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RESEARCH ARTICLE

Power of Pardon in Common Law and the Shari'ah: Harmonisation for Enhancing Justice

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ABSTRACT

The power of pardon is an act of grace whereby state authorities are solely entrusted, in all cases of crime, with the power to pardon offenders without considering any rights or compensation for crime victims. In many countries, the pardon grants have been attached to immense controversy over the centuries due to occasional abuses of the pardon power and violations of the legitimate rights of crime victims. In contrast, the Shari'ah pardon principle empowers state authorities to pardon offenders in cases where no individual is directly affected by the crime. In other cases, the Shari'ah pardon principle grants a legal and exclusive right to crime victims to determine the fate of the criminals in deciding on the pardon petitions. The aims of this study are to examine the theory of the power of pardon in the federal law of selected common law countries, to compare and contrast it with the Shari'ah pardon principle, to identify the inadequacies of the applicability of pardon principles in both jurisdictions, and to harmonise the pardon principles of both jurisdictions to formulate a feasible and balanced pardon decision-making process that is substantively and procedurally just and enhances justice for both the victims or victims' heirs in murder cases and the convicts and protects the public interest. This study adopts a qualitative doctrinal research to accumulate research data and to gather in-depth insights into the research problem. The researchers employ various research approaches such as comparative, textual and evaluative to analyse research data and to achieve research objectives. This study submits that harmonisation of the pardon principles of common law and the Shari'ah will generate a pardon decision-making mechanism that is feasible, balanced and just for both disputing parties involved in the crime, averts frequent abuses of the pardon power, and protects the public interest.

INTRODUCTION

Democratic states and nations with the rule of law have regulated human conduct through legislating and implementing laws to ensure justice and peace in society. In some criminal cases, the ideals of justice and due process may fail due to the rules of inadmissibility of evidence, suppression of evidence, poor quality of legal representation, witnesses who may lie, and police who may suppress evidence or assure false confessions (Barnett, 2003, pp. 157-58; Flanders, 2013, p. 1559; *Ex Parte Philip Grossman* (1925) 267 U.S. 87). There is also the possibility of harsh and unjust laws guaranteeing a conviction (Flanders, 2013, p. 1559; Love, 2000, pp. 1484-85). For

example, Nelson Mandela was sentenced to death for treason. He was pardoned and went on to become the President of South Africa. Therefore, all punishments, especially the grave ones should be open to reconsideration before their execution (Pandey, 2003, p. 387). Hence, the concept of the power of pardon has come into existence with the underlying belief that it can enhance justice in criminal cases. This pardon power in most common law countries is constitutionally conferred on the President, King, Ruler or Governor (U.S. Const, art. II, sec. 2; Indian Const, art. 72 and art.161; Malaysian Federal Const, art. 42), as the head of state in all cases of crimes as an act of grace (Krishnan, 2008, p. 15; *United States vs Wilson*, 32 U.S. (1833) (7 Pet.) 150) to determine the fate of the criminals before or after the completion of judicial proceeding (Sahai, 2009; Menitove, 2009, p. 449; *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458).

A full or free pardon releases the offender from the execution of punishment, frees the offender from all disabilities imposed by the offence, and restores his honour and all civil rights (Abu-Nimer and Ilham, 2013, p. 476; *Knote v. The United States*, (1877) 95 U.S. 149). In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity and rehabilitates him to that extent in his former position (Abu-Nimer and Ilham, 2013, p. 476; *Datuk Seri Anwar v Mohd Khairul Azam* [2023] 2 CLJ 236). The effect of pardon depends on the nature of the pardon granted. However, this power is prone to arbitrariness, favouritism and abuse of power in many common law countries (Majdah and Nasimah, 2015, p. 47; Verreycken, 2019, p. 4; Pascoe, 2016, p. 81; Weil, 2017, p. 24). A notable example of the abuse of the pardon power driven by personal and self-motivation can be observed in President Clinton's pardon of his brother, who was convicted of federal drug charges (Shahrasbi, 2020, p. 210). Imo Udofa (2018, p. 113) identified that the recent controversial and abusive exercise of pardon was granted by President Donald Trump to a former law enforcement officer and politician, Joe Arpaio (Docket No. 2:16-CR-01012-SRB).

On the other hand, the *Shari'ah* intends to protect the rights of the victims or victims' relatives in murder cases in the pardon process and decides on the pardon petitions based on mutual accommodation between the disputing parties of the crime with the option of pardon by the victims or victims' heirs in murder cases (Qafisheh, 2012, p. 969; Karim et al., 2017, p. 174; Pascoe and Michelle, 2017, p. 969). This pardon process can ensure the rights of the victims or victims' heirs in murder cases that are often disregarded in common law pardon practices (Kamali, 2015, p. 455). However, the *Shari'ah* pardon principle cannot be implemented as a stand-alone in the current constitutional pardon practice because it has some inadequacies in the application of the current pardon power in common law jurisdiction. Such as, the *Shari'ah* pardon principle can be opaque as it does not require the involvement of the state authorities, with decisions being made by the victims or victims' relatives in murder cases without clear guidelines or standards. The *Shari'ah* pardon process can sometimes favour rich offenders to escape punishment by giving money and abusing power and position while convicts who are not privileged may not be benefited. Therefore, to formulate a just and fair pardon decision-making mechanism in the current common law pardon system, many Muslim legal scholars such as Mohammad Hashim Kamali (2007, p. 393), Hanifah Haydar Ali Tajuddin and Nasimah Hussin (2022, p. 196) have opined that it is essential to examine the theory of the power of pardon in common law and the *Shari'ah*, and compare and harmonise them to formulate a doable and balanced pardon decision-making process that can enrich the pardon process in common law jurisdiction and bring justice to the victims or victims' relatives in murder cases as well as the violators, protect the public interest.

