

# What The Rejection Of Anwar Ibrahim’s Petition For Pardon Tells Us About Malaysia’s Royal Pardon System

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## I. INTRODUCTION

On March 16, 2015, Malaysian opposition leader Datuk Seri Anwar Ibrahim’s petition for pardon from what he claims was a politically motivated conviction for sodomizing his male aid was rejected by Malaysia’s King, the *Yang di-Pertuan Agong*.<sup>1</sup> In Malaysia’s Federal jurisdiction, the *Yang di-Pertuan Agong* exercises the prerogative power to grant clemency or pardon on advice from a specially constituted Pardons Board, consisting of up to five members.<sup>2</sup> Subsequent to the rejection of

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<sup>1</sup> *Anwar loses appeal for royal pardon, MP status*, TODAY, Apr. 2, 2015, <http://www.todayonline.com/world/asia/anwar-loses-appeal-royal-pardon-mp-status>; *Anwar Ibrahim: Malaysian jailed opposition leader denied royal pardon*, BBC NEWS, Apr. 1, 2015, <http://www.bbc.com/news/world-asia-32142078>.

<sup>2</sup> FEDERAL CONSTITUTION, art. 42(1), 42(5) (Malay.) [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf). In this article, I use the term ‘pardon’ to refer to a prisoner’s outright release from prison, whereas ‘clemency’, ‘commutation’ or ‘remission’ refer either to the replacement of one type of sentence (e.g. death) with another (e.g. life imprisonment), or else the reduction in the length of a prison sentence without immediately releasing the prisoner. Malaysia’s Pardons Boards are able to recommend all three forms of leniency to prisoners (Criminal Procedure Code, ch. XXVII sec. 281(c) (Malay.); Criminal Procedure Code, ch. XXVIII, sec. 300-301 (Malay.) <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20593%20-%20Criminal%20Procedure%20Code.pdf>), and throughout the article I use the term ‘Royal Pardon’ when referring to these powers as a whole.

his petition for pardon, Anwar filed a judicial review application in the Malaysian High Court to challenge the advice of the Pardons Board, for which leave to appeal was denied on July 15, 2016.<sup>3</sup>

In this article, I describe the way in which the Malaysian Pardons Boards operate and propose a set of plausible hypotheses explaining why the rejection of Anwar's application for pardon, submitted on his behalf by his wife (Wan Azizah Wan Ismail) and two of his daughters (Nurul Izzah Anwar and Nurul Nuha Anwar), came as no surprise. Despite arguments in the Malaysian media made in favor of the purported independence of the Pardons Board as a decision-making body and the pre-eminence of the *Yang di-Pertuan Agong* as the final decision maker on pardon,<sup>4</sup> this article argues that through its composition and procedures, the Federal Pardons Board that disposed of Anwar's petition may be subject to significant political influence from the *Barisan Nasional* government in power in Malaysia.<sup>5</sup> Moreover, the innocence-based criteria presumably presented on behalf of Anwar in written submissions to the Federal Pardons Board would not have accorded with any of the criteria needed to justify a Royal Pardon. As such, Anwar's case provides a salient demonstration of the way in which Malaysia's Pardons Boards operate in practice. Analysis of this practice will be of interest to local legal practitioners and legal scholars researching the constitutional law, politics, and criminal justice system of Malaysia.

#### A. Background on the Proceedings against Anwar Ibrahim

Anwar served as Deputy Prime Minister of Malaysia from 1993 to 1998 and as Finance Minister from 1991 to 1998. Anwar was a Member of Parliament for the United Malays National Organisation (UMNO) party

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<sup>3</sup> Ida Lim, *Lawyers say apex court unlikely to revisit Anwar's Sodomy II case*, MALAY MAIL ONLINE, Oct. 12, 2016, <http://www.themalaymailonline.com/print/malaysia/lawyers-say-apex-court-unlikely-to-revisit-anwars-sodomy-ii-case>.

<sup>4</sup> Veerasamy Anbalagan, *Sirul's mum to apply to Sultan of Selangor for pardon*, THE MALAYSIAN INSIDER, Apr. 13, 2015, <http://www.themalaysianinsider.com/malaysia/article/siruls-mum-to-apply-to-selangor-sultan-for-pardon-says-pas-mp>; Salleh Buang, *Ire over Anwar's clemency petition*, NEW STRAITS TIMES, Mar. 5, 2015; Eileen Ng, *Agong has final say on royal pardon application, says minister*, THE MALAYSIAN INSIDER, June 10, 2015, <http://www.themalaysianinsider.com/malaysia/article/agong-has-final-say-on-royal-pardon-application-says-de-facto-law-minister>; *Will King Go Against UMNO? Agong has last word in Anwar's pardon – lawyers*, MALAYSIA CHRONICLE, Feb. 26, 2015.

<sup>5</sup> At a Federal level, the Malay-based United Malays National Organization (UMNO) political party has held power as part of a coalition government (called the *Barisan Nasional*, or 'National Front' since 1973) continuously since Malaysian independence from Britain in 1957. MARSHALL CAVENDISH CORPORATION, *WORLD AND ITS PEOPLES: MALAYSIA, PHILIPPINES, SINGAPORE AND BRUNEI 1174-77, 1216-17* (2008).

and had been groomed to be the eventual successor to Prime Minister Tun Dr Mahathir Mohamad. However, in 1998, following a political split with Mahathir, Anwar was removed from his posts, charged, and convicted for the abuse of his ministerial office, and for sodomizing his family's driver.<sup>6</sup> Internationally, the charges and convictions were widely denounced as the result of political interference with the criminal justice system. This international outcry opined that Anwar's convictions were an attempt to end his political career.<sup>7</sup> Anwar was sentenced to prison for 15 years and served six years for the corruption charge. He was freed in 2004 when the Malaysian Federal Court overturned his sodomy conviction. In 1999, after the initial allegations surfaced, Anwar's wife, Dr. Wan Azizah Wan Ismail, founded the political party *Parti Keadilan Rakyat* (PKR).<sup>8</sup> Anwar led PKR after his ban from politics expired and served as Malaysia's official opposition party leader from 2008 to 2015. Currently, PKR is still regarded as the leading opposition party in Malaysia.

In 2008, Anwar was arrested a second time and charged with sodomizing a male aide. Similar to his conviction in 1998, the charge was internationally criticized as being politically motivated.<sup>9</sup> However, Anwar

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<sup>6</sup> Sodomy remains illegal in Malaysia, a Muslim-majority country, via the Penal Code, sec. 377B, (Malay.), although actual prosecutions are rare (W. M. Aun, *Anwar Ibrahim: Epilogue*, LAWASIA J. 45, 48 (2002)). NGO Human Rights Watch has counted only seven prosecutions since 1938. *Malaysia: Anwar's Conviction Sets Back Rights*, HUMAN RIGHTS WATCH, Feb. 10, 2015, <http://www.hrw.org/news/2015/02/10/malaysia-anwars-conviction-sets-back-rights>.

<sup>7</sup> Aun, *supra* note 6 at 49; Smita Shah, *Anwar Ibrahim trial turns back the clock in Malaysia*, THE GUARDIAN, Nov. 24 2010, <http://www.theguardian.com/commentisfree/2010/nov/24/anwar-ibrahim-malaysia-sodomy-trial>; *Anwar lashes chief judge after appeal thrown out*, THE AUSTRALIAN, July 11, 2002; see generally Mark. Trowell, *Anwar Ibrahim's Long Struggle for Justice*, AUSTRALIAN BAR ASSOCIATION, Sept. 2005, [http://www.austbar.asn.au/wp-content/uploads/2014/02/ABA\\_Anwar\\_Appeal\\_25E109\\_v3.pdf](http://www.austbar.asn.au/wp-content/uploads/2014/02/ABA_Anwar_Appeal_25E109_v3.pdf).

<sup>8</sup> SYED HUSIN ALI, THE MALAYS: THEIR PROBLEMS AND FUTURE 52 (2008). The *Parti Keadilan Nasional* (National Justice Party) was launched in 1999. In 2002 this party merged with the *Parti Rakyat Malaysia* (Malaysian People's Party) to form its current incarnation, *Parti Keadilan Rakyat* (People's Justice Party).

<sup>9</sup> Dagmar Dlab, *Canadian Lawyers Defend the Independence of the Bar in Malaysia*, 60(2) THE ADVOCATE 227, 227 (2002) <http://www.lrwc.org/canadian-lawyers-malaysia/>; *Anwar Sodomy Trial Hurts Malaysia's Reputation*, VOICE OF AMERICA, Feb. 16, 2010, <http://www.voanews.com/content/anwar-sodomy-trial-hurts-malaysias-reputation-84594087/112633.html>; *Australia lawmakers urge Malaysia to drop Anwar sodomy case*, ASIAONE NEWS, Feb. 12, 2010, <http://news.asiaone.com/News/AsiaOne%2BNews/Malaysia/Story/A1Story20100212-198392.html>; Shah, *supra* note 7; Gavin Magrath, *Malaysia: Wrongful Prosecution of Lawyer N. Surendran*, LAWYERS' RIGHTS WATCH CANADA, Sept. 8 2014, <http://www.lrwc.org/malaysia-wrongful-prosecution-of-lawyer-n-surendran-letter/>; James

was acquitted by Malaysia's High Court in January 2012, in time to contest the May 2013 Federal election with PKR, which he narrowly lost. At the time, one commentator noted that:

A free Anwar would certainly be a grave threat to the electoral prospects of the ruling Barisan Nasional (BN) coalition... Before the verdict [of acquittal], it had been widely thought to be a foregone conclusion that Anwar would be found guilty as charged and put away before the coming general election – reflecting the generally low confidence the Malaysian public had in the judiciary.<sup>10</sup>

However, the Court of Appeal overturned Anwar's acquittal in March 2014, which imposed on him a five-year prison sentence. Anwar's final avenue of judicial appeal to his conviction was brought to Malaysia's highest court, the Federal Court, which ultimately confirmed the Court of Appeal's decision in February 2015.<sup>11</sup> Following his conviction in March 2014, Anwar is banned from politics in Malaysia for a 10 year period: the ban begins with his term of five years of imprisonment and runs for five years after his release.<sup>12</sup> In the meantime, Anwar's wife, Wan Azizah Wan Ismail, won a by-election for Anwar's former parliamentary seat in May 2015.<sup>13</sup>

Following the rejection of Anwar's appeal to the Federal Court in February 2015, his major procedural hope was an appeal to the *Yang di-Pertuan Agong* for Royal Pardon. Anwar's family sent a petition for pardon to the *Yang di-Pertuan Agong* in February 2015. The petition was rejected soon afterwards in March 2015, and the legal procedures and theory surrounding this decision form the subject of this article.

In the following two sections I will outline the existing academic literature and procedures relating to Royal Pardons in Malaysian criminal cases. After this outline, I will posit the plausible factors which elucidate why Anwar's petition was rejected, and I will describe the implications of these factors for ongoing and future cases in Malaysia.

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Chin, *The Future of Democracy in Malaysia* in A FUTURE FOR DEMOCRACY (Konrad, Adenauer, Stiftung, 2011) 88.

<sup>10</sup> Yang Razali Kassim, *Anwar's acquittal: what next for Najib?*, RSIS COMMENTARIES, Jan. 20, 2012, <https://www.rsis.edu.sg/wp-content/uploads/2014/07/CO12016.pdf>.

