

# **A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa**

*By Dane Ally\**

*This contribution consists of a comparative analysis of the doctrine of judicial independence – more particularly, the principle of individual judicial independence – in the legal systems of Kenya and in South Africa. It is common knowledge that judicial independence consists of two interlinked components: the first element serves to protect the individual independence of judges; and the second seeks to enhance the institutional independence of the courts. The first element is concerned with the requirement that judges should decide cases independently and impartially by application of the law. The second component refers to the independence of the judiciary from the other branches of government. In other words, the notion of the individual independence of the judiciary serves to protect the rights of judges in regard to, inter alia, their removal from office. This contribution is focused on the constitutional mechanisms adopted in the relevant jurisdictions to remove judges from office.*

**Keywords:** *judicial independence, individual judicial independence, removal from office*

## **Introduction**

This contribution raises the following question: What safeguards are in place to ensure that judges may execute their duties without fear of being removed from office, especially when they deliver judgments that may displease the governing party? In this article, I attempt to answer this question in the African context, by exploring the constitutional mechanisms that are in place to avoid the unwarranted removal of judges in the Republic of Kenya (“Kenya”) and in the Republic of South Africa (“South Africa”).

This piece consists of a comparative analysis of the doctrine of judicial independence— more particularly, the principle of individual judicial independence – in the legal systems of Kenya and South Africa. The first element serves to protect the personal or individual independence of judges; and the second component seeks to enhance the institutional independence of the courts. It is common knowledge that judicial independence consists of two interlinked and equally important components: The first element is concerned with the requirement that judges should decide cases independently and impartially by application of the law. This entails that judges should decide

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\* Associate Professor, Department of Law, Tshwane University of Technology, Pretoria West, South Africa.

matters without any dishonest or improper influences, inducements, pressures, threats, or interferences, whether directly or indirectly, from any person or organ of state.<sup>1</sup> This independence not only refers to outside interferences, but also internal influences from other judges.<sup>2</sup> This aspect of judicial independence received much attention from the South African press and academics, when a Judge President of the High Court of South Africa was accused of having allegedly attempted to unduly influence two Constitutional Court judges in a matter before them, which matter involved the current President of the Republic of South Africa.<sup>3</sup>

Institutional independence of the judiciary (the second component) refers to the independence of the judiciary (as a branch of government) from the other branches of government.<sup>4</sup> This component of judicial independence ensures that the necessary structures and guarantees are in place to safeguard the integrity of the courts, on the one hand; and to advance the protection of judges as an institution of a democratic government, on the other hand.<sup>5</sup> However, the principles of personal and institutional judicial independence do not mean that judges should be unconditionally immune from disciplinary action. Judges are not above the law. If judges act – whether positively or by omission – contrary to the law or a code of conduct, such conduct should be subjected to legal scrutiny and, if found guilty during a fair inquiry, may be held accountable by the imposition of an appropriate legal sanction. The notion of the individual independence of the judiciary include the protection of the rights of judges in regard to their appointment procedure, security of tenure, and the mechanism employed to investigate and to sanction judges who allegedly contravened the relevant codes of conduct.<sup>6</sup> This paper is focused on the constitutional mechanisms adopted in the relevant jurisdictions to remove judges from office.

As the title of this contribution suggests, its focus is placed on the constitutional frameworks that were adopted to ensure that the removal of judges complies with the notion of basic fairness. In this regard, the Human Rights Committee has observed that:<sup>7</sup>

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<sup>1</sup> Principle 2, UN Basic Principles (1985) p. 59; see also Article 160(1) of the Constitution of Kenya, 2010 ('the Constitution of Kenya'); and section 165 of the Constitution of the Republic of South Africa, 1996 ('the Constitution of South Africa').

<sup>2</sup> Report of the International Bar Association (July 2008) p. 20.

<sup>3</sup> See *Langa v Hlope* 2009 4 SA 382 (SCA), ('Langa'); and *The Judicial Service Commission v Premier, Western Cape* (537/10) [2011] ZASCA 53 (31 March 2011) ('JSC decision').

<sup>4</sup> Paper presented by Justice Ojwang (2008) p. 10.

<sup>5</sup> Russell (2005) p. 538; Justice Cachalia (2010).

<sup>6</sup> See *Langa* decision; also Rautenbach & Malherbe (2008) p. 236.

<sup>7</sup> General Comment 32 (2007) par 19; see also Principle 19 of the UN Basic Principles - which dictates that such proceedings shall be 'determined in accordance with established standards of judicial conduct'. For a historic overview on the adoption of the Basic Principles, see Strydom, Pretorius & Klinck (1997) p 13. See also Articles 7 and 26 of the African Charter on Human and Peoples' Rights ('African Charter'). See furthermore *Constitutional Court v Peru*, Merits, Reparations and Costs, 31 January 2001 at par 73, Inter-Am. Ct. HR, Series C No 71 and *Apitz-Barbera et al ("First Court of Administrative Disputes") v Venezuela*, Merits, Reparations and Costs, 5 August 2008 par. 55, where the removal of a number of judges were held to infringe the standard mentioned in the text quoted above.

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making *through the constitution* or adoption of laws *establishing clear procedures and objective criteria for the ... suspension and dismissal* of the members of the judiciary and disciplinary sanctions taken against them (emphasis added).

From this point of view, the dismissal of judges must therefore be entrenched in a constitution which sets out clear procedures and objective criteria for the removal of judges. In addition to this guideline of the Human Rights Committee, human rights instruments at both the universal<sup>1</sup> and regional<sup>2</sup> levels recognise the principle of judicial independence. In the same vein, international declarations have acknowledged its importance in open and democratic societies as a means to prevent the abuse of power.<sup>3</sup> It is against this background that this contribution asks whether the constitutions in the relevant jurisdictions comply with the directive of the Human Rights Committee, mentioned in the quotation above. Although the constitutional means adopted to protect judges facing removal is the focal point of this chapter, it also briefly refers to national legislation which has been enacted to achieve this goal.