This study examines the theory of the power of pardon under federal law in selected common law countries namely the US, UK, India and Malaysia, and the *Shari'ah*. It provides insights that could potentially encourage to modify the current pardon practices to establish equal rights for all parties involved in criminal cases by harmonising the pardon principles of both common law and the *Shar'iah* jurisdictions. This study does not intend to implement or replace the *Shari'ah* over the common law jurisdictions in general, but to adopt the *Shari'ah* pardon principle which is not found in any common law jurisdiction. This adoption would be achieved through the

harmonisation of the common law pardon principle with the pardon principle of the *Shari'ah*. It is expected that this study can propose an effective, balanced, fair and just pardon decision-making mechanism that can be a useful reference for the President, King, Ruler and Governor to exercise the power of pardon in a particular common law jurisdiction.

RESEARCH METHODOLOGY

This study adopts a qualitative doctrinal research in which the perspective of laws pertinent to the power of pardon under federal law in selected common law countries and the *Shari'ah* is analysed extensively for harmonising pardon principles of both jurisdictions through the doctrinal tactic. This methodology is mainly applied using libraries and internet resources where primary and secondary legal materials are utilised to accumulate affluent materials pertinent to the study. Primary sources of law include the internal laws of the selected common law countries such as Constitutions, statutes, rules, regulations, judicial doctrines, and case laws. Additionally, this study analyses relevant verses from the *Qur'an* and Hadiths of the Prophet Muhammad (PBUH) as these are the two main and primary sources of the *Shari'ah*. In order to enhance the discussion, the researchers have analysed secondary research materials such as the contents of academic journals, juristic interpretations, legal textbooks and reliable online materials related to the pardon power. These resources are analysed to find out problems encountered, and challenges faced in implementing the pardon principles in common law and the *Shari'ah* jurisdictions and to suggest improvements in the exercise of the pardon power in current state pardon practices by harmonising the pardon principles of both jurisdictions.

To achieve the aims of this study, the researchers applied different methods of data analysis where the comparative approach is mainly used to compare and contrast between common law and the *Shari'ah* pardon principles. This approach is utilised to identify and analyse the similarities and differences in the pardon principles between these two legal systems and to harmonise them. The textual approach is used to interpret texts and explore their purpose and underlying meanings. Lastly, the evaluative approach is implemented to assess current application of the pardon power and the reality in common law and the *Shari'ah*. This approach examines the provisions of pardon and the problems faced in the exercise of the pardon power in common law and the *Shari'ah*. This approach further helps to achieve an in-depth understanding of the pardon power in the current state practices and the *Shari'ah*. By applying all of the above methods of data analysis, the researchers aim to harmonise the pardon principles of both jurisdictions to formulate a feasible pardon decision-making mechanism that can be implemented to enhance justice in the current pardon process in common law jurisdictions.

POWER OF PARDON IN COMMON LAW

The power of pardon is a constitutional scheme vested in the executive head of state in most common law countries in all cases of crime as an act of grace to release offenders (Krishnan, 2008, p. 15; *United States vs Wilson*, 32 U.S. [1833] (7 Pet.) 150) before or after the completion of judicial proceedings (Sahai, 2009; Menitove, 2009, p. 449; *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458). Chief Justice John Marshall stated in the case of *United States v. Wilson,* [1833] 32 U.S. (7 Pet.) 150) that:

"A pardon is an act of grace proceeding from the power entrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed (Krishnan, 2008, p. 15)."

According to A.V. Dicey, "The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which is at given time legally left in the hands of the Crown… Every Act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative (Dicey and Wade, 1959, pp. 434-35)."

This power is also known as the "prerogative of mercy" in most common law countries because prerogatives are inherent, non-statutory attributes. It releases offenders from execution of punishment and restores the honour of the convicts (Abu-Nimer and Ilham, 2013, p. 476; *Knote v. The United States*, (1877) 95 U.S. 149). This grace power is particularly stated in the constitutions of most common law countries which were once colonised by the British. Based on this legal notion, the head of state or President, King, Ruler, or Governor has the entire authority to pardon or to determine the fate of the criminals after being convicted under the jurisdiction of the competent court (Menitove, 2009, p. 449; *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458). This glorious power can be identified from the saying of Lord Acton that:

"I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they do no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases (Sanmiha, 2017)."

At its origin, the power of pardon was an absolute power to adjudicate convicts justly and fairly. It also removed the rigidity or harshness of laws (Pascoe and Michelle, 2017, pp. 972-73; *R v Home Secretary, ex p Bentley* [1994] QB 349, p. 360). Thus, it can be claimed that the power of pardon was historically vested in the head of state by the supreme law of the land to establish justice in criminal cases.

