

The Role of Royal Pardon in Malaysia: An Analysis and a Way Forward

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ABSTRACT

Royal Pardon is one of the prerogative rights of the King, Yang Di-Pertuan Agong in Malaysia. The granting of a royal pardon is sacred, as it will significantly shorten the punishment an offender deserves. The legal issues that arise are whether the advice of the Pardons Board is binding and whether the decision to grant a pardon will be judicially reviewed. An analysis was done about the rejection and granting of a royal pardon to Anwar Ibrahim, and also the pardon that was granted to Najib Razak recently. There are several weaknesses in Malaysia's royal pardon system, and recommendations are provided by comparing it with those of Australia and Thailand. The problem is that there is a lack of clarity about Malaysia's current royal pardon system to ensure justice is served. The research objectives are to analyse the current royal pardon system in Malaysia based on decided and ongoing cases, especially on Anwar Ibrahim and Najib Razak's pardon process, and compare the royal pardon system with Australia and Thailand to improve Malaysia's current royal pardon system. The research adopts doctrinal-based research and comparative analysis to fulfil the objectives of the research.

Keywords: Royal pardon; Prerogative rights; Pardon board; Malaysia, Federal Constitution

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1. Introduction

Black's Law Dictionary defines 'pardon' as an act of grace that exempts an individual from punishment for a committed crime.¹ According to Fauziah Hani, Abdul Rani, and Muhammad 'Azzam, there are five terms which can be considered as 'royal pardon' which are suspended, remit, commute, reprieve, and respite.² A reprieve means the sentence must eventually be carried out, but its execution is temporarily delayed. This means that the sentence will be eventually carried out, just that it will be delayed for a certain period. Respite means granting a lesser sentence than the penalty which was prescribed to the offender. For example, if an offender does not have any records of convictions, the person will be granted a lesser sentence.³ Commute means the lessening of the punishment.⁴ For example, a person who was granted a death sentence can be commuted to life imprisonment.

A suspended sentence means that the person guilty of a crime will temporarily stop enforcing the sentence.⁵ In *Jagdish Prasad v RAIR*,⁶ it defines 'suspension' as the sentence has not been remitted, and the sentence was temporarily stopped to enforce it, and the authorities have the right to direct the person to continue the sentence without any reason. Remit means to pardon or to forgive.

According to section 300(1) of the Criminal Procedure Code (CPC), it describes the ways to pardon any person who has been sentenced to punishment for an offence, the Ruler of the State would be able to exercise the power of pardoning by suspending the execution of the sentence or remitting the punishment for which he was convicted.⁷ According to section 301 of the CPC, the Ruler of the State has the power to commute the sentences of death, imprisonment, and fine.⁸

The problem is that there is a lack of clarity about the current royal pardon system in Malaysia to ensure justice is served. This research adopts doctrinal-based research and comparative analysis. The doctrinal-based research will be carried out comprehensively as part of finding relevant key sources such as primary sources comprised of legal provisions, case laws, and Hansard. Additionally, data collection on secondary sources will be conducted by using online research, newspapers, articles, journals, and theses. Moreover, a comparative analysis with Australia and Thailand will be carried out, as it provides a better

¹ *Black's Law Dictionary* (2nd edn, The Law Dictionary) <<https://thelawdictionary.org/pardon/>>.

² Fauziah Hani binti Ahmad Fuzi, Abdul Rani bin Kamarudin and Muhammad 'Azzam bin Zainal Abidin, 'Pardon, Parole, and Remission: The Inmates' Second Chance' [2018] 1 Legal Network Series(A) lxxi.

³ 'It's a Remission of Sentence for Najib Razak—Hafiz Hassan' *MalayMail* (3 February 2024) <<https://www.malaymail.com/news/what-you-think/2024/02/03/its-a-remission-of-sentence-for-najib-razak-hafiz-hassan/116119>>.

⁴ Fauziah (n 2).

⁵ *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/suspended%20sentence>>.

⁶ All India Report 1949 ALL 626.

⁷ CPC, s 300(1).

⁸ CPC, s 301.

view of how to improve the current Malaysian royal pardon system. The research objectives are to analyse the current royal pardon system in Malaysia based on decided cases, especially on the pardon process of Anwar Ibrahim and Najib Razak, and to compare the royal pardon system with Australia and Thailand to improve Malaysia's current royal pardon system.

This paper aims to discuss the royal pardon under the Federal Constitution (FC), the history of a royal pardon, the functions of the pardon board, the procedure of exercising royal pardon, whether the advice of the pardon board is binding, whether the decision of granting a pardon can be judicially reviewed, the rejection and approval of granting a pardon to Anwar Ibrahim, the pardon granted to Najib Razak in regards to the 1MDB scandal case, comparison of Malaysia's royal pardon system with Australia and Thailand, weaknesses and recommendations to be implemented in Malaysia.

2. Royal Pardon Under the Federal Constitution

The power to grant a royal pardon to the offender is in the Yang Di-Pertuan Agong's (YDPA) hands. The power was conferred under Article 42(1) of the Federal Constitution, where the Yang Di-Pertuan Agong has the power to grant pardons, reprieves, and respites towards all the offences which have been tried by court-martial and also all the offences which were committed in the Federal Territories of Kuala Lumpur, Putrajaya, and Labuan. Regarding all the offences committed in States, the power to grant pardons, reprieves, and respites was conferred on the Ruler or Yang di-Pertua Negeri (YDPN) of a State.⁹ This shows that the power to grant pardon is wide, as it not only covers imprisonment sentences but also can pardon those who were punished with the death penalty.

