

201402251

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DESSERTATION

**TOPIC: THE NEED FOR A CODE OF ETHICS LAGISLATION FOR
JUDGES IN LESOTHO TO AUGMENT JUDICIAL INDEPENDENCE.**



Submitted in partial fulfillment of LLB requirements: 201402251

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DECLARATION

I hereby declare that this study represents my work which is done for the completion of the LLB degree at the National University of Lesotho, and has not been previously included in a dissertation submitted to this or any other institution for a degree, diploma or other qualifications.

I have read the University's current research ethics guidelines, and accept responsibility for the conduct of the procedures in accordance with the University's regulations on the use of already published materials. I took caution in the use of other scholars and have acknowledged their rights.

ACKNOWLEDGEMENTS

I would like to express my special thanks to my supervisor Dr. Itumeleng Shale, who have been a tremendous mentor to me. I would like to thank you for molding and shaping my research and for allowing me to grow in the field of research. Your advice on my research have been valuable to me.

A special thanks to my family. Words cannot express how grateful I am to my father, my brothers, and sisters for all the sacrifices that you have made for me. Your prayers for me was what sustained me this far.

I would also like to thank my beloved friends, Lisema Moholei and Tsepo Masiu. Thank you for supporting me for everything, and especially I can't thank you enough for encouraging me throughout this experience. Finally, I thank my God, my good Father, for letting me through all the difficulties. I have experienced Your guidance day by day. You are the one who let me finish my degree. I will keep on trusting You for my future. Thank you, Lord.

CHAPTER ONE

Introduction and background

1.1 Introduction

This dissertation is based on the principle of separation of powers generally, and on the independence of the judiciary in particular. The principle of Separation of Powers was first introduced in the 17th century as an idea of political philosophy. It was exhibited by John Lock as follows:

It may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage.¹

From the above text, it is apparent that there was concern of abuse of power, if in a government, the power of making laws and enforcing them were to vest in one person or body. The abuse of power that John Lock is concerned with is that the body in this circumstances would 'exempt themselves from the law'. This means that the rule of law would be defeated. A French philosopher, Montesquieu also had this to say:

All would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals.²

From the above quotations, it is clear that what the philosophers were advocating for is that, a government must be divided into different arms in a way that each arm

¹ Charlse De Montesquieu, *The Spirit of law*. 'Vile Constitutionalism and the separation of powers' (1748) Chapter 62.

² ibid

would be tasked with a power that is distinct from the powers of others.³ That is, there must be an arm of government that is tasked with making laws, there must be another, that deals with executing or enforcing the law and the last arm should be to interpret and apply the same law in times of disputes and criminal charges. That is to say, the government must be divided into three main branches. These branches are established with a properly defined competence and jurisdiction so that there is no interference by one arm into the functions of those of other arms.⁴

Despite the establishment of three separate arms of government under the doctrine of separation of powers, there is still a possibility of abuse of power by the arms of government with respect to their constitutional powers. This is where the doctrine of checks and balances comes into play. In terms of this doctrine, the three arms of government must check on each other in order to restrain the powers of each other from abuse of power.⁵ Now the question is, how do these arms of government check on each other? The three arms of government are an Executive, the Legislature and the judiciary.⁶

The manner in which the executive checks on the judiciary is with respect to the appointments and removals of the judges. The judiciary checks on the legislature

³ *R v Home Secretary, Ex p Fine Brigades Union* [1995] 2 at 513 at 567 "It is a feature of the peculiar British conception of the Separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."

⁴ Phineas Mojapelo, *The doctrine of separation of powers: 'a South African perspective'* (2013) "The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, Legislative, Executive and Judiciary. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance:"

⁵ Randall Holcombe, *Checks and Balances: 'Enforcing Constitutional Constraints.'* (2018) 7.

⁶ The Constitution of Lesotho 1993 Section 120 and 124 on the appointment of judges. Section 119 on the power of review.

and the executive with its power to review the enacted laws passed by the legislature and the manner they were exercised by the executive.⁷ The legislature enacts laws that must be followed by the judiciary in the performance of their functions⁸ and the executive as well. This means that in terms of this doctrine, the three arms of government are not absolutely independent, but there must still be some sort of interference to ensure restraint of absolute power without actually performing the powers of the branch whose powers are restrained. But in that the interfering arm of government is simply ensuring that others are performing their duties in terms of the law.

Judicial independence is integral to the separation of powers. This doctrine requires that the judicial power must be vested in the judiciary and in the performance of its judicial functions, it must be free from interference by other arms of government.⁹ Judiciary independence exist in two forms. The first is the personal independence, which demand that the judge in hearing cases and delivering judgements, must be impartial and free from interference or undue influence from outside factors to the case before him.¹⁰ The second is the institutional independence. This demands that the judiciary must be in charge of its administration.¹¹

There are two factors that are fundamental to the institutional independence of the judiciary. The first is the appointment of the judges. In accordance with this factor,

⁷*President of the Republic of South Africa v SARFU* 1997 (4) SA 1 (CC) the court held that the exercise by the president of his power to pardon offenders or to appoint a commission of enquiry is subject to review by the courts.

⁸ Phineas Mojapelo, 'The doctrine of separation of powers: a South African perspective' page 44 'If a court declares a statute invalid, in theory, parliament may amend the constitution to undo the court's decision. Within our jurisdiction this will be subject to the limitation that the amending legislation should not itself be invalid for unconstitutionality'

⁹ The Constitution of Lesotho. 1993. s118(2)

¹⁰ *Valente v The Queen* [1985] 2 S.C.R. 673 at 674.

¹¹ Lunga Khaya Siyo L. at al. *The independence of South African judges: 'A constitutional and legislative perspective'* (Vol 18 2016) Potchefstroom Electronic Law Journal. page 1

the constitution provides for the transparent procedures that the executive must follow when appointing judges to the judiciary. The requirements that are prescribed by the constitution to be considered by the appointing authority ensures that the appointment is made for the good of the judiciary and not in pursuit of interests of he who appoints.¹² The second factor is the security of tenure. With security of tenure, the time within which the judge is to hold office must be secured. An appointed judge cannot be removed from office before the laps of the time provided for him to be in office but for the exceptional circumstances provided by the constitution.¹³ it is on this factor that this presentation focuses.

1.2 Problem statement

The constitution of Lesotho provides that the Judiciary of Lesotho shall be independent in the performance of its function.¹⁴ However, the judiciary in Lesotho is not independent as it is affected by interference by the executive under the guise of holding members of the judiciary accountable.

There has been research and enquiry to reflect on the factors that affect the independence of judiciary in Lesotho. However, there is little research that seeks to explore the accountability of judges or judiciary and measures that can be put to ensure the same in order to avoid enforcement of accountability by the executive in violation of the principle of separation of powers. In his Article, Prof. 'Nyane¹⁵ contents that the court took a narrow and restrictive approach to the notion of security of tenure. In the case of *President of Court of Appeal v The Prime minister*,

¹² Ibid. 8

¹³ Ibid. 10

¹⁴ The Constitution of Lesotho. s119 (2)

¹⁵ Hoolo 'Nyane, . *Lesotho Law Journal*: 'Commentary on the case of The President of Court of Appeal v The Prime Minister.' (Vol 24. No.1 2015) National University of Lesotho: Lesotho

the then President of Court of Appeal was under impeachment process. This has been evident in a number of cases in which the Prime Minister had written show cause letters to the heads of the judiciary and even went to an extent of appointing a tribunal to investigate on the misconduct of the President of Court of Appeal. For instance.... The appellant contended that he was not given hearing prior to the appointment of the tribunal and that tempered with his security of tenure. The court decided as follows;

...I do not agree with the appellant's further contention the appointment of the Tribunal in itself impacted on his right to the security of tenure. In terms of the constitution, impeachment is entirely dependent on the findings of the Tribunal which, self-evidently, will not be influenced by its own appointment.¹⁶

What Prof. 'Nyane contents in his paper suggests that the court took a narrow and restrictive approach to the notion of the security of tenure which notion is a core pillar in the independence of judiciary. In fact, he is concerned with the construction of the constitution in this case. So the question as to the proper measures to be put to ensure accountability of judges with respect to the security of tenure is partially answered because what is suggested here is that the court should have not taken a narrow and restrictive approach and the court could have arrived at the different decision. Furthermore, that would speak to what must be done as part of procedure to be followed but not what must inform the Prime Ministers decision before he begins the proceedings to appoint the Tribunal to investigate the misconduct on the Judge.