It can be acknowledged that most of the common law countries have parliamentary governments where the head of state and the head of government are two different individuals. To lead the country with the balance of power, there must be an amicable relationship between these two governmental organs. For that reason, the Constitution as the supreme law of the land defines scope and boundaries of their powers (Phillips and Jackson, 2001, p. 5). Therefore, the prerogative of mercy is designed to be exercised in accordance with the advice of the Prime Minister or the Cabinet of Ministers or the Pardons Board and not arbitrarily as "Power tends to corrupt and absolute power corrupts absolutely (Acton, 1887)." However, the mechanism of advice removes the discretionary powers of the head of state in some legal systems such as India where the head of state is bound to follow the advice of the Council of the Ministers in deciding the pardon petitions. An abuse of constitutional power may be committed if the advice is disregarded or if there is misuse of the power of pardon for political purposes (Verreycken, 2019, p. 4; Pascoe, 2016, p. 81). This abuse can lead to the contravention of the idea of equality before the law because the victims or victims' heirs in murder cases deserve to ask the state authorities to impose punishment on the convict for their injuries or losses (Love, 2000, p. 1508). An abusive use of pardon power can amount to defiance of judicial powers by allowing criminals to escape the punishment they deserve and can also defeat the purpose of enacting the pardon power which is to maintain the balance of justice (Moore, 1993, pp. 287-88). In addition, the injured victims or victims' relatives in murder cases have no right to benefit from the current common law pardon decision-making process as the pardon decisions are taken entirely by the state authorities and victims or victims' heirs are not heard in the pardon process (Faruqi, 2003, p. 90; Kamali, 2015, p. 455).

The power of pardon has been in practice since ancient times to remove the harshness or rigidity of law. It provides a deed of humanity and kindness in suitable cases but provides an exception to the idea of equality before the law which is generally protected by the constitution (Love, 2000, p. 1508). Alexander Hamilton (1788) claimed in the Federalist No. 74 (p. 482) that a pardon power should be legislated to deliver "easy access to exceptions in favour of unfortunate guilt, (without which) justice could wear a countenance too sanguinary and cruel." This power should be exercised with the utmost sense of responsibility to preserve proper treatment under the law to enhance justice in criminal cases (Love, 2000, p. 1508; Majdah and Nasimah, 2015, p. 47). In the context of appropriate circumstances, the pardon power may eliminate national tensions, political exploitations and historic harms. For example, it can be pointed out from the case of *Datuk Seri Anwar v Mohd Khairul Azam* [2023] 2 CLJ 236 that Datuk Seri Anwar Ibrahim was granted a full pardon which erased his disqualification from contesting the Malaysian general election. The effect of a pardon grant indicates that no criminal proceedings can be taken again for the same

offence after a convicted person is pardoned officially (Weihofen, 1939, p. 177). Chief Justice Taft addressed the effects of pardon as:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments (*Ex Parte Philip Grossman* (1925) 267 U.S. 87)."

This statement demonstrates that the power of pardon removes the rigor of the law and eliminates judicial error if it exists in the criminal justice system. This effect currently exists in almost all common law jurisdictions (Pascoe and Michelle, 2017, pp. 972-73).

The common law does not always provide a check and balance system to the discretionary function of the pardon power which leads to the possibility of political influence or nepotism in deciding pardon petitions (Verreycken, 2019, p. 4; Udofa, 2018, p. 129; Kumar, 2009, p. 13). Moreover, some common law countries have developed pardon advisory authorities to advise the head of state in deciding pardon petitions, but the head of state may make an arbitrary decision and abuse his power by ignoring advice of the pardon advisory authorities (Udofa, 2018, p. 113; Eckstein and Colby, 2019, p. 97). Additionally, there are no specific criteria or considerations which must be attained in deciding a pardon petition (Majdah and Nasimah, 2015, p. 52). Sometimes, an abusive use of the pardon power may disrespect the work of the judiciary which aims to achieve justice (Love, 2000, p. 1508). It is also claimed that the common law pardon principle fails to ensure justice for the victims or victims' heirs in murder cases as it does not give any right to them to seek compensation for their injuries before the pardon process (Kamali, 2012, p. 528).

Exercise of the Pardon Power in the US

According to Article II (2) (1) of the US Constitution, the President has the "Power to grant reprieves and pardons for offences against the US, except in cases of impeachment." This comprehensive pardon principle has given full discretionary power (Shahrasbi, 2020, p. 207; *Trump v. United States*, (2024) 603 U. S, p. 7; *Trump v. Vance*, (2020) 591 U. S. 786, p. 800; *Schick v. Reed*, 419 U.S. 256, p. 263, 267) to the President to grant federal criminals pardons (Moore, 1997, p. 5), provisional pardons, palliation of sentences, and mitigation of fines, amnesties and reprieves (Kobil, 1991, pp. 575–78). This power extends to all offences known to the law (Rothchild, 2011, p. 53; *Ex parte Garland*, [1866] 71 U.S. (4 Wall.) 333; *Trump v. Vance*, [2020] 591 U. S. 786, 800; *Trump v. United States*, 603 U. S., p. 7). The Court is also reluctant to limit the President in exercising his pardon power (*Zivotofsky v. Kerry* [2015] 576 U. S. 1, 32; *Schick v. Reed* [1974] 419 U.S. 256). The President's duties under Article II of the US Constitution are of "unrivalled gravity and breadth (*Trump v. Vance* [2020] 591 U. S. 786, p. 800)." This special power is historically rooted in English monarchical power (Bretgoltz, 2021, p. 4; Fowler, 2008, pp. 1651, 1654; *Fleming v. Page* [1850] 50 U.S. (9 How.). pp. 603, 618; *Herrera v. Collins* [1993] 506 U.S. 390). Sometimes the Presidents followed the advice of their attorneys general about when and how to utilise their executive pardon power (Love, 2015, pp. 92-93). It is claimed that there is no unique system of checks and balances on how this power should be evaluated, which also creates a constitutional anomaly in the American system of government (Menitove, 2009, p. 447). The pardon decisions are not subject to judicial review in the US (Stanish, 1978, p. 3). However, Colin Turpin and Adam Tomkins also stated that a judicial review on pardon decisions can be made in exceptional circumstances where it is blatantly apparent that the power has been shockingly abused (Turpin and Tomkins, 2011, p. 695).