In order to facilitate the transformation of the judiciary,<sup>4</sup> the Constitution of Kenya also provides for the creation of a framework of vetting of judges and magistrates who occupied their positions before the advent of the current Constitution. If judges and magistrates were to continue occupying their positions, they had to submit to a vetting exercise, or tender their resignations. The motivation for this “limitation” of the notion of judicial independence – more particularly within the context of security of tenure – can be traced to the events that preceded the adoption of the current Constitution. Before the 2010 Constitution was adopted, the integrity of the judiciary was, in the eyes of the average citizen, tarnished by corruption and incompetence.<sup>5</sup> What is

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<sup>1</sup> See for example Article 14 of the International Covenant on Civil and Political Rights– in Patel & Watters (1994) p 21-30 for the contents of this instrument.

<sup>2</sup> For example, Article 26 of the African Charter.

<sup>3</sup> See the Latimer House Principles (2003); also the African Commission on Human and Peoples’ Rights (‘African Commission’) ‘Resolution on the Respect for and Strengthening of the Independence of the Judiciary,’ (1996).

<sup>4</sup> In the South African context, see the discussion paper entitled ‘Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State,’(2012). This transformation project is based on item 16(6) of Schedule 6 to the Constitution, which reads as follows: ‘(a) As soon as is practical after the new Constitution took effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution. (b) The cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a)’.

<sup>5</sup> See the comments by Mutunga (2011) p. 11, where he wrote: ‘We have found a judiciary so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.’ See also Gathii (2004) p 12-14, where the author mentions that there have been

troublesome about this particular vetting framework – which could result in the removal of judges – is the fact that the review jurisdiction of the courts has been ousted by national legislation.<sup>1</sup> However, this aspect of the removal of judges is not explored in this paper.<sup>2</sup>

This article consists of this introduction, followed by a short discussion of the reasons why I settled on embarking on a comparative analysis of the two jurisdictions, in part two. Thereafter, the legal position in Kenya is discussed in part three. Part four explores the South African legal position, which is followed by a short conclusion in part five.

### Justifying the Kenya-South Africa Comparative Analysis

South African scholars<sup>3</sup> and courts<sup>4</sup> ordinarily undertake comparative analyses of the provisions of the South African Constitution with the legal systems of well established democratic societies like the United States, the United Kingdom, Canada, Germany and Australia. Such an approach is appropriate, since the provisions of the Constitution of South Africa suggest that a comparative approach may be adopted when interpreting the provisions of the Bill of Rights, contained in chapter two of the Constitution of South

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instances when judges have been forced to resign during 1987 and 1988. In 1986 two judges took early retirement in the absence of convincing reasons. In 1988 the UN Special Rapporteur on the Independence of Judges and Lawyers (1998) made the following comments on Kenya's judiciary: 'the President of Kenya made "presidential comments" publicly predicting the outcome of pending cases. Pursuant to one such comment, former Chief Justice Hancox reportedly issued a circular to all magistrates ordering them to follow the President's directive.' See further Akech (2010) p. 29, where he summarises the position in the following terms: 'In the case of the judiciary, the failure to regulate the president's and the chief justice's powers of appointment and dismissal, as well as the administrative powers of the latter, often aided human rights violations and economic crimes and undermined the legitimacy of the judiciary as a forum for dispute resolution ... The system of appointing judges has been open to abuse since it establishes no standards or criteria for vetting candidates ... Accordingly, the individuals who become judicial officers are not necessarily the most deserving. Arguably, such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority.'

<sup>1</sup> See clause 23, Sixth Schedule of the Constitution of Kenya; also Akech (2010) p 31. Compare Article 7(1)(a) of the African Charter, in Heyns & Killander (2010) p. 31, which dictates that 'Every individual shall have the right to have his cause heard. This comprises (a) [t]he right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation, and customs in force.' The African Commission has, in a number of cases expressed their disapproval where the review jurisdiction of the courts has been ousted. See for example, *Civil Liberties Organisation v Nigeria* (2001) AHRLR 75 (ACHPR 2001) and *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

<sup>2</sup> For a discussion of this issue, see the case of *Mon'gare v Attorney-General & 3 Others* [2011] EKLK, where the High Court held that the *Vetting of Judges and Magistrates Act, 2011* is constitutional. See also Akech (2010).

<sup>3</sup> See, for example, Badenhorst (2010) p. 646-672; Naude (2009) p. 506.

<sup>4</sup> See for example the influential cases of *Ferreira v Levine* 1996 2 SA 621 (CC); *S v Makwanyane* 1995 3 SA 391 (CC); *Pillay v S* 2004 2 BCLR 158 (SCA), to mention but a few.

Africa. In terms of the relevant provisions of the Constitution of South Africa the courts may “consider” foreign law jurisdictions when expounding its provisions.<sup>1</sup> I follow the latter directive of the Constitution of South Africa, but I prefer to undertake such an analysis within the African context.

My reasons for employing a comparative analysis between the legal systems of Kenya and South Africa are the following. The legal systems of both countries are firmly rooted in the British common law;<sup>2</sup> both Kenya and South Africa can be labelled as developing countries; the population of both countries consists of diversified ethnic groups;<sup>3</sup> both countries have recently adopted transformative constitutions with a justiciable Bill of Rights, designed to promote the protection of fundamental human rights, as well as the advancement of socio-economic rights and the rule of law;<sup>4</sup> the constitutions of both countries encourage a comparative analysis with foreign law instruments when interpreting the provisions of the relevant constitutions;<sup>5</sup> and both countries are signatories to the African Charter. More importantly – unlike the position in the United States and the United Kingdom<sup>6</sup> – the constitutions of Kenya and South Africa make provision for the establishment of an independent body, which has exclusive authority to initiate the process of the removal of judges.<sup>7</sup>

Having explained the reasons why I have adopted this comparative analysis, it is apposite to proceed with my discussion of the constitutional framework for the removal of members of the judiciary in Kenya.