<sup>11</sup> *Malaysia: Anwar's Conviction Sets Back Rights*, HUMAN RIGHTS WATCH Feb. 10, 2015, <https://www.hrw.org/news/2015/02/10/malaysia-anwars-conviction-sets-back-rights>

<sup>12</sup> *Id.*

<sup>13</sup> *PKR retains Pmtg Pauh with smaller majority*, MALAYSIAKINI May 7, 2015, <http://www.malaysiakini.com/news/297557>.

B. *Previous Academic Literature on the State and Federal Pardons Boards*

Royal Pardons have the potential to play a significant role within the Malaysian criminal justice system. Every prisoner sentenced to more than 18 months of imprisonment in Malaysia is entitled to petition a State Islamic Hereditary Ruler, State Governor, or the Malaysian King for clemency or pardon every two years during his or her sentence.<sup>14</sup> Likewise, every prisoner sentenced to death is automatically considered for clemency.<sup>15</sup> Anwar Ibrahim's prominent case provides a unique opportunity to explain and analyze the practice and procedures of Malaysia's State and Federal Pardons Boards, given that very little academic literature already exists on this subject.

Public knowledge of the inner workings of the State and Federal Pardons Boards is extremely limited, outside of general familiarity with the provisions of Section 42 of Malaysia's 1957 Constitution, which creates and regulates the State and Federal Pardons Boards. Due to the closed nature of Pardons Board proceedings and the secrecy of the process involved,<sup>16</sup> neither scholars nor the public have any significant knowledge of the way that Royal Pardon decisions are reached; nor is there widespread knowledge as to which categories of prisoners commonly succeed and which categories of prisoners commonly fail to obtain Royal Pardon. Aggregate statistics on Royal Pardon grants released periodically after Parliamentary questioning by opposition MPs are the closest the public usually gets to knowing pardon outcomes.

To date, most of the authors that discuss the Royal Pardon process in Malaysia have tended to do so from a doctrinal or textual perspective, frequently as part of larger studies concerning the constitutional powers and immunities of the Malay Monarchy, or regarding the mandatory death penalty for drugs or firearms offenses. These are the academic studies authored by Hashim (1976); Azlan Shah (1986); Addruse (1986); Crook (1986); Penna (1987); Talib (1989); Butler and Low (1991); Haring (1991); Tan et al (1991); Ibrahim (1992); Harding (1993, 1996); Yatim

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<sup>14</sup> Prisons Regulations 2000, part 11, reg. 113 (Malay.), [http://www.prison.gov.my/portal/page/portal/english/undang2\\_en](http://www.prison.gov.my/portal/page/portal/english/undang2_en); previously the Prisons Rules 1953, rule 111(1). By the 2000 Regulations, each prisoner sentenced to more than 18 months' imprisonment can petition for pardon once after conviction, once after three years' imprisonment, and thereafter every two years. Under the 1953 Rules, the first such petition can only be sought after one year is served.

<sup>15</sup> Criminal Procedure Code, ch. XXVII sec. 281(c) (Malay).

<sup>16</sup> N. H. Talib, *The Powers and Functions of the Pardons Board in Malaysia – A Review* (1989) (Master of Law Dissertation, Univ. of Malaya, Kuala Lumpur) 6; Telephone Interview with Amnesty International Staff (Feb. 4, 2010); Interview with Malaysian Criminal Defense Lawyer, Kuala Lumpur (Dec. 3, 2011).

(1994); Gillen (1995); Ross (1999); Kershaw (2001); Bari (2003); Faruqi (2008); Singh (2010); Babcock et al (2013); OHCHR and Thailand Ministry of Justice (2013), Pascoe (2014) and Novak (2014, 2016).<sup>17</sup> Additionally, reports from Amnesty International,<sup>18</sup> Hands off Cain,<sup>19</sup> plus various media outlets (again, often concerning the mandatory death penalty) occasionally mention the practices of the Pardons Boards, typically when notable cases arise.<sup>20</sup>

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<sup>17</sup> Typical of the existing academic literature are the following passages, providing scant details of any pardon decisions reached, and the process by which the Pardons Boards arrive at those decisions:

“The power of pardon of a Ruler or Governor is exercised on the advice of a Pardons Board constituted for each state. The board meets in the presence of the Ruler or Governor and he presides over it. The board consists of the Attorney-General of the Federation, the Mentri Besar or Chief Minister and not more than three other members... Though a member, the Attorney-General seldom attends in person. Has has power to delegate his functions to [sic] some one else and he usually delegates them to the state legal adviser. He also usually submits written opinions to the board on any matter coming before it and the board is under a duty to consider them before tendering its advice to the Ruler or Governor” MOHAMED SUFFIAN HASHIM, AN INTRODUCTION TO THE CONSTITUTION OF MALAYSIA, 42 (2nd ed. 1976).

“The Pardons Board will only meet if and when there are cases for consideration of the board. It does not function on a scheduled basis. The Board will only sit when all members are present – which normally is six, including the Yang di Pertuan Agong or Ruler or Governor. The Yang di Pertuan Agong or Ruler or Governor himself has to preside and chair the meeting... There is no clear way of knowing how long a Pardons Board may take to reach a decision as this would depend on the case in question, but normally a decision would be reached at the end of each session.” Talib, *supra* note 16 at 65-68.

“Under Article 42 the Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites. There is some doubt about whether this power is discretionary or is to be exercised in accordance with the advice of the Pardons Board” (SHAD SALEEM FARUQI, DOCUMENT OF DESTINY: THE CONSTITUTION OF THE FEDERATION OF MALAYSIA, CH. 30 (2008).

<sup>18</sup> See generally AMNESTY INTERNATIONAL, THE DEATH PENALTY (1979); AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE FEDERATION OF MALAYSIA (1979); AMNESTY INTERNATIONAL, MALAYSIA: NINE DIE IN SECURITY ACT EXECUTIONS (Apr. 1981); AMNESTY INTERNATIONAL, THE DEATH PENALTY AND EXECUTIONS IN MALAYSIA (1983); AMNESTY INTERNATIONAL, RECENT DEVELOPMENTS ON THE DEATH PENALTY IN MALAYSIA (Oct. 1985); AMNESTY INTERNATIONAL, ANNUAL REPORT 1981 (1981); AMNESTY INTERNATIONAL, ANNUAL REPORT 1996 (1996).

<sup>19</sup> *Malaysia – Retentionist* (1999-2015), HANDS OFF CAIN, <http://www.handsoffcain.info/bancadati/schedastato.php?idstato=19000317&idcontinente=23>.

<sup>20</sup> For example:

“[A]ccording to the BBC Summary of World Broadcasts, 24 November 1976, the Sultan of Selangor said that he would not grant clemency to anyone who had been

Nevertheless, these sources contain notable omissions from an empirical perspective. As aforementioned, both the decision-making process and Royal Pardon outcomes largely remain a mystery to scholars and to the public. To expand on this literature, academics could conduct further quantitative and qualitative empirical research on the population of prisoners who have benefited from Royal Pardons in Malaysia's recent history, and more importantly socio-legal analysis based on "elite" interviews to determine the way in which Pardons Boards decisions are made.<sup>21</sup> Such interviews are imperative to this article, given that it is not possible to observe Pardons Board proceedings first-hand nor to see records of proceedings in Anwar's case or others.<sup>22</sup> The remainder of this article addresses these deficiencies in the academic literature on the pardons process in Malaysia, using Anwar Ibrahim's case as a point of entry into the topic.

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sentenced to death" AMNESTY INTERNATIONAL, *supra* note 18 at 90.

"In Malaysia, the Sultan of Johor, Sultan Ibrahim has consented to grant full pardon to eight prisoners who will be released on July 21 [2012]... On the advice of the board and Attorney-General, and taking into consideration all aspects such as the prisoners' offences, jail term served and rehabilitation achieve, the Sultan consented to consider their release or to reduce their sentences." HANDS OFF CAIN, <http://www.handsoffcain.info/bancadati/schedastato.php?idstato=16000466&idcontinente=23>).

"More than 1000 prisoners – most of them due to be released before the end of this year – are to be granted amnesty in conjunction with the Malaysia Day celebrations on Tuesday [31 August 1982]. It is understood that state pardon boards have recommended more than 1000 prisoners for freedom... Among the criteria for amnesty consideration are the severity of the crime, the prisoner's behaviour during detention, his record and the danger he might pose to the public should he be released before serving his full sentence." *Malaysia Day pardon for 1,000 prisoners*, THE STRAITS TIMES, Aug. 27, 1982.

<sup>21</sup> Interviews with criminal justice decision-makers and experts in the field are of critical importance in a study such as the present one, as they have the potential to provide:

insights into events about which we know little: the activities that take place out of the public or media gaze, behind closed doors... interviews can provide immense amounts of information that could not be gleaned from official published documents or contemporary media accounts.

Darren G. Lilleker, *Interviewing the Political Elite: Navigating a Potential Minefield*, 23 POLITICS 207, 208 (2003).

Accordingly, I conducted a number of such 'elite' interviews in Malaysia in 2011 as part of my DPhil fieldwork (albeit on the topic of clemency and pardons in death penalty cases). Where I have relied upon such interviews as source in this article, the interviewee's identity has been made confidential, in line with ethical stipulations.

<sup>22</sup> Talib, *supra* note 16; *infra* note 75.

### C. Royal Pardon Procedures in Malaysian Criminal Cases

In Malaysia, the power grant Royal Pardon may be used either to reduce a death sentence to a punishment less than death, to reduce the term of a prison sentence, or to release the petitioner altogether from prison.<sup>23</sup> The reduction or abrogation of a sentence can be initiated in two ways. First, via a petition submitted to the relevant State or Federal Pardons Board established under Article 42(1) of the 1957 Constitution,<sup>24</sup> or to the separate Federal Pardons Board for Security Offences established by subordinate legislation in 1981.<sup>25</sup> Second, all death sentences are automatically considered for clemency by a Pardons Board,<sup>26</sup> and each prisoner serving a long-term sentence of imprisonment is automatically considered for remission or release every four years, or whenever the relevant Pardons Board next meets (whichever comes later).<sup>27</sup>

Each Pardons Board considers cases only from within its own jurisdiction and is composed of the following members: the Federal Attorney-General or his delegate, the relevant State Chief-Minister or the Minister responsible for Federal Territories in federal cases, and up to three appointed members of the public.<sup>28</sup> Altogether, the 16 different Pardons Boards make recommendations to the Islamic Hereditary Rulers (State Sultans, *Raja* and *Yang di-Pertuan Besar*, henceforth the 'Rulers')

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<sup>23</sup> Criminal Procedure Code, ch. XXVII sec. 281(c) (Malay.); Criminal Procedure Code, ch. XXVIII, sec. 300-301; Talib, *supra* note 16 at 67-70; Aniza Damis, *Bar Council to Lobby for Review of Taiping's Natural Life Prisoner*, NEW STRAITS TIMES, Nov. 17, 2004. *See supra* note 2, above, on the terminology used throughout this article.

<sup>24</sup> Prisons Regulations 2000, part 11, reg. 113; Shahanaaz Habib, *Pardons Board Not Sitting Regularly*, THE STAR ONLINE, Sept. 27, 2009, <http://www.thestar.com.my/news/nation/2009/09/27/pardons-board-not-sitting-regularly/>; Talib, *supra* note 16 at 46, 62. *See also supra* note 14 (on the frequency of petitions).