Moreover, Article 42 (10) of the FC states that YDPA, as the Head of the religion of the State has the power to grant pardons, reprieves, respites or to remit, suspend or commute sentences which were imposed by the court under Islamic law in State of Malacca, Penang, Sabah or Sarawak or the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.¹⁰

However, although YDPA has the discretion to grant royal pardons to the offenders, it is still subject to certain limitations. This is mentioned under Article 42(4) of the FC, where YDPA or the Ruler or YDPN shall exercise the power on the advice of the Pardons Board.¹¹ According to Article 42(9) of the FC, before the Pardons Board gave any advice to the YDPA, they had to consider the written opinion of the Attorney General.¹²

Moreover, the application of royal pardon can be found in the CPC. According to section 300(2) of the CPC, it stated that when an application to suspend or remit a sentence was made to a Ruler, the Ruler may need the convicting Judge or Magistrate to mention his

⁹ FC, art 42(1).

¹⁰ FC, art 42(10).

¹¹ FC, art 42(4).

¹² FC, art 42(9).

opinion as to whether the application should be granted or refused. Nevertheless, a Judge or Magistrate can only give their opinion to determine whether to grant or refuse the application, and the judiciary does not have the jurisdiction to decide to pardon an offender.¹³ The case of *Public Prosecutor v Soon Seng Sia Heng and Associated Appeals* states that the Royal prerogative of mercy is executive power. Only the executive would be able to make such decisions.¹⁴ This shows that the granting of the pardon is discretionary, and the judicial system was not able to question it. Section 300(4) of the Criminal Procedure Code also mentions that the judge or magistrate shall not interfere with the right of the Ruler of any State to grant pardons, respites, reprieves, or remissions of punishment.¹⁵

There is the existence of the Pardon Board to advise the YDPA or YDPN in granting pardons. There are two types of Pardons Board, namely the State Pardons Board and the Federal Pardon Board. For the members of the State Pardon Board, based on Article 42(5) of the FC, the Pardons Board for each state shall consist of the Attorney General of the Federation, the Chief Minister of the State, and not more than 3 other members who shall be chosen by the Ruler or YDPN.¹⁶ For the Federal Pardon Board, according to Article 42(11) of the FC, there will be only one single Pardon Board for the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya. The members of the Federal Pardon Board shall consist of the Attorney General of the Federation, the Minister responsible for the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, and not more than three members appointed by the YDPA.¹⁷ In regard to the categories of people that can be chosen to be members of the Pardons Board, Article 42(7) of the FC mentioned that a member of the Legislative Assembly of a State or a member of the House of Representatives shall not be appointed by the Ruler or YDPN to be a member of the Pardons Board.¹⁸ However, our FC and other legislation did not mention the actual categories of people who can be chosen to be members of the Pardons Board. After research was done by the author, the sole information about who constitutes the 3 members of the pardon board appointed are 3 lay members.¹⁹ It was to be noted that the 3 lay members are generally not legally trained.²⁰ Nevertheless, there is no information on which race, social status, job scope, and qualifications of the lay members are to be appointed as Pardon Board members.

Article 42(5) of the FC also states that the Attorney General (AG) shall have the power to delegate his functions as a member of the Board to any other person. For example, this can

¹³ CPC, s 300(2).

¹⁴ [1979] 2 Malayan Law Journal 170 (FC).

¹⁵ CPC, s 300(4).

¹⁶ FC, art 42(5).

¹⁷ FC, art 42(11).

¹⁸ FC, art 42(7).

¹⁹ Tsubasa Nair, 'Najib's Jailing and the ABCs of Clemency' *Free Malaysia Today*(Petaling Jaya, 28 August 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/08/28/najibs-jailing-and-the-abcs-of-clemency/>>.

²⁰ Daniel Pascoe, 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us About Malaysia's Royal Pardon System' (2016) 18 *Asian Pacific Law and Policy Journal* 63 <<https://heinonline.org/HOL/P?h=hein.journals/aplpj18&i=65>>.

be seen in the case of *Mohd Khairul Azam Abdul Aziz v Lembaga Pengampunan Wilayah Persekutuan and Anor*, the AG delegated his task in the Pardons Board to the Solicitor General II, who was present during the proceedings. The court held that legal delegation of the power of the AG to another officer is authorised under *Article 42 (5) of the FC*. Solicitor General II refers to the AG's assistance, which possessed the power to carry out the Attorney General's duties.²¹

Article 42(5) of FC also states that the Ruler or YDPN can appoint any person to exercise temporarily the functions of any member of the Board if the person is absent.²² Article 42(6) of the FC states the term of appointment to be members of the Pardon Board is 3 years, and they shall be eligible for reappointment, but can resign from the Board at any time.²³

Not just YDPA or YDPN has the power to grant royal pardon, according to Article 38(6) of the FC, the members of the Conference of Rulers also have the power to grant pardons, reprieves and respites, or of remitting, suspending or commuting sentences under Article 42(12) of the FC.²⁴

3. History of Royal Pardon

Before Malaysia was formed, in the 15th and the early 16th centuries, during the Malacca Sultanate period, the ruler was the foundation of justice. The ruler has the power to determine the penalties for crimes such as theft, robbery, killing, and others. The ruler had the power to grant pardons, which would set the offender free from penalties. During the Portuguese Period, the Sultan of Malacca no longer had the prerogative power, as the Portuguese Governor would be the one to pardon the offenders.²⁵

During the British Colonisation, where the British conquered Penang, Malacca, and Singapore, in 1896, the Courts of Residents and Sultans in Council were abolished. It was replaced with the Judicial Commissioner, who then became the final Court of Appeal for the Federation. After 1957, the Federation of Malaya gained independence from Great Britain, and the Constitution was drafted. The constitution grants the power of pardon to the YDPA, the Ruler or YDPN, for specific offences committed in the territories mentioned.²⁶

Previously, the King and YDPN of a State had absolute power to grant pardons, reprieves, and respites regarding all offences which were committed in the federal territories, which included pardoning himself and his children. However, amendments had been made regarding their power due to the incident of the son of the Sultan of Johor, Tunku

²¹ [2021] 1 Current Law Journal 94 (HC).