## Kenya

This part of the contribution starts off with a discussion of the threshold requirement (or objective criteria) for the removal of judges. The three stages or phases that must be followed to remove judges from judicial office are discussed thereafter.

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<sup>1</sup> See section 39(1)(c) of the Constitution of South Africa.

<sup>2</sup> See M Meredith (2006) p 92, quoting the erstwhile President of Kenya, Kenyatta, as having expressed his view in this regard as follows: ‘We do not forget the assistance and guidance we have received through the years from people of British stock ... Our law, our system of government and many other aspects of our daily lives are founded on British principles and justice.’ In the South African context, see Zeffertt & Paizes (2007) p 10-12.

<sup>3</sup> See Akech (2010) p. 12. In the South African context, see Meredith note 20 above at 121.

<sup>4</sup> See the overall structure of both Constitutions.

<sup>5</sup> See the reported decision of *Baraza v Judicial Service Commission* [2012] eKLR (‘*Baraza* decision’) par 62, where this principle is explained as follows: ‘Decisions from foreign jurisdictions with similar Constitutions are useful in helping in the interpretation of the Constitution.’ See also section 39(1)(c) in the South African context, which provides that, when interpreting the Bill of Rights, courts ‘may consider foreign law’.

<sup>6</sup> See the *JSC* decision at par. 17.

<sup>7</sup> See Article 171 of the Constitution of Kenya; see also section 179 of the Constitution of South Africa.

*The Threshold Requirement (objective criteria) for Removal*

The importance of this requirement, in the overall removal framework, should not be misjudged. A failure to meet the terms of this requirement entails that an investigation is not aimed at achieving the goals it was designed to accomplish. More importantly, such an investigation may be construed as impermissible external pressure, designed to erode the principle of judicial independence.<sup>1</sup> The legal framework for the removal of judges is contained in Article 168 of the Constitution of Kenya. The grounds for the removal of a judge are identified in sub-clause (1). This provision reads as follows:

- (1) Any judge of a Superior Court may be removed from office on the grounds of –
- (a) Inability to perform the functions of office arising from *mental or physical incapacity*;
  - (b) A breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
  - (c) Bankruptcy;
  - (d) Incompetence; or
  - (e) *Gross misconduct* or misbehaviour (my emphasis).

It must be mentioned at the outset that these are the only grounds upon which a judge may be removed from office in Kenya.<sup>2</sup> A judge of the ‘Superior Court’ refers to any judge sitting as judge in the Supreme Court, the Court of Appeal, the High Court,<sup>3</sup> the Labour Court, and courts established with the same status as the High Court to determine disputes relating to the environment, and the use and occupation of land.<sup>4</sup>

Sub-clause (a) must be read together with section 13 of the Judicial Service Act.<sup>5</sup> The latter provision dictates that when it appears to the Chief Justice that a judge is incapable of performing his or her duties due to a mental or physical condition, the Chief Justice may set the procedure for the removal of judge in motion. The Chief Justice may call upon the affected judge to submit him or herself to a medical board. The board must thereupon appoint a medical practitioner who must verify whether or not the affected judge is incapable of performing his or her duties as suspected by the Chief Justice. The Commission may, after having considered all the evidence, decide whether the judge should retire because of ill health.

Whether the conduct of a judge can be typified as ‘gross misconduct’ or ‘gross misbehaviour’ cannot be assessed in an abstract manner. It would depend on the facts of the complaint. It was held, *obiter* it must be added,<sup>6</sup> in

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<sup>1</sup> *Campbell and Fell v UK* 28 June 1984 par 80 7 EHRR 165.

<sup>2</sup> See the *Baraza* decision par. 68.

<sup>3</sup> Section 162 of the Constitution of Kenya.

<sup>4</sup> *Ibid* section 162(2).

<sup>5</sup> More particularly Part III, clause 13 of the Act.

<sup>6</sup> This issue was not fully canvassed before the court. This remark was therefore made in passing by the judge.

the *Baraza* judgment<sup>1</sup> that a conviction of a judge on a criminal offence may be regarded as a ground for his or her removal if the conviction could be construed as one of the grounds for removal. In the *Baraza* case, for example, the facts leading to the initiation of the removal process was in brief the following: The senior female judge visited a busy market in the company of her bodyguard, where a female security guard allegedly wanted the judge to submit to a security check. An altercation ensued between the judge and the security guard, and the judge allegedly instructed her bodyguard to shoot the female security guard. The bodyguard did not obey this command. The judge went outside and returned after a short while, armed with a gun. The gun was allegedly pointed at the security guard in a threatening manner. This alleged conduct of the judge clearly infringed at least the right to human dignity and the right to freedom and security of the person of the security guard. In the light hereof, it appears as if conduct which tends to undermine the fundamental values that the Constitution seeks to uphold,<sup>2</sup> could be construed as sufficiently serious to justify an investigation of a judge, who should be the custodian of the Constitution.

The procedure for the removal of a judge is divided into three stages or phases. The first phase is discussed below.

#### *The First Phase*

The first phase of the process is contained in Articles 168(2) to (4) of the Constitution of Kenya. This provision reads as follows:

- (2) The removal of a judge may be *initiated only* by the Judicial Services Commission acting on *its own motion* or on the *petition of any person* to the Judicial Service Commission.
- (3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.
- (4) The Judicial Service Commission shall *consider the petition* and, if it is *satisfied* that the petition *discloses a ground for removal* under clause (1), send the petition to the President.

In my view, the phrase 'initiated only', used in sub-clause 2 is indicative of the fact that the initial phase relating to the removal of a judge is in the exclusive domain of the Judicial Services Commission ('the JSCK' or 'the Commission of Kenya'). More importantly, it suggests that any attempt at removing a judge from office may not be instigated by any arm of government. In other words, the process may not be activated by the office of the

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<sup>1</sup> See *Baraza* decision par. 110.

<sup>2</sup> In my view, the protection of human dignity is one such value. The *Baraza* court par 62, reasoned that one of the principles that should be borne in mind when courts interpret the Constitution is that "fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity".

