

VARIATIONS ON A THEME: WHEN IS AN ATTORNEY-GENERAL NOT AN ATTORNEY-GENERAL

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The purpose of this article is to consider in brief form aspects of the evolution of the office Attorney-General in three former British colonies¹ which are now members, directly or otherwise, of the Commonwealth of Nations. These are countries which in public law terms follow the British common law tradition.

I Mauritius

The first of the countries is Mauritius, a French colony which became a British colony in 1810. It continued as a British colony until 1968 when it became an independent state within the Commonwealth. Much more recently² it became an independent republic within the Commonwealth.

The situation is interesting there because the tradition inherited by the British was that of French law and the Act of Capitulation of 1810 provided that the people of Mauritius were guaranteed the respect of their 'Religion, Laws and Customs'.³ Part of that was the maintenance of the *Code Napoleon*. Also part of that tradition was the

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¹ Mauritius, Seychelles and Niue: both Mauritius and Seychelles were first colonised by the French and then ceded to Britain. Niue was a different situation. It was part of His Britannic Majesty's dominions and became a colony of New Zealand (as defined in the *New Zealand Boundaries Act 1863*). The Order in Council 1901 (*New Zealand Gazette*, II, 1307-1308) extended the 'boundary-line' so as to 'include all islands and territories, which now or may hereafter form part of His Majesty's dominions situate within the [specified] boundary-line.' See G Marston and Peter D G Skegg 'The Boundaries of New Zealand in Constitutional Law' (1988) 13 *New Zealand Universities Law Review* 1, 9-16.

² 12 March 1992; by virtue of Act 48 of 1991.

³ *Acte de Capitulation de l'Ile de France 1810*, art 8th: 'Que les habitants conserveront leurs Religion, Loix, et Coutumes'. See D Napal, *Les Constitutions de l'Ile Maurice* (No 6, Port Louis, Mauritius, 1962) 79, 80.

Garde des Sceaux, the *Procureur General* and the *Ministère Public*.⁴ That tradition was continued in 1810, and in civil law matters, continues strongly in Mauritius today.⁵

In the 1950s there was a major debate about the change from the French cultural structure for the law functions of government to British style functions.⁶ In the debates on the Law Officers Bill in 1957, it was indicated that though the French titles and structures had in large part been maintained, the office of the *Procureur General* had never in Mauritius operated exactly as it had in France.⁷ The changes proposed were to have an Attorney-General and a deputy called the Solicitor-General, and office solicitors in a Crown Attorney's Office. The shift was therefore essentially from having the office of *Procureur General* to that of Attorney-General.⁸

The Bill was passed,⁹ after much interesting debate among the politicians¹⁰ (many of whom were leading lawyers of Mauritius at the time), and also discussions about the impact the changes might have on the retention of the *Code Napoleon*. The *Law Officers Act* is still, in largely the same form, a part of the law of Mauritius today.¹¹

Mauritius has an Attorney-General. That office evolved from that of *Procureur General* through a nominated member of the Executive Council in colonial times¹² to the present situation established in the *Constitution* of 1968¹³ where the Attorney-General

⁴ See *Consolidated Ordinance No 1 1898*, s 28(D): 'Ministère Public includes, the Procureur General, the Substitute Procureur General, and the Additional Substitute Procureur General'. 'Procureur General means, Her Majesty's Procureur and Advocate General'.

⁵ Eg the *Code Civil Mauricien* is a modern version of the *Code Napoleon*.

⁶ Mauritius Legislative Council Debates 17th September, 1957 – 20th September, 1957 (Port Louis, Mauritius, 1958) 'The Law Officers Bill (No XXXV of 1957)' 800 [Law Officers Bill].

⁷ *Ibid*, 802.

⁸ *Ibid*, 811.

⁹ *Law Officers Ordinance 1958* (40 of 1957); in s 6 it was made clear that the Attorney-General shall be entitled 'to the same rights and privileges as are enjoyed by the Attorney-General in the Courts in England.'

¹⁰ One of the concerns discussed by the members in debate was the abolishing of traditions installed under French rule. However, most of them agreed upon the importance to 'attain uniformity' within the British Empire in order to avoid misunderstandings (Law Officers Bill, above n 6, at 808) and to take the 'opportunity for reorganisation' (Law Officers Bill, above n 6, 809).