Former U.S. Pardon Attorney, Margaret Colgate Love, identified that the practices and abuses of the pardon power by American Presidents can be found in many cases like President Clinton's notorious Marc Rich pardon (House Hearing, 107 Congress), (Peterson, 2003, pp. 1228-35) George H.W. Bush's controversial pardon of six White House officials involved in the Iran-Contra

scandal and shameful commutation of I. Lewis "Scooter" Libby's sentence (Pardoned on December 24, 1992) (Love, 2008). President Donald Trump's controversial pardon of the former law enforcement officer and politician Joe Arpaio (Docket No. 2:16-CR-01012-SRB), which has reignited the debate over the nature and potential abuse of the pardon power (Udofa, 2018, p. 113). However, the current practice of the pardoning power of the President remains free, unlimited, unchanged, and unreviewable in any court (Rai, 2014, p. 4; Moore, 1997, p. 217; *Zivotofsky v. Kerry* [2015] 576 U. S. 1, 32). Paul F. Eckstein and Mikaela Colby (2019, p. 97) stated that President Trump's statement that he can pardon himself which "(opens up a) looming question of whether the President may pardon himself." This statement indicates that the President is given an unrestricted and unlimited power to grant pardon which can be extended to pardon for the President himself.

Jonathan T. Menitove proposed to reform the US constitutional pardon policy to accomplish three essential goals: first, the federal pardons must be quick to act when the public interest necessitates a pardon; second, the process must be potentially capable of responding to deserving federal criminals, and third, to increase its democratic legitimacy and reduce corruption, the presidential pardon must offer an appropriate amount of accountability and responsibility to the individuals who exercise it. Thus, a sufficiently responsive, small, partisan pardon board should be created to achieve these pardon goals (Menitove, 2009, pp. 452-55).

Exercise of the Pardon Power in the UK

The power of pardon is known as a royal prerogative of mercy in the UK, the King's discretionary power that was solidified in the seventh century, when the breach of the King's peace became a legal precedent for punishment (Poole, 2010, p. 146; Fowler, 2008, p. 1654; Genovese et al., 2002, p. 76). This power is not a statutory power, but has historically provided to the British Crown as an absolute power (Duker, 1977, pp. 475, 487; Lacey, 2005, p. 1). This power is exercised in order to grant mercies, remission pardons, conditional pardons and free pardons (Lacey, 2005, pp. 20-63; *Terence Mc. Geough v. The Secretary of State for Northern Ireland* [2012] NICA 28).

The power of pardon was primarily sanctioned by the Criminal Appeal Act 1907 in England. Section 19 of the Act specifies that:

"Nothing in this Act shall affect the prerogative of mercy but the Secretary of State on the consideration of any petition for the exercise of His Majesty's Mercy, having reference to the conviction of a person an indictment or to the sentence (Other than a sentence of death) passed on a person so convicted, may, if he thinks fit."

This provision indicates that the British Crown has the power to grant pardon in a case if he thinks appropriate. However, Section 16(1) of the Criminal Appeal Act (Act of 1994) 1995 provides that if the Monarch wants to grant a pardon to a convict and requires any help from the Secretary of State, it refers the matter to the Commission for its assistance in advising on the exercise of pardon.

This Act has recently established the Criminal Cases Review Commission which receives all pardon petitions for review and consideration before being sent to the Secretary of State, who will decide whether to recommend granting or rejecting the royal prerogative of mercy. The Commission needs to make a recommendation in its statement of conclusions before adopting a final decision and the Secretary of State is obliged to consider the findings of the Commission. As a result of the steady development of this statutory framework, the demand for a free pardon has greatly decreased. After receiving the recommendation of the Secretary of State, the Monarch, as the ultimate decision-maker, determines whether to approve or reject the petition and, if granted, the nature of mercy it can be. It is important to note that the Monarch retains the discretion to make the final decision on mercy and is not bound by the recommendation.

In the UK, the merits of the decision of pardon cannot be challenged by judicial review (*R v A* [2012] EWCA Crim 434; [2012] 2 Cr. App R. 8; *De Freitas v Benny* [1976] AC 239, 247), but the decision-making process can be challenged by judicial review, its scope is extremely restricted and narrow. This principle can be evident in several English cases namely *R v Secretary of State for the Home Department Ex Parte Bentley* [1994] QB 349 (p. 357), *R v Bentley* [2001] 1 Cr App R 307, *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374 (p. 418), *Hanratty v Lord Butler (unreported),* 12 May 1971 (p. 360), *R (on the Application of Shields) v. Secretary of State for justice* [2008] EWHC 3102, and *Terence Mc. Geough v. The Secretary of State for Northern Ireland* [2012] NICA 28. Lord Diplock accepted the reviewability of the power of pardon on the grounds of illegality or procedural impropriety but in the case of an irrationality challenge (*R v. Secretary of State for the Home Department Exp. Bentley*, [1994] Q.B. 349 DC, p. 363). It can be identified from the analysis of the pardon principle of the UK that can ensure the rights of the victims of the crime committed. This pardon power can also lead to potential abuse and political clientelism for royals as there is no check and balance system for the discretionary function of clemency (Verreycken, 2019, p. 4).

