African Charter on the Rights and Welfare of the Child, the African Commission on Human and People’s Rights and the Southern African Development Community. It has also ratified the Rome Statute.

Seychelles is subject to the Universal Periodic Review by the United Nations Human Rights Council. The review of 2011, for example recommended the repeal of all provisions in the Penal Code criminalizing consensual sexual activity between adults of the same sex and although this was accepted it has to date not been implemented.

#### **4.2.3.2 Legislation**

After the Constitution, legislation is the most important source of law in Seychelles. This consists of codifications and a mass of legislative enactments. The British establishment resisted imposing its laws wholesale on colonial Seychelles.<sup>214</sup> This is in contrast to the French approach which may perhaps be explained by a difference in “culture philosophy and the conditions of social life.”<sup>215</sup> The importance of legislation in civil law traditions may be one of the consequences of the French Revolution.<sup>216</sup> As French law was neither codified nor unified, the Revolution completely discarded the disparate customs of the older regimes. The provisions of the Civil Code were aimed therefore not only at securing the unification of law in France but also at affirming the supremacy of legislation over custom.<sup>217</sup> Yvon

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<sup>213</sup> *ibid*, 230.

<sup>214</sup> The reasons for this reluctance by the British Empire generally in its colonies is analysed by Iza Hussin in a recent paper. She finds *inter alia* that economy and order were priorities to ensure British supremacy on the world stage. See Iza Hussin, ‘Circulations of law: colonial precedents, contemporary questions’ (2012) 7 (2) *Oñati Socio-Legal Series* 18.

<sup>215</sup> Yvon Loussouarn, ‘The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law’ (1958) 18 *Louisiana Law Review* 235.

<sup>216</sup> *ibid*.

<sup>217</sup> *ibid*, 237.

Loussouarn<sup>218</sup> identifies several basic ideals of the French Revolution, the first of which has had lasting influence on Seychelles, realised through the Civil Code:

“The first of these basic concepts was that equality among citizens could be obtained more easily through legislation than through custom, for much of the diversity in French customary law had its foundation in differences among the social categories of persons”<sup>219</sup>

Hence, the reason for the supremacy of codal legislation in Seychelles is probably because of the civil law tradition which has endured despite the huge influence of the common law tradition in the past two hundred years. This may explain why the Civil Code continues to be zealously guarded by legal practitioners even against the powerful western hegemony including the International Monetary Authority, the World Bank and the African Development Bank who are focussed on uniformising the laws of commerce in return for their aid packages.<sup>220</sup>

Adopting the French mentality, the 5<sup>th</sup> June Revolution<sup>221</sup> in Seychelles saw the enactment of a plethora of legislation aimed at repairing the colonial social structure and redressing custom in Seychelles in the mode of socialism. Legislation more easily achieved this objective than years of judicial precedent would have. There is however no legislative provision as regards the establishment of a Law Reform Commission or a Law Review Commission in Seychelles. Reform, revision, updating and rationalisation of laws is carried out in piecemeal fashion by the Attorney General’s Chambers and some ad hoc committees, for example the Constitutional Review Committee and Civil Code Review Committee.

Insofar as private law is concerned its sources are provided for in the Preliminary Title of the Civil Code of Seychelles. Article 1 provides that law is “a solemn and public expression of

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<sup>218</sup> *ibid.*

<sup>219</sup> *ibid.*

<sup>220</sup> See African Development Bank, ‘Seychelles Economic Governance Reforms Program – Appraisal Report’ which finds at Page 6 that: “One fundamental constraint is the legal framework, which is not sufficiently conducive to creating a competitive business environment”  
<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/AR%20Sey02En.pdf>  
and the reaction of the Seychelles Bar Association to the proposed amendments to the law of Seychelles in the new Companies Bill 2011 and Trusts Bill 2011 <http://robingroom.blogspot.com/2011/02/bar-association-of-seychelles-speaks.html> accessed 1st July 2015.

<sup>221</sup> The Revolution of 5<sup>th</sup> June 1977 comprised of a coup d’état by France Albert René in which the first government of independent Seychelles was overthrown and replaced by a socialist one party state which was to last for eighteen years.

legislative will.” Article 4 of the Civil Code of Seychelles states that the “source of the civil law shall be the Civil Code of Seychelles and other laws from time to time enacted.”

This clearly lays down supremacy as far as the statutory provisions and precedent are concerned. The French Civil Code which was in operation in Seychelles until 1976 provided sanctions for judicial encroachments on the legislative and executive powers. Article 4 of the Code Civil provided that:

“Le juge qui refusera de juger, sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.”<sup>222</sup>

This presupposes that there is no lacuna in legislation. Moreover since article 5 of the French Code Civil forbade the judge to indicate the constructions or interpretations of legislation to be followed in future cases,<sup>223</sup> it impliedly also forbade the judge to use the argument of a lacuna in the law to pronounce a general rule. Presumably the origin of this rule is found in the concept of the separation of powers consigning the judge to applying the law rather than making it.

However, none of these provisions survived recodification in Seychelles in 1976 and in practice, although legislation is given strict superiority, the role of precedent in Seychellois law is very different to the approach taken in France. Article 4 of the Civil Code of Seychelles now provides that the source of civil law shall be the Civil Code of Seychelles and “other laws from time to time enacted.” Chloros’ objective in this recodification was to prevent the court “from using precedents prior to the Code and thus undermining the very existence of the Code.”<sup>224</sup> He supplemented article 4 by providing in article 5 that judicial decisions are not absolutely binding upon a Court but shall enjoy a high persuasive authority. This certainly supports the superiority of the Code in the hierarchy of sources of law in civil cases.<sup>225</sup>

In terms of rules of interpretation, the rules of the Civil Code which may appear to be solely related to contract, not only apply to the Code as a whole but also to other parts of Seychellois law that can trace their origin to French law.<sup>226</sup> Generally, the principle of liberal

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<sup>222</sup> The judge who refuses to decide a case on the ground that it is not covered by legislation may be prosecuted for a "denial of justice"

<sup>223</sup> Loussouarn (n 208) 237.

<sup>224</sup> Chloros (n 92) 12.

<sup>225</sup> For precedent in Seychelles see further Chapter 6 of this thesis.

<sup>226</sup> Chloros (n 92) 19.

construction<sup>227</sup> applies to these provisions but they do not make for complete judicial discretion as several provisions of the Code stipulate specific rules in certain circumstances.<sup>228</sup>

Where French law provisions have survived generally, section 21 of the Interpretation and General Provisions Act<sup>229</sup> stipulates

“(1) Where in an Act terms or expressions of French Law are used, they shall be interpreted in accordance with French Law.

(2) Where in an Act English words are followed by terms or expressions of French Law in parenthesis, subsection (1) applies to those terms and expressions and English words shall be treated as being the equivalent only of those terms or expressions.”

Rules of interpretation are laid down in respect of other statutes in the Interpretation and General Provisions Act. It provides inter alia at section 13 that:

“This Act does not exclude the application in any particular case of a rule of interpretation not referred to in this Act, but if this Act applies in the particular case the rule is applicable subject to this Act.”

Hence, all the common law rules of statutory interpretation ranging from the literal rule to the mischief rule have been utilised by the court. In several cases the court has also indicated the distinction between rules of interpretation in relation to the Constitution as opposed to legislation.<sup>230</sup> There has been a gradual change in the approach taken by the courts in interpretation. Whereas strict rules of interpretation were used initially, a more liberal approach has been adopted of late. In the 1977 case of *Pool v Controller of Taxes*,<sup>231</sup> the court held that where no ambiguity or obscurity exists in the wording of an Act, the words must be given their full effect, and no need arises for interpretation, however unreasonable or unjust the consequences, and however strong the suspicion that this was not the real intention of the legislator. In 1999, in *Marzocchi v Government of Seychelles*<sup>232</sup> the Court of Appeal

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<sup>227</sup> The principle of liberal construction is one permits a liberal or equitable construction to a term so as to implement the object and purpose for which it was designed.

<sup>228</sup> See for example articles 1157 -1163 of the Civil Code in relation to the interpretation of contracts.

<sup>229</sup> Interpretation and General Provisions Act, Cap.103, Laws of Seychelles.

<sup>230</sup> See for example *Atkinson v Government of Seychelles* SCA 1/2007 (unreported) *PDM v Electoral Commission and others* (2011) SLR 385.

<sup>231</sup> *Pool v Controller of Taxes* (1977) SLR 124.

<sup>232</sup> *Joseph Marzocchi and anor v Government of Seychelles and anor* SCA 48/1999 (unreported).

held that the court should be slow to read words into an Act of Parliament and even slower to read them into the Constitution. By 2009, however the approach had changed and in *Re Section 342A of the Criminal Procedure Code*<sup>233</sup> the Court of Appeal held that legislation must in general be interpreted in a positive sense to give effect to the intention of the legislature. In a number of recent cases the Court of Appeal has indicated that a purposive approach should be adopted unless the words of the statute are plain and unambiguous.<sup>234</sup>

#### 4.2.3.3 Jurisprudence.

Jurisprudence (precedent)<sup>235</sup> is complicated by the fact that Seychelles has inherited two legal traditions. In terms of public law the doctrine of precedent is clear and operates much the same as in common law jurisdictions. Courts are bound by previous decisions of superior courts.

However, in terms of private law the influence of article 5 of the French Civil Code which applied in Seychelles until 1976 has certain ramifications. It stipulated that a judicial determination on an issue of law has no declaratory force in subsequent cases.<sup>236</sup> When recodification took place Article 5 of the Civil Code of Seychelles was amended to provide that:

“Judicial decisions shall not be absolutely binding upon a court but shall enjoy a high persuasive authority from which a Court shall only depart for good reason.”

The mixed jurisdiction tradition seems to have bridged the gap between what may appear as irreconcilable differences between two different competing legal traditions. However, uncertainty remains in the meaning of *persuasive authority*. Some of these difficulties are further explored in Chapter 6 of this thesis.

Section 5 (2) of the Civil Code of Seychelles Act also provides that

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<sup>233</sup> *Re Section 342A of the Criminal Procedure Code* SCA 6/2009 (unreported).

<sup>234</sup> See for example *Atkinson v Government of Seychelles* SCA 1/2007 (unreported), *Frank Elizabeth v The Speaker of the National Assembly and anor* SCA 2/2009 (unreported) and *Gappy and ors v Dhanjee* (2011) SLR 294.

<sup>235</sup> Note that the civilian concept of *jurisprudence* differs from the Anglo-American concept of *stare decisis*. See F.H. Lawson, A.E. Anton and L. Neville Brown, *Amos and Walton's Introduction to French law* (3<sup>rd</sup> edn Oxford University Press 1967) 9. See also Loussouarn (206) 235 and John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (Oxford University Press 1998) 25-33.

<sup>236</sup> See Jean Carbonnier, *Droit Civil : Introduction* (Presses Universitaires de France, 1995), 227: “La jurisprudence n’est pas une véritable source du droit civil comparable à la loi ou même à la coutume. Mais elle est une autorité considérable...”

“Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles”

As the Seychellois judgments are in the common law style in both public and private law cases, the reasoning of judges is set out extensively and precedents are cited to explain decisions. French, Mauritian and Seychellois precedents are used in civil cases.

Additionally, section 9 of the same Act makes it clear that the Interpretation and General Provisions Act (specifically section 2(1) which states that where terms or expressions of French law are used, they shall only be interpreted in accordance with French law) does not apply to the Civil Code.

In the case of *Attorney General v Olia*<sup>237</sup> the Supreme Court held that French jurisprudence (scholarly works and decided cases) was applicable when the terms or provisions in Seychellois law were based on French law. Similarly in *Desaubin v Concrete Products*,<sup>238</sup> despite the fact that the provisions of the Civil Code of Seychelles had limited the concept of *faute* in Article 1382 as compared to that in the French Civil Code, it was held that since both notions required an element of imprudence, negligence or an intention to cause harm, it would be appropriate to rely on French jurisprudence.

By contrast the application of section 5 (2) of the Civil Code Act<sup>239</sup> has meant that French jurisprudence is not applicable in cases of motor accidents. The reason given was that the interpretation of the Cour de Cassation went further in such cases than the confines of the provision,<sup>240</sup> imposing the theory of risk in all cases of motor accidents thus voiding the application of *faute* as contained in Articles 1382 and 1383. However, the principle that a text based on French law must be interpreted or applied in accordance with French jurisprudence except where the solutions offered by French jurisprudence contradict the actual working of the provision is still applicable.

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<sup>237</sup> *Attorney General v Olia* (1964) SLR 142.

<sup>238</sup> *Desaubin v United Concrete Products (Seychelles) Ltd.* (1977) SLR 164.

<sup>239</sup> Section 5(2) Civil Code of Seychelles Act 1976 provides: “Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles.”

<sup>240</sup> *Mangroo v Dahal* (1937) MR 43. Although *Mangroo* is a Mauritian case, the same position was adopted in Seychelles. See for example *Coopoosamy v Delhomme* (1964) SLR 82.

The *vertical binding effect* of judgments is generally adhered to in Seychelles but there have been a few instances<sup>241</sup> where the Court has had to chide a lower court for failure to have regard for the rule. The only exception is the rule as stated in *Ilias Durdunis v The Owners of The Ship "Maria"*,<sup>242</sup> namely that a decision of a Court made per incuriam may not bind later courts. However, in terms of *horizontal binding*,<sup>243</sup> there have been many instances where Courts have not felt themselves bound by past decisions. Recently in the case of *Lucas v R*,<sup>244</sup> the Court of Appeal unanimously held that corroboration in some sexual cases was not always required if the witness was reliable, thus overturning a long list of its own cases and indeed settled law on the matter. Similarly, in the recent landmark case of *Poonoo v AG*<sup>245</sup> the Court of Appeal refused to be bound by established precedent in relation to the curtailment of the sentencing powers of the court where legislation had imposed mandatory sentences as it was of the view that the principle of democracy in article 49 of the Constitution and its expatiation about the separation of powers would dictate otherwise.

#### 4.2.3.4 Equity

The inheritance of the French legal system meant that Seychelles did not have a distinction between rights in equity and rights in law. When the British took control of the islands the status remained the same. Chloros states that the techniques of English law which are based upon the distinction between legal and equitable rights does not therefore apply in Seychelles.<sup>246</sup> He points out that the concept of the English trust does not fit into the law despite the fact that laws drafted by lawyers trained in the common law appear to include references to it.<sup>247</sup>

However, as far as English rules of equity are concerned, there have been some ingenious attempts in Seychellois case law to introduce equitable concepts with limited success.<sup>248</sup> The Courts Act promulgated in 1964 contains the provision that:

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<sup>241</sup> See however the recent decision of *FIU v Barclays Bank and ors* (2011) SLR 369 in which the Court of Appeal chided the Supreme Court for not following established precedents in cases involving the Proceeds of Crime (Civil Confiscation Act) 2008.

<sup>242</sup> *Ilias Durdunis v The Owners of The Ship 'Maria'* CA 24/1994 (unreported).

<sup>243</sup> For further discussion on precedent see Chapter 6 of this thesis.

<sup>244</sup> *Lucas v R* (2011) SLR 313.

<sup>245</sup> *Poonoo v R* (2011) SLR 423.

<sup>246</sup> Chloros (n 92) 12.

<sup>247</sup> *ibid.* See, for example, section 3 of the Status of Married Women Act, Cap 231, Laws of Seychelles which provides that "contract" includes the acceptance of any trust."

<sup>248</sup> Bogdan (n 95) 49.

“the Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.”<sup>249</sup>

As will be seen in the next chapter, in *Teemooljee v Pardiwalla*<sup>250</sup> it was argued that estoppel was part of the law of Seychelles. The Court of Appeal found that since those doctrines were in conflict with the provisions of the Civil Code the operation of section 12 of the Evidence Act<sup>251</sup> would limit their application. However, recently in the case of *Atkinson & Ors v Government of Seychelles*,<sup>252</sup> the Court of Appeal found that equitable estoppel could be relied on where a party had entered into a contract on the representation of certain facts by the other party.

In *Hallock v d'Offay*,<sup>253</sup> regarding a property settlement after a lengthy cohabitation by an unmarried couple, the dissenting judgment of Sauzier J found that equity could be used to grant a share in the property. This approach has great merit in a country where a large proportion of couples live in concubinage as opposed to getting married, but it was rejected by the Court of Appeal and has generally not been followed.

Equitable doctrines are however generally used e.g. “equity defeats delay” (*Attorney General v Ray Voysey & Ors*).<sup>254</sup> The Courts Act has also resulted in the introduction of equitable concepts such as specific performance and injunctions.

#### 4.2.3.5 Legal Doctrine

An informal source of law in Seychelles is legal doctrine. Doctrine in Seychelles is understood as encompassing all written texts by jurists commenting on rules and principles of law. While, in general, legal doctrine plays an important role in most civil law legal traditions, its use in France is problematic and complex given the fact that it is generally acknowledged that it is not a source of law and is incapable of setting down rules.<sup>255</sup> Given

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<sup>249</sup> Section 6, Courts Act Cap. 52, Laws of Seychelles.

<sup>250</sup> *Teemooljee v Pardiwalla* (1975) SLR 39.

<sup>251</sup> Section 12 of the Evidence Act, Cap.74 Laws of Seychelles provides that “except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.”

<sup>252</sup> *Atkinson & Ors v Government of Seychelles* SCA 1/2007.

<sup>253</sup> See dissenting judgment of Sauzier J in *Hallock v d'Offay* (1986) SCAR 295.

<sup>254</sup> *Attorney General v Ray Voysey* SCA 1/3/1996 (unreported).

<sup>255</sup> See for example G. Marty et P. Raynaud, *Droit Civil, Tome 1* (Sirey 1972) 127: “Le rôle de la doctrine est d'ordre scientifique. Elle clarifie et ordonne le droit existant ; elle esquisse et inspire le droit à venir. Mais on ne peut dire que les opinions qu'elle émet constituent par elles-mêmes des règles juridiques.”

the style of French judgments it is also impossible to gauge how influential doctrine really is. In Seychelles, scholarly works such as the *Encyclopédie Dalloz*, Sirey, Ripert, Planiol, Mazeaud, Carbonnier and Capitant are also heavily relied on and have strong persuasive value in civil cases. In decisions of the 1970's, especially in those of Sauzier J and Souyave CJ but also in Court of Appeal judgments numerous pages of the decisions are devoted to doctrine.<sup>256</sup> The retirement of some of these judges and the appointment of judges from common law backgrounds have reduced the volume of such citation in decisions of the courts generally.

Doctrinal writings on the other hand are used rarely in criminal cases, although perhaps more in cases where there are no precedents. Archbold on Criminal Pleading, Evidence and Practice is increasingly less used as most of the English statutory amendments since 1976 are not applicable to Seychelles. Increasingly there has been reliance on *Sauzier On Evidence*<sup>257</sup> and other journal articles by the same author.<sup>258</sup>

#### 4.2.3.4 Custom

Although the Act of Capitulation guaranteed the continuation of religion, laws, and customs of the inhabitants under French colonial rule, little custom seems to have survived into the twenty-first century. Moreover as the French Code Civil did away with custom, the Civil Code of Seychelles understandably makes no mention of custom either, unlike the provision in article 3 of the Louisiana Civil Code.<sup>259</sup> What custom remains is discussed in Chapter 6 of this thesis.

The Constitution of Seychelles recognises the right of every person to take part in cultural life and protects “customary values of the Seychellois people subject to such restrictions as may be provided by law and necessary in a democratic society.”<sup>260</sup> Derogations include laws for the protection of public order, public morals and public health and the prevention of crime.<sup>261</sup> This is in stark contrast with the South African Constitution, for example, which provides for the right to “cultural life” as long as this is not “exercised in a manner inconsistent with any

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<sup>256</sup> See SLR 1970 – 1979 and SCAR 1965- 1972 and SCAR 1972- 1978.

<sup>257</sup> Sauzier (n 91).

<sup>258</sup> See for example Hodoul J in *Nanon v Thyroomooldy* (2011) SLR 92 concluding that the concept of *abus de droit* exists in Seychelles law after quoting Sauzier's article ‘Consequences of Encroaching on the Neighbour's Land’ <http://www.bas.sc/law-journal-1/consequencesofencroachingontheneighboursland> accessed 1st July 2015.

<sup>259</sup> "Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

<sup>260</sup> Article 39, Constitution of the Republic of Seychelles.

<sup>261</sup> *ibid.*

provision of the Bill of Rights”<sup>262</sup> only. It would seem that custom in Seychelles is subject to law, whereas in South Africa it would seem to enjoy the same status as official law. Hence, the South African Constitution “not only obliges the court to take this body of [customary] law into account when interpreting the Bill of Rights, but also deems it to be part of the South African legal system.”<sup>263</sup> Custom as a manifestation of deep pluralism is examined in Chapter 6.

### 4.3 Chapter Conclusion

Seychellois has journeyed under the aegis of first an exclusive civilist tradition and then with the co-existence of both the civilist and common law traditions. Currently it is at a cross road. It has both to meet the realities of its inter-connectedness with the rest of the legal world and to meet the exigencies of its international financial commitments. In this context it has to borrow and adapt rules from many different sources.

In examining the genesis of its laws and tradition, this chapter has provided the beginning of an insight into its traits, trends and tendencies characteristic of the “third legal family”, as defined by Vernon Palmer.<sup>264</sup> Determining the *traits* of the Seychellois legal system has required an examination of its sources of law, legal infrastructure and institutions. The substantive and procedural rules of its legal tradition will be examined in the next chapter. Analysing its *trends* has entailed a description of its legal methodology and style which will be continued in the ensuing chapters. Examining its *tendencies* has necessitated a look at the values, traditions and language underpinning the legal system<sup>265</sup> which will also be continued in the rest of the thesis.

The basic scaffolding on which its legal tradition was built has been revealed in this chapter with the aim of allowing the succeeding chapters to explore in more detail some further aspects of the tradition, to trace further developments and to explore the nature and future such development.

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<sup>262</sup> Sections 30 and 31, Constitution of the Republic of South Africa, 1996.

<sup>263</sup> T. W. Bennett, *Customary Law in South Africa* (Juta 2004) 84. See also article 39 (3) (recognition of customary law) of the Constitution of the Republic of South Africa, 1996.

<sup>264</sup> Vernon Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd ed Cambridge University Press 2012).

<sup>265</sup> *ibid.*, ix. In explaining the aim of his study of the third legal family he refers to the experience as “a broad evolutionary one that may reveal the salient traits, trends, tendencies within such systems. See also Kenny Anthony, “The identification and classification of mixed systems of law” in G Kodinliye and PK Menon (eds) *Commonwealth Caribbean Legal Studies* (Butterworths 1992) 179, 190. In his essay, Kenny Anthony outlines the constituent elements of a mixed legal system as their institutional foundations, substantive rules and their sources, the accompanying legal methodology, legal style and values underpinning the system.

## Chapter 5 – Substantive and Procedural Law of Seychelles

*“But in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work.”\**

### 5.1 Introduction

In the last chapter, the genesis and historical development of the Seychellois legal system was explored. From this discussion it was seen that the double colonisation of Seychelles, together with the lack of an indigenous people or culture, combined to create a mixed jurisdiction of civilian and common law legal traditions. In this chapter, elements of the substantive and procedural law are explored in order to analyse the way in which both operate in practice in Seychelles today. As has been explained in Chapter 4, the inherited laws from two successive colonial administrations, namely France and Great Britain, the former, civilian in tradition and the latter of the common law tradition, have left deep imprints, the components of which have either survived intact or have melded into an amalgamation of laws from both traditions.

In exploring some of the broader aspects of both public law and private law, the entanglement or fusion of those legal traditions and their evolution into home-grown and distinct Seychellois law will be revealed. Outlining some of the aspects of the law will also show some of the shortcomings of such enmeshment and the confusion that sometimes permeates practical applications of the law. It is not possible to go into any great detail of either the substantive or procedural law in this chapter. Instead some examples that best describe either the distinctive traditions or their fusion or even the developing indigenous Seychellois law in a particular area are given.

This analysis of the *law-in-action* will expose the true nature of Seychellois law and assist in establishing (in accordance with the research question) what type of a legal system it is or whether it meets Vernon Palmer’s nine interim conclusions<sup>1</sup> in relation to mixed jurisdictions. In the analysis of the law I have borne in mind the fact that Seychellois law is not generally known, widely reported or easily accessible and I have tried as far as possible to

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\* Roscoe Pound, ‘The Call for a Realist Jurisprudence’ (1931) 44 Harvard Law Review, 697, 711.

<sup>1</sup> Vernon Palmer, *Mixed Jurisdictions Worldwide : The Third Legal Family* (2<sup>nd</sup> edn, Cambridge University Press 2012), 89-92. These interim conclusions are also explored in Chapter 3 of this thesis.

reveal the law in the most objective way possible so as not to pick elements that only support the thesis that it is indeed a truly mixed jurisdiction.

The examples chosen will on some occasions show the legal mixing that has occurred in Seychelles and on other occasions reflect a close association with the imposed or chosen laws of other jurisdictions.

## **5.2 Substantive Law**

In describing some of the main elements of Seychellois law, a distinction is made between its substantive and procedural laws. It would be fair to say that the substantive private law remains more of the civilian tradition while the substantive public law is more reflective of the common law tradition. The interaction of two different legal traditions, and specifically the layering of common law principles onto those of substantive civil law, has led to some inconsistencies and inevitably to conflicting judgments, especially in the private law of Seychelles. Louis Edwin Venchard, Sir Victor Glover and Professor Anthony Angelo writing in 1997 articulate the difficulties leading to contradictory judgments as:

- (a) the failure to recognise that the law applicable in Seychelles is neither English or French law but that of a mixed jurisdiction where a hybrid prevails;
- (b) the unsatisfactory harmonisation of the English principles on to laws of French inspiration;
- (c) inadequate transitional provisions at the time of the promulgation of the Civil Code of Seychelles Act 1975;
- (d) the enactment, on certain topics, of parallel legislation which did not always take account of the existing provisions of the Code;
- (e) the uncertainty caused by providing that in certain cases, “the principles of English law shall apply”, without specifying whether the reference was to the principles applicable when Seychelles severed its ties with the UK for those which apply when a case is decided.<sup>2</sup>

Unfortunately this continues to be the case today. It was the wish of the authors above that the Court would use its “judicial ingenuity”<sup>3</sup> to resolve the conflicts by reversing or distinguishing the relevant judgments. There has been a genuine effort, as will be revealed by

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<sup>2</sup> See L. B. Venchard, Sir VJF Glover and Professor A H Angelo, *The Law of Seychelles Through the Cases* (Best Graphics 1997) x -xi.

<sup>3</sup> *ibid*, xi.

reported decisions in this chapter, to correct such mistakes but this does not necessarily resolve all the inconsistencies.

In terms of procedural law, the same comments apply in the sense that despite the repeal of the French Criminal and Civil Procedure Codes in 1919 and 1920<sup>4</sup> respectively, and the promulgation of codes of procedure based on English procedural rules, several provisions of French procedural law were preserved and remain in force today. The topics outlined below are chosen to highlight either the close link between Seychellois law and French law or to show the influence of English law in the area.

### 5.2.1 Private Law

The law of Seychelles, created initially from French law, follows the same division between public and private law. This distinction is historical and emanates from Roman law, as revealed in Ulpian's notable remark that there are two branches of the study of law: public and private – a law pertaining to the State and one pertaining to the interests of individuals.<sup>5</sup> This distinction has remained a characteristic of civilian countries, resulting in separate systems of courts for resolving public law disputes.<sup>6</sup> By contrast the common law distinguished law by *forms of action*. Writs were heard by the Royal Courts and *informal complaints* by the local courts. Later the Chancery Courts would hear equitable actions.<sup>7</sup>

While Seychelles never acquired such a clear-cut distinction in its court system as that of France, presumably because of the later influence of common law principles, some principles of French civil law have endured, but have been tempered by some principles of English private law.

The private law of Seychelles is contained substantially in the Civil Code of Seychelles, and in parallel or supplementary legislation. The *Code Civil* of France based on the grand principles of equality, fraternity and liberty and enacted in 1804 abolished the distinction between the two great structures of law in operation before the French Revolution: that in force in the *pays de droit écrit*<sup>8</sup> and that in the *pays de droit coutumier*<sup>9</sup> and established one

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<sup>4</sup> The French Codes had been promulgated in Seychelles by the Arrêté of 20 July, 1808.

<sup>5</sup> Alan Watson, *The Digest of Justinian, Volume 1* (University of Pennsylvania Press 2009) 1.1.1.4.

<sup>6</sup> David Johnston, 'The General Influence of Roman Institutions of State and Public Law' in D.L. Carey Miller and R. Zimmermann, (eds), *The Civilian Tradition and Scots Law* (Berlin-Aberdeen 1997) 87.

<sup>7</sup> John Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2002). See also Chapter 3 of this thesis.

<sup>8</sup> Literally translated it means *land of the written law* and refers to the south of France where Roman written law was in force .

uniform law throughout France. That Code was introduced in Seychelles by Decaen.<sup>10</sup> It was slightly modified subsequently by further *arrêts*<sup>11</sup> and other local ordinances but substantially in force until 1975 when it was revised and translated by Alexander Chloros.<sup>12</sup>

The Civil Code of Seychelles retains the traditional French tripartite division into Book I - Persons, Book II - Property and the Different Types of Ownership and Book III - Various Ways of Acquisition of Ownership. Book I contains provisions relating to civil rights, descent, and other aspects of family law. The provisions relating to marriage and divorce were repealed and re-enacted by the British in separate legislation.<sup>13</sup> Book II contains provisions relating to property in general including ownership, personal and real rights. Book III contains provisions relating to succession. It also in its Title III deals with obligations including contracts, delicts and unjust enrichment. The following provisions chosen reflect the substantive civil law in their order in the Code.

#### **5.2.1.1 Family Law**

The family law of Seychelles was originally contained in Book I of the Civil Code. However, most of the amendments to the *Code Napoléon* during British colonial rule were in the area of family law and *the law of persons*. This is understandable given the abolition of slavery, the fluidity of the family structures and the growth of *en ménage*<sup>14</sup> relationships within the evolving mores together with the prohibitive cost of a civil marriage.<sup>15</sup> Concubinage in Seychelles denotes long term relationships between unmarried parties. It is colloquially referred to as *en ménage*. In Europe and Australia it is referred to as de facto unions. Concubine is the English term and *menazer* is the Creole term used for parties in this union in Seychelles.

During British colonial rule some provisions were expatriated from the Code, amended or translated into English and incorporated as chapters in the volumes of the laws of Seychelles which are separate from the Code. Examples are the Status of Married Women Ordinance

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<sup>9</sup> “Land of customary law” referring to the north of France where the different customs regulated life.

<sup>10</sup> Arrêté 21 April 1808, Decaen No. 168 (Seychelles).

<sup>11</sup> Arrêt is a confusing term as it can mean a decision of the court or a fundamental law. Here it means law.

<sup>12</sup> See A. G. Chloros, *Codification in a Mixed Jurisdiction: The Civil and Commercial Law of Seychelles* (North Holland Publishing 1977).

<sup>13</sup> Matrimonial Proceedings Ordinance 1944, now Matrimonial Proceedings Act 1992.

<sup>14</sup> de facto unions.

<sup>15</sup> Civil marriage registration costs were prohibitive at Rupees 50 in the late 19<sup>th</sup> century. See *Seychelles Blue Book 1899* (Government Printing Press 1899). There continues to be few marriages in Seychelles: 87% of couples living together are not married. <http://www.nsb.gov.sc/wp-content/uploads/2013/03/Population-Vital-Statistics-Jan-Dec-2012.pdf> accessed 1st July 2015.

1948, the Matrimonial Causes Ordinance 1949, the Presumption of Deaths Ordinance 1907 and the Civil Status Ordinance 1893. This has undermined the integrity of the Code as, although it has retained general principles, parallel statutes have to be read in conjunction with it for completeness. The elements of family law outlined below illustrate one of the areas of Seychellois law where the most distinctive legal mixing has taken place and is most emblematic of the Seychellois legal tradition.

### 5.2.1.1 (a) Descent

Given the social anthropology of Seychelles, *en ménage* relationships, the cognatic kinship system<sup>16</sup> and the succession laws, there have been numerous cases for proof of descent and presumption of legitimacy.<sup>17</sup> In general, applications by children to establish paternal descent follow the French *Code Civil*<sup>18</sup> both in terms of the conditions for such claims to be successful and of the evidence permitted in such cases. Although the Civil Code of Seychelles adopted the term descent, the word *filiation* has remained in legal parlance and applications to establish descent are still called *filiation proceedings*. The importance of proving descent is encapsulated in the observation by Sauzier J that “illegitimacy has never carried any social stigma in Seychelles and yet illegitimate children still suffer certain disabilities under the law.”<sup>19</sup>

These *disabilities* include the rights of *natural*<sup>20</sup> children to maintenance<sup>21</sup> and inheritance from his father or from his family.<sup>22</sup> While the *Code Napoléon* did not allow a child born as a result of adulterous intercourse to be acknowledged by his natural father, it did make provision for children not born in wedlock to be legitimated by the subsequent marriage of their parents.<sup>23</sup> The Civil Code of Seychelles further relaxed the methods of proof of paternity

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<sup>16</sup> See Marion Benedict and Burton Benedict, *Men, Women and Money in Seychelles* (University of California Press 1982) 229.

<sup>17</sup> See for example *Moncherry v Rassool* (1976) SLR 168, *Créa v Agathine (No 2)* (1977) SLR 153, *Marie v Julienne* (1978) SLR 135, *Payet v Anderson* (1983) SLR 39, *Pierre and ors v MacQueen* (1983) SLR 155 and recently *Quilindo v Moncherry* SCA 29/2009 (unreported).

<sup>18</sup> Chloros (n 12) 45.

<sup>19</sup> André Sauzier, ‘Disability of Illegitimate Children Under the Law’ (2010) *Seychelles Law Journal* <https://radar.brookes.ac.uk/radar/file/0eb09764-44be-6088-c71e-fb3d8e0bfb5c/1/Sauzier2010disability.pdf> accessed 1st July 2015.

<sup>20</sup> The Civil Code of Seychelles replaces the word *illegitimate* with *natural*.

<sup>21</sup> The Affiliation Ordinance of 1964, which was later amended and incorporated in the Children’s Act 1982, makes provision for applications by the mother of a child for its maintenance by its father.

<sup>22</sup> Article 915 (1) of the Civil Code of Seychelles states that an illegitimate heir is entitled to only half of the full share of a legitimate heir if he was conceived during the marriage of one of his parents to another person.

<sup>23</sup> Civil Code of Seychelles, Article 331.

and the following evidence is permitted: the *act*<sup>24</sup> of birth,<sup>25</sup> blood tests,<sup>26</sup> evidence that the child always bore the name of the father it claims to be descended from, that the father treated the child as his own and that he provided for its “education, maintenance and start in life”, that the child has “always been recognised as a child of that father in society”; and that he has been “recognised as such by the family.”<sup>27</sup> The provisions of the Filiation Ordinance<sup>28</sup> which gave illegitimate children the same rights as legitimate children in establishing their descent was incorporated in Article 321(2) of the Civil Code of Seychelles by Chloros in 1975. However these provisions may be disregarded by the Family Tribunal in declaring a defendant the *reputed father*<sup>29</sup> of a child for the making of maintenance orders.<sup>30</sup> Section 14 of the Children Act 1982 makes it clear that such a declaration does not establish the paternal descent of that child.

Despite the fact that 79% of children in Seychelles are born outside wedlock,<sup>31</sup> Napoléon’s obsession with upholding the married family as the basis of society<sup>32</sup> is maintained, as proof of paternal descent is still generally prohibited<sup>33</sup> except in six specific circumstances: rape or abduction, where status has been established under Article 321, seduction by fraudulent means, abuse of authority or promise of marriage, written admissions of paternity by the father, where the alleged father and mother have lived openly “*en ménage*,”<sup>34</sup> where the alleged father has provided for or contributed to the maintenance and education of the child in the capacity of father.<sup>35</sup> Many of the above provisions are subject to further change as

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<sup>24</sup> Act of birth means certificate of birth and is a literal translation of *acte de naissance*.

<sup>25</sup> Civil Code of Seychelles, Article 312.

<sup>26</sup> Civil Code of Seychelles, Article 313. Note that there is still no enactment as to the use of DNA evidence.

<sup>27</sup> Civil Code of Seychelles, Article 321(1).

<sup>28</sup> The Filiation Ordinance 1919 was amended in 1956 and repealed in 1975 by the incorporation of its provisions in the Civil Code of Seychelles.

<sup>29</sup> Where a defendant in affiliation proceedings admits that he is the father of a child or where the mother proves that the defendant is the father of her child, the defendant is deemed the reputed father of the child (Children Act 1982, s 12 (2)).

<sup>30</sup> Children Act 1982, s 12.

<sup>31</sup> Of the 1,645 births registered in 2012, 338 (21%) occurred within marriage, 1005 (61%) were acknowledged (births recognised by the father) and 302 (18%) were natural (births not recognised by the father). National Bureau of Statistics, Seychelles [http://www.nsb.gov.sc/wp-content/uploads/2013/03/Population-Vital-Statistics\\_Jan-Dec-2012.pdf](http://www.nsb.gov.sc/wp-content/uploads/2013/03/Population-Vital-Statistics_Jan-Dec-2012.pdf) accessed 1st July 2015.

<sup>32</sup> See for example Suzanne Desan, *The Family on Trial in Revolutionary France* (University of California Press 2004).

<sup>33</sup> Article 340 of the *Code Napoléon* forbade proof of paternity actions except in cases of abduction of the mother and where the period of abduction coincided with that of conception.

<sup>34</sup> This is known in France as *concubinage notoire*. The *loi du 16 novembre 1912* in France amended Article 340 of the *Code Napoléon* to allow proof of paternity to be brought where there was *concubinage notoire*.

This was reproduced in section 6 of the Affiliation Ordinance of 1919 in Seychelles.

<sup>35</sup> Civil Code of Seychelles, Article 340(1).

Seychelles ratified the United Nations Convention on the Rights of the Child on 10 August 2010.

### **5.2.1.1(b) The Distribution of Property on Termination of Marriage and *En-Ménage Relationships***

Most of the provisions in the *Code Civil* in relation to marriage, divorce and matrimonial property were repealed by the Status of Married Women Ordinance 1948<sup>36</sup> and the Matrimonial Causes Ordinance of 1949, which was replaced by the Matrimonial Causes Ordinance in 1973. Under this Act, divorce could be obtained on grounds of adultery, desertion, bigamy, incest, cruelty, incurable disease, conviction for a crime, and conviction of a husband for rape, sodomy or brutality.<sup>37</sup> This was repealed by the Matrimonial Causes Act of 1992 which introduced divorce without cause, where the parties have lived apart for a continuous period of at least one year immediately preceding the presentation of the petition and the respondent consents to the grant of the divorce.<sup>38</sup>

The French matrimonial regime that had largely grown out of customary law and the principle of community of property<sup>39</sup> was replaced by the English based separation of property principles. In France, unless a premarital contract is entered into by the parties it is presumed that they have married under the legal matrimonial property regime of community of property.<sup>40</sup> A matrimonial property regime as such is unknown in English common law; there are no proprietary consequences flowing from the marriage and each spouse owns his/her property separately. The court is given wide statutory powers to make property adjustments as it thinks fit on the divorce of the parties.<sup>41</sup> Premarital contracts in England had traditionally been regarded as void on public policy grounds,<sup>42</sup> but recent case law indicates that the courts will find the terms of the prenuptial agreement decisive in their final judgment.<sup>43</sup>

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<sup>36</sup> The Status of Married Women Ordinance 1948 granted married women equal rights to single women, a *femme sole* with the rights to own property and make contracts in her own name.

<sup>37</sup> Section 7, Matrimonial Causes Ordinance 1973.

<sup>38</sup> Section 4 (1) (d) Matrimonial Causes Act 1992.

<sup>39</sup> See Alan MacDonald, 'The French Law of Marriage and Matrimonial Régimes' (1952) 1 (3) The International and Comparative Law Quarterly 313.

<sup>40</sup> This is known as the *communauté légale*, see Articles 1400-1496, Code Civil.

<sup>41</sup> Section 25, Matrimonial Causes Act 1973 (England).

<sup>42</sup> *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745.

<sup>43</sup> See *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, *Ella v Ella* [2007] 2FLR 35, *Crossley v Crossley* [2008] 1FLR 1467, *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 and *MacLeod v MacLeod* [2008] UKPC.

With the repeal of the provisions relating to community of property in the Civil Code and the enactment of the Matrimonial Causes Act of 1992 in Seychelles, a court is entitled on divorce or judicial separation, to order a settlement as appears appropriate.<sup>44</sup> There have been no court cases involving prenuptial agreements since the enactment of the English based provisions relating to division of matrimonial property. It may be safe to presume that given the general provisions in the Civil Code in relation to freedom to contract and no specific provision to the contrary in the Matrimonial Causes Act 1992, prenuptial agreements are entirely legal in Seychelles. However, given the fact that sections 20 (g), 25(1) (c) and 25(1) (d) of the Matrimonial Causes Act give extremely wide powers to the court, it may well decide in the interests of justice to depart from such agreement in any particular case.

Whereas the court has wide powers to settle matrimonial property in Seychelles,<sup>45</sup> there are no specific legal provisions for the distribution of property of *en ménage* couples when they break up. In France, where unmarried parties have lived together, the court applies the principle of a *société de fait*<sup>46</sup> and *de in rem verso*<sup>47</sup> for the settlement of property on the dissolution of the relationship. The matter however, is further complicated in Seychelles by sections 5 and 6 of the Courts Act 1964 which provide:

“5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be brought or may be pending before it, whatever may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested

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<sup>44</sup> Section 25 91) (c) Matrimonial Causes Act 1992 (Seychelles).

<sup>45</sup> Section 20(1) (g) of the Matrimonial Causes Act provides that the court may “make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.”

<sup>46</sup> A *société de fait* is an informal association where two or more persons have behaved like partners or shareholders without evidencing their initial intention to be partners or shareholders. The *Cour de Cassation* has recognised such partnerships to give a share in the family home to a concubine who either finances work in the home, runs the family home or contributes to household expenses with her salary or otherwise. See Cass.ie Civ 26 juin 2001, Dr. fam. 2002.28 obs. Lécuyer.

<sup>47</sup> An action *de in rem verso* derives from Roman law. It was incorporated into French law by jurisprudence and was the forerunner of actions for unjust enrichment. See Paolo Gallo, ‘Unjust Enrichment: A Comparative Analysis’ (1992) 40 American Journal of Comparative Law 431.

with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.

6. The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.”

Notwithstanding the above provisions, a distinction is made in the powers of the court in the division of matrimonial property as opposed to property of a failed concubinage. As has been pointed out, section 20(1) (g) of the Matrimonial Causes Act allows the court to make any order as it thinks fit to settle matrimonial property. Hence, in matrimonial property cases the court can use its powers both under section 20(1) (g) and its equitable powers under section 6 of the Courts Act to settle property without the need to resort to resulting or constructive trusts in properties where the legal ownership is solely in the name of one spouse.<sup>48</sup> The Court of Appeal has categorically stated that “the law of trusts has no place in the law of Seychelles.”<sup>49</sup>

In regard to the settlement of property of concubines the legal position is less clear. The seminal case was that of *Hallock v d’Offay*.<sup>50</sup> The parties had lived in concubinage for twenty-seven years. The land was in the name of the respondent. The Supreme Court found that the appellant was not entitled to any share in the home under the principles of *société de fait* or unjust enrichment. On appeal, the majority view was that the court could use its wide powers under section 5 and 6 of the Courts Act to do justice between the parties who end cohabitation where no legal remedy is available and that those equitable powers are in addition to and not in derogation of the powers used along the lines of French jurisprudence such as in unjust enrichment, *société de fait* or quasi contract. In the circumstances of the case, as the party had suffered no impoverishment of her patrimony nor had there been any proof of a *société de fait*, she was not entitled to any share of her concubine’s property. The judges suggested legislative change, however, to protect the rights of concubines.<sup>51</sup> In a

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<sup>48</sup> *Finesse v Banane* (1981) SLR 103, *Renaud v Renaud* SCA 48/ 1998 (unreported), *Dijoux v Dijoux* (2013) SLR (Vol 1) 1, *Hoareau v Hoareau* SCA 27/2011 (unreported).

<sup>49</sup> *Hallock v d’Offay* (1983-1987) 3 SCAR (Vol1) 295,301, 304.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*, 301, 305.

dissenting judgment, Sauzier J found that a share could be given to the appellant under both the French doctrine of *natural obligation* under Article 1235 of the Civil Code or under the English constructive trust. He stated that since the law in Seychelles is silent with regard to cohabitation, with no legal remedy specifically available for parties who end cohabitation, it was open to the court to use its equitable powers under section 5 of the Courts Act.

The matter was considered again in the case of *Monthy v Esparon*,<sup>52</sup> the Court of Appeal finding that the constructive trust should not apply but that the concubine was entitled to a share in the property on the principle that a concubine who renders services over and above those normally rendered is entitled to recover for lost remuneration based on the 1963 case of *Dora v Curator of Vacant Estates*, which was decided on the principle of unjust enrichment.<sup>53</sup>

Over the years the court has allocated shares in property in such cases on the basis of unjust enrichment,<sup>54</sup> quasi contract<sup>55</sup> and even under Article 555 of the Civil Code.<sup>56</sup> In *Monthy v Esparon*,<sup>57</sup> (a different case in 2012 with the same appellation as the 1987 case), the Court of Appeal held that where the property is legally held in joint names and the parties are not married, the action should be based on the provisions of the Civil Code and that a decision based purely on equity would be ultra vires the court's powers.

As it currently stands the court has still not been called upon to revisit Sauzier's *obiter dicta* in *Hallock v d'Offay* in situations where a claim would not be successful under any of the alternatives suggested in *Labiche v Ah-Kong*<sup>58</sup> or *Monthy v Esparon*.<sup>59</sup>

### 5.2.1.2 Law of Succession

The law of succession of Seychelles is derived from the French law and is characterised by paternalism and forced heirship in that heirs have an inherent right to succession over and

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<sup>52</sup> *Monthy v Esparon* (1983-1987) 3 SCAR (Vol II) 12.

<sup>53</sup> *Dora v Curator of Vacant Estates* (1963) SLR 66.

<sup>54</sup> *Edmond v Bristol* (1982) SLR 353, *Charlie v Francoise* SCA 12/1994 (unreported), *Arrissol v Dodin* SCA 6/2003 (unreported).

<sup>55</sup> For a quasi-contract case to succeed the party must prove the existence of such a partnership. See *Labiche v Ah-Kong* (2010) SLR 172.

<sup>56</sup> *Vel v Knowles* SCA 41/1998, *Labiche v Ah-Kong* (2010) SLR 172, *Magnan v Desaubin* (2012) SLR 58.

Article 555 provides that if a third party builds on land of another in good faith the owner can elect to preserve the structures but must reimburse the third party either a sum equal to the increase to the value of the property or equal the cost of the materials and labour estimated at the date of the reimbursement.

<sup>57</sup> (2012) SLR 104.

<sup>58</sup> (n 55).

<sup>59</sup> (n 52).

above third parties. There are however English features introduced by the 1975 Civil Code, namely the compulsory appointment of an executor where the estate of the deceased contains immovable property,<sup>60</sup> in contrast to French law where the heirs have *saisine de plein droit*.<sup>61</sup> Seychelles, however, has its own distinctive executorship in that the executor also acts as *fiduciary*<sup>62</sup> for the property. Seychelles adheres to a unitary concept of ownership. In its laws therefore, there are neither trusts nor legal and equitable ownership and hence the fiduciary is not a trustee but more like an agent of the beneficiaries or heirs. Chloros admitted that his concept of fiduciary was borrowed from Scots law.<sup>63</sup> As will be shown in the section on property law below, the fiduciary in Seychelles is not however the same as the Scots trustee who, as owner of the property, has a real right.<sup>64</sup> The fiduciary in Seychelles law resembles the *fiduciarius* of Roman law.<sup>65</sup> He holds the co-ownership rights on behalf of the heirs or co-owners but only for its sale or partition.<sup>66</sup> The executor acting as fiduciary in Seychelles exercises his duties whether the succession is intestate or by will.<sup>67</sup> To say that the duties and functions of executors or fiduciaries are clearly laid out in the Code would be an overstatement.<sup>68</sup> The provisions continue to baffle and confound practitioners and judges alike. A Practice Direction was issued in 1989<sup>69</sup> by the Supreme Court for the appointment of executors and fiduciaries but this only relates to the documents and affidavits necessary for such appointments. The general view is that the power of the executor does not go far enough.<sup>70</sup> One of the biggest shortcomings of the Code has been in not determining the term of office of either the fiduciary or the executor, which has resulted in failures to partition, sell co-owned properties or to wind up estates.

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<sup>60</sup> Civil Code of Seychelles, Article 724 (2).

<sup>61</sup> *Code Civil*, Article 724, in other words immediate vesting; the property transfers immediately upon death to the heirs.

<sup>62</sup> Article 818 of the Civil Code of Seychelles provides: "If the property subject to co-ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act."

<sup>63</sup> Chloros (n 12) 77. See also Alexander Chloros, 'The Projected Reform of the Civil Law of Seychelles: An Experiment in Franco/British Codification' (1973) 48 *Tulane Law Review* 815. For an overview of the Scots law of trust see George Gretton, 'Scotland: The evolution of the trust in a semi-civilian system' in Richard Helmholz & Reinhard Zimmermann (eds), *Itinera Fiducia* (Duncker and Humblot 1998) 507.

<sup>64</sup> Scots law locates ownership in the trustee and classifies the rights of beneficiaries as simple personal rights, see George L. Gretton 'Trusts Without Equity' (2000) 49(3) *International and Comparative Law Quarterly* 599.

<sup>65</sup> For an explanation of the *fiduciarius*, see George Mousourakis, *Fundamentals of Roman Private Law*, (Springer 2012) 305.

<sup>66</sup> Civil Code of Seychelles, Articles 818-835.

<sup>67</sup> Civil Code of Seychelles, Articles 1025-1029.

<sup>68</sup> There have been a number of cases in which the court has had to bring some clarity to the two concepts. See *Westergreen v Whiting* SCA 9/1988 (unreported) and *Rajasundaram v Ramesh Pillay* SCA 9/2013 (unreported).

<sup>69</sup> Practice Direction No. 1 of 1989 <http://www.seylii.org/sc/legislation/government-notice/1989/186> accessed 1st July 2015.

<sup>70</sup> See *Michel v Vidot No. 2* (1977) SLR 214 and *Legras v Legras* (1983-1987) SCAR 356.

### 5.2.1.2 (a) Intestate Succession

In cases of intestate succession, as has been stated above, an executor must be appointed to deal with the estate. Another change to the existing French provisions brought about by the 1975 Civil Code of Seychelles consisted in recognising the rights of the surviving spouse.<sup>71</sup> By contrast to both English and French succession laws, on death, the surviving spouse in Seychelles is entitled to all the personal chattels and at least one half of the whole property of the deceased.<sup>72</sup> Further, where the deceased spouse leaves no descendants, ascendants or collateral heirs in the third degree or descendants of nephews and nieces, the whole succession devolves on the surviving spouse.<sup>73</sup> In France, the surviving spouse is entitled to half of the joint property only.<sup>74</sup> In England, the surviving spouse is entitled to a statutory monetary amount of the estate and half of any balance of the estate if the deceased left children. The surviving children or other descendants take the remaining half on statutory trusts. Where the deceased leaves no issue, the residuary estate will pass to the deceased's spouse absolutely.<sup>75</sup>

As has already been pointed out above in the Family Law section, the Code extends the rights of succession of *natural* children but these are still not equal to the rights of legitimate children. Their share of the estate is half of what other legitimate children receive.<sup>76</sup> This is still the current position despite the fact that Seychelles ratified the UN Convention on the Rights of the Child and the right to equal protection of the law is guaranteed by the Constitution.<sup>77</sup> It is noteworthy also that the European Court of Human Rights found France to be in breach of Article 14 (the right against discrimination) of the European Convention on Human Rights in the *Mazurek* case<sup>78</sup> because of the provisions of Article 760 which provides that a natural child only inherits half of what a legitimate child would inherit. France amended its laws by the *loi du 3 décembre 2001* and the rights of legitimate, natural or

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<sup>71</sup> The French rules had already been changed in the Succession and Wills Act, Cap 81, Laws of Seychelles 1971.

<sup>72</sup> Civil Code of Seychelles, Article 767.

<sup>73</sup> Civil Code of Seychelles, Article 766.

<sup>74</sup> French *Code Civil*, Article 1475.

<sup>75</sup> Section 46 of the Administration of Estates Act 1925 as amended by section 1 of the Intestate Estates Act 1952 and section 1 of the Inheritance and Trustees' Powers Act 2014.

<sup>76</sup> Civil Code of Seychelles, Article 759. However, if they were born before the marriage of their parents to another person their rights are equal to those of legitimate children born of the marriage - Civil Code of Seychelles, Article 757.

<sup>77</sup> Constitution of Seychelles, Article 27. Seychelles is also party to the SADC Protocol on Gender and Development in which it undertook to "review, amend or repeal all laws that discriminate by sex or gender by 2105.

<sup>78</sup> *Mazurek v France*, Application ECHR No. 34406/97,

adulterine children in succession are now equal. The discrimination between the succession rights of legitimate, natural and adulterine children persists in Seychellois law.<sup>79</sup>

### 5.2.1.2 (b) Succession by Will

The Civil Code recognises three types of will: the *holographic*, *authentic* and *secret will*.<sup>80</sup> A holographic will is valid only if it is wholly written, dated and signed by the hand of the testator.<sup>81</sup> An authentic deed is dictated by a testator to a notary; the notary has to read back the will to the testator after which it is signed with an express mention in the will that legal formalities have been followed.<sup>82</sup> A secret will is made on enclosed paper and sealed after which the testator delivers it closed, stuck and sealed to the notary and two witnesses. The testator must declare that the contents of the sealed papers consist of a signed will. If the will was written by another person, the testator must affirm that he/she has personally verified the text, upon which the notary draws up a memorandum and signs the sealed papers.<sup>83</sup>

Children cannot be excluded from the succession unless they are declared unworthy.<sup>84</sup> The Code provides that the testator can dispose of his property but it also provides the portion of the property which he can dispose of depending on whether he has children: the reserved portion is half of the estate if the deceased leaves only one child at the time of his/her death, two thirds if he/she leaves two children and three quarters if he/she leaves three or more children.<sup>85</sup> The surviving spouse however has no reserved rights where there is testacy. She does however have an entitlement under Article 205(2) of the Civil Code to receive maintenance from the estate of the deceased. That part of the estate which is not reserved for the children may be disposed of by will to any person chosen by the testator. The court has intervened to reduce the portion disposed of by gifts *inter vivos* or by will to within the lawfully allowed disposable portion.<sup>86</sup>

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<sup>79</sup> Civil Code of Seychelles, Articles 915-1 and 915-2.

<sup>80</sup> Civil Code of Seychelles, Article 969.

<sup>81</sup> Civil Code of Seychelles, Article 970.

<sup>82</sup> Civil Code of Seychelles, Article 972.

<sup>83</sup> Civil Code of Seychelles, Article 976.

<sup>84</sup> They are unworthy if they have been convicted of murder or of attempted murder of the deceased, if they have made an accusation about the deceased of a defamatory nature about a capital offence or if they had information about the unlawful homicide of the deceased and failed to report it. (Civil Code of Seychelles, Article 727.

<sup>85</sup> Civil Code of Seychelles, Article 913. The reserved portion of the children: Civil Code of Seychelles, Article 913.

<sup>86</sup> See *Ex Parte Mondon No. 4* (1969) SLR 19, *Chetty v Twomey* SC39/1994 (unreported), *Basset vs Figini and ors* SC 145/ 2011 (unreported).