¹¹ *Law Officers Act 1982*.

¹² *The Constitution of Mauritius 1964* (GN 24 of 1964) art 87 read: 'It shall be lawful for the Governor to appoint a member of the council of Ministers, other than the Chief Secretary, to be the Attorney-General of Mauritius and in any such case the person so appointed shall not, for the purposes of this *Constitution*, be deemed to be a public officer.'

¹³ *Constitution of the Republic of Mauritius 1968* (GN 54 of 1968) SI 1968/1871, arts 37, 59, 60 and 69.

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need not be an elected member of the Legislative Assembly but is a non-voting member of the Assembly, is the Chief Legal Adviser to the government, and is of Ministerial rank and therefore, a member of the Cabinet.

The Attorney-General (a political figure) is the head of the State Law Office whose permanent secretary is the Solicitor-General. The Solicitor-General leads a substantial body of staff, which in pre-Republican times was called the Attorney-General's Office, the Crown Law Office, or more vaguely or colloquially, the *Parquet*.

Following the English pattern, the Attorney-General's Office does not deal with prosecutions. There is an independent Office of Director of Public Prosecutions¹⁴ for that. The French tradition is maintained at a lower level for personal matters, which in the French system required reference to the *Ministère Public*,¹⁵ being referred to a division within the Attorney-General's Chambers. A consequence of this arrangement is that the Attorney-General is rarely a party to litigation but may seek clarification on constitutional matters as indicated by art 69 of the *Constitution*.¹⁶

In Mauritius the Attorney-General's Office is concerned with advice to the Government and is also responsible for the preparation of legislation and the maintenance of the law records. The office of Parliamentary Counsel is within the Attorney-General's chambers.

II Seychelles

Seychelles is now an independent Republic within the Commonwealth.¹⁷ It began its colonial history as a French dependency and was, on the defeat of the French and the division of its colonial empire, ceded to the British and incorporated by them into the colony of Mauritius. That arrangement continued until 1903 when a separate colonial Government was established for Seychelles.¹⁸

¹⁴ Ibid 158, art 72 provides: 'There shall be a Director of Public Prosecutions whose office shall be a public office and who shall be appointed by the Judicial and Legal Commission.'

¹⁵ *Ministère Public Act 1982*, s 2 (1) read: '*Le service du ministère public auprès des chambres des Cours d'Appel sera distribué par l'Attorney-General entre lui et ses substituts.*' See also the French influence in the *Curatelle Act* (below n 32).

¹⁶ Indicative cases are *Attorney-General v Duval* 1991 MR 271; and *Attorney-General v Ramgoolam* 1993 MR 81; these cases concerned the vacancy of Assembly seats provided in art 35(1) of the *Constitution*.

¹⁷ Seychelles became an independent republic on 29 June 1976. See A G Chloros, 'Codification in a Mixed Jurisdiction – The Civil and Commercial Law of Seychelles' in A G Chloros (ed) *European Studies in Law* (North-Holland Publishing Company, 1977) vol 3, xix.

¹⁸ Ibid. In 1814, after signing the *Treaty of Paris*, Seychelles and Mauritius came definitively under British rule and Seychelles became a dependency of Mauritius. Until 1970 Seychelles

The close historical link to Mauritius and the continuance of existing laws meant that the legal systems of the two colonies remained very similar for at least the following half century.¹⁹ The Seychelles law was essentially that of Mauritius and appeals from Seychelles' courts were heard in Mauritius and ultimately by the Privy Council. As time passed, the criminal appeals were diverted from Seychelles to the East African Court of Appeal and then to London. Finally, the link to Mauritius, even for civil appeals, was terminated with the establishment of a Seychelles final Court of Appeal.²⁰

The Seychelles Court of Appeal, as a matter of practice, has had at least one judge from Mauritius. A point of this arrangement has been not only to bring in the expertise of someone with a grounding in a mixed legal system similar to Seychelles' but also, because of the strength of the civil law tradition, to have on the panel of judges, who are typically pure common law trained members, a judge with familiarity with French private law.

