Removing a High Court Judge for Misbehaviour Under the Constitution of Botswana: Proposals for Reform

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ABSTRACT

There is too much executive control in procedures for removal of judges of the High Court under the Constitution of Botswana. It is the President who determines whether or not a question for the removal of a judge ought to be investigated – he sets the process in motion. It is the President who chooses the members of the tribunal charged with investigating the question for the removal of a judge. It is the President who is empowered to suspend a judge. The article assesses the constitutional framework for the removal of a judge of the High Court in Botswana and advances the following main arguments: (1) the Constitution allocates too much discretion to the President in removal proceedings; (2) it is undesirable that the President should have such discretion; and (3) there ought to be a pre-suspension hearing in the removal proceedings. At the end, the article suggests measures for reform.

1. INTRODUCTION

On 10 August 2015 the Chief Justice of the Republic of Botswana wrote a letter to four judges of the High Court informing them that they have been receiving housing allowance which they were not entitled to. On 12 August 2015 the judges delivered a caustic letter to the Chief Justice accusing him of selective treatment, witch-hunting and harassment. The judges also submitted a petition to the Judicial Service Commission (JSC) calling for the impeachment of the Chief Justice. A Pandora's Box opened. The Chief Justice complained that the contents of the letter were defamatory of him. He accused the judges of theft, and threatened to file a criminal complaint. On 26 August 2015 the matter took a different turn.

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The President wrote to the judges accusing them of undermining the authority of the Chief Justice. He invoked the provisions of Section 97 of the Constitution and appointed a Tribunal to investigate whether the judges ought to be removed from office for misbehaviour. In addition, he suspended the judges from office. After prolonged litigation,[1] on the 28 March 2017, the judges apologized to both the President and the Chief Justice; withdrew the letter sent to the Chief Justice and the petition sent to the JSC and further undertook to refund the Government. The Law Society of Botswana condemned the judges for apologizing to the President contending that the apology created a perception that the judges are now beholden to the President and that their independence from the Executive has been compromised. It is against the backdrop of these facts that the article sets itself two main tasks: (1) it interrogates the constitutional framework for the removal of judges on the ground of misbehavior in Botswana; and (2) suggests how the constitutional framework may be reformed. It is argued that the constitutional framework allocates a swamp of discretion to the President which leaves room for abuse and compromises the independence of the judiciary. The paper proposes a model for removal of judges that minimizes the involvement of the Executive.

2. APPOINTMENT OF HIGH COURT JUDGES IN BOTSWANA

In Botswana, Judges, other than the Chief Justice and the Judge President, are appointed[2] by the President in accordance with the advice of the Judicial Service Commission (the JSC). For a long time there existed the vexing question whether the President could refuse to follow the advice of the JSC. The question has now been settled. The phrase "in accordance with the advice of the Judicial Service Commission" means that the President must follow the advice given by the JSC and act upon it.[3] Thus, his role in the appointment of judges is only a formal one. The decision by the Court of Appeal is in line with the best international practice which requires that the commission be empowered to present the Executive with a single, binding recommendation for each vacancy.[4] That way, the interaction between the two branches poses

1 In *Oagile Bethuel Key Dingake and Ors v. The President of the Republic of Botswana and Ors* UAHGB 000175-15, the judges lost a case to review the decision of the President to suspend them from office.

2 Section 96 of the Constitution of the Republic of Botswana, 1966.

3 *The Law Society of Botswana and Anor v. The President of Botswana & Ors* Court of Appeal Civil Case No CACGB 031-16.

4 J. van Zyl Smit, "The Appointment, Tenure and Removal of Judges under Commonwealth Principles:

no danger to the independence of the judiciary.

The JSC comprises of the Chief Justice; the President of the Court of Appeal; the Attorney General; the Chairman of the Public Service Commission; a member of the Law Society nominated by the Law Society; and a person of integrity and experience not being a legal practitioner appointed by the President.[5] The majority of the members of the JSC are presidential appointees. The Chief Justice, the President of the Court of Appeal and the Chairman of the Public Service Commission are all appointed by the President. Thus, even without having any substantive role in the appointment process, through these appointees it can be argued that the President may have a preponderant say on who is appointed as a judge. Further, the very existence of the perception that the JSC is not institutionally independent from the President is a source of concern. There is more room for expanding the base of the JSC by appointing individuals who have no link with the President. Judges and representatives of the legal profession, not only practising, but also academic, should constitute at least half the members of the commission, as it is the case in 63% of Commonwealth jurisdictions. This is the emerging standard of best practice.[6]

