

## HOLDING POLITICIANS ACCOUNTABLE: WHICH WAY FORWARD?

By Tindak Malaysia (2020)

Defections among our elected representatives have resulted in the collapse in state governments in the past. However, the collapse of PH government at the federal level in 2020 revived the topic of accountability of elected representatives strongly. In Malaysia, we need to ask what are the main reasons for an elected representative breaks from his or her own party rank and switch parties.

Firstly, we need to examine the reasons underpin such defections. Some of the reasons why an elected representative may switch their political standing in the Parliament or State Legislative Assembly (Janda 2009):

- 1) Due to his or her ideal policy positioning
- 2) Due to his or her political party's positioning
- 3) Due to his or her political party's ability to influence outcomes
- 4) Due to his or her contribution to political party's ability to influence such outcomes
- 5) In seeking to receive appointments in another party (especially in nascent democracies) and this is more so defecting to the ruling party
- 6) A conflict to balance the views of constituents and stay loyal to party for political advancement

Below are the general movements of elected representative we can see in Malaysia:

- 1) Party A to Party B (i.e. PAS to Amanah)
- 2) Party A to Independent (i.e. Baru Bian from PKR to Independent)
- 3) Independent to Party A (e.g. Ho Yip Kap (Independent) of Tanah Rata Constituency in 2008 joined Gerakan in 2010)

One of the key consideration in the Malaysian context is whether our democracy can be deemed as nascent democracy. In a nascent democracy, firstly the party system is in flux (Janda 2009). Secondly, political loyalties tend to be more to clans, local figures or groups (Janda 2009)

Another consideration is to understand electoral system and constraints of the law. In our First Past the Post System, candidate with party or independent symbol contests in the election. Is the voter entrusting his or her vote to a candidate or to a party? Candidates who go under political party backing usually have the machinery, finances and other benefits to ensure they can win. Secondly, one may argue an elected representative should honourably resign upon crossing the floor. Our current laws at the Federal and State level deter such honourable act as an elected representative will purposely deny himself or herself from contesting for the next election (as they are barred from contesting for the next 5 years)

With the considerations of Malaysian state of democracy, party system, election system and law, this paper will examine some possible options on holding politicians accountable should they exit their original party. Following are the options to be considered:

- 1) Clear Stipulations in the Nomination Form
- 2) Concept of Deliberate Breach of Oath

3) Anti party hopping law

4) Recall Elections

#### OPTION 1: CLEAR STIPULATIONS IN THE NOMINATION FORM

##### OPINION

This opinion writer suggest clear statements in the Nomination Form to be added where it binds the contesting candidate on the basis he or she was elected on and conditions that can result in removal of such candidate before his or her term expires. Pointers as below:

1. *When an individual declares to stand for elections, he or she will either stand as an Independent Candidate or a Party Candidate.*
2. *The Candidate fills a Nomination Form accordingly to stand for elections*
3. *This Nomination Form should clearly state the following:*
  - a. *If the Candidate wins the Elections, he or she will serve the Constituents with due diligence in compliance with the Rule Of Law and uphold governance and integrity to the highest order*
  - b. *In the event the Constituents can prove that their Wakil Rakyat is a non-performing Wakil Rakyat, the Constituents will have the right to sue the Wakil Rakyat for non-performance and non-delivery and demand for his or her resignation. In addition be stripped off all remuneration and perks*
  - c. *In the event the Wakil Rakyat decides to join another Political Party while in Office, then he or she should pay a penalty, resign and make way for a By-Elections; and offer himself or herself under the banner of the preferred Political Party*
  - d. *The current mechanisms will need to be amended and should reflect the above through reformed Instruments and reflected in the Federal Constitution under the appropriate Schedule and Sub-Sections*
4. *When Voters go out to vote, we either vote for an individual whom we think has the capacity, tenacity, integrity, wisdom and a sense of public service ... OR ... a Political Party whom we feel will uphold the interest and well-being of the Constituents, rather than prioritise Party above Rakyat and self-preservation*
5. *Hence if the Nomination Form is able to include Items # 3a - # 3d, then we know whoever submits the Nomination Form as a Candidate will be held accountable accordingly as the Candidate signs off the Nomination Form before submission. This will also be extended to the Proposer and the Seconder.*
6. *The intention is to get it right at the onset from Nominations phase. This way the Rakyat will appreciate the seriousness of standing for elections and the need to be earnest in wanting to be of public service*