In Seychelles the Attorney-General is now a constitutional officer²¹ of judicial equivalent status but not a politician. The Attorney-General is an advisor to government but in other respects effectively a civil servant who might be seen as both the chief legal adviser to government within Seychelles and as fulfilling the role of a Commonwealth Solicitor-General. There is no Director of Public Prosecutions in Seychelles; prosecutions are dealt with by officers in the Attorney-General's Office or, at a lower level, by police prosecutors.

In Seychelles the Attorney-General's Chambers are responsible also for legislation and there are specialist drafters in that office who are responsible for the preparation of all legislation for the Legislative Assembly. They are also responsible for the production of the *Government Gazette*.

was governed by a Governor, an Executive and a Legislative Council. In 1970, a Legislative Assembly was established.

¹⁹ Taking into account the Attorney-General Ordinance 1903, it is obvious that Seychelles changed its laws relating to the office of the Attorney-General earlier than Mauritius. However, in s 14(3) the Ordinance stated that the powers of the Attorney-General of Seychelles are the same as the powers of the *Procureur General* of Mauritius. See Charlton Lane, *The Laws of Seychelles in Force on the 30th June, 1952* (Waterlow and Sons, 1953) vol III, 2012. The Law Officers Ordinance 1968 in s 2 again referred to the words Attorney-General and Assistant Attorney-General when defining Law Officers. See Campbell Wylie, *The Laws of Seychelles in Force on the 31 December 1971* (Eyre and Spottiswoode, 1972) vol III.

²⁰ Seychelles Order 1970 (SI 1970/6728) s 53; *Constitution of the Republic of Seychelles 29 June 1976* (Seychelles Independence Order 1976 SI 1976/894), art 94.

²¹ *Constitution of the Republic of Seychelles 1993*, art 76.

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III Niue

Niue presents a different situation. Not only does it not have a mixed legal heritage but it is also very small in terms of population. Niue became part of the Dominion of New Zealand in 1901 and was incorporated into the Cook Islands colony. In 1965 the Cook Islands became an autonomous state in free association with New Zealand²² and Niue then became a separate colony of the state of New Zealand. The law of Niue was drawn from both the law of the Cook Islands and that of New Zealand. The principal statute was the compendious code-like *Niue Act 1966*. In 1974, Niue in turn became a self-governing state in free association with New Zealand.²³

As a colony, Niue had adopted or had extended to it a number of laws of New Zealand and a number of those laws included legislation impacting on the role of the Attorney-General. In the *Niue Act 1966* there were references to the Attorney-General as there were in the *Crown Proceedings Act*.²⁴ In 1974, the existing law was continued, save only those laws which were inconsistent with the entrenched written *Constitution*. That *Constitution* makes no provision for the office of Attorney-General.

Before 1974, there was an Attorney-General for Niue who was the Attorney-General of the state of New Zealand. After 1974, there was no office of Attorney-General. The indication at the transition from colony to state was that references to 'Attorney-General' in the laws of Niue would be replaced by references to the 'Cabinet of Ministers' of Niue. To the extent that the role of the Attorney-General in common law terms has a political connotation, that role was picked up in Niue by the Cabinet and that situation remained largely unchanged until 1996.

In 1996, the Senior Law Officer in the Crown Law Office of Niue saw advantage, in the Commonwealth context, of having an officer with the title of Attorney-General. The consequence was that the *Niue Act 1966*²⁵ was amended to redefine the title of

²² *Cook Islands Constitution Act 1964* (NZ).

²³ *Niue Constitution Act 1974* (NZ).

²⁴ *Niue Act 1966*, ss 2, 297 and 321; s 321(e) read: 'Every reference in that Act to the Attorney-General or any Minister of the Crown shall be construed, in relation to Her Majesty in respect of the Government of Niue, as a reference to [the Cabinet of Ministers].' Additionally, s 321(f) said: 'Every reference in that Act to the Solicitor-General shall be construed, in relation to Her Majesty in respect of the Government of Niue, as including a reference to the Registrar of the High Court of Niue.'