In the case of *The President of Court of Appeal v The Prime Minister and Others*,¹⁷ the President of Court of Appeal was charged with a misconduct after an incident

¹⁶ Ibid ad para 13

¹⁷ C of A (CIV) No 62/2013

that occurred during the king's birthday where his official vehicles and those of the Chief Justice almost collided with the bystander when both judicial officers were competing for a position behind the prime minister in an official convoy. *Attorney General v His Majesty the King*.¹⁸ In this case that then President of Court of Appeal was being charged for having not paid the tax which is the breach to not pay to the taxing master. In the mean time when the case was pending in the court, the Prime Minister appointed a tribunal to investigate his misconduct. The other is that of *Chief Justice Nthomeng Majara v The Prime Minister and others*.¹⁹ The chief Justice refused to swear the Newly Appointed President of Court of Appeal to his office. The question again is, was the refusal a misconduct? Weren't there legal remedies that could be used through court process, to compel the Chief Justice to perform her due constitutional duties?

In terms of section 121(3) and 125(3),²⁰ both the Chief Justice and the President of Court of Appeal, amongst other reason, can be removed from office from for misbehavior. The constitution in this respect does not spell out which acts constitute a misbehavior such that a judge can be removed. Because in terms of section 121(5) and 125(5),²¹ the Prime Minister is the one that initiates the proceedings for removal of these top Judges, the question as to what acts constitute misconduct is left in his opinion. This means that the Prime Minister Can equate any act to misbehavior as it is apparent in the above cases. This is possible because there is no legislation that prescribes acts which constitute a misbehavior by a judge. In short, the absence of code of ethics brings about this problem. In countries like South Africa, there is a code of ethics for Judges. In that country for a conduct to constitute a misconduct, it must be a violation to the ethics for Judges. In this manner, there is certainty that

¹⁸ C of A (CIV) 13/ 2015

¹⁹ CIV/ APP/ 13/ 2018

²⁰ The Constitution of Lesotho. 1993.

²¹ *ibid*

ensures the security of tenure for judges because impeachment cannot be effected upon any act that seems to be a misconduct.

1.3 Research objectives

The general objective of this study is to explore if independence of the judiciary in Lesotho can be augmented by an enactment of Code of Ethics Legislation for judges. To achieve this general objective, the specific objectives are:

- -To explore the normative framework on the independence and accountability of the Judiciary at both the international and domestic level
- -To highlight the lack of independence of the judiciary in Lesotho.
- -To illustrate how Codes of Ethics in South Africa have contributed to independence of the judiciary.
- -To recommend adoption of a Code of Ethics as a measure and accountability of the judiciary in Lesotho.

1.4 Research questions

The questions that lie at the heart of this research are:

- How does international law provide legal frame work for independence of Judiciary.
- How does lack of Code of Ethic affect the independence of judiciary in Lesotho

- How does a Code of Ethics in South Africa augment the independence of judiciary?
- How will A Code of Ethics augment independence of judiciary in Lesotho?

1.5 Literature review

The principle of separation of powers can be traced back from the state of nature. Thomas Hobbes, says that without civilization, life is solitary, poor, nasty, brutish, and short. Therefore, people grouped themselves and elected their leader from within their groups. Be it tribal chief, feudal Lord or king.²² Hobbes idea suggests that civilization is an arrangement where the people vest power of leadership in one person elected from themselves. This arrangement is due to the perilous kind of life posed by life in the state of nature. This means that life without civilization is lawless. Everyone can do whatever he likes. Life is the survival of the fittest. So with civilization, the power that everyone has, is vested in one authority, and he who possesses such power can make and enforce the law.²³ The fundamental point here is that the power is vested in one person so as to bring about order within people.

The purpose for which power is vested in one person is defeated if it is vested in a way that the power of making law, enforcing law and applying law is vested in one body.²⁴ So this means that that body in which power is vested must be divided into organs to enable it to exercise the power in a manner that, that which people feared when they came together, can still be averted.²⁵ This is true in the theory developed by John Locke and Charles de Montesquieu.

²² Glen Thomas Parks, *Flee the Noble One: 'An historic and contemporary look at two great democracies and their struggles to maintain a separation of powers,'* (last visited on loth May 2012) p.1

²³ *ibid*

²⁴ Edgar Bodenheimer, *Jurisprudence – 'The Philosophy and Method of law,'* (1962) 45

²⁵ *Ibid.*

The principle of separation began as a theory in political philosophy. The theory came into place on the reason that if different powers are in the hands of the same person, that person is likely to rule the subjects in a tyrannical manner which violates that liberty which the people seek to protect by vesting that power in that body.²⁶ Therefore, there must be a separation of powers in order to ensure protection of the people. It must be noted that the development of this theory was to instill justice in the society. This is affirmed by Marchamont Nedham.²⁷ He says that if the executive power and the legislative power is given to one person, ordinary people will lack a remedy in times of injustices.

John Locke's theory of separation of powers suggested that there must be two bodies, one body with law making powers and the other with the enforcement of law. In other words, there had to be the legislature and the executive. Furthermore, his theory suggested that the state had limited powers.²⁸

There was again a French philosopher, Montesquieu, who took this theory to the next level. While his predecessors' theory of separation of powers recognised only two arms of government, his, recognised three arms of state, the third being judiciary. His worry was that, where the powers of a judge is joined with the executive powers, the judge might behave with oppression and violence. Here, the French philosopher brought about a break away from Locke's theory which did not draw a distinction between executive power and the judicature power.

Montesquieu, took this philosophy even further and broke it into three components. He suggested that these three branches must be free from each other's control. That is to say they must be independent. The second is the separation of function. These

²⁶ Ibid.

²⁷ M.C.J.Vile, *Constitutionalism and Separation of Powers*, (1967 2nd Edn Indianpolice. Liberty Fund, Online Library of Liberty accessed on 21st June 2010.)

²⁸ Edgar Bodenheimer, *Jurisprudence - The Philosophy and Method of law*, Harvard University Press. (1962) 45

organs must be given powers different from those of others. The last one is the separation of personnel.²⁹

From the first component, we get the idea of independence of judiciary. That, if all branches are to be independent from each other, then it is true that the judiciary must be free from interference in its functions. Montesquieu also acknowledged that if there is no interference at all, there is still possibility of abuse of power. So there must still be some degree of control over one branch by other branches to restrain to ensure that the powers that the branches have are not absolute. This idea brought about a doctrine of checks and balances.³⁰

It is clear even up to this far that the underlying factor behind these developments is the liberty of the people. Most states' constitutions have adopted this theory of separation of powers in that they establish the three arms of government. But the establishment is not enough if the basis of this theory is not achieved. The liberty of the people. The constitution must not only expressly achieve it, but must also practically achieve it.