²² FC, art 42(5).

²³ FC, art 42(6).

²⁴ FC, art 38(6).

²⁵ Norchaya Haji Talib, 'The Powers and Functions of the Pardons Board in Malaysia—A Review' (Master of Laws thesis, University of Malaya 1989) <http://studentsrepo.um.edu.my/8203/1/The_Power_and_functions_the_pardons_board_in_malaysia.pdf>.

²⁶ *ibid.*

Majid, who had assaulted the Perak hockey goalkeeper. Not only that, Mr Douglas Gomez, who was the hockey coach, was summoned to the Johor Ruler's palace for 4 hours, and the next day he was given medical treatment for "facial cuts and bruises". Later, Mr Gomez filed a police report alleging that the Sultan of Johor had assaulted him at the palace. This led to the Constitution (Amendment) Bill 1993 about the insertion of clause (12) to Article 42 that the Ruler is prohibited from pardoning himself and his children, or his wife.²⁷

4. Functions of the Pardon Board and Procedure of Exercising Royal Pardon

The function of the pardon board is to advise YDPA or YDPN of a State when exercising the power of granting a royal pardon, which was mentioned under Article 42(4) of the FC.²⁸

Usually, the Pardon Board will consider the following documents, which are the petition submitted by the prisoner mentioning the reasons why a pardon should be granted,²⁹ the G's written opinion,³⁰ a report on every prisoner which consists of a statement by the Officer-in-charge on the work and conduct of the prisoner and a Medical Officer's statement on the mental and bodily condition of the prisoner and the written opinion of the Judge or Magistrate about their opinion whether to grant or refuse the application.³¹

Since the nature of the Pardons Board proceedings is secretive, there are limited sources from the academicians and the public on how the Pardons Board made decisions. The Federal Constitution only provides information that the meeting of the Pardons Board shall be presided over by the Ruler or YDPN, which is affirmed under Article 42(8). Moreover, according to Article 42(9) of the FC, before the Pardons Board gave any advice to the YDPA, they had to consider the written opinion of the Attorney General. It was to be noted that the AG's written and verbal opinion has the most influential effect on the members of the pardon board.³²

Regulation 43 of the Prison Regulations 2000 states that the Pardons Board can encourage good conduct and industry and enable reformative treatment. A prisoner convicted for more than one month of sentence may be granted remission of one-third of his sentence, provided that the prisoner shall serve one year of imprisonment before remission can be granted. Those prisoners who were sentenced to a term of imprisonment of one month or less than one month shall not be granted remission.³³

²⁷ Hoong Phun Lee, 'Hereditary Rulers and Legal Immunities in Malaysia' (1993) 12(2) *University of Tasmania Law Review* 323 <<https://heinonline.org/HOL/P?h=hein.journals/utasman12&i=329>>.

²⁸ FC, art 42(4).

²⁹ Daniel (n 20).

³⁰ FC, art 42(9).

³¹ CPC, s 300(2).

³² FC, art 42(9).

³³ Prison Regulations 2000, reg 43.

4.1 Eligibility of Royal Pardon

For prisoners who are automatically eligible for a pardon, Regulations 54 of the Prison Regulations 2000 states that a monthly report on every prisoner who completed 4,8,12, or 16 years of their sentence during the previous month in regards to the recommendations he may make about the prisoner to be submitted to Pardons Board to take into consideration on whether to remit the residue of the sentence. There is an exception where security cases and a person convicted of an offence by Court Martial under the Armed Forces Act 1972 shall not be considered for the granting of a pardon.³⁴

If the eligibility of royal pardon is not automatic, in regards to a prisoner petitioning for pardon, under Regulation 113 (1) of the Prison Regulations 2000, he can petition to YDPA once he is convicted. If the petition fails, to petition for the second time, the prisoner has to complete 3 years of the sentence from the date of conviction. The subsequent petition can only be filed every 2 years.³⁵ For a prisoner sentenced to a death sentence, according to Regulation 114 of the Prison Regulations 2000, he can freely petition the YDPA when he is under sentence.³⁶

4.2 Suggestions to Improve the Pardon Board

Since the Federal Constitution only mentions that the 3 other members appointed by the Ruler or YDPN shall not be a member of the Legislative Assembly of a State or a member of the House of Representatives, therefore, suggestions will be given in regards to who the 3 members can be appointed.

It was the author's opinion that the Director General of Prisons or the Commissioner of Prisons can become one of the members of the Pardon Board, as the people who are eligible to petition for a royal pardon will be prisoners. This is because the Director General of the Prisons is the one who can observe the behaviour of prisoners.³⁷ Therefore, their opinions have significant weight in giving opinions on who deserves to be granted a royal pardon.

