REMOVAL OF JUDGES IN THE COMMONWEALTH – AN EXPLAINER

*Jenita Kanapathy**

*Nadhratul Wardah Salman***

ABSTRACT

Removal of judges from office is a serious form of judicial accountability. As such, international instruments, and declarations on the independence of the judiciary have expressed three principles on the substantive grounds for removal of judges. Firstly, the grounds of removal must be apparent, secondly, judges should only be removed on grounds of incapacity or misconduct and thirdly there must be grave misconduct warranting the removal of a judge. Around the world, there are a few types of removal mechanisms of judges in the higher courts. The most common type of removal mechanism is by ad hoc tribunal or parliament. Most commonwealth countries, including Malaysia, have adopted the *ad hoc* tribunal system. This article provides an overview of the different types of removal mechanisms adopted by commonwealth countries in removing judges from the higher courts, in particular the United Kingdom, South Africa and Malaysia.

Keywords: removal mechanisms, types, higher courts, judges, Malaysia

* School of Business & Law, Taylor's University, Subang Jaya Selangor Darul Ehsan. e-mail: jenitha.kanapathy@yahoo.com

** Faculty of Law, University Malaya, Kuala Lumpur. e-mail: wardah@um.edu.my

INTRODUCTION

The mechanism for the removal of judges from their office is an indispensable component of autonomy in any independent judiciary. The implementation of a free and effective judicial appointment system in any jurisdiction would not be worth its salt if higher court judges can be facilely vacated from their office especially to the whims of the executive. Therefore, mechanisms involved in judicial removals should be accorded an even higher weightage of importance compared to judicial appointments. International instruments have expressed three foundational principles that shall guide and guard the removal of judges.

The first is that the grounds of removals should not be ambiguous and there is clear evidence to institute removal proceedings against a judge as enshrined in Article 19 of the United Nations Basic Principles on the Independence of the Judiciary. Secondly, Article 18 of the United Nations Basic Principles on the Independence of the Judiciary states that countries ought not to embrace a removal mechanism that undermines judicial independence, and the removal shall be only on grounds of incapacity or misconduct. Thirdly, international instruments mandate that the gravity of the misconduct committed by the judge should be sufficient to warrant a removal proceeding. The Latimer House Guidelines provide some guidance in this respect.[1]

In addition, the Annual Report 2014 of the United Nations Special Rapporteur states that the removal and disciplinary procedures against judges should focus on a grave and intolerable professional misconduct that tarnishes the reputation of the judiciary. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa defined the threshold for judicial removal as misconduct

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1 Guideline Vl.l.(a)(A).

unbecoming of a judicial office[2] whereas Article 30 of the International Bar Association ('IBA') Minimum Standards of Judicial Independence states that a judge is deemed unfit for judicial office if the judge has committed any act of crime or grave or repeated neglect. All international instruments examined above unanimously concur that judges must not be removed from office on any other grounds save for incapacity and misconduct. They also prescribe a high threshold of burden on the state when removing any judge from office. The instance of the Chief Justice of Gibraltar[3] would be a genuine case where the Privy Council emphasised the requirement for a thorough evaluation to be made to determine if the appointed judge might be entrusted to remain in his or her judicial office. The Privy Council asserted that the test for judicial removal requires any failings of the judge to be severe enough to undermine trust in the judge's ability to perform his or her duty properly. Further, in the case of *Re Levers*[4], the Privy Council highlighted that although the standard of behaviour to be expected of a judge is set out in the Bangalore Principles of Judicial Conduct (Resolution 2006/23 of the United Nations Economic and Security Council), these standards should aspire all judges to achieve but it does not follow that a failure to do so will automatically amount to misconduct. The Privy Council expressed that the public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public

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2 Article A.4(p).

3 *Re Chief Justice of Gibraltar [2009] UKPC 43*.

4 [2010] UKPC 24.

in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit.[5]

In addition, the United Nations Human Rights Committee reported that the right to an independent and fair trial of a judge would be threatened if the power to remove judges is vested with the executive.[6] The IBA Minimum Standards of Judicial Independence advocates that, as a minimum standard, an independent judicial tribunal be established to hear cases involving judicial removal via Article 4(a) and on the other hand, by virtue of Article 4(c) the IBA Minimum standards does also allow for removal of judges via legislative council but based on the recommendation of an independent commission. The Venice Commission in its 2010 report on the Independence of Judicial System[7] recommended that the arbiter in such judicial removal cases shall be a court of permanent status or a judicial council.