<sup>25</sup> *See* Essential (Security Cases) Amendment Regulations 1981, reg. 29(2) (Malay.). Between 1975 and the enactment of this amendment in 1981, the *Agong* possessed the power to grant pardons in security cases irrespective of where they were committed in Malaysia, *without* the advice of a Pardons Board. *See* Essential (Security Cases) Amendment Regulations 1975, reg. 29(1) (Malay.).

<sup>26</sup> Criminal Procedure Code, ch. XXVII sec. 281(c) (Malay.); Talib, *supra* note 16 at 62-63.

<sup>27</sup> Prisons Regulations 2000, part 6, reg. 54; *see infra* note 130 (delays in Pardons Boards sittings).

<sup>28</sup> FEDERAL CONSTITUTION, art. 42(5) (Malay.); Essential (Security Cases) Amendment Regulations 1981, reg. 29(2) (Malay.). The lay-members must not be Members of the State or Federal Parliaments. *Id.*, art. 42(7) (Malay.). The Chief Minister is the head of government in each Malaysian state. *Id.*



within nine States,<sup>29</sup> the four appointed State Governors (*Yang di-Pertuan Negeri* – in States without a Hereditary Ruler),<sup>30</sup> or the Malaysian King (the *Yang di-Pertuan Agong*) in federal, military and security cases.<sup>31</sup> The Rulers, Governors and the *Agong*, while not obliged to follow the Boards' recommendations,<sup>32</sup> typically adhere to the recommendations made in the majority of cases.<sup>33</sup> This concurrence is largely because the Rulers, Governors and the *Agong* participate in and preside over the meetings themselves as Chairmen.<sup>34</sup> Later in this article, I will return to the independence of their decision-making.

Finally, in each case the Board typically considers the following documents:

- the petition submitted by the prisoner or on his/her behalf, outlining the reasons that a pardon should be granted<sup>35</sup>

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<sup>29</sup> These are the Malay states of Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Terengganu.

<sup>30</sup> These are Penang, Malacca, Sabah and Sarawak.

<sup>31</sup> FEDERAL CONSTITUTION, art. 42(1), 42(4)(b) (Malay.); J. Singh, Non-Custodial Sentencing Options in Malaysia, 92 (Legal Training Course Participants' Paper); Talib, *supra* note 16 at 30-31, 39. In a unique constitutional system, the title of *Yang di-Pertuan Agong* as head of state rotates between the nine State Sultans every five years (FEDERAL CONSTITUTION, art. 32 (Malay.); John Funston, *Malaysia: Developmental State Challenged*, in GOVERNMENT AND POLITICS IN SOUTHEAST ASIA 172 (John. Funston ed., 2001); Ahmad Ibrahim, *The Malaysian Constitutional System*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 517 (Lawrence W. Beer ed., 1992)).

<sup>32</sup> Talib, *supra* note 16 at 39; Faruqi, *supra* note 17; Raja Aziz Addruse, The Respective Roles of the Pardons Board and of the *Yang Di-Pertuan Agung* (July 19, 1986) (Paper presented at the Human Rights Seminar, Kuala Lumpur), 2. *Contrast* Talib, *supra* note 16 at 3 and Sangwon Suh and Santha Oorjitham, *Under the King's Watch*, ASIA WEEK, May 7, 1999.

<sup>33</sup> S. Sharif & R. V. Veera, 44 "Forgotten" Convicts, NEW STRAITS TIMES, Sept. 14 1997; Peter Crook, *Sim Kie Chon V. Superintendent of Pudu Prison & Ors: The Royal Prerogative of Mercy?*, Jurnal Undang-Undang, 195, 203 (1986); Addruse, *supra* note 32 at 1-2.

<sup>34</sup> FEDERAL CONSTITUTION, art. 42(8) (Malay.); L. R. Penna, *Pardoning Power and The "Saga" of Sim Kie Chon*, 8 SING. L. REV., 106 109 (1987); Talib, *supra* note 16 at 40, 65.

<sup>35</sup> Prisons Regulations 2000, part 11, reg. 113-114 (Malay.). The prisoner has no formal procedural right to make written or oral submissions to members of the Pardons Board (*Superintendent of Pudu Prison v Sim Kie Chon*, 1 MALAYAN L. J. 494, 498 (1986); Amnesty International (1983), *supra* note 18 at 4; Penna, *supra* note 34 at 126-127); however, a practice exists whereby the petitioner's lawyer is able to make 'informal' representations to the Board – Interview with Malaysian Government Lawyer, Kuala Lumpur (Oct. 30, 2011); Interview with Malaysian Criminal Defense Lawyer,

- police, narcotics, psychologist and Prisons Department files on the prisoner,<sup>36</sup> and
- the Federal Attorney-General's written opinion on the case.<sup>37</sup>

Death penalty cases require the following additional information to be submitted to the board:

- the evidence notes from the prisoner's trial and a recommendation from the trial judge as to whether or not the sentence of death should be carried out; and optionally,
- a report from the Federal Court on any appeal in that court.<sup>38</sup>

## II. PAST PRACTICE IN THE STATE AND FEDERAL PARDONS BOARDS

Although the reasons for Royal Pardon grants or rejections are not routinely publicized,<sup>39</sup> it is possible to hypothesize about the factors that influenced decision-making in a variety of cases, based on media reports, secondary literature, and interviews with NGO staff, academics and criminal justice practitioners. When Anwar's case is considered in light of this analysis, it becomes clear that Anwar's public assertions of innocence do not represent the kind of circumstances that typically sway the Pardons Boards and the relevant State or Federal Ruler.

Scholars and journalists have traditionally concluded that non-legal factors are the most significant circumstances that affect the State and Federal Pardons Boards' decision-making.<sup>40</sup> These opinions are consistent

Kuala Lumpur (Dec. 3, 2011).

<sup>36</sup> See Prisons Regulations 2000, part 6, reg. 54 (Malay.); Amnesty International (1983), *supra* note 18 at 4; Damis, *supra* note 23; G.P. Tan, *Time Limit to Dispose Off [sic] Petitions for Clemency* (Mar. 3 2010), [http://www.agc.gov.my/index.php?option=com\\_content&view=article&id=874:time-limit-to-dispose-off-petitions-for-clemency&catid=71:admin%20ag&Itemid=93&lang=en](http://www.agc.gov.my/index.php?option=com_content&view=article&id=874:time-limit-to-dispose-off-petitions-for-clemency&catid=71:admin%20ag&Itemid=93&lang=en); Talib, *supra* note 16 at 61; Hands off Cain, *supra* note 19; *Malaysia has the right to ask Philippines for Girl's Return*, BERNAMA DAILY MALAYSIAN NEWS, Oct. 24, 2002.

<sup>37</sup> FEDERAL CONSTITUTION, art. 42(9) (Malay.). Section 300(2) of the Criminal Procedure Code also mentions that if the sentence is to be suspended or remitted (which would include a prison sentence reduction but presumably not a pardon), then the Ruler can also ask the sentencing Judge or Magistrate for 'his opinion as to whether the application should be granted or refused and the Judge or Magistrate shall state his opinion accordingly'.

<sup>38</sup> Criminal Procedure Code, ch. XXV 272 and XXVII, sec. 272, 281(b) (Malay.).

<sup>39</sup> Interview with Amnesty International Staff, *supra* note 16; Interview with Malaysian Criminal Defense Lawyer, *supra* note 16; A. Roy, *Drug Case Briton to be Hanged*, THE SUNDAY TIMES, June 22, 1986.

<sup>40</sup> Talib, *supra* note 16 at 31; *Death or Life: Decision on Penang Pair* "This

with a conventional reading of the Malaysian Constitution, whereby the *Agong* dispenses pardon as a benevolent sovereign, rather than possessing a power analogous to judicial review.<sup>41</sup> Examples of these non-legal factors influential in previous cases include a prisoner's previous public service, political connections, and in the case of foreign prisoners, good international relations with his/her country of origin.<sup>42,43</sup>

However, a focus on non-legal matters by academic and media commentators may simply reflect the greater media exposure of 'public interest' cases,<sup>44</sup> rather than more mundane petitions decided on the basis of *retributive* factors where punishment is remitted as it is undeserved,<sup>45</sup> or else *rehabilitative* factors such as a good behavior and work record in prison 'earning' the prisoner remission or release.<sup>46</sup> Two noteworthy interviews of criminal defense lawyers elucidated that there are many cases where Royal Pardon has been granted by the State and Federal Pardons Boards, whereby the precise details remain unknown.<sup>47</sup> This

*Weekend*", THE ADVERTISER, June 19, 1986; *Insults could see convicted men hang: lawyer*, THE ADVERTISER, Jan. 14, 1986; Norman Aisbett, *Echoes of Barlow and Chambers*, THE WEST AUSTRALIAN, July 14, 2001; Shah Azlan, *The Role of Constitutional Rulers in Malaysia*, in THE CONSTITUTION OF MALAYSIA: FURTHER PERSPECTIVES AND DEVELOPMENTS 86-87 (F. A. Trinidad and H. P. Lee eds. 1986).

<sup>41</sup> *Other Important Duties Of The Yang di-Pertuan Agong*, (Perpustakaan Negara Malaysia, 2003), <http://www.malaysianmonarchy.org.my/malaysianmonarchy/?q=en/duties>; Public Prosecutor v. Soon Seng Sia Heng 2 Malayan LJ 170, 171 (1979); A. Abbas, *Juraimi Exhausts all Avenues for Reprieve*, NEW STRAITS TIMES, Sept. 13, 2001.

<sup>42</sup> See *infra* notes 64-68, 72-73, and associated text, below.

<sup>43</sup> See *infra* notes 56-57, 71, and associated text, below.

<sup>44</sup> Interview with Malaysian Criminal Defense Lawyer, *supra* note 16.

<sup>45</sup> In the academic literature, 'retributive' pardons are justified on the basis that they are seen to *enhance* retributive justice, rather than detract from it. Linda Ross Meyer, *The Merciful State*, FORGIVENESS, MERCY AND CLEMENCY 86 (Austin Sarat and Nasser Hussain ed., 2007); James R. Acker et al, *Merciful Justice: Lessons from 50 years of New York Death Penalty Commutations*, 35 CRIM. JUST. L. REV. 185 (2010). Examples are clemency granted on the basis of wrongful conviction, one or more dissenting judgements contained in the original conviction casting a degree of doubt over the accused's guilt, a sentence being disproportionate in relation to similar cases or co-defendants, the fact the crime was committed 'out of necessity, coercion or adherence to moral principles' (RANDALL COYNE AND LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 843 (2nd ed. 2001)), the prisoner's circumstances falling just short of an established defense in law, the age and gender of the prisoner, and compassionate grounds due to terminal illness of the prisoner or a family member.

<sup>46</sup> See Daniel Pascoe, CLEMENCY IN SOUTHEAST ASIAN DEATH PENALTY CASES 15 (2014).

<sup>47</sup> Interview with Malaysian Criminal Defense Lawyer, *supra* note 16; E-mail

suggests an availability bias towards non-legal factors within cases that garner the most “public interest.”