The tenure of a judge of the High Court is safeguarded by the Constitution in various ways. A person holding the office of a judge of the High Court vacates the office on attaining the age of 70 years or such other age as may be prescribed by Parliament.[7] Unlike other public officers, judges' salaries and allowances are paid from the Consolidated Fund. The grounds upon which a judge can be removed from office and the procedure for such removal also safeguard judicial tenure. Under the Constitution, a judge may only be removed from office on any two of these proven grounds: (i) inability to perform the functions of his or her office due to infirmity of the body or mind or any other cause and (ii) misbehavior.[8] This means a judge cannot be removed from office for any other ground except these two. This provision removes the post of a judge from the confines of an ordinary contract of employment in which an employee can be dismissed on very simple reasons. Under the Constitution, if the President considers that the question of removing a judge of the High Court ought to be investigated then he is required to appoint a tribunal which shall inquire into the matter and report to the President. It is the subject

A Compendium and Analysis of Best Practice", Report of Research Undertaken by Bingham Centre for the Rule of Law, [provide year and place of publication] p. xvii.

5 Section 65A.

6 J. van Zyl Smit, *op cit* p. xviii.

7 Parliament has not prescribed any law.

8 Section 97 (2) of the Constitution of Botswana.

of removal of a judge from the office of judge on the basis of misbehaviour that is the focus of this article. What then constitutes misbehavior?

3. WHAT CONSTITUTES MISBEHAVIOR?

The Constitution does not define or delineate the degree of misbehaviour and inability to perform judicial functions necessary to qualify a judge for removal from office. In addition, the words "misbehaviour" and "inability to perform judicial functions" are too general and may capture an array of human behaviours. This is then worsened by the fact that there exist no common criteria or yardstick for gauging misbehaviour and inability. The ever-present danger is the opportunity for abuse of discretion regarding what constitutes misbehaviour or inability. What constitutes misbehaviour may become a matter of the whims and opinions of whichever person or body is charged with determining the question. Thus, if not properly interpreted, the two concepts have the potential to whittle judicial security of tenure and compromise the independence of the judiciary. Whilst it has legitimate goals, the process of removing a judge can be used as a tool of intimidation and harassment against judges. Used improperly it can be a great menace to the deliberative process of the Courts. Due to the dangers that it may present, it is submitted that in determining what amounts to misbehaviour regard must be had to relevant international standards and to the need to respect the independence of the judiciary. The United Nations Basic Principles on the Independence of the Judiciary,[9] the Bangalore Principles on Judicial Conduct[10] and the Latimer House Principles[11] provide useful international standards that assist in illuminating the concept of 'misbehaviour.' It requires mention that Botswana's legal system is dualistic, thus, without having been incorporated into law by Parliament; these instruments do not have the force of law in Botswana. However, that does not render the instruments useless. Botswana courts are empowered to have regard

9 The Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

10 The Bangalore Principles of Judicial Conduct 2002, The Hague, 25 - 26 November 2002, available at http://www.unode.org/pdf/crime/corruption/judic ialgroup/Bangalor e-principles.pdf, (accessed on the 23rd October 2017).

11 Commonwealth Parliamentary Association, Commonwealth Magistrates and Judges Association, Commonwealth Legal Education Association, Commonwealth Secretariat, and Commonwealth Lawyers' Association Commonwealth (Latimer House) Principles on the Three Branches of Government, 2009.[Latimer 2009].

to relevant international treaties in interpreting enactments.[12] The absence of a definition for misbehaviour furnishes a good basis to resort to these treaties for aid.

The United Nations Basic Principles on the Independence of the Judiciary state that "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties." The Latimer House Principles provide that an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.[13] As one of the means of securing this end, the Principles state that interaction, if any, between the executive and the judiciary should not compromise judicial independence and judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Implicit in the statement that conduct must 'clearly' render the judge unfit is the idea that the incapacity or misbehaviour must reach a certain threshold. Thus, it is not any type of misbehaviour or incapacity that will render a judge unfit to discharge his duties. But what is the standard for assessing whether or not conduct 'clearly renders' a judge unfit? The Bangalore Principles furnish an answer to this question. The Bangalore Principles and the Judicial Code of Conduct set out the standards of judicial conduct that all judges should aspire to achieve. It does not follow that a failure to do so automatically amounts to misconduct.[14] As argued above, it is not any type of misbehaviour that qualifies a judge for removal. The Supreme Court of Canada laid down the test in *Therrien* v *Canada (Minister for Justice).* In this case, Justice Therrien failed to disclose the fact that he was convicted of a crime and pardoned during interviews for the post of judge. This fact was subsequently discovered after his appointment to the bench. In determining whether such failure of disclosure qualified Justice Therrien for removal the court laid the test as follows:[15]