Most Commonwealth nations have indicated the reasons for judges to be removed were due to judges' inability to carry out their judicial functions or conducts which are not in conformance to the standards set out in the Commonwealth Latimer House Principles and other international standards for judicial conduct. In South Africa, however, gross ineptitude is an additional ground that might warrant the removal of a judge as permitted under Section 177(1)(a) of the South Africa Constitution. Ineptitude might be acceptable grounds for dismissal in certain circumstances especially when judges deliberately disregard the obligations of their office, however, this may also expose judges to unfair and indiscriminate accusations of ineptitude for delays or errors attributable to other factors such as work overload and lack of administrative

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5 *Therrien v Canada (Minister for Justice) [2001] 2 SCR 3.*

6 UN Doc CCPR/C/GC/32 (23 August 2007), para 20

7 Report on the Independence of the Judicial System, Part One: The Independence of Judges, CDL-AD (2010)004, para 33 to 34 of page 84.

support.[8] In the Malaysian context, Article 125(3A) of the Federal Constitution allows the Chief Justice to exercise discretionary powers to refer any judge to a disciplinary body for a minor breach of codes of ethics. The vesting of such discretionary power on a single actor, the Chief Justice, in this case, creates ambiguity and gives an appearance of lack of judicial independence as currently there are no express guidelines on what constitutes a minor breach of ethical conduct that require lesser disciplinary sanctions or grave misconduct which warrant a judge to be removed from office.

Judicial Removal Mechanisms

Nations all over the world require a system for removing judges from office. Nonetheless, the challenge for legal frameworks is to ensure that the removal process is not used to penalise or intimidate judges. There are several different types of mechanisms to remove a judge from office in Commonwealth nations, which are ad-hoc tribunals, disciplinary councils, a hybrid mechanism involving the legislative assembly or Parliament and a disciplinary council, and a mechanism involving only the legislative assembly or Parliament. There is not a single Commonwealth nation that gives sole discretionary power to the executive to remove judges from office.[9] Figure 1 shows a percentage breakdown of the types of judicial removal mechanisms employed for higher courts across Commonwealth

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[8] Solik, Greg. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by the Bingham Centre for the Rule of Law), J van Zyl Smit." *South African Law Journal* 133, no. 3 (2016): 708-711.

[9] Solik, Greg. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by the Bingham Centre for the Rule of Law), J van Zyl Smit." *South African Law Journal* 133, no. 3 (2016): 708-711.

nations. A summary of findings revealed that in 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an ad hoc tribunal is formed to resolve the issue. Furthermore, a permanent disciplinary council is established in another 21% of jurisdictions for that purpose, and a parliamentary removal mechanism is found in 34% of jurisdictions, while in the remaining 4% of jurisdictions, some judges are removed through a parliamentary process and others through a disciplinary council.[10]

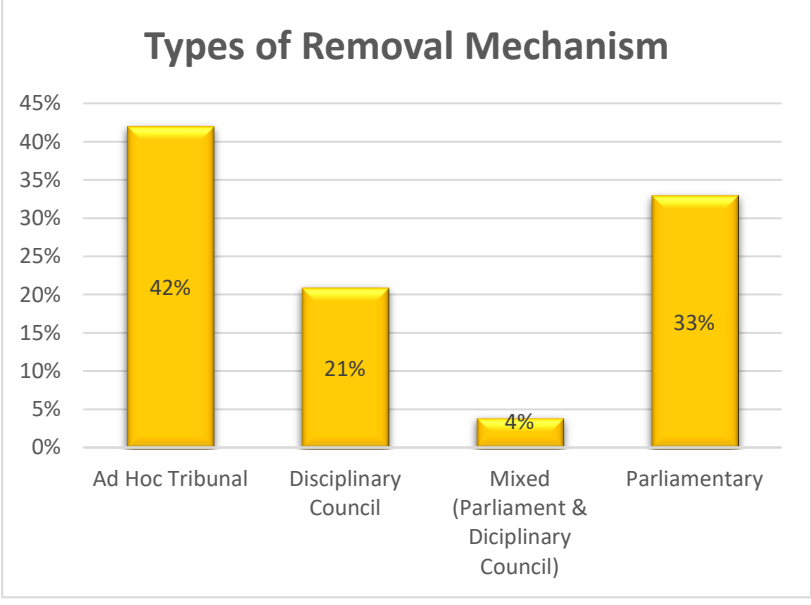

FIGURE 1: Types of removal mechanisms of higher court judges in the commonwealth countries.