##### EXAMINATION

Let's examine these pointers accordingly

**For Point 1:** This is a correct interpretation of the nomination day. More so, this is pronounced in Conduct of Elections (COE) Point 11 (2c) and (2d)

*2(c) - For the purpose of this paragraph a political party may submit to the Election Commission for its approval and for registration, if so approved, a symbol, which in this paragraph is referred to as a "party symbol", for the use of its candidates at any election.*

*2(d) - In lieu of a symbol assigned in accordance with subparagraph (b), a returning officer shall on the request of any candidate, assign to him a party symbol:*

*Provided that no party symbol shall be so assigned except on production by the candidate of a written authority signed by a responsible official of the party authorising the candidate to use such party symbol for the purposes of the election.*

Hence, there is clear written link in the law between the authorised individual of the party, the candidate and the obligation of the Returning officer to affix the party symbol. The missing element was the definition of a political party in the COE (deleted in 2011) whereby Tindak Malaysia propose the addition of a clear definition of a political party in the Malaysian Consitution

**For Point 2:** The missing element in the Nomination Form is whether he is under a contesting political party

**For Point 3a:** Let's examine what the oath for which each parliamentarian must do upon their success in election (Article 59 (1), 6th Schedule (2))

*"I, ....., having been elected (or appointed) as a member of the House of Representatives (or the Senate) do solemnly swear (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution"*

This is a valid point whereby the Nomination Form should mention this as a good reminder. Failure to take this oath within 6 months after his or her election will result the seat declared as vacant.

**For Point 3b:** The concept of suing the Elected Representative may result shooting the arrow away from the bullseye in current setting. Suing could be a long process without a guarantee of satisfied outcome for the voters

**For Point 3c:** In order to have a penalty with the effect, in the current context, elected representative:

*"...has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in the States of Sabah and Sarawak or in Singapore) and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon;"*

Current provisions in the Malaysian Constitution are deterrent to such resignations of elected representative who decided to switch political allegiances – Article 48 (6) and 8<sup>th</sup> Schedule (5)

**For Point 4:** There is an element of Sincere or ideological voting in current electoral system. However our current election system favours tactical voting

## CONCLUSION

After assessing holistically this point of view, this method isn't sufficient to deter politicians from hopping and going unpenalized by the voters. However, the key pointers derived from this view should be implemented in the constitution (some in line with our Malaysian Electoral Reform Programme):

(i) Mandated definition of a political party in the Malaysian constitution. Proposed wording as below:

“any society which by any of its objects or rules, regardless whether such object or rule is its principal object or rule, or constitutes merely an object or rule which is ancillary to its principal object or objects or to its principal rule or rules, makes provision for the society to participate, through its candidates, in elections to the House of Representative, or to the Legislative Assembly of a State, or to a Local Authority, or makes provision for it to seek the appointment of a person proposed or supported by it to the Senate; or”

“any society which, notwithstanding anything contained in its objects or rules, carries on any activity or pursues any objective which involves its participation, through its candidates, in elections to the House of Representatives, or to the Legislative Assembly of a State, or to a Local Authority, or which involves its seeking the appointment of a person proposed or supported by it to the Senate;”

(ii) Nomination Form to mention the political party that contesting candidate is associated with. The candidate is to write the name of the Political Party or state ‘Independent’;

(iii) The contents of Article 59 (1) and 6th Schedule (2) to be inserted into the Nomination Form. This is to remind should the constitution stipulates anti hopping or recall elections, the candidate who signs the agreement is fully aware that his or her term can be terminated in midway of his or her service