Finally, it is important to note that while non-Seychellois normally need government sanction to acquire property in Seychelles<sup>87</sup> a notable exception is succession by will or by the law relating to succession on intestacy, which permits a non-Seychellois to acquire land in Seychelles without such permission.<sup>88</sup> In such cases the non-Seychellois files *an affidavit of transmission on death* with the Land Registrar, signed by the executor and the land is registered in the name of the heir.<sup>89</sup> It must also be noted that there is no inheritance tax in Seychelles.

### **5.2.1.3 Property Law**

The contents pages of the Civil Code indicate in the titles that the law of property is contained in Book II entitled “Property and the different kinds of ownership.” However this is far from correct as there are many provisions in relation to property in all the three Books of the Code with substantive provisions found in Book III on co-ownership, the rules relating to conveyancing and registration found in the Land Registration Act (an English law) and the Mortgage and Registration Act and the laws relating to offshore trusts and foundations in separate legislation. Indeed, as will be seen in this section, there are incompatibilities between certain provisions of the Land Registration Act, the trusts law in offshore property and the Code. It would not be possible to cover all aspects of the law of property in Seychelles in this section but five topics are chosen to illustrate the main points of mixing in the laws from the two traditions and the emergence of Seychellois law to forge some kind of cohabitation between the two legal systems. This is perhaps a Seychellois solution to marrying seemingly irreconcilable concepts.

#### **5.2.1.3 (a) The Fiduciary and the Co-ownership of Property**

The ownership of property in French law is different from English law in that the owner of property has absolute title. Such title would perhaps resemble a *fee simple estate*<sup>90</sup> of English law but estate is not a French doctrine in any sense<sup>91</sup> and ownership is not restricted in time. Although French law does recognise different interests in land, these are not estates but rather temporary encumbrances such as servitudes.<sup>92</sup> The unity of ownership is a fundamental

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<sup>87</sup> See Immoveable Property (Transfer Restriction) Act 1994.

<sup>88</sup> *ibid.* section 3(1).

<sup>89</sup> Land Registration Act, section 72.

<sup>90</sup> See Dr. Charles Harpum, Stuart Bridge and Dr. Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet and Maxwell 2012), 38.

<sup>91</sup> See Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Praeger 2000).

<sup>92</sup> Article 543 implies the *numerus clausus* - the only rights in property are ownership, usufruct, use and habitation and lease.

principle; hence ownership of property is not dismembered into legal and equitable ownership. It is exclusive and personal and the law does not encourage co-ownership except in limited circumstances.<sup>93</sup> These principles form the basis of Seychellois law despite certain incompatibilities caused by the Land Registration Act and the concept of the fiduciary in the 1975 Code and by the subsequent introduction of trusts in the offshore industry.<sup>94</sup>

As pointed out above, whereas in French law ownership on death passes of right to the heirs (immediate vesting), the introduction of the fiduciary in Seychellois law has meant an interruption in the immediate ownership of property (deferred vesting) by heirs on the death of *de cujus*.<sup>95</sup> Chloros indicated that the concept of the fiduciary was “an attempt to graft onto the Code the convenient technique of the trust for sale”<sup>96</sup> without introducing the concept of the trust itself. A solution was certainly necessary in terms of dealing with co-owned land in Seychelles, where co-owners could not sell or transfer land because the laws required the agreement of all co-owners and many of these included fifth or sixth generation heirs who either could not be traced or whose number and exact shares in the property were unknown. Further, this was seriously hampering development in Seychelles, given the limited land available. Chloros’ fiduciary technique, however, was not thought out enough and has proved problematic in practice. As Claude Moutia has pointed out, the risk of tinkering with the Civil Code is immense:

“Le Code Civil...est un tout: touchez à une partie et vous ébranlez l’édifice ou vous en faites violence”<sup>97</sup>

While the 1975 Code sought to have all the heirs represented by one and only one person, Articles 817 and 818 went further:

“Article 817 1. When property, whether moveable or immovable, is transferred to two or more persons, the right of co-ownership shall be

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<sup>93</sup> See Bernard Rudden, ‘Economic Theory v Property Law: The Numerus Clausus Problem’ in John Eekelaar and John Bell (eds), *Oxford essays in Jurisprudence* (Oxford University Press 1987) and Christain Atias, *Droit civil: les biens* (8th edn, Lexis Nexis Litec 2009).

<sup>94</sup> International Trusts Act Cap. 102A, Laws of Seychelles.

<sup>95</sup> Person by, through, from or under whom the heir or legatee claims.

<sup>96</sup> Chloros (n 63) 839.

<sup>97</sup> Claude Moutia, ‘Le Code Civil aux Seychelles’ (1977-1988) *Mauritius Law Review*, *Revue de droit, de doctrine, et de jurisprudence mauricienne* 85. (“The Civil Code constitutes a whole: tampering with any part results in the weakening of its foundations or imputing a new sense to it.”)

converted into a claim to a like share in the proceeds of sale of any such property.

2. Paragraph 1 of this Article regulates the exercise of the right of co-ownership. It does not affect the rights of co-ownership itself.

Article 818. If the property subject to co-ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.”

Hence, the co-owner’s *real* right in the co-owned immovable property can only be exercised by the fiduciary and that right is only a right to a share in the proceeds of sale of the property. The fiduciary however is not the owner of the real right either. Article 817(2) limits the trust concept in Article 817(1), as it clearly indicates that the co-owners are still the owners of the real right but that the fiduciary is the medium through which that right is exercised. The fiduciary therefore merely amounts to a medium to facilitate the transfer of the right of ownership. That the co-owners are the *real undivided* owners in the property is demonstrated in the Articles that provide them with rights over and above that of the fiduciary - if they all agree to postpone the sale of the immovable property the fiduciary cannot transfer it;<sup>98</sup> a co-owner may also proceed to *licitation*<sup>99</sup> or partition<sup>100</sup> to recover his share of the property.

In both *Michel v Vidot*<sup>101</sup> and *Mathiot v Julienne*<sup>102</sup> where the rights of co-owners to bring actions in relation to property were challenged, the court found that co-owners could indeed bring actions without representation by a fiduciary if those actions related to the protection of their individual rights of occupation of the property and that a fiduciary was only necessary in respect of actions which affected rights to the common property. Sauzier J found that:

“Article 818 only affects the exercise of the right of co-ownership insofar as it relates to the immovable property itself and does not affect the right of the individual co-

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<sup>98</sup> Civil Code of Seychelles, Article 819, 1686-1688.

<sup>99</sup> Offering for sale to the highest bidder.

<sup>100</sup> A division in kind under Article 821(2) of the Civil Code of Seychelles and Immoveable Property (Judicial Sales Act, Cap 166, Laws of Seychelles s113-115 and 118.

<sup>101</sup> *Michel v Vidot No. 2* (1977) SLR 214.

<sup>102</sup> *Mathiot v Julienne* (1992) SLR 135.

owners to deal with their rights of co-ownership.”<sup>103</sup>

These cases are clearly distinguishable from those which involve *real* co-owned rights.<sup>104</sup> In the 1975 amendments to the Civil Code, duly executed leases were converted into *real* rights.<sup>105</sup> Hence in *Jumeau v Anacoura*,<sup>106</sup> Sauzier found that a co-owner had no right to lease land that is held in co-ownership. Such leases can only be executed by a fiduciary. Where the co-owner does so, he should be treated as a person who leases land belonging to a third party. Hence, the co-owner of land has no real right over the whole property but rather a personal right, a *jus crediti* or claim to a share in the proceeds of sale of the co-owned land.<sup>107</sup>

Sauzier’s minority decision in *Legras v Legras*<sup>108</sup> is therefore puzzling and has caused much confusion. That case concerned a sale by a mother of part of land co-owned by herself and her son. The son challenged the sale which had taken place without the intervention of a fiduciary or his consent. The majority of the judges of the Court of Appeal supported the Supreme Court decision that the sale was void and invalid as a co-owner had neither capacity nor legal right to sell land held in co-ownership or an undivided share in co-owned land without the intervention of a fiduciary. Sauzier J in a minority judgment found that the co-owners remained vested with their individual rights of co-ownership by virtue of Article 817(2) of the Civil Code and that their individual real right of co-ownership could be transmitted to another co-owner or to a third party without the intervention of a fiduciary by virtue of Article 834 of the Civil Code.<sup>109</sup> This was despite the fact that he had argued the opposite position in *Jumeau*.<sup>110</sup> The uncertainty over the conflicting rights of the fiduciary persists.

### 5.2.1.3 (b) Conveyancing and Registration

Perhaps one of the areas in which the amended Code has caused the greatest confusion has been the transfer of land. Seychelles had initially followed the French system of registration

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<sup>103</sup> *Michel* (n 101) 215.

<sup>104</sup> *Jumeau v Anacoura* (1978) SLR 180, *Azemias v Dubignon* (1992) SLR 33.

<sup>105</sup> Civil Code of Seychelles, Articles 543 and 1718 (2).

<sup>106</sup> *Jumeau* (n 104.).

<sup>107</sup> *ibid.*

<sup>108</sup> *Legras v Legras* (1983-1987) SCAR 367.

<sup>109</sup> Article 834 of the Civil Code provides: “In the case of the sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of ten years, to buy that share back by offering to such third party the value of the share at the time of such offer and the payment of all costs and dues of the transfer.”

<sup>110</sup> *Jumeau* (n 104).

of deeds as opposed to the English system of registration of title. The registration of transfers of land took place under The Mortgage and Registration Act 1927 until 1968.<sup>111</sup> Section 12 of the Act provided for a register, the *Répertoire*, in which was entered the name of every party affected by any deed or other transactions concerning immovable property. It therefore only provided a notice of the transaction to third parties but was no guarantee of title and in many cases resulted in property being successively transferred to different buyers.<sup>112</sup>

In 1967, the Land Registration Act was passed. It mirrored to some extent the reform of the English Land Registration Act of 1925 in simplifying the processes by which land transactions were carried out and ensuring that interests in land were registered in order to bind future purchasers of the property. However, with money in short supply, unidentifiable co-owners, difficult terrain and registration only being made voluntarily, it is not surprising that a study conducted twenty years later shortly before independence found that out of a total of 8,541 parcels of land on the island of Mahé only 3,940 had been surveyed and only 660 registered.<sup>113</sup> An amendment to the Act in 1979 made registration of title compulsory and provided for the adjudication of title of previous registered proprietors in the Mortgage and Registration Register and their transfer to the new Land Register.<sup>114</sup> Today, the survey and registration of title on the two main islands of Mahé and Praslin are near complete. Unsurveyed land on Praslin and La Digue and other smaller islands remains on the old register.

Section 46 of the Land Registration Act provides that land transfers are completed by registration of the transferee as proprietor of the land and the filing of the document. Hence, under the current system registration perfects and completes the transfer and certifies the ownership of absolute title to realty.

### **5.2.1.3 (c) Rights *In Rem* and Rights *In Personam***

The Code however, has preserved the concept of promise of sale from French law, which gives rights *in personam* between the promisor and the promisee<sup>115</sup> and this continues to co-exist with the provisions of the Land Registration Act, which only allows for registration of

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<sup>111</sup> The entries in the register consisted of transcriptions of property sold and inscription of property mortgages.

<sup>112</sup> See for example *Estate of Charlemagne Grandcourt and ors v Gill* SCA 7 /2011 (unreported).

<sup>113</sup> J.C.D. Lawrance, 'Note on a visit to Seychelles' (London Overseas Development Administration 1979).

<sup>114</sup> Section 10, Land Registration Act, Cap 107, Laws of Seychelles,

<sup>115</sup> See M. Beugnet, *Œuvres de Pothier: Traité de Contrat de Vente* (2<sup>nd</sup> edn, Cosse et Marchal 1861) 476, 478.

transfers of property giving rights *in rem*.<sup>116</sup> In French law and consequently Seychellois law there are distinctions between a promise of sale, an option to purchase and an agreement to sell. These arise from the original provisions of Article 1589 of the Code Civil<sup>117</sup> which were preserved and translated literally in the Civil Code of Seychelles:

“A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.”

The agreement to sell is made up of three stages which generate different consequences. The three stages were articulated by Robert-Joseph Pothier in the nineteenth century in his treatise on the law of contract:

"476. Une promesse de vendre est une convention par laquelle quelqu'un s'oblige envers un autre de lui vendre une chose... Il y a une grande différence entre la promesse de vendre et la vente même. Celui qui vous promet de vous vendre une chose, ne la vend pas encore, il contracte seulement l'obligation de vous la vendre lorsque vous le requerez...

478. Le contrat de vente est un contrat synallagmatique, par lequel chacune des parties s'oblige l'une envers l'autre, mais la promesse de vendre est une convention par laquelle il n'y a que celui qui promet de vendre, qui s'engage, celui à qui la promesse est faite ne contracte de sa part aucune obligation.”<sup>118</sup>

This invariably led to some confusion, which Marcel Planiol later explained as follows:

“Prenons donc la promesse de vente comme une convention unilatérale. Il n'y a pas encore de vente, puisqu'il n'y a pas encore d'acheteur. Il y a une obligation unique,

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<sup>116</sup> See *Arnold v Mussard* SCA 31/2010 (unreported).

<sup>117</sup> Article 1589 of the French *Code Civil* provides : “La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix.”

<sup>118</sup> (Pothier (n 162) : 476 - A promise to sell is an agreement whereby someone undertakes to another to sell him something... There is a big difference between a promise to sell and the sale itself. The person who promises to sell has not sold yet, he is only contracting the obligation to sell to you when you require the thing. 478 - The contract of sale is a synallagmatic contract, by which each party undertakes to do something for the other, whereas the promise to sell is an agreement whereby there is only one person who promises to sell, who makes an undertaking. The person to whom the promise is made does not contract or undertake anything” (translation contained in J. Denson Smith , ‘An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money’ (1960) 20 (3) Louisiana Law Review 521, 522.

contractée par le propriétaire qui seul s'est obligé en promettant de vendre... Ce n'est pas encore une vente, mais la vente se complètera peut-être un jour par l'adhésion de l'acheteur si celui lui plait.”<sup>119</sup>

Hence a promise of sale of land, for example, as pointed out by Sauzier J in *Abdou v Wistanley*<sup>120</sup> consists of three distinct stages: firstly the buyer offers to buy the land without an acceptance of the offer by owners. This offer is known as *pollicitation*.<sup>121</sup> Secondly, the offer is accepted by the sellers. At this stage it is still a unilateral promise to buy, an option to purchase. Thirdly, both parties bind themselves to this agreement, the promise to buy and the promise to sell. This is a bilateral agreement. At this stage the Civil Code (Article 1589) stipulates that the promise is equivalent to a sale and Article 1583 (1) of the Civil Code comes into play:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

The revision of the Code in 1975 however produced a proviso to Article 1589:

“However, the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as from the date of registration.”(emphasis added)

This wording has resulted in difficulties. In *Ahwan v Accouche*,<sup>122</sup> the Supreme Court *per incuriam* decided that this meant that a promise of sale can only be effective if registered and in the absence of registration, the transfer between the defendant and the plaintiff was null and void and of no effect. This was despite the clear dicta in *Hoareau v Gilleaux*<sup>123</sup> by the Court of Appeal that the words “as from the date of registration” in Article 1589 only refers

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<sup>119</sup> Marcel Planiol, *Traité élémentaire de droit civil, tôme 2* (11edn, LGDG 1931) 1401 “Let us take the promise of sale as a unilateral contract. There is not yet a sale as there is not yet a buyer. There is a unique obligation, contracted by the proprietor who alone made an undertaking to sell... It is not yet a sale but the sale may take place one day by the acceptance of the buyer if he so pleases.” (as translated by Smith (n 118).

<sup>120</sup> *Abdou v Wistanley* (1978) SLR 62.

<sup>121</sup> An offer or promise that is yet not accepted.

<sup>122</sup> (1990) SLR 196.

<sup>123</sup> *Hoareau v Gilleaux* (1982) SCAR 158.

to the effect on third parties and to give a different interpretation to Article 1589 would set its provisions in direct contradiction to the provisions of Article 1328<sup>124</sup> and challenge the integrity of the Code as a whole. *Hoareau v Gilleaux* has now been followed in a number of cases and is the correct position.<sup>125</sup>

The provision in Article 1589 certainly does not sit well with the provisions of the Land Registration Act which state that a transfer is not complete until registration.<sup>126</sup> Jurisprudence apart, the opposing provisions will have to be reconciled by revision of the Code or legislative amendment.

### **5.2.1.3 (d) Encroachment**

Given that land is limited and much of the population is grouped into extended family systems and close neighbourhood relationships,<sup>127</sup> encroachment on neighbours' land is a common complaint. Actions in court based on Articles 545 and 555 of the Civil Code are common. A convenient starting point however may be Article 26(1) of the Constitution which states:

“Every person has a right to property and for the purpose of this Article this right includes the right to acquire, own peacefully, enjoy and dispose of property either individually or in association with others...”

This is also contained to some extent in Article 544 of the Civil Code which provides for the right to enjoy and dispose freely of property to the exclusion of others. The old established principle of French law that property cannot be taken away is expressed as follows in Article 545 of the Civil Code of Seychelles:

“No one may be forced to part with his property except for a public purpose and in return for fair compensation...”

Article 545 can sometimes come into conflict with Article 555 which provides:

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<sup>124</sup> Article 1328 provides: “The date of documents under private signature shall only have effect upon third parties as from when they are registered, or as from the death of the person who signed it, or as from the date on which their contents were confirmed in documents drawn up by public officials, such as minutes under seal or inventories.”

<sup>125</sup> See also *Arnold v Mussard* (n116) *Estate of Charlemagne Grandcourt* (n112).

<sup>126</sup> Section 46(2) Land Registration Act Cap 107, Laws of Seychelles, s 46(2).

<sup>127</sup> See *Benedict* (n16).

“When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land ... shall be empowered either to retain their ownership or to compel the third party to remove them.”

Sauzier J in a paper given to the Bar Association of Seychelles explains the relationship between Articles 545 and 555:

“If one builds on someone else’s property a structure which entirely stands within the boundaries of that property, it will be Article 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend. However, if one builds partly on one’s property and the structure goes over the neighbour’s boundary encroaching on his land, Article 555 finds no application.

In such a case the neighbour can insist on demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.

The legal basis for such a stand is Article 545...<sup>128</sup>

Sauzier’s position is supported by many court decisions, since condoning an encroachment violates the constitutional right to property which cannot be cured by mere compensation.<sup>129</sup> Article 555 only operates to give the person who builds in good faith the right to compensation for the building constructed; it could never cede ownership of another’s title.

The strict application of Article 545 has been tempered in France by the concept of *abus de droit*.<sup>130</sup> In both *Nanon v Thyroomooldy*<sup>131</sup> and *Mancienne v Ah-Time*,<sup>132</sup> the Court of Appeal of Seychelles raised the issue of whether there may be exceptions to the principle enshrined in Article 545. The court referred to the example given by Sauzier J in his paper of 2010:<sup>133</sup>

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<sup>128</sup> André Sauzier, ‘Consequences of Encroaching on the Neighbour's Land’ <http://www.bas.sc/law-journal-1/consequencesofencroachingontheneighboursland> accessed 1st July 2015.

<sup>129</sup> *Nanon v Thyroomooldy* (2011) SLR 92, *Ah-Time v Mancienne* (2013) SLR 165.

<sup>130</sup> Abuse of right in the sense that one has to exercise a right so as not cause harm or damage to others comes from the Latin maxim *neminem laedit qui suo iure utitur*. The following *arrêts* have firmly established the concept in French jurisprudence: Colmar, 2 mai 1855, D. 56. 2. 9; Req. 10 juin 1902, DP 1902. 1. 454, Req. 3 août 1915 Coquerel c/ Clément-Bayard (DP 1917. 1. 79); Civ. 20 janv. 1964, D. 1964. 518, JCP 1965. II. 14035, note B. Oppetit ; v. not. Civ. 3e, 30 oct. 1972, D. 1973, Somm. 43, Bull. civ. III, n° 576 ; 9 mai 2001, Defrénois 2001. 1123, obs. Atias

<sup>131</sup> *Nanon* (n 129).

<sup>132</sup> *Mancienne* (n 129).

<sup>133</sup> Sauzier (n 128).

whether a multi storey complex would be brought down in part for a few inches of encroachment on the boundary of another. In *Mancienne*, Domah JA was of the view that

“In Seychelles, the serious need to temper justice with mercy in this area of the law was long felt. The dire need arises out of grass root realities in the exiguity of its land mass as an island and its antiquated and historical system of land use, ownership and occupation. While it is true that a lot of effort is being deployed to demarcate properties properly, a lot is yet to be done with respect to families who have lived in communities and bothered little about land demarcations any more than they had hitherto bothered about their social and family demarcations. When official documents are drawn up ex post facto and from offices to excise and demarcate properties, they pay scant regard to historical realities on site which only family and community memories can vouch for.”<sup>134</sup>

He then formulated the rule for *abus de droit* in Seychelles as follows:

“the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows: ...where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, and account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of Article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an *abus de droit*.”

It would certainly be a better option to enact a provision in the Civil Code on *abus de droit*<sup>135</sup> as has been done in Canada<sup>136</sup> and Mauritius.<sup>137</sup> For the moment, based on *Nanon* and

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<sup>134</sup> *Mancienne* (129).

<sup>135</sup> Abuse of right (n 130).

<sup>136</sup> Article 7 of the Civil Code of Quebec provides: “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.”

<sup>137</sup> Articles 16 and 17 of the Civil Code of Mauritius as amended in 1981 adopt the Canadian provisions but are more expansive: “16- Chacun est tenu d’exercer ses droits et d’exécuter ses devoirs selon les exigences de

*Mancienne*, there is no doubt that the concept, having been firmly established in Seychelles, will see further jurisprudential or statutory development.

### 5.2.1.3 (e) The *Droit de Superficie*<sup>138</sup>

It is often the case in Seychelles that landowners give permission to third parties to build on their land. As years go by, however, relationships may cool or the heirs of the original owners may wish the third party to remove the building erected. This is the backdrop to courts using equity to create the *droit de superficie*, which is a *real* right<sup>139</sup> and is distinguishable from the limited right to compensation in Article 555. While ownership cannot be split vertically within the civil law system, it can however accommodate a horizontal split to allow a *droit de superficie* when it is dictated by circumstances. The *droit de superficie* is not contained in the provisions of the Code; nor is there agreement over its legal nature but it is undoubtedly a right clearly allowed in jurisprudence.<sup>140</sup> It is explained by Ugo Mattei as having its origins in Roman law, bypassed by the French in codification but applied by them in their colonies:

“where it was crucial to maintain the principle that the state was the owner of all land (to avoid excessive speculation), but at the same time necessary to grant building rights secure enough to stimulate investments.”

Charles Aubry and Charles Rau explain that the right of *superficie* is a property right and extends to the owner of the constructions, trees or plants adhering to the surface of the property, although the property on which the structure or plant is affixed belongs to another.<sup>141</sup> The right can be in perpetuity or limited by time depending on the intention of the parties.<sup>142</sup> It can be created in two ways: either by transfer of the right of ownership (by sale or lease) or by *prescription*.<sup>143</sup>

In Seychelles, the right was not specifically mentioned but was recognised in the case of

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la bonne foi. 17- Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un préjudice hors de proportion avec l'avantage qu'il peut en retirer.”

<sup>138</sup> A *droit de superficie* is not translatable in English. It indicates that a *surface* right has been acquired over the land, from the Latin *superficies*.

<sup>139</sup> It is debatable whether a *droit de superficie* breaches the *numerus clausus*. If it splits rights vertically it would.

<sup>140</sup> Francois Terré et Philippe Simler, *Droit civil: Les biens* (8<sup>th</sup> edn Dalloz 2010).

<sup>141</sup> Charles Aubry et Charles Rau, *Cours de droit civil français, t II* (4<sup>th</sup> edn Marchal and Billard 1869-1872) 438.

<sup>142</sup> Terré (n 140) [835].

<sup>143</sup> Limitation.

*Mussard*<sup>144</sup> in 1975. In the case of *Albest v Stravens*,<sup>145</sup> the Supreme Court for the first time specifically used the terminology *droit de superficie*. It found that Article 555 did not apply and the defendant had acquired a *droit de superficie* over the plaintiff's land. In that case the plaintiff had sold a hut but not the land on which it stood to the defendant. This therefore was a case of acquisition of the *droit de superficie* by transfer of a right of ownership.

The Court of Appeal considered the principle for the first time in 1978 in *Ancana and anor v Madeleine*.<sup>146</sup> It cited French jurisprudence to indicate circumstances where Article 555 would not apply: in cases where the owner agrees that the occupier construct a building, the court will look at the terms of the agreement and not at the provisions of Article 555. Wood J summarised the principles now part of Seychellois law in *Malbrook v Barra*:<sup>147</sup>

“Where a person is given positive consent to build on the land of another the legal consequences of such consent are:

- (a) the renunciation by the owner of the land of the right of accession conferred upon him by the Civil Code;
- (b) the conferment upon the person who erects the construction of a right to enjoy the use of the land so long as the construction covers it; and
- (c) the right comes to an end when the person who erected the construction wants to rebuild or finds himself bound to do so.”<sup>148</sup>

In *Tailapathy v Berlouis*,<sup>149</sup> the Court of Appeal indicated that the right of the *superficiaire* can even extend to rebuilding in cases where the right is acquired by a lease. At the end of the lease the option under Article 555(4) of the Civil Code would come into operation and the *superficiaire* is entitled to remove the building or claim compensation for it. The *droit de superficie* can also arise by *prescription*.<sup>150</sup> In Seychelles, the *prescription* of twenty years<sup>151</sup> would apply to confer rights on the *superficiaire*. In such cases, where a purchaser acquires

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<sup>144</sup> *Mussard v Mussard* (1975) SLR 170.

<sup>145</sup> *Albest v Stravens No. 2* (1976) SLR 254.

<sup>146</sup> *Ancana and anor v Madeleine* (1978) SCAR 7.

<sup>147</sup> *Malbrook v Barra* (1978) SLR 196.

<sup>148</sup> *ibid*, 197.

<sup>149</sup> *Tailapathy v Berlouis* (1982) SCAR 335.

<sup>150</sup> Limitation.

<sup>151</sup> Civil Code of Seychelles, Article 2262.

property with the knowledge of a *droit de superficie*, the right of the *superficiaire* survives and continues.<sup>152</sup>

Finally, it is a moot point whether a *droit de superficie* can be registered under the Land Registration Act. As a *real* right it can certainly be argued that it should and would be registered as are other similar *real* rights such as usufructs.<sup>153</sup> Although no specific provision is contained in the Act for its registration, it may well be possible to register it under section 53. Section 53 is a generic provision allowing for the registration of restrictive agreements<sup>154</sup> if the proprietor agrees but it is equally possible that the *superficiaire* could insist on his *droit de superficie* being registered under section 25 of the Act<sup>155</sup> as it is indeed an overriding interest to the rights of the proprietor. The Land Registrar has indicated that for the present, *droits de superficie* are registered as an overriding interest under section 25 of the Land Registration Act.<sup>156</sup>

#### 5.2.1.4 Law of Obligations

The terminology *law of obligations* is not a concept that is known in common law. Law books from the common law world make a distinction between contract and tort law. The Civil Code of Seychelles is like the French *Code Civil* reflective of the Roman legal tradition and possesses a unity in terms of general dispositions applicable to obligations, torts, delicts and restitution. Book II, Title III provides for the effects of obligations generally and specifically for the law of contracts but also for obligations arising without agreement such as quasi contracts, unjust enrichment and delicts.<sup>157</sup>

In Seychelles, the French distinction between *faits juridiques*<sup>158</sup> and *actes juridiques*<sup>159</sup> is preserved in the Civil Code. Hence, the law of obligations remains divided between those obligations arising from *actes juridiques* such as contracts and those arising from *faits*

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<sup>152</sup> *Herminie v Francoise* SCA 21/ 2009 (unreported).

<sup>153</sup> See editor's head note in *de Silva v Bacarie* (1982) SCAR 45, 47.

<sup>154</sup> Section 53(1) of the Land Registration Act provides, "53.(1)Where the proprietor or transferee of land or of a lease agrees to restrict the building on or the user or other enjoyment of his land, whether for the benefit of other land or not, he shall execute an instrument to that effect (herein after referred to as a restrictive agreement), and upon presentation such restrictive agreement shall be noted in the encumbrances section of the register of the land or lease burdened thereby, and the instrument shall be filed."

<sup>155</sup> Section 25 of the Land Registration Act provides for the registration of overriding interests such as easements but superfiary rights are not specifically provided for.

<sup>156</sup> Oral submission by Assistant Land Registrar at Civil Code Review, Minutes 7<sup>th</sup> December 2013. Copy with author.

<sup>157</sup> A delict from the French word *délict* and latin *dēlictum*, is fault or a *tort*.

<sup>158</sup> Legal acts.

<sup>159</sup> Legal facts.

*juridiques* such as delicts and quasi delicts.<sup>160</sup> In general, the law of obligations is perhaps the area of Seychellois law that has withstood inroads from common law the most.

#### **5.2.1.4 (a) Contracts**

In general, the Seychellois law of contracts is of the French civilian tradition, where contract is the result of the meeting of autonomous wills,<sup>161</sup> and is a practical expression of the subjective theory of contract as opposed to the objective theory of the common law contract.<sup>162</sup> However, although the law has remained for the most part substantially French in character, there have been some inroads made by English common law. Where these English interpositions have happened they have taken place both through legislation and jurisprudence. Title III of Book III of the Civil Code of Seychelles containing the law of obligations has retained the Article numbers and structure of the *Code Napoléon*.

##### **5.2.1.4 (a)(i) The Validity of Contracts and Nullity.**

Generally, everyone is free to contract and to choose with whom they wish to contract. In this context, an *acte juridique* relates to the fact that one or more persons can clearly manifest their intention to produce legal consequences, i.e. consequences that have a legal character that they themselves define or at least that is clearly known to them both. In order for such acts to be legally valid however, certain rules have to be complied with. The Civil Code sets out the constituent elements of a valid contract in Article 1108: consent, capacity, definite object and lawful cause.

Consent is not defined positively but it is not valid if given by mistake or under duress or induced by fraud.<sup>163</sup> In *Chetty*,<sup>164</sup> the Court of Appeal had the opportunity to clarify the concept. In that case, the plaintiff (a grandmother) had signed a deed of transfer of immovable property to the defendant (her granddaughter). She claimed that her consent had been vitiated by duress but the Supreme Court found that duress had not been proved. On allowing the appeal, the Seychelles Court of Appeal explained the law relating to consent. It stated that Article 1108 of the Civil Code is the source or conceptual provision and Article

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<sup>160</sup> For the distinction between the two see below at Section 5.2.1.4(a)(i) The Validity of Contracts and Nullity.

<sup>161</sup> Article 1134 of the Civil Code of Seychelles which is verbatim the French *Code Civil* provides: "Agreements lawfully concluded shall have the force of law for those who have entered them." See also Barry Nicholas, *The French Law of Contract* (2nd edn, Oxford University 1992)32.

<sup>162</sup> *ibid*, 35. See also Wayne Barnes, 'The French Subjective Theory of Contracts: Separating Rhetoric from Reality' (2008) 83 *Tulane Law Review* 359 and also Joseph Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation" (2000) 69 *Fordham Law Review* 427.

<sup>163</sup> Article 1109, Civil Code of Seychelles.

<sup>164</sup> *Chetty v Chetty* SCA 15/2009 (unreported).

1109 the generic or functional provision about consent. Article 1109 only provides that consent is invalidated where there is mistake, duress or fraud. This distinction is important as it means that the concept of consent is larger than and includes the concept of duress, mistake and fraud. In such cases the contract is not rendered null as of right; it only gives rise to an *action* for nullity.<sup>165</sup>

Article 1123 stipulates that everyone may enter into a contract unless he is subject to some legal incapacity. Those with legal incapacity excluded from exercising their rights to enter into contracts are minors and interdicted persons.<sup>166</sup> Interdicted persons are defined in Article 489 as those of full age who are “habitually feeble minded, insane or a lunatic”, even when they have “lucid intervals”. However, the provisions of Article 1123 cannot be used by a person with full capacity to plead the other’s incapacity in order to escape liability. In other words, the provisions are clearly aimed at protecting such people from their own youth or mental inability but not those who contract with a minor and then seek to avoid their obligations.<sup>167</sup> Hence, in *Uzice*,<sup>168</sup> the Court refused to annul an insurance policy on the grounds that the insured was a minor when he entered into the contract of insurance. In this case there had been no misrepresentation by the minor of his age but rather an attempt by the insurance company to use incapacity to avoid their liability to pay out on the policy.

As can be seen from the cases above, when the conditions necessary for the validity of contracts are not met there may be drastic repercussions. These consequences are not clear-cut either in French or Seychellois law: they are either the *nullité relative or absolue*<sup>169</sup> of the contract. Traditionally, French law has viewed a contract as a living person composed of organs. These organs can be defective. Where the basic conditions for a contract as outlined above are not met, the private agreement between the parties essential to bringing the contract to life is *stillborn*. In this case nullity of the contract is absolute. However, when there exists a contract between the parties but there is a defect in the sense of error, fraud or duress the contract is only *sick* and therefore can be cured. In this case the nullity is relative.<sup>170</sup> Although

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<sup>165</sup> Civil Code of Seychelles, Articles 1111 and 1117.

<sup>166</sup> Civil Code of Seychelles, Article 1124.

<sup>167</sup> Article 1125 line 2 states: “Persons capable of entering into a contract shall not plead the incapacity of those with whom they have contracted.”

<sup>168</sup> *Uzice v Provincial Company Ltd.* (1975) SLR 235.

<sup>169</sup> The concepts of absolute and relative nullity may be compared to the English concepts of void and voidable contracts.

<sup>170</sup> This is a translation of the explanation given by Francois Terré. See Francois Terré, Phillippe Simler and Yves Lequette, *Droit civil: Les obligations* (Daloz 10th edn 2009)106. Article 1117 of the Civil Code of

it is not clear, it would appear that generally a contract is void or annulled (*nullité absolue*) where it infringes the law or public policy but is voidable (*nullité relative*) where it affects private interests only.

The right of action for relative nullity is limited to the parties to the contract whereas anyone with an interest (for example, the creditor of a party to a contract)<sup>171</sup> can initiate an action for absolute nullity. In *Controller of Taxes v Lawrence*,<sup>172</sup> the court annulled a sale of land at the instance of a creditor where the defendant had purportedly contracted with his cousin to sell land for Rupees 200,000 when it was worth much more and clearly for the purpose of putting it out of the reach of the Controller of Taxes to whom he owed income tax in excess of Rupees 2 million. However, the Court of Appeal refused a similar annulment in *Fanchette and anor v Blacon Pty Ltd*<sup>173</sup> on the grounds that the creditor had not been able to prove either the insolvency of the defendant or that the sale would increase the inability of the defendant to meet his debts.

In Seychelles, the limitation period (*prescription*) for an action for nullity, either absolute or relative, is five years.<sup>174</sup> This has been the case since the first revision of the Code in 1975. In France, limitation of actions for nullity distinguished between actions for absolute nullity (thirty years) and actions for relative nullity (five years) until 2008 when a reform of limitation periods abolished the difference and imposed a limitation period of five years for both.<sup>175</sup>

The effects of relative and absolute nullity are generally the same in that the contract is deemed never to have existed and the result is retroactivity with no possible action for specific performance or damages based on the contract. In some cases however, for example, *lésion*,<sup>176</sup> the results of nullity may be different. In this respect, it is important to note that in both Seychellois and French law, unlike English law, one cannot resort to self-help for

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Seychelles states that: “Contracts entered into by mistake, duress or fraud shall not be null as of right; they shall only give rise to an action for nullity or rescission...”

<sup>171</sup> Article 1167. This is known as an *action paulienne* in French law.

<sup>172</sup> *Controller of Taxes v Lawrence* (1989) SLR 239.

<sup>173</sup> *Fanchette and anor v Blacon Pty Ltd* (1978-1982) SCAR 114.

<sup>174</sup> Article 1304 Civil Code of Seychelles.

<sup>175</sup> Loi du 17 juin 2008.

<sup>176</sup> *Lésion* signifies the injury suffered, in consequence of inequality of situation, by one who does not receive a full equivalent for what he gives in a commutative contract.

rescission<sup>177</sup> but must seek it through legal proceedings.<sup>178</sup>

#### **5.2.1.4 (a)(ii) *Lésion***

In French law, in contrast with English law, the *Cour de Cassation* has refused to intervene in terms of equity to establish equality between parties to a contract even when there is clear inequality.<sup>179</sup> The reasoning seems to be based on the respect for the fundamental principles of contract, that is, freedom to contract, the obligatory effects of contracts and contractual certainty.<sup>180</sup> There is however an exception to this rule provided for in Article 1118 of the French *Code Civil* which states:

“*Lésion* only vitiates certain classes of contracts, or contracts entered into by certain persons, as explained in the said section.”<sup>181</sup>

Chloros amended and expanded the provisions in Article 1118 of the Civil Code of Seychelles to read as follows:

- “1. If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.
2. The defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.

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<sup>177</sup> Note that the Civil Code of Seychelles similarly to the French Code Civil uses the word rescission interchangeably with nullity. See on this point Terré, Simler, Lequette, *Droit civil: Les obligations* (n 170)104.

<sup>178</sup> See Articles 1117 : “Contracts entered into by mistake, duress or fraud shall not be null as of right; but they shall only give rise to an action for nullity or rescission...” and also Article 1184 [4] of the Civil Code of Seychelles which states: “Rescission must be obtained through proceedings...”

<sup>179</sup> See for example in respect of moveables CIV., 17 mai 1832, S.32.1.849; Comm., 9 oct. 1990, *RTD civ.* 1991 113, obs J. Mestre.

<sup>180</sup> See Terré (n 170) 324.

<sup>181</sup> Author’s translation of the French provision.

3. The rules of paragraphs 1 and 2 of this Article relate to the policy, and shall not be excluded by the agreement of the parties. They may, however, be excluded or restricted in specific cases laid down in this Code.”

A comparison of these two provisions shows that the French concept of *lésion* is limited to certain contracts and certain persons only. By contrast, other continental codes such as those of Switzerland and Italy<sup>182</sup> have a generalised concept of judicial intervention in cases of unfair advantage in contracts. Chloros stated that “there was morally little justification in distinctions between different types of contract”<sup>183</sup> and therefore found it necessary to bring in a general principle of unfair advantage in the Seychellois law. Paragraphs 2 and 3 of Article 1118 however, are only explicit statements of what is implicit in the French jurisprudence.<sup>184</sup> The formula in the Civil Code of Seychelles, according to Chloros, strike[s] a balance between the requirements of the security of contracts and the demands of justice.”

However, despite the claim by Chloros that he had provided a general rule to meet unfair advantage, actions for rescission where there is *lésion* are limited and can only be instituted in the following circumstances: under Articles 783 (imbalance of a legacy), 1305 (contracts entered into by minors) and 1674 (contracts for the sale of moveable or immoveable property). In practice, such actions are mainly brought in the context of contracts for the sale of immoveable property.<sup>185</sup>

The application of the rules of *lésion* in the sale of immoveable property<sup>186</sup> is however cumbersome and in need of reform. In the recent case of *Houareau v Houareau*<sup>187</sup> the Court of Appeal in a majority decision found that the rules relating to establishing whether a prima facie case of *lésion* exists are imperative. These include the requirement to obtain numerous valuation reports of the property in question, namely “a report by three experts who shall be bound to draw up a single report and to express an opinion by majority”.<sup>188</sup>

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<sup>182</sup> Article 21 of the Swiss Code of Obligations and Article 1448 of the Italian Civil Code.

<sup>183</sup> Chloros, *Codification in a Mixed Jurisdiction* (n 12) 111.

<sup>184</sup> *ibid.*

<sup>185</sup> See *Adrienne v Adrienne* (1978) SLR 8, *Fabien and anor v Esparon* SC 113/ 2002, *Roucou v Anthony* SC 269/2000, *Houareau v Houareau* (2012) SLR 239.

<sup>186</sup> Articles 1674-1684 Civil Code of Seychelles.

<sup>187</sup> *Houareau* (n 185).

<sup>188</sup> Article 1679, Civil Code of Seychelles.

#### 5.2.1.4 (a)(iii) Frustration of Contracts

Both the term *frustration* and its concept in common law contracts as established by the English case of *Taylor v Caldwell*<sup>189</sup> is unknown in France.<sup>190</sup> In England

“...a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract.”<sup>191</sup>

The concept of *vis major* or fortuitous event as contained in Article 1148 of the Code Civil is much more restrictive. For one to avail of the principle one has to prove three elements: *extériorité*, *imprévisibilité* and *irrésistibilité*.<sup>192</sup> Until 2011, the *Cour de Cassation* had held that a force majeure could not be held to be the result of an act of a third party.<sup>193</sup>

Chloros, in amending the Civil Code in 1975 acknowledged that his main guides for expanding the concept were English law and German law, “supplemented by a rule inspired by Article 1765 of the Ethiopian Civil Code”.<sup>194</sup> Hence, Seychellois law in this context is broader than French law and closer to English common law. One can avail of the general doctrine of frustration for rescission of a contract when there is:

“a complete change of circumstances which could not have been anticipated... and which is outside the control of the parties.”<sup>195</sup>

The rule that was borrowed (although somewhat amended) from the Ethiopian Civil Code is the following as now found in Article 1148 (2) of the Civil Code of Seychelles:

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<sup>189</sup> *Taylor v Caldwell* (1863) 3 B & S 826.

<sup>190</sup> René David, ‘Frustration of Contract in French Law’ (1946) 28(3) Journal of Comparative Legislation and International Law 11.

<sup>191</sup> Professor Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2000) Volume 1, 1635.

<sup>192</sup> Events or circumstances of an external nature, unforeseeable and unavoidable.

<sup>193</sup> 1ère Civ. du 23 juin 2011, pourvoi n°10-15811. This relates to an appeal from Grenoble in which a contractual claim of damages for a fatal assault by a passenger on the claimant’s son on a train operated by the SNCF resulting in his death was dismissed as the court found that the assault was a force majeure.

<sup>194</sup> Chloros (n 12) 113. Note that it is not surprising that Chloros referred to the Ethiopian Civil Code as this was itself drafted by the great French comparatist René David in 1960. See René David, ‘A Civil Code for Ethiopia: Consideration on the Codification of the Civil Law in African Countries’ (1963) 37 Tulane Law Review 187.

<sup>195</sup> Article 1148 (2) Civil Code of Seychelles.

“...the person who stands to lose from the rescission may apply to the court for the appointment of an arbitrator who shall be at liberty to modify the terms of the contract...”

In *Abel v Ehtler*<sup>196</sup> the plaintiff sought to enforce a partnership agreement to hunt for treasure. The agreement contained no termination clause but in the course of the venture it became apparent that there was no treasure at the location mentioned in the agreement. Both the trial court and the Court of Appeal found that since the root of the agreement no longer subsisted, the contract was frustrated and therefore the termination of the agreement between the parties was justified, opportune and in good faith.

The English doctrine of frustration seems however to have been wholly imported in employment law. Section 58 of the Employment Act 1995 states:

- “(1) A contract is frustrated when it becomes impossible of performance as when,  
among other things or reasons
- (a) the business of the employer ceases through its becoming prohibited or illegal under any written law;
  - (b) a worker is disqualified through the suspension or cancellation of any licence, permit, registration or authority required under the written law for the purpose of exercising the occupation or profession of the worker...”

In this context the Court of Appeal has decided that there is no need to resort to the Civil Code, the common law or any other law when deciding such cases as the provisions of the Act are sufficient in themselves.<sup>197</sup>

#### **5.2.1.4 (a) (iv) Object, Cause and Consideration**

All legal systems recognise some limitation to the enforcement of contracts.<sup>198</sup> In general, all countries require certain conditions such as capacity and intention for contracts to be valid.

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<sup>196</sup> *Abel v Ehtler* SCA 1/1992 (unreported).

<sup>197</sup> *Rosette v Union Lighterage Co. Ltd.* SCA 16/1994 (unreported).

<sup>198</sup> E. Allan Farnsworth, *Contracts* (4<sup>th</sup> edn, Aspen Law & Business 2004)11 (“No legal system has ever been reckless enough to make all promises enforceable”); Barry Nicholas, *The French Law of Contract* (2nd edn, Oxford University 1992) 118 (referring to the recognition in France that “there must be some limit” to the principle that “agreements should be observed”), Charles Calleros, ‘Cause, Consideration, Promissory

English common law further requires valuable consideration in the absence of duly executed deeds. Civilian countries have insisted on cause. Originating from Roman law, but first formulated by the canonists, the doctrine of cause (*causa*) had different meanings and nuances.<sup>199</sup> Difficulties are encountered in distinguishing between cause, object, motive and consideration, especially as the meaning varies depending on whether the contract is synallagmatic<sup>200</sup> or gratuitous.<sup>201</sup>

The Articles of the Civil Code relating to cause, object and subject-matter of contracts have caused some difficulty in Seychelles. Most of it has been the result of the 1975 revision. Chloros in one of his most condescending and also inaccurate statements on the reform of the Code in Seychelles indicated:

“It will be observed that, in comparison with the original Code [Seychelles pre 1975] and the *Code Civil* [French], the Civil Code [the 1975 Civil Code of Seychelles] has been considerably simplified by the omission of cause. Cause is no longer required.

The change is fundamental, for in this way the law of Seychelles opts for those legal systems, such as the German or the English, which have no such requirement...in the context of the new Civil Code it seemed preferable not to place upon the lawyers an additional burden such as the handling of the complicated concept of cause would undoubtedly involve.”<sup>202</sup>

He then proceeded to assimilate the concept of cause with that of object of the contract and public policy. His choice of vocabulary, that is, the replacement of the word *cause* in some provisions with the word *object* has confused the issue. It is perhaps important to illustrate the difference between the original article and the amendment before other codes and the case law are examined. The original Articles 1131-1133 provided:

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Estoppel, and Promises Under Deed: What our Students Should Know about Enforcement of Promises in A Historical and International Context’ (2013) 13 Chicago-Kent Journal of International and Comparative Law 84.

<sup>199</sup> See for example Ernest G. Lorenzen, ‘Causa and Consideration in the Law of Contracts’ (1919) 28 (7) The Yale Law Journal 621.

<sup>200</sup> A synallagmatic contract is one imposing reciprocal obligations.

<sup>201</sup> See Nicholas (n 198) 119. In synallagmatic contracts, cause approximates to consideration. In gratuitous contracts it most resembles motive.

<sup>202</sup> Chloros (n 12) 104.

“Of the Cause of a Contract

1131 An obligation without cause or founded on false cause or an illicit cause can have no effect.”

1132 An agreement is good, though the cause may not be expressed therein.

1133 The cause is unlawful when it is one prohibited by law, when it is contrary to good morals, or against the public interest.<sup>203</sup>

The Civil Code of Seychelles now reads:

“Public Policy

1131 An obligation which is against public policy shall have no effect.

1132 An agreement shall be valid although the reason for making it is not stated.

1133 The object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.”

Granted, *cause* has neither had a satisfactory definition<sup>204</sup> nor consensus by French legal theorists as to its definition,<sup>205</sup> but surely its complete removal without any reasoned or logical and consistent substitution can only be unsatisfactory. The Swiss and German Codes do not have the concept of *cause*. However, the Swiss Code still provides that the object of a contract must not be impossible or against public policy<sup>206</sup> and restitution is ordered where enrichment is unjustified.<sup>207</sup> Similarly the German *Bürgerliches Gesetzbuch* (BGB) states: the agreement is valid but one may claim restitution on the grounds of unjust enrichment.<sup>208</sup> Other mixed jurisdiction states such as Louisiana<sup>209</sup> and Quebec<sup>210</sup> have defined and discussed *cause* in their Codes.

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<sup>203</sup> The English translations of the original articles are those as provided by E. Blackwood-Wright (of Trinity College, Dublin and the Middle Temple, London), Chief Justice of Seychelles in 1908. His publication was the only available translation and annotated text of the Civil Code and was used by all practitioners in Seychelles until the Code was amended in 1975. See E. Blackwood Wright, *The French Civil Code (As amended up to 1906), Translated into English with Notes Explanatory and Historical and Comparative References to English Law* (Stevens and Sons 1908) 203-204.

<sup>204</sup> For the different definitions of cause offered see Marcel Planiol, *Traité élémentaire de droit civil, tome 2* (11edn, LGDG 1931) 394.

<sup>205</sup> The debate between causists and anti-causists is evidenced in their works. A causist would be X and an anti-causist would be Marcel Planiol who sees the concept of cause as both useless and false. See Planiol, (n 121) 391.

<sup>206</sup> Loi fédérale complétant le Code Civil Suisse, Article 17 (Livre cinquième: Droit des obligations).

<sup>207</sup> Loi fédérale complétant le Code Civil Suisse, Article 62 (Livre cinquième: Droit des obligations).

<sup>208</sup> Bürgerliches Gesetzbuch, Article 817.

<sup>209</sup> Article 1967 of the Louisiana Civil Code states that “Cause is the reason why a party obligates himself...” This is a radical change from their previous Article 1896 of their 1870 Code which provided that “by the

Blackwood Wright used the word *reason* instead of *object* in his translation of the Civil Code of Seychelles in 1908.<sup>211</sup> There is a clear distinction in French law and the French language between object and *cause*.<sup>212</sup> Chloros translates literally and uses the word *object* in Article 1126:

“Every obligation shall have as its object something which one party binds himself to deliver or perform or fail to perform.”<sup>213</sup>

The nuances of the concept of *cause* (object, consideration, fundamental duty, reason) are therefore not imported into the Civil Code of Seychelles. If *cause* now only relates to public policy, the question arises as to the enforceability of contracts with clearly no *cause*, those entered into without serious intent where the parties for example were simply joking or in gratuitous contracts not formalised by deeds. This must have been obvious even to Chloros because the doctrine of *cause* (or rather its absence) has been used in France instead of the concept of frustration not to enforce contracts where the object of the obligation has perished as in the classic *Taylor v Caldwell*<sup>214</sup> situation. If however *cause* sometimes also means object or reason, then we are none the wiser.

This indeed has been a dilemma for the court in cases where a party has tried to enforce contracts where *cause* may not be apparent. Inadvertently, the removal of *cause* has led to its replacement by consideration. In *Corgat v Maree*,<sup>215</sup> a case which arose before the 1975 Code came into operation, the Supreme Court was asked to adjudicate on an appeal involving a promissory note for which there was no apparent consideration. The promissory note was made pursuant to the Bill of Exchange Ordinance 1959 which had in this context already imported the concept of consideration into Seychellois law. Section 27 of the Act provides as follows:

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cause of the contract is meant the consideration for making it.”

<sup>210</sup> Article 1375 of the Civil Code of Quebec provides “It is also of the essence of a contract that it have a cause and an object”, whereas Article 1410 states “The cause of a contract is the reason that determines each of the parties to enter into the contract.”

<sup>211</sup> E Blackwood Wright, *The French Civil Code (As amended up to 1906), Translated into English with Notes Explanatory and Historical and Comparative References to English Law* (Stevens and Sons 1908).

<sup>212</sup> Nicholas (n 198)128.

<sup>213</sup> Article 1126 of the French *Code Civil* reads: “Tout contrat a pour objet une chose qu’une partie s’oblige à donner, ou qu’une partie s’oblige à faire ou à ne pas faire.”

<sup>214</sup> (1863) 3 B & S 826.

<sup>215</sup> *Corgat v Maree* (1976) SLR 109.

- “27(1) Valuable consideration for a bill may be constituted by
- (a) any consideration sufficient to support a simple contract;
  - (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable to demand or at a future time.

The court was appraised of the new provisions under the 1975 Code and Sauzier J made the following distinction:

“As this case arose before the 1<sup>st</sup> January 1976, that is the date when the Civil Code of Seychelles came into force, I am of the opinion that the expressions “valuable consideration” and “consideration” in this case mean “cause” under Articles 1108, 1131, 1132 and 1133 of the Civil Code. “Cause” as such does no more exist in the Civil Code of Seychelles. However it could be argued from the new provisions of Article 132 of that Code that there must be a “reason” for making an agreement to render the agreement valid, although such reason need not be stated. Such “reason” is in my opinion equivalent to section 27(1) of the Ordinance.”

Since there was evidence that the contract between the parties involved a sum of money in return for the transfer of succession rights and these had not been effected, the court found it necessary to remit the matter for determination on consideration.

In *Jacobs v Devoud*,<sup>216</sup> a case on the enforceability of a contract for commission on the sale of land, it was argued that the 1975 Code had not abolished *cause* but that *cause* and object were the same thing. Sauzier J disagreed and found that there was a distinction between the two.

“When there are correlative obligations by both parties to the contract then the “object” of an obligation by one party becomes the “cause” of the obligation by the other...As far as the object of contracts is concerned, there has been no change in the law.”<sup>217</sup>

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<sup>216</sup> *Jacobs v Devoud* (1978) SLR 164,169.

Referring to the removal of the word *cause* by Chloros and the substitution of *object* for it in Article 1108, Sauzier J then goes on to say:

“...[S]hould cause play no part in an obligation and be ignored altogether? That is not so. “Cause” here must be taken to mean the reason for the obligation. The cause of an obligation gives the obligation its stamp as it defines and classifies the obligation...”

Although case law subsequent to the above-mentioned jurisprudence has been thin, the end result of the amendment and the initial jurisprudence has been a series of mixed decisions in the Supreme Court which has seen consideration and some English jurisprudence displacing *cause* and French law.<sup>218</sup> In two recent cases, the Court of Appeal has sought to distinguish cause and consideration but the interaction of the two concepts is still uncertain.<sup>219</sup> Subsequent legislation on specific issues has also included the concept of consideration in the laws of Seychelles.<sup>220</sup> It therefore appears that the legal situation in relation to *cause* and consideration is decidedly inconsistent.

It must also be emphasised that absence of either consideration or *cause* places more emphasis on the necessity for consent in Seychellois contract law. Like German and Swiss contract law the main requirement of valid contractual relationships may have shifted from *cause* or consideration to purely the consent of the parties, their *consensus ad idem* in the formation of the contract.<sup>221</sup>

#### **5.2.1.4 (a)(v) Estoppel**

With the importation of the concept of consideration into Seychellois law it was foreseeable that the common law concept of estoppel would at some stage also arise. While the civil law concept of *cause* could be satisfied with a gratuitous promise motivated solely by a charitable intent, consideration however is linked to an exchange of a reciprocal promise. Where there is reliance on an otherwise unenforceable gratuitous promise, common law offered estoppel to

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<sup>218</sup> See for example *Fehn Commodities v Savy* (1984) SLR 163, *Husser v Larue* (1998) SLR 89, *Sedgwick and anor v Guy* SC 354/ 2006 (unreported), *Swift Enterprise Ltd v Dick* SC 55/ 2009 (unreported). In those cases, the issue of *cause* or consideration were not considered adequately or at all.

<sup>219</sup> See *Guy v Sedgwick and anor* SCA 54 of 2011 (unreported) and *Unicorn Construction Co (Pty) Ltd (Berard Monthly) v Alex Buron* SCA 06/2013(unreported).

<sup>220</sup> See for example the Bill of Exchange Ordinance 1959, the Seychelles Code of Civil Procedure 1920, Securities Industry Act 1996 and the International Business Companies Act 1995.

<sup>221</sup> In this context see Arthur von Mehren, ‘Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis’ (1959) 72(6) Harvard Law Review, 1009.

permit the court to grant relief in some circumstances.<sup>222</sup> Hence, promissory estoppel would replace the essential ingredient of consideration in such contracts to make them enforceable.<sup>223</sup>

French contract law, free from the constraints of the consideration principle could not therefore need promissory estoppel<sup>224</sup>: if one was not able to rely on an action based on a gratuitous promise, relief might also be available either under quasi contract, delict or unjust enrichment. Hence, although the English word estoppel finds its roots in old French,<sup>225</sup> the concept is not known to French law.<sup>226</sup> The doctrine was only resurrected in England by Lord Denning in 1947 in his *obiter dicta* in *High Trees House*<sup>227</sup> as:

“a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.”