[10] Smit, Jan Van Zyl;"The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Aalysis of Best Practice. *British Institute of International and Comparative Law*, 2015, xxi.

Ad-Hoc Tribunal

The ad-hoc tribunal model for removing judges from office is the most popular amongst Commonwealth nations. It was found that 20 Commonwealth jurisdictions subscribe to this model which includes Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organization of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda, and Zambia. Australian states of Victoria and Queensland, and the Australian Capital Territory.[11] The ad-hoc tribunal model is popular because it is found to be the most viable amongst all other types of mechanisms.[12] In this type of model, the tribunal is given the mandate to examine whether there are any valid grounds to remove the judge accused of being unfit to perform his or her judicial duties. The tribunal is usually made up of a combination of current and former judges and members may also be invited from foreign judiciary to give the tribunal a sense of international legitimacy and to allay any unbiased perception of domestic political interference. Also, foreign expertise is considered to ensure that the tribunal proceedings follow best practices as adopted in similar jurisdictions.[13] This kind of foreign appointment is allowed in Malaysia. The Federal Constitution under Article 125(4) allows for the appointments of tribunal members from other Commonwealth jurisdictions provided the said appointees meet the stipulated qualification criteria.

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[11] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 96.

[12] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 91.

[13] Kenneth Owen Roberts-Wray, *Commonwealth and Colonial Law*. (London: Stevens & Sons, 1966), liv.

Generally, a preliminary inquiry phase is initiated prior to any removal proceedings. This is a salient part of the judicial removal mechanism to determine whether an ad-hoc tribunal is warranted or otherwise. The United Nations Basic Principles and Article 25 of the Beijing Statements of Principles of the Independence of the Judiciary both advocates that some form of initial investigation be conducted before instituting removal proceedings against any judge. In most of the commonwealth countries that practice the ad-hoc tribunal mechanism, the Chief Justice or a commission is tasked with the duty to first conduct a preliminary inquiry to ascertain the validity of the charges against any judge and to determine if the said judge is to be subjected to a removal proceeding as currently practised inter alia in Barbados, Bahamas, Fiji, Ghana, Guyana, Jamaica, Kenya, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Seychelles and Trinidad and Tobago.[14] However, if the accused judge is the Chief Justice or in some cases the President of the Court of Appeal, then the removal process is generally initiated by the executive. This applies to all countries mentioned earlier except for Kenya.[15] In Seychelles, the appointment and removal of judges fall under the purview of the Constitutional Appointments Authority (CAA). It should be noted that it is not mandatory for the CAA to include judges as members.

In some Commonwealth countries, the judicial removal mechanism involves a hybrid ad-hoc tribunal mechanism that combines both the Chief Judge or a commission and the executive as who are jointly responsible to decide to initiate tribunal proceedings. The countries that practice this type of hybrid system are Botswana, Lesotho, Malaysia, Singapore, Solomon Islands, Tanzania, Uganda, and Zambia.

[14] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 95.

[15] Article 168. Constitution of Kenya.

Figure 2 illustrates the various types of appointments in the ad-hoc tribunal model.