Moreover, a psychiatrist can be appointed as one of the members of the Pardon Board. A psychiatrist can provide a professional viewpoint about the mental state of the prisoner to further determine whether it is desirable to grant a royal pardon to the offender. It would benefit the prisoners if the psychiatrist were able to give data about the inmates' situation before advising the YDPA.³⁸

³⁴ Prison Regulations 2000, reg 54.

³⁵ Prison Regulations 2000, reg 113(1).

³⁶ Prison Regulations 2000, reg 114.

³⁷ Norchaya Haji Talib (n 25).

³⁸ Marvin E Wolfgang, 'Murder, the Pardon Board, and Recommendations by Judges and District Attorneys' (1959) 50(4) *Journal of Criminal Law and Criminology* 338 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4858&context=jclc>>.

Besides that, the three members can be representatives from the public in Malaysian society, consisting of three major ethnic groups, which are Malay, Chinese, and Indian.³⁹ This is to ensure that there will be no discrimination when deciding to advise the YDPA in granting the pardon, and each representative from the ethnicity will be able to voice their perspective.

5. Whether the Advice of the Pardon Board is Binding

Since the function of the Pardon Board is to advise the YDPA to determine whether to grant a pardon to the offenders, an issue arises whether the advice of the Pardon Board is binding on the YDPA. The nature of the royal pardon is extrajudicial as the decision made to determine whether to grant a royal pardon is in the hands of YDPA or YDPN.

In the case of *Sim Kie Chon v Superintendent of Pudu Prison and Others*,⁴⁰ Sim Kie Chon took legal action to challenge the decision of the Pardons Board due to rejecting his petition for clemency on the ground that the Pardons Board had commuted the death sentence of Mokhtar Hashim, who was convicted of murdering a former Negeri Sembilan State Assemblyman. The court held that despite the Pardons Board being able to offer advice to the YDPA, the discretion is on the YDPA himself to exercise the power according to Article 42(1) of FC. The Pardons Board is merely acting as an advisory body and will not be able to make any final decision in granting a pardon. In the Supreme Court case of *Superintendent of Pudu Prison and Others v Sim Kie Chon*,⁴¹ the court mentioned that the power of pardon is an executive power, as the royal prerogative of mercy is expressly preserved under Article 42 of the Federal Constitution. It also further affirmed that the Pardons Board only acts as an advisory body, where its function is only to advise YDPA to exercise its powers of clemency. This shows that the advice of the pardon board is not binding and also recognises that Yang di-Pertuan Agong possesses a high prerogative of mercy in Malaysia.

However, in a recent High Court case, *Mohd Khairul Azam Abdul Aziz v Lembaga Pengampunan Wilayah Persekutuan and Anor*,⁴² the plaintiff, a lawyer who was anguished, commenced an action because the second defendant was given a full pardon by the YDPA. The plaintiff claimed that the Pardons Board had wrongly advised the YDPA. The court held that in terms of granting pardon, the Federal Constitution has clearly conferred the power on the YDPA that he not only act on the advice of the Pardons Board but must also accept the AG's written opinion. This shows that YDPA does not have personal discretion in granting pardons. This case has derived from the precedent by mentioning that the Pardons Board's advice is not binding on YDPA.

³⁹ Daniel Pascoe, 'An Investigation of Clemency and Pardons in Death Penalty Cases in Southeast Asia from 1975-2009' (DLawthesis, University of Oxford 2013) <https://ora.ox.ac.uk/objects/uuid:4b852f9a-455f-40ed-88ae889aae16e8c4/download_file?file_format=application%2Fpdf&safe_filename=THESIS01&type_of_work=Thesis>.

⁴⁰ [1985] 2 Malayan Law Journal 385 (SC).

⁴¹ [1986] 1 Current Law Journal 548 (SC).

⁴² [2021] 1 Current Law Journal 94 (HC).

6. Whether the Decision to Grant a Pardon Can Be Judicially Reviewed

Another issue arose on whether the decision made by Yang di-Pertuan Agong in granting a pardon could be subjected to judicial review.

In the case of *Superintendent of Pudu Prison and Others v Sim Kie Chon*,⁴³ the respondent was convicted on a charge under S 57(1) of the Internal Security Act 1960 and was punished with a death sentence by the High Court. His appeal to the Federal Court was dismissed, and he applied for clemency to YDPA. The respondent commenced an action against the first and third appellants and the Pardons Board Malaysia due to the rejection of clemency. The court held that the issue of the amenability of the prerogative power to judicial review should be dependent on its nature or subject matter. The court held that the nature and subject matter of the prerogative power of mercy should not be amenable to the judicial process.

In the case of *Karpal Singh v Sultan of Selangor*,⁴⁴ Mr Karpal Singh, by his originating summons, seeks a court determination and a declaration regarding a public statement allegedly made by the Sultan. The statement made was that the Selangor Sultan would not pardon anyone who had been sentenced to a mandatory death sentence for drug trafficking. He sought for declaration that this statement violated Article 42 of the FC because the Sultan can only refuse the petition for clemency after taking into consideration the advice of the Selangor Pardons Board. The court held that the originating summons on the issue of the process of clemency is non-justiciable.