Presidency, the Attorney-General, the Speaker of Parliament, or even the Chief Justice (unassisted by members of the Commission of Kenya) in his capacity as head of the judicial arm of government.<sup>1</sup> In this manner, this provision seeks to advance the notion of the independence of the judiciary. However, this does not mean that the Chief Justice does not participate in the initial process whatsoever; quite the opposite, he or she may, as member of the Commission of Kenya, voice his or her opinion on this important issue. Even so, it is the opinion of the JSCK (and not that of the Chief Justice) that determines whether the matter ought to proceed to the next phase.

The relevant provision also makes plain that the Commission of Kenya may start the process by acting in response to a petition lodged by ‘any person’ or it may examine the conduct of a judge of its own accord. When the Commission of Kenya launches an investigation on its own, it has the authority to conduct inspections *in loco*, interviewing potential witnesses,<sup>2</sup> and hearing and consulting witnesses and the relevant judge separately.<sup>3</sup> The impugned judge is entitled to rebut the allegations levelled against him or her by giving his or her version of the disputed events. However, the judge is not, at this stage, entitled to cross-examine any witness.<sup>4</sup> Although the provisions of sub-clauses (3) and (4) explicitly refer only to a ‘petition’ filed by any person, it is submitted that the criterion to determine whether or not the alleged judicial conduct warrants further assessment under the second phase, remains the same, even in matters initiated by the JSCK on its own motion.

It is important to note that the mandate of the JSCK is confined to two important aspects: First, it must determine whether the complaint complies with the provisions of Article 168(2); and secondly, it must reach a decision whether it is ‘satisfied’ that the complaint lodged by a person or initiated by them constitutes a ground for the removal of a judge, as envisaged by Article 168(1) of the Constitution of Kenya. In my view, the gravity of the complaint lodged against the judge will be an important factor in this assessment.<sup>5</sup> The phrase ‘satisfied that the petition discloses a ground for removal’ has, correctly, it might be added, been interpreted to mean that the JSCK must assess whether *prima facie* a case of misconduct has been made against a judge; and not whether the allegations made against a judge have been proved or not.<sup>6</sup> Warsame J,<sup>7</sup> in a judgment written on behalf of a unanimous court, explained the importance of this distinction in the leading case of *Baraza* as follows:<sup>8</sup>

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<sup>1</sup> *Republic v Chief Justice of Kenya & 6 Others: Ex Parte Ole Keiwua*, [2010] EKLR (‘the *Ole Keiwua* case’). This was an appeal against a decision of the Chief Justice, who bypassed the JSCK and made a recommendation to the President for the removal of a Judge.

<sup>2</sup> See the *Barbaza* decision par. 73.

<sup>3</sup> *Id* par 71.

<sup>4</sup> *Baraza* decision par .103.

<sup>5</sup> See also Ojwang J (2011) p. 11-14.

<sup>6</sup> *Barbaza* case par. 75.

<sup>7</sup> Omondi and Odunga JJ concurring.

<sup>8</sup> *Barbaraza* case pa. 75.

Unless the role of the Commission at this stage is properly understood, we may have a situation whereby the Commission would conduct a fully fledged trial and thereby usurp the role of the Tribunal.

The judge reasoned, relying on the decision of *Ole Keiwua*,<sup>1</sup> that the Commission of Kenya may only be ‘satisfied’ that the complaint is well-founded or ill-founded after it had evaluated the complaint.<sup>2</sup> This evaluation is an important function of the mentioned Commission, because a referral to the President has an immensely adverse impact on the integrity of the individual judge,<sup>3</sup> as well as on his or her income.<sup>4</sup> When the JSCK is of the opinion that that the complaint discloses one or more grounds for removal, the matter must be referred to the President, who has no alternative but to suspend the judge pending the outcome of the matter. However, when the Commission of Kenya is of the view that the complaint does not disclose a ground for the removal of a judge from office, it must reject the complaint.

It is submitted that the structure of the relevant sub-clauses, read contextually with the provisions of the subsequent sub-clauses (discussed below), suggests that the adversarial second phase may not be embarked upon in the absence of compliance with this initial phase.<sup>5</sup>

#### *The Second Phase (the Tribunal stage)*

The second phase of the removal process is contained in Article 168(5)-168(7), which provides as follows:

- (5) The President *shall*, within fourteen days after receiving the petition, *suspend* the judge from office and, *acting in accordance with the recommendations* of the Judicial Service Commission ... appoint a Tribunal ...
- (7) A tribunal appointed under clause (5) shall-
  - (a) Be responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and
  - (b) *Inquire into* the matter expeditiously and report on *the facts* and make binding recommendations to the President.

During the second phase, the President must, within the period mentioned in sub-clause (5), suspend the relevant judge, and simultaneously appoint a

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<sup>1</sup> *Ole Keiwua* case.

<sup>2</sup> *Barbaza* case par. 71.

<sup>3</sup> To this end, the affected judge has a choice as to whether the public should be allowed access to this initial investigation. See clause 8 of Part IV under the heading ‘Hearings and Evidence’ of the Judicial Service Act, 1 of 2011.

<sup>4</sup> See Article 168(6) which dictates that the ‘remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office’.

<sup>5</sup> This argument is fortified by the outcome in the *Ole Keiwua* decision.

Tribunal to inquire into the alleged conduct of the judge.<sup>1</sup> It is clear that the President must act positively within fourteen days – he has no discretion. The tribunal that must investigate the alleged misconduct of the Chief Justice justifiably differs in its composition from a Tribunal established to investigate the alleged misconduct of other judges of the Supreme Court.<sup>2</sup> It is, however, important to note that the Tribunals which have to investigate the alleged misconduct of both the Chief Justice and other judges consist of primarily lawyers and judges.