Exercise of the Pardon Power in India

Articles 72 and 161 of the Constitution of India provide that the President and the Governors of States have the parallel and sovereign power to grant pardons (Kumar, 2009, p. 13; Rai, 2014, pp. 5-9). Both Articles are worded similarly, so they can be read as "the President or the Governor shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence." The only distinction is that the President has the power to grant pardon to death row convicts, but the Governors do not have such power. This power can be implemented at any moment after the commission of the crime, including the time before legal action is taken, the period of its pending, and even the time after a verdict (Singh, 2007, p. 336). The nature of pardon power can be full or conditional as practised in the UK which can be identified in *Re Channugadu* [1954] CriLJ 1370 and *Nanavathi v. State of Maharashtra AIR [1961] SC 112.*

In practice, the power of pardon includes absolute and unconditional pardons ((Singh, 2007, p. 335; *Re Channugadu* [1954] CriLJ 1370); *Nanavathi v. State of Maharashtra,* AIR [1961] SC 112), which can be exercised at any time after the commission of the crime as ruled by the judiciary (Pandey, 2003, p. 387; *Maddela Yerra Channugadu and Ors*, MANU/TN/0394/1954; *K.M. Nanavati v. State of Bombay*, AIR [1961] SC 112; *Ramdeo Chauhan v. State of Assam* [2001] 5 SCC 714). At present, in India, the pardon power is not a President's discretionary power as the President is bound to follow the advice of the Council of the Ministers. This limitation is not justified by the Constitution, but it is the common truth as illustrated by the judiciary. For instance, the Constitutional Bench of Supreme Court has proclaimed in the case of *Maru Ram v Union of India* ([1980] INSC 213, (1981) 1 SCC 107) that "the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the head of the Republic." This decision was reiterated by the Supreme Court in case of *Dhananjoy Chatterjee alias Dhana v State of West Bengal* (AIR 2004 SC 3454), stating that "The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of State." These limitations are not prescribed by the Constitution, but they are the common truth as illustrated by the judiciary.

In India, the judiciary in many cases allowed judicial review of the pardon decisions in order to ensure justice (Sahai, 2009; *Maru Ram v Union of India* [1981] (1) SCC 107; *Kehar Singh v. Union of India* [1988] INSC 370, 1989(1) SCC 204; *Epuru Sudhakar & Anr vs Govt. of A.P. & Ors* [2006] INSC 638). In the case of *Nanavathi v. State of Maharashtra* (AIR [1961] SC 112), the Court identified that the pardon decision is made by following mala fide factors and stated that:

"Pardon order which is the product of extraneous or mala fide factors will vitiate the exercise…. For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive."

However, no law provides precise guidelines or decision-making processes on how pardon petitions should be evaluated. It can also be identified that the pardon principle of India does not provide any compensation to the victims of the crime committed in deciding pardon petitions. Mr Ravi and Arijit Pasayat J. suggested that to prevent bias in the application of pardon power, the Court should lay down guidelines to eliminate the abuse of the power of pardon and enhance justice (*Epuru Sudhakar v Government of Andhra Pradesh* (2006) 8 SCC 161, p. 169–170).

Exercise of the Pardon Power in Malaysia

Article 42(1) of the Federal Constitution of Malaysia (FC) empowers the Monarch to suspend or vary a judicial decision (Faruqui, 2008, pp. 58, 443). The Yang di-Pertuan Agong (YDPA) has the power to pardon criminals for offences committed in the Federal Territories (Lee, 2017, p. 73). Article 42(1) of the FC provides:

"The Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya…."

The power of pardon is claimed to be the discretionary power of the YDPA (Harding, 1986, pp. 353-54; see more in *Sim Kie Chon v. Superintendent of Pudu Prison* (1985) 2 MLJ 385 (No.1); *DS Anwar Ibrahim v Mohd Khairul Azam* [2023] 2 CLJ 236), and the judiciary ruled in several cases that the pardon decision cannot be even reviewed by challenging in any Court (Bari and Farid, 2004, p. 85; *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529; *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 (No 2); *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170; *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 (FC), para 50; *DS Anwar Ibrahim v Mohd Khairul Azam* [2023] 2 CLJ 236). According to Abdul Hamid CJ., the federal law does not make it mandatory for the YDPA to follow the advice, but he makes decisions based on his discretionary power granted by Article 42(1) (*Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64; see more at *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (FC), para 130; *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464 (FC), para 189). A similar power is given to every ruler or governor of each state for crimes committed in that respective state (Faruqui, 2008, p. 443; Hickling, 1975, p. 227) as it is stated in Article 42(1) of the FC that "... the Ruler or Governor of a state has similar power in respect of all offences committed in his state". However, many contemporary constitutional experts express that the pardon power is exercised in accordance with the advice of the Pardons Board which is formed, following Article 42(5) of the FC (Bari and Farid, 2004, p. 85).

Shad Saleem Faruqui, a renowned Malaysian constitutional law expert, has stated that Article 42 of the FC does not anywhere explicitly mention the King's power of pardon is discretionary, but Article 42 Clauses (4)(b), (12)(a), and (12)(c) explicitly provide that the power of pardon is to be exercised "on the advice of a Pardons Board. The use of the word "prerogative" is an error of jurisprudence. Prerogatives are, by definition, inherent, non-statutory, common law attributes of the monarch. The use of the word prerogative is appropriate in the UK with an unwritten Constitution but is wholly inappropriate in Malaysia because Article 42 Clauses (1) to 12(a) of the FC imply that the pardon power is a constitutional scheme and a non-discretionary power exercised on advice (Faruqui, 2008, p. 443). Thus, it is humbly submitted that the power of pardon in Malaysia is neither inherent, nor non-statutory, nor totally royal. For instance, in Sabah and Sarawak, Penang and Melaka, the power of pardon is exercised by politically appointed Governors. Therefore, it is submitted that the power of pardon in Malaysia is a constitutional and not a prerogative power and is subject to the Constitution and must follow the written advice of the

Attorney General (*Mohd Khairul Azam bin Abdul Aziz v Lembaga Pengampunan Wilayah Persekutuan & Anor* [2020] MLJU 1691 (HC), para 36).