In the case of *Juraimi bin Husin v Board of Pardons, State of Pahang and Others*,⁴⁵ the plaintiff and two other people were sentenced to death due to being convicted of murder. On 30 June 1999, he petitioned for a pardon from the Sultan of Pahang. However, in 2001, his petition was rejected. An appeal was made to determine whether the Sultan of Pahang, in deciding on Article 15 of the Laws of the Constitution of Pahang, read per Article 42 of the FC, was justiciable. The court held that the power conferred under Article 42 of the FC was not subject to judicial review. The court relied on the House of Lords decision of *Council of Civil Service Unions and Others v Minister for the Civil Service*, which states that prerogative powers such as the prerogative of mercy shall not allow judicial review because their nature and the subject matter are not amenable to the judicial process.

However, there is a recent case High Court held that the granting of a pardon by YDPA is justiciable. In the case *Mohd Khairul Azam Abdul Aziz v Lembaga Pengampunan Wilayah Persekutuan and Anor*,⁴⁶ the court held that the power of granting a royal pardon by YDPA is justiciable. The ratio decidendi is that the granting of a pardon in Malaysia cannot be regarded as a royal pardon, unlike in England, where the pardon by the monarch is not subject to any restrictions. The court referred to the checks and balances system of Malaysia

⁴³ [1986] 1 Current Law Journal 548 (SC).

⁴⁴ [1988] 1 Malayan Law Journal 64 (HC).

⁴⁵ [2002] 4 Current Law Journal 529 (FC).

⁴⁶ [2021] 1 Current Law Journal 94 (HC).

by making a decision where the checks of executive powers are the court system can judicially review to challenge the powers of the executive in civil cases and by way of writ of habeas corpus in criminal cases.

In the most recent unreported High Court case, *Pendakwa Raya v Nur Hidayah bt Abdullah*,⁴⁷ the judge disagreed with the decision of Mohd Khairul Azam's case and held that the power to grant a royal pardon is a prerogative granted by our Constitution. The power to grant clemency was still granted to DYMM Seri Paduka Baginda Yang di-Pertuan Agung, DYMM Sultan-Sultan dan TYT Yang di-Pertuan Negeri. It is non-justifiable.

7. Anwar Ibrahim: Rejection and Approval of Pardon

Anwar Ibrahim, our current Prime Minister, was an ex-deputy Prime Minister of Malaysia from 1993 to 1998. He was also the Finance Minister from 1991 to 1998. In 1998, he was charged with sodomizing his family's driver. However, the Federal Court of Malaysia later overturned his sodomy conviction, and he was freed in 2004. In 2008, Anwar Ibrahim was charged a second time with sodomy.⁴⁸ In the case of *Dato' Seri Anwar Ibrahim v PP and Another Appeal*, the Federal Court of Malaysia affirmed the conviction of the Court of Appeal's decision, where Dato' Seri Anwar Ibrahim was convicted for the offence of sodomy and was punished with 5 years' imprisonment.⁴⁹

In the case of *Datuk Seri Anwar Ibrahim v Menteri Hal-Ehwal Dalam Negeri and Anor*,⁵⁰ the applicant, Datuk Seri Anwar Ibrahim, is serving a 5-year prison sentence due to committing an offence under S 377B of the Penal Code. When he was serving the sentence, his wife and daughter petitioned for a free pardon on his behalf from the YDPA. The applicant filed for judicial review for certiorari to quash the decision of the Commissioner General of Prisons, who refused the applicant's permission to attend Dewan Rakyat sittings. However, the court held that after the Pardons Board took into consideration the petition by the applicant, on 16 March 2015, the YDPA, Al-Marhum Sultan Abdul Halim Mu'adzam Shah ibni Almarhum Sultan Badlishah, rejected the petition for a free pardon. The applicant, therefore, had to serve the punishment imposed by the Federal Court.

Besides that, Article 48(4)(c) of the FC states that once the petition for a pardon is disposed of, the person will be disqualified as a member of the House of Representatives. This indicates that Anwar Ibrahim's petition for a pardon was rejected, rendering him ineligible to attend Dewan Rakyat sittings.

Both national and international opinions submitted that the reason the pardon was being rejected was that Anwar Ibrahim's conviction was a politically motivated attempt by the UMNO leadership to end his career.

⁴⁷ [2022] 11 Malayan Law Journal 705 (HC).

⁴⁸ Daniel (n 20).

⁴⁹ [2015] 2 Current Law Journal 145 (FC).

⁵⁰ [2015] 1 Legal Network Series 608 (HC).

Initially, it was expected that Datuk Seri Anwar Ibrahim would be freed from prison on 9th February 2020 since it was a 5-year punishment. However, in 2018, Anwar Ibrahim's wife, Datin Seri Wan Azizah binti Wan Ismail, announced at a press conference that his husband would be released from prison on 11 June 2018. The YDPA, Sultan Muhammad V, granted a full pardon to Datuk Seri Anwar Ibrahim on 16th May 2018, which is also the outcome of the 14th General Election on 9th May 2018, after Pakatan Harapan won the election.⁵¹

Based on the Hansard dated 20 December 2022,⁵² Datuk Seri Anwar Ibrahim mentioned in Dewan Rakyat that he did not petition for a pardon because he was being punished. He mentioned that it was the YDPA who called him and told him that YDPA would grant him a full pardon immediately because YDPA had followed the developments of the trial. The reason YDPA granted a full pardon to him is because of 'a clear travesty of justice'. It was to be noted that Anwar Ibrahim was being released from jail immediately, and his criminal conviction was eliminated too.