Recently, Elizabeth Cooke has explained the concept as follows:

“Estoppel is a mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have said or done even though I am not contractually bound to do so.”<sup>228</sup>

This by no means indicates that the concept of estoppel can be reduced to a coherent body of

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<sup>222</sup> Calleros (n 198) 119.

<sup>223</sup> Christian Laroumet, ‘Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law’ (1985) 60 *Tulane Law Review* 1209, 1222.

<sup>224</sup> Mohamed Mattar, ‘Promissory Estoppel: Common Law Wine in Civil Law Bottles’ (1988) 13(4) *Tulane Civil Law Forum* 71, 73-74. See also René David, *English law and French Law: A Comparison in Substance* (Stevens and Sons 1980) 106 : “[P]romissory estoppel would not serve any useful end, and it is consequently unknown to French law”. See also Peter Birks, ‘Equity in Modern Law: An exercise in Taxonomy’ 7.

<sup>225</sup> See Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (2<sup>nd</sup> edn, Oxford University Press 2012) 317: “The etymology of the word estoppel is Old French “estouper” and “estoupail” meaning to stop or to cork...respectively.”

<sup>226</sup> Note however that in a recent patent infringement case involving international arbitration, the Cour de Cassation has explicitly recognised that a person may not contradict himself/herself/itself to the detriment of another person. See Commercial Chamber of the Cour de Cassation, September 20, 2011, n°10-22888. The Cour d’Appel de Paris had already applied the estoppel doctrine for the first time in a decision of 17 January 2002. It stated that a party invoking an arbitration clause and taking part in the arbitration proceedings without any reserve was not allowed to claim for the annulment of the arbitration award on the grounds that the arbitration court had no jurisdiction. See 53 CA Paris, 17 January 2002 CA Paris, Sa ITM Logistique International v Gavaud.

<sup>227</sup> *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.

<sup>228</sup> Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 1-2.

law.<sup>229</sup> Both promissory and proprietary estoppels are equitable remedies but different rules apply to them. In English common law, in order to be successful in a claim for proprietary estoppel (but not promissory estoppel), the claimant must show that he has suffered some detriment in his reliance on the assurance of the defendant.<sup>230</sup> This is not however the case in other common law jurisdictions.<sup>231</sup> Similarly the rule that the concept may operate as a shield but not a sword has not been applied consistently.<sup>232</sup>

One of the difficulties with the application of the doctrine in French law is the fact that the basis of French law rests on the supremacy of documentary evidence over all other evidence including oral evidence. The parole evidence rule contained in Article 1341 forbids the admissibility of such oral evidence except in some limited circumstances.<sup>233</sup> Article 1355 also states that

“The allegation of an extra-judicial and purely oral admission shall have no effect if it relates to a claim in respect of which oral evidence is not admissible.”

Promissory estoppel was raised on many occasions in Mauritius when Seychelles was still its protectorate and the *Code Napoléon* was in force.<sup>234</sup> It was first used in *Bardin v Brousse de Gersigny*,<sup>235</sup> the Supreme Court finding on appeal, in agreement with the Magistrates Court, that a possessor of land was estopped from ejection as he held the same by the disposition of a will. This precedent was subsequently followed in numerous cases.<sup>236</sup> In *The National Bank of South Africa Ltd. v Merven and Co.*,<sup>237</sup> the Supreme Court of Mauritius put a brake to the application of the principle in Mauritian law and by implication Seychellois law. It stated:

“For the purpose of the case it is sufficient to say that we are prepared to hold that where our local law provides for the effect and purport of certain admissions or

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<sup>229</sup> See Viscount Hailsham in *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co. Ltd* [1972] AC 741 (HL) 758.

<sup>230</sup> *Taylor Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch).

<sup>231</sup> See for example the Australian case of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

<sup>232</sup> *Combe v Combe* [1951] 2 KB 215, *Amalgamated Investment Co v Texas Bank* [1982] 1 QB 122.

<sup>233</sup> Article 1341 of the Civil Code of Seychelles is identical to the French Civil Code except for the amount above which oral evidence is not permitted except in limited circumstances.

<sup>234</sup> Raymond d’Unienville, *L’évolution du droit civil a l’île Maurice 1721- 1968* (Best Graphics 1994) 262 – 274.

<sup>235</sup> (1864) MR 90.

<sup>236</sup> *ibid*, 264.

<sup>237</sup> *The National Bank of South Africa Ltd. v Merven and Co.* (1924) MR 53.

presumptions, it should be applied to the exclusion of the English law of evidence on the same subject, be that in the shape of estoppel or otherwise.”<sup>238</sup>

Although this was aimed at pointing out that Article 1355 of the Civil Code in relation to extra-judicial and oral admissions would operate against the application of the principle of estoppel it was also clearly a shot across the bows at the applicability of promissory estoppel in general.

In 1957, the Court of Appeal of Seychelles composed of two Mauritian judges, Sir Francis Herchenroder and Maurice Lavoipierre, in the case of *Jean-Louis v Francois*,<sup>239</sup> also overruled the Chief Justice of Seychelles’ reliance on the doctrine of estoppel, finding again that estoppel could not be equated with an extra judicial admission despite their similarity. This approach is also consistent with the practice of applying French based rules of evidence where these are specifically provided for in Seychellois law.<sup>240</sup>

In 1972, the Supreme Court of Seychelles in *Teemooljee v Pardiwalla*<sup>241</sup> refused to be drawn on the applicability of the principle in Seychelles, Sauzier J stating that if the principle did apply in Seychelles it would not apply to the particular circumstances of the case. On appeal however, the Court of Appeal<sup>242</sup> referred to the case of *Jean-Louis v Francois*<sup>243</sup> and pointed out that it was time that the issue of applicability of estoppel to Seychelles law was resolved. It distinguished between equitable estoppel and estoppel at common law which it found was a rule of evidence. As a rule of evidence it would not find applicability given the provisions of section 12 of the Evidence Act, as specific rules of evidence were provided in the Civil Code. Insofar as equitable estoppel was concerned, although the Seychelles Supreme Court was invested with equitable powers these could only be used “where no sufficient legal remedy is provided by the law of Seychelles.”<sup>244</sup> Hence it concluded:

“The question then is whether ...the English rules of estoppel have become part of the [Seychellois] law of evidence, the courts being left to ascertain each time if and how

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<sup>238</sup> *ibid*, 65.

<sup>239</sup> (1957) MR 340.

<sup>240</sup> Section 12, Evidence Act, Cap. 74, Laws of Seychelles.

<sup>241</sup> (1972) SLR 89.

<sup>242</sup> *Teemooljee and Co. Ltd v Pardiwalla* (1975) SLR 39.

<sup>243</sup> (1957) MR 340.

<sup>244</sup> Section 6, Courts Act, Cap. 52, Laws of Seychelles.

far it is ousted by a legal provision. The correct answer would appear to be in the negative. These two enactments, as we construe them, will by their effect, if we may use metaphors, permit the reception of grafts but not of transplants. Their purpose is to insert into the stock of our law of evidence buds that may grow in harmony with it, not to introduce into the body of our substantive law an organ of proof which has been severed from the foreign body of law and which can only live and properly function in that body.”<sup>245</sup>

Recently, in the case of *Anscombe*,<sup>246</sup> the Supreme Court resurrected promissory estoppel in Seychelles. In that case, at the end of a lease, the plaintiff had asked the defendant to remain in her house at half the originally agreed rent until her return. She subsequently sued for the whole rent. The Supreme Court found that she was estopped from claiming the whole rent. The case was not appealed and it remains to be seen what would have been the reaction of the Court of Appeal. In *Mancienne v Ah-Time*,<sup>247</sup> a case by a land owner who relied on the promise of the adjacent proprietor to sell him the land on which he had encroached, the Court of Appeal, without directly saying that promissory estoppel could never apply in Seychelles, refused to apply the doctrine of promissory estoppel in the particular case on the basis that estoppel was an equitable and therefore discretionary remedy and that the maxim “he who seeks equity must do equity” had not been observed.

The future of estoppel in Seychelles remains to be seen. As will be demonstrated below the doctrine has also been raised in constitutional law,<sup>248</sup> delicts,<sup>249</sup> and property law in relation to settlements involving immovable property shared by couples in non-marital relationships when these relationships come to an end.<sup>250</sup>

#### **5.2.1.4 (b) Delicts**

The elegant and succinct statement of the law of delict (tort) in one sentence of the French *Code Civil* is reproduced in the Civil Code of Seychelles:

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<sup>245</sup> *Teemooljee v Pardiwalla* (1975) SLR 39, 55.

<sup>246</sup> *Anscombe v Indian Ocean Tuna Ltd* (2010) SLR 9.

<sup>247</sup> *Mancienne* (n 130).

<sup>248</sup> *Atkinson & Ors v Government of Seychelles* SCA 1/2007 (unreported).

<sup>249</sup> *Bouchereau v Francois* (1978) SLR 147. This was a case where *res judicata* was argued.

<sup>250</sup> *Hallock v d’Offay* (1988) 3 SCAR (Vol 1) 295.

“Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.”<sup>251</sup>

Therein is expressed the different types of torts including negligence, intentional torts and nuisance. Chloros was of the view that this made the civil law of delict more limited and rational in character.<sup>252</sup> In amending the Civil Code of Seychelles he added three paragraphs to Article 1382 to codify subsequent French jurisprudence but used English terminology from common law tort law, for example the terms *prudent person*<sup>253</sup> and *voluntary assumption of risk*.<sup>254</sup> Ironically, the French term *bon père de famille* has become common parlance in English common law.

The provisions of Article 1382 clearly state the three elements necessary to establish delictual liability: fault, damage and causality.<sup>255</sup> Unlike common law, the law of delict is not hampered by the burden of proving a specific duty of care. However, while common law bases tortious liability on unlawfulness, negligence and fault, liability in French law is generally based on the single concept of fault.<sup>256</sup> The exception to this rule lies in distinguishing between *le fait de l'homme* (human act) and *le fait de la chose* (act of a thing) as outlined below.<sup>257</sup>

#### **5.2.1.4 (b)(i) Fault and Strict Liability**

The legal regime applicable to the different provisions governing tortious liability in both Seychelles and France has been shaped by jurisprudence. In *Attorney General v Jumaye*,<sup>258</sup> a case stated by the Supreme Court, the Court of Appeal distinguished between the rules in French law applicable to those of Seychellois law brought about by the new provisions of Articles 1382-1386. It found that Articles 1382(1), 1383(1) and 1384(1) are literal translations of Article 1382, 1383 and 1384 of the French Code Civil. Articles 1382 and 1383

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<sup>251</sup> Civil Code of Seychelles, Article 1382.

<sup>252</sup> Chloros (n 12) 122.

<sup>253</sup> Article 1382 (2), Civil Code of Seychelles.

<sup>254</sup> Article 1382 (5), Civil Code of Seychelles.

<sup>255</sup> *ibid*, 123.

<sup>256</sup> Vernon Palmer, ‘General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law’ (1987) 62 *Tulane Law Review* 1303, 1315.

<sup>257</sup> The argument for strict liability of the custodian of the thing that had created the risk was made by Louis Josserand in 1897 with respect to Article 1384. See Louis Josserand, *La responsabilité du fait des choses inanimés* (Rousseau 1897). Josserand’s development of the concept of objective liability is well articulated by Daniel Jutras, ‘Louis and the Mechanical Beast, or Josserand’s Contribution to Objective Liability in France’ in Ken Cooper-Stephenson and Elaine Gibson (eds), *Tort Theory* (Captus University Publication 1993).

<sup>258</sup> *The Attorney General rep. Government of Seychelles v Jumaye* (1978-1982) SCAR 348.

deal with *human acts* (*le fait de l'homme*), where liability is based on fault and which consists of damage caused by one person to another by a positive act or an omission either by negligence or imprudence. Liability of a defendant under Article 1382 can however be absolved totally or partially. This is the case where there is an act exterior to the actions of the defendant or by reason of the acts of the victim.<sup>259</sup>

In relation to the *act of a thing* (*le fait de la chose*) such as in motor accidents, Lalouette JA in *Jumaye*<sup>260</sup> stated that in France, liability under Article 1384 is not based on *faute* (fault) but on “objective liability independent of *faute*”.<sup>261</sup> Hence, in such cases the victim of the damage must allege and establish only the causal role of the *chose* (thing) by which the damage has occurred.<sup>262</sup> Otherwise he benefits from a *presumption of causality* (responsibility) by the custodian although the custodian of the thing may be exonerated fully or partially if he can show that there existed natural events (e.g. *vis major*), the intervening act of a third party or the act of the victim himself.<sup>263</sup> He went on to explain that in his view Article 1383(2) of the Civil Code of Seychelles does the same job. Hence, a victim of an accident had the choice to proceed under Articles 1382, 1383 or 1384 and liability without fault is imposed upon a custodian for injuries caused by an object in his custody or under his control.

*Jumaye* overruled a long line of jurisprudence that had started with the Supreme Court of Mauritius’ decision in *Mangroo v Dahal*<sup>264</sup> in which there was a refusal by the court to accept *Jand’heur*<sup>265</sup> and the principle of strict liability. It found that liability for motor accidents was based upon proof of fault and rejected the interpretation of Article 1384 by the French jurisprudence which imposed strict liability on drivers for motor accidents.

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<sup>259</sup> See Terré (n 170) on ‘La disparition de la faute’ [730- 734].

<sup>260</sup> *Jumaye* (n 257).

<sup>261</sup> This approximates to prima facie liability or even strict liability in common law and refers to the concept of objective liability first articulated by Josserand (n 91). Josserand’s argument was applied by the Cour de Cassation in the landmark decision of *Jand’heur v. Les Galeries Belfortaises*, Judgment of 13 fevr. 1930, Cass. ch. reun.D.1930.1.57 note Ripert, S.1930.1.121 note Esmein.

<sup>262</sup> Note that the loi n. 85-677 du 5 Juillet 1985, also known as Loi Badinter after the Minister of Justice who introduced it, now provides that all victims of road traffic accidents with the exception of drivers are strictly compensated for damage suffered as a result of accidents.

<sup>263</sup> *Jumaye* (n 257) 360. See also Dalloz, *Encyclopédie de Droit Civil, Verbo Responsabilité du Fait des Choses Inanimés* (2nd edn, Paris 1951-1955)104, Henri Mazeaud, Louis Mazeaud and André Tunc, *Traité Théorique Et Pratique De La Responsabilité Civile Delictuelle Et Contractuelle, Tôme 1* (6<sup>th</sup> edn, Montchrestien 1965) 405-08.

<sup>264</sup> *Mangroo v Dahal* (1937) MR 43.

<sup>265</sup> *Jand’heur v les Galeries Belfortaises* (n 101).

Seychelles initially followed Mauritius in a number of cases<sup>266</sup> but it is now settled law that the position in Seychelles was changed by the addition of Article 1383(2) in its Civil Code. Hence, the liability of motor car drivers that operated in France under Article 1384 through the jurisprudence beginning with *Jand'heur* has been adopted in the provisions of Article 1383(2). Although Article 1383(2) does not specifically provide for an apportionment of damages where there is contributory negligence, jurisprudence has established the principle in Seychelles.<sup>267</sup>

#### 4.2.1.4 (b) (ii) Damages

The new paragraphs in Article 1382 defining fault expand on recoverable damages in delictual actions. Damages in this context are, in the style of French *Code Civil*, recoverable when they are direct and certain,<sup>268</sup> and this applies in accordance with Article 1150 to both contract and delicts. To make this clear, Chloros added a new paragraph to Article 1149 stating that damages provided in the law of obligations “shall apply as appropriate to the breach of contract and the commission of a delict.”<sup>269</sup>

The Civil Code of Seychelles unlike the French *Code Civil* also contains provisions specifying the type of damage recoverable in tort namely, damages for injury, loss of rights to personality, pain and suffering, aesthetic loss and the loss of any of the amenities of life.<sup>270</sup> Jurisprudence has classified these damages under material damages and moral damages. Material damages have meant material loss which is generally more easily ascertainable. It is generally a distinction between pecuniary loss (*préjudice matériel*) constituting an attack on a patrimonial right, and non-pecuniary loss (*préjudice moral*) constituting an attack on an extra patrimonial right). Article 1149(4) also provides that the award of damages in cases of delicts may take the form of a lump sum or a periodic payment and that in the latter case the court may order that the rate should be pegged to a recognised index such as the cost of living. These principles have been expounded in extensive case law as expounded below.

In *d’Offay v Electricity Department*,<sup>271</sup> the Court found that damages may be awarded in

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<sup>266</sup> See for example *Pon Waye v Chetty* (1971) SLR 209, *Esparon v Chetty* (1976) SLR 74.

<sup>267</sup> *Joubert v Suleman* SCA 210/1999 (unreported).

<sup>268</sup> Articles 1147 and 1150 Civil Code of Seychelles. In this respect the law is similar to the English common law as expressed in the *Overseas Tankship (UK) Ltd v The Miller Steamship Co, Wagon Mound (no 2)* (1967) AC 617. For a treatise on damages see Terré, (n 170) on “Le dommage” [697- 728].

<sup>269</sup> Article 1149 (3) Civil Code of Seychelles,

<sup>270</sup> Article 1149(2) Civil Code of Seychelles.

<sup>271</sup> *d’Offay v Electricity Department* (1968) SLR 143.

respect of future prospective damage if these are reasonably certain. As this was a case where the plaintiff had suffered from the loss of felled coconut trees in his plantation, the court concluded that it was bound to take into account subsequent developments which might affect the period for which the plaintiff would suffer a loss of profits from not being able to collect coconuts. This was qualified in subsequent cases,<sup>272</sup> the court finding that the damage must be certain and not merely eventual; hence, hypothetical future prejudice was not recoverable in damages.

In terms of moral damages the court has consistently held that the difficulty in their assessment was no bar to their award.<sup>273</sup> Moral damages however, are always compensatory and never punitive.<sup>274</sup>

#### **5.2.1.4(b)(iii) Defective Goods**

While both the Civil Code and jurisprudence inherently contained product liability law,<sup>275</sup> the French Code Civil was amended in 1998 to establish a specific regime for defective products and to transpose the European Product Liability Directive 85/374/EEC into French law.<sup>276</sup> In common law, liability for defective goods arose out of the concept of the duty of care in the landmark case of *Donoghue v Stevenson*<sup>277</sup> but was limited in the thalidomide cases by the difficulties in proving a breach of duty of care by manufacturers.<sup>278</sup> Similarly to France, the European Products Liability Directive was similarly transposed into the United Kingdom by the Consumer Protection Act 1987.

In Seychelles liability for defective goods was claimed under the existing provisions of Article 1383(1) of the Code. In several cases factually similar to *Donoghue v Stevenson*: *Camille*<sup>279</sup> (glass in a beer bottle), *GrandJean*<sup>280</sup> (lizard in coca cola bottle) and *Aithal*<sup>281</sup> (lizard in a bottle of ginger ale), the Supreme Court set aside *Camille*, an appeal from the

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<sup>272</sup> *Hardie v Costain Civil Engineering* (1972) SLR 74, *Chang Yune v Costain Civil Engineering* (1973) SLR 259 and *Rosette v Lefèvre* (1976) SLR 208.

<sup>273</sup> *Cable and Wireless v Michel* (1966) SLR 253, *Fanchette v Attorney General* (1968) SLR 111, *Vidot v Libanotis* (1977) SLR 192.

<sup>274</sup> *Sinon v Sinon* (1977) SLR 209.

<sup>275</sup> Liability could be inferred either contractually under Articles 1641 – 1648 or delictually under Articles 1382-3 but under the principle of *non-cumul* one had to elect between either cause of action.

<sup>276</sup> See Article 1386-1 to 1386-18 of the Code Civil.

<sup>277</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>278</sup> No case ever reached a trial verdict but was settled in court. See *S v Distillers (Biochemicals) Ltd* [1970] 1 WLR 114.

<sup>279</sup> *Camille v Seychelles Breweries Ltd* SC6/1996 (unreported).

<sup>280</sup> *GrandJean v The Seychelles Breweries Co. Ltd* SC 368/1996(unreported).

<sup>281</sup> *Aithal v Seychelles Breweries Ltd* SC 52/2004 (unreported).

Magistrates Court, which had erroneously been decided on the common law principles of *Donoghue*. The claims in *GrandJean* and *Aithal* failed partly because the plaintiffs could not prove negligence or imprudence on the part of a manufacturer utilizing highly sophisticated machinery in the production of soft drinks. Recognising the enormity of the burden of proof on the plaintiffs, Perera J ruled that in the circumstances, while the legal burden of proof continued to remain with the plaintiff, the evidential burden to establish the efficiency of the manufacturing process, which was peculiarly within their knowledge, should shift to the defendant.

This burden is alleviated by the recent statutory provisions contained in The Consumer Protection Act of 2010 which amended the previous Act of 1997. The 2010 Act contains the substantive provisions of the European Directive. Liability for defective goods can be found in the provisions of section 45 which state:

“...where any damage is caused by

(a) any unsafe goods;

(b) a product failure or defect, or a hazard in any goods; or

(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, every person to whom or which subsection (3) applies is liable for the damage, irrespective of whether the damage resulted from any negligence on the part of any of those persons...”

Hence, it is clear from the provisions that a plaintiff can succeed on an action under section 45 as long as he can prove he suffered damage, that the product was unsafe or defective and that there was a causal relationship between the defect and the damage. It must be noted that actions for defective goods are also qualified by special rules of the Commercial Code. Hence for example, joint and several liability is presumed<sup>282</sup> and a *mise en demeure* (notification) before the institution of legal proceedings is not required.<sup>283</sup>

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<sup>282</sup> Article 109-1 Commercial Code of Seychelles.

<sup>283</sup> Article 109-2 Commercial Code of Seychelles.

#### 5.2.1.4(b)(iv) Nuisance

There are consistent decisions on the tort of nuisance in Seychelles, the landmark decision being *Desaubin v Concrete Products*,<sup>284</sup> which was quoted with approval by the Court of Appeal in *Green v Hallock*.<sup>285</sup> The doctrine has its origins with the concept of the abuse of rights (*abus de droit*) in old French jurisprudence.<sup>286</sup> It is an amalgam of concepts with links to the non-absolute character of property rights emanating from Article 544 of the Civil Code,<sup>287</sup> with the law of obligations as quasi-contractual liability under Article 1370<sup>288</sup> and tortious liability under Article 1382. It evolved in such a way so as not to require the proof of fault. The Seychellois law of nuisance like that of France (where it is called *troubles du voisinage*<sup>289</sup>) and for that matter other mixed jurisdictions such as Quebec, is based on the concept of a threshold of tolerance between neighbours which if crossed gives rise to a right of action.<sup>290</sup>

The Court of Appeal in *Green* restated the law of nuisance as laid out in *Desaubin* as follows:

“the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of the neighbourhood. It is not necessary that the author of the nuisance should have been negligent or imprudent in not taking the necessary precautions to prevent it. Liability arises even in cases where it is proved that the author of the nuisance has taken every possible precaution and all the means not to harm or inconvenience his neighbours and that his failure is due to the fact that the damage is the inevitable consequence of the exercise of the industry.”

Actions for nuisance have succeeded in respect of dust,<sup>291</sup> smell,<sup>292</sup> and noise.<sup>293</sup>

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<sup>284</sup> *Desaubin v Concrete Products (Seychelles) Pty Ltd* (1977) SLR 164.

<sup>285</sup> *Green v Hallock* (1979) SCAR 141.

<sup>286</sup> See Terré (n 170) [7].

<sup>287</sup> Article 544 of the Civil Code of Seychelles is verbatim Article 544 of the French Code Civil and provides: “Ownership is the widest right to enjoy and dispose freely of things to the exclusion of others, provided that no use is made of them which is contrary to laws or regulations.

<sup>288</sup> These are obligations arising without agreement, termed quasi contracts. Article 1370 specifies that certain rights or duties arise without agreement such as “the rights and duties between neighbouring owners.”

<sup>289</sup> Literally neighbourhood disturbances.

<sup>290</sup> Yaell Emerich, ‘Contribution à une Étude des Troubles de Voisinage et de la Nuisance: La Notion de Devoirs de la Propriété’ (2011) 52 Cahiers de Droit 3, 8.

<sup>291</sup> *Desaubin* (n 280).

<sup>292</sup> *Green v Hallock* (1979) SCAR 141.

<sup>293</sup> *Bouchereau v Francois* (1980) SLR 80.

#### 5.2.1.4 (b)(v) Defamation

Article 9 of the Civil Code of Seychelles protects both an individual's privacy and confidential information. These provisions are clearly borrowed from the French *loi du 17 juillet 1970*. However, the law of defamation in Seychelles is derived from the English law. Chloros in his revision of the Civil Code in 1975 inserted a provision in Article 1383 on delictual liability to make this clear:

“The provisions of this Article and of Article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English law.”<sup>294</sup>

It must be emphasised that he was not altering the status quo. The 1948 Ordinance which operated until then contained provisions declaring:

“The civil law of defamation shall mutatis mutandis be the English law of libel and slander for the time being.”<sup>295</sup>

It was obviously intended that Seychelles would enact its own defamation laws but unfortunately this has not happened to date.

Section 3 of the 1948 Ordinance states that Articles 1382 and 1383 of the Civil Code shall cease to have effect as far as defamation is concerned. It appears therefore that the *loi du 29 juillet 1881*<sup>296</sup> on defamation in France which operates in France to this day was never applied to Seychelles. Since the law has regrettably never been amended this creates difficulties, as all other referential (and incorporative) legislation in England does not apply.<sup>297</sup> There has been a polemic in Seychelles in relation to this type of provision. In *The Marine Board of Victoria*,<sup>298</sup> an appeal heard in Mauritius while Seychelles was still a colony of Great Britain, the Court of Appeal held that such provision was constitutional and applicable and imported English law on the subject without the need for a specific Order in

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<sup>294</sup> Article 1383(3) Civil Code of Seychelles.

<sup>295</sup> Section 2 Seychelles Ordinance No. 5 of 1948.

<sup>296</sup> For an account of defamation in France, see Joseph Roux, *La Loi Du 29 Juillet 1881 Et Les Delits de Presse* (Kessinger Publishing 2010).

<sup>297</sup> See for example John Mark Keyes, ‘Incorporation by Reference in Legislation’ (2004) 25 (3) Statute Law Review 181, Horace Emerson Read, ‘Is Referential Legislation Worthwhile?’ (1941) 25 Minnesota Law Review 261, F. Scott Boyd, ‘Looking Glass Law: Legislation by Reference in the States’ (2008) Louisiana Law Review 68 (4) 1202.

<sup>298</sup> *The Marine Board of Victoria and ors v Voss* (1952) MR 271.

Council or local enactment. In *Kimkoon*,<sup>299</sup> the Court of Appeal held that subsequent legislation or amendments in England to the referential law do not apply, as it would amount to the Seychellois Legislature delegating or abdicating its power to legislate to England.

The totality of these decisions seems to indicate that the law of defamation in Seychelles is frozen (in terms of the English law applicable) as of 1 January 1976 when the Civil Code came into effect until and unless the laws of defamation are amended in Seychelles. It is not clear however, whether the freezing results in the law being static in relation to statute only or also in terms of English jurisprudence.

Hence, obiter dicta as expressed by Karunakaran J to the effect that the law of defamation of Seychelles is the “English law of defamation with all its developmental changes as it stands today”<sup>300</sup> must be viewed with reservation. The correct view is that as expressed by Sauzier J in *Biscornet v Honoré*<sup>301</sup> that the law of defamation of Seychelles is the English law of defamation which was in force at the time the 1975 Civil Code was enacted.<sup>302</sup> The Court of Appeal has however qualified *Biscornet* by stating that in terms of the procedural rules relating to prescription of actions, it is Seychellois law that applies.<sup>303</sup>

Another qualification is in relation to the law relating to foreign languages used in defamation cases where in applying Article 1383(3), the courts have invariably followed English procedural law.<sup>304</sup> Hence, where *plaints*<sup>305</sup> contained words in Creole, unless the translation was accepted by the defendant, the plaintiff had to prove the actual words published in English. Where this was omitted, actions invariably failed.<sup>306</sup> In *Gappy v Barallon*,<sup>307</sup> the Court of Appeal held that since Creole was one of the national languages of Seychelles by virtue of Articles 4 and 5 of the Constitution,<sup>308</sup> Article 1383 (3) insofar as it required the defamatory words to be pleaded in English and proved was unconstitutional.

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<sup>299</sup> *Kimkoon & Co. Ltd. v R* (1969) SCAR 60.

<sup>300</sup> *Prea v Seychelles People Progressive Front and Another* (2007) SLR 108.

<sup>301</sup> *Biscornet v Honoré* (1982) SLR 451.

<sup>302</sup> *ibid*, 454.

<sup>303</sup> Twomey J in *Christ v Kurtz* SCA 24/2012 (unreported) following *Gappy v Barallon* (2008) SLR 36, *Samson v Ally* SSC 96/2006 (unreported) and *Prea v Seychelles People Progressive Front and Another* (2007) SLR 108.

<sup>304</sup> See Richard Parkes, Patrick Milmo and W.V. H. Rogers, *Gatley on Libel and Slander* (11edn, Sweet and Maxwell 2008) 1297.

<sup>305</sup> In Seychelles *statements of claims* are called *plaints* from the French civil procedure of *complainte*.

<sup>306</sup> See *Osse v Fabien* (1979) SLR 15.

<sup>307</sup> *Gappy v Barallon* (n 299).

<sup>308</sup> Article 5 Constitution of Seychelles.

#### 5.2.1.4 (c) Unjust Enrichment

The Civil Code of Seychelles unlike the French Code Civil contains clear provisions in relation to unjust enrichment.<sup>309</sup> Article 1381-1 of the Civil Code provides:

“If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it.”

These provisions are a restatement of the Cour de Cassation’s decision in the *Arrêt Boudier*.<sup>310</sup> Peter Birks explains unjust enrichment as the law of gain-based recovery as opposed to compensation which is the law of loss-based recovery.<sup>311</sup> It is a doctrine which emanates from natural law, from equitable notions and the principle that one cannot be enriched at the expense of another.<sup>312</sup>

Unjust enrichment has been used in Seychelles mainly in the area of property distribution on the termination of *en ménage* relationships as was described above. It is important to note the subsidiarity rule in unjust enrichment, namely that a party cannot bring an action based both under unjust enrichment and under quasi-contract.<sup>313</sup> Further, the court itself is not permitted to find a case for the plaintiff based on ‘unjust enrichment’ when the plaintiff had chosen to bring an action under a different head.<sup>314</sup>

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<sup>309</sup> The French Code Civil does not formulate any general rule of unjust enrichment although several Articles make provisions for the recovery of undue payments, for example Articles 554,555,570,571,1376, 1337. French jurisprudence has however developed the general rules on unjust enrichment: Julien Patureau c. Boudier Cass req. 15 juin 1892 (D.P. 92.1. 596; Soc. Lutetia c. Dambrin Civ. cass., 28 févr. 1939., (D.P. 1940. 1. 5) ; Ville de Bagnères-de-Bigorre c. Brianhaut Civ. cass., 2 mars 1915 (D.P. 1920. 1. 102). See Henri Capitant, Alex Weill Francois and Francois Terré, *Les grands arrêts de la jurisprudence civile* (7th edn, Dalloz 1976) 546.

<sup>310</sup> *ibid*, Boudier, 1892.

<sup>311</sup> Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> edn, OUP Oxford 2005) 3.

<sup>312</sup> Jean Marie Augustin, *Introduction historique à l’enrichissement sans cause en droit français* (LGDJ 2007) 42.

<sup>313</sup> See Civil Code of Seychelles, proviso to Article 1381-1. See also *Fostel v Ah-Tave* (1985) SLR 113.

<sup>314</sup> *Charlie v Françoise* SCA 12/1994 (unreported).

### 5.2.1.5 Corporate and Commercial Law

Seychelles started off as an agrarian colony but after independence its fishing and tourism industry became its mainstay. In the 1990s serious competition in the traditional sectors led its government to explore alternative avenues to boost its failing economy. It enacted a series of financial and business legislation to attract foreign investment. Most of these enactments are based on common law models and have nothing to do with the business models of the civil law. The International Business Companies Act 1994 provides for the incorporation of offshore companies to carry on business outside the Seychelles, not only as holding companies and/or investment companies but also to carry on business within other jurisdictions. It has not resulted in any immediate difficulties of incompatibility with existing provisions of the Civil and Commercial Codes, largely because it is self-contained, does not interface with existing local laws and does not allow the holding of any interest in local immovable property. A short summary of the main business and investment laws is provided below, together with a brief discussion on the domestic company legislation and the commercial laws, mainly to illustrate the difficulties caused by mixity. There are plans by Seychelles to adopt a single Act to modernise and simplify company law for both domestic and off shore companies.<sup>315</sup> The issue of introducing the concept of trusts into local laws will then invariably have to be tackled.

Article 3 of the Civil Code of Seychelles states in no uncertain terms that immovable property shall be governed by Seychellois law and that this applies equally to immovable property under foreign ownership or control. Seychellois law, specifically the Immoveable Property (Transfer Restriction) Act, does not permit the purchase or acquisition of immovable property or any right therein by a non-Seychellois<sup>316</sup> without having first obtained the sanction of the Minister. Integrated Resort Schemes (IRS), together with the Tourism (Incentives) Act 2003, have permitted hotel chains to operate in Seychelles. IRS have also permitted non-nationals to acquire residential property in Seychelles.<sup>317</sup> Other investments have been attracted into Seychelles by The Seychelles Investments Act 2010,

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<sup>315</sup> A White Paper on the proposals has since been withdrawn but see reaction of Bar Association of Seychelles to the proposals <http://robingroom.blogspot.ie/2011/02/proposal-for-companies-act-2011-put-to.html> accessed 1st July 2015.

<sup>316</sup> The only exception is by succession or by a matrimonial property settlement (section 3, Immoveable Property (Transfer Restriction) Act Cap 95 Laws of Seychelles).

<sup>317</sup> They acquire 99 year leases. See Divino Sabino, 'Introduction to Economic, Trade and Investment Laws of Seychelles,' Seychelles Law Journal 2012 <http://www.bas.sc/law-journal-1/introductiontoeconomictradeandinvestmentlawsofseychelles> accessed 1st July 2015.

which ensures that investors' property rights are protected and that they are never directly or indirectly nationalized or expropriated by the Government. It also permits the investor to transfer its profits out of the jurisdiction freely.<sup>318</sup>

#### **5.2.1.5 (a) The Companies Ordinance 1972**

The Companies Ordinance enacted in 1972, was inspired by the English Companies Act of 1948.<sup>319</sup> It provides for the incorporation of companies to carry out business within Seychelles. The Ordinance provides for two categories of companies, namely the proprietary company and the public company. Companies can be limited by shares, by guarantee or in the case of hybrid companies by shares and guarantee.

The proprietary limited companies are the most popular local companies formed by small groups of individuals usually within a family circle or close network of friends (not more than 50).<sup>320</sup> All its shareholders are members of the company; at least three-quarters of the issued shares of the company are held by its directors; all its directors are also members; none of the members or directors of the company can be a corporation, and the company cannot own a holding company.<sup>321</sup> The Act gives the shareholders statutory protections, ensuring that the ownership and control of such companies stay within the small group, for example it cannot issue prospectuses, no derivative interests can be created in its shares and the continuing members of the proprietary company are entitled to purchase the shares of an outgoing member.<sup>322</sup>

The public company is regulated by provisions in the rest of the Act which do not relate specifically to proprietary companies. Perhaps the most controversial case involving a public company has been that of *Ailee Development*<sup>323</sup> in which a winding up was ordered on the application of a minority shareholder (the Government of Seychelles) which held only 8% of the shares of the company. The Court of Appeal upheld the decision of the Supreme Court finding, inter alia, that where the public interest (in this case the tourist industry) is at stake or where the substratum of the company is gone, for example, where its management is

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<sup>318</sup> *ibid.* See also OECD *Global Forum on Transparency and Exchange of Information for Tax Purposes: The Seychelles 2011 Phase* (OECD Publishing 2011).

<sup>319</sup> The English Companies Act 1948 was amended in 1985 and re-enacted in 2006.

<sup>320</sup> Section 24(1) (b) Companies Ordinance 1972.

<sup>321</sup> *ibid.*

<sup>322</sup> Sections 25- 27 Companies Ordinance 1972.

<sup>323</sup> *In Re: Ailee Development Corporation Ltd and In Re: Companies Act, 1972* SCA 13/2008 (unreported).

characterised by misconduct or gives rise to a lack of confidence, the winding-up of a company was justifiable.

An overseas company is defined as an incorporated or unincorporated body formed under the laws of a country other than Seychelles which has as its object the acquisition of gain by it or its members.<sup>324</sup> Overseas companies are governed by their own constitution which is interpreted by the law of the country of incorporation.<sup>325</sup> The Act also provides for the retention of companies that were in existence at the time of coming into force of the 1972 Ordinance, transforming them into either proprietary or public companies depending on the choice they opt for.<sup>326</sup>

#### **5.2.1.5 (b) International Business Companies**

An international business company is defined in the International Business Companies Act 1994 as one that does not own an interest in immoveable property situate in Seychelles, or a lease of immoveable property situate in Seychelles other than a lease of property for use as an office from which to communicate with members or where books and records of the company are prepared or maintained.<sup>327</sup>

International Business Companies are also not allowed to carry on banking as defined in the Financial Institutions Act, 2004; carry on business as an insurance or reinsurance company; or carry on international corporate services, international trustee services or foundation services as defined in the International Corporate Service Providers Act, 2003.<sup>328</sup>

Essentially they are tax free corporations<sup>329</sup> designed for engaging in international business with no reporting and minimum record keeping requirements. The only records delivered to the Registrar are the Memorandum and Articles of Association which have no reference to the beneficial owner, directors, officers or shareholders.<sup>330</sup> The risk of fraudulent and illegal transactions in relation to such companies, especially in relation to bearer shares, was highlighted in the case of *Zalazina v Joubert*.<sup>331</sup>

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<sup>324</sup> Section 309 Companies Ordinance 1972.

<sup>325</sup> *Alliance Security v Fidelity SCA 23/1998* (unreported).

<sup>326</sup> Section 322 Companies Ordinance 1972.

<sup>327</sup> Sections 5 (1), 5 (2) (e) International Business Companies Act 1994.

<sup>328</sup> Sections 5(1) International Business Act 1994.

<sup>329</sup> Section 109 International Business Act 1994.

<sup>330</sup> Section 14 International Business Act.

<sup>331</sup> (2013) 1 SLR 189.

### 5.2.1.5 (c) The Commercial Code of Seychelles

The Commercial Code of Seychelles was enacted in 1977. Although it replaced the French *Code de Commerce* which was in application until then, the new Commercial Code bears little resemblance to its predecessor.<sup>332</sup> In fact by the time the Commercial Code of Seychelles was enacted in 1977, it bore little resemblance to the existing French *Code de Commerce* as the latter had been updated on several occasions since its first enactment in 1807.<sup>333</sup> The Seychelles Commercial Code also had to take into account the provisions of the Companies Ordinance which, as has been explained above, was of English common law origin and had replaced the provisions of the French *Code de Commerce* in relation to companies.<sup>334</sup>

The basis of the Commercial Code was the development of the French *law merchant* which developed independently of the civil law.<sup>335</sup> This aspect of the French commercial law is retained in Seychelles. Hence Title I, Book I, of the Code is devoted to merchants and there are cross references in the Civil Code to the special rules applicable to merchants.<sup>336</sup> Unlike France, however, because of the common law courts and system of procedure, there were no independent commercial courts. An example of the applicability and cross reference to the Civil Code is illustrated by the case of *Glaetzle v Berlouis*.<sup>337</sup> Article 1326 of the Civil Code of Seychelles generally prohibits the admission of written acknowledgments of debt under private signature except if these emanate from tradesmen or employees of a trade. In *Glaetzle* the court found that as the parties were businessmen, the exception in Article 1326 would apply and the written evidence of the acknowledgement of debt was admissible. Similarly, the rule against oral evidence for matters the value of which exceeds 5000 rupees does not apply to merchants.<sup>338</sup>

Apart from rules relating to merchants, the Commercial Code also provides for the rules relating to books to be kept by commercial persons and other entities, partnerships, pledges, mercantile agents, carriers, sales, arbitration, maritime and shipping law. The latter had been

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<sup>332</sup> The French Code de Commerce was enacted in Seychelles by the Arrêté of 14<sup>th</sup> July 1809, Decaen No 28.

<sup>333</sup> The French Code de Commerce was completely revised in 2000 and again updated in 2007.

<sup>334</sup> The companies set up under the French code of commerce in Seychelles prior to 1971 were the *société anonyme* and the *société en commandite*.

<sup>335</sup> See Rene David and Henry P. De Vries, *The French Legal System: An Introduction to Civil Law Systems* (Oceana Publications 1958).

<sup>336</sup> See for example Articles 1326, 1329, 1330 Civil Code of Seychelles.

<sup>337</sup> SC 16/1994 (unreported).

<sup>338</sup> See Article 1341 Civil Code of Seychelles.

regulated by English law by virtue of Article 190 of the Commercial Code, which stated that subject to any Seychellois law in force “maritime and shipping matters shall be subject to the English law which shall apply mutatis mutandis”. The Merchant Shipping Act of 1992 replaced these provisions and regulates the registration of ships, the control and development of merchant shipping and also includes provisions on safety aspects, qualifications of crew, wages, accommodation, welfare and discipline. In admiralty matters the Supreme Court has the powers of the High Court of England.<sup>339</sup> The Admiralty Jurisdiction Rules 1976 made under the Act apply provisions of the U.K. Administration of Justice Act, 1956, subject to a few modifications and adaptations.<sup>340</sup> The rules provide jurisdiction for the Supreme Court to hear all claims in personam and in rem relating to shipping in the territorial waters of Seychelles including loss, damage, salvage, towage whether the ships are registered in Seychelles or not.

#### **5.2.1.5 (d) Insurance**

Before the repeal of Article 190 of the Commercial Code by operation of the Insurance Act of 1994 a peculiar situation obtained in Seychelles in terms of the law of insurance. The provisions of Article 190, as explained in the preceding section, together with a cross reference to Article 1964 in the Civil Code which states that contracts of insurance “shall be governed by the rules relating to marine insurance”, meant that French laws relating to insurance in general no longer applied. The legal situation before the amendment was complicated as the cases of *Mahé Trading Ltd v H. Savy and Co*<sup>341</sup> and *Lau Tee v Provincial Insurance*<sup>342</sup> in 1975 were to confirm. Neither English law nor French law applied. Article 1964, supplemented by Article 1134 of the Civil Code, governed contracts of insurance. These were unclear and inadequate. France had updated its laws on insurance by the *loi of 12 juillet 1930* but these were not applicable to Seychelles and the court could only rely on jurisprudence in France prior to 1930, an altogether unsatisfactory situation. The combination of the provisions of the 1975 Civil Code meant that contracts of insurance were to be treated as ordinary contracts.

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<sup>339</sup> Section 7(1) of the Courts Act, Cap 52, Laws of Seychelles states that “[t]he Supreme Court shall have the Admiralty jurisdiction of the High Court of Justice in England as stated in section 1 of the Administration of Justice Act, 1956 of the United Kingdom Parliament.”

<sup>340</sup> See section 2, Admiralty Jurisdiction Rules 1976.

<sup>341</sup> *Mahé Trading Ltd v H. Savy and Co (Seychelles) Ltd* (1975) SLR 178.

<sup>342</sup> *Lau Tee v Provincial Insurance* (1975) SLR 210.

Subsequent to the new provisions in the Commercial Code, *Didon v Provincial Insurance*<sup>343</sup> expressed the applicable law in motor insurance claims: by virtue of Article 1964, contracts of insurance were governed by special legislation<sup>344</sup> and in the absence of such legislation the rules relating to marine insurance applied. By virtue of Article 190 of the Commercial Code, it was the English law of marine insurance that applied. Hence, the English law of marine insurance applied to all kinds of insurance in Seychelles except where special legislation existed. This was confirmed in the case of *Christen v General Insurance*,<sup>345</sup> another motor insurance case. In *Pillay v General Insurance Company*<sup>346</sup> where an insured had claimed under a policy of insurance against “theft involving entry to or exit from a building by forcible or violent means”<sup>347</sup> for loss arising from looting by individuals as a result of an army mutiny, the court again found that English marine insurance applied and the exceptions relating to loss arising from perils were construed according to English law. The enactment of the Insurance Act in 1994 introduced Seychellois provisions for the first time. That Act was repealed and the updated modern Insurance Act of 2008 now regulates both domestic and non-domestic insurance business.

#### **5.2.1.5 (e) Partnerships**

As has been explained above, the Companies Ordinance introduced the types of companies and legal personalities that could set up in Seychelles. Prior to the Ordinance, the Civil Code of Seychelles and the Commercial Code of Seychelles three main types of partnerships existed: the partnership (*société en nom collectif*), the limited partnership (*société en commandite*) and the commercial partnership (*association commerciale en participation*). The new laws provided for the incorporation of companies, for civil partnerships under the Civil Code and for commercial partnerships under the Commercial Code. Here again there is considerable cross-reference to the Civil Code as Articles 1832 - 1873 provide the general rules applicable to partnerships. The provisions relating to the management of commercial partnerships in the Commercial Code are largely borrowed from French legislation.<sup>348</sup>

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<sup>343</sup> *Didon v Provincial Insurance* (1980) SLR 93.

<sup>344</sup> For example The Motor Vehicle Insurance (Third Party Risks) Act 1952 as amended.

<sup>345</sup> *Christen v General Insurance* (1981) SLR 168.

<sup>346</sup> *Pillay v General Insurance Company* (1984) SLR 62.

<sup>347</sup> *ibid*, 63.

<sup>348</sup> Chloros (n 12)153.

The provisions of the Civil Code relating to partnerships have been applied even in the absence of written partnership agreements being drawn up. In *d'Offay v Barbier*,<sup>349</sup> the defendant denied he was in partnership with the plaintiff. The court relied on oral evidence and the certificate of registration of the business name in the name of both parties to conclude that a commercial partnership existed. The subsequent case of *Ernestine v Ernestine*,<sup>350</sup> which found that it is a requirement of Article 50 of the Commercial Code that a deed of partnership must exist before oral evidence may be given, is clearly *per incuriam*.

*Pillay v Pillay*<sup>351</sup> confirmed most of the modern rules relating to commercial partnerships: a transfer of interest by one partner amounts to a variation of a partnership agreement; a transfer of interest not made with the unanimous consent of all partners is null and void between the parties to a transfer but does not bind the partnership or any other party; a commercial partnership is a legal entity distinct from its partners. The latter rule derived from Article 47 of the Commercial Code<sup>352</sup> is a departure from English law which does not recognise legal personality in partnerships.

### 5.2.2 Public and Criminal Law

The public and criminal law of Seychelles is based almost exclusively on common law. The criminal law is codified. Until its re-enactment in 1952, the Penal Code was a patchwork of provisions from the French Penal Code, The Indian Penal Code, Post-Capitulation French Law, The Mauritius Penal Code, Mauritius Ordinances, Seychelles Ordinances, English Orders in Council, English Statute Law, and Stephen's Digest of Criminal Law.<sup>353</sup> This is despite the fact, as explained in Chapter 4 above, that as early as 1831 it was decreed that English criminal law was to apply exclusively in Seychelles. The 1952 Penal Code which only came into force in 1955 was derived from the East African Penal Codes, in turn derived

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<sup>349</sup> *d'Offay v Barbier* (1981) SLR 100.

<sup>350</sup> *Ernestine v Ernestine* SC 253/1994 (unreported).

<sup>351</sup> *Pillay v Pillay* (1982) SLR 242.

<sup>352</sup> Article 47 of the Commercial Code states that "1. The law recognises four kinds of legal persons: 1st. A company formed and registered under the Companies Act. 2nd. An association, the object of which is not pecuniary gain to its members, and registered under the Registration of Associations Act. 3rd. A partnership under articles 1832 to 1873 inclusive of the Civil Code. 4th. A commercial partnership of no more than ten persons the object of which is the acquisition of gain. It shall be subject to the same rules as a partnership under the Civil Code to the extent that it is not contrary to the laws and usages of commerce or the provisions of this Code.

<sup>353</sup> British National Archives, Foreign and Commonwealth Office Records (FCO) 141/1304.

from the Nyasland Code and ultimately from the Queensland Code drafted by Chief Justice Samuel Walker Griffith.<sup>354</sup>

The constitutional and administrative law was destined to be one influenced by English constitutional doctrines,<sup>355</sup> Seychelles getting its independence from Britain in 1976. The constitutional court, introduced by the 1993 Constitution, is however a civilian concept.

### **5.2.2.1 Public Law**

The public law of Seychelles is markedly different in its origin, sources and mix to the private law. It has a distinctive common law character and in its interpretation the courts have been generally faithful in adopting common law (mostly English) case law. Some limited topics are chosen in this section to either illustrate the close alignment of Seychellois public law with English common law or to indicate the variations resulting from importation from common law countries other than England, either through codification or globalisation or where local conditions have necessitated the enactment of indigenous Seychellois law.

#### **5.2.2.1(a) Constitutional Law**

Constitutional cases are adjudicated very much in the common law tradition but in a constitutional court setting. The Constitution is the supreme law of Seychelles and is also the most authoritative source of its laws.<sup>356</sup> Its opening chapter outlines the governance dimension and proclaims that “Seychelles is a sovereign democratic Republic.”<sup>357</sup> Its territory, national symbols, and languages are defined and the rules of interpretation of the Constitution are provided for.<sup>358</sup>

Chapter II sets out the provisions relating to citizenship, and was amended to deal with the eligibility of persons born outside Seychelles between Independence Day on 29 June 1976 and the 5 June 1979 Revolution, and persons married to citizens of Seychelles wishing to become citizens of Seychelles in their own right.<sup>359</sup>

Chapter III contains the Seychellois Charter of Fundamental Human Rights and Freedoms,

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<sup>354</sup> See Mathilda Twomey, ‘Mongrel Laws or Model Code? The Antecedents of the Penal Code of Seychelles’ (2015) *Journal of Comparative Law in Africa* (forthcoming).

<sup>355</sup> See A.V. Dicey, *The Law of the Constitution* (10<sup>th</sup> edn, Macmillan 1985).

<sup>356</sup> Article 5 of the Constitution.

<sup>357</sup> Article 1 of the Constitution.

<sup>358</sup> Articles 2-4 of the Constitution.

<sup>359</sup> Constitution of Seychelles Amendment Act, 19 March 1995.

(The Charter) which in many respects is a verbatim reproduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is progressive in that it provides for the enforcement of first generation rights, such as freedom of expression and the right to a fair trial, but also for the rights to work and to health care, and even third generation rights, for example the rights to a safe environment and cultural life and values. Provision is also made for remedies for the breach of these rights.<sup>360</sup> A device of modern constitutionalism is also utilised in that fundamental duties are set out as well.

The distribution of powers and the legislative jurisdiction of the National Assembly is then outlined, providing for the main organs of state power: Chapters IV and V contain extensive provisions relating to the status of the President and the executive,<sup>361</sup> and Chapter VI outlines the rules pertaining to the functions of the legislature, including the composition of the Assembly, the qualification and election of its members, and their legislative power. It also provides for the sessions and dissolution of the National Assembly.<sup>362</sup>

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

#### **5.2.2.1(a)(i) Constitutional Principles**

Judgments of the courts have been explicit in emphasizing the rule of law. In *Servina v Speaker of the National Assembly*,<sup>363</sup> the Court of Appeal held that the powers vested in the President had to be exercised in accordance with the Constitution and the laws of Seychelles. In the case of *Bradburn v The Superintendent of Prison and anor*,<sup>364</sup> the Constitutional Court was keen to distinguish between what it saw as confusion between the rule of law and equality of protection before the law as contained in Article 27.

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<sup>360</sup> Article 46 of the Constitution.

<sup>361</sup> Articles 50-76 of the Constitution.

<sup>362</sup> Articles 77-111 of the Constitution.

<sup>363</sup> SCA 4/2001(unreported).

<sup>364</sup> (2012) SLR 181.

Other case law has also reiterated that the principle of separation of powers is implicit in the provisions of the Constitution.<sup>365</sup> In the case of *Napoléon v Republic*,<sup>366</sup> the Constitutional Court stated that the legislature must operate within the framework of the Constitution and that it could neither usurp the judicial powers of the judiciary nor the executive powers of the executive.

Checks and balances are also a feature of the Constitution; hence the power of the legislature is further checked by the fact that Article 87 grants the President the power to refer Bills to the Constitutional Court and Article 130 allows any person to act similarly for any alleged breach of the Constitution if their interest is likely to be affected by the contravention.

Equally, the courts have been vociferous in underlining the separation of powers and the duties of the different branches of government. In the case of *Poonoo v R*,<sup>367</sup> the Court of Appeal refused to have its powers of discretion in sentencing curbed by a legislative provision that imposed a presumptive mandatory sentence without any inbuilt discretion in the provision allowing a departure from the mandatory sentence for reason of substantial or compelling circumstances. It found that in its blanket application the legislative provision might breach the separation of powers.

#### **5.2.2.1(a)(ii) The Charter and its Interpretation**

As indicated above, the Charter provides for the enforcement of the three “generations of rights”. *First generation rights* (the civil and political rights), which include, inter alia, the right to life (Article 15), the right to liberty (Article 18), and freedom of expression (Article 22), are expressed in positive terms and hence impose positive obligations on the state for their protection. A person alleging that these obligations have been breached is further aided by provisions of the Constitution in terms of the evidentiary burden in proving such breaches. In this respect Article 46(7) of the Constitution provides:

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

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<sup>365</sup> See for example *Hackl v The Financial Intelligence Unit and another* (2012) SLR 225.

<sup>366</sup> *Napoléon v Republic* CC 1&2/1997 (unreported).

<sup>367</sup> *Poonoo v R* (2011) SLR 423.

contravention or risk of contravention shall, where the allegation is against the State, be on the State.”

*Second generation rights* are also contained in the Charter: for example, the right to health care (Article 29) and the right to education (Article 33). *Third generation rights* are also provided for: for example, the right to a safe environment (Article 38). Some affirmative action by the state is recognised in Articles 30 (rights of working mothers), 31 (rights of minors), and 36 (rights of the aged and disabled).

The principles of interpretation of the Constitution are set out in Articles 47 to 49 and in Schedule 2 of the Constitution. Article 48 instructs the courts to interpret the Charter in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms, and to take judicial notice of international instruments and cases. Section 8 of Schedule 2 of the Constitution provides:

“For the purposes of interpretation—

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

In *Servina v Speaker*,<sup>368</sup> the Constitutional Court held that the Constitution provided its own general principles of interpretation, and where they were adequate, resort to other principles or aids was not justifiable. In *Elizabeth*,<sup>369</sup> Domah JA stated:

“We have had a couple of occasions in the recent past to state that the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See *John Atkinson v Government of Seychelles and Attorney General SCA 1 of 2007*. The Constitution is not to be treated as legislative text. The Constitution is a living document. It has to be interpreted “*sui generis*.” In the case of *Chow v Gappy and Ors SCA 10/2007* (unreported), we also emphasised the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such.

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<sup>368</sup> *Servina* (n 359).

<sup>369</sup> *Elizabeth v The Speaker of the National Assembly and another SCA 2/2009* (unreported).

In as much as the Constitution enshrines the freedoms of the people, the Constitutional provisions have to be interpreted in a purposive sense.<sup>370</sup>

What can be distilled from the above cases is that the approach of the courts generally has been to interpret the Constitution in a pragmatic and dynamic way as a living document.<sup>371</sup>

### **5.2.2.1(a)(iii) The Spectrum of Rights**

The Constitution protects all fundamental rights, freedoms, and civil liberties as contained in the Charter. Generally, the limitations and exceptions to these rights are expressed as “necessary in a democratic society” and have resulted in the courts applying the proportionality test and using the balancing approach to determine whether individual rights have been breached as is common in the European Court of Human Rights.