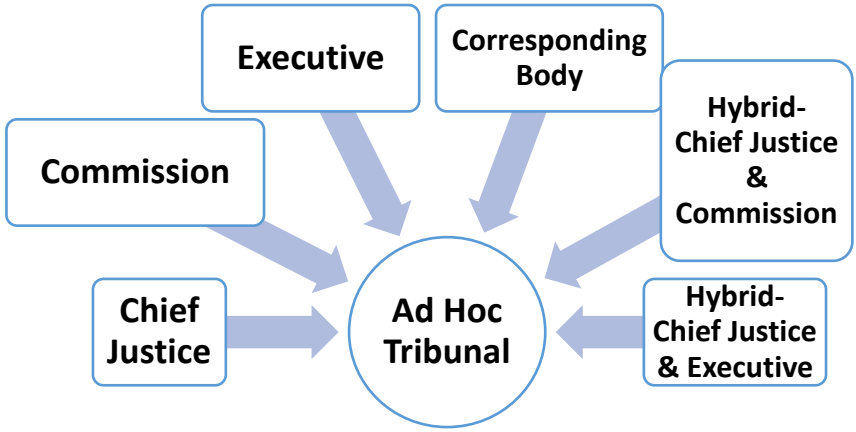

Figure 2: Types of appointment of Ad Hoc Tribunal

However, there is an inherent risk of abuse of power by the executive in this type of ad-hoc tribunal model when the power to commence removal proceedings against judges is vested in the executive. An example of this was the tribunal of the former Lord President of Malaysia, Tun Salleh Abas, where it was alleged that the Prime Minister purportedly used his constitutional powers under Article 125 of the Federal Constitution to select the members[16] of the tribunal; the qualification of some members remains questionable until

[16] Report of the Tribunal Established under Article 125 (3) and (4) of the Federal Constitution Re: Y.A.A. Tun Dato' Hj Mohamed Salleh Abas, Lord President, Malaysia. (Kuala Lumpur Government Printer, 1998). https://trove.nla.gov.au/work/19170446.

today.[17] This dark episode in the history of the Malaysian judiciary seems to demonstrate that the model does not guarantee an independent judicial removal proceeding if safeguards in such a mechanism do not adequately shield the judiciary against executive intimidation. According to Harding, it is not a bad idea to have fellow judges scrutinize the alleged breach of ethics or misconduct of their brother or sister judges if there are clear and guiding principles that expressly delineates the rules in the composition of the tribunal members, the procedures as well as the grounds for such removal proceedings. He pointed out that the reason for Malaysia to choose the tribunal mechanism for instituting judicial removals is to avert any manipulation by an executive with majority control of Parliament in a legislative council judicial removal mechanism.[18] However, there is an ominous weakness in the Malaysian system that manifested in the Tun Salleh case which is that the Prime Minister holds the constitutional discretionary powers in the removal process under Article 125.

Parliamentary Removal

Another mechanism that is widely used in the removal of judges in Commonwealth nations is the Parliamentary removal mechanism. Although it is not as popular as the Ad-Hoc tribunal method, it has nevertheless found acceptance in countries such as Australia, Bangladesh, Canada, India, Kiribati, Malawi, Maldives, Malta, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu and also the United Kingdom.[19] It is also applicable to Nigeria and

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17 Harding, Andrew J. "The 1988 constitutional crisis in Malaysia." *The International and Comparative Law Quarterly* 39, no. 1 (1990): 57-81.

18 Harding, Andrew J. "The 1988 constitutional crisis in Malaysia." *The International and Comparative Law Quarterly* 39, no. 1 (1990): 57-81.

19 Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best

Rwanda for certain judicial positions. The minimum standards set by Article 4(c) of the IBA Minimum Standards of Judicial Independence requires that in a Parliamentary removal system, the judicial removal powers exercised by the parliament should be founded on the recommendation by a commission. Notwithstanding this, Chief Justices namely from the Asia-Pacific region had expressed their concerns that this parliamentary removal system is susceptible to abuse by the executive if the parliament is under the control of the executive.[20]

In a situation where the executive commands the support of the parliament, any judge whose decisions are unfavourable to the government of the day could potentially see the said judge being ousted from his or her judicial position with a simple majority vote in the parliament. Any opposition voice would be drowned, futile against the majority rule of the executive and the executive could potentially pack the courts with executive-minded judges. Considering this, most commonwealth jurisdictions adopt a hybrid system combining both the Ad-Hoc Tribunal and parliamentary removal mechanism instead of a vesting removal power solely on parliament for instance in the United Kingdom[21] and South Africa.[22] Alternatively, the threshold for parliamentary approval to remove a judge could be set higher by requiring a two-thirds majority instead of a simple majority for parliament to remove any judge from office. This would further enhance safeguards in the countries adopting the parliamentary removal mechanism.

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practice. British Institute of International and Comparative Law, 2015, 106.