An issue arose whether the granting of a royal pardon amounted to eliminating the conviction. Based on Tun Abdul Hamid Mohamad, former Chief Justice of Malaysia, mentioned that the granting of the pardon, reprieve, and respite did not constitute the extinguishment of conviction and sentence from the court record. This means that even though the offender was free from serving the punishment, the court order remains. The granting of the pardon does not amount to quashing or a declaration of null and void of a court order.⁵³

Tun Abdul Hamid Mohamad's opinion is consistent with the position in England, where a pardon does not eliminate the conviction; it merely removes the penalty. This principle was laid down in the case of *Regina v Foster (Barry)*,⁵⁴ the court held that the outcome of a free pardon was to remove the penalties and punishments and the offender convicted, but it did not constitute the elimination of the conviction itself.

However, this did not apply to the pardon granted to Anwar Ibrahim in 2018, as he was not just released from prison, but his criminal conviction was eliminated. He was able to be elected as a member of parliament, and now he is our current Prime Minister.⁵⁵

It was the author's opinion to argue that the royal pardon granted by YDPA to Datuk Seri Anwar Ibrahim may have breached Prison Regulation 2000. This is because Anwar Ibrahim's situation falls under non-automatic eligibility for consideration of pardon, which means he has to petition for a royal pardon, as he only served 3 years of imprisonment when

⁵¹ Fauziah (n 2).

⁵² DR Deb (Bil 2) 20 Disember 2022, pg 6 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-20122022.pdf>>.

⁵³ Tun Abdul Hamid Mohamad, 'Pardon and Removal of Disqualification to Be a Member of Parliament' (7 October 2018) <<https://tunabdulhamid.me/2018/10/pardon-and-removal-of-disqualification-to-be-a-member-of-parliament/>>.

⁵⁴ [1985] Queen's Bench Division 115 (COA).

⁵⁵ Tsubasa Nair (n 19).

the pardon was granted to him. The reason is that Regulation 113 of the Prison Regulation 2000 provides that the prisoner has to petition for pardon first to the YDPA, only then can the YDPA grant the pardon to the prisoner. However, in this case, it seems that it was YDPA's initiative to grant the pardon rather than Anwar Ibrahim making an effort to petition for it.

Moreover, based on Article 48 of the Federal Constitution, the only term used is 'free pardon'.⁵⁶ The Federal Constitution did not define what constitutes a free pardon. However, Datuk Seri Anwar Ibrahim was granted a full pardon, and the law was silent on the existence of a full pardon. It is the author's opinion that it may be due to political influence that the pardon was granted, as YDPA granted a full pardon to Anwar 2 days after the federal government was formed.

8. Pardon Granted to Najib Razak

In the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya*,⁵⁷ our former prime minister, Datuk Seri Najib Razak, was sentenced to 12 years of imprisonment and a fine of RM210 million due to guilty of 7 offences regarding criminal breach of trust and money laundering. The appellant challenged the conviction and sentence. On 23 August 2022, the Federal Court dismissed the appeals and affirmed the conviction and sentence.

On 5 September 2022, it was announced by the Dewan Rakyat Speaker, Tan Sri Azhar, that Datuk Seri Najib Razak had petitioned for a royal pardon on 2 September 2022 about his conviction. It was to be noted that Najib filed for an application for pardon within 14 days once his conviction and sentence were affirmed under Article 48(4) of the Federal Constitution. This announcement caused numerous parties to express their opinions on the issue of granting the royal pardon to Najib Razak.

For example, the Malaysian Bar president, Karen Cheah Yee Lynn, mentioned that granting a royal pardon to Najib Razak would have a detrimental effect on Malaysia's administration of justice, domestically and internationally. She further mentioned that Najib Razak did not show any repentance regarding his actions.⁵⁸

In the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor*,⁵⁹ the Court of Appeal judges used the word "national embarrassment" when giving judgment about the act of Najib Razak in misappropriating RM42 million from SRC International Sdn. Bhd. into his accounts.

⁵⁶ FC, art 48.

⁵⁷ Criminal Appeal No 05(L)-289-12/2021(W) (FC).

⁵⁸ Hailey Chung, 'Malaysian Bar: Royal Pardon for Najib Would Be Premature, Set Dangerous Precedent' *The Edge Markets* (Kuala Lumpur, 13 September 2022) <<https://www.theedgemarkets.com/article/malaysian-bar-royal-pardon-najib-would-be-premature-set-dangerous-precedent>>.

⁵⁹ [2021] Malayan Law Journal Unreported 2485 (COA).

Sultan Sharafuddin Idris Shah, Selangor ruler stated that the power to grant pardons should be done by following the laws and procedures mentioned in the Federal Constitution and other related legislation. The power to grant a pardon should be used wisely, as the precedent will affect the future decisions made.⁶⁰

Since Regulation 113(1) of the Prison Regulations 2000 mentioned that a prisoner was able to petition for a pardon to YDPA when a person was convicted, therefore, since Najib Razak was already convicted with imprisonment under the Federal Court, he has the right to petition for a pardon. However, since there is no properly written standard or requirements laid down in FC or other legislations which will be taken into account by YDPA to grant a royal pardon, therefore, it was the author's opinion that it is up to the YDPA's discretion and Pardon Boards to decide whether to grant a pardon to him.