The most basic of the Charter provisions, the right to life, expressly abolished the death penalty by Article 15(2), which states that no law shall provide for a sentence of death to be imposed by any court.<sup>372</sup> The right to dignity, including the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment, is not subject to any stated derogation. Actions for its breach have been brought in respect of terms of imprisonment imposed by the court, but the Constitutional Court has ruled that terms of imprisonment are neither cruel nor inhuman or degrading if they are proportionate to the seriousness of the offence.<sup>373</sup>

Perhaps the right that has attracted the most court activity has been the right to liberty. The provisions relating to arrest, detention, questioning, and treatment by police generally are contained in the Seychelles Criminal Procedure Code. The Code, however, is silent on a number of issues, including bail. Prior to the 1993 Constitution, the courts relied on the English Judges Rules and Administrative Directions 1964 to decide on issues relating to arrest, detention, and bail. Although these rules were eventually enacted in England in the Police and Criminal Evidence Act 1982, the original Judges Rules continue to be applied in

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<sup>370</sup> *ibid.*

<sup>371</sup> See in this respect, William H Rehnquist, “Notion of a Living Constitution” (1975-1976) 54 *Texas Law Review* 693, David A Strauss, *The Living Constitution* (Oxford University Press 2010) and for an opposing view see Antonin Scalia, *Scalia Dissents: Writings of the Supreme Court’s Wittiest, Most Outspoken Justice* (Regnery Publishing 2013).

<sup>372</sup> See also section 194 of the Penal Code, which provides that the maximum penalty for a criminal offence is imprisonment for life.

<sup>373</sup> *Siméon v Attorney General* (2010) SLR 280.

Seychelles by a Practice Direction issued in 1971. Article 18 of the Constitution now not only provides for the right to liberty and security of the person, but also stipulates permissible exceptions to those rights, such as arrest and detentions.

As there is no Bail Act in Seychelles and there is limited provision in the Criminal Procedure Code, a number of constitutional cases have been brought in relation to bail and unlawful detention under Article 18 of the Constitution, the most important being *Beehary v R*.<sup>374</sup> In that case the Court of Appeal stated that the bail provisions in the Constitution ought to be interpreted in a purposive manner, taking into account the decisions of the European Court of Human Rights and courts in democratic jurisdictions. Continued detention can only be justified in a given case if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule requiring respect for individual liberty.

The personal rights of an arrested person have also been clearly laid down in the case of *Serret v Karunakaran*.<sup>375</sup> In that case the appellant was arrested on suspicion of murder and was remanded in custody by a magistrate for 14 days and then for a further period of 7 days. He was subsequently charged, tried, and sentenced to life imprisonment for murder in the Supreme Court. He was, however, released on appeal, and he brought a case before the Constitutional Court claiming that his right to liberty had been breached by the remand orders of the magistrate. The Constitutional Court held that the remand orders had not breached the Constitution. On appeal the Court of Appeal found that the right to liberty is not breached by a competent court declining to release a person and ordering their remand in custody, bearing in mind that a person charged with an offence must be tried within a reasonable time. The Court also specified the circumstances in which one's liberty may be infringed: on arrest on the reasonable suspicion of having committed an offence or of being about to commit an offence, for the purposes of investigating an offence, to prevent the commission of an offence, or if it is necessary for the offender to appear before a competent court. The frequency of cases before the Constitutional Court and the Court of Appeal in respect of arrest, detention, and bail has raised the question of whether specific matters relating to these issues should not have been better dealt with under separate legislation rather than in the Constitution itself.

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<sup>374</sup> *Beehary v R* (2010) SLR 470.

<sup>375</sup> *Serret v Karunakaran* SCA 12/1996 (unreported).

Other breach of Charter cases have included the right to a fair and public hearing, contained in Article 19 of the Constitution. In *Lai-Lam v R*,<sup>376</sup> the Court of Appeal found that the absence of a defendant at his trial contravened his constitutional right to a fair trial. The terminology “within a reasonable time” qualifying one’s right to a fair hearing has resulted in what may be perceived as an abuse of process by both the police and the courts. The Constitutional Review Committee Report of 2009 found that:

“[t]he courts persistently interpret “reasonable time” very elastically and in a way that seems to condone and justify the prolonged delays with which the police and prosecution undertake the prosecution or disposal (as the case may be) of criminal cases.”<sup>377</sup>

The freedom of expression has been vigorously tested, most notably in the case of *Mancienne v Government of Seychelles (No 2)*.<sup>378</sup> In that case, the defendant was subject to an injunction preventing him from publishing a letter which was allegedly damaging to the integrity and dignity of the court. He nevertheless published the letter in defiance of the injunction and faced contempt of court proceedings for disobeying the order. The Court of Appeal ruled that freedom of expression, although of fundamental importance, was not absolute. It held that in interpreting that right, the trial court should balance all other competing rights and values, and that contempt of court proceedings are a justifiable limit to the right to freedom of expression.

The right to be free from all forms of discrimination is provided for in Article 27, which states that every person has a right to equal protection of the law, including the enjoyment of the rights and freedoms set out in the Charter, without discrimination on any ground except as is necessary in a democratic society. This is reaffirmed in the Preamble to the Constitution, which confirms the rights free from all types of discrimination. There is, however, no explicit prohibition of discrimination based on specific factors. In *Napoléon v Republic*,<sup>379</sup> the Constitutional Court held that dissimilar treatment does not necessarily offend the right to

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<sup>376</sup> SCA 5/2004 (unreported).

<sup>377</sup> Constitutional Review Report 21 December 2009.

[http://www.statehouse.gov.sc/docs/Constitutional\\_Review\\_Report.pdf](http://www.statehouse.gov.sc/docs/Constitutional_Review_Report.pdf) accessed 1st July 2015.

<sup>378</sup> SCA 10(2)/2004 (unreported).

<sup>379</sup> *Napoléon* (n 363).

equality before the law, but stressed that what is prohibited is invidious or hostile discrimination that is arbitrary, irrational, and not reasonably related to a legitimate objective.

While it is generally believed that second and third generation rights are largely unenforceable, Seychelles has grappled with their implementation. The right to work was defined in *Nolin*<sup>380</sup> as meaning a right to practise one's profession and to engage in trade, business, and economic activities of one's choice and not to be deprived of the freedom to continue working for a willing employer. The court was careful to point out that the right did not mean that a person has the right to a job if unemployed. In the case of *Pool v Michel*,<sup>381</sup> the Constitutional Court found that the right to work has corresponding duties and, specifically, the right to work in a chosen occupation, profession, or trade involves a duty to safeguard the health and moral, social, and financial rights of fellow citizens.

In *Regar Publications v Lousteau-Lalanne*,<sup>382</sup> the Court of Appeal stated that the Constitution granted the people of Seychelles the right to an ecologically balanced environment, and in *Eliza v PUC*,<sup>383</sup> the right to clean water was considered. The Court in the latter case found that the constitutional right to a safe environment could be breached where there is force majeure precluding a party from meeting its obligations under the Charter.

While challenges in relation to breaches of Charter rights have demonstrated their clear vertical application, there have been very few actions between private individuals or between private individuals and companies establishing their horizontal application. The case of *Maureen Ugo Sala and another v Sir Georges Estate (Proprietary) Limited*,<sup>384</sup> which concerned a breach of the right to enjoy property, does indicate that parties are willing to challenge constitutional breaches even between individuals or, as in this case, between a private individual and a company. As is discussed in the next section, the imposition of duties on all Seychellois citizens also underscores the horizontal dimension of duties towards fellow citizens.

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<sup>380</sup> *Nolin v Attorney General* SCA 30/1995 (unreported).

<sup>381</sup> SCC 06/1996 (unreported).

<sup>382</sup> SCA 25/2006 (unreported).

<sup>383</sup> SCA 20/2009 (unreported).

<sup>384</sup> (2012) SLR 135.

### **5.2.2.1(a)(iv) Constitutional Adjudication**

Constitutional adjudication is provided for in two separate sections of the Constitution: Article 46 for remedies for the infringement of the Charter and Article 130 for all other constitutional issues. Any aggrieved citizen can bring such actions under these Articles, with the possibility of an appeal to the Court of Appeal. In both circumstances the Constitutional Court can declare the act or omission a contravention of the Constitution, declare any law which contravenes the Constitution as void, and award damages, grant any remedy, or make any order appropriate in the circumstances.

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

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

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

After the amendment of the Constitution was passed, the Assembly passed the Economic Development Act 1995, Section 5(7) (a) and (b) of which made it possible for foreign investors to be granted immunity from prosecution for certain criminal offences, protection against seizure of their assets, and in some cases the grant of diplomatic passports if they placed US\$10 million in approved Seychelles investments. Two cases were brought challenging the constitutionality of the Act. In the first, a case brought by the main opposition party on the issue of the provisions of the Act breaching the right to equal protection of the law, the Court of Appeal held that given the provisions contained in Article 86(1) (B) of the

Constitution, it was constitutional for a Bill to entrench itself.<sup>385</sup> In the allied case of *Roger Mancienne v Attorney General*<sup>386</sup> the petitioner challenged Section 5(7)(a) and (b) of the Economic Development Act 1995 on the ground that those provisions contravened Article 27 of the Constitution, which guaranteed the right to equal protection of the law. It was argued that the granting of immunity from prosecution to investors for certain criminal offences under the Act made them superior to the petitioner and diminished the latter's right of equality before the law. The Constitutional Court adopted a narrow interpretation of Article 46(1) and held that the petitioner had failed to establish that he belonged to the class of investors, and therefore had no locus standi. The Court of Appeal disagreed with that finding and held that what was challenged was the legislative classification itself, and hence the Court ought not to have adopted a narrow view when it looked for the standing of the petitioner as an investor. It stated that in terms of Article 27(1) of the Constitution, the right to equal protection of the law inheres in every person. On the merits of the application, however, the Court most controversially found that deference must be given in a democratic society to the legislature and the executive, and that judges should refrain from judicial activism. Subsequently, however, due to international and local pressure, Article 86(1) (B) of the Constitution was repealed in July 2000.

The Court came close to pronouncing that some legislative provisions were unconstitutional in the case of *Poonoo v R*.<sup>387</sup> In that case the appellant, a first time offender, had received a minimum mandatory sentence of five years for breaking and entering a building and stealing a pair of shoes. He appealed on the grounds of the constitutionality of section 27A (1) (c) (i) and section 291(a) of the Penal Code, which the court had relied on to impose the mandatory minimum penalty of 5 years' imprisonment. The provisions contained no inbuilt discretion which would allow the court to depart from the mandatory sentence for reason of substantial or compelling circumstances.

The Court of Appeal did not strike down sections 27A(1)(c)(i) and 291(a) of the Penal Code as unconstitutional, but ruled that the mandatory sentence meted out was disproportionate and had not allowed for judicial discretion. It stated that the Penal Code could not be said to have contravened Article 1 of the Constitution *in abstracto*, but there was a breach *in concreto* by

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<sup>385</sup> *United Opposition v Attorney General* SCA 14/1996 (unreported).

<sup>386</sup> *Roger Mancienne v Attorney General* SCA 15/1996 (unreported).

<sup>387</sup> *Poonoo* (n 364).

the manner in which the appellant's sentence was determined: in this case, the magistrate passing sentence had stated that she had no discretion to pass a lesser sentence given the mandatory provisions of the Penal Code.

To date, only one case has resulted in the court striking down provisions of an Act for unconstitutionality: *Seychelles National Party & Ors. v Government of Seychelles & Anor.*<sup>388</sup> In that case the Supreme Court found that most of the provisions of the Public Order Act 2103 were unconstitutional. A new Public Order Act is now before the Cabinet.

However, it must also be pointed out that even if a law is deemed unconstitutional by the court, there is no mechanism for its removal from the statute book. Neither Article 46 nor Article 130 of the Constitution, which provide for challenges for infringement by any law of the Charter of Fundamental Rights or the Constitution before the Constitutional Court, contain a provision forcing the legislature to act on a declaration of unconstitutionality made by the Constitutional Court in respect of any law. This, in effect, may result in the law that is struck down as being unconstitutional remaining on the statute books, and the possibility of further contraventions of the Constitution committed in pursuance thereof.

#### **5.2.2.1(b) Administrative Law**

The Supreme Court of Seychelles was constituted in 1903 by the Seychelles Judicature Order in Council 1903 with the jurisdiction of the Court of Queen's Bench in England, including the supervisory powers of that court exercised through the prerogative writs. The Ordinance was amended in 1939 and amended and re-enacted as the Courts Act in 1964. This Act remains in force and sections 4 and 5 of the Act provide the Supreme Court with the same inherent powers as the High Court of England to review decisions of administrative bodies.<sup>389</sup> These traditional powers of judicial review may well have been superseded by the 1993 Constitution which expressly states the judicial review powers and remedies now available:

“[The] Supreme Court... shall... have “supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto

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<sup>388</sup> CS 03/2014 (unreported).

<sup>389</sup> Courts Act, Cap 42, Laws of Seychelles.

as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction.”<sup>390</sup>

Although courts regularly refer to the powers of the court under the Courts Act, as a matter of habit, it may no longer be appropriate to do so as it is from the Constitution that the powers and jurisdiction are now derived. However, given the substantial jurisprudence before the promulgation of the Constitution, the Seychellois law of judicial review remains a common law system in terms of both substance and remedies but operating within the framework of the Constitution. Rules for administrative reviews are contained in the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authority) Rules 1995. Rule 18 reiterates that the Supreme Court:

“may for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction, issue injunctions, direction, orders or writs including writs or orders in the nature of habeas corpus, mandamus, prohibition and quo warranto as may be appropriate.”

In addition to these supervisory powers, the legislature in some cases also provide for a statutory scheme for review of the decisions of an Authority.<sup>391</sup> Ordinarily, where a statutory scheme is provided for, it should be preferred to the supervisory jurisdiction of the Supreme Court which is in any case discretionary.<sup>392</sup> However, the statutory limitation cannot oust the constitutional and inherent power of judicial review vested in the Supreme Court.<sup>393</sup> This is implied by article 85 of the Constitution which states that legislative power is “subject to and in accordance with th[e] Constitution.”

#### **5.2.2.1(b) (i) The Nature of Judicial Review**

The validity of parliamentary legislation may be challenged with reference to overriding constitutional provisions. Hence although the courts may be reluctant to interfere with the Legislature in terms of its legislative functions, it must interfere when the legality of the

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<sup>390</sup> Article 125(1) (c) of the Constitution.

<sup>391</sup> See for example the International Corporate Service Providers Act, 2003 and the Employment Amendment Act 21 of 2008.

<sup>392</sup> See for example the English cases of *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and *R (G) v Immigration Tribunal* [2005] 1 WLR 1445.

<sup>393</sup> See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

procedure is brought into question.<sup>394</sup> There is sometimes in this respect an overlap between constitutionality and legality, especially when the courts are asked to delve into the merits of legislation<sup>395</sup> or review the *reasonableness* of a decision. In the case of *Michel v Dhanjee*<sup>396</sup> Twomey JA explained the context and boundaries of judicial review:

“There are inherent tensions in democratic government and these are exacerbated in judicial review cases. This is not peculiar to Seychelles. It is a fundamental difficulty in all democracies where constitutionalism is safeguarded through the process of judicial review. In cases such as the present one, an unelected body (the judiciary) tells an elected body – either the legislative (the National Assembly) or the executive (The President), who are elected by the people, that their will is incompatible with the fundamental aspirations of the people as formulated in the Constitution of the Seychelles. It is for this reason that the law has developed procedural and substantive safeguards to control the boundaries of judicial authority...”<sup>397</sup>

In exercising its powers of judicial review, frequent use is made of English authorities, including those on procedure for administrative review. The rules of procedure in Seychelles are contained in the Civil Procedure Code with the proviso of section 17 of the Courts Act 1964 that:

“In civil matters whenever the laws and rules of procedure of the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”

This has led to some difficulty as the rules of procedure in relation to judicial review in England changed in 1981. Since Seychelles became independent in 1976 and in view of the jurisprudence of *Kimkoon*<sup>398</sup> the administrative review procedure and remedies as contained in the new Civil Procedure Rules UK 1998 (White Book) and the Senior Courts Act 1981 cannot apply to Seychelles. In terms of procedure, like other matters where the courts have to refer to English law, Seychelles law remains frozen at pre 1976 cases and legislation of

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<sup>394</sup> See for example the case of *Roger Mancienne* (n 383) where controversially it refused to do so.

<sup>395</sup> *ibid.*

<sup>396</sup> *Michel and ors v Dhanjee and ors* (2012) SLR 258.

<sup>397</sup> *ibid.*, 264.

<sup>398</sup> *Kimkoon* (n 296).

England,<sup>399</sup> unless and until it legislates of its own. In matters such as the issue of a writ of certiorari, for example, where the court is of the view that the decision of the administrative body was unreasonable, illegal or procedurally improper,<sup>400</sup> the Seychellois courts can only remit the matter to the decision maker, whereas the court in England now has power to substitute its own decision for that to which the claim relates.<sup>401</sup>

There is also a distinction to be made between an appeal and the judicial review process. A distinction is made in the Constitution between, on the one hand, the supervisory jurisdiction of the courts<sup>402</sup> and on the other, their appellate jurisdiction.<sup>403</sup> In *Vidot v Minister of Employment*<sup>404</sup> and *Raihl v Ministry of National Development*<sup>405</sup> the Court of Appeal was at pains to point out the difference between the two. It stated that in the case of its supervisory jurisdiction, it was its duty to check that the exercise of the executive power was judicious, not arbitrary and capricious, in bad faith, abusive or taken by reference to extraneous matters.<sup>406</sup> In *Michel v Dhanjee*<sup>407</sup> it reiterated the same principles emphasising that

“[In] reviewing the decision making process of a decision making body or person [it] can only review how the decision was made, declare on its fairness ... In this respect therefore it has to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did. The Court cannot substitute its opinion for that of the public authority”.<sup>408</sup>

There is however a difficulty in establishing a boundary between these two powers when a case involves the scrutiny of both the constitutionality and the legality of a decision. In the review of a case brought under the transitional provisions of the Constitution for redress for past land acquisitions, for example, the Court of Appeal saw fit to scrutinise the decision of the Minister and order the return of land that had not been developed in the national interest.

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<sup>399</sup> See for example *Tirant and Bibi v R* SCA 10/1993.

<sup>400</sup> See in this respect *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>401</sup> RSC 54.19 (UK 1998).

<sup>402</sup> Article 125 (1) (c). See above at P 59 for the provisions of Article 135(1) (c).

<sup>403</sup> Article 125 (1) (d).

<sup>404</sup> *Vidot v Minister of Employment* SC 217/1998 (unreported).

<sup>405</sup> *Raihl v Ministry of National Development* (2010) SLR 66.

<sup>406</sup> *ibid*, 73.

<sup>407</sup> *Michel* (n 393).

<sup>408</sup> *ibid*.

It remitted the matter to the Supreme Court for assessment of compensation for those portions of land that had been acquired in the national interest.<sup>409</sup> In contrast, in *Michel v Dhanjee*<sup>410</sup> the Court of Appeal refused to analyse the decision of the President in reappointing a judge of the Court of Appeal. It is true that the limits of judicial review are blurred in such cases, especially as the courts are reluctant to be drawn into the merits of a decision when the constitutional and legal function of the executive are found to have been correctly performed.

### 5.2.2.1(b)(ii) Principles of Judicial Review

The Seychellois courts have adopted common law principles of judicial review. Hence the 1948 *Wednesbury* decision<sup>411</sup> has passed into its jurisprudence and the Seychellois courts have applied the principle of what decision-makers must take into account.<sup>412</sup> Similarly the principles enunciated by the *GCHQ* case<sup>413</sup> of the consideration of illegality, irrationality, and procedural impropriety in judicial review have also been applied.<sup>414</sup> Recently, the principle of proportionality,<sup>415</sup> a decidedly continental principle, adopted by many common law countries, was also applied.<sup>416</sup> The Court of Appeal found that in cases involving fundamental rights, given the similarity of the Seychellois Charter to the European Convention of Human Rights and the application of article 48 of the Constitution, which provides for the consistency of constitutional interpretation with the international obligations of Seychelles, the test of proportionality applied in relation to fundamental rights under the Convention must logically form part of the Seychellois jurisprudence.<sup>417</sup> In such cases, the courts are asked to perform an “anxious scrutiny”<sup>418</sup> to consider whether the decision constitutes a disproportionate interference with the petitioner’s right.

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<sup>409</sup> *Government of Seychelles v Moulinié* (2012) SLR 350.

<sup>410</sup> *Michel* (n 393).

<sup>411</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>412</sup> See *SNP v Government of CC 6/1999* (unreported), *Bar Association of Seychelles & anor v the President* SCA 7/2004.

<sup>413</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>414</sup> See *Chio v Tave* (2011) SLR 157, *Pierre (born Timonina) v Attorney-General and Director General of Immigration* (2008) SLR 251, *Raihl* (n 3397), *Timonina v Government of Seychelles and the Immigration Officer* (2007) SLR 251, *Vidot v Minister of Employment* SC 217/98 (unreported).

<sup>415</sup> See *Soering v United Kingdom* (1989) 11 EHRR 439, *R v Secretary of State for the Home Dept, ex parte Bugdaycay* [1987] AC 514, *R. v. Secretary of State for the Home Department ex parte Brind* (1991) 1 All ER 720, *R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532.

<sup>416</sup> See *Trajter v Minister for Home Affairs and Transport Morgan* (2013) 2 SLR 329.

<sup>417</sup> *ibid.*, [20-25].

<sup>418</sup> The term was used for the first time by Lords Bridge and Templeman in *R v Secretary of State for the Home Dept, ex p Bugdaycay* (n 408).

### 5.2.2.1(c) Criminal Law

The criminal law of Seychelles is substantially based on principles of English common law as codified in the 1952 Penal code of Seychelles. Originally it was the French *Code Pénal* of 6 September 1791 that was made to apply in the colonies of Mauritius and Seychelles. It was partly repealed in 1838 and replaced by Napoléon's *Code Pénal* of 1810. Subsequently, this Code was modified on several occasions and existed both as a French text and English text in parallel columns.<sup>419</sup> In 1904, a much amended and consolidated Seychelles Penal Code was promulgated.<sup>420</sup> Some importations from the Indian Penal Code (the Macaulay Code)<sup>421</sup> were added to this text.<sup>422</sup>

By the time the Penal Code of 1952 was enacted, it comprised nine elements: The French Penal Code, The Indian Penal Code, Post-Capitulation French Law, The Mauritius Penal Code, Mauritius Ordinances, Seychelles Ordinances, English Orders in Council, English Statute Law, and Stephen's Digest of Criminal Law;<sup>423</sup> in the Colonial's Office's terminology, "a Russian salad."<sup>424</sup> That 1952 Penal Code was largely modelled on the *Model Code*, written by Albert Ehrhardt.<sup>425</sup> The *Model Code* had come about largely because of complaints about the unworkability of the Indian Penal Code and the wish to have a code "closely following the wording and methods of English criminal law".<sup>426</sup> Ehrhardt took as his model the Nigerian Code of 1916 - in effect the Griffith Code of Queensland.<sup>427</sup> The *Model Code* was adopted first by Cyprus, then Palestine and Israel and later the British territories of East Africa and subsequently other African colonies and Pacific states.<sup>428</sup> Seychelles adopted

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<sup>419</sup> William Burge, *Burge's Commentaries on Colonial and Foreign Laws, Volume 1* (Sweet and Maxwell 1907)186.

<sup>420</sup> Seychelles Penal Code, Ordinance 10 of 1904.

<sup>421</sup> See Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' in Wing-Cheong Chan, Barry Wright and Stanley Yeo (eds.) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* : "Criminal law codification was never realised in England, despite its central place in nineteenth century law reform debates there. Codes were developed in other British jurisdictions and the first of these, and the one most directly influenced by the ideas of Jeremy Bentham, was Thomas Babington Macaulay's Indian Penal Code" 19.

<sup>422</sup> Deryck Scarr, *Seychelles since 1770:History of a Slave and Post-Slavery Society* (Hurst and Company 2000)149.

<sup>423</sup> British National Archives, Foreign and Commonwealth Office Records (FCO)141/1304.

<sup>424</sup> *ibid.*

<sup>425</sup> See Barry Wright, 'Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's' (2008) 12 *Legal History* 19, 44.

<sup>426</sup> H. F. Morris, 'History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935 (1974) 18 *Journal of African Law* 6.

<sup>427</sup> Robin O'Regan , 'The Migration of the Griffith Code' in *New Essays on the Australian Criminal Codes* (The Law Book Co 1988).

<sup>428</sup> Sir Harry Gibbs, 'The Queensland Criminal Code: From Italy to Zanzibar' (Speech delivered at the Opening of Exhibition at Queensland Supreme Court Library, Brisbane, 19 July 2002.

it in 1952. Although amended on several occasions, it remains in force to this day.<sup>429</sup> Some offences such as the misuse of drugs are contained in separate legislation.<sup>430</sup>

While the source of the criminal law of Seychelles is English common law, the illustrations below demonstrate that the importation of concepts is not exclusive of other common law countries. Additionally, the evolution of jurisprudence, given local circumstances, is leading to a distinctive indigenous criminal law.

### **5.2.2.1(c)(i) The Penal Code and its Interpretation.**

The Penal Code of Seychelles was enacted in 1952. Since it was inspired by the East African Penal Codes<sup>431</sup> and ultimately Griffith's Queensland Code,<sup>432</sup> references to case law based on similar provisions extant in these jurisdictions are sometimes still resorted to.

Crimes are classified under the Penal Code under three types of offences: against morality, against the person and against property. Crimes against morality are contained in Chapters V-XVII and include rape, indecent assault, prostitution, bigamy and child neglect.<sup>433</sup> Crimes against the person are contained in Chapters XIX-XXV and include murder, manslaughter, infanticides, abortions and assaults.<sup>434</sup> Crimes against property are contained in Chapters XXVI- XXXVIII and include theft, robbery, housebreaking, burglary and forgery.<sup>435</sup> The Code also contains general rules relating to criminal responsibility<sup>436</sup> and punishment.<sup>437</sup>

In the interpretation section of the Penal Code the following provision is made:

“This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so

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[http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719\\_Harry%20Gibbs.pdf](http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719_Harry%20Gibbs.pdf) accessed 1st July 2015.

<sup>429</sup> For the updated Penal Code, see Cap. 158, Laws of Seychelles. See also Twomey (n 347).

<sup>430</sup> Misuse of Drugs Act 1995. Drug offences were never included in the Penal Code. They were first legislated for in the Dangerous Drugs Ordinance 1935 and then updated on several occasions.

<sup>431</sup> British National Archives, CO 530/735. See also H. F. Morris, 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935' (1974) 18(1) *Journal of African Law, Criminal Law and Criminology* 6, 6.

<sup>432</sup> See Report on (Draft) Criminal Code Proclamation" 6 October 1903, British National Archives CO 446/33. See also Robin Stanley O'Regan, 'Sir Samuel Griffith's Criminal Code' (1991) 14(8) *Journal of the Historical Society of Queensland* 305.

<sup>433</sup> Sections 130-165 Penal Code.

<sup>434</sup> Sections 192-251 Penal Code.

<sup>435</sup> Sections 252-376 Penal Code.

<sup>436</sup> Sections 8-21 Penal Code.

<sup>437</sup> Sections 25-38 Penal Code.

far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.”<sup>438</sup>

In *R v Hoareau*<sup>439</sup> the court interpreted this to mean that it “ought to turn to English authorities to construe expressions used in the [Code].” The Penal Code is therefore generally interpreted on the basis of English sources. There have been some exceptions to this rule, notably where the expressions used in the Code are contextually different to those which obtain in England. This is especially true where the expressions have developed as a result of special wording in codification. In such cases, the courts have sought help from the interpretation of the text in similar codes in the Commonwealth. Hence it is common to see references of interpretation from East African, Australian and Privy Council decisions.

An example is the definition of *common intention* in the Code. Whereas section 23 of the Code provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In the cases of *Kilindo and anor v R*,<sup>440</sup> *Sopha v R*<sup>441</sup> and *Cinan and anor v R*,<sup>442</sup> the Court of Appeal had to interpret section 23 and to determine whether a subjective test was to be applied in relation to a secondary offence being a *probable consequence* of the primary offence. They were urged to find that by virtue of section 4 of the Code, the law relating to common intention was the same as that in England and that the test for liability of the secondary party in joint enterprise offences has to be subjective, that is, that the secondary offender knew that the secondary offence was a probable consequence of the primary

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<sup>438</sup> Section 4, Penal Code.

<sup>439</sup> *R v Hoareau* (1972) SLR 60.

<sup>440</sup> (2011) SLR 283.

<sup>441</sup> (2012) SLR 296.

<sup>442</sup> (2013) 2 SLR 279.

offence. The court refused to apply the English subjective test and quoted the High Court of Australia in *Darkan*.<sup>443</sup>

“One of the objectives of codification of the criminal law was to avoid unnecessary elaboration of the law. Such elaboration may be prone to confuse rather than to assist juries. Especially where the law has been restated in a code, so as to make a fresh start, it would ordinarily be wrong to gloss the language with notions inherited from the common law or with words that merely represent a judicial attempt, in different language, to restate Parliament’s purpose”<sup>444</sup>

It found that Seychellois law as contained in the Code was different to English law. It decided to follow the decisions of the High Court of Australia in Queensland<sup>445</sup> and the Privy Council in an appeal from Bermuda<sup>446</sup> because their respective codified definitions of common intention were identical to that of Seychelles and they had consistently decided that, given the wording in the provision, *probable consequence* had to be interpreted objectively.

It is important to note that up to 1964, as Seychellois criminal appeals were made to the Court of Appeal for Eastern Africa and ultimately to the Privy Council, their decisions bound the courts of Seychelles. Even after the formation of the Seychelles Court of Appeal in 1965<sup>447</sup> decisions from East Africa and the Privy Council continue to this day to have persuasive force.<sup>448</sup>

### 5.2.2.1(c)(ii) Piracy

The explosion of piracy off the coast of Somalia in the early 1990s had legal implications for Seychelles. Although a distant neighbour of Somalia, Seychelles lies in the middle of one of the most important shipping lanes affected by the acts of piracy and even saw its own ships and fishermen hijacked and kidnapped by the pirates. It conducted its first piracy prosecution in 2009 in the case of *Dahir*.<sup>449</sup> The charges brought against the eleven accused were under

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<sup>443</sup> *Darkan v R* (2006) HCA 34.

<sup>444</sup> *ibid* [130].

<sup>445</sup> *Stuart v R* (1974) 134 CLR 426, *R v Keenan* (2009) 236 CLR 397 and *R v AAP* [2012] QCA 104.

<sup>446</sup> *Furbert and anor v The Queen* [2000] 1 W.L.R 1716.

<sup>447</sup> The Seychelles Court of Appeal was established by the Seychelles Court of Appeal Order, 1964 and commenced sitting in 1965.

<sup>448</sup> See *Guy Pool v R* (1965-1976) SCA 88, 95.

<sup>449</sup> *R v Dahir and ors* SC 51/2009 (unreported).

existing domestic provisions of the Penal Code<sup>450</sup> and also under the provisions of the Prevention of Terrorism Act, 2004.<sup>451</sup> In that case the pirates had attacked one of the patrol boats of the Seychelles coast guard, the *Topaz*, in an attempt to hijack it but had been apprehended.

The charges in relation to terrorism were dismissed as the prosecution were unable to prove that the pirates belonged to a terrorist group or that their acts had indeed been acts of terrorism. The charges for piracy were under section 65 of the Penal Code, which provides as follows:

“Any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.”

The Supreme Court relied on definitions of piracy as set out in *Re Piracy Jure Gentium*,<sup>452</sup> in the United Nations Convention on the Law of the Sea to convict all eleven accused on the counts of piracy. Similarly, in the subsequent case of *Abdi Ali*<sup>453</sup> convictions on piracy charges were obtained for the eleven accused persons. The two cases were appealed but withdrawn at the last minute and the Court of Appeal, although apprised of the arguments of the defendants, were not called to deliver a decision on the conviction of the defendants on the piracy charges. It became evident however to all concerned that the convictions may well have been unsafe given the jurisdictional problems under the definition of piracy and possibly the principle of *nullum crimen* as contained in article 19(4) of the Constitution.<sup>454</sup> In this context the provisions were quickly amended in 2010 and a new section 65 enacted to provide:

“65(1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offense and liable to imprisonment for 30 years and a fine of R1 million.

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<sup>450</sup> Section 65, Penal Code.

<sup>451</sup> Prevention of Terrorism Act 2004.

<sup>452</sup> *Re Piracy de Jure Gentium* [1934] A.C. 586.

<sup>453</sup> *R v Abdi Ali* (2010) SLR 341.

<sup>454</sup> Article 19(4) of the Constitution provides that: “Except for the offence of genocide or an offence against humanity, a person shall not be held guilty of an offence on account of any act or omission that did not at the time it took place, constitute an offence...”

65(2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.

65(3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offense contrary to section 65(1) commits an offence and shall be liable to imprisonment for 30 years and a fine of R1,000,000.

65(4) For the purposes of this section "piracy" includes:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;

(ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State...

65(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or pirate aircraft, or ship or aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ship, aircraft or property seized, accordingly to the law.”

The reference to English law has been replaced with the customary international law concept and the United Nations Convention on the Law of the Sea definition of piracy,<sup>455</sup> especially that of universal jurisdiction for crimes of piracy. The new provisions have contributed greatly to the development and evolution of piracy definition worldwide.<sup>456</sup> They have allowed for the prosecution in Seychelles of acts of piracy committed inside and outside

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<sup>455</sup> United Nations Convention on the Law of the Sea, Article 101.

<sup>456</sup> U.N. Secretary-General, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 2-3’ UN Doc. S/2011/30 (Jan. 25, 2011).

Seychelles territory. They also established Seychelles as a regional court for piracy prosecution. Several other prosecutions for piracy have since been brought and successfully prosecuted. It must be noted that section 65 (7) imposes an obligation on the Seychelles to seize pirate ships and arrest and detain pirate suspects on the high seas and obliges the Seychelles courts to hear all such cases even though the international law on piracy imposes no such obligations.

Seychelles resisted the prosecution of cases of a truly universal jurisdiction nature and for obvious capacity reasons initially only undertook cases where a nexus with Seychelles was established. However, recent cases have involved acts of piracy of universal jurisdiction nature in the sense that the acts were committed against other ships, on the high seas, with no involvement with Seychelles apart from their apprehension and prosecution.<sup>457</sup> In the context of piracy, Seychelles has developed its own law, a twenty-first century variation of a medieval offence.

#### **5.2.2.1(c)(iii) Money Laundering**

The modern offence of money laundering, a process by which criminals attempt to conceal the true origin and ownership of the proceeds of their criminal activities and maintain control and possession of their illicit proceeds, is also provided for in legislation outside the Penal Code. The creation and promotion of Seychelles as an off-shore jurisdiction brought with it the attendant activities of individuals and corporations laundering money. Here again, Seychelles has looked beyond England for inspiration when enacting its provisions; this time to the IMF and Ireland. The Financial Intelligence Unit<sup>458</sup> (FIU) which oversees compliance with the provisions is an independent statutory body and in many ways mirrors the Irish Criminal Assets Bureau.

The Seychelles Anti Money Laundering Act of 2006 and its amendment in 2008, which repealed and replaced the Anti-Money Laundering Act of 1996, criminalises and defines money laundering as converting or transferring property knowing that the property is the proceeds of crime with the aim of concealing or disguising the illicit origin of the property.<sup>459</sup> The Act provides for the restraining, seizure and forfeiture of any money or property relating

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<sup>457</sup> See for example *R v Ise & ors* (2011) SLR 220, *R v Osman & Ors* (2011) SLR 344, *R v Aden & ors* (2011) SLR 30.

<sup>458</sup> Section 16, Anti-Money Laundering Act, 2006.

<sup>459</sup> Section 3, Anti-Money Laundering Act, 2006.

to the offence of money laundering.<sup>460</sup> The Anti-Money Laundering (Amendment) Act 2008 significantly enhanced the original Act. It amended the definition of money laundering to include recklessness in not ascertaining if the money transaction is benefit from crime<sup>461</sup> and increased the powers of the FIU allowing it to investigate suspicious financial transactions, liaise with other international bodies and bring cases to court.<sup>462</sup>

Allied to the anti-money laundering legislation is the Seychelles Proceeds of Crime (Civil Confiscation) Act, which is verbatim the Irish Proceeds of Crime (Civil Confiscation) Act apart from some numbering differences. It introduced provisions for the freezing and civil confiscation of criminal assets even in cases where the predicate offence takes place outside the jurisdiction.

A body of jurisprudence resulting from the cases brought under the legislation has developed distinctive Seychellois law in this area, although reliance has been placed on Irish and other common law cases.<sup>463</sup> Of note is the fact that cases brought under the Proceeds of Crime (Civil Confiscation) Act sit between the civil and criminal law in the sense that it is the assets of the defendant that are seized and there is no criminal charge proffered. This point was made in the case of *FIU v Mares Corp.*<sup>464</sup> Hence, in *Hackl*,<sup>465</sup> the Court of Appeal found that proceedings under the Act would not attract the protection of the double jeopardy provision in article 19(5)<sup>466</sup> of the Constitution, as the provisions of the Proceeds of Crime Act are essentially civil in nature. It surveyed similar cases across the world and quoted the South African case of *Simon Prophet v National Director of Public Prosecutions*<sup>467</sup> in which the Constitutional Court of South Africa traced the origins of modern forfeiture laws to the common law of the *deodand* (the guilt of inanimate objects) of the Middle Ages, finding that:

“Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened

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<sup>460</sup> Sections 26-37, Anti-Money Laundering Act, 1996.

<sup>461</sup> Section 3, Anti- Money Laundering (Amendment) Act 2008.

<sup>462</sup> Sections 16-25 Anti-Money Laundering (Amendment) Act 2008.

<sup>463</sup> See for example *FIU v Mares* (2011) SLR 404, *FIU v Sentry Global Securities Ltd* (2012). SLR 331, *Hackl v FIU* (2012) SLR 225.

<sup>464</sup> *Mares* (n 458).

<sup>465</sup> *Hackl* (n 458).

<sup>466</sup> Article 19(5) of the Constitution provides that a person cannot be tried again for an offence on which he has been either convicted or acquitted.

<sup>467</sup> *Simon Prophet v National Director of Public Prosecutions* CCT 56/05.

the law. It does not require a conviction or even a criminal charge against the owner.”<sup>468</sup>

Hence, while money laundering is itself a criminal offence, the provisions of the Proceeds of Crime (Civil confiscation) Act have proved more punishing for defendants and effective in suppressing the criminal offence. The Irish influence for the legislation and its interpretation is also categorically clear.

#### **5.2.2.1(d) The Misuse of Drugs**

Offences relating to the misuse of drugs are contained in the Misuse of Drugs Act 1995. The main offences relate to possession, cultivation, trafficking and importation of drugs. As the world trade of drugs grew and became more prolific so did the incidence of drug offences in Seychelles. In a bid to contain the problem, the government enacted draconian laws which have resulted in much jurisprudence in the area. As many of the initial statutory provisions were importations from the common law, the basis of court decisions remained initially grounded in common law jurisprudence. In the past decade however, Seychelles has created its own drug laws with some innovative provisions,<sup>469</sup> the practical applications of which have not been fully tested.

One of the problems encountered has come with the arrival of heroine on the Seychellois shores and the difficulty with assessing the purity of the drug seized and the quantity of the active substance with which to charge the accused. The matter is complicated by the fact that a deeming provision in the legislation<sup>470</sup> allows the prosecution to rely on the quantity of a prohibited drug found in a person’s possession to prove that the drugs were for the purpose of trafficking. The offence of trafficking carries a minimum mandatory sentence of eight years. In *Siméon*<sup>471</sup> the accused was convicted of drug trafficking for having 2.44 grams of a mixture, which contained 4% heroin (0.0976 diamorphine). He successfully appealed on the grounds that the law required possession of more than 2 grams of pure heroin and not of a mixture in excess of 2 grams which contained some heroin.

*Siméon* closed the door on similar cases where for lack of sophisticated testing methods the

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<sup>468</sup> *ibid*, [58].

<sup>469</sup> These relate, *inter alia*, to mandatory sentences, rehabilitation of addicts and the removal of remission on prison sentences.

<sup>470</sup> Section 14(c) Misuse of Drugs Act 1995.

<sup>471</sup> *Siméon v R* (2010) SLR 195.

prosecution had charged the accused with the whole amount seized in his possession. It also differentiated purity from weight, Fernando JA pointing out that:

“Heroin can be interpreted in the context of the illegal trade as a substance, mixture or product. This has already been done by the Misuse of Drugs Act. But one cannot interpret the words "2 grams of diamporphine (heroin)" in section 14(c) without an arithmetical calculation and doing so is not a scholastic exercise.”

In April 2014, section 14 of the Misuse of Drugs Act was amended to remove any distinction between purity and weight; hence “any substance, preparation or product” containing “any quantity”<sup>472</sup> whatsoever of the drug would be used for calculating the amount for the charge of possession or trafficking. This draconian measure has not been challenged in any case so far.

### **5.3 Procedural Law**

The law of procedure in Seychelles is largely based on the procedural laws of England apart for some exceptions in civil procedure.<sup>473</sup> This is the result of the separate historical development of the Civil Procedure and the Criminal Procedure Codes and of the retention of the Code Civil after Seychelles was ceded to the British in 1815. Similarly it can be said that the law of evidence is the English law of evidence apart for certain exceptions which have been retained because of pre-existing French law and are specifically provided for.<sup>474</sup> Some aspects of procedural law are outlined below, chosen because they most reflect the mixity or their distinction from the laws of England or France.

#### **5.3.1 Civil Procedure**

The civil procedural law of Seychelles was originally contained in the French Code of Civil Procedure (Promulgation) Act 1808, which provided that the French Code of Civil Procedure would apply from then on. This remained the position until 1920 when the Seychelles Code of Civil Procedure was enacted. That Code transformed the law of civil procedure to that as obtained in England at that time. This is emphasized by section 17 of the Courts Act which provides:

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<sup>472</sup> Section 14, Misuse of Drugs (Amendment) Act, 2014.

<sup>473</sup> French procedural law is retained by the operation of section 327 of the Seychelles Code of Civil Procedure in some specific areas. See section 4.2.1 Civil Procedure below.

<sup>474</sup> Section 12, Evidence Act, Cap. 74, Laws of Seychelles.

“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”

Hence, the court has on numerous occasions resorted to consulting the orders and rules of the Supreme Court Practice (White Book) of England.<sup>475</sup> As has been expressed in respect of other matters where Seychellois legal provisions refer back to the laws of England, special care is necessary to ensure that the provisions relied on in England do not postdate Seychelles’ independence in 1976. Here again, some of the orders and rules relied on by the courts of Seychelles may be dated and are not keeping with the modern rules enacted since by England.

There is a further anomaly in the rules of civil procedure in Seychelles and this arises from sections 326-7 of the Code of Civil Procedure which provides:

“326 The laws, enactments, Ordinances, rules and orders, and the Arrêtés mentioned in the first column of Schedule B are hereby repealed to the extent specified in the second column thereof.

327 Articles of the French Code of Civil Procedure repealed by any law which is repealed by this code shall remain repealed.” (emphasis added)

Apart from the tautological and poor drafting, by inference a number of the French Civil Procedure articles (those that were never repealed) remain in force. Those articles that remain in force can be found, again by inference, in the French Code of Civil Procedure (Promulgation Act) Cap 86: Articles 173 to 187, 193 to 213, 302 to 323, 352 to 362, 626 to 672, 806 to 825, 839 to 854, 865 to 870, 898 to 906, 907 to 952, 966 to 968, 976 to 985, 986, 989 to 996, 998 to 1002. They range in subject matter from the record of court proceedings to recusals and calculation of time limits in the filing of pleadings and execution of judgments.

The Seychelles Code of Civil procedures sets out English based rules on the subject matter of pleadings and actions, summons, service, hearings and execution. However some specific procedures of the French Civil Code have also been specifically included in the Seychelles Civil Procedure Code and these indicate the mixed nature of the procedural rules. Two of these are discussed below.

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<sup>475</sup> See for example *Ex Parte Medine* (2007) SLR 38, *Morin v Pool* (2012) SLR 108.

### 5.3.1.1 Personal Answers

The examination of parties to a case being called on personal answers (*examen sur faits et articles* – questioning a party before he calls or gives evidence on acts, facts and circumstances pertinent to the cause of action. The party must give sworn answers that may be used as evidence in the proceedings) is mentioned already in Chapter 4 but it is important to examine it in more detail. It must be remembered that in France there is a heavy reliance on documentary evidence and little if any oral evidence is adduced at the trial. A summary of oral arguments is handed over in the file together with supporting documentary evidence to the judge.<sup>476</sup> In English civil procedure law, proceedings take place by the plaintiff calling his witnesses first, followed by the defendant calling his. This is also normally the path of a civil hearing in Seychelles. However, sometimes parties decide for various reasons to resort to the procedure known as examination on personal answers. The rules pertaining to this French practice<sup>477</sup> are contained in sections 162-167 of the Seychelles Code of Civil Procedure. It is akin to but not the same as the English procedure of interrogatories.<sup>478</sup> A party to a suit can apply for the attendance of the adverse party for the examination on personal answers either to a judge at the pleadings stage<sup>479</sup> or at the hearing itself if the party is present in court.<sup>480</sup> If at the date of hearing neither the party nor his attorney appears, the “facts, matters and things alleged by the adverse party may be held to have been admitted.”<sup>481</sup>

The object of this process is to establish certain facts so as to adduce evidence excepted by the Civil Code. The Civil Code, for example prohibits the admissibility of oral evidence for any matter, the value of which exceeds five thousand rupees, against and beyond a notarial document or a document under private signature.<sup>482</sup> The exceptions to this rule are when the matter concerns a commercial transaction<sup>483</sup> or when there is a “writing providing initial proof.”<sup>484</sup> In *Anscombe v Indian Ocean Tuna Ltd*,<sup>485</sup> in a claim which had failed because the plaintiff relied on a variation in a contract of which he had no proof in writing, the Court of Appeal reminded practitioners of the usefulness of the procedure of personal answers where a party cannot rely on the exceptions to article 1341. It underlined that the purpose of personal

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<sup>476</sup> See Mauro Cappelletti and B. Kaplan, *International Encyclopedia of Comparative Law* (BRILL 1996) 60.

<sup>477</sup> See French Article 324, *Code de Procédure Civile*.

<sup>478</sup> See John Hamilton Baker, *An Introduction to English Legal History* (2<sup>nd</sup> edn, Butterworths, 1979).

<sup>479</sup> Section 163 Seychelles Code of Civil Procedure.

<sup>480</sup> Section 164 Seychelles Code of Civil Procedure.

<sup>481</sup> Section 162(2) Seychelles Code of Civil Procedure.

<sup>482</sup> Article 1341 Civil Code of Seychelles.

<sup>483</sup> Article 1341 (2) Civil Code of Seychelles.

<sup>484</sup> Article 1347 Civil Code of Seychelles.

<sup>485</sup> *Anscombe v Indian Ocean Tuna Ltd* (2010) SLR 182.

answers would be to secure admissions which would either establish a commercial transaction or that the existence of a contract was likely. In *Savy v Rassool*,<sup>486</sup> a plaintiff claimed he had not received money for a transfer of right of inheritance which could not be proved by documentary evidence. He was allowed to call the defendant on her personal answers, during which she referred to a document her father had signed in relation to the receipt of the purchase price. On this basis the court allowed the plaintiff to adduce oral evidence against and beyond the notarial document which claimed he had received the money.

### 5.3.1.2 Petitory and Possessory Actions

Petitory and possessory actions are French in origin.<sup>487</sup> In the discussion on property law above, an attempt was made to distinguish the concept of ownership of property in the common law and the civil law system. French law has for a long time supported possession over ownership.<sup>488</sup> In terms of moveable property this is clearly expressed as: “With regard to moveables, possession in good faith establishes a presumption of ownership.”<sup>489</sup>

The rules of civil procedure in Seychelles follow the French concept of property law and make provision for the protection of the possessor of immovable property as well. A distinction is made between petitory and possessory actions. In a petitory action an owner of an immovable right brings an action against another who has possession of the immovable in order to determine ownership; in such a case he merely seeks to vindicate his title.

By contrast the possessory action is brought by the person in possession of the property or a right arising from the property to maintain its possession. Hence, the person who is evicted, for example, can choose between the two actions. If he simply relies on prior possession he can only be defeated by the adverse party showing better possession. Section 97 of the Code of Civil Procedure provides that such actions are only maintainable if they are entered within one year from the date of trespass<sup>490</sup> and where the plaintiff has been in quiet and peaceful possession for at least a year by himself or by those through whom he claims the right.<sup>491</sup> However section 98 of the Code provides that if in such actions possession and trespass are

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<sup>486</sup> *Savy v Rassool* (1981) SLR 201.

<sup>487</sup> Paul Thomas, *Le Droit de Propriété des Laïques sur les Églises et le Patronage Laïque au Moyen Age* (Leroux 1906), Jean Brissaud *A History of French Private Law* (Rapelje Howell tr, John Murray, 1912).

<sup>488</sup> See for example Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate 2003).

<sup>489</sup> Article 2279 of the Civil Code of Seychelles is a verbatim translation of Article 2279 of the French *Code Civil*.

<sup>490</sup> Section 97(a) Seychelles Code of Civil Procedure.

<sup>491</sup> Section 97(b) Seychelles Code of Civil Procedure.

denied, it shall not be competent to raise the question of title or ownership. In the case of *Cécile v Payet*<sup>492</sup> the Supreme Court established the following principles in respect of possessory actions: A party in possession of land for one full year is entitled to be protected against one who disturbs his possessions; a court trying a possessory action has no jurisdiction to decide upon questions of title to the land in suit; there can be both physical interference with possession (*trouble de fait*) and non-physical interference (*trouble de droit*).

### 5.3.2 Criminal Procedure

The criminal procedure of Seychelles is now entirely based on English common law procedure and was a logical extension of the decision to adopt the criminal law of England in the islands in 1831.<sup>493</sup> This was not always the case. Until 1831 “criminal procedure was regulated mainly by the French Ordinance of 1670.”<sup>494</sup> This was followed by the Colonial Code *d’Instruction Criminelle* but was amended by provisions relating to jury trials and then virtually repealed by the Criminal Procedure Ordinance of 1853, which introduced criminal procedures on the islands of Mauritius and Seychelles along English lines.<sup>495</sup> This remained in place until the adoption of the Criminal Procedure Code of 1919, which was necessitated by the adoption of the consolidated Penal Code of 1904.

However it was not until 1952 at the adoption of the Penal Code that the current Criminal Procedure Code was also adopted, both codes based on the corresponding East African Codes of the British territories of Kenya, Tanzania and East Africa.

The Code outlines the powers and jurisdictions of the different courts in relation to criminal matters. It also provides for general matters relating to arrest, the institution of proceedings, bail, trial, conviction, procedures in relation to jury trials and appeals.

The case of *Gardette*<sup>496</sup> established that Penal Code of 1952, which was put into force from 1955 eliminated any French law from the criminal law of Seychelles and all the Codes relating to criminal law were of English common law nature both in substance and procedure, including evidence.

The Code provides in section 3(3) that:

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<sup>492</sup> (1982) SLR 396.

<sup>493</sup> See Order in Council 1831.

<sup>494</sup> Justice Wood Renton, ‘French law within the British Empire’ (1909) 10 (1) Journal of the Society of Comparative Legislation, 105, 201. This Ordinance formed part of the Code Delaleu.

<sup>495</sup> *ibid*, 201-202.

<sup>496</sup> *Gardette v R* (1959) SLR 179.

“Notwithstanding anything in this Code contained, the Supreme Court, may, subject to the provisions of any law for the time being in force in Seychelles, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure described by this Code is inapplicable, or for which no procedure is so prescribed, exercise such jurisdiction according to the course of procedure observed by and before the High Court of Justice in England.”

Again, this explains the close bond that continues to operate with English procedural rules. These are reverted to on the rare occasion when the Code itself is silent on the issue raised but there are qualifications made by the court in this respect. In *Victor*,<sup>497</sup> for example, the Supreme Court stated that, although the Criminal Procedure Code was silent on a particular power relating to the Magistrates’ Court, it would be wrong to import an English rule of procedure to apply to the Magistrates’ Court which would be diametrically opposed to similar procedures that operated in the Supreme Court.

There are certain matters obviously which have come subsequent to independence, the 1993 Constitution and through the development of Seychellois jurisprudence that have qualified the strict application of English common law. While, for example, there may have been some substantial amendment to certain legal provisions in England this may not have happened to similar provisions in Seychelles. Care must be exercised therefore when English case law is relied on in the same context. Two areas of concern are chosen as examples below.

### **5.3.2.1 Powers of Arrest, Bail and Remand**

As stated above there is no specific legislation dealing with arrest, bail and remand in Seychelles. The English Police and Criminal and Evidence Act of 1984 could not apply in Seychelles by virtue of the case of *Kimkoon*.<sup>498</sup> The procedure and substantive law for arrest, bail and remand are contained in the Constitution<sup>499</sup> and the Criminal Procedure Code at sections 24, 70 (1) and 100.

The relevant sections of the Criminal Procedure Code are reproduced below:

“Section 24- When any person has been taken into custody without a warrant for an offence other than murder or treason, the officer in charge of the police station to which such person shall be brought may in any case and shall, if it does not appear

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<sup>497</sup> *R v Victor* (1980) SLR 11.

<sup>498</sup> *Kimkoon* (n 299).

<sup>499</sup> Article 18 of the Constitution.

practicable to bring such person before an appropriate court within twenty-four hours after he was taken into custody, inquire into the case, and unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond; but where any person is retained in custody he shall be brought before a court as soon as practicable”

section 70(1) - Where a person who has been arrested without warrant is brought before a court, the Judge or Magistrate before whom the person is brought shall draw up and shall sign a formal charge containing a statement of the offence with which such person is charged, unless such a charge shall be signed and presented by a police officer.

Section 100(1) - When any person, other than any person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail: Provided that such officer or court may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance as hereinafter provided.

(3) - Notwithstanding anything contained in subsection (1), the Supreme Court may in any case direct that any person be admitted to bail or that the bail required by the Magistrates’ Court or a police officer be reduced.”

The provisions have caused certain difficulties due to their lack of clarity and lack of cross reference. In *Re Radegonde*<sup>500</sup> in relation to a writ of habeas corpus for a person who had been detained without a warrant for more than 24 hours, the courts had to revert to guidance from English case law to establish that the provision of section 24 mandatorily obliged the person to be brought before a court after the period of detention allowed under the provisions had expired. The Constitution has cleared up these matters as it has entrenched the right to liberty.<sup>501</sup>

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<sup>500</sup> (1987) SLR 52.

<sup>501</sup> Article 18 of the Constitution.

In *Tirant*,<sup>502</sup> a case that was heard before the promulgation of the Constitution, a defendant was remanded without charge under section 24 of the Criminal Procedure Code. In that case, as is pointed out by Phillip Boullé, section 24 was again interpreted in such a way to make the word “shall” not mandatory.<sup>503</sup> Boullé was of the view that section 24 of the Seychelles Criminal Procedure Code was based on the English provisions of section 38 of the Magistrates Courts Act 1952, which traces its origins to section 38 of the Summary Jurisdiction Act 1879, section 22 of the Criminal Justice Amendment Act 1914 and section 45 of the Criminal Justice Act 1925.<sup>504</sup>

*Tirant* was severely criticised and overruled by Alleear CJ in the case of *R v Murangira* (1993)<sup>505</sup> in which he found that the implication of section 70 (1) of the Criminal Procedure Code is “that no person who appears before a court shall leave court without a charge having been preferred against him” and that “no person is to be remanded in custody without having been charged with an offence.”