²⁵ The *Niue Amendment Act 1996* represented the first big change in the interpretation of the words 'Attorney-General' and 'Solicitor-General'. It provided: 'Section 2 of the principal Act is hereby amended by omitting [from the definition of] the words "Attorney-General" the words "includes the Solicitor-General" and substituting the words "means the Chief Legal Adviser to the government of Niue and the officer of the Niue Public Service holding the position of Attorney-General; and includes his deputy lawfully acting in place of the

Attorney-General in the legal system. As a consequence, there was a public servant whose title was Attorney-General and that lawyer headed the Crown Law Office. Simple use of the title, however, brought no constitutional change. This situation was prone to cause confusion and in 2004 it was corrected by the repeal of s 2 of the *Niue Act 1966* by the *Interpretation Act 2004*. The result is that there is a Crown Law Office which provides legal advice to the government. Its head is a public servant and the Public Service Commission chooses the titles for the officers of that department. The current head is a Solicitor-General.

The work of the Crown Law Office in Niue is that of advising government ministries on legal matters generally and in respect of litigation in particular. The Crown Law Office does no criminal prosecutions but does advise the police who are responsible for initiating criminal prosecution. The Crown Law Office is also responsible for drafting legislation for the Niue Assembly. There are frequently no other lawyers in Niue and in that circumstance the officers have endeavoured on request, to provide general legal advice to members of the community who need it. The *Crown Proceedings Act* of Niue provides for the commencement of litigation against the Government and also for the defence by government in litigation. The office on which process is served is the Cabinet.

In recent times the question of the exercise of the *nolle prosequi* has arisen.²⁶ There was provision in the *Niue Act 1966*²⁷ but that provision was repealed in 2004.²⁸ The power

Attorney-General.'" The *Interpretation Act 2004* repealed s 2 of the *Niue Act 1966*. Other references to Attorney-General were repealed by the *Legislation (Corrections of Errors and Minor Amendments) Act 2004*, ss 21(7) and (8), *Continental Shelf Act 1964* s24 (1)(a), *Crown Proceedings Act 1950* s25(35), *Customs Act 1966* s42(61) and (62). In 2006, the *Proceeds of Crime Act 1998* (s 4(1) Interpretation) served as model for the amendments of s 2 *Financial Transactions Reporting Act 2006* and s 2(2) *Mutual Assistance in Criminal Matters Act 2006*. In these Acts there is a reference to the Attorney-General. This is because the legislation was based on model laws. Niue in this context has defined Attorney-General as 'the chief legal adviser to the Government of Niue'.

²⁶ The particular criminal proceedings in respect of which the *nolle prosequi* became relevant are recorded in the cases of *McCoy v R* (Niue High Court, 17 February 2010) and *McCoy v R* (Niue Court of Appeal, 1 March 2011) reported in *Niue Legislation Supplement 2009 – 2011* 81, 84. Initially, the government decided against issuing a *nolle prosequi* and to proceed with a new trial of the accused. Subsequently, and with a change of government, the position was reversed and the *nolle prosequi* was entered.

²⁷ *Niue Act 1966*, s 283: 'In any criminal prosecution, the [Cabinet] may direct a stay of proceedings, and the proceedings shall be stayed accordingly.' Until 1974 the power was vested in the Attorney-General, then it was changed to Cabinet.

²⁸ *Legislation (Corrections of Errors and Minor Amendments) Act 2004*, s 109(56). Additionally, ss 285 and 286 were repealed; they related to the exercise of the prerogative of mercy.

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subsists because of arts 1 and 2 of the *Constitution*. The prerogative powers of the Head of State are retained and are exercised by the Cabinet. The *nolle prosequi*, therefore, is entered by Cabinet.

IV Comparisons

In Niue there is no Attorney-General. The prime political and prerogative agency functions are now exercised by Cabinet under the *Constitution*. The criminal prosecution functions in Niue are performed by the police, and functions of the Parliamentary Counsel are performed by officers in the Crown Law Office. Advice to government on matters of law is provided by public servants in the Crown Law Office.