## OPTION 2: CONCEPT OF DELIBERATE BREACH OF MP’S OATH

### OPINION

The following opinion was submitted to Tindak Malaysia by Puthan Perumal and it sums up the legal relationship between the elected representative and the voters. Her potential solution is summed up in the following two sentences:

“It is humbly submitted that the courts can determine and answer the question: if a particular MP has deliberately, fundamentally breached their oath, and if this is found to be in the affirmative, make the necessary orders to vacate the seat. Any citizen aggrieved by this breach should be able to bring forth this question to the courts, and the issue of locus standi would not arise”

Her full article can be read here: <https://headtopics.com/my/concept-of-deliberate-breach-of-mp-s-oath-the-malaysian-insight-11704155>

Here are the key excerpts for the approach

“ARTICLE 59(1) of the federal constitution expressly states that every member of either House of Parliament shall, before taking his seat, take and subscribe before the person presiding in the House an oath in the form set out in the Sixth Schedule.”

As mentioned in Option 1, each MP or State Legislator are to take oath according to the 6th Schedule. The author highlights the oath has following the key words “will preserve, protect and defend its constitution”

Subsequently the author mentions on how the MP or State Legislator gets elected which is mentioned in Articles 113 & 114. The author reiterates the MP will have to preserve, protect and defend this element as it is part of the constitution

The next part refers to individuals who elect the MPs or State Legislators. The author points to Article 119 (1) which states among others, that every citizen (subject to qualifying factors) is entitled to vote in their constituency in any election to the House of Representatives or State Legislative

Assembly. This element has to be preserved, protected and defended by an elected representative as it is part of the constitution

Reading together with all articles from 113 to 120, both the future elected representative and the citizen (the voter) are subjected to elements of the constitution. The author states this “in essence, the proposed/future MP makes thousands and thousands of legally binding obligations to the thousands and thousands of citizens who cast their votes in his or her favour, and subsequently to his or her success”

At this stage, the author argues should the MP fails to honour binding obligation to the citizens besides death or resignation, he or she has deliberately failed to “preserve, protect and defend its constitution”. Finally, since this amounts to deliberate breach of oath, the MP should vacate their seat

The author argues there is a distinction to a right to stand as a candidate and right to remain as an elected representative where the author referred to the judicial cases in India. The words of acting chief Justice of India in a 1982 case stated “For, there is no fundamental right in any person to continue as a member of the legislature. The right to stand as a candidate in an election and the right to continue as a member after such election is a statutory right that can be validly and reasonably taken away by a statute.”

Subsequently, the author argued the 1992 Nordin Salleh case which asserted the principle of freedom of association should be revisited. The argument presented is an elected representative being part of the legislature stands so long there is no breach of oath occurs

Furthermore the author argues there is no necessity to have anti hopping law where it would have been invalidated due to the 1992 Nordin Salleh’s case. Without the need of anti hopping law, the question of freedom of association under Article 10 does not arise. The premise of MP’s ability to continue to be in the legislature as an elected represented will be judged on the basis of oath

Finally, the author argues that any citizen affected by breach of oath should be able to present his or her case to the court “and the issue of locus standi would not arise”

## EXAMINATION

It is an innovative and robust way to show the firm association between an elected representative and the citizen at any given election. Secondly, it provides the timely reminder to all elected representatives to honour the constitution. However, this approach remains untested and whether a citizen will be able to present the breach of oath to the court remains to be seen

## CONCLUSION

This or similar approach has been discussed by certain civil society members to hold politicians to account. As this approach may involve a judicial process and interpretation of the distinction between breach of oath and freedom of association, this approach may not be able to hold defecting politicians to account. The first applicable element of this discourse is the written statement to appear on Nomination Form where contesting candidates must be aware of the Oath of the house that he or she must pronounce after winning. Each elected representative is reminded that he or she are bound by the rules of the Constitution which may have clauses or interpretations that can strip his or her position in midway of the elected term. Secondly, this concept can only be proven true should there be a judicial case conducted on a particular defecting politician.