In the case of *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170, it was ruled that the pardon power is regulated to ensure justice, public interest and conscience. However, Article 42 of the FC does not specify any criteria or consideration that must be attained for the pardon grant (Majdah and Nasimah, 2015, p. 52). It can be proclaimed that the process of the prerogative of mercy may not consider relevant factors such as the rights of the victims or victims' heirs in murder cases in deciding the pardon petitions because the pardon decisions are made by the state authorities while nobody from the victims' side is included in the Pardons Board to ensure their rights or hear their cases in deciding the pardon petitions. Thus, it can be claimed that the current pardon power violates the rights of the victims or victims' heirs in murder cases in the pardon process because they are not either heard or compensated but they are the actual sufferers of the crime committed (Faruqi, 2003, p. 90). Therefore, it is suggested that more just procedures and guidelines need to be formulated to assist state pardoning authorities in coming up with a just and fair pardon process which will ensure the rights of the victims or victims' heirs in murder cases and protect the rights of the convict as well as protect the public interest (Pascoe, 2016, pp. 81-82).

In Malaysia, the decision of pardon is non-justifiable or not reviewable in a court of law. This is the judicial stand in several cases such as *Chiow Thiam Guan v Supt Pudu Prisons* [1983] 2 MLJ 116, *Sim Kie Chon* [1986] 1 MLJ 494 (SC), *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, *Juraimi Husin v Pardons Board* [2002] 4 MLJ 529, and *Datuk Seri Anwar v Mohd Khairul Azam* [2023] 2 CLJ 236. Some of these cases are post-1993 and are not reconcilable with two significant constitutional developments. First, in 1993, the immunities of the Royals were taken away by Articles 182 and 183 of the FC. Second, Article 40(A1) was inserted by Act A885 (Constitution (Amendment) Act of 1994) to underline the duty of the YDPA to act in accordance with advice (*Datuk Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2010] 3 MLJ 174). In other words, before the insertion of Article 40(1A) in 1993, the YDPA held discretionary power to grant pardons. However, since Article 40(1A) was introduced in 1994, the YDPA is now required to act in accordance with the advice of the Pardons Board.

Power of Pardon in the *Shari'ah*

The *Shari'ah* (Bearman, 2016, p. 1) identifies that the state is a legal entity where the head of state has the supreme authority to pardon an individual after being proven guilty by a court of competent jurisdiction (Parwez, 2002, p. 8). Some Muslim jurists claimed that under the *Shari'ah* pardon principles, a pardon can be accepted by the state authorities in recognition of the sincere repentance and remorse of the convicted person in cases where the society is the victim (Abu-Nimer and Ilham, 2013, p. 477). For example, in cases where public funds have been stolen or corrupted, the return of those funds to the state should be a necessary consideration for the pardon. The spirit of the *Shari'ah* is to consider the unfortunate circumstance behind a party's guilt and allow the offender to go through rehabilitation (Majdah and Nasimah, 2015, p. 49; Peters, 2005, p. 27). However, the *Shari'ah* does not empower the head of state to use the prerogative of mercy in all cases especially those in which using this power may lead to miscarriage of justice, contravention of fairness (Kamali, 2012, p. 528) and inequality before the law. If an offender violates a personal right or injures a person, the *Shari'ah* has vested an absolute discretion in the victim or his legal heirs (in murder cases) to pardon completely or pardon with compensation (Rahami, 2007, pp. 227-248) or recommend for execution as it is the right of the aggrieved victim (Peters, 2005, pp. 7-8; Bearman, 2016, p. 170; Kamali, 2015, p. 455; Wasti, 2006, pp. 100-101).

This *Shari'ah* pardon principle characterises homicide or injury as a private matter between the perpetrator and the victim or the victim's relatives known as "guardian of blood (*wali al-dam*)" in murder cases (Kamali, 2015, p. 460), as they are the sufferers of the crime (Aykut, 2017, p. 17). If the victim is dead and his family members survive, only adult heirs who are deemed mentally competent may pardon the perpetrator (Kamali, 2015, p. 460). According to the Islamic theory of *qisas* (retribution), the victim or his relatives in murder cases are authorised to request the state

authorities to execute decided punishment or pardon the offender by collecting monetary compensation (Hascall, 2010, p. 7; Peters, 2005, pp. 44-45; Kamali, 2015, p. 456; Black et al., 2013, p. 220). They are also eligible to pardon the offender free of cost or by accepting a certain amount of compensation in their free choice. If the victim is alive, he would have the sole authority to demand compensation or grant any type of pardon (Black et al., 2013, p. 221). For instance, the Qur'an provides that "Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake, he must … pay compensation to the victim's relatives, unless they charitably forgo it (Surah al-Nisa 4: 92)." Another Quranic verse provides that "Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We [God] have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God] (Surah al-Isra 17: 33)." Furthermore, in a hadith, the Prophet (PBUH) said that: "No person is caused to suffer injury on his body and then he pardons him (who injured him) but Allah (SWT) elevates him a degree on that account or expiates his sin (Ibn Majah, 2007, p. 545, hadith no. 2693)."

The *Shari'ah* pardon system integrates or combines the law of tort which ensures compensation to the victim, and the law of crime which ensures punishment for the commission of crime. It provides compensation to the victim of the crime in return for the option of pardon by the victim or his family (Kamali, 2015, p. 455). By this principle, the *Shari'ah* emphasises the protection of the interests of the victim (or his family members) of the crime committed (Majdah and Nasimah, 2015, p. 45). In such a pardon case where the victim or his relatives pardon the convict, the state authority (Black et al., 2013, pp. 12-13) may impose discretionary (*ta'zir*) punishment (El-Awa, 1982, pp. 96-97, 114-116) for protecting public interest aiming to rehabilitate the offender to become a better person than he was before (Majdah and Nasimah, 2015, p. 49). In addition, saving the life of a murderer with or without compensation can be considered a form of pardon because it mitigates the original punishment of death (Majdah and Nasimah, 2015, pp. 47-48).