For a country of 1500 people the removal of the office of the Attorney-General and the devolution of the Attorney-General's functions to other officers and agencies is understandable. Moreover, it is understandable in the context of a Pacific community governed largely by customary and social practices. In Niue the law has no obvious presence. The government functions in accordance with the *Constitution* as do the courts, however, the law is much more a body of rules to which recourse is made in times of difficulty rather than a set of principles referred to on a daily basis to govern the lives of the people.

Seychelles also has a reduced role for the Attorney-General. The Attorney-General is a constitutional officer but also a public servant. The office of the Attorney-General deals with drafting of legislation, the publication of the *Gazette*, the bringing of criminal prosecutions, the representation of government in litigation,²⁹ and the giving of legal advice to government. The population of Seychelles is about 85 000. That may be a reason that the role is somewhat scaled down. It is perhaps also understandable in the context of the post-independence political history of Seychelles that the Attorney-General should not be a political officer. Evidence of the role of the Attorney-General in the general maintenance of the legal system is seen in the use of the power to seek directions from the court.³⁰ Some slight reflections of the French

²⁹ *Seychelles Code of Civil Procedure*, s 165: 'In no cause or matter where the Government or the Republic is a party shall the Minister represent or be regarded as the agent of the Government or of the Republic nor shall the Minister be made a party to such cause or matter or be summoned thereto on personal answers or otherwise except as an ordinary witness. In any such cause or matter the Attorney-General shall represent the Government or the Republic.'

³⁰ *In Re Section 342a of (the) Criminal Procedure Code in Angelo Leading Cases of Seychelles 1988 – 2010* (2011) 167 (SCA 12/1999 the Attorney-General sought the opinion of the Court of Appeal on the propriety of the lower Court procedure); 181 (SCA 1/2000 the Attorney-General requested the opinion of the Court on the appropriate venue for the trial of a child

system are seen in that functions of the *Ministère Public* are performed by the Attorney-General.³¹ It is probably fair to say that in Seychelles the common law tradition of Attorney-General does not exist. At the present time, there is a senior legal adviser with that title whose task is *sui generis*.

The situation in Mauritius with 1.2 million people is as in many other things a reflection of the dual cultural background of Mauritius. The system in many ways is French³² but the Attorney-General's office is still reminiscent of the Attorney-General's chambers of late British colonial times, and to a large degree, the division of government legal functions of the British style is reflected in the organisation of the legal services in Mauritius with an Attorney-General's office, an independent office of Director of Public Prosecutions, and a separate department (within the Attorney-General's office) of Parliamentary Counsel.

Mauritius is by far the largest of the three states commented on here. It has a mixed legal heritage. In respect of public law, the heritage is very clearly from the common law but in respect of the operation of the legal profession and the private law the tradition is strongly and proudly French. The *Mauritius Civil Code* was re-enacted in 1983 and brought up-to-date; it remains in French. The contrast with Seychelles is marked. In 1976, at the time of independence, the *French Civil Code* (the *Code Napoleon* as inherited from France through Mauritius) was re-promulgated in a revised and English language only version.³³ This did two things for Seychelles: First, it made that Code both visibly and legislatively independent and separate from the *French Civil Code*; second, by being in English, the need for an ongoing library of French doctrinal and judicial writing was reduced.

The protector of charities role is not relevant in Mauritius or Seychelles because their civil law tradition does not know the trust institution. However their offshore trust legislation does provide for trusts and in that context both refer to the Attorney-General in relation to charitable trusts.

accused of murder); 252 (SCA 18/2003 the Attorney-General referred a constitutional question to the Court of Appeal); and 340 (SCA 6/2009 the Attorney-General made an *ex parte* application for the disclosure of documents).

³¹ *Seychelles Code of Civil Procedure*, s 151 (Matters which must be referred to the Attorney-General for conclusions as *Ministère Public*).

³² One example is the *Curatelle Act 1982*. The office of curatelle has its origin in French law.

³³ That document was prepared for the government of Seychelles by Professor Chloros of the University of London. See above n 17.