In effect, *Murangira* imports the mandatory provisions of section 70 into cases where persons arrested without warrant are brought before the court under section 24. In such cases it is mandatory on the court to charge or release such persons.<sup>506</sup> *Murangira* also established that section 100 of the Criminal Procedure Code is in effect the Bail Act of Seychelles. The court emphasised that there was no power in the law of Seychelles to remand someone indefinitely.

Although the position in *Murangira* is now reiterated in article 18 of the Constitution (the right to liberty) it remains an important case as it examines the procedures in relation to arrest, bail and remand. Despite the right to bail being enshrined in the Constitution, the court has made it clear that an application for bail should be made under the provisions of the Criminal Procedure Code and not under the Constitution.<sup>507</sup> The substantive law on bail is explicitly laid out in the Court of Appeal case of *Beeharry v R*<sup>508</sup> as has previously been explained at page 176.

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<sup>502</sup> *Tirant v R (Bail)* SC13/ 1993(unreported).

<sup>503</sup> Phillip Boullé, ‘The Criminal Justice System : Let history be our way forward’ (1995) Available <https://radar.brookes.ac.uk/radar/file/ee2ce0ba-a3ab-f4f7-0ff2-5604bb5bfc66/1/boullé2010proposed.pdf> accessed 1st July 2015.

<sup>504</sup> *ibid.*

<sup>505</sup> *R v Murangira* (1993) SLR 30.

<sup>506</sup> Boullé (n 503).

<sup>507</sup> *R v Dubignon* (1998) SLR 47.

<sup>508</sup> *Beeharry v R* (2010) SLR 470.

In the case of *R v Esparon (The Charitas)*<sup>509</sup> the Court of Appeal in a majority judgment refused to see its jurisdiction ousted in relation to bail applications even in the face of an amendment brought by section 342 (6) of the Criminal Procedure Act. The relevant provisions of section 342 provide:

342 (1). Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal –

(a) against his conviction ...

(b) against the sentence ...”

...

(4) The Judge may in his discretion, in any case in which an appeal to the Court of Appeal is filed or in any case in which a question of law has been reserved for the decision of such Court of Appeal, grant bail pending the hearing of such appeal or the decision of the case reserved.

(5) An application for bail under this section shall be by motion, supported by affidavit, served on the Attorney-General, and may be heard in Chambers.

(6) Except as it is otherwise provided in this section, an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence.”

The appellants appealed to the Court of Appeal against a decision of the Supreme Court refusing them bail. The Attorney General opposed the application on the basis of section 342(6), arguing that the Court of Appeal had no jurisdiction to hear the appeal. It was argued by the appellants that bail was a constitutional right and that the constitutional jurisdiction of the Court of Appeal could not be ousted by a legislative provision. The Court found that bail was not a mere incident in a criminal case or a part of it. If it had been, it would be caught by section 342 (6). Since section 342 dealt with criminal appeals and bail was an action in its own right, it could be entertained by the Court of Appeal. It stated that:

“It [was] inconceivable that the Legislature, in its wisdom, would have wanted to oust by a criminal provision the constitutional right of a citizen to appeal to the Court of Appeal on his constitutional right to bail and in the same foul swoop taken away the

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<sup>509</sup> *R v Esparon and others (The Charitas)* SCA 1/2014 (unreported).

Judiciary's intrinsic power to ensure that the citizen has a right to bail and a right to an appeal on his refusal or denial of bail.”

### 5.3.2.2 Jury Trials

Given the small population of Seychelles, it is not surprising that offences triable by jury are extremely limited. Trial by jury was available for capital offences only; these were the crimes of murder and treason. Until section 194 of the Penal Code was amended in 1966, the punishment for murder was death.<sup>510</sup> However, until the Constitution of 1993 the death penalty was still enforceable in Seychelles for treason.<sup>511</sup> In any case no execution had taken place in the preceding 65 years.<sup>512</sup>

Unlike England and most other common law countries, a jury of only nine members is empaneled in jury trials, presumably again because of the size of the population of Seychelles. The Chief Justice on 1 January “at intervals not exceeding three years” publishes in the Official Gazette the names of eligible jurors.<sup>513</sup>

The rest of the procedure in relation to jury trials is much the same as that which obtains in England. There is however an important provision in section 344 of the Criminal Procedure Code, in relation to trials, that has been used on several occasions by the Court of Appeal in relation to misdirections by a judge to a jury. The provisions of section 344 are as follows:

“Subject to the provisions hereinbefore contained, no omission in finding, sentence or order passed by a court of competent charge or jurisdiction shall be reversed or altered on appeal or revision on account -

...

(c) of any misdirection in any charge to a jury,

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<sup>510</sup> See section 2, Ordinance No.8 of 1966 (Murder (Abolition of Death Penalty)). Consequential amendments were made by section 3 of the Ordinance to the relevant sections of the Criminal Procedure Code. These were not permanent provisions as section 4 of the Ordinance provided for the operation and suspension of sections 2 and 3. Hence, the operation of sections 2 and 3 was extended every three years until 1978. The 1966 Ordinance was repealed in its entirety in 1978 by Decree No.62 of 1978, section 4 of which abolished the death penalty for murder.

<sup>511</sup> Section 39(1) of the Penal Code continued to provide that the penalty for treason was death despite the fact that Article 15(2) of the 1993 Constitution stated that "A law shall not provide for a sentence of death to be imposed by any court. This was rectified by The Penal Code (Amendment) Act No 15 of 1996 whereby the words “imprisonment for life” was substituted for the word “death.”

<sup>512</sup> The last execution in Seychelles took place on 19<sup>th</sup> January 1948. Wilson Anacoura was hung for the murder of his wife. Copy of death certificate retrieved from Seychelles National Archives with author.

<sup>513</sup> Section 229 Criminal Procedure Code.

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

Provided that in determining whether any error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The origin of the proviso is section 4(1) of the Criminal Appeal Act 1907 of England. Its application is no less problematic in Seychelles.<sup>514</sup> While the English provisions have been amended by the Criminal Appeal Act of 1968 and the Criminal Appeal Act of 1995, no such amendment has taken place in Seychelles. It would appear that the application of the concept of a misdirection occasioning a miscarriage of justice continues to be interpreted in a very restrictive manner in Seychelles. In any case, the provision leaves much power of appreciation in the appeal court to determine what amounts to a “failure of justice.” A retrial was allowed for example in a case where, in a murder trial, a trial judge had directed a jury on a defence of diminished responsibility to find manslaughter<sup>515</sup> but not in a case where a written summing up with no other oral direction was given to a jury.<sup>516</sup> A conviction for manslaughter was quashed by the Court of Appeal where in an original trial for murder a guilty plea for the lesser charge of manslaughter was taken in the absence of the jury.<sup>517</sup> It must also be noted that unlike England there are neither prescribed forms for summing up in jury trials in Seychelles, nor practice directions in relation to the same.

### **5.3.3 The Law of Evidence**

Unlike other areas of substantive and procedural law in Seychelles, a small academic text book exists on the law of evidence: Sauzier on Evidence.<sup>518</sup> Sauzier summarises the law by stating that generally the law of evidence in Seychelles is the English law of evidence. This stems from section 12 of the Evidence Ordinance 1962 which provides:

“Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.”

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<sup>514</sup> See for example the difficulties in England posed by the provisions in Richard Nobles and David Schiff, ‘Miscarriages of Justice: A Systems Approach’ *The Modern Law Review* (1955) 58 (3) 299.

<sup>515</sup> *Siméon v R* SCA 7/ 2001 (unreported)

<sup>516</sup> *Dodin v R* SCA 6/2003 (unreported).

<sup>517</sup> *Ragain v R* (2013) SLR 619.

<sup>518</sup> André Sauzier, *Introduction to the Law of Evidence in Seychelles* (2<sup>nd</sup> edn City Print 2011).

There was much debate as to whether the expression *time being* should be interpreted to mean the English law of evidence as in force in 1962 or from time to time. The matter was, as previously pointed out, settled in the case of *Kimkoon & Co. Ltd v R*<sup>519</sup> in which the Court of Appeal stated:

“We have no doubt that it is not competent for the Seychelles Legislature to delegate the power to legislate, and that so far as section 12 of the Evidence [Act]...may purport to Seychelles future amendments of the English law of evidence, it is inoperative. In our judgment the effect of the section is to apply to Seychelles the law of evidence as it stood on the 15<sup>th</sup> October 1962, the date of enactment of the [Act]...<sup>520</sup>

Although there has been no judicial pronouncement on the matter, Sauzier is of the view that the limitation of the application of the English law of evidence as at 15 October 1962 only applies to statute and not case law. He does appreciate that “the introduction of an entirely new concept of evidence as opposed to the reversal of an existing concept in the common law” might also be excluded by the limitation.<sup>521</sup>

Although there are a number of matters of evidence in civil law which are governed by French provisions, *Gardette*<sup>522</sup> made it clear that it is only the English law of evidence that obtains in criminal trials. Sauzier J however, notes that even then where there are special laws that apply in relation to criminal cases, these supersede section 12 of the Evidence Act notwithstanding their provenance.<sup>523</sup>

The regime relating to civil evidence is entirely different. While English common law rules generally apply in civil cases, for example in relation to the burden of proof and standard of proof, there are a number of areas where the rules of evidence are of French provenance. It must be noted that in French law the methods of proof in civil matters are stipulated in Article 1316: proof by way of documentary evidence, proof by way of oral testimony, presumptions, confession and oath (Art. 1316). Two examples of these methods are given below.

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<sup>519</sup> *Kimkoon* (n 299). See also the cases of *Mémé v Attorney-General* (1974) SLR 279 and *Vel v Tirant* (1978) SLR 7.

<sup>520</sup> *ibid*, 64.

<sup>521</sup> Sauzier (n 518) 2.

<sup>522</sup> *Gardette* (n 496).

<sup>523</sup> See for example specifically section 24(5) of The Road Transport Act, Cap 206 in relation to conviction on the evidence of a single witness.

### 5.3.3.1 Oral Evidence in Civil Cases

The biggest exception to the applicability of English law of evidence in Seychelles is the rule relating to oral evidence as contained in article 1341, which provides:

“Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees. The above is without prejudice to the rules prescribed in the laws relating to commerce.”

There are a number of exceptions to the rule as provided in the Civil Code, namely in relation to commercial transactions,<sup>524</sup> in situations where there is a commencement of proof in writing<sup>525</sup> or where there is a moral impossibility to do so as in the case of close relatives.<sup>526</sup>

There are two rules contained in the provisions of Article 1341: the first relates to the inadmissibility of oral evidence of an oral agreement not evidenced in writing of a matter the value of which exceeds 5000 rupees; the second relates to inadmissibility of evidence against documentary evidence.<sup>527</sup> Sauzier points out an interesting exception to the rule in the case of a lottery ticket purchased in common by two persons where the ticket wins a prize of more than 5000 rupees. As he points out, oral evidence would be admissible in this case as it is the value of the ticket which is relevant and not the value of the prize.<sup>528</sup>

### 5.3.3.2 The Decisive Oath

Provision for the decisive oath<sup>529</sup> is made in Articles 1358 to 1365 of the Civil Code of Seychelles. Sauzier explains the decisive oath as a means to secure the proof of a fact and to put an end to litigation. The origins of the oath are uncertain but existed in Greek, Germanic and Roman law. It came to England via its Anglo-Saxon heritage but did not survive.<sup>530</sup> The procedure is as follows: a party calls on his adversary to swear that some critical fact is or is not true, if the oath is refused, the party who has called for it prevails; if the oath is taken, he

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<sup>524</sup> Article 1341, Seychelles Civil Code.

<sup>525</sup> Article 1347, Seychelles Civil Code.

<sup>526</sup> Article 1348, Seychelles Civil Code.

<sup>527</sup> See *Corgat v Maree* (1976) SLR 109, *Ladouceur v Bibi* (1975) SLR 278, *Cooposamy v Morel Duboil* (2012) SLR 218.

<sup>528</sup> Sauzier (n 518) 10.

<sup>529</sup> It is known as *le serment décisoire* in French law.

<sup>530</sup> It was abolished in 1833. See Helen Silving, ‘Oath: I’ (1959) 68 (7) Yale Law Journal 1329.

loses.<sup>531</sup> As Sauzier explains, by invoking this mode of evidence the plaintiff throws himself on the conscience of the defendant trusting that he will not perjure himself.<sup>532</sup> The seminal case on the issue in Seychelles is that of *Chez Deenu (Pty) Ltd v Loizeau*<sup>533</sup> where the plaintiff instead of calling the defendant to take the oath offered to take it himself. The court held that the oath is reserved for the defendant and that he may in certain cases offer the oath back to the plaintiff.<sup>534</sup> No witnesses can be called after the decisive oath is taken. The case is decided purely on the oath taken. Needless to say this procedure is not invoked very often today.

#### 5.4 Chapter Conclusion

In this chapter an account of the main aspects of Seychellois law has been provided. An explanation is given of the origins of the law and a description of its evolution and its present status. In describing and analysing the different areas of substantive and procedural law it becomes evident that Seychelles is a mixed jurisdiction with a complex blend of civil law and common law. A stark distinction can also be made between the private and public law domains. Private law remains very much marked by civilian traits with elements of the French *Code Civil* still in evidence, while public law has clear features of the English common law. Procedural law in general is also of common law origin. Public law began as entirely of a French civilian tradition and became layered with English common law. Unlike the private law domain however, codified law was also introduced in the public law sphere, for example, the criminal law of Seychelles has as one of its main sources, the Penal Code.

In outlining some of the main aspects of the law of obligations, some detail is provided about the close similarity that continues to exist between the provisions of the Civil Code of Seychelles with the French *Code Civil*. The introduction of French jurisprudence into codal law in the 1975 revision of the Civil Code of Seychelles, mainly in the areas of *lésion* and *faute*, has been highlighted. Despite provisions in the Courts Act allowing the courts to resort to equity in the absence of legal remedies, the general approach has been one of remaining faithful to French doctrines in the areas of estoppel and unjust enrichment. On the other hand, where French doctrine has been abandoned to the advantage of English law, for example in

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<sup>531</sup> See James Beardsley, 'Proof of Fact in French Civil Procedure' (1986) 34 (3) *The American Journal of Comparative Law* 459.

<sup>532</sup> Sauzier (n 513) 35. The other party cannot prove the falsity of the oath under Article 1363 but this does not prevent a prosecution for perjury.

<sup>533</sup> SCA 1/1987(unreported).

<sup>534</sup> This option is not allowed if the knowledge of the fact in question is personal to the defendant, Article 1362 Seychelles Civil Code.

the law relating to defamation, some of the difficulties that arise are also illustrated. In some areas where the 1975 revision has failed to bring clarity, for example in relation to the concept of *cause* in contract, Seychellois jurisprudence has been left to repair the damage of a clumsy translation with unsatisfactory results.

In the area of family law, the importation of the English concept of matrimonial property has not led to any clarity in terms of the settlement of property when either marriages or de facto relationships break down. Similarly the law of property is marred by conflicts between English legislation, namely the Land Registration Act, and the Civil Code provisions in relation to conveyancing and registration. The ingenuity of the courts in trying to marry concepts from both systems is evident.

The obvious inequality and discrimination between heirs is unmasked in the laws of succession. Here, it is obvious that the discrepancies in terms of the distinction between legitimate, natural and adulterine children is both dated and has not kept up with developments in France.

The development of the offshore sector in Seychelles has brought new challenges where the laws devised for its operation interface with different rules applicable to local companies. Joined up thinking is clearly desirable in the reform of the laws so that a uniform approach is taken to both offshore and local companies. To make the trust concept applicable in terms of foreign companies but not local companies is unreasonable and bound to cause conflict as is depicted in the jurisprudence cited.

Importations from other jurisdictions have added a further layer to the existing patchwork. While public law closely mirrors the common law tradition, it is not always English common law that is emulated. Seychellois legislation and case law often import rules from Australia, Ireland and other common law jurisdictions. This is obvious in the areas of criminal law, for example, in the offence of money laundering and the confiscation of the proceeds of crime. Some aspects of the indigenisation of law are also depicted. The offence of piracy has been redrafted using customary international law concepts but also bearing in mind local circumstances.

Civil procedural law remains a curious mix of the two traditions which has on the whole not resulted in any great difficulty to date. The biggest problem that remains to be addressed is the result of legislation such as the Courts Act and the Evidence Act in applying the law of

England to Seychelles where Seychellois law is silent. Their effect has been to freeze the law to that of England prior to the independence of Seychelles. Until this situation is remedied by Seychellois legislation the courts remain locked in the application of dated laws that are not in keeping with current thought. The Seychellois legal tradition that is emerging is examined in the next chapter.

## Chapter 6: The Seychellois Legal Tradition

*“Creoleness is our primitive soup and our continuation, our primeval chaos and our mangrove swamp of virtualities”<sup>1</sup>*

### 6.1 Introduction

The examination of the theoretical underpinnings of law, legal systems and traditions in earlier chapters of this thesis now provides the framework for a proper consideration of the nature of Seychellois law. Similarly, the analysis of taxonomy, comparative law methodology and the concepts relating to the transplantation and dissemination of law offer an in-depth understanding of the status of the Seychellois legal tradition. Research into the origins, the current practice and application of constituents of the substantive and procedural law of Seychelles will provide signposts as to its sustainability into the future.

As was explained in Chapter 2, law can be conceived as being many different things. In my analysis of Seychellois law, I have chosen to use the legal tradition approach. A.W.B. Simpson observed that law is “essentially a tradition, that is to say something that has come down to us from the past.”<sup>2</sup> The concept of legal tradition essentially entails a process, “a living tradition, as opposed to a simple deposit of information that may have become lost.”<sup>3</sup> In this context, it becomes clear that the perpetuation of the tradition is not guaranteed and the process may well be interrupted and even cease in the future, since as pointed out ‘everything changes and nothing remains still as you cannot step twice into the same stream’<sup>4</sup> In this context, the laws of Seychelles as described in Chapters 4 and 5 are not immutable. They are subject to alteration and transformation.

Patrick Glenn explained *legal tradition* as a ‘bran-tub’<sup>5</sup> of information, available to individuals or societies as they make choices for themselves. He conceived tradition as normative information that has been passed on over a period of time through an iterative

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<sup>1</sup> Jean Bernabé, Patrick Chamoiseau and Raphaël Glissant, *Éloge de la Créolité/ In Praise of Creolness* (Gallimard 1993) 90.

<sup>2</sup> A.W.B. Simpson, *Invitation to Law* (Blackwell 1988) 23.

<sup>3</sup> Patrick Glenn, ‘A Concept of Legal Tradition’ (2008-2009) 34 *Queen's Law Journal*, 427, 432.

<sup>4</sup> Attribution to Heraclitus as quoted by Achilles Emilianides in ‘Cyprus: ‘Everything Changes and Nothing Remains Still’ in Sue Farran, Esin Örucü and Seán Patrick Donlan (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Ashgate 2014) 240.

<sup>5</sup> Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, Oxford University Press 2010) 13. By *bran-tub*, Glenn refers to a social stock of knowledge that is continuously and constantly changing.

process of capture, application and recapture.<sup>6</sup> The Seychellois tradition conceived over two different eras and types of colonisation has specific characteristics which have undergone rapid change during the post-colonial era. That part of its law that was handed down by the English colonisers is no longer English common law, nor is its civil law French. The Seychellois legal tradition today may be best regarded as one where there is a continuum of values or multivalence,<sup>7</sup> but with distinctive traits and characteristics. However, as will be explored in this chapter, it is now experiencing further change from new influences.

It is proposed, therefore, to analyse the complexities that arise from the factors described above. In particular, having acknowledged and demonstrated that the Seychellois legal tradition is mixed, the focus of Chapter 6 will be in considering the unique mixing process taking place and the emerging tradition. An analysis of the mixing process may well be more important than the mix of laws already described in Chapter 4, for it is the process of mixing that may yet determine the future and sustainability of the Seychellois legal tradition.

## **6.2 Official Law-In-Action<sup>8</sup> in Seychelles**

The official law of Seychelles, that is its state laws and norms, are described and set out substantively in Chapter 5. The main sources of state law are the Constitution of Seychelles, legislation, the Civil Code and case law. Their application in legal conflicts demonstrates the mixing process and development at play. Adjudication in Seychelles involves reference to local legislation and precedents but much reference is also made to foreign precedents, although not exclusively from England and France from whence the legal tradition was originally derived. Local legislation is itself also substantively derived from foreign legislation. The level of mixing and the type of mixing of local law with foreign law is not however readily discernible. There is in any case no literature or research carried out to date to determine what reliance is placed on foreign law by Seychellois courts.

Given those shortcomings, this chapter will examine citations in decisions of the court which would indicate the level of the mixing of laws in Seychelles. Citations to authorities in court decisions give indications as to the movement and diffusion of foreign laws and their reception into a legal tradition. It has also been pointed out that:

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<sup>6</sup> Glenn (n 3) 427.

<sup>7</sup> *ibid*, 444.

<sup>8</sup> This terminology is a combination of the terms *law-in-action* as used by Roscoe Pound in his article 'Law In Books and Law In Action' (1910) 44 *American Law Review* 12 and *official law* by Masaji Chiba Masaji Chiba, 'Introduction' in Masaji Chiba (ed) *Asian Indigenous Law In Interaction with Received Law* (2nd edn Routledge 2009).

‘Citation to authority not only links the decision in a specific case to the existing law, but also speaks to the future. This occurs because citation to an existing case establishes its precedent value and, hence, its influence on the future evolution of the common law.’<sup>9</sup>

Studies of appellate judgments also provide an ‘essential window into the legal culture of the judges.’<sup>10</sup> What if this could also indicate the path of the Seychellois legal tradition in the future? It was with this objective in mind that the research was carried out in some specific areas of law. Two small scale studies were undertaken: the first was a quantitative analysis addressing the provenance of the precedents chosen by the court in its adjudication process; and the second, a qualitative analysis of the views of members of the bar and bench on the weight of precedent in civil and criminal cases in Seychelles. Those two pieces of research address some of the research questions posed at the beginning of the thesis, namely, what type of adjudication mechanisms are in place and what is the weight of jurisprudence in adjudication. The results of the research carried out will give strong indicators as to the position of the Seychellois legal tradition within the comparative law context in relation to other systems where mixing is taking place. It will demonstrate the development of the law in the post-colonial era and will provide some clarity as to whether in the comparative law context the current legal system is sustainable.

### **6.2.1 Data and Methodology**

The sample cases used in the first study are Court of Appeal decisions reported in the Seychelles Law Reports (SLR) between 2012-2013 in the areas of constitutional law, criminal law and civil law. The editorial board which selects cases for inclusion in the law reports are the Chief Justice, the Attorney General and two senior members of the Bar. The selection of cases for inclusion is based on their precedential value.

The citations to authorities in all the reported judgments were counted. Repeat citations in the same case were only counted once unless they were cited to support a different proposition. Where more than one judgment was delivered in the same case and different judges referred to the same citation for the same proposition, the authority was only counted once. Only cases relied on by the court delivering the judgment were counted. Cases cited by the lower

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<sup>9</sup> Ingrid Nielsen and Russell Smyth, ‘One Hundred Years of Citation of Authority on the Supreme Court of New South Wales’ (2008) 31 *University of New South Wales Law Journal* 189.

<sup>10</sup> Lawrence M Friedman, Robert A Kagan, Bliss Cartwright and Stanton Wheeler, ‘State Supreme Courts: A Century of Style and Citation’ (1981) 33 *Stanford Law Review* 773, 773.

courts referred to by the higher courts but not relied on were not counted. The *ratio decidendi* of decisions of the Court of Appeal were easily ascertainable as there is seldom more than one judgment; and dissenting judgments, although occasionally given, rarely number more than one. This stems from the fact that the normal panel consists of three judges; it is only in important constitutional cases that the whole bench of five judges sit.

Three areas of public and private law were chosen. An analysis was first made of reported decisions of the Court of Appeal in matters relating to constitutional law. Secondly, a sample of reported decisions of the Court of Appeal relating to criminal cases was analysed. Thirdly, a sample of reported decisions of the Court of Appeal relating to civil cases was examined. The decisions were read, studied and the head notes where the list of cases are cited were cross-checked against a reading of the decisions to determine the number of cases cited and their provenance. A simple count and note was then made of jurisdictions from which they originated.

The second piece of research in relation to jurisprudence and adjudications is examined in detail further below.<sup>11</sup>

### **6.2.2 Limitations**

It must be acknowledged that there are limitations to the empirical research carried out. The years chosen for sampling were picked at random and may not reflect an average year in terms of both the number of precedents cited and the type of precedents cited. The samples taken are quite small in comparison to other similar studies in Australia and New Zealand. For example, the Russell Smyth study in New Zealand<sup>12</sup> used a sample of 300 cases while a bigger sample of 1018 cases were examined in the New South Wales study by Ingrid Nielsen and Russell Smyth.<sup>13</sup> A sample of 5,900 cases was used in a study of 16 supreme courts in the United States between 1870 and 1970.<sup>14</sup> These studies however, focussed on citation practice to elucidate patterns of judicial reasoning over time.

The focus of this study is on the mixing taking place within the Seychellois legal tradition. The size of Seychelles and the number of cases decided by the Court of Appeal per year (about 50) and the average number of reported cases (about 20) makes the sample of 42

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<sup>11</sup> See below 6.2.4

<sup>12</sup> Russell Smyth, 'Judicial Citations; An Empirical Study of Citation Practice in the New Zealand Court of Appeal' (2000) 31(4) Victoria University of Wellington Law Review 847.

<sup>13</sup> Nielsen and Smyth (n 9).

<sup>14</sup> Friedman et al (n 10).

reported cases relevant in the circumstances.

It must also be noted that unlike some jurisdictions, the judiciary in Seychelles has not played any role in controlling the citation of case law. It has issued no practice directions in this regard. There is no written restriction on citing foreign authorities, unlike the provisions of the Practice Direction issued by the Chief Justice of England and Wales<sup>15</sup> which states:

‘...any advocate who seeks to cite an authority from another jurisdiction must ...

ii. indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is;

iii. certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish...’<sup>16</sup>

Hence, attorneys and judges in Seychelles cite authorities freely with the only caveat that they are relevant to the issue being adjudicated upon. However, the courts in the different samples chosen may have paid no regard to irrelevant authorities foreign or otherwise cited by advocates. This may be reflected by the courts in simply making no reference to inapt citations in its decisions.

### **6.2.3 (a) Mixing within the Constitutional Law of Seychelles**

As has been explained, the present constitution is the third promulgated in the Republic. Its drafting and promulgation was born out of the fall of the Berlin Wall and socialism generally together with the drive to democratise Africa. These events were to lay the groundwork for the development of twentieth century constitutional principles and the enshrinement of fundamental rights and freedoms namely: *first generation rights* (the civil and political rights that have their foundation in the seventeenth and eighteenth centuries, their main purpose being the protection of personal liberty and safeguarding the individual against violations by the state), *second generation rights* (the social, economic and cultural rights such as the right to education, health care and to take part in cultural life) and *third generation rights* (the collective rights of a people such as the rights to development and to a healthy environment).

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<sup>15</sup> Practice Direction 9 April 2001: Citation of Authorities [2001] 1 WLR 1001.

<sup>16</sup> *ibid*, 9.2.

In adopting these rights in its third constitution, Seychelles cognitively opened its legal tradition to universally or democratically accepted principles of the western world. Article 48 of the Constitution provides:

“Consistency with international obligations of Seychelles

48. This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of -

(a) the international instrument containing these obligations;

(b) the reports and expression of views of bodies administering or enforcing these instruments;

(c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;

(d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.”<sup>17</sup>

The Court of Appeal in deciding constitutional cases has used article 48 of the Constitution to refer to foreign cases. This has resulted in more foreign cases being cited in constitutional decisions than local authorities. The mixing process has resulted in ingredients being collected far and beyond Seychelles from the shores of Africa and India to Europe, North America and Australia. In 8 reported constitutional cases<sup>18</sup> between 2012 and 2013, the Court of Appeal referred to 76 foreign cases and only 22 local cases.<sup>19</sup> The cases came from a variety of jurisdictions as is illustrated in *Figure 1* below.<sup>20</sup> In referring to these foreign authorities, the courts in many instances relied substantially on principles contained therein to overrule a previous local decision. In the case of *Michel*<sup>21</sup> for example, the Court of Appeal

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<sup>17</sup> Article 48, Constitution of Seychelles.

<sup>18</sup> The cases are the following: *Michel v Talma* (2012) SLR 95, *Hackl v Financial Investigative Unit* (2012) SLR 224, *Michel v Dhanjee* (2012) SLR 250, *Michel v Dhanjee* (2012) SLR 257, *Serret v Attorney General* (2012) SLR 289, *Government of Seychelles v Moulinié* (2012) SLR 350, *Government of Seychelles v Rose* (2012) SLR 364, *Trajter v Morgan* (2013) 2 SLR 329.

<sup>19</sup> This number includes the same foreign cases cited in different Seychellois cases.

<sup>20</sup> *Figure 1*, Page 253.

<sup>21</sup> *Michel v Dhanjee* (2012) SLR 257.

introduced new principles of constitutional interpretation based on foreign cases.<sup>22</sup> In construing the phrase *exceptional circumstances* contained in article 131(4) of the Constitution,<sup>23</sup> the Court in a majority decision referred to no less than 9 foreign cases on this point from an eclectic mix of jurisdictions.<sup>24</sup>

An analysis of the results obtained makes it clear that the court continues to refer to cases mainly from the United Kingdom, even in constitutional cases. There are probably three main reasons for this. First, although the United Kingdom does not have a written constitution, constitutional principles derived from English law continue to be applied to Seychellois cases driven by a subconscious respect for tradition and a generally held belief that the United Kingdom is the cradle of democracy and guardian of human rights. This is interesting given that the 1993 constitution is more comparable to the South African Constitution, especially as regards its Charter of Human Rights. The second reason for reference to English authorities is the fact that these are more easily accessible in Seychelles. Access to legal databases, such as Westlaw, LexisNexis and HeinOn Line are cost prohibitive. Simple google searches are carried out or authorities are accessed through physical reports in the Supreme Court library which is up to date with United Kingdom Law Reports but holds few law reports from other jurisdictions. Thirdly, referring to English authorities is almost a reflex action for judges of the court, conditioned by the colonial past of Seychelles and accustomed to reaching out for English authorities to rationalise decisions. Many judges and attorneys see English authorities as the gold standard as far as case law is concerned, England being the birthplace of the common law.

It is however interesting to note that there is an increasing reference to local cases, presumably as the court begins to confidently rely on its own body of experience from adjudicating on issues arising from the 1993 Constitution. Of great interest is the number of times authorities from both the European Court of Human Rights and courts of the United States are cited; this is more of a recent phenomenon. Mauritian decisions also continue to

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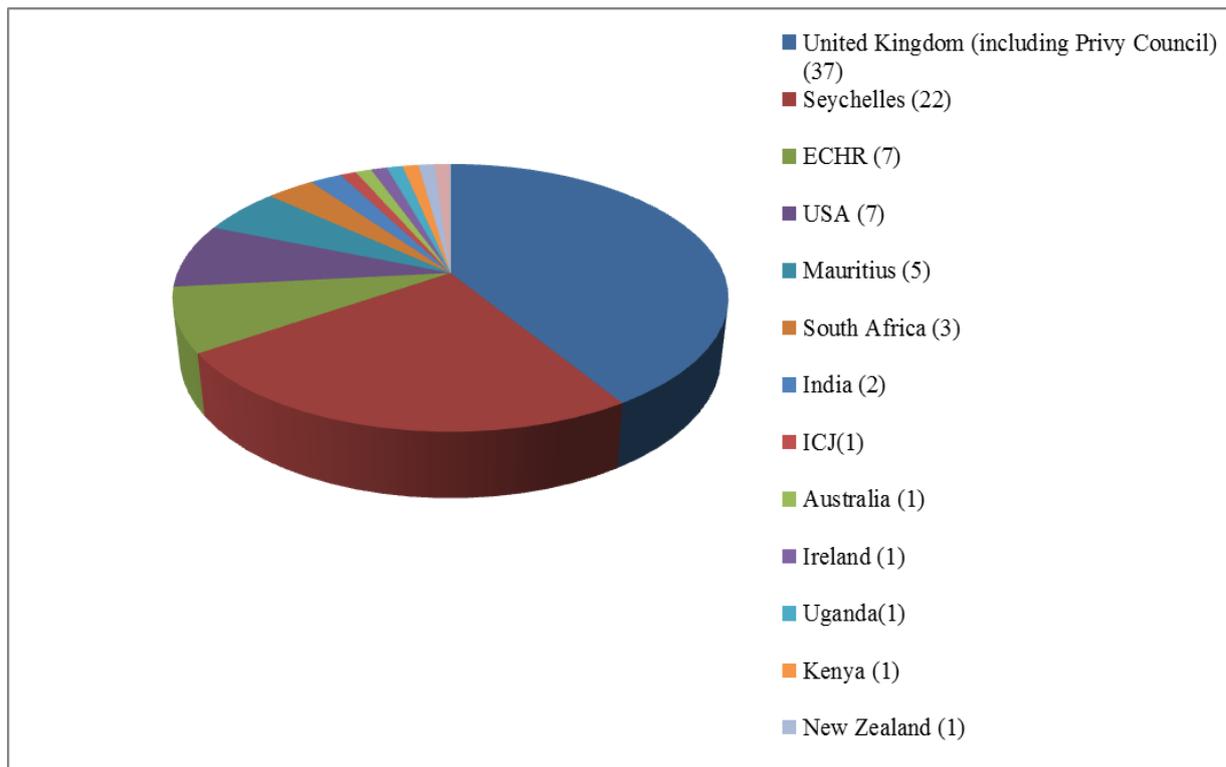
<sup>22</sup> The Court distinguished between legislative and constitutional interpretation and ascribed a more liberal interpretation to constitutional provisions.

<sup>23</sup> Article 131(4) of the Constitution provides: “The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years.”

<sup>24</sup> *R v Kelly (Edward)* [2000] 1 QB 198, *San v Rumble (No 2)* (2007) NSWCA 259, *R v Buckland* 1 All ER 907, *Ho v Professional Services Review Committee* No 295 [2007] FCA 388, *Awa v Independent News Auckland* [1996] 2 NZLR 184, *Re S* [2009] 2 All ER 700, *R v Monopolies Commission and Anor, Ex parte South Yorkshire Transport Ltd and Anor* [1993] 1 WLR 23, *(R(A) v Croydon London Borough Council* [2009] 1 WLR 2567.

have considerable influence in Seychelles. The other important jurisdiction referred to in constitutional cases is South Africa. *Figure 1* below illustrates the provenance of all authorities referred to by judges of the Court of Appeal and the number of authorities from each jurisdiction in the study.

***Figure 1: Local and Foreign Cases Referred to by the Seychelles Court of Appeal in Constitutional Cases between 2012 and 2013.***



### **6.2.3 (b) Mixing within the Criminal Law**

Mixing within the criminal law of Seychelles is much more limited and it strongly reflects English law. This is so given the fact that criminal procedural rules,<sup>25</sup> the Courts Act<sup>26</sup> and the Penal Code<sup>27</sup> make direct reference to the powers of the High Court of England.<sup>28</sup> Even the Evidence Act provides that it is the English law of evidence that should be followed

<sup>25</sup> Section 3 (1) (3), Criminal Procedure Code 1955, Chapter 54, Laws of Seychelles.

<sup>26</sup> Section 9, Courts Act 1964, Chapter 52, Laws of Seychelles.

<sup>27</sup> Section 6, The Penal Code 1955, Chapter 158, Laws of Seychelles.

<sup>28</sup> For example section 17 of the Courts Act states ‘...whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.’

unless there are specific provisions otherwise.<sup>29</sup>

The totality of these different provisions has created an ingrained legal culture to refer to English authorities as a first port of call although this is not stated in any legislation. There remains a reluctance to rely on local authorities without alternative or further recourse to English decisions even when these support similar arguments to local cases. Hence, out of a total of 10 reported criminal cases for the years 2012-2013, there are references to 87 foreign authorities and only 22 local citations. Of the foreign authorities 75 are English citations, 4 are citations of East African authorities, 1 of Mauritius and the rest from miscellaneous jurisdictions.

Some other conclusions can be drawn from the results: The decisions of the Court of Appeal may have been influenced by the composition of its panel. Its president, Francis McGregor, P is from Seychelles but was born and lived for many years in Tanzania. January Msoffe, JA is a Tanzanian national and also a practising judge of the Court of Appeal of Tanzania. Bhushan Domah, JA is a Mauritian national and a retired judge of the Supreme Court of Mauritius. Anthony Fernando, JA is a Sri Lankan national but has spent most of his professional life in Seychelles and is now also a naturalised Seychellois. Mathilda Twomey, JA is Seychellois but has spent two decades living in Ireland. The jurisdictions from which the judges hail would share a common English colonial history and a common law background. In this context, references to English cases are therefore understandable and resonate with Sacco's formants theory.<sup>30</sup>

As was explained in Chapter 2, criminal appeals in Seychelles were heard in East Africa until 1954 and ultimately referred to the Judicial Committee of the Privy Council until 1976. This fact, coupled with the similarity of the Penal Code of East African countries with that of Seychelles, and the fact that two of the judges on the Court of Appeal panel are either Tanzanian or at least familiar with East African law would explain the number of references to East African authorities. References to Mauritian cases in criminal cases would be unusual given the fact that Mauritius still has a Penal Code derived from the French Penal Code as opposed to Seychelles which has inherited the Queensland Code via a circuitous route as

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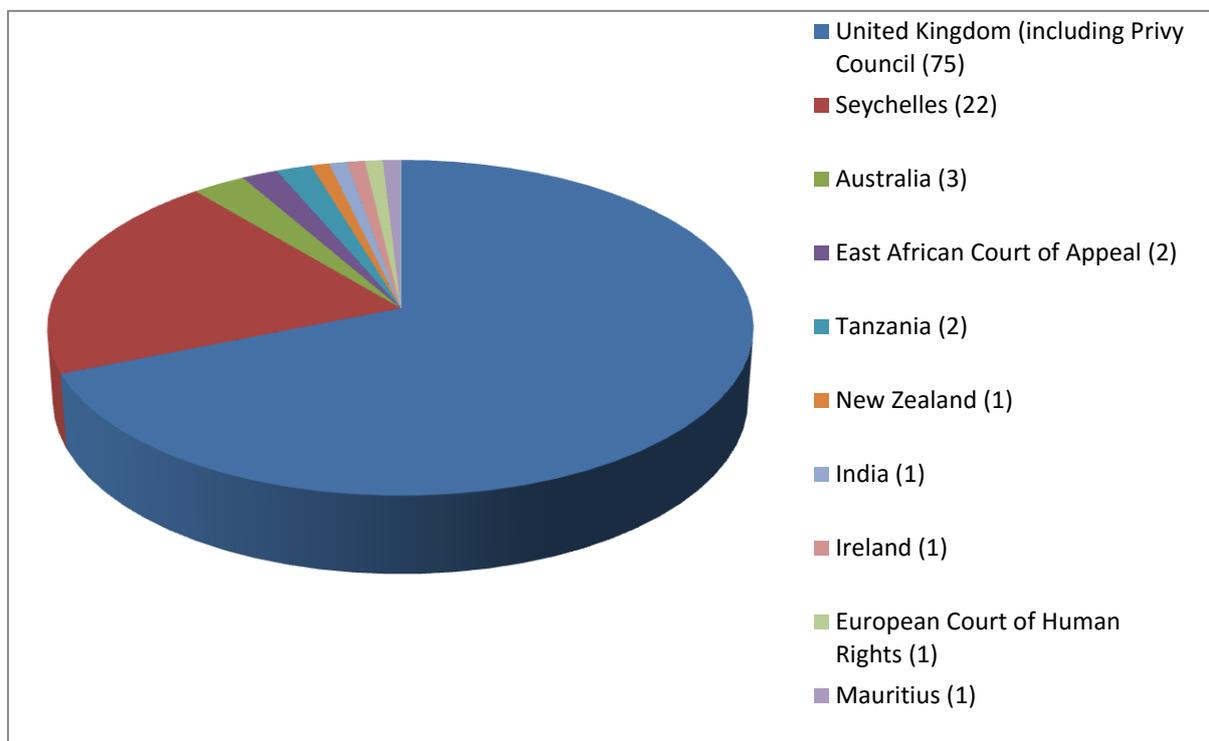
<sup>29</sup> Section 12, Evidence Act 1882, Chapter 74, Laws of Seychelles.

<sup>30</sup> Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39 *American Journal of Comparative Law* 1.

explained in Chapter 5.<sup>31</sup> The dearth of Mauritian authorities is therefore logical.

The reference to authorities from other common law countries may be indicative of the lived experiences and professional lives of the judges in jurisdictions outside Seychelles or access by them to material of other common law countries. It is in any case a sign of the porosity of the legal tradition. The origin of other foreign cases is shown in *Figure 2* below.

***Figure 2: Origin of cases cited in criminal cases before the Seychelles Court of Appeal between 2012 and 2013***



### **6.2.3 (c) Mixing within the Civil Law**

As was explained in Chapter 4, the civil law of Seychelles is substantially borrowed from the French legal tradition. The Civil Code of Seychelles is by and large a translation of the French Civil Code with some minor differences. Civil Procedure however, is based on the procedural rules of the High Court of England. Similarly, unless specific rules of evidence applicable to particular situations are provided for in the Civil Code, the law of evidence, even in civil cases is largely based on English rules. This mix is a result of the

<sup>31</sup> See Chapter 5 Section 5.2.2.1(c) Criminal Law.

superimposition of English rules onto French law by the British on their takeover of the islands in the nineteenth century.

Other English law grafted onto the substantially French civil law tradition is the law relating to defamation, matrimonial proceedings and the registration of property. In matters of commerce, an English style Companies Act<sup>32</sup> has also led to the common law tradition gaining ground in the private law sphere. Lately, the introduction of laws relating to the regulation of the offshore sector including the civil forfeiture of property obtained by crime has caused more encroachment onto the province of the French civil law tradition.

The analysis of the 23 reported civil appeals before the Court of Appeal reveals a stark reality: the common law is gaining ground at the expense of French civil law even in the private law sphere. Out of the 23 cases analysed, only 10 references were made to French authorities while 39 references were made to English authorities. There were, however, references to 62 local cases, largely decided on French law principles.

Some qualifications need to be made however. As was explained in Chapter 3, French court decisions do not refer to previous authorities.<sup>33</sup> The references are to legislation. Similarly, the references in Seychelles civil law cases where the Civil Code provisions are involved refer to these provisions. A reference to a decided case in these circumstances emulates the common law tradition. That is a distinctive Seychellois trait.

There is also a difficulty in accessing French authorities. The reported French cases in *Dalloz*<sup>34</sup> are difficult to access. The Supreme Court Library has one copy of the eleven volumes and these are out of date.<sup>35</sup> Only two of the judges of the Court of Appeal speak French and the other three judges rely on the two other members of the panel for research and translations. This has a direct bearing on the number of French authorities relied on. There is however a considerable amount of references to Mauritian cases, which has a similar Civil Code to that of Seychelles.

The number of English authorities reflects the growth of cases involving civil confiscation of assets obtained through crime, but also the number of matrimonial cases governed by English

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<sup>32</sup> Companies Ordinance 1972, Chapter 40, Laws of Seychelles.

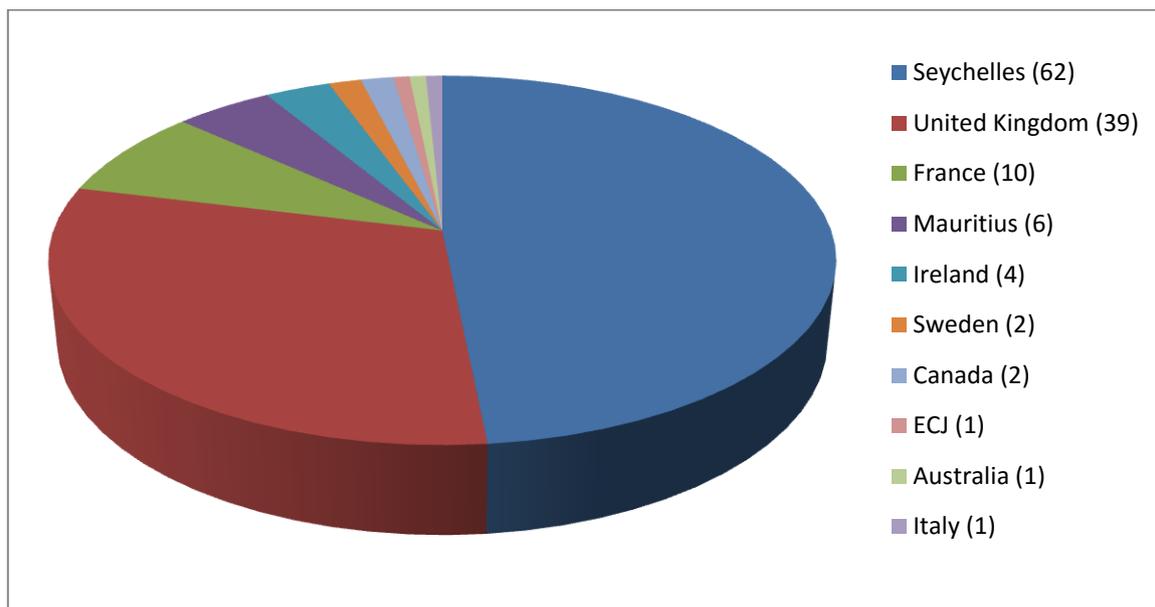
<sup>33</sup> See Chapter 3, Section 3.1.3.1 (d) Sources of Law.

<sup>34</sup> The *Recueil Dalloz* is a commentary on cases and legislation published in a series of bulletins gathered in an encyclopaedia and used by practitioners in Seychelles for researching civil law cases.

<sup>35</sup> The Supreme Court Library holds the only copy of the 11 volumes of the *Répertoire du Droit Civil* (Dalloz 1951- ) which has not been updated since the early 1980's for researching civil law cases.

style legislation. There is also a number of authorities referred to concerning civil procedure. Despite these qualifications, it is however clear that the reliance on French civil law is waning. *Figure 3* below illustrates the provenance and number of the authorities relied on by the Court of Appeal for the year 2012-2103.

**Figure 3: Origin of cases cited in civil cases before the Seychelles Court of Appeal between 2012 and 2013**



### 6.2.3 (d) Mixing within Legislation generally

In legislation, a similar scenario obtains, that is, sources of legislation emanate from several jurisdictions and are fashioned into local legislation after some minor adaptations. Of particular note are the recent legal instruments relating to money laundering and the civil confiscation of assets arising from the proceeds of crime. The Seychellois Anti-Money Laundering Act, 2006 and the Seychellois Proceeds of Crime Act 2008 are verbatim (with some minor adjustments) the Irish Criminal Justice Act 1994 and the Irish Proceeds of Crime Act 1996. There is nothing surprising in this mixing since, as was pointed out in Chapter 4, many of the criminal substantive and procedural laws of Seychelles are verbatim English, East African, Indian or even Australian equivalents. Similarly, the civil laws of Seychelles are, as already explained, derived directly from the Napoleonic Code. What is new in the mixing is the derivation of the current mixes. Expertise is sought and obtained on many

occasions from those jurisdictions from whence the innovative legislation originates. Seychelles unashamedly borrows the legal instruments. Hence, for example Ireland was the first country to introduce legislation using civil procedures to deal with benefit derived from criminal conduct in what was to become a global trend in the battle against crime. These hybrid laws, essentially civil in nature but sitting between the civil and criminal law regime dealing with the proceeds of criminal conduct, were novel and resisted by legal practitioners in subsequent cases in Seychelles. This was the first transplantation of Irish law into Seychellois law. In *Financial Intelligence Unit v Sentry Global Securities Ltd*,<sup>36</sup> a unanimous decision of the Court of Appeal, the Court observed:

“It is abundantly clear that section 4 applications under POCA<sup>37</sup> involve different evidential burdens used in both criminal and civil cases. Practitioners and judges need to accept once and for all that such legislation introduces new concepts that are not comparable to the law we have hitherto practised. This calls for new ways of practice and adjudication to give effect to the law.”

The novel Irish legal provisions mixed into the Seychellois legal tradition were explained again in the subsequent case of *Hackl v Financial Investigative Unit*:<sup>38</sup>

“In the context of the present case, it is worth noting that legislation using civil procedures to deal with “criminal assets” is an emerging global trend in the battle against crime. There are many models: the US model which provides for the confiscation of any property constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense; the UK model which provides that such property must have been obtained ‘by or in return for unlawful conduct’; the Irish model which defines proceeds of crime as “any property obtained or received by, or as a result of, or in connection with the commission of an offence”... Seychelles has adopted the Irish model...”<sup>39</sup>

In a different context, it was noted in Chapter 4 that the Seychellois courts use equitable doctrines as they are empowered to do so by the Courts Act.<sup>40</sup> Until recently there was no concept of *trust* in Seychelles and there was no law of trusts as such. The concept of trusts, as

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<sup>36</sup> *Financial Intelligence Unit v Sentry Global Securities Ltd* (2012) SLR 331, 336.

<sup>37</sup> The Proceeds of Crime Act 2008.

<sup>38</sup> *Hackl v Financial Investigative Unit* (2012) SLR 225.

<sup>39</sup> *ibid*, 228.

<sup>40</sup> Section 6, Courts Act Cap. 52, Laws of Seychelles.

has been explained in Chapter 5, does not fit within the law of Seychelles.<sup>41</sup> In 2011, the Seychelles International Business Authority circulated a Seychelles Trusts Bill which was replaced by an amended Bill in 2013. The Bill was withdrawn but it is interesting to note that it was heavily modelled on the Trusts (Jersey) Law 1984. The International Trusts Act<sup>42</sup> on the other hand only applies to offshore trusts and establishes a parallel regime to domestic law as the Civil Code only recognises that property rights should reside with the owner. Hence, the Act, which was modelled on Mauritian law, itself inspired from Guernsey law<sup>43</sup> provides that the trust property cannot include any property in Seychelles or shares or interests in any company incorporated in Seychelles.<sup>44</sup> These examples give an indication of some of the new types of mixing taking place and which are changing the legal tradition.

#### **6.2.4 (a) Adjudication and the Weight of Jurisprudence**

Given the incorporation of two very different legal traditions into Seychellois law, namely the common law tradition and the civil law tradition, it would be expected that adjudication in constitutional, criminal and civil cases would be very different. What has emerged has been a very mixed system which has borrowed from both traditions. As was pointed out in Chapter 3, adjudication in France depends on whether the matter is one of administrative law overseen by the *Conseil d'État* and its subordinate courts; or one of civil and criminal law where adjudication is by the *Cour de Cassation* and its subordinate courts.<sup>45</sup> Where it is not clear whether the jurisdiction exercised should be judicial or administrative, the matter is resolved by the *Tribunal des Conflits*. It must also be noted that the *Cour de Cassation* only decides the question of law referred to it and not the outcome of the case.<sup>46</sup> Hence, if it finds that the lower court was wrong in its interpretation, it quashes its decision and directs it to reconsider the case.

By contrast, Seychelles has adopted the common law tradition in that it has a unified court system with the Court of Appeal at its apex. In this sense, every case is subject to final scrutiny by that court.<sup>47</sup> Hence civil, criminal and constitutional issues are finally and

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<sup>41</sup> See Chapter 5 and *Hallock v d'Offay* (1983-1987) 3 SCAR (Vol1) 295.

<sup>42</sup> International Trusts Act, Cap. 102A, Laws of Seychelles. The Act was first passed in 1994 and amended in 2011.

<sup>43</sup> See Maurizio Lupoi, *Trusts: A Comparative Study* (Cambridge University Press, 2000).

<sup>44</sup> Section 4 (1) (c) International Trusts Act 1994 as amended.

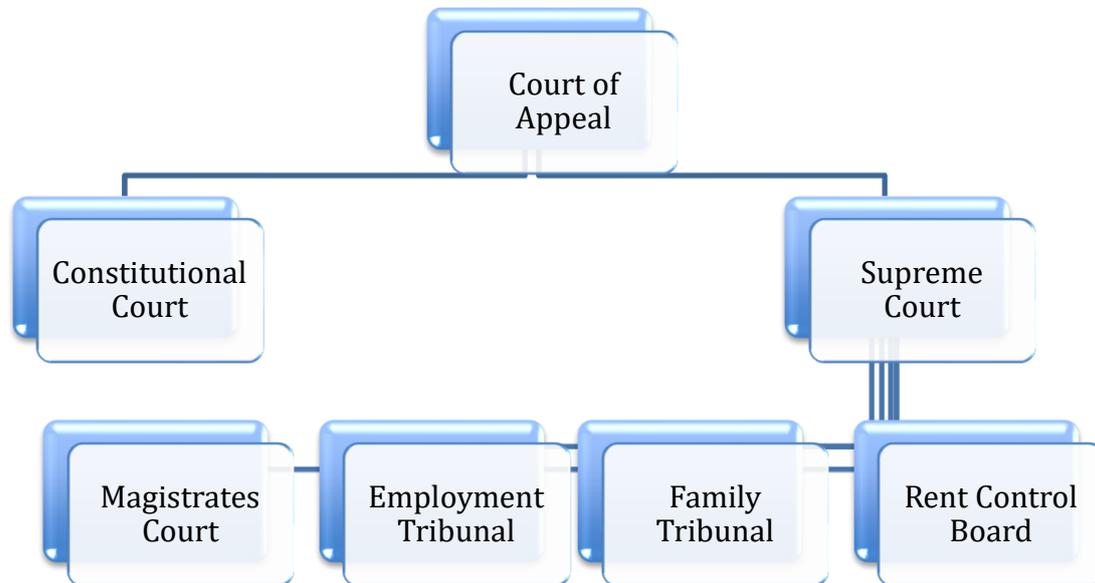
<sup>45</sup> See Chapter 3, 3.1.3.1 (b) Legal Structures.

<sup>46</sup> See John Henry Merryman and Rogelia Perez-Perdoma, *The Civil Law Tradition* (3<sup>rd</sup> edn, Stanford University Press, 2007) 88.

<sup>47</sup> Note however that the Courts Act proscribes civil appeals from interlocutory judgments of the Supreme Court or where the subject matter of the appeal only has a monetary value and that value does not exceed ten

ultimately resolved by the Court of Appeal. In this sense there is hierarchical precedent. *Figure 4* below illustrates the structure of the court system in Seychelles.

**Figure 4 Hierarchy of the Courts of Seychelles**



**6.2.4 (b) Differences in Adjudication and the Weight of Jurisprudence between Criminal and Civil Cases**

In terms of criminal cases, the principle of *stare decisis* (binding precedent) is adhered to in Seychelles regardless of the fact that no legal provision provides for it. It has survived as a legal tradition of the common law. Binding in terms of case law, however, is vertical but not always horizontal as is the case in many common law countries. Courts have regularly departed from a long line of settled precedent of both Seychellois and English cases where there is a compelling reason to do so. Reasons would include public policy or where the court is convinced that the earlier decision was clearly wrong in principle or if the previous decision is contrary to what is really substantially the whole of informed legal opinion.<sup>48</sup>

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thousand rupees and the Criminal Procedure Code permits criminal appeals against conviction, other than on a conviction based on the person’s own plea of guilty on any ground of appeal whenever the penalty awarded exceeds six months’ imprisonment or one thousand rupees or on any ground of appeal which involves a question of law alone.