20 Beijing Statement on the Independence of the Judiciary (1997).

21 Regulation 2, 4(2), 14(b) and 15. Judicial Discipline (Prescribed Procedures) Regulations 2014.

22 Section 20 and 30. Judicial Service Commission Act 1994.

Removal by Disciplinary Council

Judicial service commissions, judicial councils, and other permanent bodies are examples of disciplinary councils that are authorised in some Commonwealth jurisdictions to decide whether a judge should be removed from office. International norms require these to be judicial bodies, but in some Commonwealth states that follow this model,[23] only a minority of members are required to be judges, with some jurisdictions entrusting the executive with the power to appoint council members.[24] It is still common practice for disciplinary bodies, such as ad hoc tribunals, to recommend that a judge be removed to the Head of State, who oversees the formal act of removal. The role of the head of state is merely perfunctory in the removal process. In the absence of a viable review or appeal mechanism, it is not inconceivable that a Head of State would refuse to act on such a recommendation if there is clear evidence of illegality or irregularity in the disciplinary process. To affirm a broader discretion on the Head of State would be to reintroduce an element of executive control over the removal of judges, which would be incompatible with the judiciary's independence. It is pertinent to note that an advantage of entrusting removal decisions to disciplinary councils rather than ad hoc tribunals is that their members are not chosen for the purpose of investigating a specific judge, making manipulation of the body more difficult.

Dual Removal Mechanism

Some countries have adopted a combination of two types of removal mechanisms in their judicial removal system consisting of the judiciary and the legislative assembly. In the context of this article, the dual system for England and Wales in the United Kingdom and South Africa are selected for discussion.

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[23] Belize, Cameroon, Namibia, Swaziland, Tonga, and Vanuatu.

[24] Section 159(2). Constitution of Swaziland.

The South African Model

The South African Constitution under section 177(1)(a) empowers the Judicial Service Commission to conduct an investigation to ascertain if any judge is incapacitated or is grossly incompetent or is guilty of gross coffences of misconduct. If the commission finds prima facie evidence of such incapacity, incompetence, or misconduct then a tribunal shall be established to initiate a removal hearing.[25] The full hearing shall be before a tribunal consisting of two judges and a layperson who is not a member of the national assembly.[26] The exclusion of legislative council members in the tribunal ensures conformance with the Latimer House Guidelines and assures an independent and impartial tribunal in accordance with Section 178(5) of the South African Constitution. The accused judge would be given reasonable notice to defend himself or herself and could also be represented by a counsel of his or her choice and given the right to call and question witnesses. If the judge is found to be incapacitated or guilty of gross incompetency or misconduct, the said judge would be referred to the National Assembly for a parliamentary resolution as prescribed under sections 22 and 33 of the Judicial Service Commission Act 1994. A two-third majority would be required in the National Assembly to remove the judge from office in accordance with section 177(1)(b) of the South African constitution. In the South African model, the safeguards in the judicial removal under section 177 (1)(a) reduced the risk of parliamentary interference as it limits the parliament to act at the advice of the tribunal. Once the two-third majority endorsement is complied with, section 177(2) of the South African constitution mandates the President to remove the affected judge from office.

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[25] Dane Ally, "A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa," *Athens Journal of Law* (AJL) 2, no. 3 (July 2016): 150.

[26] Section 22(1). Judicial Service Commission Act 1994.

The United Kingdom (England and Wales) Model

For key judicial positions such as the Lord Chief Justice, Lords Justices of the Appeal Court and judge of the High Courts, Her Majesty the Queen of England is the final authority in the removal of higher court judges from their positions. However, this is subject to an address in the Parliament pursuant to section 11(3) of the Supreme Court Act 1981. However, the Lord Chancellor can exercise powers given under the Constitutional Reform Act 2005 to remove other judicial officers not mentioned above on grounds of incapacitation and misbehaviour. In the United Kingdom, Judicial Conduct Investigations Office (JCIO) was established as an independent statutory organisation to assist the Lord Chancellor and Lord Chief Justice in conducting investigation into complaints of judicial misconduct with exception of Supreme Court judges.[27] Rule 1 of the Judicial Conduct (Judicial and other office holders) Rules 2014 Supplementary Guidance states that the overall responsibility to conduct a proper investigation and ascertain whether there is any credibility in the complaints of misconduct against judges shall be shared by the Lord Chancellor and Chief Justice. The officers in JCIO are appointed by the Lord Chancellor with the consent of the Chief Justice as per Regulation 4 of the Judicial Discipline (Prescribed Procedures) Regulations 2014 and is tasked to handle complaints against the conduct of judges in a consistent, fair, and efficient manner.