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V Conclusion

Size is relevant but is not the real answer to the question of the development of the role of the Attorney-General in the three states discussed above. Nothing concerning the role of the Attorney-General is population dependent. A small law profession is even not an impediment as can be seen for example in New Zealand where non-lawyers have been Attorney-General. The fact that both Niue and Seychelles have ethnically homogeneous communities may be what distinguishes them from Mauritius. The cultural aspect, however, must be taken into consideration as an important factor. The common law is not an export product. There is no common law jurisdiction that was not established by English settlers or colonists. There is no case of a state opting to become a common law state.

And then there is the prerogative. Most states have written entrenched constitutions and there is no power of a feudal prerogative nature retained. This means that the office of Attorney-General as a constitutional office in an independent Commonwealth state must be specifically legislated for. Niue is a common law state and prerogative powers subsist. There is no Attorney-General simply because there is no need. The main functions have been distributed to other offices. Niue has a strong cultural focus on its villages. Therefore, the role of the Attorney-General as a member of a political party or affiliate is irrelevant, because there are no political parties. In conclusion, in Niue size and political culture can be seen as indicators against the office of an Attorney-General.

In contrast, Mauritius has a vibrant party-oriented political system, no shortage of lawyers and it has had almost two centuries of English-dominated public law. But it is not a common law state – far from it. Why then is the office of the Attorney-General in a form recognisable as a common law Attorney-General? The answer lies perhaps in the history of the legal profession (*avocats*, *avoués* and *notaries*). Mauritius barristers were trained in the Inns of Court in London and, accordingly, have a very strong allegiance to the British law.³⁴ Being a barrister means being at the top of the legal profession in Mauritius. Only barristers can become judges and also many leading politicians have been and are barristers. This influence may wane as a

³⁴ In 1964, Mauritius was already on its way to independence. Some functions were going to be replaced: *‘Parmi celles-là se trouvait le Procureur Général, ou plus précisément, le “Procureur and Advocate General” – son véritable titre – c’était un haut-fonctionnaire, le doyen du barreau. Il avait trois fonctions principales: Conseiller juridique du Gouvernement, Responsable de l’élaboration des Lois (qui étaient en ces temps-là sujettes à l’approbation de la Colonial Office de Londres) et Responsable des poursuites pénales.’* See Cyrille de Labauve d’Arifat, *‘Le Directeur des Poursuites Publiques’* (1978) 2 *Mauritius Law Review – Revue de Droit et de Jurisprudence Mauricienne* 145, 147.

generation of Mauritius-trained judges reaches the superior courts. For the time being, British barristerial traditions (the Attorney-General is leader of the Bar) are a matter of professional significance. What is equally true is that Mauritius is a staunch follower of the French civil law tradition. Taking all this into consideration, why is there a difference between Seychelles and Mauritius?

The independence *Constitution* of Seychelles was 'made in London' as was that of Mauritius. In Seychelles, however, the Attorney-General was the personal appointee of the President and his or her period in office terminated with each change of President.³⁵ Nevertheless, at Independence there were already signs of waning French law influence.³⁶ Then there was the coup. Under the Decree of 1979 the office of the Attorney-General remained almost the same. Under the present *Constitution*,³⁷ the office is substantively the same as in 1976 but has been given constitutional protection mechanisms. The office is now subject to the powers of the Constitutional Appointments Authority which also proposes to the President the appointment of judges, the Electoral Commissioner, the Auditor-General and the Ombudsman.³⁸ This procedure provides security of tenure which means that, unlike in the independence *Constitution* of 1976, the Attorney-General continues in office even though the President may change.

³⁵ *Constitution of the Republic of Seychelles 1976* (Seychelles Independence Order 1976 SI 1976/894); 'There shall be an Attorney-General of the Republic who shall be appointed by the President and shall be the principal legal adviser to the Government' (art 52(1)); 'The office of the Attorney-General shall become vacant - (a) if the holder of the office is removed from office by the president; or (b) upon the assumption by any person of the office of President' (art 52(3)).

³⁶ Eg the promulgation of the Civil Code in English. See above n 33.

³⁷ *Constitution of the Republic of Seychelles 1993*.

³⁸ *Ibid* ss 139-142 (Constitutional Appointment Authority), 115.A (Members of the Electoral Commission), 123 (Appointment of Justices of the Court of Appeal), 143 (Ombudsman) and 158 (Auditor-General).