> "whether the conduct is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

12 Interpretation Act Cap 01:04, Section 24.

13 Article IV of the Latimer House Principles.

14 Hearing on the report of the tribunal to the Governor of the Cayman Islands - Madam Justice Levers (Judge of the Grand Court of the Cayman Islands), referral under Section 4 of the Judicial Committee Act 1833.

15 *Therrien v Canada (Minister for Justice)* 2001 (2) SCR 3.

This principle has also been endorsed by the Privy Council in *Re Chief Justice of Gibraltar*.[16] The Privy Council stated that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. Therefore, the finding that a judge is guilty of misconduct does not end the matter; the inquiry must proceed to establish whether such misconduct reaches the required threshold for removal on the basis of misbehaviour. It follows that there will be instances where a judge commits a misconduct that does not reach the required threshold for removal.

The Bangalore Principles on Judicial Conduct set an internationally agreed standard of the conduct that is expected from judicial officers. The Bangalore Principles [17] are intended to establish standards for ethical conduct of judges. The preamble records that the Principles followed extensive consultations with judiciaries of more than eighty countries of all legal traditions leading to their endorsement by various judicial forums, including a Round Table Meeting of Chief Justices, held in The Hague on the 25 and 26 November 2002. The meeting was attended by senior judges of the civil law tradition as well as judges of the International Court of Justice.[18] The United Nations Economic and Security Council had invited Member States to take them into consideration when reviewing or developing rules with respect to the professional and ethical conduct of the judiciary.[19] It is submitted that the principles constitute a reliable and objective standard in determining conduct that amounts to misbehaviour.

Botswana has a Judicial Code of Ethics[20] which is binding on all judicial officers.[21] The purpose of the Code is to provide guidelines for and prescribe ethical conduct of all judicial officers in Botswana. Thus, it convers magistrates, judges of the High Court, Court of Appeal and all such other courts as may be established by law. The Code does not propose to set out an exhaustive set of ethical conduct or acts of misconduct of Judicial Officers. The Judicial Code of Conduct requires its principles to be applied 'consistently with the requirements of judicial independence and the law.'[22] Because the Judicial Code of Conduct is not exhaustive, it is submitted that where it leaves

16 [2009] UKPC 43.
17 See the preamble of the Bangalore Principles of Judicial Conduct, (2002).
18 *Ibid*, Article IV.
19 Resolution 2006/23, 27 July 2006.
20 Judicial Code of Conduct, http: www.justice.gov.bw (accessed 15 September 2015).
21 *Ibid*, Article 1.3.
22 *Ibid*, Article 1.2.

gaps it must be supplemented by the Bangalore Principles. It must also be interpreted in light of such principles. Together, the Bangalore Principles and the Judicial Code of Conduct establish a common yardstick for regulating judicial misbehaviour. In determining whether or not a question for the removal of a judge ought to be investigated, it is submitted that the President must use the two to determine whether there is a *prima facie* case of misbehaviour, so must the Tribunal in determining whether or not a judge ought to be removed.

4. THE TRIBUNAL AND PROCEDURE FOR REMOVAL OF JUDGES

Under the Constitution, if the President considers that the question of removing a judge of the High Court ought to be investigated then he is required to appoint a tribunal which shall inquire into the matter and report to him. It is the President who chooses who to appoint to constitute the tribunal. In its report, the tribunal must advise the President whether the judge ought to be removed from office or not. Even though the Constitution uses the permissive word 'advice', where the tribunal advises the President that a judge ought to be removed the President is required to remove the judge, he has no discretion in the matter. The Constitution makes it imperative that a judge should not be removed unless it is in accordance with Section 97 of the Constitution, hence rendering any other process followed in their removal unlawful.[23] By placing an explicit and exclusive procedure for removal of judges, this provision serves to secure the tenure of judges and, in addition, to protect the independence of the judiciary.

Before the appointment of a Tribunal, the President must determine whether or not the question of removing a judge of the High Court ought to be investigated. Two issues arise for consideration on this subject. The first issue is what should trigger the President's determination? The second issue is whether the President's determination is reviewable?