A more holistic view of the factors relevant in Malaysian clemency and pardon decisions was preferred by Talib, who quotes a former Malaysian Attorney-General stating that the members of each Pardons Board:

have to consider very carefully all aspects of the case in the national and public interest, the nature and gravity of the offence, the circumstances in which the offence was committed and all grounds submitted by their counsel [i.e. the Federal Attorney General] before making their decision.<sup>48</sup>

Consistent with this observation, in addition to the non-legal factors mentioned above, there have also been several cases evincing retributive justifications for the Royal Pardon being decisive before the Pardons Boards. In general, such cases have involved factors such as the youth of a prisoner,<sup>49</sup> cases where a complete or partial defense, while argued by defense lawyers at trial, could not be proven,<sup>50</sup> procedural irregularities, and other cases where pressing legal criteria demanding commutation have emerged during trial.<sup>51</sup>

Furthermore, rehabilitation has also proven to be a decisive factor. In the absence of a separate body for the task, each Pardons Board also operate as a parole board. This occurs even if Board sittings are sometimes

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from Malaysian Human Rights Lawyer (Feb. 4, 2010).

<sup>48</sup> Talib, *supra* note 16 at 173, quoting Abdul Kadir Yusuf (Attorney-General from 1963 to 1977).

<sup>49</sup> S. Sharif, and R. V. Veera, 44 ‘Forgotten’ Convicts, NEW STRAITS TIMES, Sept. 14, 1997; *Rehabilitation is our top priority, says Prisoners D-G*, NEW STRAITS TIMES, (Sept. 14, 1997; *See infra* notes 55 and 69, and associated text.

<sup>50</sup> Interview with Former Malaysian Federal Court Judge, Kuala Lumpur (Dec. 1, 2011); Interview with Malaysian Government Lawyer, *supra* note 35.

<sup>51</sup> Interview with Malaysian Criminal Defense Lawyer, *supra* note 16; Amnesty International, *The Death Penalty and Executions in Malaysia*, *supra* note 18; *Reprieve for Death Row Woman*, STRAITS TIMES, Feb. 18, 1983) 4. *See also* K. K. SOONG, THE EQUALITY OF MERCY 6 (Paper presented at the Human Rights Seminar, Kuala Lumpur, July 19, 1986), who notes that ‘The Pardons Board[s] also consider the quality of the evidence adduced at the trial and the safeness of the conviction’. However, as I outline below, despite assertions that the safeness of the conviction may be one of the factors considered, there has not yet been a Pardons Board decision benefiting a prisoner who was thought to be *factually* innocent of the crime committed, as opposed to *legally* innocent, where the prosecutor has not been able to prove factual guilt due to insufficient evidence or procedural improprieties.

irregular and Board members do not include correctional services personnel. Many prisoners in lower-profile, unreported cases have been awarded pardon or commutation where the prisoner “showed remorse, had repented and apologized, and promised good behavior and not to repeat the offence.”<sup>52</sup> Additional factors favoring commutation or pardon include that a minor offense was committed, the prisoner having a clean record before the offense in question, and no assessed risk of dangerousness to the public upon the prisoner’s release.<sup>53</sup> As noted above, each prisoner serving a longer term of imprisonment is automatically considered for release every four years, in addition to holding the right to petition the Ruler, Governor or *Agong* every two years. For prisoners facing natural life or life sentences, the longer the period spent in prison, the greater the opportunity to demonstrate the desired criteria for a Royal Pardon, and the more chances the prisoner is given to petition for one.

Bearing in mind a number of methodological caveats,<sup>54</sup> the following examples form a chronological compilation of pardons and sentence commutations reported in the media, by NGOs and in academic articles since the mid-1970s, where sufficient details are known about the prisoner’s case and the reasons the pardon was given. These examples do not include examples of prisoners who were released on the basis of good behavior over a long period. I have included commutations in capital cases as well as where the petitioner’s prison sentence was reduced or abrogated by the relevant Ruler, Governor or *Agong*. In some cases, the names and

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<sup>52</sup> Rahmat Khairulrijal, *Reprieve for prisoners on death row*, NEW STRAITS TIMES, May 5, 2015; Talib, *supra* note 16 at 183; *Early Release for Four Convicts in the Spirit of Merdeka*, BERNAMA DAILY MALAYSIAN NEWS, Aug. 30, 2000; *Rehabilitation is our top priority, says Prisoners D-G*, NEW STRAITS TIMES, *supra* note 50.

<sup>53</sup> For example, THE STRAITS TIMES, *supra* note 20.

<sup>54</sup> There would be many other unreported pardons not included in the list presented. The methodological drawbacks of the sample provided include: a) the bias towards toward cases involving ‘non-legal’ factors, as identified above; b) a predominance of English-language sources (although I do also speak serviceable Malay); c) a bias towards more recent cases from the 1990s and 2000s, as information has become more readily available in the internet era; and d) a preference for the international media to focus on prisoners sentenced for political, security-based, or drug offences, rather than more mundane crimes and e) a preference for the international media to focus on westerners pardoned in Malaysia, rather than Malaysian and other Asian prisoners.

I have conducted searches of material from the mid-1970s onwards due to a) date restrictions on internet searches for major newspapers; b) the publication of Malaysia’s major English-language daily *The New Straits Times* since 1974; c) Amnesty International’s reports on the death penalty (forming a major source of news on commutations) dating from 1977 and c) a desire to keep a list of clemency and pardon grants reasonably current and relevant to modern-day practice, rather than including pardons throughout Malaysia’s British colonial history and its union with Singapore from 1963-1965.

years of beneficiaries remain unavailable, but importantly, this represents the first time that a scholar has systematically collected data on Royal Pardon grants and the reasons for them in post-independence Malaysia:

- Lim Hang Seoh, 14-year-old boy, was sentenced to death for possession of a firearm in 1977. Protests from the Malaysian Bar Council and western nations may have been significant in the subsequent decision of the Penang Pardons Board to commute his sentence to a detention in juvenile detention until the age of 21.<sup>55</sup>
- Various foreign prisoners, from Indonesia, Thailand, the Philippines and western nations, have been clemency or pardon, commonly in death penalty cases, to safeguard Malaysia's relationship with their country of origin.<sup>56</sup> As an official from the Malaysian Foreign Affairs Ministry confirmed to the media in 2010, "there have been cases where appeals for clemency by foreign governments were entertained by Malaysia."<sup>57</sup>

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<sup>55</sup> Amnesty International, *Report of an Amnesty International Mission to the Federation of Malaysia*, *supra* note 18 at 52; Amnesty International, *The Death Penalty*, *supra* note 18, 90-91; TIM DONOGHUE, *KARPAL SINGH, TIGER OF JELUTONG* 275 (2013). Malaysia only foreclosed the sentencing to death of juvenile offenders for firearms offences in 2001 via the Child Act 2001, sec. 97(1) (Malay.). Prior to this law, the Essential (Security Cases) Regulations 1975, reg. 3(3) allowed juveniles to be dealt with as adults in relation to security offences, overruling the original prohibition on the death penalty for minors found in the Juvenile Courts Act 1947, sec. 16 (Malay.).

<sup>56</sup> See N. Lilburn, *Grim Reminder to Traffickers*, NEW STRAITS TIMES, Aug. 13, 1986; *It is govt's duty to protect all*, NEW STRAITS TIMES, July 26, 2010; *Probe into alleged dadah trafficking in prisons*, NEW STRAITS TIMES, Aug. 23, 1996 (on various westerners sentenced to death and life imprisonment in the 1970s and early 1980s); AMNESTY INTERNATIONAL, *AGAINST THE TIDE: THE DEATH PENALTY IN SOUTHEAST ASIA* 13 (Jan. 1, 1997); Nick Perry, *Winning a Battle, Losing the War*, 96 INSIDE INDONESIA, <http://www.insideindonesia.org/winning-a-battle-losing-the-war>; D S. Osman, *Malaysia Asked to Spare 3 Traffickers Facing Death*, JAKARTA GLOBE, Sept. 19, 2010; *Menuju Tiang Gantung Malaysia*, VIVA NEWS, Aug. 27, 2010, <http://sorot.news.viva.co.id/news/read/173848-menuju-tiang-gantung-malaysia>; *Capital Sentence Against Indon Worker in M'Sia Aborted*, ANTARA, Jan. 6, 2004 (on Indonesian migrant workers sentenced to death); *Hands off Cain*, *supra* note 20; *Malaysia commutes death sentence of Filipina to life*, MANILA BULLETIN, July 2, 2015 (on Filipino migrant workers sentenced to death); *Malaysia to free 39 Thais*, NEW STRAITS TIMES, May 31, 1996; *Campaign against capital punishment of two Thai prisoners*, HUMAN RIGHTS IN THAILAND REPORT 20 (on Thai prisoners sentenced to death and to terms of imprisonment whose sentences were commuted).

<sup>57</sup> Than Tai Hing, *It is govt's duty to protect all*, NEW STRAITS TIMES, July 26, 2010.

- Ibrahim Ismail, then Crown Prince of Johor, was pardoned in the 1980s after he shot a man to death in a nightclub.<sup>58</sup> Ismail is now Sultan of Johor.
- Ismail's half-brother, Abdul Majid, was pardoned for assault.<sup>59</sup>
- Sultan Mahmood Iskandar, Ibrahim and Abdul Majid's father, was pardoned for manslaughter and assault while he was Crown Prince.<sup>60</sup>
- Collectively, the three aforementioned pardons formed part of "several incidents over the course of at least the previous twenty years [prior to 1993] in which Rulers and members of the royal families had abused their privileges."<sup>61</sup> These events culminated in a series of constitutional amendments in 1993 that included restrictions on Rulers' power to pardon themselves or family members.<sup>62</sup>
- Mah Chuan Lim, convicted for firearms offenses in 1981, was pardoned in light of irregularities in the procedures used in his case after the prosecutor had improperly amended his non-capital charge to a capital one.<sup>63</sup>
- The *Agong* has pardoned a number of UMNO politicians in the past, both for capital and non-capital offenses.<sup>64</sup> Two of the most prominent cases were: 1) Mokhtar Hashim, a former cabinet minister found guilty of murdering an UMNO colleague in 1983, who was granted a commutation and later released,<sup>65</sup> due to "previous service to his country,"<sup>66</sup> and

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<sup>58</sup> Azlan Shah, *supra* note 40, at 86-87; J. Robles *Noynoy's Johor BFF*, MANILA STANDARD TODAY, Mar. 21, 2013.

<sup>59</sup> H. P. Lee, *Hereditary Rulers and Legal Immunities in Malaysia*, 12(2) U. TASMANIA L. REV. 323, 330 (1993).

<sup>60</sup> *Id.*; *Malay rulers meet to discuss move to curb rights*, REUTERS NEWS, Dec. 21, 1992; *Sultan committed 15 criminal acts in 20-year period, reports NST*, STRAITS TIMES, Jan. 21, 1993; *Public Prosecutor v Tengku Mahmood Iskandar*, 2 MALAYAN L. J. 123 (1977); *Public Prosecutor v. Tengku Mahmood Iskandar*, MALAYAN L. J. 128 (1973).

<sup>61</sup> Mark R. Gillen, *The Malay Rulers' Loss of Immunity*, (1995) 29 Univ. of B.C. L. Rev. 163, 180, n. 108; *see also* STRAITS TIMES, *supra* note 56.

<sup>62</sup> Michael Richardson, *Malaysia Prepares to Strip Sultans of their Immunity*, INTERNATIONAL HERALD TRIBUNE, Dec. 15, 1992; Gillen, *supra* note 61 at 185.

<sup>63</sup> *Judicial Error and the Pardons Board*, 15(2) INSAF: J. MALAYSIAN BAR 1 (1982).

<sup>64</sup> Ronnie Liu Tian Khiew, *The King can pardon Anwar only with advice from PM* (Media Statement from Malaysian Opposition Politician, Oct. 22, 2003); Malaysia Chronicle, *supra* note 4.