It is impossible to understand that the principle of independence of judiciary without separation of powers. There must be a proper separation of powers for there to be an independent judiciary. The independence of the judiciary is guaranteed if there is institutional independence and personal independence. Institutional independence is available where the remuneration for judiciary is proper, where there is no interference with its functions. Personal independence is available where the security of tenure is guaranteed. Where the appointment of judges is proper.³¹

²⁹ Aman. advocate, www.legalserviceindia.com/article/16-separation-of-powers.html

³⁰ Tasneem Sultana, Montesquieu's 'Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 55

³¹ Mumba Malila, *Judges' Symposium On Judicial Independence, Impartiality And Accountability: 'The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples' Rights.'* (2010)

In Lesotho, there independence of the judiciary is highly tempered with. There is manipulation of budget revenue, there is alleged close relationship between top judges and the politicians, there is ignorance of court orders by executive, and many other problems.³² This means that there is a need to strengthen the independence in some way to make sure that politicians do not have too much control over the judicature than the one contemplated by the doctrine of checks and balances.

1.6 Research methodology

My approach to this research will be an analytical one. It will be a desktop analysis of case law, legal textbooks, law journal articles, international instruments on judiciary independence, as well as statutory frameworks regulating independence of the judiciary in Lesotho and South Africa.

I will undertake a legal comparison of the legal framework of Lesotho, firstly, against the international framework, and South Africa with respect to Judiciary independence. The aim of this analysis will be to draw lessons from both international and other South Africa in relation to judiciary independence.

At this end therefore, the study seeks to make a contribution to the ongoing crises where the a judicature is being interfered with under the guise of holding the judicial officers accountable.

³² Rachel Ellett, *Politics of Judicial Independence in Lesotho*. 61

1.7 Chapter overview

Chapter one is an introductory chapter that lays a foundation of the study and functions as its preview. It covers the background of the study, articulates the problem statement and highlights the research questions which this study intends to answer along with the objective of the research

This chapter will embark on the legal frame work on the independence of the judiciary at international law.

Chapter three is a critical analysis on the lack of Code of Ethics for judges in Lesotho. This analysis will be made through a comparative study between Lesotho's legal frame work and South Africa's against the international frame work.

Chapter four is the recommendations of the passing of Code of Ethics Legislation and how it should be drafted in order to augment the independence of judiciary.

CHAPTER TWO

International Standards on Independence of the Judiciary

2.1 Introduction

International law sets the minimum standards of Judiciary Independence which every state must comply with when ensuring independence of its Judiciary. The pillars of the judicial independence are, Separation of Powers, Appointment of Judges, Security of tenure, Accountability and Financial freedom of the Judiciary. Hence this chapter discusses the international standards in line with these pillars. The discussion is divided into two main parts. Part one is mandatory standards which states cannot under any circumstances derogate from and part two entails the permissive standards which states are urged but not strictly mandated to comply with.

2.1. Mandatory standards

2.1.1. Separation of powers and its relation to judicial independence

International law demands that there should be separation of powers in any state so that there will be a proper guarantee to the independence of the judiciary.³³ This principle means that there must be a government that is divided into three main equal branches each having its area of specialty in the performance of their constitutional powers.³⁴ These branches are executive, legislature and judiciary. The basis of separation of powers in international law is protection of basic human rights. International instruments on the protection of the international rights provide that

³³ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges. Lawyers and Prosecutors.* (guide No.1 2004) 18

³⁴ Ibid , “The principle of the separation of powers is the cornerstone of an independent and impartial justice system.”

every person has a right to a fair trial before an impartial and independent court or tribunal.³⁵ In interpreting the rights to fair trial, the International Human Rights Committee, which is a body established to oversee implementation of the International Covenant on Civil and Political Rights (ICCPR) 1966, stated that the principles of legality and the rule of law are inherent in International law.³⁶ Therefore, separation of powers is required in order to properly establish an independent Judiciary in any state. This is a principle of rule of law inherent to the International law.³⁷

As an integral part of the principle of separation of powers, the concept of Independence is twofold. There is institutional independence and individual independence.³⁸ In general, independence means that neither a Judge nor a Judiciary is subordinate to any other branches of the government.³⁹ Institutional independence means that the Judiciary is not subject to the control of any other branch of the government.⁴⁰ This means that the judiciary is an equal arm of government to the Executive and the Legislature, it is responsible for its administration. As a result, other branches of the government must not interfere and must respect the judiciary as an institution.⁴¹ For example, the Executive cannot assign judges cases as that would be tempering with the administration of the judiciary which is the responsibility assigned to the Judiciary as an institution.⁴² On the other hand,

³⁵ Universal Declaration on Human rights 1948, article 7 and 10. "For a trial to be fair, the judge or judges sitting on the case must be independent... The Human Rights Committee has repeatedly taken the view that the right to an independent and impartial tribunal is an absolute right that may suffer no exception... Even though a person's right to a fair trial may be respected in a particular case when a judge is independent, a State would be in breach of its international obligations if the judiciary were not an independent branch of power."

³⁶ Human Rights Committee, General Comment No. 29 - States of Emergency (article 4), *doc. cit.*, para 16.

³⁷ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Page 18

³⁸ *Ibid.* 17

³⁹ *Opcit.* 21.

⁴⁰ Basic Principles on the Independence of the Judiciary 1985. Principle 1

⁴¹ *Ibid.* Principle 2

⁴² *Ibid.* principle 14.

Individual Independence means that the Judge must be free from undue interference by other branches of the government when deciding a particular case before him.⁴³

In a nut shell, the independence of the Judiciary is the requirement of a right to fair trial. In order to protect this right, there must first be separate arms of government each vested with powers different from those of others. Because the principle of separation of powers provides for the establishment of separate institutions of government, it means that the judiciary is an independent institution of the government. As a result, the institutional and individual independence are provided for in terms of this principle.

2.1.2. Appointment of Judges.

International law requires that Judges must be appointed through strict and transparent procedures which are based on the personal suitability to the office of a Judge in order to guarantee the independence of the Judiciary.⁴⁴ The appointment of the Judicial officers is twofold, namely, Appointment Criteria and Appointment procedure. By Appointment Procedure, it is meant that the appointment of a Judge is made, based on the legal skill, training and the personal integrity of a person being appointed.⁴⁵ Any other factor that poses discriminatory criteria of appointment is prohibited by international law. This means that the appointment criteria need to be fair and transparent. The *UN Basic Principles* prescribes two qualities that a properly

⁴³ Ibid principle 2

⁴⁴ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*. (2004) 41.

⁴⁵ UN Basic Principles. Supra. Principle 10. " Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

conducted criteria must seek. They are, personal integrity and legal training or qualification. However, the *UN Basic Principles* exclude or prohibit any criteria that is influenced by, sex, race, religion, political affiliation and any other factors that can make an appointment criteria be discriminatory.⁴⁶ The *Universal Charter of the Judge* provides that the appointment must be done objectively based on the professional qualifications of the Judge.⁴⁷ *European Charter on the statute for judges* provides that the appointment must be based on the ability of the candidate to adjudicate any legal matter brought before him impartially and freely.⁴⁸ *The Council of Europe* recommends that, having regard to the personal integrity of a candidate, professional qualifications, the selection must be made based on the merit.⁴⁹

It is clear that the international standards of appointment of Judges requires three qualities. That personal integrity, ability to act impartially, professional qualification which is selected objectively based on the merit, and any method that provides a discriminatory criterion is forbidden.

2.1.3. Security of Tenure.

International law demands that Judges must have a security of tenure. This means that Judges must be appointed to their office for a secured period of time prescribed and guaranteed by the law, which period must come to an end at the attainment of retirement age, or at the lapse of a fixed term, or at the occurrence of an event that makes a Judge incapable to administer his duties as a Judge. The basis of this

⁴⁶ Ibid.

⁴⁷ Article 9. "the selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification"

⁴⁸ Paragraph 2.1. "...The choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity."