The Constitution simply provides that where the President considers that the question of removing a judge ought to be investigated he must constitute a tribunal. It is not clear from whom the President obtains information that will cause him to invoke the removal proceedings and how any such information must reach him. As this involves the exercise of Executive power, and there

23 In Section 97(2) of the Botswana Constitution, it is underscored that a "judge of the High Court may be removed from office ***only for***…" (*My Emphasis*).

is no Act of Parliament that prescribes how such power must be exercised, Section 47(2) of the Constitution is applicable. According to Section 47(2):

> "In the exercise of any function conferred upon him by this Constitution ... the President shall ... act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority."

The import of this provision is that the President may receive information from any source he deems fit; it is all a matter of the President's deliberative judgment. This does not bode well for the independence and integrity of the judiciary. The peril that lies in this provision is demonstrated in *Law Society of Botswana and Anor v. The President of the Republic of Botswana and Ors.* In this case the President declined to act in accordance with the advice of the Judicial Service Commission to appoint Mr. O. Motumise as a judge. He also refused to give reasons for the decision citing national security interests. Having based his decision on national security interests, the President's decision could have escaped the machinery of judicial review.[24]

Since the law furnishes no guidance on the President's sources of information, the President could obtain such information from intelligence services and decline to disclose his sources on the pretext of national security. Further, as the Constitution does not specify the source of information for the President, questions as to whether a complaint of such a nature can be raised by another judicial officer or by a member of the public linger without answers. This leaves open the possibility that any person may refer a complaint against a judge to the President. In practice, it is likely that such information may come from the Chief Justice. This is despite the fact that there is no law that authorises the Chief Justice to report a judge to the President. In terms of the High Court Act, the Chief Justice is a senior Judge.[25] Whilst one may contend that the Chief Justice's seniority gives him such powers, absent a clear statutory power specifically conferring such powers on him, the argument is untenable. Another question that arises is whether or not a judge can report another judge to the President. Because of the serious implications that such action carries, this matter ought not to have been left to speculation and guesswork. The lack of clear functions for the office of Chief Justice and a clear procedure on how misbehaviour for a judge must be first handled breeds opportunities for bitter enmity between the judges and the Chief Justice which does not augur well

24 See *Good v The Attorney-General* [2005] 2 B.L.R. 337, CA.
25 Section 4 of the High Court Act, 1967, Cap. 04:02.

for the repute and integrity of the institution. Again, this lack of clarity could be blamed for what unfolded: The judges writing a letter to the Chief Justice supplemented by a petition to the JSC.

The procedure suffers from another deficiency – one of vagueness. The phrase "If the President considers that the question of removing a judge ought to be investigated ..." is conditional. It suggests that there may be a situation where the President does not consider that the question of removing a judge ought to be investigated. What then happens? The Constitution does not deal with this situation. The result is the President has room not to refer a legitimate question for removal to the Tribunal without anybody ever knowing about it. The President is granted unbridled discretion, with no possibility of oversight over its exercise. Worse, the public or even the judge whose conduct is under scrutiny may never know about it.

According to the Constitution, the Tribunal must consist of a Chairman and not less than two other members, who hold or have held high judicial office – the minimum number of members for the tribunal is three. High judicial office means office of a court of unlimited jurisdiction in civil and criminal matters in Botswana, a Commonwealth country or in any country outside the Commonwealth that may be prescribed by Parliament. The Constitution confers upon the President, him alone, the discretion to select the individual members who shall constitute the Tribunal. Because of the definition of high judicial office, the pool from which the President may choose members to constitute the Tribunal is adequately extensive.

However, giving the President discretion to choose who seats on the Tribunal has the potential to enable undue executive interference in the process – if the President does not want a certain judge, he can appoint members that he is certain will advise him to remove. This potential danger is not sufficiently mitigated by the fact the President may choose members of the Tribunal from outside the country. There is also a constitutional requirement that the Tribunal must be independent and impartial – which is a stronger oversight mechanism. Finally, the fact that it is the tribunal and not the President, which is vested with the final discretion on the question of removal, gives the Tribunal some measure of independence. Notwithstanding this mitigation, the potential for executive interference or manipulation of the process ought to be eliminated.