<sup>48</sup> See for example *Lucas v R* (2011) SLR 313 where the Court of Appeal overturned established Seychellois precedent to hold that it is not mandatory for a judge to give a corroboration warning in cases involving

In civil cases, the matter is somewhat more complicated. The institutional hierarchy established by the Constitution ensures vertical bindingness of courts. However, in terms of the precedential value of decisions in civil law the matter is unclear. As was pointed out in Chapter 4, Article 5 of the Civil Code before its amendment in 1975 by Alexander Chloros<sup>49</sup> provided that:

‘Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision.’<sup>50</sup>

Although the provision clearly provided that precedent had no part to play insofar as civil cases were concerned, in practice this did not occur. Chloros stated that the position in respect to precedent had not been clear in Seychelles even before the enactment of the Seychelles Civil Code and that practitioners generally assumed that the decisions of the Court of Appeal of Mauritius, then the highest court for civil matters, were binding upon the Supreme Court of Seychelles.<sup>51</sup> In any case there is a clear underlying tension between the principle of hierarchical precedent inherent in provisions of different Seychellois legislation and the Civil Code. For example, section 5 of the Courts Act 1964 invests the Supreme Court of Seychelles with

‘all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.’

It could be argued that this placed the courts of Seychelles clearly within the common law structure of English courts and by extension caused the Seychellois Supreme Court to be bound by its previous decisions both in public and private law matters and also bound inferior courts by decisions of superior courts. This in effect would mean that decisions of the Courts even in civil matters would generally have precedential value.

However, this is inconsistent with Article 1 of the Civil Code of Seychelles which uncompromisingly provides that ‘[l]aw is a solemn and public expression of legislative will’

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sexual offences.

<sup>49</sup> Alexander G. Chloros, *Codification in a Mixed Jurisdiction: The Civil and Commercial law of Seychelles* (North Holland Publishing 1977).

<sup>50</sup> This translation is that provided by E. Blackwood Wright, Chief Justice of Seychelles 1908 in his translation of the Code for use by the courts of Seychelles. See E. Blackwood Wright, *The French Civil Code (As amended up to 1906), Translated into English with Notes Explanatory and Historical and Comparative References to English Law* (Stevens and Sons 1908).

<sup>51</sup> Chloros (n 49) 13.

(where law clearly means legislation and not case-law). It is also irreconcilable with Article 4 of the Code which states that '[t]he source of the civil law shall be the Civil Code of Seychelles and other laws from time to time enacted' and Article 5 of the Civil Code.

In 1976, Article 5 was repealed and the following provision substituted:

'Judicial decisions shall not be absolutely binding upon a Court but shall enjoy a high persuasive authority from which a Court shall only depart for good reason.'

The provision for some sort of *bindingness* of precedents in civil law as contained in Article 5 has not resolved the uncertainty. How persuasive is persuasive? In general, the courts have applied the same principles of precedent to civil cases as are applied in criminal cases, that is, they apply both hierarchical binding and case law binding. The Court of Appeal, in both public and private law cases, has also considered their decisions defeasible for good reasons (horizontal *stare decisis*).<sup>52</sup>

The examination of the cases chosen for the first piece of research clearly shows that there is little distinction in terms of the application of the principle of precedent between criminal and civil cases. There remain, however, some dissenting views on this matter. It was this uncertainty within the legal practitioners' community which prompted the next piece of research.

There has been considerable international research on precedents and their value.<sup>53</sup> There is still, however, a perplexing amount of confusion both in terms of vocabulary (*stare decisis*, vertical and horizontal *stare decisis*, binding precedent, persuasive precedent, *jurisprudence constante*) and the varying *bindingness* of precedents within different jurisdictions. The literature was examined and the different concepts examined before the research was undertaken. The concept of binding precedent is adopted for this piece of research.

It is acknowledged that there were limitations to the research. No distinction was made, for example, between the value of precedents arising from statutory interpretation and that of case law. Further, the principle of *stare decisis* operating in the United Kingdom is not

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<sup>52</sup> The practice is to follow the general principle as expressed in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 that a previous decision can be set aside where there have been conflicting decisions or where to follow precedent would cause injustice. See further below P. 219.

<sup>53</sup> See especially D. Neil MacCormick & Robert S. Summers (eds.) *Interpreting Precedents: A Comparative Study* (Ashgate and Dartmouth 1997) and Ewoud Hondius, 'Precedent and the Law' in Katharina Boele-Woelki & Sjef van Erp (eds) General reports of the XVIIth Congress of the International Academy of Comparative Law <http://www.ejcl.org/113/article113-3.pdf> accessed 1st July 2015.

comparable to that in Seychelles. It is accorded much more respect and deference in the former. Seychelles has, in terms of its Codes, been imbued with the concept of legislation being accorded supremacy over judicial law making. The Constitution of Seychelles also provides for a separation of powers, although like France, it has a hybrid system of government with features of both presidential and parliamentary systems. Civil law countries proper, with strict divisions between the three pillars of government, generally cannot accept judicial precedent as a source of law. In practice, however, the principle of *jurisprudence constante*<sup>54</sup> operates in many civil law countries, and even to some extent in France.<sup>55</sup> Jurisprudence in France is described as the ‘reproduction of the practices of judging’ coupled with the selection of these practices through the hierarchy of the courts.<sup>56</sup> Given the hybrid system of Seychelles and the development of its legal tradition from the French civil law and the English common law traditions, it is understandable why the legal practitioners in Seychelles are conflicted on the value of precedent.

The research into the weight of precedent in Seychelles was carried out using the forum of the Civil Code Review Committee. This Committee was set up in May 2013 and was charged with the second revision of the Civil Code since the Napoleonic Code was promulgated in Seychelles in 1807. It sat for sessional periods between May 2013 and December 2014 to read and analyse the provisions of the Code and hear submissions on the three Books contained in the Code. Book I of the Code contains the provisions relating to the weight of precedent in civil cases.

#### **6.2.4 (c) Advocates’ and Judges’ Views on the Weight of Jurisprudence**

Views of members of the bar and bench were sought first in an open meeting held on 26 August 2013 and these were recorded in the minutes of the meetings of the committee.<sup>57</sup> All those attending and others who wished to submit their observations in writing prior or subsequent to the meeting were asked the following question:

‘Is the weight of precedent the same in both the public law and private law spheres in Seychelles?’

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<sup>54</sup> Consistent decisions.

<sup>55</sup> See Michel Troper and Christophe Grzegorzczak in D. Neil MacCormick and Robert S. Summers (eds.) *Interpreting Precedents: A Comparative Study* (Ashgate and Dartmouth 1997) 125.

<sup>56</sup> M. Saluden, ‘La jurisprudence, phénomène sociologique’ in *Archives de philosophie du droit* (Sirey 1985)198.

<sup>57</sup> These minutes are currently being consolidated into a report on the review process of the Civil Code to be published. Draft with author.

The oral submissions received by the Committee at the meeting were minuted. The following is an excerpt from the minutes of the meeting:

‘It was noted that in the criminal sphere courts are vertically and horizontally bound. The comment was made that there should be greater consistency between civil and criminal matters. It was also agreed that a form of precedent gives certainty to the legal system and that that is desirable. It is equally desirable that there should not be an absolute rule of precedent. It was agreed that article 5 should be amended to make clear that courts are vertically bound and to include a non-exhaustive indication of what would amount to “good reason” for a court to depart from one of its previous decisions.’<sup>58</sup>

Further written submissions were subsequently received by the Committee in the ensuing months. A sample reflecting the most common views are reported below:

‘ ... any deviation from precedent would be for good reason and the final decision would still fall within the wording of Article 5... the ultimate decision in each case will or should take into account precedent but also be looked at “in the round” bearing in mind the factors set out in Article 5.’<sup>59</sup>

‘The vertical binding as far as the Court of Appeal is concerned does not or should not limit or defeat the object of article 5 of the Civil Code...’<sup>60</sup>

‘Appellate jurisdiction is conferred by the Constitution only on the Court of Appeal and this may have a bearing on the application of article 5 of the Civil Code.’<sup>61</sup>

‘Article 5 states that there is no principle of binding precedent in Seychelles. The goal of this provision was to emancipate the courts and to encourage them always to go back to the Code for guidance, and not to precedents. It was also thought that this would give the courts flexibility.’<sup>62</sup>

‘This rule is rarely mentioned in practice. The usual approach is for lower courts to regard themselves as bound by courts higher in the judicial hierarchy. Although the

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<sup>58</sup> Minutes prepared by Mihiata Pirini, records of which are in my safe keeping as Chair of the Civil Code Review Committee.

<sup>59</sup> CM. The contributors are anonymised but their identities and responses are documented and kept with the researcher.

<sup>60</sup> FM.

<sup>61</sup> AF.

<sup>62</sup> AS.

Court of Appeal indicates that some flexibility may be possible, there are also cases where the Court appears to indicate that it would like to depart from precedent but feels obliged not to.’<sup>63</sup>

‘The current practice illustrated by cases seems to be that the Court of Appeal should not exercise its right to depart: where the earlier decision has been followed in one or more other Court of Appeal cases; where the earlier decision has stood for many years; where the legislator has consolidated and amended the law in question subsequent to the decision without changing the effect of the Court of Appeal decision; where departing would result in injustice to those who have relied on the previous decision.’<sup>64</sup>

‘In the criminal sphere courts are vertically and horizontally bound. There should be greater consistency between civil and criminal matters.’<sup>65</sup>

‘A form of precedent gives certainty to the legal system and that is desirable. It is equally desirable that there should not be an absolute rule of precedent.’<sup>66</sup>

‘Article 5 should be amended to make clear that courts are vertically bound and there should be included a non-exhaustive indication of what would amount to *good reason* for a court to depart from one of its previous decisions.’<sup>67</sup>

The proposed amendment to article 5 by the Committee for the Review of the Civil Code<sup>68</sup> represents the consensus of the views expressed and largely reflects the Court of Appeal of England’s decision in *Young v Bristol Aeroplane Co Ltd*:<sup>69</sup>

‘(1) A judicial decision is binding on all courts lower in the judicial hierarchy than the court which delivered the precedent decision.

(2) A court is not bound by its previous decisions but these should be considered to be highly persuasive and should only be departed from for good reason.

(3) Good reason includes:

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<sup>63</sup> AA.

<sup>64</sup> BG.

<sup>65</sup> RG.

<sup>66</sup> KS.

<sup>67</sup> JH.

<sup>68</sup> The second Revision of the Civil Code since the Napoleonic Code was promulgated in Seychelles in 1807 was launched in May 2013.

<sup>69</sup> *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

- (a) that the earlier judgment was given *per incuriam*;
- (b) that there are two conflicting decisions;
- (c) where to follow the precedent would cause injustice in a public law matter.<sup>70</sup>

A second consultation on these draft provisions is imminent with the final draft to be presented to the Attorney General's Office in December 2015. Until the provisions are amended as proposed some uncertainty in the weight of precedent in civil cases will no doubt remain. For now, however, it would appear that the majority of legal practitioners treat the matter of precedent in civil matters as they would in criminal matters, binding precedent of superior courts and binding precedent of decided cases.

### 6.3. Unofficial Law in Seychelles

In Chapter 2, I examined the nature of unofficial law generally and reiterated Mariano Croce's statement that "legal pluralism can be regarded as a permanent condition of social reality".<sup>71</sup> This pluralism normally manifests itself in the operation of various legal and non-legal norms in any given community.<sup>72</sup> As was explained in Chapter 2, unofficial law refers to norms "authorized in practice by the general consensus of a certain circle of people, whether of a country or within or beyond."<sup>73</sup> In this context I am referring to those norms that supplement, oppose, modify, or undermine state law.<sup>74</sup>

Law in Seychelles is understood by its people and legal practitioners generally in state-centred terms, that is, law emanating solely from the state. Very little legal or anthropological research on this issue has been carried out and the matter is given little thought. As was pointed out in Chapter 4, there were no indigenous people of Seychelles and it is assumed that its laws as the result of the reception of two traditions, one superimposed on the other, although bifurcated is essentially Western law. However, an exploration of the colonial history of Seychelles together with an examination of its African ancestry and cultural

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<sup>70</sup> Draft provisions of amended Article 5 by the Civil Code Review Committee, minutes and notes with author.

<sup>71</sup> Mariano Croce, 'All Law is Plural. Legal Pluralism and the Distinctiveness of Law' (2012) 65 *Journal of Legal Pluralism and Unofficial Law* 1, 27.

<sup>72</sup> See Seán Patrick Donlan, 'Things being various: normativity, legality, state legality' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart 2014), 161. See also Seán Patrick Donlan, 'To Hybridity and Beyond: Reflections on Legal and Normative Complexity' in Vernon Palmer and Anna Koppel (eds), *Mixed Legal Systems, East and West: Newest Trends and Developments* (Ashgate 2015) 17.

<sup>73</sup> Chiba (n 8).

<sup>74</sup> *ibid*, 6.

heritage suggests that norms other than those emanating from the state operate and in some instances these are not recognised by the state.

There is no established framework from which such a study can be carried out. The examination of legal material will not elicit the operation of norms outside that of state law. Chiba, in examining the legal tradition of his native Japan asked the question, which I also wish to pose for my native Seychelles:

“How then is it possible to observe and analyse the whole structure of law of a people as a phase of their culture and as a result of struggles between received law and indigenous culture...?”<sup>75</sup>

Chiba was of the view that the anthropological exercise, for example that of Eugen Ehrlich,<sup>76</sup> demonstrates polycentricity and demolishes the idea of monist law. In Chapter 2, I explored such theories of law which point to the pluralism of laws and norms within any given state or community. In Chapter 3, I pointed to the different cultural differences of two main legal systems, that is, the English common law and the French civil law. The received law from these two traditions is pervasive in the Seychellois legal tradition and can cloud other norms at play. They also confuse the relationships between these other norms and state law. The theory of legal pluralism explored in Chapter 2 has enormous relevance to analysing the legal tradition of Seychelles. The examples I set out below are, in my view, manifestations of both *strong*<sup>77</sup>(*deep*)<sup>78</sup> and *weak*<sup>79</sup>(*state*)<sup>80</sup> pluralism at play in Seychelles. I have chosen instances of these manifestations in the context of religious law, family law, inheritance and witchcraft.

Religious law is not recognised by the state in Seychelles. The French legal tradition received into the Seychellois legal tradition maintained the separation between church and state. This has been reiterated in several cases. Both in *Lafortune*<sup>81</sup> and *Mériton*<sup>82</sup> the respondents to a divorce petition objected to a grant of decree *nisi* of divorce on the grounds that their Catholic

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<sup>75</sup> *ibid*, 5.

<sup>76</sup> Eugen Ehrlich, ‘Das lebende Recht der Völker in der Bukowina’ (1912) 1 *Recht und Wirtschaft* 273.

<sup>77</sup> See John Griffiths, ‘What is Legal Pluralism’ (1986) 24 (1) *Journal of Legal Pluralism & Unofficial Law* 39 and generally Chapters 2 and 3 above on the concept of pluralism.

<sup>78</sup> See Gordon R Woodman, ‘Ideological Combat and Social Observation: Recent Debates about Legal Pluralism’ (1998) 42 *Journal of Legal Pluralism & Unofficial Law* 21 and Chapters 2 and 3 above.

<sup>79</sup> Griffiths (n 77).

<sup>80</sup> Woodman (n 78).

<sup>81</sup> *Lafortune v Lafortune* SCA DV S 29/2003(unreported). *Mériton v Mériton* (unreported) SCA DVS 1/2006(unreported) the respondents to a divorce petition objected to a grant of decree nisi of divorce on the grounds that their catholic faith did not permit it.

<sup>82</sup> *Mériton v Mériton* (unreported) SCA DVS 1/2006.

faith did not permit it. The Supreme Court held that religious beliefs had no bearing on the dissolution of marriage and that the court was only concerned with the irretrievable breakdown of the marriage due to one or more of the grounds prescribed in the Matrimonial Causes Act 1992. Similarly, in *Majah*,<sup>83</sup> this time in the context of an Islamic marriage, a husband objected to the divorce on the grounds that his wife could not bring him to any court for a *talaq* (divorce) and that he was permitted under his religious beliefs to have other wives. He stated that polygamy was his privilege and he had a right to do so as per Qur'anic injunction. He further testified that men in Islamic law have the authority over women in all aspects of life. His direct testimony is instructive on the point of how he perceived Seychellois courts and what he considered were the norms that guided his community:

“A lot of Seychellois people come into this religion but they don't have the basic knowledge of the religion. I am very sorry for those Seychellois people... I suggested to [my wife] that we did not have to come to a civil court. I told her we are wasting the time of the court. This is a European court. We have a Muslim *affaire*.<sup>84</sup> We should go to the *Jamaat*.<sup>85</sup> But she went to the wrong *Jamaat*, not a man of experience. I put a complaint to the Imam and he told me that according to the Muslim law she does not have a right except under extreme circumstances...”<sup>86</sup>

The Supreme Court's response is equally telling and is set out *in extenso*:

“First of all, I note that there is a conflict of law; that is, between the personal civil law (*lex loci* and *lex fori*) which is universally applicable to all in Seychelles irrespective of their religious belief, faith and worship, and the personal Islamic law applicable to the marriage of the parties. As I see it, although the parties were married under Islamic law being Muslims, they are still subject to the personal law of the land... In the circumstances, I find that the Supreme Court of Seychelles has unfettered jurisdiction to entertain this petition and grant any relief in accordance with domestic laws, particularly the Matrimonial Causes Act. In my view, although there appears to be a conflict of personal laws in this matter, since both parties are Seychellois nationals, resident and domiciled in Seychelles, they are undoubtedly,

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<sup>83</sup> *Majah v Majah* (2010) SLR 327, Judgment of Karunakaran J.

<sup>84</sup> *affaire* in French or *zafer* in Creole can be defined as a court case.

<sup>85</sup> Muslim Assembly or teacher.

<sup>86</sup> *Majah* (n 83) 331.

subject to the laws of Seychelles. Their marriage, divorce and civil status are obviously governed by the *lex loci* and *lex fori*. In the circumstances, I decline to accept the contention of the Respondent that the petitioner being a Muslim woman has no right to come before this Court for divorce. I also reject the respondent's contention that this Court has no jurisdiction to entertain the petition for divorce in this matter. At this juncture, it is pertinent to observe that the Supreme Court of Seychelles has unlimited original jurisdiction in all civil matters in terms of article 125(1)(b) of the Constitution. Obviously, no other law or any practice, whether customary or religious in this country can take away that jurisdiction conferred on this Court by the Constitution. No attempt by anyone to whittle it down in the name of religion, culture, tradition or custom can be entertained by this Court.”<sup>87</sup>

The Supreme Court in this statement clearly only recognises official law and refuses to acknowledge the application of any other law or norms in Seychelles.

However, it is incorrect to assume that cultural norms have not been incorporated into state law. The two main examples of these recognised norms are both in the family law sphere and have been referred to in Chapters 4 and 5. The first is in relation to *en-ménage*<sup>88</sup> relationships. In this context, the case law described in Chapter 5 clearly shows that despite reluctance by the court to equate *en-ménage* relationships with those of married couples, it has incrementally given recognition to the status of the relationship by finding and articulating a legal framework to accommodate these relationships within official law. Thus, it first dismissed such relationships as immoral and punished one party (normally the female partner) in such relationships by refusing to order compensation where joint assets were legally held by the other party (normally the male partner).<sup>89</sup> Starting with the dissenting judgment of Sauzier J in *Hallock*,<sup>90</sup> the courts eventually began to use legal provisions of the Civil Code, namely those relating to unjust enrichment,<sup>91</sup> quasi contract,<sup>92</sup> and the provisions of Article 555 of the Civil Code (relating to structures built on land to which one has no legal

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<sup>87</sup> *ibid*, 332.

<sup>88</sup> Also referred to as *concubinage notoire* or *de facto* relationships and denotes long term relationships between unmarried parties. See Chapter 5 for the courts treatment of children and assets of the parties on the breakdown of such relationships.

<sup>89</sup> See *Hallock v d'Offay* (1983-1987) 3 SCAR (Vol1) 295.

<sup>90</sup> *ibid*.

<sup>91</sup> *Dora v Curator of Vacant Estates* (1963) SLR 66, *Edmond v Bristol* (1982) SLR 353, *Charlie v Françoise* SCA 12/1994 (unreported), *Arrissol v Dodin* SCA 6/2003 (unreported).

<sup>92</sup> *Labiche v Ah-Kong* (2010) SLR 172.

title)<sup>93</sup> to do justice in such cases. Although the Court can make no order as to the legal transfer of proprietary rights, it continues to order cash settlements in such cases.

This approach can be contrasted to that taken with regard to the succession rights of a concubine. The courts have steadfastly refused to grant such rights, stating that a concubine may not have any right of succession to the property of a deceased person.<sup>94</sup> Conversely, this is also in sharp contrast with the law of delict. In the case of *Jouanneau*,<sup>95</sup> for example, the Court of Appeal stated that concubines were entitled to claim moral damages from a plaintiff for damages arising out of the death of their de facto partner.

Much of the courts' approach in relation to *en-ménage* relationships and couples illustrate the findings of Bob Simpson that there is a general acknowledgment of the blurring of the definition of family as was traditionally conceived and the new and emerging kinship models of the 21<sup>st</sup> century.<sup>96</sup> The *en-ménage* model increasingly recognised by the Seychellois courts is also an example of the contextualisation of the relationship between newer forms of kinship and society.<sup>97</sup> This Seychellois approach is a useful model for the recognition by courts of societal changes and the regulation of unofficial law.

The second example is that of the *piti sonnyen*, a traditional arrangement whereby a large family (usually, a poor family) gives away one of their children to a household that has no children. The legislation in 1982<sup>98</sup> recognised this custom by incorporating into the definition of foster parent, those parents who are so “by virtue of a private agreement.”<sup>99</sup> The two examples above reflect traditional norms of unofficial law that have been incorporated into official law. There are however some other norms, “unofficial practices which have a distinct influence upon the effectiveness of official law.”<sup>100</sup> Although unrecognised by official law, they vie with state law and are a constant source of conflict. They are illustrations of *strong*

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<sup>93</sup> *Vel v Knowles* SCA 41/1998 (unreported), *Labiche v Ah-Kong* (2010) SLR 172, *Magnan v Desaubin* (2012) 58.

<sup>94</sup> *Clarisse v Sophola* (2005) SLR 96.

<sup>95</sup> *Jouanneau v Government of Seychelles* SCA4/2007 (unreported).

<sup>96</sup> Bob Simpson, *Changing Families: An Ethnographic Approach to Divorce and Separation* (Bloomsbury Academic 1998).

<sup>97</sup> See Maurice Godelier, *The Metamorphoses of Kinship* (Verso Books 2011).

<sup>98</sup> Children Act 1982.

<sup>99</sup> See section 28 of the Children Act 1982.

<sup>100</sup> Chiba (n 8) 5.

or *deep pluralism*<sup>101</sup> in Seychelles.

In Seychellois law, customary norms today are very much at the margins. Whatever custom *praeter legem* exists is rarely custom *contra legem*.<sup>102</sup> Such norms that still exist have been almost comprehensively regulated if not stifled by law. Examples of these are the criminal offences of beating drums or conch blowing after nine pm, enacted to stamp out the custom of *moutia* dancing,<sup>103</sup> the offence of dealing in witchcraft<sup>104</sup> which was an attempt to stop the custom of *gri-gri*,<sup>105</sup> *malfesan*<sup>106</sup> and *bonhom dibwa*.<sup>107</sup> Legislation has also encroached on the customary diet of Seychellois. Hence, the widespread consumption of *kalou*, *bacca* and *lapire*<sup>108</sup> and the eating of *kare*<sup>109</sup> and *fouke*<sup>110</sup> are either heavily regulated or banned outright. Much of the consumption of traditional fare has been curtailed by environmentally friendly laws.<sup>111</sup>

Guy Lionnet describes *moutias* as nocturnal gatherings around a fire accompanied by dancing to the throbbing beat of the African drum accompanied “by a melopoeia, very often improvised, which is either a lament, the narration of an event or a satire aimed generally at some important member of the audience.”<sup>112</sup> *Moutias* were an important method of dispute

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<sup>101</sup> See Griffiths (n77) and Woodman (n77).

<sup>102</sup> Custom *praeter legem* is custom as to a matter not covered by legislation, and *custom contra legem*, is custom contrary to existing legislation on the subject. See René David “The Legal Systems of the World Their Comparison and Unification, Volume 2”, *The International Encyclopaedia of Comparative Law* (Martinus Nijhoff 2011), 97-106.

<sup>103</sup> See Drums Regulation GG 1/5/1935. Section 183 of the Penal Code and the Drums Regulations punishes as “common nuisance” a person who makes noise or plays music and “beat[s] drums or tambours or blow[s] shells, etc at night after 9 p.m.” in delineated areas, most of which are within a mile radius of the town centre, village centres and churches of Mahé, Praslin and La Digue.

<sup>104</sup> Section 303, Penal Code, Chapter 158, Laws of Seychelles. See *Eugenie v R* (1969) SCAR 71.

<sup>105</sup> *Gri-gri* (gris-gris, grey magic) are voodoo spells. See Guy Lionnet, *The Seychelles* (David and Charles Publishers 1972)111. See also Burton Benedict, *People of the Seychelles* (H.M.S.O.1966) 64.

<sup>106</sup> *Malfesan* (malfaisance or evil). See Benedict (n 102) 64. “...malfaisance in itself is secret and not to be lightly discussed. My impression is that the belief is very widespread and that restrictive legislation and clerical disapproval are less likely to be effective in stamping it out than improved social and economic conditions.”

<sup>107</sup> *Bonhom/bonfam dibwa* (bonhommes or bonnefemmes du bois, witch doctors. Lionnet (n102) 111-112.

<sup>108</sup> See section 17 of the Public Order Act in relation to the prohibition to tap toddy and manufacture bacca for sale. See also the Penal Code Restrictions relating to *toddy*, *bacca* and *lapire* and the Licences Act , Cap 113. The three indigenous drinks in Seychelles are toddy (*kalou*, *calou*, fermented coconut palm juice) *bacca* (fermented sugar cane juice) and *lapire* (*la purée*, fermented fruit or vegetable juice). See Benedict (n102) 192.

<sup>109</sup> *Tortues marines carées*, green sea turtle.

<sup>110</sup> *Fouquet*, shearwater (sea birds).

<sup>111</sup> See Wild Animals and Birds Protection Act, Cap 247, Laws of Seychelles. See also *R v Fayolle* (1971) SLR 119 and recently *R v Marengo and Others* SC CRS 11 of 2003. See also Lionnet (n 102) 115: “the favourite meat of the Seychellois are turtle meat (which is now unobtainable since the capture of the green turtle has been prohibited) and pork...”

<sup>112</sup> Lionnet (n 105) 113.

resolution and dissipating conflict. Legislation has been so successful in stamping out the custom that it is rare today to hear or see a *moutia* on the inner islands. They do however continue to feature on outlying islands and are important in keeping the peace in communities in which there is no police presence.

Lionnet ascribes the Seychellois belief in the supernatural to their African ancestry. *Dibwa*<sup>113</sup> remains surprisingly strong to this day and is widely practised and used. There have been no modern day prosecutions for witchcraft since *Eugenie*.<sup>114</sup> In a study of herbalism in Seychelles, Henk Bilo and Corrie Bilo-Groen<sup>115</sup> distinguish herbalism (good magic) practised by what they term *white witches* but known in Creole as *bonhom dibwa*<sup>116</sup> and the bad *grigri* (black magic) practised by other witch doctors. For those with belief in *dibwa*, the knowledge that someone has consulted a witchdoctor about them can produce hysterical and sometimes fatal outcomes.

The Penal Code prohibits the practice of witchcraft. Section 303 provides:

- “(1) Any person who-
- (a) pretends to deal in witchcraft; or
  - (b) pretends to tell fortunes; or
  - (c) uses or pretends to use subtle craft, means or device by witchcraft, charms or other like superstitious means, to deceive or to impose upon any other person or to cause fear, annoyance or injury to another in mind, person or property; or
  - (d) employs or solicits any person to advise him on any matter for any purpose whatsoever by witchcraft, non-natural or other like superstitious means; or
  - (e) has in his possession any charm or poison or thing which he intends for use either by himself or by some other person for the purpose of any act punishable under paragraph (a), (b) or (c) of this subsection,
- is guilty of a misdemeanour.

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<sup>113</sup> The practice of witchcraft or the occult.

<sup>114</sup> *R v Eugenie* (1969) SCAR 71.

<sup>115</sup> Henk Bilo and Corrie Bilo-Groen, ‘Herbalism in Seychelles’ in Ekkehard Schröder (ed) *Ethnobotanik-Ethnobotany* (Springer 1985) 394.

<sup>116</sup> There is both good *dibwa* and bad *dibwa*. Good *dibwa* are herbal remedies for medical complaints.

- (2) A person found in possession of anything commonly used for the purpose of an act punishable under paragraph (a), (b), or (c) of such purpose unless and until the contrary be proved.
- (3) Any person who shall receive or obtain any consideration whatsoever or the promise thereof for or in respect of the doing by such person of any act punishable under paragraphs (a), (b) or (c) of subsection (1) shall, if he has actually received such consideration, be deemed guilty of the offence of obtaining by false pretences, and if he has not actually received such consideration but only the promise thereof, be deemed guilty of the offence of attempting to obtain by false pretences and shall be liable upon conviction and punishable accordingly.

Any agreement for the giving of any consideration for or in respect of the doing of any act punishable as aforesaid shall be null and void.”

*Eugenie*<sup>117</sup> was overturned on appeal on the basis that there was insufficient evidence to support the conviction of “possessing things intended for use in pretending to deal in witchcraft” since neither of the prosecution witnesses could be admitted as experts to establish that the paraphernalia in the possession of the appellant were used in witchcraft. The Court of Appeal also defined the expression “pretending to deal in witchcraft” as meaning “to profess or to deal.”<sup>118</sup> *Eugenie* also bears out the difficulties of regulating non legal norms. The fact that there have been no prosecutions for witchcraft in more than forty five years coupled with the fact that a substantial proportion of Seychellois have superstitious beliefs and resort to witchdoctors to resolve disputes within the home and the community is an acknowledgement of the tolerance of the practice today. Moreover, as will be seen below there is also an undertaking by the government to protect the constitutional right to cultural values and this may well have a bearing in this area.

#### **6.4 Additional Cultural, Political and Economic Influences**

As pointed out in Chapter 2, the cultural, political, and economic conditions of every society are reflected in their national laws. There is some evidence that societies around the world follow a similar path of development.<sup>119</sup> According to the modernisation theory, states adopt

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<sup>117</sup> *Eugenie* (n114).

<sup>118</sup> *ibid*, 73.

<sup>119</sup> See Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies* (Princeton University Press 1997).

similar changes in, among other things, politics, economics and culture in a coherent and predictable manner.<sup>120</sup> The internationalisation of the world and the fact that states generally and specifically in terms of Seychelles, micro-jurisdictions, are at the mercy of global forces in terms of the integration of economic, political and social cultures is a major factor in considering the status and future development of the Seychelles legal tradition.

However, critiques of the modernisation theory equally have a bearing for Seychelles. The concept of modernisation is largely Western-centric and assumes that development is a process to be achieved by all states regardless of cultural, political and economic factors inherent in the society in question. As has been pointed out:

“[W]ithin the confines of any seemingly single international framework, there may in fact develop several different international systems - political, economic, cultural, etc. - each with some autonomy of its own.”<sup>121</sup>

The path followed by Western states through industrialisation or political revolution might not be replicated in Africa or Seychelles as the local factors harnessing such development are not necessarily the same. Local factors, therefore also have a crucial role to play in the development of a legal tradition. Some of these factors in the context of Seychelles are examined below.

#### **6.4.1 Cultural Influences**

One of the *second generation rights*<sup>122</sup> protected under the Charter of Human Rights in the 1993 Constitution is the following:

“Right to cultural life and values

39.(1) The State recognises the right of every person to take part in cultural life and to profess, promote, enjoy and protect the cultural and customary values of the Seychellois people subject to such restrictions

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<sup>120</sup> Karl Marx (tr Martin Nicolaus) *Grundrisse: Foundations of the Critique of Political Economy* (Vintage Books 1973).

<sup>121</sup> Shmuel Noah Eisenstadt, ‘A Reappraisal of Theories of Social Change and Modernization’ in Hans Haferkamp and Neil. Smelser, *Social Change and Modernity* (University of California Press 1992) 419.

<sup>122</sup> First generation human rights were the first rights to be conceived by the United Nations, and were largely political rights. The second generation of human rights are social and economic. The third generation rights are the rights of groups. Given this classification, there is disagreement and confusion about whether cultural rights are second generation or third generation rights. There is nonetheless a general rejection of the classification of rights. The UNHCR sees all human rights as being indivisible and interdependent. See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc. E/CN.4/1987/19.

as may be provided by law and necessary in a democratic society including-

- (a) the protection of public order, public morals and public health;
  - (b) the prevention of crime;
  - (c) the protection of the rights and freedoms of other persons.
- (2) The State undertakes to take reasonable steps to ensure the preservation of the cultural heritage and values of the Seychellois people.

Despite its entrenchment in the Constitution, the right to culture like other socio-economic rights is seen to be largely aspirational and generally considered non-justiciable. However, the right to cultural and customary values in the International Covenant on Economic, Social and Cultural Rights, which Seychelles acceded to in 1992, was clarified and measures introduced for their enforcement in both The Limburg Principles,<sup>123</sup> and the Maastricht Guidelines.<sup>124</sup> These protocols have provided clarification on obligations by adherents to the International Covenant on Economic, Social and Cultural Rights in the area of socio-economic rights including the declaration that all appropriate means, including legislative, administrative, judicial, economic, social and educational measures must be used to order to fulfil their obligations under the Covenant.<sup>125</sup>

The Ministry of Local Government, Sports and Culture has articulated its policy in the context of culture as its democratisation, its continuing development and its protection, preservation, and the promotion of the natural and cultural heritage generally.<sup>126</sup> As part of its aims, it has guaranteed the promotion and development of a Seychellois Creole identity. It has given an undertaking to cultivate tolerance for the cultural traditions, customs, beliefs, and also religious differences between the different communities living in Seychelles.<sup>127</sup> In this context, cultural values, including the practice of witchcraft, may well be protected as long as these do not interfere with public order or health. There have been no cases on this issue and it remains to be seen how such rights would be defended in practice.

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<sup>123</sup> Limburg Principles (ibid).

<sup>124</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.  
[http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)

<sup>125</sup> Principle 17, Limburg Principles.

<sup>126</sup> Ministry of Local Government, Sports and Culture, 'The Cultural Policy of the Republic of Seychelles' (2004) [http://ocpa.irmo.hr/resources/policy/Seychelles\\_Cultural\\_Policy-en.pdf](http://ocpa.irmo.hr/resources/policy/Seychelles_Cultural_Policy-en.pdf) accessed 1st July 2015.

<sup>127</sup> *ibid*, Article 9.

In general, the national culture of the Seychellois people is resistant to Western culture despite the latter's encroachment on many aspects of life including that of its laws. Some further elaborations are given below.

#### **6.4.2 Post-Colonial Thought, Language and Legal Hybridity.**

The promotion of *Creolité*<sup>128</sup> since the 1980's has in many ways changed Seychelles' outlook in terms of its regional and international affiliations. Creolité is an acknowledgement of the fact that Seychellois are neither European, African nor Asian but rather Creole.<sup>129</sup> This has in a sense liberated the country in terms of choosing from as wide a variety of laws and norms as it chooses. Hence, an affirmation of Seychelles' historical and racial affiliations with Africa, has led to closer ties and affiliations to Africa and African groupings. It is part of an attempt, too, to harmonise the laws of Seychelles with that of its neighbours especially in terms of a Southern African *lex mercatoria*.<sup>130</sup>

*Creolité* has its origins in the manner in which Seychelles was formed as a nation. The concepts of *colonies of occupation* and *colonies of settlement* were explored in Chapter 2.<sup>131</sup> I stated that Seychelles, having no indigenous people made it difficult to situate it within either of these definitions. In my submission, Seychelles, therefore, experienced an original form of colonisation and the Seychellois people are therefore both colonisers and colonised.

The white settlers and the slaves became the indigenes, simultaneously colonising and colonised. For the white settlers (the colonisers) in Seychelles, the laws were certainly an extension of metropolitan law albeit through the agency of another quasi colonial power, Mauritius, who administered Seychelles for Britain. For the slaves (the colonised) who had neither a common cultural or racial whole, since they did not emanate from one distinct region of Africa but from the disparate reaches of the Horn of Africa, East Africa, Madagascar, Burundi, Malawi, Zaire, South Africa, Zambia and Zimbabwe,<sup>132</sup> the colonial laws were foreign and bore no identity to their racial and cultural origin.

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<sup>128</sup> Creoleness – a term coined by the Martiniquais, Jean Bernabé. See Jean Bernabé, Patrick Chamoiseau, Raphaël Confiant, *Éloge de la Creolité/ In Praise of Creoleness* (Gallimard 1993).

<sup>129</sup> *ibid*, 75.

<sup>130</sup> See for example, Eben Nel 'The business trust and a Southern African *lex mercatoria*' (2014) 47 (2) *Comparative and International Law Journal of Southern Africa* 297.

<sup>131</sup> See Chapter 2 Section 2.3.3 Post-Colonial Thought and Hybridity.

<sup>132</sup> Joseph E. Harris Evanston, *The African Presence in Asia: Consequences of the East African Slave Trade* (Northwestern University Press, 1971).

As was described in Chapter 4, once Seychelles became a fully-fledged British colony, the erosion of distinctive racial classes and identity with France or French law became more pronounced.<sup>133</sup> The Seychellois population itself was hybridising.

In this second period of legal history, the style of colonial administration and legal transfer is starkly different. British colonial policy was one of *association* and indirect rule compared to that of the French policy of *assimilation* into a greater France.<sup>134</sup> The French viewed their national patrimony as worthy of export and they intimated to the colonised that if they adopted French language and culture they would ultimately become French and even French citizens.<sup>135</sup> This was never replicated by Great Britain who either because they considered themselves superior or recognised their subjects as culturally different were quite happy to rule at arm's length.<sup>136</sup> Hence, the British legal transfer was not wholesale as for example in the case of the Civil Code but was more subtle, measured and apparently consensual; one step at a time over a longer period of time. Its effect has been a permanence and inculcation into the legal framework over and above that achieved by their French counterparts.

By the time of its independence in 1976, the Seychellois population had melded into a distinct nationality, but with some underlying identity problems persisting. The three languages of English, French and Creole were still widely used by different sectors of the population. Despite what can be largely regarded as a successful hybridisation in both nationhood and legal structure, there remained a lack of a holistic cultural identity perpetuated by the inequality in terms of land distribution, wealth, education and language. *Creolité* offered a way out of the identity crisis, but to this day remnants of colonialism remain. Traits from the French settlers though considerably weakened persisted. During British rule the interests of the French *plantocracy* were so well served that the British administration did nothing but “strengthen the allegiance of the élites to French culture,”<sup>137</sup> and they ended up feeling alien in their own crown colony and in so doing created a third layer in Seychellois society<sup>138</sup>. The Creoles for their part when it suited them resented either

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<sup>133</sup> Chapter 4, Section 4.1.4.2 Ramifications of the end of colonialism.

<sup>134</sup> See Raymond F. Betts, *Assimilation and Association in French Colonial Theory, 1890-1914* (University of Nebraska Press 2005) and Janet R Horne, ‘In Pursuit of Greater France: Visions of Empire among Musée Social Reformers, 1894-1931,’ in Julia Clancy-Smith and Frances Gouda (eds) *Domesticating the Empire: Race, Gender, and Family Life in French and Dutch Colonialism* (University of Virginia Press, 1998).

<sup>135</sup> *ibid*, Betts.

<sup>136</sup> See Dennis McCarthy, *International Economic Integration in Historical Perspective* (Routledge 2006).

<sup>137</sup> Deryck Scarr, *Seychelles since 1770: History of a Slave and Post-Slavery Society* (Hurst and Company 2000)178.

<sup>138</sup> Jean Houbert, ‘The Indian Ocean Creole Islands: Geo-Politics and Decolonisation’ (1992) 30 (3) The

*les colonisateurs anglais* (the English colonisers) or the *grands blancs* (the old landed families descended from the first French settlers).<sup>139</sup> However, class struggle did not initially lead to much politicisation partly because the *grands blancs* and the British exiles concentrated their efforts in attacking the government and subduing the Creoles.<sup>140</sup> It was only *métissage* and the astute decision by the socialist government in 1981 to make Creole an official language<sup>141</sup> which completed the creolisation of the Seychellois, mended the schism and in many ways unified its people.

However, vestiges of colonialism remain not only in the Creole psyche but also, substantially, in the legal and political infrastructure of Seychelles. Civil administration continues to mirror the British system. The 1993 Constitution now provides that the national languages of Seychelles are Creole, English and French but laws may provide for the use of any one or more of these languages for any specific purpose.<sup>142</sup> Court language, laws and official documents are all in English. Interpreters are used in court to translate Creole testimony into English, both for the advantage of non-Seychellois judges but also for the court record. More and more judges and legal practitioners are from a common law background and speak little French. The loss of French to Creole and the increasing use of English in the past thirty years have undeniably contributed to the erosion of the civil law tradition.

By far the biggest assault on French law was the translation and recodification of the Napoleonic Code. While the Civil Code of Seychelles remains faithful to the French *Code Civil* in form and structure and retains the same numbering for the articles,<sup>143</sup> there are many innovations; for example, the rules relating to guardianships<sup>144</sup> and the partial introduction of the concept of trusts in cases of co-ownership of property.<sup>145</sup> It is difficult to ascertain the real reason behind the translation and recodification apart from making it easier to assimilate Seychelles into the Commonwealth. Many express the view that it was because aspects of the Code had to be amended to meet the challenges of nationhood.<sup>146</sup> Professor Alexander Chloros who drafted the new Code even stated that:

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Journal of Modern African Studies 465,468.

<sup>139</sup> Scarr (n 136) 178.

<sup>140</sup> *ibid*, 130.

<sup>141</sup> Liam Campling, Hansel Confiance and Marie-Thérèse Purvis, *Social Policies in Seychelles* (Commonwealth Secretariat 2011).

<sup>142</sup> Article 4, Constitution of the Republic of Seychelles, 1993.

<sup>143</sup> See Chloros (n 49)7.

<sup>144</sup> Article 402- 422, 429 - 437 Civil Code of Seychelles.

<sup>145</sup> Article 818 of the Civil Code of Seychelles.

<sup>146</sup> See André Sauzier, 'The Influence of the French Judicial Model on the Seychelles' (Nicole Tirant-Gherardi

“Without a new Code, the attachment of Seychelles to the original French Civil Code would have become little more than a fiction. For hardly any part of that Code could for long remain relevant to modern conditions [as] modern legislation on British models would have completely superseded the Code.”<sup>147</sup>

This argument is not entirely convincing as comparisons with Mauritius prove otherwise. Their Civil Code remained with some exceptions much the same after their Independence and until today remains in the French language assuring a more pronounced bijuralism; yet it cannot be said that either their economy or nationhood suffered because of it; the tweaking that happened in Mauritius was mainly in terms of economic not legal policies.<sup>148</sup>

While French had been the medium of education in schools up to 1945, its replacement by English and the gradual loss of spoken French to both English and Creole - a bitter battle fought in the War Years between the *grands blancs*, the Marist Brothers and the Catholic Church against the British administration<sup>149</sup> - was another nail in the coffin of civil law as fewer legal practitioners and judges turned to French jurisprudence in civil cases.

The period post-independence was an era of great legal upheaval in Seychelles. This continues in some respects to this day. It cannot be said that any stability has been reached in terms of the law making enterprise or the bedding down of a coherent legal system. In this respect, post-colonial theory assists in understanding Seychellois legal hybridity. Donlan has noted that:

“[i]n “post-colonial studies”,... the concept of *hybridity* serves as part of a critique of binary, reified thinking about cultures and their members. It emphasises the deep and dynamic complexity of individual identities in colonial and post-colonial contexts. But *hybridity* is rarely used in legal and normative scholarship. When employed by comparatists, it is synonymous with the mixity of state laws, ie the coexistence of diverse, discrete state legal traditions within a single jurisdiction... hybridity may be

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tr.) <http://www.bas.sc/law-journal-1/theinfluenceofthefrenchjudicialmodelontheseychelles> accessed 1st July 2015.

<sup>147</sup> See Chloros (n 49).

<sup>148</sup> See for example Louis Yeung Lam Ko, ‘The Economic Development of Mauritius Since Independence’ Research Working Paper No. 6, School of Economics, University of New South Wales, Australia [http://www.docs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998\\_6.pdf](http://www.docs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998_6.pdf) accessed 1st July 2015.

<sup>149</sup> Scarr (n 135) 128-163.

used as a constructive term-of-art in a holistic, relational analysis of the legal-normative complexity of different time-spaces.”<sup>150</sup>

Using the language of Homi Bhabha,<sup>151</sup> a study of the Seychellois legal system at present depicts a tortured identity, a “double inscription of cultures” that are both of the colonising and the colonised producing “two kinds of authority and two kinds of authenticity.”<sup>152</sup> The concepts developed by Bhabha, central to postcolonial theory have resonance in Seychelles: hybridity, mimicry, difference, ambivalence. What is uncertain is whether in doing law, especially in view of the current influences of globalisation, Seychelles can use her own authoritative voice or just that of her former colonial masters given the enduring complexity of her identity which has only been partially cured by creolisation. Post-colonial traits persist and are evident in the practice of law today; for example, despite the enactment of the Civil Code nearly forty years ago, complaints<sup>153</sup> are still filed in the Supreme Court alleging *faute* when the Civil Code of Seychelles clearly introduces *delict* and *fault*.<sup>154</sup> The second revision of the Civil Code of Seychelles launched in May 2013 may offer the opportunity to provide both Seychellois authority and authenticity in its laws but it is still unclear how *mixité* will endure into the future. What is clear, however, is that unlike Mauritius, the close links with French civil law are severely diminished and the links with the common law more pronounced.

#### 6.4.3 Regional and International Influences

Before its independence Seychelles was very much an insular society. It had no airport until 1972 and depended on infrequent shipping for contact with the outside world. Its legal system was much less porous than it is today given its remote geographical location. The advent of technology and the involuntary rapprochement resulting from the World Wide Web has left its legal system *cognitively open*<sup>155</sup> to regional and international influences. Although, it is not clear what effects these influences will have, they may yet be the most important meta-

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<sup>150</sup> Seán Patrick Donlan, ‘Things being various: normativity, legality, state legality’ in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart 2014) 161, 169.

<sup>151</sup> Homi Bhabha, *The Location of Culture* (Routledge, 1994)136.

<sup>152</sup> Alan Johnston and Anna Lawson, ‘Settler Colonies’ in H Schwarz and S Ray (eds), *A Companion to Postcolonial Studies* (Blackwell Publishing 2005, 369.

<sup>153</sup> In Seychellois procedural law, a complaint is a statement of claim initiating civil action before the courts.

<sup>154</sup> Paper presented by Bernard Georges at the launch of the Second Revision of the Civil Code of Seychelles on 6<sup>th</sup> May 2013( copy with author).

<sup>155</sup> See Niklas Luhmann, ‘Closure and Openness: On reality in the World of Law’ in Gunther Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1988).

legal formants<sup>156</sup> of the Seychellois legal system.

Similarly, the geographic position of Seychelles at the intersection of major shipping routes has given it a strategic importance. This point was brought home recently in the incidents of Somali piracy and the concerted efforts by the international community to make Seychelles the focal point of their coordination programme to combat the crime. Hence, Seychelles quickly amended its Penal Code to update the medieval piracy laws it had inherited from England and has prosecuted a substantial number of piracy cases including those engaging universal jurisdiction principles.<sup>157</sup>

International influences on domestic law include those of international and regional organisations, for example the Commonwealth, the *Organisation Internationale de la Francophonie*<sup>158</sup> and the African Union. However, more influential are those organisations engaged in promoting cooperation with other African states with the primary focus of economic development or integration, for example the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).<sup>159</sup> Their stated principles and motivations include the promotion of sovereign equality; solidarity, peace and security; human rights, democracy and the rule of law. Seychelles actively participates in these regional bodies. A Seychellois legal practitioner, Bernard Georges, has this year been appointed as one of the judges at COMESA's first instance court.

The SADC's vision includes inter alia economic well-being, freedom and social justice; peace and security for the peoples of Southern Africa. It also aspires to emulate the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA)<sup>160</sup> operating in the French speaking west and central African states with harmonized business law enabling economic integration of its member states. Those harmonised laws trump domestic laws and to date nine uniform Acts have been promulgated across OHADA's sixteen member

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<sup>156</sup> Metalegal formants refer to elements affecting law such as policy considerations, philosophical premises, economic and social factors, social values and the structure of legal institutions. See Rudolf B. Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *American Journal of Comparative Law* 477 and Mauro Bussani & Ugo Mattei, 'The Common Core Approach to European Private Law' (1997) 3 *Columbia Journal of European Law* (1997) 339.

<sup>157</sup> See Mathilda Twomey, 'Muddying the Waters of Maritime Piracy or Developing the Customary Law of Piracy? Somali Piracy and Seychelles' (2014) 20 *Comparative Law Journal of the Pacific* 137.

<sup>158</sup> The International Organisation of Francophony.

<sup>159</sup> See Declaration and Treaty of SADC <http://www.sadc.int/index/browse/page/119>

Its member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe. See Salvatore Mancuso, 'Creating new mixed (?) jurisdictions: some methodological reflexions on legal integration in the SADC region' (2011) 6 *Journal of Comparative Law*.

<sup>160</sup> Organisation for the Harmonisation of Business Law in Africa.

states.<sup>161</sup> Some recent reports have indicated a rise in the activity by the informal sectors in these countries resisting the uniformising forces of OHADA. Others have documented its shortcomings, including the limitation of using only the French language on a continent where other important languages including English, Spanish and Portuguese are utilised, together with the World Bank's initial dismissal of the use of French-business influenced law. However, the overall economic success of the organisation is now being increasingly recognised even by the World Bank<sup>162</sup> and has put paid to the legal origins theory.<sup>163</sup> OHADA however operates in African countries which have inherited the French civil law system.

SADC proposes to go even further than OHADA to codify both common principles and non-state practices of its member states.<sup>164</sup> Whether that will be possible given that its members have neither a common source of legal tradition nor a common European language is questionable. In any case even the suggestion that the harmonisation of *African laws* is possible by passing through the lens of African legal pluralism<sup>165</sup> may be misconceived. The maintenance of legal diversity is not clearly spelt out and many of the legal constructs used are Eurocentric and inappropriate. In any case the recent decisions in *Campbell v Republic of Zimbabwe*<sup>166</sup> and *Louis Karel Fick & Others v Republic of Zimbabwe*<sup>167</sup> display the toothlessness of both the Tribunal and SADC itself. In both of these cases the Tribunal found that the Zimbabwean government had acted unconstitutionally in seizing the land of white farmers and ordered that the plaintiffs be compensated. The decisions were ignored by the Zimbabwean government. These cases leave the sustainability of the legal integration process undecided.

Adherence to imposed legal frameworks where the ground work has not been laid out adequately also leads to domestic noncompliance. COMESA, for example provided

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<sup>161</sup> For a list of the Uniform Acts see <http://www.ohadalegis.com/anglais/reglitionohadagb.htm> accessed 1st July 2015.

<sup>162</sup> See Claire Dickerson, 'Harmonizing Business Laws in Africa: Ohada Calls the Tune' (2005) 44 *Columbia Journal of Transnational Law* 17. See also Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (2011) *The World Bank, Justice & Development Working Paper Series*, 45.

<sup>163</sup> For the legal origins theory see Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 (2) *Journal of Economic Literature* 285.

<sup>164</sup> Mancuso (n 159).

<sup>165</sup> See Salvatore Mancuso, "Harmonisation of laws and convergence between common law and civil law legal Families: Lessons from the OHADA experience" [http://www.tipmoz.com/library/resources/Oldsite1/Harmonization of Laws in SADC Mancuso.pdf](http://www.tipmoz.com/library/resources/Oldsite1/Harmonization%20of%20Laws%20in%20SADC%20Mancuso.pdf) accessed 1st July 2015.

<sup>166</sup> SADC (T) 2/2007.

<sup>167</sup> SADC (T) 01/2010.

Seychelles with the technical assistance to prepare the legal structure necessary for public procurement and the training of government officials and private bodies for best buying practices. It must be borne in mind that such initiatives come at the back of a Seychellois mind-set and culture of a sixteen year one-party rule. Hence, despite its enactment in 2008, the Public Procurement Act is still not applicable to certain public bodies such as government owned companies and other statutory institutions and this coupled with the lack of enforcement to ensure adherence with the provisions of the Act leads to a general lack of transparency and incoherence in many sectors.<sup>168</sup> And yet according to the UN, Seychelles leads Africa in e-government.<sup>169</sup> Similarly, the same criticism can be applied to the policies of the IMF and the World Bank in their imposition of legal instruments that have little appreciation of the existing domestic legal system. Although the laws concern the operational framework of public finance, these international organisations often underestimate tenacious domestic and informal practices.

This largely echoes Roger Cotterell's "law's community";<sup>170</sup> and his emphasis on the "localized as against the centralized, and on diversity as against uniformity."<sup>171</sup> Cotterell is at pains to point out that despite influences outside the state, law remains very much a social experience, embedded in its social setting. This recognises the fact that law as global concept must embrace a healthy pluralism. Similarly John Gillespie in his analysis of legal transfers in East Asia shows how underestimated interpretative communities are and how they constrain the globalisation of law.<sup>172</sup>

The socialist policies inculcated in the Seychellois mentality for nearly two decades are generally difficult to shift - privatization is slow; the enhancement of transparency and the improvement in the governance of state-owned enterprises seems to be repelled as Seychelles continues to resist the full blown market policies advocated by both the IMF and the World Bank. Yet there is persistence in this respect by the IMF and willingness by the Seychellois government to ensure Seychelles adheres to these policies in order to benefit from the tranches of loans promised.<sup>173</sup> While one can hardly bite the hand that feeds it, there are

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<sup>168</sup> See Annual Report 2011, Report on the Activities of the National Tender Board <http://www.ntb.sc/images/tenders/annrep2011.pdf> accessed 1st July 2015.

<sup>169</sup> See UN Public Administration Programme <http://unpan3.un.org/egovkb/ProfileCountry.aspx?ID=152> accessed 1st July 2015.

<sup>170</sup> Roger Cotterell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995).

<sup>171</sup> *ibid*, 322.

<sup>172</sup> John Gillespie, 'Towards a discursive analysis of legal transfers into developing East Asia' (2008) (41(2) New York University Journal of International Law and Politics 101. See also Twomey (n 130) 159.

<sup>173</sup> See 'International Monetary Fund: Seychelles: Letter of Intent, Memorandum of Economic and Financial

concerns in relation to some of the legislation adopted, notably in the anti-money laundering legal structure and in the legislative framework governing offshore activities especially trusts. The concept is even more problematic especially in terms of rules of procedure and evidence, when trying to graft such legislation onto civil law or mixed jurisdictions. Similarly, the Trusts Bill proposed fails to take into consideration existing property provisions in the Civil Code of Seychelles and ignores the fact that the common law trust concept does not exist in Seychelles and only allows a statutory trust regime in the offshore structure.<sup>174</sup>

#### **6.4.4 The Role of Foreign Judges in Seychelles**

As a small jurisdiction with a limited amount of legal practitioners, judges in Seychelles are drawn from practitioners locally and from the Bench of other Commonwealth countries.<sup>175</sup> Traditionally they have come from as far away as the United Kingdom and the Caribbean to closer jurisdictions such as those of East Africa, Sri Lanka and Mauritius. The biggest challenge to the mixed and unique jurisdiction of Seychelles has been the appointment of non-Seychellois judges with little knowledge of the political, economic and cultural traditions or the intricacies of the mixed legal system of Seychelles. The difficulty in *perception* by jurists dealing with a system that is not their own is generally acknowledged.<sup>176</sup> Undoubtedly this lack of perception does influence the decisions of the courts and ultimately the character of the law. Although there is no empirical evidence that the background of judges influences judge-made law, it is evident when reading decisions of the Seychellois courts that judges with common law backgrounds often superimpose common law notions and concepts onto the Civil Code of Seychelles, even where the former differ substantively from the latter. The criticism is less applicable in cases of judges from other types of mixed jurisdictions such as the judges from Sri Lanka; in their case it is perhaps their lack of French that may ultimately undermine the mixity of the Seychelles legal system. Even then the same general criticism may apply to the majority of Seychellois legal practitioners and judges who qualified through universities in the United Kingdom. If the University of Seychelles was to hold true on its promise of teaching modules on Seychellois law there is a real and substantial probability of the mixed jurisdiction being maintained.