<sup>65</sup> Jerry Bass, *Malaysia in 1983: A Time of Troubles*, 24 ASIAN SURVEY 167 (1983); P. Crook, *Sim Kie Chon V. Superintendent of Pudu Prison & Ors: The Royal Prerogative of*

perhaps also evidential improprieties in the original conviction;<sup>67</sup> 2) Harun Idris, a former UMNO Chief Minister of Selangor state, who was pardoned and released from prison in 1981 after serving three years of imprisonment for various corruption offenses.<sup>68</sup>

- Roger Anang and Basar Jikirie were two prisoners from the Philippines under 18 years of age. They were sentenced to death for drug trafficking in the early 1990s and had their sentences commuted to life imprisonment due to their age in 1993 and 1994, respectively.<sup>69</sup>
- Tan Kim Guan, whose execution for drug trafficking was stayed by the *Yang di-Pertuan Agong* in 1994. His death sentence was subsequently commuted in January 1995. The *Agong* had reportedly been impressed by the prisoner's bravery in making a guilty plea so that his wife could escape the gallows on a joint drug trafficking charge.<sup>70</sup>
- Chu Tak Fai, a British national born in Hong Kong, whose death sentence for drug trafficking was commuted by the *Agong* to a life sentence in 2006. Fai successfully persuaded the Pardons Board that he was forced to smuggle drugs into Malaysia from Thailand by a money laundering group in order to repay a family debt.<sup>71</sup>
- In 2008, property developer Kenneth Lee Fook, the grandson of Malaysia's first finance minister, was convicted of shooting a woman to death after a car crash. Fook was granted a pardon by the *Agong* and had his sentence reduced to life imprisonment.<sup>72</sup> One significant non-political factor here may

*Mercy?*, JURNAL UNDANG-UNDANG 195 (1986). See *Hashim v. Public Prosecutor*, 2 MALAYAN L. J. 232 (1983).

<sup>66</sup> "Insults could see convicted men hang: lawyer," *supra* note 40.

<sup>67</sup> Interview with Malaysian Government Lawyer, *supra* note 35.

<sup>68</sup> *Harun should thank PM for pardon: Najib*, NEW STRAITS TIMES, Jan. 23, 1989; *Jailed Malaysian leader back in the front line*, THE AGE, July 1, 1981.

<sup>69</sup> Amnesty International, *supra* note 56 at 12. See also *supra* note 56 on juveniles sentenced to death.

<sup>70</sup> TIM DONOGHUE, KARPAL SINGH: TIGER OF JELUTONG 235-236 (2013).

<sup>71</sup> REPRIEVE UK, CHU TAK FAI, (Death Penalty Case Information, 2013) <http://www.reprive.org.uk/cases/chutakfai/>; AMNESTY INTERNATIONAL, MALAYSIA: IMMINENT EXECUTION, CHU TAK FAI [M], AGED 30, HONG KONG NATIONAL/N/N (June 13, 2001). The Defendant's nationality may have also been significant here.

<sup>72</sup> Hands off Cain, *supra* note 19.



have been the RM550,000 (approximately £90,000) compensation award that Fook paid to his victim's family.<sup>73</sup>

- In 2010, a Muslim woman's sentence of caning was unexpectedly commuted; the woman was convicted of drinking alcohol at a beach-side restaurant in Pahang State. Her commutation was possibly due to "an uproar in the media and among human rights activists... It was not clear what promoted [Pahang] Sultan Ahmad Shah to commute the sentence, but he could have been influenced by the negative publicity that Malaysia received after the caning sentencing".<sup>74</sup> Malaysia retains corporal punishment for Muslim men and women sentenced in the non-secular *Syariah* court system.<sup>75</sup>

Importantly, petitioners do not so far appear to have been pardoned or have had their sentences commuted on the basis of possible factual innocence. The factors that have proved decisive in previous cases are merely *mitigating* factors,<sup>76</sup> rather than exculpatory factors such as wrongful conviction on the basis of fabricated evidence. Datuk Jagjit Singh, a noted Malaysian criminal defense lawyer and former judge, has stated that in relation to applications for Pardon: "In the eyes of the law, the applicant is guilty as charged with the offense. The board can only vary the sentence imposed by the court."<sup>77</sup> Moreover, former Federal Attorney-General Tan Sri Abu Talib Othman has recently stated that "the Pardons Board is the final court of clemency although it cannot substitute

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<sup>73</sup> *Family aghast after King pardons killer*, THE NEW PAPER, Jan. 30, 2008; Veena Babulal and I. L. Mokhtar, *Nothing can bring back Good Yew*, NEW STRAITS TIMES, Jan. 28, 2008. The failure to prove a defense of diminished responsibility or self-intoxication at trial may also have been an influential factor in the commutation (Interview with Malaysian Government Lawyer, *supra* note 35; Interview with Malaysian Criminal Defense Lawyer, *supra* note 35).

<sup>74</sup> *Malaysian state ruler commutes caning sentence for beer-drinking Muslim woman*, THE CANADIAN PRESS, Apr. 1, 2010.

<sup>75</sup> AMNESTY INTERNATIONAL, A BLOW TO HUMANITY: TORTURE BY CANING IN MALAYSIA, 8 (Dec. 2010); W-C. Chan, *Legal Protection of Minors: Experiences of Four Common Law Jurisdictions in Asia*, in ROUTLEDGE HANDBOOK OF FAMILIES IN ASIA 437 (S. R. Quah ed., 2015).

<sup>76</sup> *Anwar Ibrahim Must Sign Petition for Pardon*, FREE MALAYSIA TODAY, Feb. 26, 2015, <http://www.freemalaysiatoday.com/category/nation/2015/02/26/anwar-ibrahim-must-sign-petition-for-pardon/>; Interview with Malaysian Criminal Defence Lawyer, *supra* note 35.

<sup>77</sup> *Anwar Ibrahim Must Sign Petition for Pardon*, FREE MALAYSIA TODAY, Feb. 26, 2015; *See also Was it a request for pardon?*, NEW SUNDAY TIMES, Mar. 1, 2015: 'former Attorney-General Tan Sri Abu Talib Othman [1980-1993] was quoted as saying last week that the Pardons Board was Anwar's final chance for clemency, although it could not substitute the guilty verdict with that of not guilty'.

the finding of guilty to that of not guilty." If this is true of all cases, any consideration of Anwar's possible innocence is unlikely to have been taken into account by the Federal Pardons Board.

Although the contents of Anwar's petition were not divulged to the media, nor was I personally able to obtain a copy of Anwar's petition,<sup>78</sup> it is likely that Anwar's petition was indeed based on an innocence claim. A quote from Anwar's second daughter Nurul Nuha as she submitted the petition is telling: "The court may have passed a guilty verdict, but our father is innocent. Therefore, we are submitting the petition based on Article 42 of the Federal Constitution."<sup>79</sup> Likewise, for Anwar's eldest daughter Nurul Izzah, the hope was that through the pardon, the *Agong* would "right the wrong, especially in the miscarriage of justice that has taken place" and that "[o]ur case is clear. He is innocent, [hence] there is [a] request for a pardon on the miscarriage of justice."<sup>80</sup>

Of course, it should be acknowledged that Anwar does exhibit one key mitigating factor looked upon favorably in previous cases: his public service as an UMNO politician from 1982 to 1998. It is unknown whether or not this point was discussed in the relevant Federal Pardons Board meeting; however, previous pardons awarded to politicians have invariably involved *current* members of the ruling party.<sup>81</sup> As it was, the *Agong* rejected Anwar's application for Pardon, finding no circumstances to justify his release from prison. This supports the trend of factual innocence (as opposed to procedural improprieties in the original trial, or else the availability of an arguable defense) never appearing to have been a successful argument, at least since the mid-1970s. Tellingly, this was one reason for Anwar's initial reluctance to submit a petition (whereas the application was eventually submitted on his behalf by his wife and two of his daughters): because petitioning the *Yang di-Pertuan Agong* for pardon himself would "paint an impression of guilt on him."<sup>82</sup>

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<sup>78</sup> In July 2015, my emails to Anwar Ibrahim's legal team and to a Senior Counsel in the Attorney-General's Chambers requesting a copy of the pardon petition itself went unanswered.

<sup>79</sup> See *Pardon petition holds up Permatang Pauh polls*, NEW STRAITS TIMES, Feb. 25, 2015.

<sup>80</sup> Rajina Dhillon, *Family hopeful about Anwar getting pardon*, THE RAKYAT POST, Mar. 2, 2015, <http://www.therakyatpost.com/news/2015/03/02/family-hopeful-about-anwar-getting-pardon/>.

<sup>81</sup> One exception is Democratic Action Party MP and the current joint opposition leader Lim Kit Siang, who was granted a pardon in 1969 after contravening election laws. This pardon is not included on the list provided above as it occurred more than 40 years ago (See L. SURYADINATA, *SOUTHEAST ASIAN PERSONALITIES OF CHINESE DESCENT* 638 (vol. 1, 2012).

<sup>82</sup> P. Prem Kumar, *Pardon unlikely for Malaysian opposition leader*, ANADOLU AGENCY, Feb. 18, 2015, <http://www.aa.com.tr/en/news/467093--pardon-unlikely-for->

### III. NATURE OF THE DECISION-MAKING PROCESS

The second plausible hypothesis that explains the rejection of Anwar's petition is the overt political influence on the Federal Pardons Board, along with the nature of the materials considered by Board members. As noted, the State and Federal Pardons Boards were constitutionally established in order to provide advice to the Rulers, Governors and the *Agong* on the exercise of their prerogative power to mitigate or abrogate criminal punishments. This "advice" is interpreted in different ways by the different Rulers, leading to a state-by-state variation in clemency and pardon practice. However, before the final decision is made, the *composition* of and *materials* considered by each Pardons Board heavily impact the kind of advice passed to the Ruler. Whether the Ruler ultimately chooses to act on that advice or not, the very fact that a negative recommendation is usually made increases the likelihood that the petition will be rejected. Although these factors reduce the chances of *any* prisoner receiving a pardon in Malaysia, they have even greater salience in cases involving political adversaries of the ruling Barisan coalition.

Despite the official position being that the Pardons Boards deliver politically-impartial advice and that "the Federal Government has no say in the power of pardon,"<sup>83</sup> the implicitly or overtly political representatives serving on the Pardons Boards (in the form of the Federal Attorney-General, the local Chief Minister,<sup>84</sup> and perhaps even politically sympathetic lay members)<sup>85</sup> are usually in a position to guarantee

malaysian-opposition-leader; *Anwar Seen as Admitting Guilt in Sodomy with Pardon Petition – Political Analysts*, BERNAMA DAILY MALAYSIAN NEWS, Feb. 25, 2015. The same observation also applies to Anwar's first set of convictions arising from the 1998 charges: Aun, *supra* note 6 at 48; *Is Anwar Really Poised for a Comeback?*, STRAITS TIMES, Dec. 24, 2005.

<sup>83</sup> Hashim, *supra* note 17 at 42; Interview with Member of the Malaysian Bar Council, Kuala Lumpur (Oct. 26, 2011).