### OPTION 3: ANTI PARTY HOPPING LAW

#### OPINION

This opinion writer is in favour of anti party hopping law. His opinions are found below:

*“The rakyat appoint their wakil rakyat base on the candidate’s capability, integrity and charisma (at least my view). There maybe other reason.*

*Any wakil rakyat can offer themselves as the candidate for their constituent with a nominee and a seconder under any registered political party or under calon bebas. When the elected wakil rakyat in office he/she should honour stand on the basis of who they are when they stand for the election. No right to move party or coalition.*

*If for any reason they want to leave, he/she should let go his post and a by election to take place.*

*Unless and until we succeed in this, our country politic is going to be ‘volatile’”*

#### EXAMINATION

A common opinion emerging in individuals ranging from activists to constitutional lawyers from time to time is the concept of anti party hopping law. The arguments laid in favour for anti party hopping law are defecting politician breached the faith of the electors (as most voters associate the candidate with the party), strengtening of the party concept, prevention of larger parties in luring smaller parties in exchange of powers and gifts and democratic accountability (Janda 2009). Certain political parties are in favour as it grants greater control to party leaders to dictate the attitudes of its elected representative. One can argue the case of Sheraton Move heightened the calls of anti party hopping law as it metes out punishment immediately and effectively

The main stumbling block is Article 10 (1) (c) of the Consitution which stipulates the freedom of association. Any potential anti party hopping law will be challenged and could be deemed unconstitutional. Secondly, while it is an honourable action for an elected representative to resign upon his or her exit from the political party, current constitutional statements of Article 48 (6) and 8th Schedule (5) denies the capability of that representative to contest in elections for the next 5 years. For obvious reasons, these two clauses are significant deterrences to honourable action of resigning

Currently in Penang, the anti party hopping law clauses states a member of State Legislative Assembly shall vacate his/her seat if (Loh 2020):

- (a) Having been elected as a candidate of a political party, he resigns or is expelled from or ceases for any reasons whatsoever to be a member of that party; or
- (b) Having been elected as an independent but later joins a political party.

Unfortunately, the clauses in Penang and previously in Kelantan could not enforced due to state law can’t take precedence on top of the Federal Law

There are many variations of anti party hopping law in the world which can be summarised to following situations where elected representative loses his or her seat due to (Janda 2009) :

- (1) he or she resigns from the original party
- (2) he or she crosses the floor (i.e. move to another party)
- (3) he or she is expelled from the original party

In order for anti party hopping law to be effective, following items have to be added and removed at the Federal Level:



- (1) Adding an element to Article 10 (2) (c) whereby party hopping is prejudicial to public interest (Loh 2020)
- (2) Adding an element to Article 50 where  
“A member of either House of Parliament who resigns from the political party under which he obtained his membership to that House shall resign his membership of that House immediately.” (Similar to the principles of New Zealand Electoral (Integrity) Amendment Act 2018)
- (3) Repealing of Article 48 (6) which allows the resigned representative the right to contest immediately. Similar amendments to be done within the State Constitutions

## CONCLUSION

Having a bare minimum anti party hopping law must be done at the Parliamentary Level. This is to take into consideration of the federal law's supremacy. Instead of laws that strengthen political party's power on its elected representatives, the seat would be declared on vacant based on the actions of the elected representative. This is to consider that elected representative has leveraged party's influence, resources and finances to win the constituency. Moreover, it will hold all elected representatives are accountable to the people who voted for them. Secondly, the proposal by Jason Loh of Emir Research to add article 10(2) can be used to stop legal issues with penalties of crossing parties. Should this be successful, it is able to punish the defecting politician immediately

## OPTION 4: RECALL ELECTIONS

### OPINION

According to International IDEA, a recall election is one of three mechanisms that are part of direct democracy (Andrew Ellis 2005). A Recall election is a procedure for the voters to remove their elected representative through a direct vote before that official's term has ended. In the current context of anger and disappointment at the inability to rectify the 'wrongs' of defection, the faith in representative democracy in Malaysia may be quietly eroding. Adding the element of direct democracy allows the electors (or voters on polling day) to take the reins of control on the behaviour of elected representative. A recall election can be used more than to hold a politician accountable upon his or her defection. It can be used when the electors perceive their elected representative are not performing to the expectations of the electors