⁴⁹ Recommendation No. R (94) 12, doc. cit., Principle I.2.

position is that, if Judges do not enjoy a secured tenure, they are not independent from the authorities in charge of appointing them to the office.⁵⁰

The *UN Basic principles* provides for Security of tenure in two ways. The first is that a Judge must leave office at the attainment of a prescribed retirement age prescribed by law. The second is that a Judge must Leave office at the lapse of the fixed term which he was appointed in terms of as prescribed by the law.⁵¹ The *Latimer House Guidelines*⁵² puts more emphasis on the permanent appointment but provides further that in the case of temporary appointments, there should be conformity with the conditions of security of tenure. What is demanded of the appointment is that it must be made in a way that the independence of the judiciary is not endangered.⁵³ In ensuring the security of tenure, what is important is different factors such as remuneration, pensions, housing, retirement age, personal security and many other benefits and condition. All these factors must be prescribed and guaranteed by law.⁵⁴ The appointment of a Judge in international standards is not to be contractual.⁵⁵

Promotion is one vital ingredient of Security of tenure. Promotion of Judges must be done in the light of the requirements of the appointment of a judge, being,

⁵⁰ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutor*. (2004) 51.

⁵¹ Principle 12 "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists"

⁵² Guideline II.1: "Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure"

⁵³ Universal Charter of the Judge 1999. Article 8. "A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered"

⁵⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003. Principle A, paragraphs 4 (l) and (m). "Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office" and that "the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law"

⁵⁵ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995. operative paragraphs 18-20.

professional qualifications, personal integrity, merit, experience, competence and the independence.⁵⁶

2.1.4. Accountability of Judges

Although it is important that Judges and courts be given Independence so that they are not to be interfered with, international law also curbs for the risk that may be post by the very independence if the Judges were to be totally independent in a manner they could not be interfered with. So it is required that Judges be held accountable for the acts which are not expected of a judicial officers.⁵⁷ In this case international law is conversant with the fact that the Judges should be held accountable by a different institution.

As much as Judges must be held accountable by other government institution, there is still a possibility of such powers to abuse the power to hold the judicial officers accountable. Therefore, international law sets up standards with which the Judges must be held accountable for their act. The general rule which is prescribed by international law is that Judges can only be removed for serious misconducts only.⁵⁸ But there must be a proper and transparent procedure to be followed for a Judge to be removed. This means that there must be a hearing given to the Judge accused of a serious misconduct.⁵⁹ According to International Principles on the Independence

⁵⁶International Commission of Jurists. *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, supra. 54

⁵⁷ UN Basic Principles. Principle 17

⁵⁸ International Commission of Jurists. *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, supra 55

⁵⁹ UN Basic Principles. Supra. Principle 17. "A charge or complaint made against a judge in his/ her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge." : Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. supra. Principle A, paragraph 4 (q). Paragraph (r) further provides that

of the Judiciary and the Accountability of Judges, states have a duty to provide clear grounds of removal and proper or transparent procedures of removal of judges.⁶⁰

International law prescribes general guides for removal of Judges. They are, serious misconduct, and incapacity to perform judicial duties.⁶¹ On the point of misconduct, international instruments qualify it with ‘serious’. This mean that it is not every misconduct that constitutes a ground for removal.

2.2. Permissive standards

2.2.1. Financial Autonomy

International Law requires that judiciary be given adequate financial resources in order to perform its functions freely.⁶² Like other two branches of the government, a Judiciary is a co-equal branch of the government, so it must participate in the proceedings where there is a determination of adequate resources that should be allocated to the Judiciary.⁶³ There must be adequate and sustainable financing of the Judiciary. However, this standard is conditioned by the economic power of state. In a country where there are financial constraints, so much that it is impossible to allocate to the judiciary what is considered to be adequate resources, resources are to be allocated by prioritising the needs and the court system.⁶⁴ The fact that this

⁶⁰ International commission of Jurists. Supra. Page 56.

⁶¹ UN Basic Principles. Principle 18. “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”.

⁶² UN Basic Principles on the Independence of the Judiciary, *doc. cit.*, Principle 7: Council of Europe, European Charter on the statute for judges. supra paragraph 1.6: Beijing Statement of Principles of the Independence of the Judiciary *in the LAWASIA Region*, *doc. cit.* supra operative paragraph 41.

⁶³ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence. 1998, Guideline II.2.

⁶⁴ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, *doc. cit.* supra. Operative paragraph 42.

standard is conditioned by the economic power of states, that condition makes it not mandatory but permissive.

2.2.2. Appointment Procedure.

With the appointment procedure, it must be noted that it is mandatory that there are clear procedures that are followed when electing or appointing Judges. However, international law requires that there must be a body that is independent of the government that is tasked with the responsibility of appointing Judges.⁶⁵ On the other hand, international law provides that there should be transparency where the constitution provides that the appointment is the responsibility of the government.⁶⁶ That means that the standard that the appointment should be made by an organ independent of the government is not obligatory provided the transparency can still be achieved at the same degree as with the former body.

2.3 Conclusion

It is clear at this point that when a judiciary is denied either of the above, then its independence is interfered with. These are the pillars of the independence of the judiciary. In the next chapter, the study will concentrate on how independence of the judiciary if tempered with in Lesotho based on security of tenure.

⁶⁵ Council of Europe. *Recommendation No. R (94) 12, doc. cit.*, Principle I.2.c.

⁶⁶ *ibid*

CHAPTER THREE

Critical analysis on the lack of code of ethics legislation for judges in Lesotho

3.1 Introduction

This chapter is the critical analysis on the effects of lack of code of ethics for judges in Lesotho. The approach that this chapter will adopt is a comparative one. It will reflect on the following; uncertainty of what constitute a misconduct, constitutional powers vested on the Prime minister and or the President over the judiciary, composition and powers of the Judicial Service Commission in Lesotho and South Africa side by side, and then make a conclusion

3.2 Uncertainty of what constitute a misconduct

3.2.1 Lesotho jurisdiction.

When a person is appointed to the office of a judge, that person must leave office at the attainment of the prescribed age in law or at the expiry of a fixed term for which the candidate was appointed.⁶⁷ However, a judge can still be removed from office before the lapse of such time should an occasion happen whereby the judge in question is incapable to execute the functions of his office any more or for misconduct.⁶⁸ In Lesotho, a judge remains in office until he attains the age of 75 or the one prescribed by the Act of Parliament.⁶⁹ But the constitution further provides that before the attainment of the retirement age, a judge Can be removed from office

⁶⁷ The Constitution of Lesotho 1993, s 121(1) and 125 (1) "Subject to the provisions of this section, a person holding the office of Chief Justice or other judge of the High Court shall vacate that office when he attains the prescribed age."

⁶⁸ Ibid, s 121 (3) and 125(3). "The Chief Justice and any other judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be so removed except in accordance with the provisions of this section."

⁶⁹ Ibid, s 121 (8) and 125 (8). "The prescribed age for the purposes of subsection (1) is the age of seventy-five years or such other age as may be prescribed by Parliament:"

for inability to perform his or her duties and for misbehavior.⁷⁰ As for what may give rise to inability to perform functions, the constitution provides that it could be from infirmity of body or mind or any other cause⁷¹ but as for the misbehavior, The Constitution does not state which acts constitute a misbehavior and there is no legislation giving guidelines in determining what acts constitute a misbehavior.⁷²

In the case of removal of the Chief Justice and the President of Court of Appeal, the Prime Minister is the one who initiates the proceedings, and in the case of puisne judge or justice of appeal, it is the Chief Justice and President of Court of Appeal who initiates the proceedings for removal.⁷³ In the absence of the guidelines to what acts constitutes a misbehavior, the Prime Minister, the Chief Justice and the President of Court of Appeal are placed in a position of having a discretion on what constitute a misbehavior. Because of this gap, any act can be equated to a misbehavior and a judge can be removed from office for any act. And this state becomes more detriment when a politician has such a discretion. There are three cases that illustrates this peril in Lesotho. The first is the case of *President of Court of Appeal v The Prime Minister*.⁷⁴

In this case, the President of court of Appeal and the Chief Justice had attended His Majesty's birthday. As an official practice, the arrival of the high ranking government officials at any official ceremony is in accordance with their seniority. And so is their departure.⁷⁵ For the first time in Lesotho the President of Court of

⁷⁰ Ibid, s 121 (3) and 125(3)

⁷¹ Ibid.