Sub-clause (5) dictates that the President ‘shall’, while ‘acting in accordance with the recommendations’ of the Commission of Kenya, appoint a Tribunal. The *Baraza* court had the opportunity to interpret this phrase. In this case the Commission, in its petition to the President called upon him to appoint a Tribunal to inquire into events that took place on a particular day at a specific place where the alleged misconduct occurred. In response to this petition a Government Gazette in terms of which the Tribunal had to be established, proclaimed that the mandate of the Tribunal is to conduct an investigation into the ‘conduct of the judge, including but not limited to’ the allegations contained in the petition of the Commission of Kenya.<sup>3</sup> The court framed the issue thus: ‘Can it be said that on receipt of a petition from the JSCK by the President, he can empower the said Tribunal to inquire into matters other than the matters which were considered by the JSCK and found to disclose a ground for removal?’<sup>4</sup> The court held that the President does not have ‘absolute, unrestricted and/ or unchecked powers to appoint a Tribunal’.<sup>5</sup> More importantly, the court reasoned that the President may not claim to go outside the contours of the petition presented to him by the JSCK by formulating the issues in such a manner that it broadens the scope of the inquiry beyond the facts considered by the Commission of Kenya.<sup>6</sup>

Unlike the mandate of the Commission of Kenya (to ‘consider’ allegations of alleged judicial misconduct) the mandate of the Tribunal is to ‘inquire into’ the alleged misconduct, and to render a ‘report on the facts’ relating to the removal of a judge.<sup>7</sup> A ‘report on the facts’ suggests that the merits or demerits of the allegations levelled against a judge must be determined by means of effective cross-examination. Ojwang J is of the view that judges may only be *investigated* by a Tribunal duly appointed by the President. He bases

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<sup>1</sup> *Baraza* decision par. 115.

<sup>2</sup> *Id* par 83. Article 168(5)(a) of the Constitution of Kenya provides that, when the removal of the Chief Justice is in dispute, the Tribunal shall consist of the Speaker of the National Assembly (as chairperson), three Superior Court judges from common law jurisdictions, one senior advocate and two persons with experience in public affairs. In contrast, when other members of the judiciary face impeachment, Article 168(5)(b) dictates that the Tribunal must consist of a chairperson, three judges or persons who are qualified to be appointed as such (and who have not been members of the JSCK in the preceding three years), one senior advocate, together with two persons with experience in public affairs.

<sup>3</sup> *Baraza* decision paras. 117-124.

<sup>4</sup> *Id* par. 119.

<sup>5</sup> *Id* par. 122.

<sup>6</sup> *Id* par. 122.

<sup>7</sup> Article 168(7)(b) of the Constitution of Kenya.

this opinion on the provisions of Article 168(5) of the Constitution of Kenya, read together with section 31 of the Judicial Service Act.<sup>1</sup> The Tribunal is a quasi-judicial body which must comply with the rules of natural justice.<sup>2</sup> Differently put, the principles enunciated in the Banagalore Principles of Judicial Conduct must be adhered to during this phase of the proceedings.<sup>3</sup> That means that the Tribunal must conduct a fully-fledged trial, where the affected judge shall be entitled to the right to legal representation; the right to be present while the witnesses testify; the right to adduce and challenge evidence; the right to present argument, and related rights in order to ensure that the hearing complies with the dictates of procedural and substantive fairness.<sup>4</sup> Additionally, the public has access to the hearing, unless the Tribunal Tribunal orders otherwise.<sup>5</sup>

Against this background, it is submitted that the nature of the assessment undertaken during the first phase differs from that followed during the second phase. The first phase consists of an informal, administrative process, whereas the second takes the form of a quasi-judicial process. If the findings of the Tribunal are in favour of the judge, the matter is finalised. The third phase of the proceedings ensues after the Tribunal had rendered an adverse decision against the affected judge.

#### *The Third Phase (the post-Tribunal stage)*

An aggrieved judge has the right to launch an appeal against an unfavourable recommendation submitted against him or her by the Tribunal. The appeal stage is guaranteed by sub-clauses (9) to (10) of Article 186, which provide as follows:

- (8) A judge who is aggrieved by a decision of the tribunal under this Article may *appeal* against the decision *to the Supreme Court*, within ten days after the Tribunal makes its recommendation.
- (9) The President *shall act in accordance with the recommendations* made by the Tribunal on the later of-
  - (a) The expiry of the time allowed for an appeal under clause (8), if no such appeal is taken;
  - (b) The completion of all rights of appeal in any proceedings allowed for under clause (8), if such an appeal is taken

<sup>1</sup> 14-19 August pp. 11-14.

<sup>2</sup> *Ibid*; see also the *Baraza* judgment par 99.

<sup>3</sup> The judge is entitled to the right to a fair trial, which includes (but is not limited to the following rights): the right to adequate notice; the right to be accorded an adequate opportunity to prepare a case; the right to legal representation; the right to cross-examine witnesses; the right to an interpreter; right to a speedy trial; the right to be provided with reasons for the decision; and the right to lodge an appeal.

<sup>4</sup> See, in this regard, clauses 9-18 of Part IV, under the heading 'Hearing and Evidence' of the Judicial Services Act, Act 1 of 2011.

<sup>5</sup> *Id* clause 8(2) of Part IV, which states that the Tribunal may exclude any person or class of persons from the hearing or any part thereof as a means to, *inter alia*, protect witnesses and to maintain order.

and the final order in the matter affirms the Tribunal's recommendations.

Sub-clause 9 creates a special appeal procedure, available only to an aggrieved judge, since the normal procedure of approaching the High Court first, and thereafter the Appeal Court, has been by-passed. In other words, this sub-clause envisages that an aggrieved judge should have direct access to the apex court. This procedure may have its advantages and also its disadvantages. On the one hand, the benefit of such a procedure is that the final outcome is not delayed. It is not in the interest of justice that a judge should be suspended over a prolonged period, especially when he or she has pending cases awaiting his or her attention. On the other hand, the direct access procedure takes away the advantage that the apex court might have had if the matter went through the appeals process in the normal manner. The Supreme Court would under these circumstances not have the benefit of considering the reasons for judgment delivered, as well as the authorities cited by both the High Court and the Appeal Court.