When a complaint had been filed, the Lord Chancellor and the Lord Chief Justice may assign the case to any designated person or body for investigation as per Regulation 13(2) of the Judicial Discipline (Prescribed Procedures) Regulations 2014 (JDR 2014). The designated person may be a nominated judge or a disciplinary panel. In cases involving

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[27] Judicial Conduct Investigations Office, accessed on October 4, 2021, https://www.complaints.judicialconduct.gov.uk.

tribunal judges, the President of the relevant tribunal may be nominated to investigate the complaint whereas if it involves a magistrate, an advisory committee may be tasked to conduct the investigation. If the outcome of the investigation into any complaints does not warrant removal or suspension of a judge, the matter may be referred to a disciplinary panel constituted jointly by the Lord Chancellor and Lord Chief Justice in accordance with Regulation 14 of the JDR 2014. The possible penalties or sanctions against any judge found guilty of judicial misconduct is set out in The Constitutional Reform Act 2005 (CRA). Regulation 15 of the JDR 2014 describes that the sanctions shall be commensurate with the degree of severity of the offense. These include sanctions such as a formal advice, formal warning, reprimand, and removal from office. Hodge[28] indicated that the UK model espouses shared responsibility in disciplinary or judicial removal cases as to avert any perception or suspicion that the Lord Chief is protecting his or her fellow judges.

The United Kingdom model is founded on a consensus between the Lord Chancellor and the Lord Chief Justice. There is also additional protection to safeguard the system by requiring both chambers of the UK Parliament to vote on the matter concerning High Court judge and above. These are stipulated in regulations 2, 4(2), 14(b) and 15 of the JDR 2014. The mechanism for the removal of Supreme court judges is based on provisions under Section 33 and Note 219 of the CRA which allows removal only if passed by both the House of Commons and the House of Lords.

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[28] Lord Hodge, "Upholding the Rule of Law: How We Preserve Judicial Independence in the United Kingdom," Lincoln's Inn Denning Society, accessed October 1,2021, https://www.supremecourt.uk/docs/speech-161107.pdf.

CONCLUSION

The comparative analysis of different types of removal mechanisms in the commonwealth countries illuminated the benefits and inadequacies of various removal mechanisms and had also assisted in determining the most viable method in the removal of higher court judges. It is incumbent on legislators to create a suitable legal framework with best practices and standards that adopts a more executive-free approach in the removal of higher court judges in order to regain the public trust in the judiciary and as not to repeat the judicial crisis of 1988 involving Tun Salleh Abbas.

After considering the various types of removal mechanisms used in the commonwealth countries in particular the United Kingdom, South Africa and Malaysia, the question arises whether Malaysia's method of adopting ad hoc tribunal should be retained or changed. Removal of higher court judges by way of parliament is a far cry from our intention to have a more independent judiciary, whereas a hybrid system of both ad hoc tribunals and parliamentary removal or setting a higher threshold of the two-thirds majority would also not be a viable option for Malaysia given the history of political consideration in the removal of judges in the Malaysian higher courts. This type of mechanism may be abused by the executive if it commands the majority in the parliament. Furthermore, the current political landscape and the suspension of parliament due to the Covid 19 pandemic by the Government does not augur well for the removal mechanism method by the parliament. Therefore, the parliamentary removal system is also not viable in Malaysia.

The next question is whether the ad hoc tribunal system appointed by the Head of State on the advice of the executive would be the best removal mechanism for higher court judges in Malaysia. The answer is an approving – YES. As previously stated, the reality is that the removal of the judges at higher courts in Malaysia may be initiated by the Prime Minister.

Therefore, this concentration of power in the executive would still impose an inherent risk of abuse and the errors of the past can still be repeated when the Prime Minister's position is challenged be it within his political party or externally in the parliament. The case of Tun Salleh Abbas proves that the ad hoc tribunal system has its flaws if there is executive interference and involvement.

Therefore the ad hoc tribunal system must be maintained as it appears to be the best method to guarantee a more independent method of removing judges from the higher courts compared to a parliamentary system. However, the degree of independence of the ad hoc tribunal is heavily dependent on the extent of executive involvement in its appointment as well as the appointment of members to the ad hoc tribunal. The best way forward in a Malaysian context is to amend the current Malaysian Constitution to ensure that appointment of the ad hoc tribunal and its members is conferred to the commission as opposed to the Prime Minister or confined only to the top judges of the land. In addition, the commission should be composed of pertinent stakeholders in the Malaysian judicial system. In this way, there is a greater possibility of ensuring independence even in the removal system of the higher court judges in Malaysia.