⁷² Ibid

⁷³ Ibid, s 121(5) "If the Prime Minister or, in the case of a puisne judge, the Chief Justice represents to the King that the question of removing a judge under this section ought to be investigated, then - (a) the King shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected in accordance with the provisions of subsection (6) from among persons who hold or have held high judicial office. See also section 125 (5)"

⁷⁴ (C of A (CIV) No 62/2013) [2014] LSCA 1 (04 April 2014)

⁷⁵ Ibid.

Appeal attended King's birthday and the President was the first Mosotho to be appointed to that office. So this raised the question of who is the senior judge between the two. In the meantime, each judge believed that they are senior to one another, but the constitution does not provide who is the senior judge between the two. The Chief Justice relied on the fact that he is vested with constitutional powers which are not vested on the President of Court of Appeal. The President of the court of Appeal relied on the Fact that he presides at apex court of the land which has powers to set aside or upheld any decision from the High Court where the Chief Justice Presides, so he is the top judge.⁷⁶ This means there was no certainty as to who is the senior judge.

This uncertainty culminated in a situation where the two judges scrambled over a position after the Prime Minister in the Official convoy during the departure at His Majesty's Birthday ceremony. The said vehicles belonging to the two officials caused a scene where a standby person or people almost got hit by the vehicles. After this incidences, the Prime Minister advised the two officials to take an early retirement to which the Chief Justice complied but the President of Court of Appeal did not. The Minister of Justice then instructed the Registrar of the Court of Appeal that the official vehicles of the President be surrendered while the court was not in session. The President made an application to challenge this decision meanwhile the Prime Minister represented to the King to appoint the tribunal. The Prime Minister's grounds for triggering section 125 (5) were that the President misbehaved.

The grounds relied on against the President of Court of Appeal, included the following;

⁷⁶ Ngcobo. S et al. *The Crisis of the Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission of the International Commission of Jurists in the Kingdom of Lesotho.* (2015) Page 27 to 30

- (a) His protracted and public dispute with the former Chief Justice seriously undermined the integrity of the judiciary.
- (b) He had instructed his government-appointed driver, a sergeant in the Lesotho Defense Force, to submit a false insurance claim to cover the damages caused to the appellant's official vehicle in an accident, indicating that the sergeant was the driver at the time of the accident while in fact the vehicle was driven by the appellant's son, who had no authority to do so.
- (c) The appellant overcharged the Government for exercising his duties as President of the Court of Appeal by claiming and acquiring remuneration and travel allowances from the Government to which he was not entitled.
- (d) He simultaneously held two permanent judicial appointments: as President of the Court of Appeal of Lesotho and as the Chief Justice of Swaziland, which was incompatible with the requirements of judicial independence prescribed by the Lesotho Constitution and further rendered the appellant unable to perform his judicial functions in Lesotho properly.
- (e) He had committed serious misconduct and abused his office as Chief Justice of Swaziland as alleged in an official complaint by the Law Society of Swaziland against the appellant in July 2011. This complaint comprised eight charges of misconduct, including the sexual harassment of female employees; the abuse of financial resources of the judiciary; the subversion of judicial independence by issuing practice directives calculated to impermissibly protect the King of Swaziland against civil judgments and his refusal to recuse himself as Chairperson at the Swaziland Judicial Service Commission's disciplinary hearing into a complaint against a high court judge which he had brought himself.
- (f) He had brought the first application against the most senior officials in Government, including the Prime Minister, without first attempting to resolve

the issues in accordance with the requirements of co-operative government and he thereby rendered himself unable to sit as a judge in matters involving the Government of Lesotho.

The dispute that is alleged to have undermined the integrity of the judiciary is the dispute that was based on who is the senior judge between the President of Court of Appeal and the Chief Justice. The President of Court of Appeal argument was that he is the senior judge because he presides in the apex court of the land. The Chief Justice argument was that he is vested with constitutional powers which the President of Court of Appeal is not, therefore he is a senior judge.⁷⁷ This dispute was solely based on the law. The arguments that the two judges advanced were merely their legal opinion to which they are entitled as judges. This dispute was necessitated by the uncertainty in The Constitution as to who is the senior judge.⁷⁸ This means that there is no way a dispute based in law can undermine the integrity of the judiciary.

The International Criminal Court Code of Judicial Ethics,⁷⁹ provides that judges will conduct themselves with probity and integrity in accordance with their office. Sub article 2 provides as thus, “Judges shall not directly or indirectly accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions.” What is important to note here is that integrity of court is violated when judges engage in acts that are intended to influence their performance of judicial function. The judges’ legal opinions were not

⁷⁷ Ibid.

⁷⁸ Ibid

⁷⁹ ICC-BD/02-01-05

related in anyhow with influencing their judicial performance hence that did not constitute a misbehavior.

The second reason relied upon had allegations of fraud by the President of Court of Appeal, and fraud is a criminal offence and it constitutes a serious misconduct on the part of the judge which results in the impeachment of the judge.⁸⁰ In terms of this allegation, it was necessary to appoint a tribunal to investigate the misconduct. And so is the third ground. The ground is not based on misconduct but on inability to perform judicial functions. So it falls outside the scope of this study.

The forth ground is that the President of court of Appeal was charged with serous acts of misconduct by the Law Society of Swaziland. The Prime Minister relied on this acts at the time when they were merely allegations and were not yet investigated by either the court or a tribunal in Swaziland. This is apparent from the wording of the ground. In principle, the President of Court of Appeal remained innocent in terms of the principle of presumption of innocence, until he was found guilty through judicial process.⁸¹ So the government of Lesotho was impeaching him based on the allegations upon which he was at the time not found guilty. If the tribunal in this case was to find him guilty of misconduct at that time, the tribunal would be adjudicating over a matter that is pending before courts in another jurisdiction, to which matter the tribunal had no jurisdiction to adjudicate. Therefore, this was not a valid ground for impeachment.

In the last ground, the President was accused of filing an application against the most senior government officials without first attempting to resolve his claim in terms of corporative government requirements. This ground cannot be valid for impeachment because it basically alleges a procedural flaw which can only make the application

⁸⁰ International Commission of Jurists. *Supra*. 55

⁸¹ The Constitution of Lesotho. *Supra*, S 12 (2) (a)

invalid. it does not amount to even a misconduct. A mistake in law only affects that which was sought in applying it.⁸² So the last ground was unfounded.

The grounds alleged in this case, and the manner in which they are alleged shows that the Prime Minister can find any reason to use to impeach the Chief Justice and the President of Court of Appeal.

In the case of *Dr Kananelo Mosito v Director of Public Prosecution*,⁸³ Dr Kananelo Mosito had appealed to the Court of Appeal after he was charged with 19 counts of tax returns from 1996. Before he was charged, the newly elected Prime Minister challenged the constitutionality of Dr Mosito's appointment as President of Court of Appeal on the ground that the former Prime Minister did not seek the view of the cabinet when advising the king to appoint him. This was in the case of *Attorney General v His Majesty King Letsie III and others*.⁸⁴ The challenge was unsuccessful. After that, the Director charged Dr Mosito for tax returns hence this case. One of Dr Mosito's contentions was that he was singled out of other judicial officers who have not payed tax returns as well. So the charge by the Director of Public Prosecutions was discriminatory.