Under the Constitution,[26] the function of the Tribunal is to "…enquire into the matter and report on the fact thereof to the President and advise the

26 Section 97 (2) of the Constitution of Botswana.

President whether the judge ought to be removed from office … for incapacity or misbehavior." The Tribunal must in other words establish the facts. It must determine the guilt or innocence of the judge, and instruct or advise the President accordingly. It is a quasi –judicial Tribunal. The President should play no part in the fact-finding and guilt-finding processes. But there are no guidelines as to how the investigation should be carried out, and neither are any timelines stipulated. The Tribunal is entitled to determine its own procedure. For purposes of transparency, it would have been more desirable if procedures and operations of the Tribunal were clearly spelt-out, and proceedings accessible to judges and the members of the public.

Upon receipt of the report from the Tribunal advising the President that the judge ought to be removed, the President must remove such judge from office. The language is imperative. Thus, the Tribunal, and not the President, has the final say as to whether a judge ought to be removed or not. The Constitution does not deal with the event where the Tribunal does not advise that the judge ought to be removed. It is submitted that by necessary implication the Tribunal still has a final say on the matter. That is to say, even where the Tribunal decides that the judge ought to stay, the President has no discretion in the matter.

5. ONUS AND STANDARD OF PROOF

The removal of a judge from office is obviously a very serious matter, with grave consequences. It must therefore be done only in the clearest of cases. The standard of proof required to reach a finding that a judge is guilty of misbehaviour is what may ensure that judges are removed only in fitting cases. Yet, the Constitution is silent on these matters. It is silent on whether or not a Tribunal must give an accused judge a hearing, and on what other facilities must form part of the hearing.

That a judge who is being investigated for removal has a right to a fair hearing is not open to doubt. Section 10 (9) of the Constitution provides:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognized by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

Even under the common law, affording an accused judge a hearing was a requirement. Scholars argued that since the judicial tenure is based on "good behavior" depicted by the Act of Settlement,[27] then such a judge can only be removed after he has been afforded a "hearing and trial, and an opportunity to defend himself before a fuller board, knowing his accuser and accusation."[28]

What then is the standard of proof in such proceedings? There is no judicial opinion in Botswana that provides guidance on this point. On face value, this issue appears simple, but it has given courts serious difficulties. Since there is no judicial opinion on this point in Botswana and a law that deals with the subject, the issue deserves clarification.

There are two main standards of proof, proof on a balance of probabilities, which is usually applied in civil cases, and proof beyond reasonable doubt, which is applied in criminal cases. In *Briginshaw* v *Briginshaw* the Court said: [29]

> "At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded. The distinction obtained long before the publication in 1824 of *Starkie's Law of Evidence;* but the form in which the higher standard of persuasion is described is said to have been influenced by passages in that work. The learned author, who occupied the Downing Chair of Common Law, wrote:-'It is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case. Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable. Even the most direct evidence can produce nothing more than such

27 12 & 13 Wm. Ill, c. 2 § 3 (1701) effective after the death of Queen Anne (1714). The language of the Act was: 'Judges and Commissions be made *Quandiu se beneges.ierbit* [during good behavior], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.'

28 Saikrishna Prakash & Steven D. Smith, 'Removing federal judges without impeachment' 116 *Yale Law Journal*. Pocket Part 95 (2006), http://yalelawjournal.org/forum/removing-federal-judges-without-impeachment. John Adams, para.4 (accessed 16 September 2015).

29 (1938) 60 C.L.R 336, 360.

> a high degree of probability as amount to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favour of the particular fact.' The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither on a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt."

Proceedings to remove a judge are not criminal proceedings. The purpose of removal proceedings is not to punish[30] or exact retribution.[31] As removal proceedings are not criminal proceedings, it is clear that proof beyond reasonable doubt has no place. However, in view of Briginshaw case, the question that arises is whether in view of the seriousness of the removal of a judge, both to the judge personally and to the institution, the standard of proof should be on a higher degree of preponderance of evidence? English and Australian jurisprudence is in favour of a flexible standard of proof that stretches to accommodate the seriousness of the charges and consequences of the findings of the tribunal. In *Hardcastle* v *Commissioner of Australian Federal Police*[32] the decision involved judicial review of the decision of the Federal Police Disciplinary Tribunal finding a member of the Australian Federal Police guilty of improper conduct. The applicant argued that the Tribunal had failed to apply the appropriate standard of proof in that it failed to pay regard to the gravity of the consequences flowing from its findings.[33] The Court agreed that in terms of Briginshaw, this is a requirement; however, the Court dismissed the argument on the basis that the Tribunal had taken that factor into account. In *Re Seidler*,[34] the Australian Court stated that:

> "In Australia and in England the appropriate standard of proof in disciplinary actions has been closely examined by the courts and this standard is regularly applied in practice by disciplinary bodies. The standard of proof is proof on the balance of probabilities possessing

30 *Harvey v. Law Society of New South Wales* (1975) 49 ALJR 362 per Barwick C.J, 364.
31 *Ex parte Attorney-General; In re a Barrister and Solicitor* (1972) 20 FLR 234 per Fox, Blackburn and Woodward J.J. 244.
32 [1984] FCA 103.
33 *Ibid* para 30.
34 [1986] 1 Qd R 486, 490.

> as that standard does the required measure of flexibility so that the more serious the allegation, the higher the degree of probability that is required."

In South Africa, it appears that this approach is not preferred by the courts. Thus, in *Ley* v. *Ley's Executors and Others*,[35] dealing with the onus of proof required to prove a change of domicile, the court rejected this approach by stating that:

> "This being the position, it is, I think, free for this Court to consider whether the standard of proof required in *Johnson's* case to establish a domicile of choice (assuming that it is higher than the standard required in other civil cases) is not too high ... unless it can be said that there is a different standard of proof in domicile cases from that required in other civil cases. On principle there seems to be no reason why a different standard should be required. In *Gates v. Gates*, supra at pp. 154 - 155, this Court held that the standard of proof where adultery is alleged is the same as in other civil cases; in *Bagus v Estate Moosa, supra* at p. 71, the same standard was applied when fraud was alleged and in *Miller v Boxes & Shooks (Pty.) Ltd., supra* at p. 580, it was stated by DAVIS, A.J.A., that our law does not know any *onus* other than the ordinary one in civil cases. All those cases show that, no matter how serious an allegation of fact may be, the *onus* of proving the fact is, in civil cases, discharged on a preponderance of probability and there is no reason why the same rule should not apply when the question at issue is whether a domicile of choice has been acquired. I am therefore of opinion that the rule laid down in *Johnson's* case, if it is to be construed as laying down a higher standard of proof than obtains in other civil cases, should not be followed."

The question regarding what standard of proof is applicable occurred in *Freedom under Law* v *Acting Chairperson: Judicial Service Commission and Others*[36] where the Judicial Service Commission had applied proof beyond reasonable doubt to determine whether, *prima facie*, a judge charged with committing misconduct had a case to answer. The court held that proof beyond a reasonable doubt was inappropriate and pointed out that "an investigation of a complaint of gross misconduct is not a criminal enquiry but more in the nature of a disciplinary enquiry where proof on a balance of probabilities is

35 1951 (3) SA 186, 192.
36 2011 (3) SA 549 (SCA).

required at its conclusion." It is submitted that the approach requiring a higher standard of proof should be applied by the Tribunal investigating the conduct of a judge especially where the allegations are serious. The potential findings arising from the proceedings have serious implications for both the judge and the judicial system. On policy grounds, a higher standard of proof is in tandem with protecting the independence of the judiciary by ensuring that judges are not removed from office on the flimsiest of cases.

6. SUSPENSION OF A JUDGE

Where the question of removing a judge from the High Court has been referred to the Tribunal, the President may suspend a judge from performing the functions of his office and any such suspension may be revoked by the President anytime.[37] By using the permissive word 'may'[38] the provision gives the President an option. Suspension of a judge may or may not be deemed necessary by the President. The circumstances that should guide the President in deciding whether or not to suspend are not indicated. What kind of misbehaviour or incapacity renders a judge liable to suspension is thus left to the whims of the President. This is undesirable.

The other troublesome issue here is whether or not a suspended judge has a right to be heard prior to suspension. There is no doubt that the decision to suspend a judge has detrimental consequences for the concerned judge. It is potentially a career-ending decision. The reputation of a judge is likely to be irreparably damaged when it becomes public knowledge that he or she is being investigated for removal.[39] Speculation will be rife that the judge has committed a serious wrong. Not only will the reputation a judge be affected, public confidence in the judiciary may also be lowered.

The case and need for a pre-suspension hearing in this situation seems unarguable. But the Constitution does not expressly provide for it. That, however, does not close the question. Under administrative law, the general principle is that where a statute empowers a public official or body with power and discretion to make a decision prejudicially affecting an individual in his

37 Section 97(5) of the Botswana Constitution provides: "If the question of removing a judge of the High Court from office has been referred to a tribunal under subsection (3) of this section, the President may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought not to be removed from office."