<sup>84</sup> By mid-2015, *Barisan Nasional*-backed Chief Ministers or *Menteri Besar* held power in 10 of the 13 States. By comparison, the pro-establishment figure in 1975 was 13 of 13 and in 1990 was 11 of 13. On the Federal Pardons Board that decided on Anwar Ibrahim's petition, the relevant appointee was the UMNO Minister for Federal Territories: Datuk Seri Tengku Adnan bin Tengku Mansor (Shaun Tan, *Agong has last word on Anwar's pardon, say lawyers*, MALAY MAIL ONLINE, Feb. 27, 2015, <http://www.themalaymailonline.com/malaysia/article/agong-has-last-word-on-anwars-pardon-say-lawyers>.)

<sup>85</sup> The lay-members of the Pardons Boards are appointed for renewable terms of three years by the relevant Ruler, Governor or the *Agong*. FEDERAL CONSTITUTION, art. 42(5)-(6) (Malay.). The original constitutional intention was to provide a racial balance on the Pardons Boards with members from each of Malaysia's three main racial communities: Malay, Indian and Chinese. However, rather than their race, the political fidelity of the three appointees is more likely to be determinative of their views on pardons petitions (on the Federal Pardons Board, at least), given they are appointed to the

recommendations for pardon to the *Agong*, Ruler, or Governor that suit the UMNO-dominated government's agenda.<sup>86</sup> Echoing Hashim's assertion that Federal government influence on these constitutional advisory bodies "may be brought to bear only *indirectly* through the good offices of the Attorney-General,"<sup>87</sup> Harding has more bluntly stated that the Federal Pardons Board, at least, has been subjected to unconstitutional governmental pressure from time to time.<sup>88</sup> The significance for the present case is that, as mentioned earlier in the article, both national and international opinion posit that Anwar's conviction was a politically-motivated attempt by the UMNO leadership to end his career.<sup>89</sup> Although we cannot be sure in the absence of first-hand testimony or minutes of proceedings, if Malaysia's Federal Government, under the guise of the UMNO leadership, wanted Anwar's petition to be rejected for political reasons, it would probably have been able to achieve a consensus to make that recommendation to the *Yang di-Pertuan Agong*.<sup>90</sup> The membership of the Federal Attorney-General in the Pardons Board is critical to this argument.

In terms of the decision-making methodology of the Pardons Board, the Malaysian Constitution provides that before disposing of a petition, the members of the Pardons Board "*shall* consider any written

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Board by the Chairmen on the political recommendation of the Prime Minister and their terms are subject to tri-annual renewal. *See Hurdles loom in Anwar's pardon bid*, MALAYSIAKINI, Feb. 26, 2015, <http://www.malaysiakini.com/news/290280>; FEDERAL CONSTITUTION, art. 40(1) (Malay.); Inter-Parliamentary Union, Resolution by Inter-Parliamentary Council, Case No Mal/11 – Lim Guan Eng – Malaysia, 164<sup>th</sup> session, Brussels, Apr. 16, 1999 <http://www.ipu.org/hr-e/164/mal11.htm>. *But see* H. P. Lee, *Malaysian royalty and the Special Court*, in *NEW COURTS IN ASIA* 322 (A. Harding, and P. Nicholson ed., 2010) on the State Pardons Boards.

<sup>86</sup> Interview and published sources have suggested that being 'tough on crime' has significantly helped UMNO politically (Interview with Australian Academic Expert on Thailand, Canberra (Sept. 16, 2009); Interview with Australian Academic Expert on Indonesia, Melbourne (Dec. 15, 2011); F. A. Noor, *The Malaysian General Elections of 2013: The Last Attempt at Secular-inclusive Nation-building*, 32(2) J. CURRENT SOUTHEAST ASIAN AFF. 89, 102 (2013)). Conversely, government interference in the nominally independent pardon process may enable the few prisoners with political connections to the ruling party to escape more serious punishment. Interview with Malaysian Government Lawyer, *supra* note 35. The cases of Mokhtar Hashim, Harun Idris and Kenneth Lee Fook, described earlier, are possible examples of this practice.

<sup>87</sup> Hashim, *supra* note 17 at 42 (emphasis added).

<sup>88</sup> ANDREW JAMES HARDING, *LAW, GOVERNMENT AND THE CONSTITUTION IN MALAYSIA*, 70 N58 (1996).

<sup>89</sup> *See supra* note 17 at 42.

<sup>90</sup> Kumar, *supra* note 86.

opinion which the Attorney-General may have delivered thereon.”<sup>91</sup> Presumably, this was originally in reference to the Attorney-General’s opinion on the legal (rather than political) reasons for issuing a pardon or rejecting the petition.<sup>92</sup> While the prisoner has no formal procedural right to make written or oral submissions to members of the Pardons Board,<sup>93</sup> the Attorney-General’s written representations *must* be considered, and are presented first at each meeting.<sup>94</sup> Likewise, three separate sources confirmed by interview, that it is the Attorney-General’s (or his delegate’s) written and verbal opinion is the most influential factor on the Pardons Board’s decision.<sup>95</sup> As one of these aforementioned interviewees asserted, unlike the trial and appeal judges (whose opinions are sought in cases of death penalty commutation), prison staff and psychologists, the Attorney-General is the only member of the Pardons Board physically present at the meeting and capable of defending the tendered written report on the case.<sup>96</sup> This will have significant bearing on the way that the three appointed lay members vote on the petition,<sup>97</sup> as typically they are not legally trained.<sup>98</sup>

Ultimately, there are two key reasons that the Attorney-General’s written and oral submissions to the Pardons Board are likely to reflect a negative view towards the petitioner’s chances of pardon or commutation. The first reason is that the Federal Attorney-General, the Malaysian

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<sup>91</sup> FEDERAL CONSTITUTION, art. 42(9) (Malay.), emphasis added; Talib, *supra* note 16 at 41.

<sup>92</sup> Talib, *supra* note 16 at 43-44, 184; A. AHMAD ET. AL., OTHER BODIES AND INSTITUTIONS THAT ARE RELATED TO THE JUDICIARY 8 (2014), <http://www.aseanlawassociation.org/legal-malaysia.html>.

<sup>93</sup> *See supra* note 33, above.

<sup>94</sup> Interview with Malaysian Member of Parliament, Kuala Lumpur (Dec. 3, 2011).

<sup>95</sup> *Id.*; Interview with Malaysian Government Lawyer, *supra* note 35; Interview with Malaysian Criminal Defense Lawyer, *supra* note 35.

<sup>96</sup> Interview with Malaysian Government Lawyer, *supra* note 35. *See supra* notes 33-36, and associated text.

In most state cases the Attorney General does not personally attend in order to defend his report but instead sends the relevant state legal adviser, as permitted by art 42(5) of the Constitution of Malaysia (Talib, *supra* note 16 at 66; Harding, *supra* note 92 at 70; Hashim, *supra* note 17 at 42); however, the Attorney General did attend the hearing disposing of Anwar Ibrahim’s petition in person, given it was such a high profile case. Ng, *supra* note 6.

<sup>97</sup> Talib, *supra* note 16 at 66; *See also* note 83.

<sup>98</sup> Interview with Malaysian Member of Parliament, *supra* note 98.

State's chief legal adviser, also doubles as Malaysia's chief prosecutor.<sup>99</sup> Although the Attorney-General's main function on the various Pardons Boards is to advise Board members on the legal issues surrounding the case,<sup>100</sup> the fact that the Attorney General's Chambers have prosecuted the prisoner whose petition comes before the Board arguably creates a conflict of interest. Malaysian civil society has long recognized this as a problem. As a member of the Malaysian Bar observed in 1983:

If an accused person is apprehended after an offence has been committed the Attorney General has the following discretionary powers: to charge him, if so the type of charge, to issue a certificate to bring the case under the emergency legislation [on security offences], to transfer the case to the High Court, to appear in person at the trial, to appeal to the Federal Court against acquittal and to apply for the remand of the accused until the disposal of the appeal, *to give a written opinion to the Pardons Board if the accused is convicted and to sit on the Pardons Board when the pardon is considered...* The powers of the Attorney General make nonsense the doctrine of separation of powers.<sup>101</sup>

Likewise, although the following comments were made in relation to Anwar's first set of trials following the 1998 allegations, they apply equally to the most recent Federal Pardons Board proceedings:

Given the present Attorney-General was the chief prosecutor at Anwar's trials, it is difficult to perceive how, wearing a new hat, he can now exercise that function [to give legal advice on the petition] impartially in relation to Anwar.<sup>102</sup>

Why would the Federal Attorney-General recommend pardon if the state has already put significant resources into the prosecution of the case, other than for circumstances arising after conviction?<sup>103</sup> If after arrest, a

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<sup>99</sup> FEDERAL CONSTITUTION, art. 145(2)-(3) (Malay.); Criminal Procedure Code, ch. XXXVII, sec. 376(1) (Malay).

<sup>100</sup> See *supra* note 92.

<sup>101</sup> Tommy Thomas, *The Attorney General – The most powerful person in Malaysia?*, THE MALAYSIAN BAR (1983), [http://www.malaysianbar.org.my/members\\_opinions\\_and\\_comments/the\\_attorney\\_general\\_the\\_most\\_powerful\\_person\\_in\\_malaysia\\_.html](http://www.malaysianbar.org.my/members_opinions_and_comments/the_attorney_general_the_most_powerful_person_in_malaysia_.html), emphasis added.

<sup>102</sup> Aun, *supra* note 6 at 47-48.

<sup>103</sup> Even for circumstances arising after conviction, good behavior and rehabilitation in prison are likely to be put forward by reports by the relevant prison

case exhibits mitigating factors that justify a lesser punishment or an immediate release, a decision not to bring a prosecution, to bring a prosecution for a lesser offense, or a recommendation in favor of administrative detention,<sup>104</sup> can instead be made by in-house by the Attorney-General's Chambers well before the case comes to trial, rather than at the final stage of pardon deliberations.<sup>105</sup>

Second, the Attorney-General's closeness to Malaysia's elected government means the latter's agenda usually succeeds. As the state's legal adviser and public prosecutor, the Federal Attorney-General has often been accused of lacking independence from Malaysia's elected government in the exercise of these functions.<sup>106</sup> The very appointment

superintendent, rather than the Attorney-General, whose advice presumably focuses on the circumstances known around the time of trial, conviction and sentencing.

<sup>104</sup> Laws allowing for detention without trial in Malaysia previously included the Dangerous Drugs (Special Preventive Measures) Act 1985 (Malay.), the Emergency (Public Order and Crime Prevention) Ordinance 1969 (Malay.) (repealed in 2012) and the Internal Security Act 1960 (Malay.) (also repealed in 2012). A new law: the Security Offences (Special Measures) Act 2012 (Malay.) is designed to partially replace the Internal Security Act, whereas the Prevention of Crimes Act 1959 was amended in 2013 to provide for indefinite detention without trial. Most recently, the Prevention of Terrorism Act 2015 (Malay.), enacted in April 2015, enables the administrative detention of terror suspects.

<sup>105</sup> A similar argument may be made for the trial and appeal judges' recommendations on clemency requests submitted in death penalty cases, and in other cases where it is *commutation* or *remission* that is sought (i.e. a changing or reduction of sentence), rather than a full pardon like in Anwar's case. See Criminal Procedure Code, ch. XXVII sec. 281(b), 300(2) (Malay.). As with the initial prosecution of the matter by the Attorney-General's Chambers, why would the trial judge recommend pardon or commutation in a case of possible innocence (such as Anwar's), when the judge could have acquitted the Defendant in the first place? Certainly there have been many cases, especially where mandatory death penalty offences have been charged, where the trial judge has written recommendations in favor of commuting the death sentence to a life or natural life term (Talib, *supra* note 16 at 63; *Poser over mandatory and minimum sentences*, NEW SUNDAY TIMES, Nov. 10, 2002; Interview with Malaysian Government Lawyer, *supra* note 35). This is to be expected where a lack of judicial discretion available over sentencing means that the judges' hands are tied. However, for charges with discretionary penalties such as sodomy (Penal Code, sec. 377B (Malay.)), there is no foreseeable reason why the trial judge would write in favor of a sentence reduction, as to reduce the sentence is an option initially open to the judge at trial.