A recall election process has few stages (Andrew Ellis 2005):

- (i) Initiation of the recall process whereby sufficient number of signatures are collected to support the recall
- (ii) Upon the attainment of verified and required level of support, the recall vote takes place

Should the recall vote result in the removal of the elected representative, the seat will be declared vacant in the Malaysian context and by election will be called within 60 days upon notice of vacancy

Firstly, we need to examine to whom the recall mechanism should be applied at. In Malaysian context, the bare minimum the recall mechanism should be applied will be Federal Legislators (MPs), State Legislators (ADUNs) and future elected positions of Local Authorities. This will not exempt an elected Prime Minister, Chief Minister and the Mayor whereby the voter is able to hold the highest authorities to account

Secondly, we need to define the grounds for such recall. The simplest principle is unpopularity of elected representative of the incumbent (Andrew Ellis 2005). The success of recall will hinge on two factors: ability to obtain enough petitioners to bring a recall and passing the threshold to declare the

seat vacant. In other countries or territories, recall is only to be used on the basis of impropriety and incompetence (for example, Recall of MPs Act 2015 of UK). While these rigid clauses prevent abuses on recall elections, the law has to be codified who makes the judgement call to state the elected representative has committed impropriety or an equivalent (Andrew Ellis 2005). For Malaysia, a simple question of unpopularity should be the use as the basis of recall elections

Thirdly, we need to define when the incumbent can be recalled. To be fair to newly elected legislators and citizens, a recall should be done no earlier than one year of swearing of the representative and not to be done less than one year before official term ends.

Fourthly we need to define who is eligible to initiate recall elections (first stage). Requirements are suggested as below:

(1) A voter of the given constituency (or local authority) of the age of 18 years and above may launch the initiative

(2) The recall vote will be only called should there be a petition of 10% of registered voters of the local authority or constituency (current at the time of initiation of the petition) before the recall takes place

The summary suggested process of the conduct of recall elections is explained as below:

(1) A proposal initiated by a popular initiative may take the form of a specific draft related to the incumbent elected representative (qualifying minimums will be name, title and constituency of the elected representative) Example as below:

"Shall [title and name of elected representative, the name of constituency he or she represents] be recalled (removed) from the Dewan Rakyat/State Legislative Assembly/Local Council? (County of Los Angeles, California n.d.)"

(2) Signatures should only be collected once the proposal initiative is successfully filed at the management body of recall process (i.e. Election Commission). This will be the start date and 4 months are given to collect signatures

(3) All signatures must be verified prior to the start of recall vote

(4) The process of recall vote and nominating the successor should be separate. The recall vote is to be initiated within 60 days when the recall vote is qualified (Andrew Ellis 2005)

(5) The incumbent is removed on the basis where the specific proposal that is submitted to the vote of registered voters shall be considered as accepted if a majority of the registered voters who participated in the recall vote to approve the proposal.

(6) Once the incumbent is removed, the speaker of the House or State Legislative Assembly or the equivalent in local authority shall notify Election Commission of the vacancy. A by election is triggered

(7) The defeated incumbent should be given the right to contest in the by election

(8) To prevent abuses in the interim, should the recall election failed to remove the incumbent, another recall process should not be initiated against incumbent within that given term period



## EXAMINATION

There are some considerations for recall elections to be instituted in the Malaysian context. First, the willingness to spend financially for the election costs of the drafting the proposal, verification of signatures and the conduct of recall vote. To give an approximate idea of financial costing in the Malaysian context, a DUN by election costs around RM 1 – 2 Million and Parliamentary by election costs around RM 3 – 4 Million in the post GE14 era. That's just for a by election as result of vacancy (in the context of recall vote, the incumbent was booted out and vacancy was declared). The cost of recall vote from the beginning to the end is very high. While some may argue as an experiment for recall elections is to be done at the state level, lawyers must be consulted whether the introduction of a mechanism of this manner doesn't allow a challenge at the Federal Level. To be fair on the incumbent, the element of 8th Schedule (5) should be deleted. The incumbent who was defeated has the right to recontest in the coming by election. Should there be no constitutional challenge to the state's ability to add the element of recall mechanism, Article 113 (4) allows the State to authorize Election Commission to conduct such elections. Throughout the entire process, the principles of Election Offences Act should be applied to ensure free and fair elections