The office of Director of Public Prosecution is in the executive arm of government. So the fact that it filed the criminal charges in which case they singled out Dr Mosito brings about a doubt that this was in pursuit of the desire to remove him from office. If the court found Dr Mosito guilty as charged, then Dr Kannanelo would be guilty of a criminal offence, as a result, that would constitute a misconduct worthy of removing him from the office. However, the discriminatory charges establish that the politicians can use both section 121 (3) and 125 (3) of the constitution not to

⁸² International Commission of Jurists. Supra. 55

⁸³ (C of A (CIV) 66 of 2015) [2016] LSCA 17 (29 April 2016)

⁸⁴ (CONS/CASE/02/2015) [2015] LSCA 1 (12 June 2015)

check on the judiciary but can also abuse it by targeting a Judge of their interest. This possibility subjects the judiciary under executive control and violates its independence.

In the case of *Chief Justice Nthomeng Majara v The Prime Minister and others*,⁸⁵ the Chief Justice had refused to swear the newly appointed President of Court of Appeal on the basis that application was made to the High Court in which the appointed candidate was said to be not fit and proper and the High Court decided in favor of the applicants and the matter had been appealed and was pending in the Court of Appeal. The Minister of Justice then made speeches in public where he stated that the Chief Justice would face impeachment if she does not opt to take early retirement. This speech by the Minister came after several Ministers had confronted the Chief Justice whereby they advised her to resign as the government was no longer happy to work with her. The Minister threatened the Chief Justice with impeachment, on the basis of misconduct among other reasons. They complained that the Chief Justice “staged a verbal Spat” against the Minister of Justice, law and Constitutional affairs when the Chief Justice indicated that the Minister’s speech that requested the Law Society to intervene was very low, cheap and lacking in civility. And again, the Chief Justice was accused of leasing a puisne judge her official residential home which Director on Corruption and Economic Offence investigated and found no criminality.

In this case, it is clear that the government was not happy with the refusal to swear the President of Court of Appeal to office, which refusal was based in law and could not in any way constitute a misbehavior. However the government searches for any act they could equate to misconduct so as to have the Chief Justice removed from

⁸⁵ Founding affidavit: Nthomeng Majara

office. This case show that the executive can find any act and equate it to misconduct and then initiate proceedings for removal.

3.2.2 South African Jurisdiction

The South African Constitution has a similar but not identical provision on the removal of judges. It provides that a judge will be removed from office if the commission finds that the said judge suffers an incapacity, or is grossly incompetent, or has committed a gross misconduct.⁸⁶ The South African Constitution qualifies misconduct with the word “Gross” this connotes that in the case of a misconduct on the judge, what is required is more than just a misconduct. This was emphasised in the case of *Langa v Hlophe*, in that case, the court said that where the judge is found to have committed a gross misconduct will be removed and where it is found that the judge is guilty of a misconduct will not be removed.⁸⁷ So this raises an important question of what is a gross misconduct.

The term gross misconduct is well defined in dismissal cases in labour issues. In the case of *Bishop v Graham Group Plc*,⁸⁸ the court stated that for a conduct to justify dismissal, it must be serious and willful and obvious. The court made this statement in response to the appellant’s submission that the misconduct in issue did not constitute a gross misconduct. The court in this case relied on the case of *Clouston & Co v Corry*,⁸⁹ where it was stated that;

Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the

⁸⁶ The Constitution of Republic of South Africa 1994, s 177 (1) (a)

⁸⁷ (697/08) [2009] ZASCA 36 (31 MARCH 2009), para 23.

⁸⁸ EAT 16 Sep 1999

⁸⁹ [1906] AC 122

will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

These cases show that a gross misconduct is a grave misconduct that strikes at the root of the contract of employment. This means that the word “gross” connotes seriousness of the misconduct which the South African Constitution requires for the misconduct to justify the removal of a judge. This is consistent with what the judge said in the case of *Langa v Hlophe*,⁹⁰ that when a judge is accused of a misconduct, he will be removed from office for a serious misconduct. So the South African constitution is more specific with what constitutes a misconduct that justifies removal. It also connotes that it is not every misconduct that justifies a misconduct hence making it consistent with the requirements of international standards on the removal of judges.⁹¹

Subject to section 177, there is *Judicial Service Commission Act*.⁹² It provides the procedure which the commission follows in the determination of whether the conduct which a judge is accused of constitutes a misconduct that justifies removal. Pursuant to section 12 of the act, there is a code of ethics enacted as a standard of judicial conduct to which every judge must adhere. The code of ethics frame work is as follows, judges must act independently, must be transparent, restraint, obedience of the law, integrity of the courts, and many others.⁹³ All these requirements contained in the code attach to the service of judicial officer. This connotes that the misconduct must strike at the heart of the employment of the judge. So in South African jurisdiction there is more clarity to what constitutes a misconduct worthy to constitute impeachment.

⁹⁰ supra, para 23.

⁹¹ International Commission of Jurists. Supra. Page 55

⁹² 9 of 1994. s 14 ton17

⁹³ Code of Judicial Conduct. No. R. 865 2012

3.3 Too much power on the Prime Minister.

3.3.1 Lesotho Jurisdiction

The procedure for the removal of the President of Court of Appeal and the Chief Justice vests too much power on the Prime Minister that it renders the judiciary not independent. The procedure for removing the two top Judges is a three stages procedure in which all of them involve action by the Prime Minister.

The first stage is provided for under sections 121 (5) and 125 (5).⁹⁴ It is provided that if the Prime Minister represents to the king that the question of removing Chief Justice or the President of Court of Appeal ought to be investigated, the King shall appoint a tribunal which shall consists of not less than three members. This provision is couched in mandatory terms. Meaning that the king does not have a discretion to appoint or to not. Once a representation is made by the Prime Minister is made, then he is bound to act in accordance with such representation.⁹⁵ This makes the Kings power merely of procedural significance for compliance and does not limit the powers of the Prime Minister in terms of this sections. The above sections provide further that the tribunal shall be comprised of members selected in accordance with subsection (6) respectively. Subsection (6) provides that the tribunal shall be selected by the Prime Minister.⁹⁶ this means that the composition of the tribunal is the choice of the prime minister.

The second stage is provided for under section 121 (7) and 125 (7).⁹⁷ It is provided that when the question of removing either the President of Court of Appeal or the Chief Justice has been referred to the tribunal, the king may suspend the candidate whose question of removal is before the tribunal. The king in this exercise of power

⁹⁴ The Constitution of Lesotho. supra.

⁹⁵ President of Court of Appeal v The Prime Minister and Others. Supra. Para. 16

⁹⁶ The Constitution of Lesotho. supra.

⁹⁷ ibid

acts on the advice of the Prime Minister. the last stage is in subsection (4).⁹⁸ In terms of this provision, either the President of the Court of Appeal or the Chief Justice will be removed from the office when the tribunal has advised the king to remove them.⁹⁹ Even in this last two stages, the king acts in accordance with the advice and does not have a discretion.¹⁰⁰ In the last stage, the Prime Minister is still involved in that the tribunal that advises the king is the selection of the Prime Minister. So the constitution has centralized the power of removal of the two top judges in Lesotho on the Prime Minister.

On the question of removal of puisne judges in and Justices of Appeal Court, the procedure for removal is the same. The difference is that the king acts on the advice of the Chief Justice and the President of Court of Appeal.¹⁰¹ It is important to note that Chief Justice and the President of Court of Appeal are appointed by the Prime Minister,¹⁰² and as such the Prime Minister can still have control over the appointment and removal of all High Court and Court of Appeal judges due to the extent of control that the Prime Minister has on them as shown above.