Many Muslim jurists proclaimed that demanding compensation is an exclusive right of the parties being affected in criminal cases (Waqas and Qaiser, 2014, p. 52). Abdul Qadir Awdah (1985, pp. 157-58), a prominent Muslim scholar, stated that the victim or his heirs may claim remedies or pardon totally (Wells and Burnett, 2000, p. 13) or pardon with compensation (Wasti, 2006, pp. 100-101). Some Muslim jurists argued that the *Shari'ah* pardon mechanism opens the gate of mercy with or without compensation based on the free and uncoerced choice of the victim or his relatives in this regard, or otherwise where the state authorities should guarantee that the victim is satisfied with the pardon decision (Al-Kashif, 2009, p. 87). In this notion, the convicted person or his representative(s) negotiates with the victim or his representative(s) to settle the issue (Qafisheh, 2012, p. 488). When the pardon is granted by the victim or his relatives, the state authorities may impose other punishments lesser than the death penalty to rehabilitate the offender (Adil and Abdullah, 2016, p. 48). In this situation, the state authorities can pardon the offender by considering his repentance and remorse (Abu-Nimer and Ilham, 2013, p. 477). Mohammad Hashim Kamali (2012, p. 528) addresses the *Shari'ah* and recommends that justice and pardon should come together to formulate a moderate principle of law. Based on this notion, the *Shari'ah* proposes to form a fair and peaceful dispute resolution process where all disputing parties are directly involved in the pardon decision-making process (Baderin, 2010, p. 6; Pascoe and Michelle, 2017, p. 969). It is also expected that this unique dispute resolution process can adopt and ensure a peaceful affiliation among people in the society (Karim et al., 2017, p. 174).

In comparison, it can be identified that the underlying theory of pardon of the current common law approach ignores the legal rights of the victims of the crime or victims' heirs in murder cases in deciding pardon petitions. It forms a one-sided or even a third-party dispute resolution process where the victim of the crime is not heard. Consequently, this may create a spirit to take revenge on the convict as the rights of the victim or victim's heirs in murder cases are violated and equal treatment of law is not reached to the victim or victim's heirs in the cases of murder for their injuries or losses (Majdah and Nasimah, 2015, p. 47). The application of the power of pardon in common law is also prone to arbitrariness, favouritism, political nepotism and abuse of power as

there is no check and balance system to ensure justice in the pardon process (Majdah and Nasimah, 2015, p. 47). On the other hand, the *Shari'ah* has proposed to decide pardon petitions based on mutual understanding between the disputing parties (Qafisheh, 2012, p. 488) with the option of pardon by the victim or his family (Pascoe and Michelle, 2017, p. 969; Karim et al., 2017, p. 174) as there is a possibility of arbitrariness, bias, abuse of power and political influence in the traditional pardon process (Majdah and Nasimah, 2015, p. 47). However, the *Shari'ah* pardon principle has some inadequacies such as it does not demonstrate a complete mechanism of the pardon power that can be implemented independently in common law countries to exercise pardon in a just and fair manner.

The *Shari'ah* pardon principle would be opaque compared with the common law pardon principle, with decisions made by the victim or his relatives in murder cases without clear guidelines or standards. Furthermore, if powerful and rich people commit crimes, they might easily obtain pardons by giving compensation. Sometimes the victim or his relatives upon his death may be compelled or induced by the power or money of the convict to grant pardon which may create discrimination and a loophole in achieving justice in the society. In other words, the powerful and wealthy can benefit more from the *Shari'ah* pardon process than the poor. Thus, the *Shari'ah* principle of pardon might not be implemented fairly and equitably in the modern justice system unless there is a mechanism which would equally protect and ensure the rights of all people in the society.

Therefore, since the common law pardon process is prone to arbitrariness, bias, political nepotism, abuse of power and has no rational mechanism or policy that can establish justice and protect the rights of the victim or his family, it is important to learn from the pardon principles of the *Shari'ah* as it has proposed to decide pardon petitions based on mutual understanding between the disputing parties with the option of pardon by the victim or his family with or without compensation (Qafisheh, 2012, p. 969; Karim et al., 2017, p. 174). Hence, this study recommends to harmonise the pardon principles of both the *Shari'ah* and common law and formulate a decision-making process to enrich the applicability of the current principle of the power of pardon and enhance justice in the pardon process.

COMPARING THE PARDON LAWS IN COMMON LAW AND THE *SHARI'AH*

The power of pardon is legally acknowledged in both common law and the *Shari'ah* to establish justice, fairness and mercy in the criminal justice system or to serve the public interest. The exercise of the pardon power is justified as an essential tool to deal with individual cases where strict implementation of the law may lead to unfair or disproportionate results (Pascoe and Michelle, 2017, pp. 972-73; *R v Home Secretary, ex p Bentley* [1994] QB 349, p. 360). This power focuses on the high values of compassion and rehabilitation of the offender (Majdah and Nasimah, 2015, p. 49).