The previous Constitution of Kenya aided presidential control over the judiciary. This was possible because the powers of the President were unfettered. Judges could be appointed or removed from office in the absence of any rationale.<sup>1</sup> Nowadays, this would not be possible, because the new era brought with it the notion of constitutionalism. To this end, the role played by the President in both the first and the third phases of the removal process has been circumscribed in clear and unambiguous terms. It follows that any likelihood of undue political influence on the judiciary has, for all practical purposes, been removed.

To summarise, the provisions discussed above represent the structure, as well as the procedural and constitutional guarantees adopted to ensure that a judge facing the sanction of removal from office in Kenya is treated fairly during the entire process. During the first phase, a decision as to whether a member of the judiciary's conduct deserves judicial scrutiny is decided by a small group of persons who are predominantly lawyers. During the second, by mainly judges; and the third phase consists of a confirmatory step, performed by the President. The position for the removal of members of the judiciary under the Constitution of South Africa is discussed next.

## **South Africa**

The discussion under this heading mirrors that followed in the discussion of the position in Kenya. The threshold requirement for the removal of judges is explored first, followed by a discussion of the three phases for the removal of a judge.

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<sup>1</sup> Akech (2010) p. 18.

*The Threshold Requirement (objective criteria) for Removal*

Section 177 of the Constitution of South Africa provides the framework for the removal of judges. Sub-section 1 reads as follows:

- (1) A judge may be removed from office *only* if –
  - (a) The Judicial Service Commission finds that the judge suffers an *incapacity*, is grossly incompetent or is guilty of *gross misconduct* ...

In my view, the word ‘only’ dictates that the grounds listed in the sub-section are the sole grounds upon which the removal of a judge may be based – nothing else. It is also worthy of note that the grounds for removal under the South African Constitution are not as elaborate as that of the Constitution of Kenya. For example, one of the grounds that may trigger the removal procedure in Kenya – which is not explicitly mentioned in the South African provision – is the insolvency of a judge. Even so, it is inconceivable that a South African judge could evade the prospect of removal from office after he or she has been declared insolvent.

It is submitted that the Judicial Service Commission (‘the Commission’ or ‘the JSC’) may only initiate removal proceedings based on ‘incapacity’ if, in the opinion of a medical practitioner, the judge cannot perform his or her official duties. It is further submitted that the ‘incapacity’ referred to in this sub-section includes the mental and physical incapacity of a judge. As is the case in Kenya, if the medical practitioner concludes that the affected judge cannot perform his or her duties based on this ground, and the Commission confirms this finding, the appropriate outcome would be a recommendation that the judge should retire by reason of ill health.

The Commission was recently asked to determine whether the alleged conduct of the Judge President of the Cape High Court constitutes ‘gross misconduct’. The affected judge allegedly approached two judges of the Constitutional Court in an improper attempt to influence the judgment of the Constitutional Court in a matter concerning the prosecution of President Zuma. This investigation by the Commission was the subject of an appeal, first, to the High Court, and finally, to the Supreme Court of Appeal.<sup>1</sup> In a judgment delivered by Streicher JA<sup>2</sup> in the *Freedom Under Law* case, the Supreme Court of Appeal emphasised the seriousness of the alleged judicial misconduct when he observed that any attempt by a person to ‘improperly influence a pending judgment of a court case constitutes a threat to the independence, impartiality, dignity and effectiveness of that court’, thus signifying that the threshold requirement of ‘gross misconduct’ had been duly satisfied.<sup>3</sup> The judge continued by reasoning that ‘[t]he JSC had already, when it decided to conduct interviews with the [Constitutional Court] judges decided that if Hlope JP had

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<sup>1</sup> *Freedom Under Law v JSC* (52/2011) [2011] ZASCA 59 (31 March 2011) (‘*Freedom Under Law*’).

<sup>2</sup> Brand, Cachalia, Theron and Seriti JJA concurring.

<sup>3</sup> *Freedom Under Law* par. 50.

indeed attempted to do so he would have made himself guilty of gross misconduct which, *prima facie*, may justify his removal from office’.

Section 177 of the Constitution of South Africa consists of three stages (or phases) that must be complied with before a judge may be removed from office. The first phase is discussed below.

### *The First Phase*

Upon receipt of a complaint and the response thereto, the Commission must consider such documents and decide whether, if established, the conduct complained of *prima facie* constitutes such incapacity, incompetence or misconduct as envisaged by section 177(1)(a) of the Constitution of South Africa.<sup>1</sup> A sub-committee of the Commission may conduct a preliminary investigation of the complaint.<sup>2</sup>

In marked contrast to the position in Kenya, the President has a *discretion* as to whether the affected judge may be suspended, after having been advised by the Commission to suspend the judge pending the outcome of the investigation.<sup>3</sup> However, it is submitted that this provision does not confer an unfettered discretion on the President. In my view, the decision of the President is subject to judicial review, since it constitutes administrative action.<sup>4</sup> In other words, the decision of the President must be able to withstand scrutiny under a rationality test.<sup>5</sup> It seems logical that one of the important factors that need to be taken into account in such an assessment (depending on the nature of the ground of misconduct) should be whether the conduct of the affected judge constitutes a ‘threat to the independence, impartiality, dignity and effectiveness’ of the judiciary; and whether the continued presence of the affected judge, pending the outcome of the hearing, would undermine these key public concerns.<sup>6</sup> To come to the point, if the decision of the President does not withstand constitutional scrutiny, it may be declared invalid.<sup>7</sup> Bishop

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<sup>1</sup> Section 177(1)(a) of the Constitution of South Africa; also Rule 3 of the Rules Governing Complaints and Enquiries adopted by the JSC. Section 178(1) of the Constitution of South Africa provides that the JSC shall consist of the Chief Justice (as chairperson), the President of the Supreme Court of Appeal, one Judge President, the Minister of Justice, two practising advocates, two practising attorneys, one law lecturer, six persons of the National Assembly designated by the President, four permanent delegates of the National Council of Provinces, and four persons delegated by the President. The ten members (those from the National Assembly and the National Council of Provinces) are excluded when the removal of a judge is considered – see the *JSC* decision par 15.