38 Section 45 of the Interpretation Act, Cap. 01:04.

39 Reputation is a protected interest under the Constitution, under the Penal Code, and under the common law of defamation.

liberty, property or existing rights, the individual has a right to be heard unless the statute expressly or by necessary implication indicates to the contrary.[40] The right to be heard is not expressly excluded by the Constitution. The question of whether it may be excluded by implication is far more complex.

At common law there are stages in the continuum of decision making that are not subject to the rules of natural justice. A suspension prior to disciplinary proceedings is considered as one of those decisions. The principle has been endorsed by the Botswana Court of Appeal in various decisions,[41] but the prominent one is *Sakaeyo Jannie* v. *Secretary, Presidential Affairs and Administration and Anor.*[42] In this case, the question for determination was whether a public service employee who was suspended from performance of his duties pending disciplinary proceedings is entitled to a hearing before he or she is placed on such suspension.[43] The Court of Appeal drew a distinction between, "a substantive adverse finding on the rights of the employee" and what is "merely an administrative step preparatory to the charge itself."[44] The Court, relying on various authorities on the point, held that the rule under common law is that rules of natural justice do not apply at that preliminary stage.[45] This principle has been applied in cases involving disciplinary proceedings against judges. *Evan Rees and Others* v. *Richard Alfred Crane*[46] involved the removal of a judge from a roster of cases pending investigations into judicial misconduct who was subsequently charged with misconduct. In that case, the Privy Council, relying on *Lewis* v. *Heffer*[47] held that in certain preliminary or initiating procedures there was no right to be heard.

This principle has been justified on various considerations.[48] It has been held that the investigation is purely preliminary; that there will be a full opportunity to adequately deal with the complaints; that the making of the inquiry without observing the rules of natural justice is justified by urgency or administrative necessity; that no penalty or serious damage to reputation is

40 See: *Administrator, Transvaal and Others v. Traub and Others* 1989 (4) SA 731; *Cooper v. Wandsworth Board of Works* (1863) 14 C.B (N.S) and the following decisions: *Mothusi v. Attorney General* 1994 BLR 246, *Arbi v. Commissioner of Prisons and Another* 1992 BLR 246; *Oshima Onalenna Selema v. Commissioner of Botswana Police and Another* CACGB 014-13.

41 Gaborone Consumers Co-operative Society v. Gaolekwe 1998 BLR 177. See also Gaseitsiwe v. The Attorney General 1996 BLR 54.

42 CACGB 078-13, unreported.

43 *Ibid,* para. 1.

44 *Ibid*, para. 37.

45 *Ibid,* para. 52.

46 [1994] 2 AC 173 (P.C).

47 [1978] 1 W.L.R 1061. In this case, the Court of Appeal held that the rules of natural justice did not apply to the decision to suspend pending inquiry since suspension was a holding operation and was merely done by way of good administration.

48 See *Wiseman v. Borneman* [1971] AC 297.

inflicted by proceeding to the next stage without such preliminary notice; and that a statutory scheme excludes such a right. The two strongest justifications for this principle are where a decision has to be made urgently and where the statutory scheme excludes such a right.[49]

In matters concerning suspension of judges, there is a case to be made for the recognition of the right to be heard prior to suspension, which overrides all these justifications. In cases involving removal of a judge the stakes are too high. There is a clear and present risk to reputational damage to both the judge and more importantly the confidence and trust that the public has in the judiciary. In *Oagile Bethuel Key Dingake and Ors* v. *The President of the Republic of Botswana and Ors* the Court accepted the judges' reputation had been tarnished by wide publication of the matter.[50] Hence, there is a greater public interest in protecting both the judge and the judiciary against the dander of wild speculation. Protection of the judiciary from anything that may cause the members of the public to lose confidence and trust in it is a constitutional imperative.

There are practical benefits from recognition of a right to pre-suspension hearing. Giving a judge the opportunity to be heard at that stage protects both the individual and the institution. Where it results in the President being persuaded not to suspend, the judiciary will not be exposed to negative speculation that has the potential to eat into the confidence that the public bestows on the judiciary and the reputation of the judge is left intact. In addition, recognition of the right to be heard prior to suspension in this case accords with the principle that justice must not only be done but must also be seen to be done. The institutions of justice have a moral responsibility to promote justice and other related virtues. Lastly, the United Nations Basic Principles on the Independence of the Judiciary require that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review."[51] The High Court missed the opportunity in *Oagile Bethuel Key Dingake and Ors* v. *The President of the Republic of Botswana and Ors* to adapt the common law to differing circumstances.[52]

7. PROPOSED LEGAL REFORMS

Some of the more modern constitutions in Africa, such as the Namibian

49 *Kenneth Good v. Attorney General* 2005 (2) BLR 337 (CA).
50 See page 24.
51 See Article 20.
52 *Invercargill City Council v Hamlin* [1996] AC 624.