Based on the statement made by former Malaysian Attorney General Abdul Kadir Yusuf, he mentioned that members of the Pardons Board have to take into consideration all aspects of the case in the national and public interest, the nature of the offence, the occurrences of the offence which was committed and all the grounds submitted by their counsel before making their decision.⁶¹ By considering the statement made by the former AG, since Najib Razak was our 6th Prime Minister, he possessed a high executive position in Malaysia, it was the author's opinion that the pardon may not be easily granted, as serious consideration may be taken because it is related to national and public interest. This is because Najib Razak was punished for committing the offence of corrupting the funds and using them for his interest.⁶²

However, on 2 February 2024, it was reported that the Pardons Board had halved Najib's jail term to six years, and the fine that he should pay was reduced from RM210 million to RM50 million. The board was led by the former king, Sultan Abdullah Ahmad Shah, who ended his reign on 30 January 2024.⁶³ Due to the reduction of the imprisonment term, this means that Najib will be released on 23 August 2028.

Shafee Abdullah, who is Najib's lawyer, mentioned that the team has thoughts of petitioning for another pardon, which is a full pardon.⁶⁴ Yet, the law was silent on whether a royal pardon was granted, the offender petitioned for another pardon.

⁶⁰ 'Selangor Ruler Backs Agong's Comments on Pardons' *Malaysia Now* (12 September 2022) <<https://www.malaysianow.com/news/2022/09/12/selangor-ruler-backs-agongs-comments-on-pardons>>.

⁶¹ Daniel (n 20).

⁶² Rozanna Latiff, 'Understanding Goldman Sachs' Role in Malaysia's 1MDB Mega Scandal' *Reuters* (Kuala Lumpur, 23 October 2020) <<https://www.reuters.com/article/us-goldman-sachs-1mdb-settlement-explain-idUSKBN2772HC>>.

⁶³ Leslie Lopez and Aqil Haziq Mahmud, 'Malaysia's Pardons Board Halves Najib's Jail Term to 6 Years: How It Happened, and What Questions Remain' *Channel NewsAsia* (Kuala Lumpur, 2 February 2024) <<https://www.channelnewsasia.com/asia/malaysia-former-prime-minister-najib-razak-royal-pardon-jail-term-cut-4094251>>.

⁶⁴ Riyaz ul Khaliq, 'Malaysian ex-Premier Najib may seek full royal pardon over corruption' (*aa.com*, 7 February 2024) <<https://www.aa.com.tr/en/asia-pacific/malaysian-ex-premier-najib-may-seek-fullroyal-pardon-over-corruption/3130111>>.

It can be said that the process of considering a pardon petition may be arbitrary, as there is no clear legal framework, tests, or rules to decide how pardon decisions should be made. Since granting a royal pardon is the King's prerogative, it may bring a prejudicial effect towards the administration of justice in Malaysia if a Prime Minister who commits a serious offence can be granted a partial royal pardon.

9. The Royal Pardon System in Selected Jurisdictions

To improve Malaysia's current royal pardon system, a comparison with Australia's and Thailand's royal pardon systems was made.

9.1 Australia

The power to grant pardons in Australia was vested in the Governor-General and State Governors. According to section 8 of the Constitution (Office of Governor) Act 1987, it states that the governor can grant in the name and on behalf of Her Majesty a pardon, commutation of sentence, or reprieve of execution of sentence, where the Governor thinks fit or remission of penalty.⁶⁵

In Australia, there is a proper process laid down for exercising the Royal Prerogative of mercy. Firstly, the petitioner has to submit their written petition to the Governor of New South Wales by stating the reason that the Royal prerogative of mercy should be exercised. Section 76 of the Crimes (Appeal and Review) Act 2001 states that a petition for the exercise of the Governor's pardoning power can be made by the convicted person or by another person on behalf of the convicted person.⁶⁶ Secondly, the Attorney General will consider the petition, with the assistance of the Department of Communities. Thirdly, if there are other options available to a petitioner, the petitioner will be informed about the option given, as the Royal prerogative of mercy will be the last choice. Fourthly, the Attorney General will seek legal advice when considering the petition before recommending it to the Governor. Lastly, the governor will consider the Attorney General's recommendation to make a decision. Later, the petitioner will be informed about the result.⁶⁷

9.2 Thailand

Thailand is a constitutional monarchy. In Thailand, the King, who is the head of state, may grant a pardon to anyone. Section 191 of the Constitution of the Kingdom of Thailand states that the King has the prerogative to grant a pardon.⁶⁸

⁶⁵ The Constitution (Office of Governor) Act 1987, s 8 (Aus).

⁶⁶ Crimes (Appeal and Review) Act 2001, s 76 (Aus).

⁶⁷ Government of New South Wales, 'Royal Prerogative of Mercy: Fact Sheet' <<https://dcj.nsw.gov.au/documents/legal-and-justice/royal-prerogative-of-mercy/royal-prerogative-mercy-fact-sheet.pdf>>.

⁶⁸ Constitution of the Kingdom of Thailand, s 191.

There are 2 types of Royal King's Pardon, which are collective pardon and individual pardon. For collective pardon, when there is an important event in Thailand, such as their Majesties' 60th Anniversary, the Golden Jubilee, the Cabinet may provide recommendations to the King in considering granting the Royal King's pardon to celebrate these significant occasions. There is no involvement of prisoners to take part in the process of pardon.

There are 3 main conditions to grant the collective pardon to inmates. The first condition is for inmates who are eligible for release. For example, inmates who have less than 6 months to be served, pregnant inmates who only have less than 1 year to be served, inmates who are beyond 60 years old and still need to serve a sentence of more than 5 years and others. The Royal Decree of Pardon also specified the conditions to be adhered to by the inmates after they were released, such as being prohibited from using drugs.