<sup>2</sup> Rule 4 of the Rules.

<sup>3</sup> Section 177(3) of the Constitution of South Africa reads as follows: ‘The President, on the advice of the Judicial Service Commission, *may* suspend a judge who is the subject of a procedure in terms of subsection (1).’ (My emphasis).

<sup>4</sup> See *Pharmaceutical Manufacturers Association of SA: In re: ExParte President of the Republic of South Africa* 2000 2 SA 674 (CC).

<sup>5</sup> Currie & de Waal ((2005) p. 21.

<sup>6</sup> *Freedom Under Law* par. 50.

<sup>7</sup> Section 33 of the Constitution of South Africa; also section 6(h) of the Promotion of Administrative Justice Act, 3 of 2000, which provides that administrative action is reviewable on the ground that it constitutes unreasonable administrative action.

accurately underscores this principle when he observes that '[j]ustification permeates all corners of our post-apartheid legal order.'<sup>1</sup>

Once the Commission has established that the conduct of the affected judge *prima facie* falls within the confines of section 177(1)(a), the matter must proceed to be assessed in terms of the second, adversarial, phase.

### *The Second Phase (the Tribunal and Parliamentary endorsement)*

The second phase of the removal process consists of two components: The first is the hearing by the Tribunal,<sup>2</sup> and the second requirement consists of the approval of a recommendation by the Commission for the removal of a judge by members of the National Assembly. The first requirement is considered next, followed by a brief discussion of the second component.

The Rules of Procedure of the Commission makes provision for a hearing,<sup>3</sup> hearing,<sup>3</sup> where the judge is formally charged; is asked to plead; is entitled to legal representation; may call witnesses; may cross-examine witnesses; and present argument. Unless the Commission provides good cause as to why the hearing may not be open to the public, such hearing may not be conducted *in camera*.<sup>4</sup> This approach is strongly aligned to the approach followed by the African Commission<sup>5</sup> (although in different contexts), as well as in Kenya,<sup>6</sup> and should be embraced.

After having considered all the evidence and argument, the Commission must make a finding as to whether or not the judge suffers from incapacity, or is grossly incompetent, or is guilty of gross misconduct. The importance of this function of the Commission in protecting the dignity and independence of the courts must not be undervalued. Streicher JA stressed, correctly it must be added, that a condition precedent to the removal of a judge on the grounds of judicial misconduct is that the Commission *must*, depending on the merits of the case, *find him or her guilty* of misconduct within the meaning of section 177(1)(a).<sup>7</sup> If not, the judge may not be removed from office. Differently put, the merits or demerits of the allegations against the affected judge must be properly examined in order to arrive at the relevant decision. This explains why

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<sup>1</sup> Bishop (2007) 35; see also Mureinik (1994) p. 32, where he submits that the New Constitution seeks to uphold a 'culture of justification', which is 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by force at its own command. The new order must be a community built on persuasion, not coercion.' See further Currie & de Waal (2005) p 17.

<sup>2</sup> Section 178 of the Constitution of South Africa; see also in this regard the provisions of the Judicial Commission Act, 9 of 1994 ('JSC Act') and the Judicial Commission Amendment Act, 20 of 2008 ('JSC Amendment Act'). The JSC Amendment Act provides for *inter alia*, a code of judicial conduct, a complaints procedure regarding judges, and the establishment of Tribunals to investigate alleged judicial misconduct.

<sup>3</sup> Rule 5 of the Rules.

<sup>4</sup> *eTV (Pty) Ltd and Others v JSC and Others* 2010 1 SA 537 (GS) ('eTV') p 546.

<sup>5</sup> See the *Civil Liberties* case.

<sup>6</sup> See, in this regard, clause 9 of Part IV of the Judicial Service Act (Kenya), 1 of 2011.

<sup>7</sup> *Freedom Under Law* par 49.

a failure by the Commission to perform this constitutionally entrenched fact-finding duty may be subjected to judicial review;<sup>1</sup> and any irrational procedure adopted,<sup>2</sup> which results in a manifestly unsound decision, may be declared invalid.<sup>3</sup>

The decision taken by the Commission, which was the subject of review in the *Freedom Under Law* case, engendered considerable public concern relating to the independence of the Commission. Commentators have expressed the disconcerting view that the role played by an emerging political power bloc in the Commission may have a detrimental impact on public opinion concerning the processes of the Commission, which in turn may ultimately lead to a lack of public confidence in the judiciary.<sup>4</sup>

The second requirement that must be complied with during the second phase of the removal process is that at least two-thirds of the members of the National Assembly must sanction the opinion of the Commission, which calls for the removal of the judge. This requirement signifies that the issue of the removal of a judge is subject to the approval of members of Parliament, which represents the view of the voting public. To additionally protect an affected judge from being removed from office, non-compliance with this requirement could serve as a decisive shield in the removal process. The bar is raised prohibitively high – a two-thirds majority is required. However, upon compliance with this requirement, the issue must proceed to the third phase of the process.

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<sup>1</sup> *Id* par 50.

<sup>2</sup> Although section 178(6) of the Constitution of South Africa provides that the Commission ‘may determine its own procedure’, the procedure it adopts to conduct a hearing must be designed to achieve the purpose for which the Commission was established. If the procedure it adopts does not serve this purpose, the procedure may be subjected to judicial scrutiny, and may be declared invalid. See the *Freedom Under Law* case par 45 where the Supreme Court of Appeal held that the ‘procedure adopted [by the JSC] was therefore not appropriate for the final determination of the complaint’.

<sup>3</sup> *JSC* decision par 25, the court relying on section 172(1)(a) of the Constitution of South Africa, which reads as follows: ‘(1) When deciding a constitutional matter within its power a court – (a) must declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’.