Constitution, the South African Constitution and the Kenyan Constitution, provide good lessons from which Botswana can learn. These constitutions provide clear procedures for the removal of judges, which also minimize Executive control of the proceedings and endeavour to conform to best international practice.

According to the Namibian Constitution a judge may be removed from office only by the President acting on the recommendation of the Judicial Service Commission.[53] The Constitution empowers the Judicial Service Commission to investigate whether or not a judge should be removed from office and if it decides that the judge should be removed, it is required to inform the President of its recommendation.[54] While the question of whether or not a judge ought to be removed is being investigated the President may, on the recommendation of the Judicial Service Commission, suspend the judge from office.[55] Under the South African Constitution, a judge may be removed from office only if the Judicial Services Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct[56] and the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.[57] Upon adoption of the resolution, the President must remove the judge.[58] The power to suspend a judge is vested in the President who exercises it on the advice of the Judicial Service Commission.[59] The Kenyan Constitution prescribes five grounds[60] on the basis of which a judge of a superior court may be removed from office. The removal of a judge can only be initiated by the Judicial Service Commission on its own motion, or on the petition of any person to the Judicial Service Commission.[61] The petition by a person to the Judicial Service Commission ought to be in writing setting out the alleged facts constituting the grounds for the judge's removal.[62] Upon receipt of the petition, the JSC considers the petition and if it is satisfied that the petition discloses a ground for removal it is required to send the petition to the President. Within fourteen days after receiving the petition, the President shall suspend the judge from

53 Section 84(1).
54 Section 84(2).
55 Section 84(5).
56 Section 177(a).
57 Section 177(b).
58 Section 177(2).
59 Section 177(3).
60 Section 168(1). The listed grounds are: inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence or gross misconduct or misbehaviour.
61 Section 168(2).
62 Section 168(3).

office and appoint a Tribunal.[63] The Tribunal shall then inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.[64] A judge who is aggrieved by a decision of the Tribunal has a right of appeal to the Supreme Court.[65]

In the models discussed above, the President is not involved in invoking the removal proceedings; rather, it is the Judicial Service Commission that is empowered to do so. Further, the President's power to suspend is not exercised unilaterally. He does so on the advice of the Judicial Service Commission. In the Kenyan model, a judge has a right of appeal which goes into the merits of the decision and therefore provides a more robust remedy than judicial review which is limited to the manner of arriving at the decision.[66]

In the light of the foregoing, the following proposals are made for reform of the law on this subject:-

A The President should not be part of the removal proceedings. Instead, where the question arises, the Chief Justice should refer the question of removal a judge to the Tribunal. Under this model, it is the Chief Justice and not the head of the Executive, who invokes the machinery for removal of judges and determines whether or not there is a *prima facie* case of misbehaviour.[67]

B. The Tribunal must retain its function of investigating the question of whether or not a judge ought to be removed from office. However, the members of the Tribunal should not be appointed by the President. It is proposed that the JSC is the appropriate authority to do so.

C Under the current system, the Constitution appears to contemplate removal from office in all cases of misbehaviour. It is submitted that there must be a range of sanctions to accommodate minor misbehaviours by judges that do not reach the required threshold for removal. In addition to removal, other sanctions, such as a reprimand or a punitive suspension, should be provided for.

D. The suspension of a judge pending disciplinary proceedings must only be carried out when there is just cause for such suspension either based on the nature and degree of misbehaviour or other legitimate grounds. It must be done on a recommendation by the JSC.

63 Section 168 (5).
64 Section 168(7) (b).
65 Section 168(8).
66 *Raphethela v. The Attorney General*, 2003(1) BLR 591.
67 See Section 168(2) of The Constitution of the Republic of Kenya. Proceedings for removal of a judge are initiated by the Judicial Service Commission. See also Section 177 of the Constitution of the Republic of South Africa, 1996. Here again the President has no role in initiating proceedings for removal of a judge.