

Issues surrounding the Pardons Board decision...

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THE eagerly awaited press statement by the Federal Territories Pardons Board on Datuk Seri Najib Razak's petition for pardon has generated intense controversy.

The law, politics and ethics of the exercise of the power of pardon are being scrutinised. This article will be confined to the legal aspects of this constitutional power.

The press release: The release raises significant legal issues. First, there is a clear drafting error in the Board's press statement. The Board announced a 50% reduction of the 12-year imprisonment and the RM210mil fine. However, it then erroneously stated that the fine is reduced to RM50mil – a 76% reduction!

Second, it is noteworthy that the statement seems to indicate that the pardon decision was made by the Pardons Board and not by the Yang di-Pertuan Agong (YDPA) after due consideration of opinions and advice. This does not affect legality but rekindles the interesting debate about whether the grant of pardon is the YDPA's personal prerogative or whether His Majesty acts as a constitutional monarch on the advice of the Board.

A long line of judicial decisions holds that in the exercise of the power of pardon, the King is not bound by the Board's advice and acts at his own discretion. Among the cases are: PP v Soon Seng Sia Heng (1979), Chiow Thiam Guan v Supt of Pudu Prisons (1983), Supt of Pudu Prisons v Sim Kie Chon (1986), Karpal Singh v Sultan of Selangor (1988), Juraimi Husin v Pardons Board (2002), Yong Vui Kong v AG (2011), and Datuk Seri Anwar Ibrahim v Mohd Khairul Azam (2023).

Third, the Board gave no reasons for its decision, as indeed it is not bound to. Its deliberations are secret.

Nevertheless, many citizens wish to know why a high-profile and politically sensitive verdict that took more than four years to reach, cost millions of ringgit and witnessed extraordinary courage and integrity from nine judges at three levels of the court system, had to be undermined this way without cogent reasons.

However, it must be noted that around the world, an executive decision to pardon is not an appeal from the court. As was said in the Anwar case, the Pardon Authority does not sit as a court; is entitled to take into consideration matters that the courts cannot take into account; and

decides each case on grounds of public policy. Pardon is an exercise in mercy and not a determination in law. Further, in most countries including Malaysia, it is not reviewable by a court of law – Sim Kie Chon (1986).

Fourth, the Board ordained that if the reduced fine of RM50mil is not paid, then the imprisonment is extended by another year.

Fifth, the Board specified the date of release to be Aug 23, 2028 and the extended date to be Aug 23, 2029. Perhaps there is a minor error here – the correct date should be Aug 22 and not Aug 23 as Najib commenced his prison term on Aug 23, 2022.

Is this a pardon or a remission? Articles 42(1) and (2), 48(1)(e) and 25(1)(c) mention the following types of clemency:

1. Free pardon: A “free” or “full pardon” wipes the conviction off the slate. The prisoner is released from all the penalties, legal disabilities and disqualifications. Note the full pardon granted to Anwar on May 16, 2018, which enabled him to contest the Port Dickson seat for the Dewan Rakyat and avoid the five-year disqualification under Article 48(1)(e).

2. A reprieve, respite or suspension is a temporary postponement of the sentence.

3. A remission or commutation is a reduction of the sentence. Thus, the death penalty can be reduced to life imprisonment (Datuk Mokhtar Hashim’s case, 1982). The period of imprisonment or fine can be lowered (as in Najib’s case and Datuk Harun Idris’ case in the 70s). Alternatively, the prison sentence can be lifted but the fine retained.

What is the effect of a pardon? Much depends on the type of clemency bestowed and whether it was about the conviction or the sentence. There is scholarly dispute about whether a pardon can obliterate a conviction. In the United Kingdom case of Regina v Foster (1985), it was ruled that a free pardon removes the penalties and punishments but not the conviction.

However, in Malaysia, Articles 25(1)(c) and 48(1) seem to distinguish between “pardon” and a “free pardon”. The Court of Appeal equated free pardon with full pardon (pengampunan sepenuhnya) in the Anwar Ibrahim v Mohd Khairul Azam case, where it ruled that the power of clemency can encompass both conviction and sentence. Likewise, in Singapore in JB Jeyaratnam v The AG (1990), the court recognised that a full pardon can remove the conviction.

What lies ahead? In accordance with the Board’s order, Najib can be released from custody on Aug 23, 2028. However, there are several variable and unpredictable factors.

First, there is no bar to repeated acts of clemency. In due course of time, he may receive another remission to hasten his release.

Second, under Section 43 of the Prisons Regulations 2000, a prisoner sentenced to a term of imprisonment exceeding one month may be granted remission of one-third of his sentence for good behaviour. However, this is subject to the terms of an order of the Pardons Board, and that order is to release him on Aug 23, 2028. SO, THE ONE-THIRD REMISSION RULE CANNOT APPLY TO NAJIB.

Third, under Section 46A of the Prisons Act, there are complicated rules about parole. A prisoner may be released to serve any part of his sentence outside the prison pursuant to a Parole Order.

Fourth, as there is no bar to repeated acts of clemency, Najib could be gifted with another act of clemency and given a full pardon, which would wipe away the conviction and all disabilities.

Election to Parliament: The rule in Article 48(3) is that a person convicted of an offence under Article 48(1)(e) is disqualified from contesting for five years after his release from custody.

However, this will not apply if he receives a free pardon under Article 42 or his disqualification is removed by the YDPA under Article 48(3).

Other pending trials: Can the YDPA pardon work in respect of offences not yet tried? In the United States of America, it is well known that the President has the power to show clemency towards those not yet charged and not yet convicted! President Ford pardoned Richard Nixon in advance of any charge. In Malaysia, this has never been done. It is possibly unconstitutional under Article 42(1). A pardon is not an immunity against future prosecutions.

However, the Najib camp may succeed in obtaining a discharge not amounting to acquittal (DNAA).

The vicissitudes of the law are many and that opens up possibilities for parties on both sides of the political fence.

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