The composition of Judicial Service Commission is important to illustrate how the Prime Minister still retain some degree of control on the Judiciary even at magistrate courts and local courts level. The Judicial Service Commission is vested with the power of appointment and removal on the offices of the Registrar both of High Court and Court of Appeal, the magistrates and the local courts.¹⁰³ The Judicial Service commission is composed of the Chairman, and that is the Chief Justice.¹⁰⁴ The office of the Chief Justice is occupied by a candidate appointed by the King acting on the

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ *President of Court of Appeal v The Prime Minister and Others*. *Supra*. Para. 16

¹⁰¹ The Constitution of Lesotho. *Supra*. s 121 (4) and 125 (4)

¹⁰² *ibid*. s 120 (1) and 124 (1)

¹⁰³ *ibid*. s 133 (1) (2)

¹⁰⁴ *ibid*. s 132 (1) (a)

advice of Prime Minister.¹⁰⁵ The second personnel is Attorney General.¹⁰⁶ The office of Attorney General is an office in the executive arm of government.¹⁰⁷ The third is the Chairman of Public Service Commission.¹⁰⁸ The Chairman of Public Service Commission is appointed by the King acting on the advice of the Judicial Service Commission,¹⁰⁹ the commission which at least 50% of its Members are appointed by the King acting On the Advice of the Prime Minister. And the last personnel is any person who holds or have held a high Judicial office. High judicial offices are actually offices of Judges both at High court and Court of Appeal. And these are the Prime Ministers appointees or the chief Justice's or the President of Court of Appeal.

This link shows how much the Prime Minister is involved even in Judicial Service Commission, where the Constitution does not expressly grant him control or power. This link shows, again that, if the Prime Minister has that degree of control in the Judicial Service Commission, then functions of this Commission can still be subjected under his interests over those offices on which the Commission has power. At this stage, it is apparent that the whole Judiciary is under the control of the politicians or the Prime Minister due to the manner in which the constitution vests power on the Prime Minister.

3.3.2 South African Jurisdiction.

In South Africa, the power of removal is three staged process like in Lesotho. But the exercise of power in all those stages in not vested on the same repository of power. Each stage involves a different institution to exercise power.

¹⁰⁵ Ibid, s 120 (1)

¹⁰⁶ Ibid, s 132 (1) (b)

¹⁰⁷ Ibid, s 98 (1)

¹⁰⁸ Ibid, s 132 (1) (c)

¹⁰⁹ Ibid, 136 (1)

The first stage is under section 177 (1) (a)¹¹⁰ of The South African Constitution. it provides that a judge will be removed from office if the Judicial Service Commission finds that the judge suffers an incapacity, or is grossly incompetent or has committed a gross misconduct. This first stage is twofold. The first requirement is the determination by the commission on whether the complaint lodged is impeachable. Here the Commission receives a complaint from anyone,¹¹¹ and it makes an examination whether the grounds advanced in the complaint constitute a *prema facie* grounds for removal.¹¹² The complaint is regarded impeachable if it falls squarely within the confines of section 14 (4).¹¹³ the complaint must not be vexatious and must also not be hypothetical.¹¹⁴ If it satisfies the commission that there is a *prema facie* cause, then the commission will encourage the appointment of the tribunal to investigate the question of removal.¹¹⁵

The appointment of the tribunal triggers the second requirement of the first stage. The tribunal is appointed by the Chief Justice consisting of two judges one designated by the Chief Justice as the chairperson of the tribunal and one non judicial member whose name appears in the list established by the Executive secretary and approved by the Chief Justice with the concurrence with the Minister.¹¹⁶ at this stage, the judge whose question of removal is being investigate is allowed to plead, to call witnesses and to cross examine witnesses.¹¹⁷ When the tribunal process has ended and evidence been led, the commission then considers evidence and the arguments

¹¹⁰ The constitution of the Republic of South Africa. Supra.

¹¹¹ Judicial Service Commission. Supra. Section 14 (1)

¹¹² Ibid, s 14 (4) read with section 15 (2)

¹¹³ Ibid.

¹¹⁴ Ibid, s 15 (2)

¹¹⁵ Ibid, s 16 (1)

¹¹⁶ Ibid, s 21 (1) to (3)

¹¹⁷ Ibid, s 28 and 29

advanced and makes a finding whether the judge in question suffers incapacity, or is grossly incompetent, or guilty of a gross misconduct.¹¹⁸

At this first stage, the President or the Executive arm of government is limited to only concurrence with the approval of list of non-judicial members of the tribunal¹¹⁹ and to the extent that the lodging of the complaint can be made by anyone.¹²⁰ But as to the determination of the matter, the executive does not feature as it does not have such control in the constitution of the formation of the tribunal and the Commission. The commission's fact finding power is an administrative function and by that virtue, it is subjected to judicial review if it is believed that the commission has arrived at an unsound decision during the fact finding process.¹²¹ Its decision must receive the majority voting by the majority of the members composing the commission and not the ones present at the sitting.¹²²

The second stage is that the national assembly must adopt a resolution with the voting at least two thirds majority of the national assembly.¹²³ At this stage the national assembly has power to sanction the Judicial Service Commission decision calling the judge in question to be removed or to adopt the resolution calling for the removal as the resolution calling the removal has to be supported by the two thirds majority.¹²⁴ Meaning if it receives less than that the candidate in question cannot be removed. The last stage is that the President must remove the judge in question upon the adoption of the resolution calling the judge to be removed from office.¹²⁵ The president does not have a discretion due to the manner the constitution vests this

¹¹⁸ Ibid, s 33.

¹¹⁹ Ibid, s 21 (2)

¹²⁰ Ibid, s 14

¹²¹ *Ex Parte President of the Republic of South Africa* 2000 (2) SA 674

¹²² *Judicial Service Commission v Premier of Western Cape*. (537/10) [2011] ZASCA (31 March 2011)

¹²³ The Constitution of the Republic of South Africa. *Supra*. Section 177 (1) (b)

¹²⁴ *ibid*

¹²⁵ *Ibid*. section 177(2)

power on him. The constitution uses the word “must”. This power is put in mandatory terms. This means that upon the adoption of the resolution, the President does not have any other option but to remove the judge. His power is again dependent on the adoption of a resolution. Meaning if it is not adopted, he cannot act.

It is clear that the executive does not play main functions in the removal proceedings because, the Constitution and the Judicial Service Commission Act vest the power of determination on the commission which is composed of different members from different institutions who don't pursue the same administrative interests.¹²⁶ The President's power also is merely of procedural significance and is bound to perform it irrespective of his opinion. One last important point to make here is that the power of removal of judge in South Africa is decentralized to different institutions or personnel over which the executive does not have control.

3.4 Conclusion

In Lesotho, unlike in South Africa, there is no certainty as to what constitutes a misconduct, and the constitution gives the Prime Minister too much power that in the absence of the certainty to what constitute a misconduct, the whole judiciary can be subjected under an arbitrary control by the executive. So there is a need for code of ethics legislation for judges to come and neutralise this excessive power that the Prime Minister has.

¹²⁶ Ibid, s 178 (1)

CHAPTER 4

Recommendations

4.1 Introduction

In the previous chapter, it has been apparent that there is no certainty on what constitute a misconduct or misbehavior in terms of which a judge can be impeached and that there is too much power vested on the Prime Minister, which powers become a problem when it is not certain what acts constitute misconduct. as result, there is a need for a legislation that can bring about certainty and also that can neutralise the excessive powers that the Prime Minister has over the judiciary. So this chapter is going to suggest how that legislation needs to be framed so that there is certainty to what constitute a misconduct and neutralise the powers of the Prime Minister.

4.2 How to bring about certainty of a misconduct or misbehavior.

The piece of legislation that is necessary to bring about certainty to what constitute misbehavior is not merely a code of conduct for judges. But it is a legislation that shall embody ethics of good conduct for judges and define the nature of misbehavior that is envisaged by section 121 (3) and section 125 (3) of The Constitution.¹²⁷ this is because the meaning of misbehavior must be defined in a manner that there is distinction between a misbehavior that is worthy for removal and that is not.

¹²⁷ The Constitution of Lesotho. Supra.