## CONCLUSION

A recall election allows the voters ultimately to decide whether the defecting or unperforming elected representative to remain in power or to be ejected from his seat. While the suggested process is not fully comprehensive, key considerations such as right to launch petition, who forms the signatory body for petition, deadlines for signature collection, threshold of victory in recall vote and ability for defeated incumbent to recontest must be studied in detail. More importantly, any attempt to introduce at the state level must be studied rigorously to avoid federal constitutional challenge. For the public and the country, the finances must be sufficient for holding a recall vote and subsequent by election. Tindak Malaysia advocates the adoption of referendum concept (as listed in the Malaysian Electoral Reform Programme) and some of its principles can be applied for the recall election process

## CONCLUDING REMARKS

As the document has examined the four options, all four options are warranted to be considered in the future constitutional amendments or court judgment for the areas of holding politicians accountable. These options were weighed based on principles of efficiency, clarity and democracy. Following are the suggested amendments for the Malaysian Constitution:

- I. Mandated definition of a political party in the Malaysian constitution. Proposed wording as below:  
“any society which by any of its objects or rules, regardless whether such object or rule is its principal object or rule, or constitutes merely an object or rule which is ancillary to its principal object or objects or to its principal rule or rules, makes provision for the society to participate, through its candidates, in elections to the House of Representative, or to the Legislative Assembly of a State, or to a Local Authority, or makes provision for it to seek the appointment of a person proposed or supported by it to the Senate”;  
OR  
“any society which, notwithstanding anything contained in its objects or rules, carries on any activity or pursues any objective which involves its participation, through its candidates, in elections to the House of Representatives, or to the Legislative Assembly of a State, or to a

- Local Authority, or which involves its seeking the appointment of a person proposed or supported by it to the Senate;”
- II. Nomination Form to mention the political party that contesting candidate is associated with. The candidate is to write the name of the Political Party or state ‘Independent’
  - III. Insertion into Nomination Form of the contents of Article 59 (1), 6th Schedule (2) and equivalent texts of State Assemblies. This is to remind should the constitution stipulates anti hopping or recall elections, the candidate who signs the agreement is fully aware that his or her term can be terminated in midway of his or her service
  - IV. Adding an element to Article 10 (2) (c) whereby party hopping is prejudicial to public interest
  - V. Adding an element to Article 50 where:  
 “A member of either House of Parliament who resigns from the political party under which he obtained his membership to that House shall resign his membership of that House immediately.”
  - VI. Repealing of Article 48 (6) and 8th Schedule (5) which allows the resigned representative the right to contest immediately
  - VII. Adoption of recall election mechanisms within Federal and State Law

While the concept of deliberate breach of oath has not been tested, in the current political circumstance, this is the only option that can be exercised immediately. In longer term, Clarity from the day one of nomination to the introduction of recall mechanism ensures contesting candidate and the citizens are fully aware of their rights and responsibilities as elected representative and voters respectively.

\*Malaysian Electoral Reform Programme – A comprehensive research program that enlist all the necessary amendments relating to our election system. This was built by the collaboration of Tindak Malaysia and individuals Malaysians (locally and internationally)

*The four opinions are from Theresa Ratnam Thong, Puthan Perumal, Henry Lim and Danesh Prakash Chacko. Additional minor opinions were added from Wong Piang Yow, Fork Yow Leong and Yvette Mah. Tindak Malaysia’s Malaysian Electoral Reform Programme was used as considerable reference to wordings of suggested solutions and amendments to the constitution. All the opinions were critically assessed by Danesh Prakash Chacko and Wong Piang Yow (the Directors of Tindak Malaysia)*

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