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Policies, and Technical Memorandum of Understanding November 30, 2012 and Attachment 1: Memorandum of Economic and Financial Policies for 2013’  
<http://www.imf.org/external/np/loi/2012/syc/113012.pdf> accessed 1st July 2015.

<sup>174</sup> See reaction of Bar Association of Seychelles <http://robingroom.blogspot.ie/search?updated-min=2011-01-01T00:00:00%2B04:00&updated-max=2012-01-1T00:00:00%2B04:00&max-results=24> accessed 1st July 2015.

<sup>175</sup> The first Seychellois Chief Justice, Sir Nicholas France Bonnetard was only appointed in 1959.

<sup>176</sup> Sacco (n 30) (I of II) 33.

Decisions of the Supreme Court in civil and criminal matters given at first instance or on appeal are subject to appeal to the Court of Appeal, as are the decisions of the Constitutional Court. Until 2004, the Court of Appeal was not resident in Seychelles. Although now resident in Seychelles, three of its members are still non-Seychellois. It still continues to sit trimestraly. The first Seychellois Court of Appeal judge was only appointed in 2005 and the first Seychellois President of the Court of Appeal in 2007.

As a court of last resort it has the opportunity and duty to correct mistakes and resolve conflicting decisions made by judges in previous cases. The authors Louis Edwin Venchard, Sir Victor Glover and Professor Anthony Angelo writing in 1997 summarise the reasons for conflicting judgments as being:

- “(a) the failure to recognise that the law applicable in Seychelles is neither English or French law but that of a mixed jurisdiction where a hybrid prevails;
- (b) the unsatisfactory harmonisation of the English principles on to laws of French inspiration;
- (c) inadequate transitional provisions at the time of the promulgation of the Civil Code of Seychelles Act 1975;
- (d) the enactment, on certain topics, of parallel legislation which did not always take account of the existing provisions of the Code;
- (e) the uncertainty caused by providing that in certain cases, “the principles of English law shall apply”, without specifying whether the reference was to the principles applicable when Seychelles severed its ties with the UK for those which apply when a case is decided.”<sup>177</sup>

Unfortunately this continues to be the case today. It was the wish of the authors above that the Court would use its *judicial ingenuity* to resolve the conflicts by reversing or distinguishing the relevant judgments.<sup>178</sup> This is a difficult enterprise by the Court of Appeal as it attempts to correct such mistakes. It does so at the expense of being overly forceful or imperious in relation to the decisions of previous or lower courts or engaging in too much judicial activism.

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<sup>177</sup> See L. B. Venchard, Sir VJF Gosk and Professor A. H. Angelo, *The Law of Seychelles Through the Cases* (Best Graphics 1997) x -xi.

<sup>178</sup> *ibid*, x.

## 6.5 Chapter Conclusion

The creation and development of any legal tradition is a long and slow process and its formation and status reflects “historically conditioned attitudes about the nature of law.”<sup>179</sup> Law reflects the heritage, culture, language and national identity of the people in which it exists. Law’s relationship with culture and community has been explored for centuries.<sup>180</sup> Although the two concepts of legal tradition and legal culture are not synonymous,<sup>181</sup> they both contextualise and provide an understanding of the development and sustainability of law in national jurisdictions. Legal culture is one constituent of legal tradition reflecting on the style and approach to written rules. It allows a legal society, like that of Seychelles, to develop and “to make, find, interpret, and confirm law.”<sup>182</sup> Hence, while imperialism and globalisation, in the past and today, have had pervasive consequences, the changes and alterations dictated by the domestication of their legal instruments in the Seychellois local culture and community must also be put in perspective.<sup>183</sup>

The Seychellois legal tradition is clearly distinctive. Its official law has unique traits and characteristics but its tradition is reminiscent of other jurisdictions of the third legal family.<sup>184</sup> It has seen the superimposition of two different traditions out of which it has created its own. It is now borrowing from other similar traditions with a clear emphasis on importations from the common law tradition. The effects of some of the borrowings have resulted in inconsistencies, contradictions and ambiguities, at least in the short term. These difficulties will not be lessened by the conscious or unconscious desire to eliminate the French civil law tradition. Seychelles’ unofficial law reflects some of its African culture that has persisted despite state legislation. It has become part of the fabric of the Seychellois legal tradition.

Its legal practitioners also have had a role to play in terms of the formation and development of the legal tradition. Similarly regional and international influences are now playing a

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<sup>179</sup> John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3<sup>rd</sup> edn 2007) 2.

<sup>180</sup> See Charles de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge 1989)). See also Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (Dartmouth Publishers 2008). For a critique of legal culture and legal tradition, see Ralf Michaels, ‘Legal Culture’ in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds.), *Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012).

<sup>181</sup> See the debate between Patrick Glenn (n 4) and Czarba Varga, *Comparative Legal Cultures* (New York University Press 1992)14 on the distinction between the two concepts.

<sup>182</sup> Ari Afilalo, Dennis Patterson & Kai Purnhagen, ‘Statecraft, The Market State and the Development of European Legal Culture’ in Genevieve Helleringer & Kai Purnhagen (eds), *Towards a European Legal Culture*, Forthcoming Available at SSRN: <http://ssrn.com/abstract=2044096> accessed 1st July 2015.

<sup>183</sup> See Iza Hussin, ‘Circulations of Law: Colonial Precedents, Contemporary Questions’ (2012) 2 (7) *Oñati Socio-Legal Series*.

significant role in the further development of its laws. The challenge will remain in trying to promote and maintain coherence and harmony within the Seychellois legal tradition.

## Chapter 7: Final Analysis and Conclusions

“...a world of which no lawyer will ever be content to lose sight who has once entered it, seen its wealth, strength and beauty, and felt its abiding charm.”<sup>185</sup>

### 7.1 Introduction

Alexander Wood Renton, a judge first appointed to the Supreme Court of Mauritius and then Ceylon, was struck in the early twentieth century by the distinctiveness of the emerging tradition wrought by the layering of common law onto civil law in some colonies of the British Empire. He recognised the wealth, strength and beauty of “the new strong wine of fresh political and social conditions, that refused to be poured into the old bottles”<sup>186</sup> of law and which were coalescing into something new but not yet fully formed. That special mixing of civil law with common law was achieved in at least seventeen countries.<sup>187</sup> All these mixtures remain distinctive and unique but have some underlying characteristics. They all, however, continue to morph and change and generally thwart the early comparativist’s view that if one could only wait and see, they would emerge from their mixing and move in the direction of one of the main legal families.<sup>188</sup> It has now become clear that this expectation will not be met. As has been pointed out by Rose-Marie Belle Antoine, “True hybrid legal traditions should not be viewed as merely being in a stage of transformation [...] but should be judged on their own.”<sup>189</sup> They are, put simply, traditions in their own right, a mixture in perpetual mixing.

It is in the spirit of Wood Renton’s approach, that I return to my overarching research question of whether and how the experience of the Seychellois legal tradition (its genesis, its substantive and procedural law, its legal institutions and structures, its current status) has become a new wine and how it compares with the old wine of its formative traditions. Ultimately, the question addressed in the research is how it now compares with other

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<sup>185</sup> Alexander Wood Renton, ‘French law within the British Empire’ (1909) 10 J Soc Comp Legis 250, 260.

<sup>186</sup> *ibid.*, 259-260.

<sup>187</sup> Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2<sup>nd</sup> edn Cambridge University Press 2012) 3-6. Those seventeen political entities are Scotland, Quebec, Louisiana, South Africa, Sri Lanka, Philippines, Botswana, Malta, Israel, Puerto Rico, Lesotho, Namibia, Swaziland, Zimbabwe, Mauritius, St. Lucia and Seychelles.

<sup>188</sup> Jacques du Plessis, ‘Mixed Legal Systems, Especially the South African Legal System, and the Study of Comparative Law’ (2005) 9 (3) *Electronic Journal of Comparative Law* 9 (3) <http://www.ejcl.org/93/editor93.html> accessed 1st July 2015.

<sup>189</sup> Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2<sup>nd</sup> ed Routledge-Cavendish 2008) 58.

traditions in the family of world legal traditions and if, as contextualised, it can offer any signposts for legal systems where current mixing or hybridisation<sup>190</sup> is taking place.

Apart from answering the other research questions, this thesis makes a number of original contributions. First, it adds to the general literature on mixed legal systems and mixed jurisdictions by placing new material relating to Seychelles into the comparative law field. Second, this thesis provides the first substantive treatise on Seychellois law. Third, it provides further evidence that all legal traditions are hybrid to some extent. Fourth, it proposes a model for studying the effects of diffused law on the domestic law of states. Finally, the overall structure of the thesis provides a practical understanding of how domestic law and legal traditions constantly evolve and change through the mechanics of legal transfer, imposition, erosion, hybridisation and diffusion.

## **7.2 Research Questions**

This chapter will therefore iterate the research questions which underpin this thesis and will synthesise the doctrinal and empirical research undertaken to answer the questions raised.

Neil MacCormick argues that imagination is needed to comprehend the new legal reality resulting from the interlocking of legal systems.<sup>191</sup> He urges the embracement of pluralism, the acknowledgment of a plurality of institutional normative orders and the recognition of every order within its own sphere.<sup>192</sup> That is certainly an exacting commandment but one that may provide a useful approach in exploring the legal traditions of the twenty-first century and in particular the tradition studied in this thesis.

## **7.3 Research Results and Analysis**

The thesis sought first of all to explore the law and legal system of Seychelles. It surveyed the different conceptualisations of law and the different approaches to understanding the nature of law before attempting to analyse the specific legal tradition of Seychelles. It then drew parallels between the Seychellois legal tradition and other traditions. The results are outlined and analysed below.

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<sup>190</sup> Hybridisation as opposed to hybrid refers to the “process of cultural mixing” and the “construction of a local identity.” See Matteo Solinas, *Legal Evolution and Hybridisation: The Law of Share Transfers in England* (Intersentia 2014) 26. Seán Patrick Donlan sees it as a “sequence of frames that attempt to record normative development”. See Seán Patrick Donlan, ‘To Hybridity and Beyond’ in Vernon Valentine Palmer, Mohamed Y. Mattar and Anna Koppel (eds) *Mixed Legal Systems, East and West* (Ashgate 2015) 17, 28.

<sup>191</sup> Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Law, State, and Practical Reason) (2<sup>nd</sup> edn Oxford University Press 2002) 97-122

<sup>192</sup> *ibid*, 104.

### 7.3.1 The Nature of Law

The doctrinal research carried out in this thesis leads to the finding that in terms of colonial Africa, the positivist view of law was the one that generally obtained. In the nineteenth century, it was understood following Austin,<sup>193</sup> that the term *law* logically referred to law emanating from the sovereign. Hart's concept of law,<sup>194</sup> in the twentieth century, although conceding that there could be societies with primary rules, was dismissive of these as having law and preferred to see them as being merely pre legal societies. The concept of *law* and legal systems continued to apply to only those advanced societies with both primary and secondary rules. In terms of African societies, the lack of a sovereign also logically meant that the rules of indigenous law that operated could not be regarded as *law*.<sup>195</sup>

In the twentieth century, a new legal scholarship began to question the concept of law as emanating solely from the state and jurists began to examine different aspects of *living law*.<sup>196</sup> Lately, the legal pluralism model has provided a platform on which different types of laws and norms could be explored. It has allowed law to be viewed as community, state, interstate and global norms and orders with interactions and combinations. Further, it has demonstrated that internal and external influences including cultural, political, economic and linguistic forces have transforming power on both law and norms generally.

Whilst acknowledging the difficulties in conceptualising law, it was accepted for the purposes of the thesis, that no one meaning of law could be universally adopted. It was acknowledged rather, that the different manifestations of law and norms in any given society enlivened and assisted in the enterprise of understanding and gaining perspective into what law is for that society and how law functions within it. This understanding has allowed for a deep analysis of the Seychellois legal tradition.

### 7.3.2 The Movement of Legal Traditions

In examining the Seychellois legal tradition, the back drop of the comparative approach also provided a most useful tool. Comparison allowed a consideration of plurality, context, culture and flexibility - in short a holistic approach to examining the *métissage* of law in Seychelles.

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<sup>193</sup> John Austin, *Province of Jurisprudence Determined* (first published 1832, Weidenfeld and Nicholson 1955) 3.

<sup>194</sup> Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd ed, Oxford University Press, 1997).

<sup>195</sup> For an explanation of the positivist theory and its application in the colonies see Melanie Forsyth, *A Bird That Flies With Two Wings: Kastom and State Justice Systems in Vanuatu* (Australian National University E-Press 2009) [http://epress.anu.edu.au/kastom\\_citation.html](http://epress.anu.edu.au/kastom_citation.html) accessed 1st July 2015.

<sup>196</sup> Eugen Ehrlich, *Principles of the Sociology of Law* (Walter L. Moll tr., Harvard University Press 1936).

Legal taxonomy aided the comparative enterprise, although an acknowledgment was initially made of the unsatisfactory methods of traditional classifications. The shortcomings of some of these methods were analysed: legal systems and families, traditions, cultures, patterns, metaphors and family trees. This led to the finding that taxonomies inevitably fail because they neither take into account legal hybridity and normative pluralism nor the evolutionary characteristic of legal systems. Nevertheless, as a reference point, taxonomy proved to be a useful tool in providing a descriptive and practical shorthand approach to examining the Seychellois legal tradition.

The theory of the movement of legal traditions, namely of the common law and civil law from their European cradles, and their reception in colonies provided a vehicle for understanding the movement and diffusion of the laws of both France and Britain into Seychelles. While the transplantation theory could not fully explain the development of law in Seychelles, it went a considerable way in explaining the initial *métissage* of law that occurred.

Whereas the Seychellois legal tradition could be inserted into Palmer's *third legal family*<sup>197</sup> classification and displays the traits and characteristics of its sisters within the family, the research also found that there was a need to appreciate the wider context into which the tradition could be placed. The research concluded therefore, that the Seychellois legal tradition fitted well within the theories of legal hybridity and normative pluralism. It also found that the adoption of Örucü's theory of ubiquitous mixedness<sup>198</sup> was a useful approach when examining the competing layers of law within the Seychellois legal tradition and that Smits' concept of legal choice<sup>199</sup> was valuable in examining options for Seychelles. The research also found that a component for the formation of the tradition lay in its unique cultural, racial, linguistic identity, essentially in its *creolité*.<sup>200</sup>

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<sup>197</sup> Palmer (n 3).

<sup>198</sup> Esin Örucü, 'A General View of "Legal Families" and of "Mixing Systems" in Esin Örucü and David Nelken, *Comparative Law: A Handbook* (Hart Publishing 2007).

<sup>199</sup> Jan Smits, 'Beyond Euroscepticism: On the Choice of Legal Regimes as Empowerment of Citizens' (2010) 6(3) *Utrecht Law Review* 68.

<sup>200</sup> See Jean Bernabé, Patrick Chamoiseau, Raphaël Confiant, *Éloge de la Creolité/ In Praise of Creoleness* (Gallimard 1993) 28. The concept of creolité is a reaction against homogenisation, "an annihilation of fake universality, of monolinguisism, and of purity" and seeks to emphasise the mixed, the local and the particular. See also Juan Flores, *The Diaspora Strikes Back: Caribeño Tales of Learning and Turning* (Routledge 2010) 28-29.

### **7.3.3 The Formation of the Seychellois Legal Tradition**

The settlement of Seychelles by the French in the early eighteenth century began the islands' legal journey under the aegis of an initial exclusive civilist tradition. The final capitulation of the colony to the British in 1810 began the eventual co-existence of both the civilist and common law traditions within Seychelles. The early resistance to grafted rules from Britain onto both the substantive and procedural law of Seychelles gave way to a more wholesale transplantation of laws in the run-up to Seychellois independence. The ensuing one-party socialist state also influenced the legal tradition as have the cultural, economic, geographical and linguistic impacts of the twentieth and twenty first centuries.

It is clear from the research that Seychelles is a mixed jurisdiction with a complex blend of civil law and common law. A stark distinction in legal make-up can also be discerned between the private and public law domains. Private law remains very much marked by civilist traits with many elements of the French Code Civil still in evidence. Public law, which began entirely in the French civilist tradition, became layered with English common law components and has now become almost entirely of the common law character. This can be clearly seen in the case of the Penal Code, whose antecedents when researched revealed French law origins, superimposed by codal influences ranging from colonial Africa to Australia. Procedural law in general is also of common law origin.

Where French doctrine has been abandoned to the advantage of English law, for example in the law relating to defamation, difficulties have arisen, in ascertaining whether the law that pertains is English law before Seychelles attained independence in 1976 or the law as obtains today. The research revealed that Seychellois jurisprudence has been left to repair the damage of these clumsy changes sometimes with unsatisfactory results. In the area of family law, specifically when de facto relationships break down, the English concepts of joint property and the French law concepts of unjust enrichment have collided but neither have completely succeeded in copper fastening any clear rules applicable to a truly Seychellois problem. Similarly the law of property is marred by conflicts between English legislation, namely the Land Registration Act and the Civil Code provisions in relation to conveyancing and registration. The ingenuity of the courts in trying to marry concepts from both systems whilst acknowledging the domestic circumstances in which these concepts are to apply is evident.

Some of the laws researched show a distinct need of reform to keep pace both with constitutional and other local developments in Seychelles but also in terms of the country's

international commitments. This is undoubtedly due to the fact that no audit of discrepancies between existing laws and the 1993 constitution was ever carried out. An example is the succession law and the inconsistencies in terms of the distinction between legitimate, natural and adulterine children. The distinctions made in the legal and civil status of children are dated and unsustainable and will have to be reformed.

Parallel and dissimilar developments in the law have brought new difficulties in terms of legal clarity and uncertainty. The offshore sector, for example, has produced new challenges where the laws devised for its operation interface with different rules applicable to local companies. The necessity for joined-up thinking is clearly desirable so that a uniform approach is taken to both offshore and local companies and to avoid the application of conflicting rules to entities operating within the same jurisdiction. Hence, to have a trust concept applicable to foreign companies but not to local companies is unfeasible and bound to cause confusion.

Recent importations from other jurisdictions have added a further layer to the existing patchwork of laws nesting within the tradition. While public law closely mirrors the common law tradition, it is not always English common law that is emulated. Seychellois legislation and case law often import rules from Australia, Ireland and other common law jurisdictions. This is obvious in the areas of criminal law, for example, in the offence of money laundering and the confiscation of the proceeds of crime. Some aspects of the indigenisation of laws have also been revealed, for example, the offence of piracy has been redrafted using customary international law concepts but also bearing in mind local circumstances.

The absence of a Law Reform Commission in Seychelles has on the whole impacted negatively on the development of its legal tradition. This is clearly visible in the increasing lack of coherence in some current legislation but also in terms of the reluctance by the state to revise or reform outdated laws. Civil procedural law, for example remains a curious but uncertain mix of the French civil and English common law traditions. One of the biggest problems in this area which has to be addressed is the rules of the Courts Act and the Evidence Act which provide that the laws of England should apply where Seychellois law is silent. The effect of these provisions has been to freeze the law of Seychelles to that of England prior to the independence of Seychelles in 1976. It has also, in those circumstances, effectively delegated legislation to a foreign jurisdiction.

The direct transplantation of laws suited to the particular circumstances from where they obtained into the Seychellois law without appreciating local custom have produced some dire results. As Pierre Legrand has pointed out in a similar context, “legislation cannot make mores”.<sup>201</sup> This has been particularly true in the context of some Seychellois laws. It remains particularly disappointing to see provisions in the Civil Code of Seychelles relating to vineyards,<sup>202</sup> moats<sup>203</sup> and hailstones<sup>204</sup> when none of these exist in tropical Seychelles. Until this situation is remedied by Seychellois home-grown legislation, the courts remain locked in the application of dated laws that are either redundant or not in keeping with the mores, current thought and legal development in Seychelles.

### **7.3.4 The Future and Sustainability of the Seychellois Legal Tradition**

The identification of the transplanted, borrowed and adapted rules from France and England which formed the basic legal scaffolding revealed the place of the Seychellois legal tradition within Palmer’s *third legal family* but also within the wider context of legal hybridity and pluralism. The Seychellois law that is emerging can be looked at from different perspectives. On the one hand, the law as it stands appears confused or muddled and seems to have no distinct or clear character. On the other hand, there exists a Seychellois legal tradition fusing and blending several sub traditions and norms into a complex but coherent whole - a métissage.

The dominance of the common law tradition generally and its influence even into the private law at this stage must however be clearly acknowledged. The findings from the empirical research suggest that although the trajectory of legal development seems to be leaning more in favour of the common law tradition, the Seychellois tradition will retain much of its mixed jurisdiction characteristics as some aspects of its laws will preserve civilist traits. Some of these civilist traits have been so inculcated into the Seychellois legal psyche that it has become part of the fabric of what might well be an enduring part of its tradition. Further, much of its non state law continues to reflect some of the African culture that has persisted despite state legislation. It too has become part of the fabric of the Seychellois legal tradition.

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<sup>201</sup> Pierre Legrand, ‘The Impossibility of Legal Transplants’(1997) 4 Maastricht Journal of European and Comparative Law 111, 119.

<sup>202</sup> See Article 1774 of the Civil Code of Seychelles.

<sup>203</sup> See Article 541 of the Civil Code of Seychelles which also provides for “ramparts of battlefields and fortresses”.

<sup>204</sup> See Article 1754 of the Civil Code of Seychelles which makes provisions for windows broken by hailstones.

The study found that the tradition was now at a cross-road. It had to face the realities of Seychelles' inter-connectedness with the rest of the legal world and to meet the exigencies of its international financial commitments but at the same time has to find ways to withstand the changes these forces are imposing on its identity. In this context, Seychellois commercial and financial laws especially are under the constant pressures of imposed Anglo-American globalised laws. In many ways, the Seychellois legal tradition displays extraordinary tenacity and ingenuity in resisting some of this pressure. Examples of its resourcefulness are its alignment with regional bodies, the enactment of innovative laws and the creation of a Seychellois law module within the overall law degree programme of its fledgling University to impart the tradition to future legal scholars. This provides genuine hope for the continuity of its legal mixité.

The research confirmed that the creation and development of any legal tradition is a long and slow process and its formation and status reflects “historically conditioned attitudes about the nature of law.”<sup>205</sup> Law is clearly related to culture and community. Legal culture reflects the style and approach to written rules and is a constituent of legal tradition. It allows a legal society, like that of Seychelles, to develop and confirm its own law. This consciousness will also no doubt provide a shield against both imperialism and globalisation. In this context, Seychellois legal practitioners also have a role to play in terms of the formation and development of the legal tradition into the future.

The research has demonstrated that pluralism is alive and well in Seychelles today as it was when the country was first created. The early mixity reflecting colonial legal pluralism is increasingly being replaced by a different type of mixity reflecting the diffusion of supra state legal orders and by national flexibility in choosing transnational concepts. This pragmatism will ensure the future of the mixed jurisdiction of Seychelles.

### **7.3.5 The Relevance of the Seychellois Legal Tradition for Other Jurisdictions where Mixing is On-Going**

The results of the research indicate benefits that may be gained from a holistic comparative examination of the mixed jurisdiction of Seychelles and those other jurisdictions where mixing is taking place. While the research findings are not suggestive of any evidence of

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<sup>205</sup> John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd edn 2007) 2.

either the convergent<sup>206</sup> or divergent<sup>207</sup> theories of legal systems, they confirm that law is not entirely self-propagating or transmitted from one entity or institution alone. They also show that laws travel and though they may not take the same form where they arrive, they bear similar characteristics to the laws of the entity from whence they came and to other laws in other places where similar transplantation has taken place.

The results also indicate that there are competing norms in most traditions. These can be local as in the case of state norms and non-state norms in deep or strong pluralistic legal systems. There are also external competing norms. The research findings suggest that no tradition is strictly *sui generis*. It may well have some unique traits but it has many underlying common characteristics with other world traditions. Further, in the world of increased interlegality and legal rapprochement created by the diffusion of knowledge and facts across the modern technological platforms, it is no longer possible to have a *pure* or a strictly uni-juridical legal system. It is even extremely unlikely that there exists a pure legal tradition unsullied by aspects of other traditions. In sum, legal traditions are porous and susceptible to internal and external changes. Legal pluralism has always been a reality and will continue to be so in the contemporary world.

The primary lesson from Seychelles is that the dominant regime or world order has pervasive influences on the fabric of any given legal tradition. But the converse lesson is also true - that despite what may be considered as cataclysmic events, in the case of Seychelles- change of colonial regime, independence, nationhood, collapse of a legal system through political coups, experimentation with different ideologies and new world orders - despite all, legal traditions endure in some distinct form.

The Seychellois experience proposes nonetheless that some minimum harmonisation with supra national laws is necessary to avoid tension, conflict and uncertainty. In this context, some superior harmonising instrument may be necessary. In Seychelles, that benchmark is its Constitution which proclaims in Article 5 that “[The] Constitution is the supreme law of Seychelles and any other law found to be inconsistent ... is, to the extent of the inconsistency,

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<sup>206</sup> See H. Patrick Glenn, ‘La civilisation de la common law’ (1993) *Revue Internationale de Droit Comparé* 559, Basil S. Markesinis, ‘Learning from Europe and Learning in Europe’ in Basil S. Markesinis, *The Gradual Convergence : Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Clarendon Press 1994) 30, Jan Smits, ‘Convergence of Private Law in Europe: Towards a New *Ius Commune*?’ in Esin Örüçü & David Nelken, eds, *Comparative Law: A Handbook* (Hart Publishing, 2007) 219-240.

<sup>207</sup> See Pierre Legrand ‘European Legal Systems Are Not Converging’ (1996) 45 *International and Comparative Law* 52.

void.” The research results are more geared towards showing how external laws and norms may be successfully incorporated into domestic law to enhance, enliven and energise legal traditions.

There may however, be a distinction between the imposition of norms or laws by external forces or entities and changes voluntarily made to existing norms. Further work needs to be done to establish how best to effect and implement these changes or establish linkages when they are made by choice. Generally, the Seychellois experience may be helpful in reconciling different experiences of how to make and apply law.

#### **7.4 Recommendations**

It is acknowledged that there are several limitations to this thesis which is essentially a contribution to both research into Seychellois law and the larger field of comparative law and specifically that of mixed jurisdictions. Further work is required in many areas that are touched on but given the scope of this thesis it has not been possible to explore in any deep or substantive way.

One of the priorities should be further research into the substantive and procedural law of Seychelles, a more in-depth exposition of all its laws than this thesis permitted. There are no substantial books on Seychellois law.<sup>208</sup> With its fledgling University now in its fourth year, it is incumbent on law academics and practitioners in Seychelles to produce such works and publish books for students and practitioners alike. These will be valuable not only for local consumption but for other researchers in the wider community of the comparative law world who enthusiastically draw knowledge and experience from other legal traditions for their own work.

It is also recommended that Seychelles moves swiftly towards the establishment of a Law Reform Commission which can only enable the further sustainable development of the Seychellois legal tradition. The benefit of such an entity cannot be underestimated. It will enable further legal certainty where there are conflicting laws, arm Seychelles against the stagnation of its laws and allow it to be responsive to both the changing world and evolving local norms. Judges are left on many occasions to do the gap filling where there are

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<sup>208</sup> The exceptions are booklets, digests, essays and articles among which are André Sauzier’s first short writings on specific areas of particular aspects of the law. See for example, André Sauzier, *Introduction to the law of Evidence in Seychelles* (2nd edn City Print 2011). See also Michael Bogdan, *The Law of Mauritius and Seychelles : A Study of Two Small Mixed Legal Systems* (Juristförlaget i Lund 1989) and Anthony Angelo, *Leading Cases of Seychelles 1988 – 2010* (Law Publications 2010 and Anthony Angelo, *Seychelles Digest* (Law Publications, 2014).

inconsistencies or vacuums. The Legislature reacts to emergencies with knee jerk or piece meal law. But as Justice Cardozo pointed out nearly a century ago in the context of America, neither judges nor the legislature on their own are best prepared for law reform:

“On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labours bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them. This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged”.<sup>209</sup>

This warning must be heeded by Seychelles especially in this age of rapid change and constant external interventions if it is to avoid poorly thought out or hastily drawn up legal amendments to address emerging issues.

Further work is also suggested in terms of mixed jurisdictions generally but also specifically in terms of those members of the third legal family, such as Seychelles and Mauritius and even perhaps, St. Lucia,<sup>210</sup> where *creolité* has played a significant role in defining the legal tradition. It would be interesting to find out if the development of their traditions is different to other members of the third legal family.

## **7.5 Chapter Conclusion**

An act of imagination and self-assertiveness must occur if Seychelles is to move from merely interpreting existing laws in the mould of the English common law or French civil law traditions, even from a *métissage* of the two traditions and into a process of considering the laws as truly its own. It is in rightly appreciating its unique *creolité* that Seychelles can be self-assured and confident about the unique character of its own legal tradition. With this confidence will come boldness in promoting its legal tradition and resistance to the

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<sup>209</sup> Benjamin N. Cardozo, ‘A Ministry of Justice’ (1921) 32 (2) Harvard Law Review 113, 113-114.

<sup>210</sup> Seychelles and Mauritius had no indigenous peoples. St Lucia by contrast did have an indigenous population but most of the Amerindians were decimated by the arrival of the Europeans.

inappropriate homogenising influences of globalisation. Conversely, the hope is that the giants of globalisation may reciprocate respect and tolerance for this micro-jurisdiction. It may be an appeal for the promotion of diversity and toleration which simultaneously recognises a single humanity.<sup>211</sup> As Rainer Forst has stated, “[the] promise of toleration is that coexistence in disagreement is possible.”<sup>212</sup>

Finally, caution has to be exercised in regard to *mixité* (either in terms of legal pluralism or simply in terms of mixes of positive laws) as it is neither a panacea, nor does it equate *good law*.<sup>213</sup> Rather, the hope is that this research reflects an understanding of law’s complexity and its “proven ability to hold together mutually inconsistent sub-traditions.”<sup>214</sup> Ultimately, in the relentless march towards what appears to be a homogenised legal order, the Seychellois legal tradition must assert its own unique and dynamic legal tradition.

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<sup>211</sup> Johann Wolfgang von Goethe, *Maxims and Reflections* (trans Elisabeth Stopp Penguin 1999).

<sup>212</sup> Rainer Forst, *Toleration in Conflict* (Cambridge University Press 2013) 1.

<sup>213</sup> Boaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed Cambridge University Press 2002 ) 91 and William Twining, *Globalisation and Legal Theory* (Butterworths 2000) 87.

<sup>214</sup> Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2<sup>nd</sup> ed, Oxford University Press 2014) 368.

## Bibliography

### Books

Abele F, Stasiulis D, 'Canada as a 'white settler colony': What about Natives and Immigrants?' in Wallace Clement and Glen Williams (eds) *The New Canadian Political Economy* (McGill-Queens University Press 1989).

Ackerman B, *Social Justice in the Liberal State* (Yale University Press 1980).

Allison J W, *A Continental Distinction in the Common Law: A Historical and Comparative* (Oxford University Press 1996).

Ancel M, *Utilité et méthodes du droit comparé* (Éditions Ides et Calendes 1971).

An-Na'im A, *Cultural Transformation and Human Rights in Africa* (Zed Books 2002).

Angelo A, *Leading Cases of Seychelles 1988-2010* (Law Publications 2010).

Angelo A, *Seychelles Digest* (Law Publications Seychelles 2014).

Anthony K D, 'The Identification and Classification of Mixed Systems of Law,' in Gilbert Kodlinye and P. K. Menon *Commonwealth Caribbean Legal Studies* (Butterworths 1992) 179.

Antoine R-M B, *Commonwealth Caribbean Law and Legal Systems* (2<sup>nd</sup> ed Routledge-Cavendish 2008).

Aoki H, 'Nobushige Hozumi: A Skilful Transplanter of Western Legal Thought into Japanese Soil' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 150.

Aquinas T, *Summa Theologica* (Fathers of the English Dominican Province trs, 2<sup>nd</sup> edn, Burns, Oates and Washbourne Ltd.1912).

Aristotle, *Politics* (Benjamin Jowett tr, Clarendon Press 1885).

Arminjon P, Nolde B and Wolff M, *Traité de Droit Comparé, Tome I* (Librairie Générale de Droit et de Jurisprudence 1950).

Atias C, *Droit civil: les biens* (8th edn, Lexis Nexis Litec 2009).

Aubry C et Rau C, *Cours de droit civil français, t II* (4<sup>th</sup> edn Marchal and Billard 1869-1872).

Augustin J M, *Introduction historique à l'enrichissement sans cause en droit français* (LGDJ 2007).

Austin J, *Province of Jurisprudence Determined* (first published 1832, Weidenfeld and Nicholson 1955).

Bagehot W, *Physics and Politics Or Thoughts on the Application of the Principles of 'Natural Selection' and Inheritance' to Political Society* (Ivan R Dee, 1899).

Bagehot W, *The English Constitution* (first published 1867 Oxford Paperbacks 2009).

Baker J H, *An Introduction to English Legal History* (4th edn, Oxford University Press 2002).

Baldacchino G, *Island Enclaves: Offshoring Strategies, Creative Governance, and Subnational Island Jurisdictions* (2010 McGill-Queen's University Press).

Bayard P, *How to Talk About Books You Haven't Read* (Jeffrey Mehlman tr, Ganta 2007).

Beale H, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2000) Volume 1.

Behrman H J, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 2009).

Bell D S, *Presidential Power in Fifth Republic France* (Bloomsbury Academic 2000).

Bell J, *French Legal Cultures* (Cambridge University Press 2001).

Bell J, Boyron S and Whittaker S, *Principles of French Law* (Oxford University Press 1998).

Benedict B, *People of the Seychelles* (H.M.S.O.1966).

Benedict B, 'Slavery and Indenture in Mauritius and Seychelles' in James L. Watson *Asian and African Systems of Slavery* (University of California Press, 1980).

Benedict M and Benedict B, *Men, Women and Money in Seychelles* (University of California Press 1982).

- Bennett T W, *Customary Law in South Africa* (Juta 2004).
- Bentham J, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf, and Others* (John Polhemus, 1882).
- Berman P S, *Global Legal Pluralism: A Jurisprudence of Laws beyond Borders* (Cambridge University Press 2014).
- Bermann G A and Picard E, *Introduction to French Law* (Kluwer Law International 2008).
- Bernabé J, Chamoiseau P and Confiant R, *Éloge de la Creolité/In Praise of Creolness* (Gallimard 1993).
- Berring R and Edinger E, *How to Find the Law* (11th edn, West Group 2005).
- Betts R F, *Assimilation and Association in French Colonial Theory, 1890-1914* (University of Nebraska Press 2005).
- Beugnet M, *Œuvres de Pothier : Traité de Contrat de Vente* (2<sup>nd</sup> edn, Cosse et Marchal 1861).
- Bhabha H, 'Signs taken for wonders: Questions of ambivalence and authority under a tree outside Delhi, May 1817' in Homi Bhabha, *The Location of Culture* (Routledge, 1994) 136.
- Bhabha H, *The Location of Culture* (Routledge, 1994).
- Bilo H and Bilo-Groen C, 'Herbalism in Seychelles' in Ekkehard Schröder (ed) *Ethnobotanik-Ethnobotany* (Springer 1985).
- Birks P, *English Private Law* (Oxford University Press, 2000).
- Birks P, *Unjust Enrichment* (2<sup>nd</sup> edn, OUP Oxford 2005).
- Blackstone W, *Commentaries on the Laws of England* (Harper 1852).
- Blaut J M, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).
- Boahen A A, *African Perspectives on Colonialism* (The Johns Hopkins University Press 1989).

- Bogdan M, *The Law of Mauritius and Seychelles* (Juristförlaget 1989).
- Bourke P, *A Digest of the Ruling Decisions of the Supreme Court of Seychelles from 1903 to 1933 and the Reported Cases on appeal therefrom to His Majesty's Privy Council from 1870 to 1902* (Government Press Seychelles 1934).
- Bradley J, *The History of Seychelles* (Clarion Press 1940).
- Brissaud J, *A History of French Private Law* (Rapelje Howell tr, John Murray, 1912).
- Brooks C W, *Law, Politics and Society in Early Modern England* (Cambridge University Press 2009).
- Bulpin T V, *Islands in a Forgotten Sea* (H.B. Timmins 1958).
- Burge W, *Burge's Commentaries on Colonial and Foreign Laws, Volume 1* (Sweet and Maxwell 1907).
- Bussani M and Palmer V V, *Pure Economic Loss in Europe: New Horizons in Comparative Law* (Taylor & Francis 2009).
- Campling L, Hansel Confiance and Marie-Thérèse Purvis, *Social Policies in Seychelles* (Commonwealth Secretariat 2011).
- Capitant H, Francois A W and Terré F, *Les grands arrêts de la jurisprudence civile* (7th edn, Dalloz 1976).
- Cappelletti M and Kaplan B, *International Encyclopedia of Comparative Law* (BRILL 1996).
- Carbonnier J, *Droit civil : Introduction* (Presses Universitaires de France, 1995).
- Chen-Wishart M, *Contract Law* (Oxford University Press 2012).
- Chen-Wishart M, 'Reciprocity and Enforceability' in Mindy Chen-Wishart , Lusina Ho, Puja Kapai (eds) *Reciprocity in Contract* (Faculty of Law, University of Hong Kong 2010).
- Chiba M, 'Introduction' in Masaji Chiba (ed) *Asian Indigenous Law in Interaction with Received Law* (Kegan Paul International 1986).

Chiba M, 'Introduction' in Masaji Chiba (ed) *Asian Indigenous Law In Interaction with Received Law* (2nd edn Routledge 2009).

Chloros A G, *Codification in a Mixed Jurisdiction: The Civil and Commercial law of Seychelles* (North Holland Publishing 1977).

Clark C, *A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies* (S. Sweet 1834).

Cooke E, *The Modern Law of Estoppel* (Oxford University Press 2000).

Cotterrell R, 'A Concept of Law of Global Legal Pluralism?' in Seán Patrick Donlan and Lukas. Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014) 193, 196.

Cotterrell R, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995).

Cotterrell R, *Living Law: Studies in Legal and Social Theory* (Dartmouth Publishers 2008).

Council of the Hakluyt Society, *The Journal of John Jourdain, 1608-1617* (Cambridge University Press 1905).

Crépin P, *Mahé de la Bourdonnais, gouverneur général des îles de France et de Bourbon (1699-1753)* *Société de l'histoire des colonies françaises* (Editions Leroux, 1922).

Croce M, *Self-sufficiency of Law: A Critical-institutional Theory of Social Order* (Springer Science & Business Media 2012).

Dalloz, *Encyclopédie de Droit Civil, Verbo Responsabilité du Fait des Choses Inanimés* (2nd edn, Paris 1951-1955).

Darian-Smith E and Fitzpatrick P, 'Laws of the Postcolonial: An Insistent Introduction' in Eve Darian-Smith and Peter Fitzpatrick (eds) *Laws of the Postcolonial* (University of Michigan Press 2002).

David R, *English law and French Law: A Comparison in Substance* (Stevens and Sons 1980).

David R and Brierley J, *Major Legal Systems in the World* (3rd ed., Stevens & Sons 1985).

David R and De Vries H P, *The French Legal System: An Introduction to Civil Law Systems* (Oceana Publications 1958).

Dawson J, *The Oracles of the Law* (University of Michigan Law School 1968).

de Cruz P, *Comparative Law In A Changing World* (3rd edn, Routledge-Cavendish 2007).

Delaleu M, *Code des Isles de France et de Bourbon* (L’Imprimerie Royale 1777).

Desan S, *The Family on Trial in Revolutionary France* (University of California Press 2004).

de S.-O.-L’E. Lasser M, ‘The question of understanding’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).

de Sousa Santos B, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed Cambridge University Press 2002).

Dicey A V, *Introduction to the Study of the Law of the Constitution* (first published 1867 8th ed Liberty Fund Inc 1982).

Dicey A V, *The Law of the Constitution*. (10<sup>th</sup> edn, Macmillan 1985).

Domat J, *Les lois civiles dans leur ordre naturel* (Coignard 1691).

Donlan S P, ‘Comparative Law and Hybrid Legal Traditions – An Introduction’ in Eleanor Cashin-Ritaine, Sean Patrick Donlan, and Martin Sychold (eds) *Comparative Law and Hybrid Legal* (Swiss Institute of Comparative Law 2010).

Donlan S P, ‘Things Being Various: Normativity, Legality and State Legality’ in Maurice Adams and Dirk Heirbault (eds) *The Method of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014) 164.

Donlan S P, ‘To Hybridity and Beyond: Reflections on Legal and Normative Complexity’ in Vernon Palmer (ed), *Mixed Legal Systems, East and West* (Ashgate 2015) 17-32.

Donlan S P and Urscheler L H, 'Concepts of Law: An Introduction' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential and Social Science Perspectives* (Ashgate 2014) 1-16.

d'Unienville R, *L'Evolution du Droit Civil à L'Ile Maurice (1721-1968)* (Best Graphics 1994).

du Plessis J, 'Editorial-Comparative Law and the Study of Mixed Legal Systems' in Mathias Reimann and Reinhard Zimmermann ( eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 480.

Duxbury N, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

Ebke W F and Finkin M W, *Introduction to German Law* (Kluwer Law International, 1996).

Economic Intelligence Unit, *Quarterly Economic Review of Madagascar, Mauritius, Seychelles, Comoros – Annual Supplement 1983* (Economist Intelligence Unit 1983).

Ehrlich E, *Principles of the Sociology of Law* (Walter L. Moll tr., Harvard University Press 1936).

Eisenstadt S N, 'A Reappraisal of Theories of Social Change and Modernization' in Hans Haferkamp and Neil. Smelser, *Social Change and Modernity* (University of California Press 1992) 419.

Evanston J E H, *The African Presence in Asia: consequences of the East African slave trade* (Northwestern University Press, 1971).

Fanon F, *Peau Noire. Masques Blancs.* (Les Éditions du Seuil 1952).

Farquhar R T, *Code régissant la législation aux Seychelles* (Government Press 1822).

Farnsworth E A, *Contracts* (4<sup>th</sup> edn, Aspen Law & Business 2004).

Farran S, Öricü E and Donlan S P, 'An Introductory Overview' in Sue Farran, Esin Öricü and Seán Patrick Donlan (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Ashgate 2014).

Farran S, Örüçü E and Donlan S P, 'Endnote' in Sue Farran, Esin Örüçü and Seán Patrick Donlan (eds), *Mixed Legal Systems: Endangered, Entrenched, Blended or Muddled?* (Ashgate, 2014).

Fauvel A A, *Unpublished documents on the history of the Seychelles Islands anterior to 1810* (Government Stationery Office 1909).

Finnis J, *Natural Law and Natural Rights* (2<sup>nd</sup> edn, Oxford University 2011).

Flores J, *The Diaspora Strikes Back: Caribeño Tales of Learning and Turning* (Routledge 2010).

Forst R, *Toleration in Conflict* (Cambridge University Press 2013).

Franda M, *The Seychelles, Unquiet Islands* (Gower Publishing Company 1982).

Freeman M D A, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001).

Frescourt M, *Histoire de la double conspiration de 1800* (Guillaume 1819).

Friedman L M, *The Legal System: A Social Science Perspective* (Russel Sage Foundation 1975).

Fuller L, *The Morality of Law* (Yale University Press, 1964).

Gearey A, Morrison W, Jago R, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge 2013).

Gerber D J, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001) 199.

Glendon M A, Gordon M W and Osakwe C, *Comparative Legal Traditions: Text, Materials and Cases* (West Publishing Co., 1982).

Glenn J M, 'Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing' in Esin Örüçü (ed) *Mixed legal systems at new frontiers* (Wildy, Simmonds & Hill, 2010).

Glenn P, 'Legal Cultures and Legal Traditions' in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing) 2004, 19-20

Glenn P, *Legal Traditions of the World: Sustainable Diversity in Law* (4<sup>th</sup> ed, Oxford University Press 2010).

Godelier M, *The Metamorphoses of Kinship* (Verso Books 2011).

Gordley J and von Mehren A T, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (Cambridge University Press 2006).

Grant C, *The History of Mauritius* (W. Bulmer 1801).

Gretton G, 'Scotland: The evolution of the trust in a semi-civilian system' in Richard Helmholz & Reinhard Zimmermann (eds), *Itinera Fiduciae* (Duncker and Humblot 1998) 507.

Gretton G, 'Scots Law in a Golden Age' in Anthony Kinahan (ed) *Now and Then: A Celebration of Sweet & Maxwell's Bicentenary* (Sweet and Maxwell 1999) 163-172.

Guébourg J L, *Les Seychelles* (Karthala 2004).

Guidice A L, 'The Concept of Law in Postnational Perspective,' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014) 209-224.

Gutteridge H C, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, reprinted Wildy & Sons, 1971).

Hall J, *Comparative Law and Social Theory* (Louisiana State University Press 1963).

Harpum C, Bridge S and Dixon M, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet and Maxwell 2012).

Hart H L A, *The Concept of Law* (2nd ed, Oxford University Press, 1997).

Hatchard J, Ndulo M and Slinn P, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004).

Hertogh M, 'What is Non-State law? Mapping the Other Hemisphere of the Legal World' in Hanneke van Schooten & Jonathan Verschuuren (eds.) *International Governance and Law: State Regulation and Non- State Law* (Edward Elgar Publishing 2008) 11.

Hodgson G M, 'On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering' 2009 43(1), *Journal of Economic Issues*, 143; Itai Sened, *The Political Institution of Private Property* (Cambridge University Press 1997).

Hoebbel E A, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press 2009).

Holdsworth W S, *A History of English Law, Volume IV* (Methuen and Company 1903).

Holmes O W, *The Common Law* (Little, Brown & Co. 1881).

Horne J R, 'In Pursuit of Greater France: Visions of Empire among Musée Social Reformers, 1894-1931,' in Julia Clancy-Smith and Frances Gouda (eds) *Domesticating the Empire: Race, Gender, and Family Life in French and Dutch Colonialism* (University of Virginia Press, 1998).

Husa J, 'Legal Families' in Jan M. Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2nd ed Edward Elgar Publishing 2012).

Hussain N, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003).

Inglehart R, *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies* (Princeton University Press 1997).

Jack B E, *Negritude and Literary Criticism: The History and Theory of Negro-African Literature in French* (Greenwood Press, 1996).

Johnston D, 'The General Influence of Roman Institutions of State and Public Law' in D.L. Carey Miller and R. Zimmermann, (eds), *The Civilian Tradition and Scots Law* (Berlin-Aberdeen 1997) 87.

Johnston A and Lawson A, 'Settler Colonies' in H Schwarz and S Ray (eds), *A Companion to Postcolonial Studies* (Blackwell Publishing 2005).

Josserand L, *La responsabilité du fait des choses inanimés* (Rousseau 1897).

Jutras D, 'Louis and the Mechanical Beast, or Josserand's Contribution to Objective Liability in France' in Ken Cooper-Stephenson and Elaine Gibson (eds), *Tort Theory* (Captus University Publication 1993).

Kahn-Freund O, *Comparative law as an academic subject* (Clarendon Press, 1965).

Kavanagh A, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

Kelsen H, *Pure Theory of Law* (Max Knight tr, 2<sup>nd</sup> edn, University of California Press 1967).

Kiberd D, *Inventing Ireland* (Harvard University Press 1997).

Kim M S-H, *Law and Custom in Korea: Comparative Legal History* (Cambridge University Press 2012).

King C, *Views of Difference: Different Views of Art* (Yale University Press 1999).

Klieger P C, *The Micro-States of Europe: Designer Nations in a Post Modern World* (Lexington Books 2012).

Kodinliye G and Menon P K (eds) *Commonwealth Caribbean Legal Studies* (Butterworths 1992).

Lawrance J C D, *Note on a visit to Seychelles* (London Overseas Development Administration 1979).

Lawson F H, Anton A E and Brown L N, *Amos and Walton's Introduction to French Law* (3rd edn Oxford University Press 1967).

Legrand P, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 55, 57.

Linz J J, 'Presidential Democracy or Parliamentary Democracy: Does It Make a Difference?' in Juan J. Linz and Arturo Valenzuela (eds) *The Failure of Presidential Democracy: Comparative Perspectives, Vol. 1* (Johns Hopkins University Press 1994).

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

Lionnet G, *The Seychelles* (David and Charles Publishers 1972).

Llwellyn K, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications 1930).

Luhmann N, *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2<sup>nd</sup> ed, Routledge 2014).

Luhmann N, 'Closure and Openness: On reality in the World of Law' in Gunther Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1988).

Lupoi M, *Trusts: A Comparative Study* (Cambridge University Press, 2000).

MacCormick D N & Summers R S (eds.) *Interpreting Precedents: A Comparative Study* (Ashgate and Dartmouth 1997).

Maitland F W, *The Forms of Action at Common Law* (A. H. Chaytor and W. J. Whittaker, eds Cambridge University Press 1936).

Malleson K, 'The New Judicial Appointments Commission in England and Wales' in Peter H. Russell, Kate Malleson (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006).

Mancham J, *Paradise Raped* (Methuen 1983).

Markesinis B S, 'Learning from Europe and Learning in Europe', in Basil S. Markesinis, *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Clarendon Press 1994) 30.

Marty G et Raynaud P, *Droit civil, tome I* (Sirey 1972).

Marx K, *Capital* (Samuel Moore and Edward Aveling trs, 3<sup>rd</sup> edn, The Modern Library 1906).

Marx K (tr Martin Nicolaus) *Grundrisse: Foundations of the Critique of Political Economy* (Vintage Books 1973).

Mattei Ugo, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Praeger 2000).

Mazeaud H, Mazeaud L and Tunc A, *Traité Théorique Et Pratique De La Responsabilité Civile Delictuelle Et Contractuelle, Tôme 1* (6<sup>th</sup> edn, Montchrestien 1965).

McAteer W, *To Be A Nation* (Pristine Books 2008).

McCarthy D, *International Economic Integration in Historical Perspective* (Routledge 2006).

MacCormick N, *Institutions of Law* (Oxford University Press 2007).

MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Law, State, and Practical Reason)* (2<sup>nd</sup> edn Oxford University Press 2002).

McKendrick E, *Force Majeure and Frustration of Contract*, (2<sup>nd</sup> ed CRC Press, 2013).

Menski W F, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed Cambridge University Press 2006).

Merryman J F and Pérez-Perdomo R, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3<sup>rd</sup> edn, Stanford University Press 2007).

Michaels R, 'Legal Culture' in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012).

Michaels R, 'The Functional Method of Comparative Law', in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 339.

Montesquieu C, *The Spirit of the Laws* (Cambridge 1989).

Mouffe C, *The Democratic Paradox* (Verso 2000).

Mousourakis G, *Fundamentals of Roman Private Law*, (Springer 2012) 305.

Nair S, 'Creolization, Orality and Nation language in Caribbean' in Henry Schwarz and Sangeeta Ray (eds) *A Companion to Postcolonial Studies* (Blackwell Publishing 2005) 238.

Newman R, in 'Miscegenation' in Kwame Appiah and Henry Louis Gates, Jr. *Africana: The Encyclopedia of the African and African American Experience* (Basic Civitas Books 1999) 1320.

Nicholas B, *The French Law of Contract* (2nd edn, Oxford University 1992).

OECD *Global Forum on Transparency and Exchange of Information for Tax Purposes: The Seychelles 2011 Phase* (OECD Publishing 2011).

Oldham J, *English Common Law in the Age of Mansfield* (University of North Carolina Press 2004).

Olivier-Martin F, *Histoire du droit français, des origines à la Révolution* (Editions du Centre National de la Recherche Scientifique, 1992).

O'Regan R, 'The Migration of the Griffith Code' in *New Essays on the Australian Criminal Codes* (The Law Book Co 1988).

Ortiz F, *Etnia y Sociedad* (Editorial de Ciencias Sociales 1993).

Örücü E, 'A General View of 'Legal Families' and of 'Mixing Systems' in Esin Örücü and David Nelken, *Comparative Law: A Handbook* (Hart Publishing 2007).

Örücü E, 'Developing Comparative Law' in Esin Örücü and David Nelken, *Comparative Law: A Handbook* (Hart Publishing 2007) 61.

Örücü E, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 360.

Örücü E, 'What is a Mixed Legal System: Exclusion or Expansion?' in Esin Örücü (ed), *Mixed Legal systems at New Frontiers* (Wildy, Simmonds & Hill, 2010).

Palmer V V, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn Cambridge University Press 2012).

Palmer V V, Mattar M Y and Koppel A (eds) *Mixed Legal Systems, East and West* (Ashgate 2015).

Parkes R, Milmo P and Rogers W H V, *Gatley on Libel and Slander* (11edn, Sweet and Maxwell 2008).

Peel E and Treitel G, *The Law of Contracts* (13 ed Sweet & Maxwell, 2011).

Petersen H and Zahle H (eds) *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995).

Planiol M, *Traité élémentaire de droit civil, tome 2* (11edn, LGDG 1931).

Plato, *The Republic* (Benjamin Jowett tr Collier 1901).

Plucknett T F T, *A Concise History of the Common Law* (first published 1929, The Lawbook Exchange 2001).

Pothier R-J, *Traité des obligations, selon les règles tant du for de la conscience, que du for extérieur* (Debure l'aîné, 1764).

Pound R, *Interpretations of Legal History* (Cambridge University Press 1923).

Pound R, *Jurisprudence: Volume 2, The Nature of Law* (West Publishing Co. 1959).

Pound R, *The Formative Era of American Law* (Little Brown and Company 1938).

Prabhu A, *Hybridity: Limits, Transformations, Prospects* (State University of New York Press 2007).

Rabel E, *The Conflict of Laws: A Comparative Study, Volume 1* (University of Michigan Press 1945).

Radding C M and Ciaralli A (eds) *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill 2007).

Riles A (ed), *Rethinking the Masters of Comparative Law* (Hart Publishing 2001).

Roux J, *La Loi Du 29 Juillet 1881 Et Les Delits de Presse* (Kessinger Publishing 2010).

Rudden B, 'Economic Theory v Property Law: The Numerus Clausus Problem', in John Eekelaar and John Bell (eds), *Oxford essays in Jurisprudence* (Oxford University Press 1987).

Saïd E, *Orientalism: Western Representations of the Orient* (Routledge and Kegan Paul 1978).

Saleilles R, 'Conception et objet de la science juridique du droit comparé' in *Proces-Verbaux et Documents du Congrès International de Droit Comparé, Paris 1900 Vol 1* (Librairie Générale de Droit et de Jurisprudence 1905) 173.

Saluden M, 'La jurisprudence, phénomène sociologique' in *Archives de philosophie du droit* (Sirey 1985).

Samuel G, *A Short Introduction to the Common Law* (Edward Elgar Publishing Limited 2013).

Samuel G, *Epistemology and Method in Law* (Ashgate 2003).

Sauzier A, *Introduction to the Law of Evidence in Seychelles* (2nd edn City Print 2011).

Scalia A, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Regnery Publishing 2013).

Scarr D, *Seychelles since 1770: History of a Slave and Post-Slavery Society* (Hurst and Company 2000).

Schlesinger R, *Comparative Law: Cases - Text - Materials* (3rd edn. The Foundation Press, 1970).

Schlesinger R B and Bonassies P G, *Formation of contracts: a study of the common core of legal systems, conducted under the auspices of the General principles of law project of the Cornell Law School* (Oceana Publications, 1968).