<sup>4</sup> See for example the newspaper article written by Kgosana (2012) p 4. The author remarks that ‘[t]he first signs of the emergence of an ANC-aligned power bloc emerged in the commission in August last year during the widely publicised interview of Justice Mogoeng Mogoeng for the position of chief justice.’ He further comments that: ‘Failure to conclusively deal with the matter involving Western Cape Judge President John Hlope did not help matters,’ and concludes by raising the alarm that ‘[a]n institution as crucial as the JSC can ill afford this sad state of affairs. Divisions based on political expediency will only serve to weaken it and cast aspersions on its processes.’ See also, in different context, the newspaper article by Makhanya (2012) p 4 he argues that: ‘While the institution [JSC] started off as a collection of the strongest minds from the legal, political and academic worlds, today it is hard to vouch for its collective wisdom and integrity. Not that they are intellectually lacking. Rather it is that many of them lack moral steel. Instead of doing what is right ... they follow a Luthuli House brief. The philosophy of many on the commission seems to be: “Ask not what is good for the country, but what the party mandarins want”.’

*The third phase (the post-Tribunal/ Presidential endorsement phase)*

Section 177(2) of the Constitution of South Africa introduces a third phase that must be complied with to complete the procedure for the removal of judges. This section reads as follows:

The President *must* remove a judge from office upon adoption of a resolution calling for that judge to be removed.

Put in another way, following the two-thirds majority endorsement by the legislative arm of government, the President has no alternative but to remove the affected judge from office. In contrast to the proceedings during the first phase, it is noteworthy that the President has no discretionary powers during this phase of the process. In my view, this provision ensures that the President, as member of the Executive – in furtherance of the doctrine of separation of powers – has no meaningful influence in the process of the removal of judges.

To summarise, three requirements must be met before a judge may be removed from office in South Africa. The first requirement is fulfilled when a decision is taken by predominantly judges and lawyers – in this manner excluding the political arm of government – that the complaint *prima facie* establishes one or more of the grounds listed under section 177(1)(a) of the Constitution of South Africa;<sup>1</sup> the second, by a decision of predominantly lawyers, followed by an endorsement by the elected political representatives of the people.<sup>2</sup> The third requirement is complied with when a member representing the Executive arm of government complies with the constitutional command by endorsing the decisions taken by the institutions representing primarily the judiciary and the majority of the members in the legislature. This procedure is consistent with the fundamental constitutional value of social accountability,<sup>3</sup> a goal which the Constitution of South Africa seeks to enhance.<sup>4</sup>

## Conclusion

This comparative analysis has revealed that the models adopted for the removal of judges in Kenya and South Africa bear significant analogous features. For example, the threshold requirements for removal, although textually different, are capable of a comparable interpretation. A prominent feature of both provisions is the fact that the grounds for removal are couched in broad, flexible terms. It follows that this feature may be viewed by some as a

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<sup>1</sup> See section 178(1) of the Constitution of South Africa; see also the *JSC* case paras 15 and 17, consequently excluding the politicians nominated under subsections (h) and (i) of section 178(1).

<sup>2</sup> *Ibid.*

<sup>3</sup> See section 1(d) of the Constitution of South Africa.

<sup>4</sup> *Premier of the Western Cape Province v JSC and Others* (unreported judgment of the Western Cape High Court, delivered 31 March 2010) Case No: 25467/ 2009 par 16.

possible weakness, which may expose members of the judiciary to potential abuse of power. However, in my view, this potential for abuse is effectively abated by the composition of the Judicial Services Commission – especially in regard to the removal of judges – in both Kenya and South Africa. In South Africa, for example, the ten members of the Commission designated by both the President, as well as those members designated by the Council of the National Council of Provinces are excluded as members. In both jurisdictions, the Commission consists principally of lawyers and judges. This is an important safety feature, since the decision of the majority of the members of the Commissions, in both jurisdictions, represents a binding decision of the Commissions.

In compliance with the terms of General Comment 32 of the Human Rights Committee,<sup>1</sup> and the provisions of the ‘Resolution on the Respect for and Strengthening of the Independence of the Judiciary’ adopted by the African Commission,<sup>2</sup> the governments of Kenya and South Africa have taken special measures to guarantee the individual independence of judges. Objective criteria for the removal of judges have been established in both jurisdictions. In addition, both jurisdictions have created transparent procedures for the removal of judges. Furthermore, the removal procedures adopted in both Kenya and in South Africa make any unwarranted attempt at the removal of a judge an extremely difficult task.

I have identified three phases in the removal process relating to both countries. These three phases serve to strike a balance between the public interest in the protection of individual judges from unjustifiable outside pressure, on the one hand, and the equally important public interest in upholding the integrity of the judiciary as an institution of government, on the other hand. In both jurisdictions the removal process consists of a judicial process of adjudication of the facts relevant to the conduct of an affected judge. More importantly, an aggrieved judge, in both jurisdictions, has recourse to the courts. However, the procedures adopted by the two jurisdictions differ in one important respect, that is, during the second phase.

In South Africa, the second phase consists of two requirements. The first is the Tribunal adjudication phase, and the second is triggered only after the Tribunal has made an adverse finding against an affected judge. In such an event, the second requirement must be complied with in order to complete this phase. The second requirement of the second phase entails that at least two-thirds of the members of Parliament must endorse the decision of the Tribunal in order to complete this phase. This second requirement is markedly absent from the removal mechanism for judges in Kenya. This second requirement removes the issue of the impeachment of judges from the domain of lawyers and judges, into the sphere of political functionaries. The political arm of government represents the ‘will of the people’ of South Africa.<sup>3</sup> In my view,

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<sup>1</sup> Article 14.

<sup>2</sup> Adopted in 1996.

<sup>3</sup> See the Preamble of the Constitution.

political representatives play a meaningful role in the removal process.<sup>1</sup> However, they do not perform a *decisive* function, since their responsibility only arises after the Tribunal had made an unfavourable ruling against a judge.

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