The second condition is the conditions for those who are eligible for sentence commutations. If the inmate did not qualify under the first condition, their sentence can be commuted based on their class. One of the examples is the decree of pardon was able to commute the death sentence of inmates to life imprisonment.⁶⁹ The third condition is about the conditions for inmates who were not entitled to a pardon. For example, inmates who committed serious drug offences, serious crimes, or other crimes mentioned in the decree.

In 1999, during His Majesty the King's 6th Cycle Birthday, 23,940 inmates received unconditional release while 30,681 inmates received sentence remission. The benefit of granting pardons to release inmates from prison helps in temporarily solving the prison overcrowding problem.

The 2nd type of pardon is an Individual Royal Pardon. This is for any inmate or relative who has the chance to petition for royal clemency. It also clearly provides the criteria to be considered when granting an Individual royal pardon, which includes the prisoner's nationality, the rehabilitation of the prisoner shown within the prison, gender, age, critical illness in prison, employment in civil service or the military, and providing cooperation with pending police investigations.⁷⁰

10. Weaknesses and Recommendations to Be Implemented in Malaysia

By comparing Malaysia's royal pardon system with Australia and Thailand, several recommendations can be made to improve the effectiveness of the royal pardon system.

The first weakness of Malaysia's pardon system is the absence of an official procedure for petitioning and granting royal pardons. There are Prison Regulations 2000, which mention the time interval to petition for a royal pardon, and the Federal Constitution, which mentions considerations that need to be taken by the Pardons Board and YDPA before

⁶⁹ Kanokpun Kalyanasut and Atchara Suriyawong, 'The Criminal Justice System And Community-Based Treatment Of Offenders In Thailand' 121st International Training Course Participants' Papers <https://www.unafei.or.jp/publications/pdf/RS_No61/No61_22PA_Suriyawong.pdf>.

⁷⁰ Daniel (n 39).

granting pardons. This can be seen in Datuk Seri Anwar Ibrahim's pardon. Initially, in 2015, the petition for a pardon for Anwar Ibrahim was rejected, but later in 2018, YDPA suddenly granted a pardon for him without him petitioning for a pardon. This demonstrates that the current practice of granting pardons can create confusion due to the lack of a clearly defined procedure. It could cause ambiguity as the process of pardons is not transparent.

Unlike in Australia, there is a proper process for the petitioner to petition for a pardon laid down by the Government. To improve the royal pardon system in Malaysia, Malaysia can refer to Australia's procedure to come out with an official Pardon System procedure to be included in the official website of the Prisons Department of Malaysia.⁷¹

The second weakness is that there is no proper definition of the types of pardon mentioned under the legislation that can be granted by YDPA or the Ruler, or YDPN, to the prisoners. There are terms used by the Federal Constitution and Criminal Procedure Code to consider 'pardon', but there is no definition of the terms laid down in the legislation and the constitution. Moreover, there is no definition of the word 'free pardon' mentioned under Article 48 of the FC. It was recommended by the author that Malaysia refer to Thailand, which mentioned the types of pardon that can be granted. For example, an explanation of the definition of 'free pardon' should be given. Furthermore, Malaysia can amend the Criminal Procedure Code to include the definition of the terms which constitute a pardon. Moreover, Malaysia can amend the Prison Regulations 2000 to expressly include the conditions to grant pardons to inmates to show the transparency of those who can receive pardons.

The third weakness is that there is no time duration mentioned for the YDPA or the Ruler, or the YDPN to decide on granting a pardon. There are no cases or laws mentioned about the period given to decide on granting a pardon.⁷² Therefore, it was recommended that amendments to Prison Regulations 2000 should be made by setting a period for the YDPA to decide whether to grant or reject a pardon. This is because if there is no time frame given, it will cause mental distress to the prisoners as they will have no idea when their punishment will be lessened or when they will be freed from imprisonment. Amendments are needed to protect the interest of the applicant, who is the prisoner.

The fourth weakness is that there is a lack of transparency regarding the Pardons Board proceedings. There is no official publication about the proceedings on how the Pardons Board decided to grant or reject a royal pardon. For example, the pardon was granted to Najib on 2 February 2024, but there is no explanation given by the Pardon Board on the reason the pardon was granted. Therefore, it is recommended that Malaysia publish the Pardons Board Proceedings on a website similar to the publication of open court decisions. The Pardon Board should disclose the reason why a royal pardon was granted to an

⁷¹ 'Direktori Enjin Carian Direktori Jabatan Penjara Malaysia', <http://jpmportal.prison.gov.my/cariandirektori_en/>.

⁷² Majdah Zawawi and Nasimah Hussin, 'Forgiving the Enemy: A Comparative Analysis of The Concept of Forgiveness in Shari'ah and Malaysian Law' (2015) 23 *Pertanika Journal of Social Sciences and Humanities* 43 <<http://irep.iium.edu.my/id/eprint/45543>>.

offender, especially when it comes to a public interest case. This is to ensure that there is more transparency regarding the operation of the Pardons Board.

11. Conclusion

In conclusion, a royal pardon plays an important role in Malaysia's justice system as it affects the punishment given to the inmates. There is no doubt that the pardon system in Malaysia gives offenders a second chance to decide whether to serve the punishment. Since there are some uncertainties regarding the procedure to petition a pardon and the way to grant a pardon, Parliamentary members may delve into this matter, as it will affect the national interest if the inmates involved in petitioning for royal pardons are high-profile figures in Malaysia. It is hoped that there will be further research on the matter in the future that can help to improve the current royal pardon system in Malaysia. As always, justice and fairness shall prevail.

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