Sheppard S, *The Selected Writings of Sir Edward Coke* (Liberty Fund 2003).

Simpson A W B, *Invitation to Law* (Blackwell 1988).

Simpson B, *Changing Families: An Ethnographic Approach to Divorce and Separation* (Bloomsbury Academic 1998).

Smith S A, *Contract Theory* (Oxford University Press 2004).

Smith T B, *Studies Critical and Comparative* (W. Green and son 1962).

Smith T B, ‘The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’’ in A. N. Yiannopoulos (ed) *Civil Law in the Modern World* (Louisiana State University Press 1965).

Smits J, ‘Convergence of Private Law in Europe: Towards a New Ius Commune?’ in Esin Örüçü & David Nelken, eds, *Comparative Law: A Handbook* (Hart Publishing, 2007) 219-240.

Smits J M (ed) *Elgar Encyclopaedia of Comparative Law* (2<sup>nd</sup> ed Edward Elgar Publishing 2012).

Solinas M, *Legal Evolution and Hybridisation: The Law of Shares Transfer in England* (Intersentia 2014).

Strauss D A, *The Living Constitution* (Oxford University Press 2010).

Telford-Georges P, *Charting Our Course: Report of the Constitutional Commission to President F.A. René and Draft Instructions* (Government Press, 1978).

Terré F et Simler P, *Droit civil: Les biens* (8<sup>th</sup> edn Dalloz 2010)

Terré F, Simler P and Lequette Y, *Droit civil: Les obligations* (Dalloz 10th edn 2009).

Teubner G, ‘Global Bukowina: Legal Pluralism in the World Society’ in Günther Teubner (ed) *Global Law Without a State* (Ashgate 1997) 7.

Teubner G, *Law as an Autopoietic System* (ed. Zenon Bankowski, tr. Annie Bankowska and Ruth Adler, Blackwell 1993).

Thomas P, *Le Droit de Propriété des Laïques sur les Églises et le Patronage Laïque au Moyen Age* (Leroux 1906).

Trakman L E, *The Law Merchant: The Evolution of Commercial Law* (F.B. Rothman, 1983).

Treitel G H, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press 1998).

Troper M and Grzegorzczak C in D. Neil MacCormick and Robert S. Summers (eds.) *Interpreting Precedents: A Comparative Study* (Ashgate and Dartmouth 1997).

Tutu D, *No Future Without Forgiveness* (Image 2000).

Twining W, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

Twining W, *Globalisation and Legal Theory* (Butterworths 2000).

Twomey M, 'Legal Salmon: Comparative Law and Africa' in Salvatore Mancuso and Charles Fombad (eds) *Comparative Law in Africa* (Juta, forthcoming September 2015).

Twomey M, 'The Parts That Make a Whole? The Mixity of the Laws of Seychelles' in Vernon Valentine Palmer, Mohamed Y. Mattar and Anna Koppel, *Mixed Legal Systems, East and West* (Ashgate 2015)

Twomey M, 'Things fall apart? - The mixing of fate, free will and imposition in the laws of Seychelles' in Sue Farran, Esin Örüçü and Seán Patrick Donlan (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Ashgate 2014).

Valcke C, 'Three Perils of Legal Pluralism' in Seán Patrick Donlan and Lukas Heckendorn Urscheler (eds) *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Ashgate 2014).

Vanderlinden J, 'Le pluralisme juridique: essai de synthèse' in John Gilissen (ed) *Le pluralisme juridique* (l'Université Bruxelles 1971).

Varga C, *Comparative Legal Cultures* (New York University Press 1992).

Vencharad L B, Glover V J F and Angelo A H, *The Law of Seychelles Through the Cases* (Best Graphics 1997).

von Goethe J W, *Maxims and Reflections* (trans Elisabeth Stopp Penguin 1999).

von Mehren A and Gordley J, *The Civil Law System* (2nd ed, Little Brown 1977).

Waddell E, *Jean-Marie Tjibaou, Kanak Witness to the World: An Intellectual Biography* (Centre for Pacific Islands Studies 2008).

Walker D, *The Scottish Legal System: An Introduction to the Study of Scots Law* (5th edn W. Green and Son Ltd 1981).

Walton F P, *The Scope and Interpretation of the Civil Code* (Wilson & Lafleur Ltée 1907 Butterworths 1980).

Watson A, *Legal Transplants: An Approach to Comparative Law* (2d ed. University of Georgia Press, 1993).

Watson A, *The Digest of Justinian, Volume 1* (University of Pennsylvania Press 2009)

Webb A W T, *The Story of Seychelles* (Seychelles Government Printer 1966).

Wilken S and Ghaly K, *The Law of Waiver, Variation and Estoppel* (2<sup>nd</sup> edn, Oxford University Press 2012).

Winroth A, *The Making of Gratian's Decretum* (Cambridge University Press, 2000).

Wright E B, *The French Civil Code (As amended up to 1906), Translated into English with Notes Explanatory and Historical and Comparative References to English Law* (Stevens and Sons 1908).

Zimmerman R, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press 2001).

Zweigert K and Kötz H, *An Introduction to Comparative Law* (Tony Weir tr. Oxford University Press 1998).

### **Journal Articles**

Aalbers M B, 'Creative Destruction through the Anglo-American Hegemony: A Non-Anglo-American View on Publications, Referees and Language' (2004) 36(3) *Area* 319.

Abel, R L, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785.

Amos M S, 'The Common Law and the Civil Law in the British Commonwealth of Nations' (1937) 50 *Harvard Law Review* 1249.

Baker B, 'Seychelles: Democratising in the shadows of the past' (2008) 26(3) *Journal of Contemporary African Studies* 279.

Barnes W, 'The French Subjective Theory of Contracts: Separating Rhetoric from Reality' (2008) 83 *Tulane Law Review* 359.

Barnett R, 'Foreword: Four Senses of the Public Law-Private Law Distinction' (1986) 9 *Harvard Journal of Law and Public Policy* 267.

Beardsley J, 'Proof of Fact in French Civil Procedure' (1986) 34 (3) *The American Journal of Comparative Law* 459.

Bell J, 'English Law and French Law - Not So Different?' (1995) *Current Legal Problems* 69.

Bennett T, 'Ubuntu: a New Doctrine of Equity in South African Law' (2011) 57 *Loyola Law Review* 709.

Bingham L, 'The Rule of Law' (2007) *The Cambridge Law Journal* 66.

Boon A, Flood J and Webb J, 'Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession' (2005) 31 (3) *Journal of Law and Society* 473.

Boyd F S, 'Looking Glass Law: Legislation by Reference in the States' (2008) *Louisiana Law Review* 68 (4) 1202.

Brand O, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2006-2007) 32 *Brook Journal of International Law* 405.

Bridge J W, 'Judicial Review in Mauritius and the continuing Influence of English law' (1997) 46 *I.C.L.Q.* 787.

Bussani M & Mattei U, 'The Common Core Approach to European Private Law (1997) 3 *Columbia Journal of European Law* (1997) 339.

Bybee K J, 'Law in Action' (2006) 59 (3) *Political Research Quarterly* 415,416.

Calleros C, 'Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What our Students Should Know about Enforcement of Promises in A Historical and International Context' (2013) 13 *Chicago-Kent Journal of International and Comparative Law* 84.

Cardozo B N, 'A Ministry of Justice (1921) 32 (2) Harvard Law Review 113.

Cheibub J A and Limongi F, 'Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered' 2002 (5) Annual Review of Political Science 151.

Chloros A G, 'The Projected Reform of the Civil Law of the Seychelles: An Experiment in Franco/British Codification'(1974) 48 Tulane Law Review 815.

Clarke M L, 'Advice and Consent vs. Silence and Dissent - The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments' (2010-2011) 71 Louisiana Law Review 451.

Clifford J, 'Indigenous Articulations' (2001) 13(2) Contemporary Pacific.

Curran V G, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 American Journal of Comparative Law 43.

Croce M, 'All Law is Plural. Legal Pluralism and the Distinctiveness of Law' (2012) 65 Journal of Legal Pluralism and Unofficial Law 1.

Damren S C, 'Stare Decisis: The Maker of Customs'(2000) 35 New England Law Review 1.

David R, 'A Civil Code for Ethiopia: Consideration on the Codification of the Civil Law in African Countries' (1963) 37 Tulane Law Review 187.

David R, 'Frustration of Contract in French Law'(1946) 28(3) Journal of Comparative Legislation and International Law 11.

David R, 'The Legal Systems of the World Their Comparison and Unification, Volume 2', *The International Encyclopaedia of Comparative Law* (Martinus Nijhoff 2011) 97.

Davies M, 'Feminism and the Flat Law Theory' (2008) 16(3) Feminist Legal Studies 281.

Demleitner N, 'Combating Legal Ethnocentrism: Comparative Law Sets Boundaries' (1999) (31) Arizona State Law Journal 737.

de Sousa Santos B, 'Three Metaphors for a New Conception of Law: 'The Frontier, the Baroque, and the South'(1995) 29 (4) Law and Society Review 569.

Dickerson C, 'Harmonizing Business Laws in Africa: Ohada Calls the Tune' (2005) 44 Columbia Journal of Transnational Law 17.

Donlan S P and Kennedy R, 'A Flood of Light? : Comments on the Interpretation Act 2005' (2006) 6(1) Judicial Studies Institute Journal 92.

Donlan S P, 'Remembering: Legal Hybridity and Legal History' (2011) 2 Comparative Law Review 1.

Donlon S P, 'The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture' (2010) Journal of Civil Law Studies 6.

d'Unienville R M, 'Capitulation Revisited: Ce que nous devons a Farquhar' (2012) Mauritius Law Review 17.

d'Unienville R M, 'L'Évolution de Droit Civil Mauricien'(1969) Annales de la Faculté de Droit d'Aix-en-Provence 89.

Dupret B, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) (1) European Journal of Legal Studies 1.

Eberle E, 'The Method and Role of Comparative Law' (2009) 8 (3) Washington University Global Studies Law Review 450.

Ehrlich E, 'Das lebende Recht der Völker in der Bukowina' (1912) 1 Recht und Wirtschaft 273.

Ellis L T, 'The History of Judicial Precedent' (1932) 48 Law Quarterly Review 230.

Emerich Y, 'Contribution à une Étude des Troubles de Voisinage et de la Nuisance: La Notion de Devoirs de la Propriété' (2011) 52 Cahiers de Droit 3.

Esmein A, 'Le Droit Comparé et L'Enseignement du Droit'(1900) 24 Nouvelle Revue Historique de Droit français et Étranger 489.

Ewald W, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat? (1995) 143 (6) University of Pennsylvania Law Review.

Frankenberg G, 'Critical Comparisons: Re-thinking Comparative Law' (1985) Harvard International Law Journal.

Friedman D, 'Private Creation and Enforcement of Law: A Historical Case' (1979) (8) 2 Journal of Legal Studies 399.

Friedman L M, Robert A Kagan, Bliss Cartwright and Stanton Wheeler, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 Stanford Law Review 773.

Galanter M, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous law,' (1981) 19 (1) Journal of Legal Pluralism 1.

Gallo P, 'Unjust Enrichment: A Comparative Analysis (1992) 40 American Journal of Comparative Law 431.

Gardiner J S, 'The Seychelles Archipelago' (1907) 29 (2) The Geographical Journal 148.

Gillespie J, 'Towards a discursive analysis of legal transfers into developing East Asia' (2008) (41(2) New York University Journal of International Law and Politics 101.

Glenn H P, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 McGill Law Journal 863.

Glenn H P, 'La civilisation de la common law' (1993) Revue Internationale de Droit Comparé 559.

Goldflam R and Hunyor J, 'Mandatory Sentencing and the Concentration of Power' (1999) 24(5) Alternative Law Journal 211.

Gordley J, 'Is Comparative Law a Distinct Discipline' (1998) 46 (4) American Journal of Comparative Law 607.

Gretton G L, 'Trusts Without Equity' (2000) 49(3) International and Comparative Law Quarterly 599.

Griffiths J, 'What is Legal Pluralism' (1986) 24 (1) Journal of Legal Pluralism & Unofficial Law 39.

Grydehøj A, 'Making the Most of Smallness: Economic Policy in Microstates and Sub-National Island Jurisdictions' (2011) 15 (3) *Space and Polity* 183.

Holdsworth W, 'Sir Edward Coke.' (1935) 5 (3) *Cambridge Law Journal* 332.

Holmes O W, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

Houbert J, 'The Indian Ocean Creole Islands: Geo-Politics and Decolonisation' (1992) 30 (3) *The Journal of Modern African Studies* 465.

Husa J, 'Family affair: Comparative Law's Never Ending Story' forthcoming

Hussin I, 'Circulations of Law: Colonial Precedents, Contemporary Questions' (2012) 2 (7) *Oñati Socio-Legal Series* 18.

Jantjes G, *In Fusion: New European Art* (South Bank Centre 1993) 53.

Jantjes G, 'Good Practice and Creativity in Good, Better, Best' (2001) 8 *Engage* 20.

Jantjes G, 'The Artist as a Cultural Salmon,' (1993) 23 *Third Text* 103.

Kahn-Freud O, 'On Uses and Misuses of Comparative Law' (1974) 34 *Modern Law Review* 1.

Kamba W J, 'Comparative Law: a Theoretical Framework' (1974) (23) *International and Comparative Law Quarterly*, 485.

Kasirer N, 'Legal Education as Métissage' (2003) 78 *Tulane Law Review* 481.

Kedar N, *Law, Culture and Civil Codification in a Mixed Legal System* (2007) 22 (2) *Canadian Journal of Law and Society* 177.

Keyes J M, 'Incorporation by Reference in Legislation' (2004) 25 (3) *Statute Law Review* 181.

Kleinhans M-M and MacDonald R, 'What is Critical Legal Pluralism (1997) 12 (2) *Canadian Journal of Legal Studies* 25.

Langdell C C, 'Harvard Celebration Speeches' (1997) 3 *Law Quarterly Review* 24.

La Porta R, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 (2) *Journal of Economic Literature* 285.

Laroummet C, 'Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law' (1985) 60 *Tulane Law Review* 1209.

Lasser M, 'Comparative Readings of Roscoe Pound's Jurisprudence' (2002) 50 (4) *The American Journal of Comparative Law* 719, 740.

Law Revision Committee Sixth Interim Report (1937) 1 (2) *The Modern Law Review* 97, 100.

Lawson F H, 'The Field of Comparative Law' (1949) 61 *Juridical Review* 16.

Lee R W, 'The Civil Law and the Common Law-A World Survey' (1915) 14 *Michigan Law Review* 89.

Legrand P, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law* 52.

Legrand P, 'The Impossibility of Legal Transplants (1997) 4 *Maastricht Journal Of European and Comparative Law* 111.

Llewellyn K, 'A Realistic Jurisprudence-the Next Step' (1930) 30 (4) *Columbia Law Review* 431.

Lorenzen E G, 'Causa and Consideration in the Law of Contracts' (1919) 28 (7) *The Yale Law Journal* 621.

Loussouarn Y, 'The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law' (1958) 18 *Louisiana Law Review* 235.

Macdonald A, 'The French Law of Marriage and Matrimonial Régimes' (1952) 1 (3) *The International and Comparative Law Quarterly* 313.

Malleson K, 'Parliamentary Scrutiny Supreme Court Nominees - a view from the UK' (2006) 44 (3) *Osgoode Hall Law Journal* 557.

Matsuda M, 'Looking to the Bottom: Critical Legal Studies and Reparations (1987) 22 Harvard Civil Rights- Civil Liberties Law Review 323.

Mattar M, 'Promissory Estoppel: Common Law Wine in Civil Law Bottles' (1988) 13(4) Tulane Civil Law Forum 71.

Mattei U, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 American Journal of Comparative Law 1.

Mattei U, 'Why the Wind Changed' (1994) 42 American Journal of Comparative Law 195, 201.

McKnight J, 'Some Observations on Mixed Legal Systems' (1977) Juridical Review 177.

Merry S E, 'Law and Colonialism' (1991) 25(4) Law & Society Review 889.

Merry S E, 'Legal Pluralism' (1988) 22(5) Law & Society Review 869.

Mertz E, 'Legal Language: Pragmatics, Poetics, and Social Power' (1994) 23 Annual Review of Anthropology 435.

Michaels R, 'Global Legal Pluralism' (2009) 5 Annual Review of Law and Social Science 225.

Milo M and Smits J, 'Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law' (2000) European Review of Private Law 477.

Moore S F, 'Law as Process: An Anthropological Approach' (1973) 7 Law and Society Review 719.

Morris H F, 'History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935 (1974) 18 Journal of African Law 6.

Moutia C, 'Le Code Civil aux Seychelles' (1977-1988) Mauritius Law Review.

Murat M, 'Gordon's Eden or, The Seychelles Archipelago' (1900) Foreign and Commonwealth Office Collection 14.

Nel E, 'The business trust and a Southern African *lex mercatoria*' (2014) 47 (2) Comparative and International Law Journal of Southern Africa 297.

Nelken D, 'An e-mail from Global Bukowina' (2007) International Journal of Law in Context 189.

Nelken D, 'Law in Action or Living Law?: Back to the Beginning in Sociology of Law 1984 (4) Legal Studies 157.

Nelken D, 'Using the Concept of Legal Culture' (2004) 29) Australian Journal of Legal Philosophy 1.

Nielsen I and Smyth R, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31 University of New South Wales Law Journal 189.

Nobles R and Schiff D 'Miscarriages of Justice: A Systems Approach' The Modern Law Review, (1955) 58 (3) 299.

Okeke C N, 'African Law In Comparative Law: Does Comparativism Have Worth?'( 2011) 16 (1) Roger Williams University Law Review 1.

O'Regan R S, 'Sir Samuel Griffith's Criminal Code' (1991) 14 (8) Journal of the Historical Society of Queensland 305.

Örücü E, 'What is a Mixed Legal System: Exclusion or Expansion?' [2008] 1 Electronic Journal of Comparative Law 12.

Ostrom V, Tiebout C M and Warren R, 'The Organisation of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55 American Political Science Review 831.

Palmer V V, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' Winter, 2005), (53) (1) The American Journal of Comparative Law, 261,262.

Palmer V V, 'General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law' (1987) 62 Tulane Law Review 1303, 1315.

Palmer V V, 'Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities' in Palmer (ed.), 'Collectif, First Worldwide Congress on Mixed Jurisdictions' (2003) 78 Tulane Law Review 1.

Parglender M, 'The Rise and Decline of Legal Families' (2012) 60 (4) American Journal of Comparative Law 1043.

Perillo J, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 Fordham Law Review 427.

Peters A, 'Universalist Assumptions and Implications of Comparative Law: Should They Be Deconstructed?' (1999) 93 Proceedings of the Annual Meeting (American Society of International Law).

Peters A and Schwenke H, 'Comparative Law Beyond Post-Modernism' (2000) 49 International and Comparative Law Quarterly 800.

Picker C B, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008) 41(4) Vanderbilt Journal of Transnational Law 1093.

Pound R, 'Law In Books and Law In Action' (1910) 44 American Law Review 12, 15.

Radin M, 'A Restatement of Hohfeld' (1938) 51 (7) Harvard Law Review 1045.

Read H E, 'Is Referential Legislation Worthwhile?'(1941) 25 Minnesota Law Review 261.

Rehnquist W H, 'Notion of a Living Constitution' (1975-1976) 54 Texas Law Review 693.

Reid K G C, 'The Idea of Mixed Legal Systems' (2003) 78 Tulane Law Review 5.

Reimann M, 'Nineteenth Century Legal Science' (1990) 31 Boston College Review 837.

Renton J W, 'French law within the British Empire' (1909) 10 (1) Journal of the Society of Comparative Legislation, 105.

Rheinstein M, 'Sociology of Law, A Propos Moll's translation of Eugen Ehrlich's Grundlegung der soziologie des Rechts' (1938) 48 Journal of Ethics 232.

Riley K, 'Trial by Legislation: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine' (2010) 19 Public Interest Law Journal 28.

Roach K, 'Searching for Smith: The Constitutionality of Mandatory Sentences' (2001) 39 Osgoode Hall Law Journal Review 367.

Roy A, 'Postcolonial Theory and Law: A Critical Introduction (2008) 29 Adelaide Law Review 315.

Sacco R, 'Legal Formants: A Dynamic Approach to Comparative Law' (Instalment I of II) 1991(39) 1The American Journal of Comparative Law, 1.

Samuel G, 'Comparative Law and Jurisprudence' (1998) 47 International and Comparative Law Quarterly 817.

Schlesinger R B, 'The Past and Future of Comparative Law' (1995) 43 American Journal of Comparative Law 477.

Short J R, Boniche A, Kim Y and Li P L 'Cultural Globalization, Global English, and Geography Journals (2001) 53Professional Geographer, 1-1 1.

Silving H, 'Oath: I' (1959) 68 (7) Yale Law Journal 1329.

Smith J D, 'An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money' (1960) 20 (3) Louisiana Law Review 521, 522.

Smith T B, 'The Preservation of the Civilian Tradition in 'Mixed Jurisdictions' (1966) 35 Revista Juridica de la Universidad de Puerto Rico, 263.

Smits J, 'Beyond Euroscepticism: On the Choice of Legal regimes as Empowerment of Citizens'(2010) 6(3) Utrecht Law Review 68.

Smits J M, 'Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures' (2007) 67 Louisiana Law Review 1181.

Smits J M, 'Mixed Jurisdictions: Lessons for European Harmonisation?'(2008)12 (1) Electronic Journal of Comparative Law 5.

Smits J M, 'Mixed Jurisdictions: Lessons for European Harmonisation? Journal of Comparative Law'3 (2008), 15.

Smyth R, 'Judicial Citations; An Empirical Study of Citation Practice in the New Zealand Court of Appeal (2000) 31(4) Victoria University of Wellington Law Review 847.

Tamanaha B, 'The Folly of the 'Social Scientific Concept' of Legal Pluralism.' (1993) 20 *Journal of Law & Society* 192.

Tamanaha B, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2013) *Legal Studies Research Paper Series* 1.

Tamanaha B 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

Tetley W, 'Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)' (2000) 60 (3) *Louisiana Law Review* 678.

Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

Tinker G E and Freeland M 'Thief, Slave Trader, Murderer: Christopher Columbus and Caribbean Population Decline' (2008) 23 (1) *Wičazo Ša Review* 25.

Tushnett M, 'The Possibilities of Comparative Constitutional Law' (1999) 108 (6) *The Yale Law Journal* 1225.

Twining W, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473.

Twining W, 'Social Science and Diffusion of Law' (2005) 32(2) *Journal of Law and Society* 203.

van Hoecke M and Warrington M 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 (3) *The International and Comparative Law Quarterly* 495.

von Mehren A, 'Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis' (1959) 72(6) *Harvard Law Review* 1009.

von Mehren A, 'The French Civil Code and Contract: A Comparative Analysis of Formation and Form' (1955) 15(4) *Louisiana Law Review* 687.

Valcke C, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52 *The American Journal of Comparative Law* 713.

Vanderlinden J, 'Is the Pre-20<sup>th</sup> Century American Legal system a Common Law System: An Exercise in Legal Taxonomy' (2011) 4 (1) Journal of Civil Legal Studies 1.

Vanderlinden J, 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 Journal of Legal Pluralism and Unofficial Law 149.

von Benda-Beckmann F, 'Who's Afraid of Legal Pluralism and Unofficial Law' (2002) 47 Journal of Legal Pluralism 37, 39.

Walton F P, 'Cause and Consideration in Contracts' (1925) 41 Law Quarterly Review 306.

Walton F P, 'The Civil Law and the Common Law in Canada' (1899) 11 Juridical Review 282.

Waterman J S, 'Mansfield and Blackstone's Commentaries' (1934) 1(4) The University of Chicago Law Review 552.

Watson A, 'Aspects of Reception of Law, (1996) 44 American Journal of Comparative Law 335.

Woodman G R, 'Ideological Combat and Social Observation: Recent Debates about Legal Pluralism (1998) 42 Journal of Legal Pluralism & Unofficial Law 21.

Woodman G R, 'Legal pluralism and the search for justice', (1996)40 (2) Journal of African Law 152.

Wright B, 'Codification of English Law, Imperial Projects, and the Self-Governing Codes: The Queensland and Canadian Examples' (2007) 26 (1) University of Queensland Law Journal 39.

Wright B, 'Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's, (2008) 12 Legal History 19.

Wright L, 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1936) 49 Harvard Law Review 1225.

Yntema H, 'Comparative Legal Research: Some Remarks on 'Looking Out of the Cave' (1956) 54 Michigan Law Review 899.

## Websites

Administrative Sciences <http://ras.sagepub.com/content/49/1/49.full.pdf>

Ari Afilalo, Dennis Patterson & Kai Purnhagen, 'Statecraft, The Market State and the Development of European Legal Culture' in Genevieve Helleringer & Kai Purnhagen (eds), *Towards a European Legal Culture*, Forthcoming Available at SSRN: <http://ssrn.com/abstract=2044096>

African Elections Database <http://africanelections.tripod.com/sc.html>

Allan C, 'The Transfer of Power: Ministerialization in Island Countries' (1983) International Review of Annual Report 2011, Report on the Activities of the National Tender Board <http://www.ntb.sc/images/tenders/annrep2011.pdf> accessed 1st July 2015.

Bar Association of Seychelles <http://robingroom.blogspot.ie/search?updated-min=2011-01-01T00:00:00%2B04:00&updated-max=2012-01-1T00:00:00%2B04:00&max-results=24>

Bar Council of Ireland [www.kingsinns.ie](http://www.kingsinns.ie)

Bell T W, 'The Jurisprudence of Polycentric Law' Unpublished manuscript University of Chicago School of Law, 1999 <http://www.tomwbell.com/writings/JurisPoly.html>

Borchard K-D, 'The ABC of European Union Law' [http://europa.eu/documentation/legislation/pdf/oa8107147\\_en.pdf](http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf) Boullé P, 'The Criminal Justice System : Let history be our way forward' (1995) Available <https://radar.brookes.ac.uk/radar/file/ee2ce0ba-a3ab-f4f7-0ff2-5604bb5bfc66/1/boullé2010proposed.pdf>

Constitutional Review Report 21 December 2009 [http://www.statehouse.gov.sc/docs/Constitutional\\_Review\\_Report.pdf](http://www.statehouse.gov.sc/docs/Constitutional_Review_Report.pdf)

Donlan S P, 'Mixed and Mixing Systems Worldwide: A Preface' (2012) 15 (3) Potchefstroom Electronic Law Journal [http://www.nwu.ac.za/webfm\\_send/58703](http://www.nwu.ac.za/webfm_send/58703)

du Plessis J, 'Mixed Legal Systems, Especially the South African Legal System, and the Study of Comparative Law' (2005) 9 (3) *Electronic Journal of Comparative Law* 9 (3) <http://www.ejcl.org/93/editor93.html>

Dupret B, 'What is plural in the law? A praxiological answer' <http://ema.revues.org/1869#tocto2n7>

Forsyth M, *A Bird That Flies With Two Wings: Kastom and State Justice Systems in Vanuatu* (Australian National University E- Press 2009) [http://epress.anu.edu.au/kastom\\_citation.html](http://epress.anu.edu.au/kastom_citation.html)

Gibbs H, 'The Queensland Criminal Code: From Italy to Zanzibar' (Speech delivered at the Opening of Exhibition at Queensland Supreme Court Library, Brisbane, 19 July 2002. [http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719\\_Harry%20Gibbs.pdf](http://www.sclqld.org.au/schp/exhibitions/crimcode/20020719_Harry%20Gibbs.pdf)

Glover V, 'Legislative Drafting in Mauritius: A Developing Discipline' [http://www.opc.gov.au/calc/docs/Loophole\\_papers/Glover\\_Aug2011.pdf](http://www.opc.gov.au/calc/docs/Loophole_papers/Glover_Aug2011.pdf)

Hondius E, 'Precedent and the Law' in Katharina Boele-Woelki & Sief van Erp (eds) *General reports of the XVIIth Congress of the International Academy of Comparative Law* <http://www.ejcl.org/113/article113-3.pdf>

Husa J, 'About the Methodology of Comparative Law – Some Comments Concerning the Wonderland...' (2007)5 *TheMaastricht Faculty of Law Working Paper* <http://dx.doi.org/10.2139/ssrn.1085970> accessed 1st July 2015.

International Monetary Fund: Seychelles: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding November 30, 2012 and Attachment 1: Memorandum of Economic and Financial Policies for 2013' <http://www.imf.org/external/np/loi/2012/syc/113012.pdf>

Jackson L, *Review of Civil Litigation Costs* <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf>

Kiekbaev D, 'Comparative Law: Method, Science or Educational Discipline?' (2003) 7(3) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/73/art73-2.html>

Kotzur M, 'Recent Developments in International Constitutional Thinking: Reform Perspectives for the Seychelles Constitution,' Paper given at a symposium which took place in the European Parliament on 7 October 2008

<http://www.europarl.europa.eu/committees/en/afco/studiesdownload.html?languageDocument=EN&file=29707>

List of International Corporate Service Providers <http://www.siba.net/index.php?s=links-icsp>

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html>.

Macdonald R A and McMorrow T, 'Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships' (2007) 1 European Journal of Legal Studies online <http://www.ejls.eu/1/15UK.htm>

Mancuso S, 'Harmonisation of laws and convergence between common law and civil law legal Families: Lessons from the OHADA experience' [http://www.tipmoz.com/library/resources/Oldsite1/Harmonization\\_of\\_Laws\\_in\\_SADC\\_Mancuso.pdf](http://www.tipmoz.com/library/resources/Oldsite1/Harmonization_of_Laws_in_SADC_Mancuso.pdf)

Ministry of Local Government, Sports and Culture, 'The Cultural Policy of the Republic of Seychelles' (2004) [http://ocpa.irmo.hr/resources/policy/Seychelles\\_Cultural\\_Policy-en.pdf](http://ocpa.irmo.hr/resources/policy/Seychelles_Cultural_Policy-en.pdf)

Moss N, 'A Managed Case: Using the Criminal Procedure Rules' Speed to London Crown Prosecution Service. <https://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/nicholas-moss-speech-cps-london-050313.pdf>

National Bureau of Statistics, Seychelles [http://www.nsb.gov.sc/wp-content/uploads/2013/03/Population-Vital-Statistics\\_Jan-Dec-2012.pdf](http://www.nsb.gov.sc/wp-content/uploads/2013/03/Population-Vital-Statistics_Jan-Dec-2012.pdf)

Official EN Journal of the European Union 26.10.2012 'Consolidated Version of the Treaty on European Union' <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>.

Örücü E, 'What is a Mixed Legal System: Exclusion or Expansion?' Electronic Journal of Comparative Law (2008) 12 (1) <http://www.ejcl.org/121/art121-15.pdf>

Palmer V V, 'Two Rival Theories of Mixed Jurisdictions' (2007) Electronic Journal of Comparative Law <http://www.ejcl.org/121/art121-16.pdf>

Partnership Agreement, Seychelles-EU Country Strategy Paper and National Indicative Programme for the period 2008-2013  
[http://ec.europa.eu/development/icenter/repository/scanned\\_sc\\_csp10\\_en.pdf](http://ec.europa.eu/development/icenter/repository/scanned_sc_csp10_en.pdf)

Platsas A E, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12 (3) Electronic Journal of Comparative Law' <http://www.ejcl.org/123/art123-3.pdf>

Practice Direction No. 1 of 1989 <http://www.seylli.org/sc/legislation/government-notice/1989/186>

Practice Statement (Judicial Precedent) HL 1966  
<http://www.uniset.ca/other/cs2/19661WLR1234.html>

Sabino D, 'Introduction to Economic, Trade and Investment Laws of Seychelles, 2012' Seychelles Law Journal <http://www.bas.sc/law-journal-1/introductiontoeconomictradeandinvestmentlawsofseychelles>

Sauzier A, 'Consequences of encroaching on the neighbour's land', Seychelles Law Journal, <https://radar.brookes.ac.uk/radar/file/256680fb-77e2-610c-a05f-15f5924100f4/1/sauzier2010consequences%282%29.pdf>

Sauzier A, 'Disability of Illegitimate Children Under the Law' (2010) Seychelles Law Journal <https://radar.brookes.ac.uk/radar/file/0eb09764-44be-6088-c71e-fb3d8e0bfb5c/1/Sauzier2010disability.pdf>

Sauzier A, 'The Influence of the French Judicial Model on the Seychelles' (Nichole Tirant-Gherardi tr.) <http://www.bas.sc/law-journal-1/theinfluenceofthefrenchjudicialmodelontheseychelles>

Select Committee on Constitution, First Report  
<http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1102.htm>

Stephens M, 'Māori Law and Hart: A Brief Analysis'  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548123](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548123)

*The Reports of Sir Edward Coke 1572-1617* (first published 1777)

<https://archive.org/details/reportssiredwar04cokegoog>

UN Public Administration Programme

<http://unpan3.un.org/egovkb/ProfileCountry.aspx?ID=152>

Woolf L, 'Access to Justice: Interim Report and Consultation Paper'

<http://www.info.gov.hk/archive/consult/2002/FullReport.pdf>

Yeung Lam Ko L, 'The Economic Development of Mauritius Since Independence' Research Working Paper No. 6, School of Economics, University of New South Wales, Australia

[http://www.docs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998\\_6.pdf](http://www.docs.fce.unsw.edu.au/economics/Research/WorkingPapers/1998_6.pdf)

Yiannopoulos A N, 'The Civil Codes of Louisiana' (2008) 1 Civil Law Comment 1, 1

[http://www.law.tulane.edu/uploadedFiles/Institutes\\_and\\_Centers/Eason\\_Weinmann/v01i01-Yiannopoulos\(1\).pdf](http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Eason_Weinmann/v01i01-Yiannopoulos(1).pdf)

#### **Miscellaneous**

Colonial Office Papers 168/6, British National Archives Kew London.

Colonial Office Papers 446/33, British National Archives Kew London.

Colonial Office Papers CO 530/735, British National Archives Kew London.

Foreign and Commonwealth Office Records (FCO)141/1304. British National Archives,

Phillippe Boullé, 'The Evolution of the Legal System of Seychelles,' Address delivered at the conference. 'Understanding Legacies' at the National Institute of Education, 22nd March 2003.

Renaud Beauchard and Mahutodji Jimmy Vital Kodo 'Can OHADA Increase Legal Certainty in Africa?' (2011) The World Bank, Justice & Development Working Paper Series, 45.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc. E/CN.4/1987/19.

Ministry of Justice, 'Judicial Review: Proposals for Further Reform', Consultation Paper, September 2013, paragraph 21.

Oral submission by Assistant Land Registrar at Civil Code Review, Minutes 7<sup>th</sup> December 2013. Copy with author.

Paper presented by Bernard Georges at the launch of the Second Revision of the Civil Code of Seychelles on 6<sup>th</sup> May 2013 (copy with author).

Practice Direction 9 April 2001: Citation of Authorities [2001] 1 WLR 1001.

Seychelles Blue Book 1899 (Government Printing Press 1899).

U.N. Secretary-General, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 2-3,' UN Doc. S/2011/30 (Jan. 25, 2011).

## Table of Cases

### Seychelles

*Abdou v Wistanley* (1978) SLR 62.

*Abel v Eihbler* SCA 1/1992 (unreported).

*Adrienne v Adrienne* (1978) SLR 8.

*Ah-Time v Mancienne* SCA 9/ 2010 (unreported).

*Ah-Wan v Republic* (2002) SCAR 1.

*Aithal v Seychelles Breweries Ltd* SC 52 /2004 (unreported).

*Albest v Stravens No. 2* (1976) SLR 254.

*Alliance Security v Fidelity* SCA 23/1998 (unreported).

*Ancana and anor v Madeleine* (1978) SCAR 7.

*Anscombe v Indian Ocean Tuna Ltd* (2010) SLR 182.

*Arnold v Mussard* SCA 31/2010 (unreported).

*Arrissol v Dodin* SCA 6/2003. (unreported).

*Atkinson v Government of Seychelles* SCA 1/2007 (unreported).

*Attorney General v Olia* (1964) SLR 142.

*Attorney General v Ray Voysey* SCA 1/3/1996 (unreported).

*Azemia v Dubignon* (1992) SLR 33.

*Bar Association of Seychelles & anor v the President* SCA 7/2004 (unreported).

*Basset vs Figini and ors* SC 145/ 2011(unreported).

*Beehary v R* (2010) SLR 470.

*Biscornet v Honoré* (1982) SLR 451.

*Bradburn v The Superintendent of Prison and anor* (2012) SLR 181.

*Bouchereau v Francois* (1978) SLR 147.

*Bouchereau v Francois* (1980) SLR 80.

*Cable and Wireless v Michel* (1966) SLR 253.

*Camille v Seychelles Breweries Ltd* SC6/1996 (unreported).

*Carpin v SNP* (2011) SLR 327.

*Casino des Seychelles v Compagnie Seychelloise* SC 1 /1994 (unreported).

*Cécile v Payet* (1982) SLR 396.

*Chang Yune v Costain Civil Engineering* (1973) SLR 259.

*Charlie v Françoise* SCA 12/1994 (unreported).

*Chetty v Chetty* SCA 15/2009 (unreported).

*Chetty v Twomey* SC 39/1994 (unreported).

*Chez Deenu (Pty) Ltd v Loizeau* SCA 1/1987.

*Chio v Tave* (2011) SLR 157.

*Chow v Gappy* CC 10/2007 (unreported).

*Chow v Michel* (2011) SLR 1.

*Christ v Kurtz* SCA 24/2012 (unreported).

*Christen v General Insurance* (1981) SLR 168.

*Cinan and anor v R* (2013) 2 SLR 279.

*Clarisse v Sophola* (2005) SLR 96.

*Controller of Taxes v Lawrence* (1989) SLR 239.

*Cooposamy v Delhomme* (1964) SLR 82.

*Cooposamy v Morel Duboil* (2012) SLR 218.

*Corgat v Maree* (1976) SLR 109.

*Créa v Agathine (No 2)* (1977) SLR 153.

*Desaubin v Concrete Products (Seychelles) Pty Ltd.* 1977 SLR 164.

*de Silva v Bacarie* (1982) SCAR 45.

*Didon v Provincial Insurance* (1980) SLR 93.

*Dijoux v Dijoux* (2013) SLR Vol 1, 1.

*Dodin v R* SCA 6/2003 (unreported)..

*D'Offay v Barbier* (1981) SLR 100.

*Dora v Curator of Vacant Estates* (1963) SLR 66.

*Edmond v Bristol* (1982) SLR 353.

*Eliza v PUC* SCA 20/2009 (unreported).

*Elizabeth v The Speaker of the National Assembly and anor* SCA 2/2009 (unreported).

*Ernestine v Ernestine* SC 253/1994 (unreported).

*Esparon v Chetty* (1976) SLR 74.

*Estate of Charlemagne Grandcourt and ors v Gill* SCA 7 /2011 (unreported).

*Eugenie v R* (1969) SCAR 71.

*Ex Parte Medine* (2007) SLR 38

*Fabien and anor v Esparon* SC 113/ 2002 (unreported).

*Fanchette v Attorney General* (1968) SLR 111

*Fanchette and anor v Blacon Pty Ltd* (1978-1982) SCAR 114.

*Fehn Commodities v Savy* (1984) SLR 163.

*Finesse v Banane* (1981) SLR 103.

*FIU v Barclays Bank and ors* SCA 21/2011 (unreported).

*FIU v Mares Corp* (2011) SLR 405.

*FIU v Sentry Global Securities Ltd* (2012) SLR 331.

*Fostel v Ah-Tave* (1985) SLR 113.

*Gappy v Barallon* (2008) SLR 36.

*Gappy and ors v Dhanjee* (2011) SLR 294.

*Gardette v R* (1959) SLR Vol 2 191.

*Glaetzle v Berlouis* SC 16/1994 (unreported).

*Government of Seychelles v Moulinié* (2012) SLR 350.

*Government of Seychelles v Rose* (2012) SLR 364.

*GrandJean v The Seychelles Breweries Co. Ltd* SC 368/1996 (unreported).

*Green v Hallock* (1979) SCAR 141.

*Guy v Sedgwick and anor* SCA 54 of 2011 (unreported).

*Hackl v Financial Intelligence Unit (CC)* (2010) SLR 98.

*Hackl v Financial Investigative Unit (CA)* (2012) SLR 225.

*Hallock v d'Offay* (1983-1987) 3 SCAR (Vol1) 295.

*Hardie v Costain Civil Engineering* (1972) SLR 74.

*Herminie v Francoise* SCA 21/ 2009 (unreported).

*Hoareau v Hoareau* SCA 27/2011 (unreported).

*Houareau v Houareau* (2012) SLR 239.

*Husser v Larue* (1998) SLR 89.

*Ilias Durdunis v The Owners of The Ship 'Maria'* SCA 24/1994 (unreported).

*Jacobs & anor v Devoud* (1978) SLR 164.

*Jouanneau v Government of Seychelles* SCA4/2007 (unreported)

*Joubert v Suleman* SC 210/1999 (unreported).

*Jumeau v Anacoura* (1978) SLR 180.

*Kilindo and anor v R* (2011) SLR 283

*Kim Koon & Co. Ltd. v R* (1969) SCAR 60.

*Labiche v Ah-Kong* (2010) SLR 172.

*Ladouceur v Bibi* (1975) SLR 278.

*Lafortune v Lafortune* SCA DV S 29/2003 (unreported)

*Lau Tee v Provincial Insurance* (1975) SLR 210.

*Legras v Legras* (1983-1987) SCAR 356.

*Louise v Barbier* SCA 14/2005 (unreported).

*Lucas v R* (2011) SLR 313.

*Magnan v Desaubin* (2012) 58.

*Mahé Trading Ltd v H. Savy and Co (Seychelles) Ltd* (1975) SLR 178.

*Malbrook v Barra* (1978) SLR 196.

*Mancienne v Attorney General* SCA 15/ 1996 (unreported).

*Mangroo v Dahal* (1937) MR 43.

*Mares v FIU* (2011) SLR 404.

*Marie v Julienne* (1978) SLR 135.

*Marzocchi and anor v Government of Seychelles and anor* SCA 48/1999 (unreported).

*Mathiot v Julienne* (1992) SLR 135.

*Maureen Ugo Sala and another v Sir Georges Estate (Proprietary) Limited* (2012) SLR 135.

*Mémé v Attorney-General* (1974) SLR 279.

*Mériton v Mériton* SCA DVS 1/2006 (unreported).

*Michel v Dhanjee* (Recusal Proceeding) (2012) SLR 250.

*Michel v Dhanjee* (Substantive Proceeding) (2012) SLR 257.

*Michel v Talma* (2012) SLR 95.

*Michel v Vidot No. 2* (1977) SLR 214.

*Moncherry v Rassool* (1976) SLR 168.

*Monthy v Esparon* (1983-1987) 3 SCAR (Vol II) 12.

*Morin v Pool* (2012) SLR 108.

*Mussard v Mussard* (1975) SLR 170.

*Nageon de l'Estang v Government of Seychelles* (1986) SLR 50.

*Nanon v Thyroomooldy* (2011) SLR 92

*Napoléon v Republic* CC 1&2/1997 (unreported).

*Osse v Fabien* (1979) SLR 15.

*Payet v Anderson* (1983) SLR 39.

*PDM v Electoral Commission and others* SCA 16/ 2011. (2011) SLR 385

*Pierre and ors v MacQueen* (1983) SLR 155.

*Pierre (born Timonina) v Attorney-General and Director General of Immigration* (2008) SLR 251.

*Pillay v General Insurance Company* (1984) SLR 62.

*Pillay v Pillay* (1982) SLR 242.

*Pool v Controller of Taxes* (1977) SLR 124.

*Pool v Michel* SCC 06/1996 (unreported).

*Pool v R* (1965-1976) SCAR 88.

*Poonoo v R* (2011) SLR 423.

*Pon Waye v Chetty* (1971) SLR 209.

*Prea v Seychelles People Progressive Front and Another* (2007) SLR 108.

*Quilindo v Moncherry* SCA 29/2009 (unreported).

*R v Abdi Ali* (2010) SLR 341.

*R v Aden & ors* (2011) SLR 30.

*R v Dahir and ors* SC 51/2009 (unreported).

*R v Dubignon* (1998) SLR 47.

*R v Esparon and others* SCA 1/2014 (unreported).

*R v Fayolle* (1971) SLR 119.

*R v Hoareau* (1972) SLR 60.

*R v Ise & ors* (2011) SLR 220.

*R v Marengo and Others* SC CRS 11 of 2003 (unreported).

*R v Murangira* (1993) SLR 30.

*R v Osman & Ors* (2011) SLR 344.

*R v Sims and ors* SCA 4/1982

*R v Victor* (1980) SLR 11.

*Ragain v R* (2013) SLR 619.

*Raihl v Ministry of National Development* (2010) SLR 66.

*Re: Ailee Development Corporation Ltd and In Re: Companies Act, 1972* SCA 13/2008 (unreported)

*Regar Publications v Lousteau-Lalanne* SCA 25/2006 (unreported).

*Renaud v Renaud* SCA 48/ 1998 (unreported).

*Rosette v Lefèvre* (1976) SLR 208.

*Rosette v Union Lighterage Co. Ltd.* SCA 16/1994 (unreported).

*Roucou v Anthony* SC 269/2000 (unreported).

*Samson v Ally* SSC 96/2006 (unreported).

*Savy v Rassool* (1981) SLR 201.

*Sedgwick and anor v Guy* SC 354/ 2006 (unreported).

*Serret v Attorney General* (2012) SLR 289.

*Serret v Karunakaran* SCA 12/1996 (unreported).

*Servina v Speaker of the National Assembly* SCA 4/2001(unreported).

*Siméon v Attorney General* (2010) SLR 280.

*Siméon v R* (2010) SLR 195.

*Siméon v R* SCA 7/ 2001 (unreported).

*Sinon v Sinon* (1977) SLR 209.

*SNP v Government of Seychelles* CC 6/1999 (unreported).

*Sopha v R* (2012) SLR 296.

*Swift Enterprise Ltd v Dick* SC 55/ 2009 (unreported).

*Tailapathy v Berlouis* (1982) SCAR 335.

*Teemooljee v Pardiwalla* (1975) SLR 39.

*The Attorney General rep. Government of Seychelles v Jumaye* (1978-1982) SCAR 348.

*Timonina v Government of Seychelles and the Immigration Officer* (2007) SLR 251.

*Tirant v R (Bail)* SC13/ 1993 (unreported).

*Tirant and Bibi v R* SCA 10/1993 (unreported).

*Trajter v Minister for Home Affairs and Transport Morgan* (2013) 2 SLR 329.

*United Opposition v Attorney General* SCA 14/1996 (unreported).

*Uzice v Provincial Company Ltd.* (1975) SLR 235.

*Vel v Knowles* SCA 41/1998 (unreported).

*Vel v Tirant* (1978) SLR 7.

*Vidot v Libanotis* (1977) SLR 192.

*Vidot v Minister of Employment* SC 217/1998 (unreported).

*Westergreen v Whiting* SCA 9/1988 (unreported).

*Zalazina v Joubert* (2013) 1 SLR 189.

## United Kingdom

*Amalgamated Investment Co v Texas Bank* [1982] 1 QB 122.

*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

*Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

*Campbell v Hall* [1558-1774] All ER 252.

*Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

*Chief Adjudication Officer v Kirpal Kaur Bath* [2001] 1 FLR 8 [CA].

*Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

*Combe v Combe* [1951] 2 KB 215.

*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

*Crossley v Crossley* [2008] 1FLR 1467.

*Darkan v R* (2006) HCA 34.

*Davis Construction Ltd v Farnham UDC* [1956] AC 696.

*Davis v Johnson* [1979] AC 264.

*Donoghue v Stevenson* [1932] AC 562.

*Ella v Ella* [2007] 2FLR 35.

*Ex parte South Yorkshire Transport Ltd and Anor* [1993] 1 WLR 23.

*Furbert and anor v The Queen* [2000] 1 W.L.R 1716.

*Ho v Professional Services Review Committee No 295* [2007] FCA 388.

*K v K* (Ancillary Relief: Prenuptial Agreement) [2003] 1 FLR 120.

*Lang & Co. v Reid & Co.* (1858) 12 Moo. PCC 72.

*London Tramways v London County Council* [1898] A.C. 375.

*Matadeen v Pointu* [1998] UKPC 9.

*N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745.

*Overseas Tankship (UK) Ltd v The Miller Steamship Co, Wagon Mound (no 2)* (1967) AC 617.

*Pepper v Hart* [1993] AC 593.

*R v Brent London Borough Housing Benefit Review Board, ex parte Khadim* [2001] QB 955.

*R v Buckland* 1 All ER 907.

*R v Kelly (Edward)* [2000] 1 QB 198.

*R v R (Rape Marital Exemption)* [1991] 4 All E.R. 481.

*R v Monopolies Commission and Anor* [1993] 1 WLR 23.

*R. v. Secretary of State for the Home Department ex parte Brind* (1991) 1 All ER 720.

*R v Secretary of State for the Home Dept, ex parte Bugdaycay* [1987] AC 514.

*R (A) v Croydon London Borough Council* [2009] 1 WLR 2567.

*Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.

*Rainieri v Miles* [1981] AC 1050.

*R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532.

*R (G) v Immigration Tribunal* [2005] 1 WLR 1445.

*R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475.

*Re Piracy de Jure Gentium* [1934] A.C. 586.

*Re S* [2009] 2 All ER 700.

*S v Distillers (Biochemicals) Ltd* [1970] 1 WLR 114.

*Taylor v Caldwell* (1863) 3 B & S 826.

*Taylor Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch).

*Westminster City Council v IC* [2007] EWHC (Fam) 3096.

*Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co. Ltd* [1972] AC 741 (HL)  
758.

*Young v. Bristol Aeroplane Co Ltd* ([1944] KB 718 (CA)).

### **Australia**

*Darkan v R* (2006) HCA 34.

*R v AAP* [2012] QCA 104.

*R v Keenan* (2009) 236 CLR 397.

*San v Rumble (No 2)* (2007) NSWCA 259.

*Stuart v R* (1974) 134 CLR 426.

*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

### **New Zealand**

*Awa v Independent News Auckland* [1996] 2 NZLR 184.

### **France**

Cass.1e Civ 26 juin 2001, Dr. fam. 2002.28 obs. Lécuyer.

53 CA Paris, 17 January 2002, Sa ITM Logistique International v Gavaud.

Civ. 17 mai 1832, S.32.1.849; Comm., 9 oct. 1990, *RTD* civ. 1991 113, obs J. Mestre.

Civ. 20 janv. 1964, D. 1964. 518, JCP 1965. II. 14035, note B. Oppetit;

Civ. 3e, 30 oct. 1972, D. 1973, Somm. 43, Bull. civ. III, n° 576.

Civ. 9 mai 2001, Defrénois 2001. 1123, obs. Atias.

Colmar, 2 mai 1855, D. 56. 2. 9 Req. 10 juin 1902, DP 1902. 1. 454.

Conseil Constitutionnel Décision No 2011 – 625 DC du 10 Mars 2011.

Jand'heur v. Les Galeries Belfortaises, Judgment of 13 fevr. 1930.

Julien Patureau c. Boudier Cass req. 15 juin 1892 (D.P. 92.1. 596.

Req. 3 août 1915 Coquerel c/ Clément-Bayard (DP 1917. 1. 79).

Soc. Lutetia c. Dambrin Civ. cass., 28 févr. 1939., (D.P. 1940. 1. 5).

Ville de Bagnères-de-Bigorre c. Brianhaut Civ. cass., 2 mars 1915 (D.P. 1920. 1. 102).

### **Mauritius**

*Bardin v Brousse de Gersigny* (1864) MR 90.

*Jean-Louis v Francois* (1957) MR 340.

*Mangroo v Dahal* (1937) MR 43.

*The Colonial Government v Widow Laborde & ors* (1902) MR 19.

*The Marine Board of Victoria and ors v Voss* (1952) MR 271.

*The National Bank of South Africa Ltd. v Merven and Co* (1924) 53 MR

*R v Ramjan Mirza* (1891) MR 9.

### **South Africa**

*Simon Prophet v National Director of Public Prosecutions* CCT 56/05.

### **Southern African Development Community Tribunal**

*Campbell v Republic of Zimbabwe* SADC (T) 2/2007.

*Louis Karel Fick & Others v Republic of Zimbabwe* SADC (T) 01/2010

### **European Court of Justice**

*Flaminio Costa v ENEL* [1964] ECR 585 (6/64).

### **European Court of Human Rights**

*Mazurek v. France*, Application ECHR No. 34406/97.

*Soering v United Kingdom* (1989) 11 EHRR 439.

## **Legislation**

### **Seychelles**

Affiliation Ordinance of 1964.

Anti-Money Laundering Act 2006.

Bill of Exchange Ordinance 1959.

Children Act 1982

Civil Code of Seychelles.

Companies Bill 2011.

Criminal Procedure Code.

Drums Regulation GG 1/5/1935.

Constitution of Seychelles 1976.

Constitution of the Republic of Seychelles Decree 1979.

Constitution of Seychelles 1993.

Constitution of Seychelles Amendment Act 19th March 1995.

Constitutional Reform Act 2005.

Corporate Service Providers Act 2003.

Courts Act Cap. 52, Laws of Seychelles.

Dangerous Drugs Ordinance 1935.

The Domicile Act Cap. 66, Laws of Seychelles.

Employment Amendment Act 2008.

Evidence Act, Cap.74 Laws of Seychelles.

Filiation Ordinance 1919.

Immoveable Property (Judicial Sales) Act, Cap 166, Laws of Seychelles.

Immoveable Property (Transfer Restriction) Act 1994.

International Business Companies Act 1995.

International Corporate Service Providers Act 2003.

International Trust Act 1994.

International Trusts Act Cap. 102A, Laws of Seychelles.

Interpretation and General Provisions Act, Cap.103, Laws of Seychelles.

Land Registration Act.

Lands Acquisition Act 1977.

Lawyers and Conveyancers Act 2006.

Legal Practitioners Act, Cap.111, Laws of Seychelles.

Matrimonial Causes Act 1992.

Matrimonial Causes Ordinance 1973.

Matrimonial Proceedings Act 1992.

Matrimonial Proceedings Ordinance 1944.

Misuse of Drugs Act 1995.

Misuse of Drugs (Amendment) Act, 2014.

Motor Vehicle Insurance (Third Party Risks) Act 1952.

Notaries Act, Cap. 149, Laws of Seychelles.

Order in Council 1831.

People's Housing Mortgages Act 1981.

Prevention of Terrorism Act, 2004.

Proceeds of Crime Act 2008.

Public Order Act 2014.

Registration of Associations Act.

Road Transport Act, Cap 206.

Securities Industry Act 1996.

Seychelles Code of Civil Procedure 1920.

Seychelles Ordinance No. 5 of 1948.

Status of Married Women Act, Cap 231, Laws of Seychelles.

Status of Married Women Ordinance 1948.

Succession and Wills Act, Cap 81, Laws of Seychelles.

Supreme Court Act 1981.

Tenant's Rights Act 1981.

Tenant's Rights (Repeal) Act, 1992 (Act 7 of 1992).

Trusts Bill 2011.

Wild Animals and Birds Protection Act, Cap 247, Laws of Seychelles.

### **United Kingdom**

Administration of Estates Act 1925.

Administration of Justice Act 1969.

Bills of Exchange Act 1882.

Common Law Procedure Act 1852.

Companies Act 1948.

Courts and Court Officers Act 1995.

Criminal Appeal Act 1968.

Human Rights Act 1999.

Lawyers and Conveyancers Act 2006.

Sale of Goods Act 1893.

Supreme Court Rules.

## **France**

Code de Procédure Civile

Code Civil.

Constitution of France 1958.

### **Miscellaneous Legislation**

Civil Code of Quebec.

Constitution of the Republic of South Africa, 1996.

European Communities Act 1972.

Italian Civil Code.

Swiss Code of Obligations.

United Nations Convention on the Law of the Sea.

United States Constitution.