<sup>106</sup> C. O'Donnell, "Karpal Singh" [2002-2003] Bar News: The Journal of the NSW Bar Association 61, 67; AMNESTY INTERNATIONAL, THAILAND: FEAR OF IMMINENT EXECUTION (Apr. 25, 2002); *Malaysian PM pledges Police Chief, Attorney-General not involved in Anwar's sodomy case*, INTERNATIONAL HERALD TRIBUNE, July 20, 2008; G. Rodan, *Do Markets Need Transparency? The Pivotal Cases of Singapore and Malaysia*, 7(1) NEW POL. ECON. 23, 31 (2002); *Press Release: The Bar is Pro-Rule of Law and Justice, Not Pro-Opposition or Government*, THE MALAYSIAN BAR, Feb. 26, 2015, [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_the\\_bar\\_is\\_pro\\_rule\\_of\\_law\\_and\\_justice\\_not\\_pro\\_opposition\\_or\\_government.html](http://www.malaysianbar.org.my/press_statements/press_release_%7C_the_bar_is_pro_rule_of_law_and_justice_not_pro_opposition_or_government.html); Interview with

and dismissal process makes it likely that the nominated person will carry out the elected government's bidding.<sup>107</sup> Moreover, in his own case, Anwar had questioned the impartiality of the then-Federal Attorney-General, Abdul Gani Patail, stating that Patail has a "long-standing animosity towards him [Anwar]",<sup>108</sup> stemming from Patail's role as Chief Prosecutor for Anwar's first set of trials in the late 1990s.<sup>109</sup> If this is true, then once the decision to prosecute Anwar a second time for sodomy was made, the Attorney-General's choice not to recommend pardon was already obvious. The only task remaining would be to convince the lay members of the Pardons Board of his view. These lay members, who have the chance to speak during the meeting,<sup>110</sup> will usually not be legally trained nor often familiar with the precise details of the case at hand.<sup>111</sup> Accordingly, the most authoritative voice on the Pardons Board will be that of the government, expressed not only through the State Chief Minister or Minister for Federal Territories, but also indirectly through the Federal Attorney-General. In a politicized case such as Anwar's, this gives the petitioner very little if any chance of receiving a recommendation in favor of pardon.

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Australian Academic Expert on Malaysia, Melbourne (Dec. 15, 2011) ; Interview with Malaysian Member of Parliament, *supra* note 98; K. L. Whiting, *Malaysia's Hard Line on Drug Abusers*, THE ADVERTISER, June 25, 1986. Amanda Whiting observes that the incidence of recent sedition prosecutions bears out this concern (Amanda Whiting, *Emerging from emergency rule? Malaysian Law 'Reform' 2011-2013*, 14(2) AUSTL. J.ASIAN L. 1, 36 (2013)).

<sup>107</sup> The Attorney-General is appointed by the Prime Minister's recommendation. On the Attorney-General's lack of political independence, *see generally* Elliot Brennan, 'I am not a thief': Malaysian PM denies corruption but is losing battle to clear his name, THE INTERPRETER, July 9, 2015, <http://www.lowyinterpreter.org/post/2015/07/09/I-am-not-a-thief-Najibs-corruption-claims.aspx>; Ahmad et al, *supra* note 91 at 7-8; Interview with Malaysian Member of Parliament, *supra* note 98; GLOBAL BERSIH, THE PEOPLE'S TRIBUNAL ON MALAYSIA'S 13TH GENERAL ELECTIONS: SUMMARY OF THE REPORT (2013) <https://www.globalbersih.org/2014/04/08/the-peoples-tribunal-on-malysias-13th-general-elections-summary-of-the-report/>. Contrast J. Chua and H. R. Dipendra, *IMLC 2012 - The Independence of the Attorney General: A cornerstone of the administration of the criminal justice system*, MALAYSIAN BAR ASSOCIATION (Sept. 29, 2012), [http://www.malaysianbar.org.my/international\\_malaysia\\_law\\_conference\\_2012/imlc\\_2012\\_the\\_independence\\_of\\_the\\_attorney\\_general\\_a\\_cornerstone\\_of\\_the\\_administration\\_of\\_the\\_criminal\\_justice\\_system.html](http://www.malaysianbar.org.my/international_malaysia_law_conference_2012/imlc_2012_the_independence_of_the_attorney_general_a_cornerstone_of_the_administration_of_the_criminal_justice_system.html).

<sup>108</sup> Kit Yen Ho, *Anwar seeks judicial review of Pardons Board rejection*, FREE MALAYSIA TODAY, June 24, 2015, <http://www.freemalaysiatoday.com/category/nation/2015/06/24/anwar-seeks-judicial-review-of-pardons-board-rejection/>.

<sup>109</sup> Aun, *supra* note 6 at 51.

<sup>110</sup> Interview with Malaysian Government Lawyer, *supra* note 35.

<sup>111</sup> Interview with Malaysian Member of Parliament, *supra* note 98.



#### IV. ROLE OF THE MALAY MONARCHY ON THE PARDONS BOARDS

The third plausible hypothesis explaining the rejection of Anwar's petition concerns the nature and status of the final decision-maker on pardon in the federal jurisdiction. As described throughout this article, the constitutional function of each Pardons Board is to make a recommendation to the respective Ruler, Governor, or *Yang di-Pertuan Agong*, who sits as Chair of the Board. Although the Chairmen follow a majority of recommendations made in *State* cases,<sup>112</sup> they are far from mere figureheads in the Royal Pardon process, and are not legally obliged to follow the advice given.<sup>113</sup>

The Chairmen, Rulers, Governors, and the *Agong* actively participate in the petition discussions themselves, even if they ultimately have the final say over a Royal Pardon decision.<sup>114</sup> This process is at odds with the traditional concept of decision-making in a constitutional monarchy, whereby prerogative powers are only exercised in a ceremonial fashion, subject to the advice provided by government ministers. Talib had observed that even though the drafting of the Malaysian constitutional power to grant merciful pardons was significantly influenced by the royal prerogative practiced in the United Kingdom, the various Malaysian State Hereditary Rulers had been exercising their traditional power to pardon well before British possession of Malaysia in 1825, and as far back as the sixteenth century.<sup>115</sup> The late Raja Azlan Shah, a former Malaysian Chief Justice and a Hereditary Ruler of Perak state, asserted that the Malay Sultans ruled in a manner that suggests they frequently exercised clemency and pardon in the form of "mercy from the sovereign"<sup>116</sup>

A Malay Sultan during the Malacca period [1402-1511 AD] held absolute power and his subjects gave him absolute loyalty... The Sultan declared war, decided on life and

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<sup>112</sup> Interview with Former Malaysian Federal Court Judge, *supra* note 51; Interview with Malaysian Criminal Defence Lawyer, *supra* note 35.

<sup>113</sup> See *supra* note 30; Interview with Member of the Malaysian Bar Council, *supra* note 82.

<sup>114</sup> Talib, *supra* note 16 at 40.

<sup>115</sup> *Id.* at 21-24.

<sup>116</sup> According to this theoretical model, clemency or pardon is considered a merciful 'gift' from the executive to the prisoner, and as such its granting may be more a reflection of the benevolent nature of the ruler and his or her desire for social control and to exercise of the 'power over life and death' rather than any particularly deserving features of the case. Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 571, 582 (1991); AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION 16 (2005); Coyne and Entzeroth, *supra* note 45 at 839.

death of his subjects, administered justice, and maintained law and order.<sup>117</sup>

Similarly, even relatively recent Royal Pardons have been granted in conjunction with Rulers' birthday celebrations and on the first day of Ramadan,<sup>118</sup> although it is unclear whether the festivities were the *reason* for the grants, or simply affected the *timing* of grants decided by other criteria. Whether due to the continuation of a historical practice associated with the Sultanates and with Islam,<sup>119</sup> a desire to re-assert traditional royal powers after the enactment of the *Constitution (Amendment) Act 1994*,<sup>120</sup> or simply by force of personality, a number of modern State Rulers have demonstrated their independent discretion in constitutional matters in recent years.<sup>121</sup> It remains the case that the Chairmen of these State

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<sup>117</sup> Shah, *supra* note 59 at 77; *See also* Gillen, *supra* note 62 at 167; ROLAND BRADDELL, *THE LEGAL STATUS OF THE MALAY STATES* 12 (1931) ("In a Malay State the Ruler is an absolute monarch; he is the sole fount of honor, the sole source of justice and the sole repository of the executive and legislative power.").

<sup>118</sup> *Perak Sultan Grants Four Prisoners Royal Pardon*, NEW STRAITS TIMES, Apr. 18, 2000; *Johor Sultan Pardons Eight Prisoners*, THE MALAYSIAN INSIDER, July 18, 2012; Interview with Malaysian Member of Parliament, *supra* note 98; Interview with Malaysian Criminal Defense Lawyer #2, Kuala Lumpur (Dec. 5, 2011); *Only Agong's Forgiveness Can Set Anwar Free*, BERNAMA DAILY MALAYSIAN NEWS, Feb. 10, 2015.

In Malaysia's Federal jurisdiction, pardons are typically granted on the *Yang di-Pertuan Agong's* birthday in June (Kumar, *supra* note 86).

<sup>119</sup> The State Sultans are the constitutional guardians of the Islamic religion in their jurisdictions. Shah, *supra* note 59 at 78-79; ABDUL AZIZ BARI, *MALAYSIAN CONSTITUTION: A CRITICAL INTRODUCTION* 60 (2003). The use of lenient discretion in death penalty cases is not necessarily an anathema to Islamic rulers. Khaled Abou El Fadl, *The Death Penalty, Mercy, and Islam: A Call for Retrospection*, in *RELIGION AND THE DEATH PENALTY* 91 (Erik Owens, John Carlson and Eric Elstain ed., 2004; MASHOOD BADERIN, *INTERNATIONAL HUMAN RIGHTS & ISLAMIC LAW* 73 (2005); William Schabas, *Islam and the Death Penalty*, 9(1) WILLIAM & MARY B. RTS. J. 223, 231-232 (2000). However, significant to Anwar Ibrahim's case is the very fact that the *Yang di-Pertuan Agong* is a Muslim leader of a Muslim-majority nation. This makes it less likely that a crime such as sodomy (as a *Hudud* crime under the Koran) would be the subject of a pardon. *See* Kumar, *supra* note 86; MUHAMMAD SALIM EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* 1-2, 13-15 (1981).

<sup>120</sup> *See* Richardson, *supra* note 63. The 1994 amendments to the Constitution removed many of the legal immunities previously enjoyed by the Sultans, and legally compelled the *Yang di-Pertuan Agong* to act on the advice given in matters beyond his personal discretion under the Constitution. These amendments were the culmination of a campaign by Prime Minister Mahathir to restrict the residual royal prerogatives beginning in 1983 (ROGER KERSHAW, *MONARCHY IN SOUTH-EAST ASIA: THE FACES OF TRADITION IN TRANSITION* 160 (2001)).