International law standards demand clarity in laws of states that deal with appointments and removal of judges.¹²⁸

4.2.1 Misbehavior.

International law requires that states should enact laws that clearly stipulates the grounds for removal for judges.¹²⁹ It is stated in international law that judges shall be impeached for serious misconducts and disciplinary or criminal violations.¹³⁰ In terms of international law, any ground complained of must be a serious violation not a bona fide violation. With this, the law has minimized the grounds for removal. This is apparent in South Africa. *The Constitution of the Republic of South Africa* stipulates that a judge is removable for only gross misconducts.¹³¹ If a judge is found guilty of just a misconduct, he is not to be removed from office.¹³² This is exactly why Lesotho needs a legislation that shall state, pursuant to section 121 (3) and 125 (3) of *The Constitution of Lesotho*, a judge shall only be removed from office for serious violations of the law, serious misbehavior and criminal misconducts. However, in the light that it is the discretion of Prime Minister to determine what constitutes a misbehavior, it is not enough to give clarity of what is a misconduct. But there must also be a body that is tasked with a responsibility to investigate the availability of a *prema facie* case.

¹²⁸ UN Basic Principles. Supra. Principle 19: Council of Europe's recommendation. Supra: *Recommendation No. R (94) 12, doc. cit.*, Principle VI.2.

¹²⁹ *Ibid.* " Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules."

¹³⁰ *ibid*

¹³¹ 1994, s 177

¹³² *Langa v Hlophe*. Supra.

4.2.2 Pre-tribunal Determination.

International law requires that the removal of a judge must occur after a fair procedure has been conducted.¹³³ The Council of Europe's Recommendations provides that there should be established a body that deals with the determination of grounds for removing a judge, which its decisions are controlled by the superior judicial organ should be the judicial organ itself.¹³⁴ This is apparent in South Africa. The Judicial Service Commission of South Africa handles and deals with disciplinary proceedings for all judges.¹³⁵ A judge will be removed if found guilty of a gross misconduct by the Judicial Service Commission.¹³⁶ The power of determination is in the hands of the Commission which is the judicial organ in South Africa. This body also has power to determine if there is a *prema facie* case for removal once it received a complaint.¹³⁷ If it finds that there is no *prema facie* case, the complaint can be dismissed at that stage, even before a tribunal proceedings.¹³⁸ It is this aspect of removal proceedings that is important to establish in Lesotho.

There needs to be a setting in which a body under the control of Judicial Service commission, that sits and determines whether the complaint launched before it constitute a *prema facie* case for removing a judge in question, before the Prime Minister can advise the king. And if it finds that there is no *prema facie* case, it should then be given power to dismiss the complaint. But if it finds that there is a case, it should then advise the Prime Minister as such so that he can advise the king to appoint a tribunal. Anyone should be given a *locus standi* to present a complaint before the body. This has the ability to neutralise the powers the Prime Minister has

¹³³ International Commission of Jurists. *Supra*. 55

¹³⁴ *Council of Europe's Recommendations*. Recommendation No. R (94) 12, *doc. cit.*, Principle VI.3.

¹³⁵ The Constitution of the Republic of South Africa. *supra*, s 177 (1).

¹³⁶ *Ibid*.

¹³⁷ Judicial Service commission. *Supra*, s 14: *Langa v Hlophe*.

¹³⁸ *ibid*

on the judicature in that it takes away the discretion that the Prime Minister has on what constitute a misconduct. it also provides for a fair procedure for removal as it makes the judiciary part of removal proceedings as it involves the Judicial Service commission as a Judicial organ. It also requires an amendment to The Constitution of Lesotho to expand the powers of the Judicial Service Commission to this extend so that if the commission is to function in accordance with the proposed manner above, it should do so not in contravention of the constitution.

4.3 Code of Good Conduct

There is a need for code of conduct because accountability of judicial officers is twofold. The first is accountability for crimes that judges may commit in their private life and accountability for the discharge of professional duties.¹³⁹ The last accountability is one that is governed by the code of ethics. In south Africa, the *Judicial Service Commission Act* provides that a serious breach of code of conduct constitute a valid ground for removal of a judge.¹⁴⁰

A legislation that this study is proposing must also include values of good conduct so that there is clarity on what is a misconduct both on accountability for acts committed privately and those that attach to the discharge of judicial functions of a judge. And the legislation should be clear that it is a serious and intentional violation of the code of good conduct that will amount to a valid ground for removal.

¹³⁹ International Commission of Jurists. Supra. 55

¹⁴⁰ Supra. s 14 (4) (b)

Bibliography

Parks G T, *Flee the Noble One: An historic and contemporary look at two great democracies and their struggles to maintain a separation of powers*, christuniveisity.academia.edu/... (last visited on loth May 2012)

Edgar Bodenheimer, *Jurisprudence - The Philosophy end Method of law*, Harvard University Press. (1962)

Montesquieu C. *The Spirit of law. 'Vile Constitutionalism and the separation of powers'* (1750). Thomas Nugent.

Vile M CJ, *Constitutionalism and Separation of Powers*, (19672nd Edn Indianpolice. Liberty Fund, Online Library of Liberty accessed on 21“ June 2010.)

Articles

Holcombe R, 'Checks and Balances: Enforcing Constitutional Constraints.' [2018]

Mojapelo P, 'The doctrine of separation of powers: a South African perspective' [2013]

'Nyane H, 'Commentary on the case of The President of Court of Appeal v The Prime Minister.' [2015] Vol 24. No 1. Lesotho Law Journal

Lunga Khaya Siyo L. at al. 'The independence of South African judges: A constitutional and legislative perspective' [2016] Vol 18 Potchefstroom Electronic Law Journal

Sultana T, Montesquieu's 'Doctrine of Separation of Powers: A Case Study of Pakistan' [2012]

Cases

Attorney General v His Majesty the King C of A (CIV) 13/ 2015

Bishop v Graham Group Plc EAT 16 Sep 1999

Clouston & Co v Corry, [1906] AC 122

Chief Justice Nthomeng Majara v The Prime Minister and others. CIV/ APP/ 13/ 2018

Dr Kananelo Mosito v Director of Public Prosecution, (C of A (CIV) 66 of 2015) [2016] LSCA

17 (29 April 2016)

Ex Parte President of the Republic of South Africa 2000 (2) SA 674

Judicial Service Commission v Premier of Western Cape. (537/10) [2011] ZASCA (31 March 2011)

Langa v Hlophe (697/08) [2009] ZASCA 36 (31 MARCH 2009)

President of the Republic of South Africa v SARFU 1997 (4) SA 1 (CC)

R v Home Secretary, Ex p Fine Brigades Union [1995] 2 @ 513

The President of Court of Appeal v The Prime Minister and Others C of A (CIV) No 62/2013

Valente v The Queen [1985] 2 S.C.R. 673

International instruments

Basic Principles on the Independence of the Judiciary 1985

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995

Council of Europe. Recommendation No. R (94) 12, doc. cit., Principle I.2.c

European Charter on the statute for judges 1998

Latimer House Guidelines 2004

Human Rights Committee, General Comment No. 29 - States of Emergency

International Commission of Jurists. International Principles on the Independence and

Accountability of Judges, Lawyers and Prosecutors. No.1, 2007

International Criminal Court Code of Judicial Ethics ICC-BD/02-01-05

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. 2003

Universal Charter of the Judge. 1997

Universal Declaration on Human rights. 1948

Reports

Malila. M, Judges' *Symposium on Judicial Independence, Impartiality and Accountability*. 'The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples Rights.' 2010

Ngcobo. S et al. *The Crisis of the Judicial Leadership in the Kingdom of Lesotho Report of the High-Level Mission of the International Commission of Jurists in the Kingdom of Lesotho*. 2015

Ellett L R, *Politics of Judicial Independence in Lesotho*.

Statutes

Judicial Service Commission Act 9 of 1994

The Constitution of Lesotho 1993

The Constitution of Republic of South Africa. 1994.

Websites

Aman. advocate, www.legalserviceindia.com/article/16-separation-of-powers.html