<sup>121</sup> Especially the Sultans of Johor, Selangor and Perak: Interview with Australian Academic Expert on Malaysia, *supra* note 110; Interview with Amnesty International Malaysia Staff, Kuala Lumpur (Oct. 25, 2011); Interview with Malaysian Government Lawyer, *supra* note 35.

Pardons Boards are formally independent from the elected government and are empowered to authorize what would be politically unpopular pardon grants.<sup>122</sup>

However, a number of interview and archival sources also suggest that the Pardons Board dynamics will differ, depending on whether the Board is chaired by one of the nine State Hereditary Rulers with a long collective history of granting pardons, the *Yang di-Pertuan Agong*, or one of the four government-appointed *Yang di-Pertuan Negeri*. The *Yang di-Pertuan Negeri*, being appointed by the *Agong* on the recommendation of each State Chief Minister pursuant to each State's Constitution,<sup>123</sup> are thought to demonstrate less independence from *Barisan Nasional* policy in their decision-making on matters of royal prerogative (at least in the ten States where *Barisan Nasional* holds power).<sup>124</sup> Moreover, with significance for Anwar's case, the *Yang di-Pertuan Agong* himself holds a rotating throne created only by the Malaysian Constitution in 1957, rather than a stand-alone hereditary title stretching back hundreds of years.<sup>125</sup> The *Agong's* decision-making independence on clemency and pardons in federal, military, and security cases is the subject of academic and political debate.<sup>126</sup> For example, when asked in Parliament about Anwar's case, the Minister in the Prime Minister's Department, Nancy Shukri, relayed the conventional view that the final decision lay with the *Agong* rather than with the Attorney-General or the Pardons Board.<sup>127</sup> On the other hand, Suh

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<sup>122</sup> Addruse, *supra* note 32 at 2.

<sup>123</sup> *Id.*

<sup>123</sup> Ibrahim, *supra* note 31 at 519; Shah, *supra* note 59 at 76; Harding, *supra* note 92 at 63 n16.

<sup>124</sup> Interview with Australian Academic Expert on Malaysia, *supra* note 110; Interview with Amnesty International Malaysia Staff, *supra* note 125.

<sup>125</sup> Harding, *supra* note 92 at 67; Bari, *supra* note 123 at 60. See *supra* note 31.

<sup>126</sup> The Malaysian Constitution itself is ambiguous on the decision-making independence of the *Yang di-Pertuan Agong* in pardons cases. It is unclear whether or not art. 40(1A), inserted in 1994 in order to *compel* the *Agong* to act in accordance with the 'advice' given, applies to art. 40(3) and 42(4)(a), describing the Federal Pardons Board as a forum for 'consultation' with or 'recommendation' to the *Agong* (rather than a body to dispense 'advice').

<sup>127</sup> Ng, *supra* note 4. Shukri's view reflects the position in *Superintendent of Pudu Prison v Sim Kie Chon* 1 MALAYAN L. J. 494, 496-497 (1986) and *Karpal Singh v Sultan of Selangor* 1 MALAYAN L. J. 64, 67 (1988).

However, constitutional law Professor Shad Saleem Faruqi takes the opposite view, stating that "in light of [the subsequent insertion of] Article 40(1A), the Malaysian position is that at the federal level, the grant of pardon is not a discretionary power and must be exercised on advice" (Shad Saleem Faruqi, *Multiple advisers for the King*, THE MALAYSIAN BAR (Jan. 25, 2007)

and Oorjitham quote a senior lawyer's view that may reflect the *Agong's* largely ceremonial role in relation to pardons:

The decision is exclusively his'... [However] the king will not see it as his function to take a different view from that advised. He's the head of state, not a political leader.<sup>128</sup>

Likewise, Bari comments on the comparison between the State Hereditary Rulers and the *Agong*:

The rulers are likely more capable to assert their influence as they, unlike the *Yang di Pertuan Agong*, practically reign for life. This enables the rulers to influence the administration of [their] states.<sup>129</sup>

Accordingly, the third part of my hypothesis posits that Anwar's petition was rejected as the *Yang di-Pertuan Agong* interpreted his constitutional role to follow a presumably negative recommendation from the political executive, sitting as the Pardons Board.<sup>130</sup> If Anwar had been

[http://www.malaysianbar.org.my/constitutional\\_law/multiple\\_advisers\\_for\\_the\\_king.html](http://www.malaysianbar.org.my/constitutional_law/multiple_advisers_for_the_king.html) ).

<sup>128</sup> Suh and Oorjitham, *supra* note 32.

<sup>129</sup> Bari, *supra* note 23 at 60, emphasis added; Interview with Amnesty International Malaysia Staff, *supra* note 125.

<sup>130</sup> Ironically, further evidence that Anwar Ibrahim's application for pardon was subject to political influence is demonstrated by the speed and efficiency with which the petition was disposed of by the Federal Pardons Board. In cases involving the State Hereditary Rulers, the wait to have a petition heard has sometimes extended to up to 15 to 25 years in the past, despite the fact that the Chairmen and their pardons boards receive reports on each prisoner every four years. See Office of the High Commissioner on Human Rights and Thailand Ministry of Justice, *Expert Seminar on Moving Away from the Death Penalty in Southeast Asia: Draft Report*, 34 (Oct. 22-23, 2013); M. Shafee Abdullah, *A deeper impact beyond the gallows*, NEW STRAITS TIMES Nov. 2, 2012; Annie Freeda Cruz, *Remand prisoners to be separated*, NEW STRAITS TIMES Jan. 14, 2002; Azran Aziz and Carolyn Hong, *Rais to meet Rulers in move to 'activate' State pardons boards*, NEW SUNDAY TIMES Mar. 25, 2001. As such, in cases involving prison sentences, it has not been unusual to have the entire prison sentence served by the time the Pardon is considered by the Board (*Anwar Seen as Admitting Guilt in Sodomy with Pardon Petition – Political Analysts*, BERNAMA DAILY MALAYSIAN NEWS, Feb. 25, 2015).

There is no legal time limit within which the *Agong*, Rulers or Governors must come to a final decision on a clemency petition – this is a matter entirely within their royal prerogative (Talib, *supra* note 16 at 64-65; *Malaysia Chronicle*, *supra* note 4), and hence the very fact that Anwar's petition was disposed of within a few weeks suggests either that the *Yang di-Pertuan Agong* was keen to pardon Anwar, or else that a recommendation had been made by the political executive to reject Anwar's pardon as soon as possible – a recommendation that the *Agong* saw fit to follow in line with his constitutional role. One possible reason for the unusual speed with which Anwar's case was dealt with was the political executive's desire to force an immediate bi-election in Anwar's Permatang Pauh constituency in Penang, so as to prevent Anwar from garnering

convicted in one of the nine Malaysian states with a Hereditary Ruler, the result of his petition for pardon could conceivably have been different. This is largely because the State Hereditary Rulers enjoy a historical mandate to act independently of the wishes of the government representatives on the Pardons Board.<sup>131</sup> Of course, this would largely depend on the degree of sympathy for Anwar emanating from the relevant Ruler, and moreover the Ruler deciding to enter into uncharted territory by issuing a pardon on the grounds of possible innocence: two far from certain assumptions.

## V. CONCLUSION

In this article, I have observed that the *Yang di-Pertuan Agong's* rejection of Anwar Ibrahim's petition for pardon was not surprising for three reasons.<sup>132</sup> First are the factors that have contributed to Malaysian Pardons Boards' decisions to pardon or commute sentences in previous cases. In previous cases, mitigating rather than exculpatory factors were salient. Cases of proclaimed innocence, like Anwar's, do not appear to have swayed Pardons Boards in the past. Second is the likely political influence on the Federal Pardons Board by the pro-government members. Board members with the most influential voices consist of the Federal Attorney-General, the Minister for Federal Territories, and any politically impressionable lay members of the Board, whose input appears to be marginalized in any event. This political influence lowers all prisoners' odds of receiving a pardon, but is especially detrimental to political adversaries of the Barisan Nasional government such as Anwar. Third, the largely ceremonial role of the *Yang di-Pertuan Agong* in the Pardon process contrasts greatly with the traditionally more assertive Rulers of the nine Malay States.

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international sympathy and from being heard in Parliament as a Member of Parliament (See *Anwar Seen as Admitting Guilt in Sodomy with Pardon Petition – Political Analysts*, BERNAMA DAILY MALAYSIAN NEWS, Feb. 25, 2015).

<sup>131</sup> In such a scenario, the outcome would also depend on which of the nine Malay States Anwar would have been tried in. In three of these states (Kelantan, Penang and Selangor) various opposition parties hold power, and as such a non-*Barisan Nasional* Chief Minister would be adjudicating on Anwar's case, and appointing the three lay-members, as part of the State Pardons Board.

<sup>132</sup> Without actually being inside the room when the decision was made, I acknowledge that the exact opposite could be true: the *Yang di-Pertuan Agong* might have refused to follow an established line of precedents where factually innocent petitioners were pardoned; the Attorney-General's view is only one of five on the Pardons Board, and moreover the *Agong* could have exercised his personal discretion to refuse Anwar's pardon in defiance of a positive recommendation from the Federal Pardons Board. However, this combination of events remains unlikely. The analysis presented in this article encompasses the three most plausible explanations for the refusal of Anwar's application, on the basis of the available evidence.

Each of these three factors represents an important hypothesis that could apply more broadly across each of Malaysia's 16 State and Federal Pardons Boards in future cases. However, empirical testing of any one of these three theorems in a meaningful way is unlikely and largely impossible. Unlike the courts, the proceedings of Malaysia's Pardons Boards are not open to the public, hence first-hand observations cannot be made on the decision-making process of each five-member Board. Moreover, absent empirical data on the recommendations made by each Pardons Board, scholars cannot be sure whether the end result in each petition comes as a result of agreement between the Chairman and the Board, or else the Hereditary Rulers, Governors and *Yang di-Pertuan Agong* taking royal prerogative into their own hands. Finally, the third explanatory hypothesis, based on the justifications for previous Royal Pardon grants, is also difficult to verify empirically, although I have attempted to do so in this article. Even a comprehensive historical compilation of Royal Pardon grants via media sources, government and NGO documents, and academic articles is bound to miss many unreported, unremarkable, and long-forgotten pardon and clemency grants. Moreover, even *if* access could be secured to an archive containing a record of *all* such grants and rejections, the true reasons for pardon grants and refusals would in many cases remain the subject of speculation, absent first-hand testimony from the decision-makers involved.<sup>133</sup>

For future studies on clemency and pardon decision-making, I suggest the clearest way forward is the semi-structured "elite" interview with two types of parties: 1) lawyers filing petitions on behalf of their clients and 2) the lay members of the State and Federal Pardons Boards, together with an acknowledgement that the conclusions presented on Anwar's case and others are merely made on the basis of the best possible evidence available to the researcher. However raw and untested, any new hypotheses allowing for an incrementally better understanding of the opaque world of Malaysian clemency and pardons negotiations represents some measure of academic progress.<sup>134</sup>

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<sup>133</sup> See William Alex Pridemore, *An empirical examination of commutations and executions in post-Furman capital cases*, 17(1) JUST. Q. 159, 163, 165 (2000).

<sup>134</sup> See David Johnson and Franklin Zimring, *Taking Capital Punishment Seriously*, 1 ASIAN CRIMINOLOGY 89, 94 (2006).