Both common law and the *Shari'ah* jurisdictions recognise the power of pardon in certain circumstances to show leniency, remove hardship and uphold justice in the criminal justice system. Although the underlying philosophies and principles of both legal systems differ, both employ the pardon power to promote the process of rehabilitation of offenders and protect public interest. In contrast, the pardon principles of the common law do not recognise the rights of the aggrieved parties in deciding the pardon petitions, but the *Shari'ah* affirms their rights and encourages the pardoning authorities to decide the pardon petitions based on mutual understanding between both the disputing parties and particularly the victims of the crime (Qafisheh, 2012, p. 969; Karim et al., 2017, p. 174). It is essential to note that for a valid pardon, no party would be coerced, threatened, deceived or unduly influenced to accept or reject a specific proposal of pardon. Therefore, harmonisation of the *Shari'ah* and common law pardon principles would establish a peaceful dispute resolution process which would reduce crime, hatred and animosity in society. In some crimes that do not have direct victims, for example, corruption or drug offenders. public funds have been stolen, the return of those funds to the state and expressing repentance and remorse should be a necessary consideration to the pardon.

HARMONISATION OF THE PARDON LAWS IN COMMON LAW AND THE *SHARI'AH*

The theory of harmonisation has a greater potential to gain widespread support because it is inclusive by nature and encourages intellectual sharing to develop a better understanding that is good for everyone (Kamali, 2007, p. 393; Tajuddin and Nasimah, 2022, p. 196). Many Muslim legal experts namely Mohammad Hashim Kamali (2007, p. 393), Hanifah Haydar Ali Tajuddin and Nasimah Hussin (2022, p. 196), and Moamen Gouda (2013, p. 77), opined that the *Shari'ah* principles can be certainly harmonised with modern constitutionalism. This harmonisation process can bring better coordination and uniformity between these two legal systems (Baderin, 2010, p. 4). This harmonisation would adopt the pardon principle of the *Shari'ah* in the common law pardon process and enhance the applicability of the power of pardon in the criminal justice system. In essence, it can promote a coherent and just approach to pardon offenders within diverse legal contexts, fostering greater consistency and fairness in legal outcomes.

It can be identified from the previous discussion that the power of pardon in common law countries and the *Shari'ah* aims to eliminate legal hardship, severity of punishment and establish justice in the criminal justice system. However, it can also be acknowledged that the pardon principles in common law countries do not ensure the rights of the victims or victims' heirs in murder cases in deciding on the pardon petitions. In other words, the common law pardon process does not provide any compensation to the victims of crime. This injustice can create animosity between the disputing parties involved in criminal cases and cause communal unrest as justice is not achieved in the pardon process (Majdah and Nasimah, 2015, p. 47). On the other hand, the *Shari'ah* suggests that the pardon decisions should be made based on mutual understanding between the disputing parties that can ensure the legal rights and compensation of the victims of the crime (Qafisheh, 2012, p. 488; Karim et al., 2017, p. 174), and at the same time, the state authorities should act as mediators to protect the public interest and resolve the issues of aggrieved parties in a just and fair manner in the pardon process. Therefore, this study brings together the similarities and differences of the pardon principles of common law countries and the *Shari'ah* and harmonises them to formulate a feasible and better pardon decision-making process which can enhance justice in the current common law criminal justice system. It is expected that the proposed harmonised pardon framework can be accepted by the vast majority of people in general and implemented in the current common law jurisdictions to protect the rights of the victims of the crime or victims' relatives in murder cases as well as the convict and protect the public interest in deciding the pardon petitions. It is also hoped that this proposed harmonisation of common law and the *Shari'ah* pardon principles can develop a balanced pardon model to establish justice in society and reduce possible abuse of the power of pardon in the context of the seeming omnipotence of the government.

REFORMATION OF THE LAW OF PARDON

This study suggests that to enhance pardon process in the current common law jurisdictions, ensure justice for both the disputing parties involved in the crime and to protect the public interest, the process of the power of pardon under selected common law countries and the *Shari'ah* should be reformed by harmonising both legal systems. This reform of the pardon principle requires the formation of a Pardon Advisory Board consisting of the victim or victim's heirs in murder cases or their representatives and the convict or his representatives who should be the most important members in the board while the state authorities should play a vital role as mediators in resolving issues between the disputing parties involved in the crime and in protecting the public interest in deciding on the pardon petitions. The decision of the proposed Pardon Advisory Board should be made based on mutual understanding between both disputing parties with love and generosity, but the state authority should ensure the protection of the public interest in the pardon decision-making process. The victim or victim's relatives in murder cases should be convinced to grant a free pardon for humanitarian purposes or to seek rewards from Allah (SWT) in the Hereafter as per the belief of Muslims. If they want to grant pardon with

compensation, the state authorities, as mediators, should ensure that the amount of the compensation is proportionate, just, fair and reasonable. The state authorities should also ensure that the decisions of pardon consider certain mitigating factors, such as post-conviction activity and sign of repentance of the offender, mental condition of the offender at the time of the crime, the age of the offender, disparate sentencing, and commission of crime with a legally justifiable cause. In cases where public funds have been stolen, the return of those funds to the state should be a necessary consideration to the pardon and protect the public interest.

The reformed pardon mechanism should be an open consultative decision-making process while the current common law pardon process is secret in nature, and no one knows how and why a pardon is granted or denied. This proposed reform should allow for judicial review to ensure a fair and just pardon decision whereas the current common law pardon principle barely allows for judicial review of pardon decisions except in India and UK where pardon decisions can be reviewed in special cases. It should be transparent and apply reporting and publication requirements for pardon deliberations so that everyone can understand why and how a pardon can be granted. It should have justice-enhancing elements and create a role for the victims or victims' families in murder cases in the pardon decision-making process as the current pardon process does not provide any compensation or require any scope to have their rights heard. Legal experts such as lawyers should be allowed to participate in the pardon process to ensure the rights of disputing parties. Furthermore, the pardoner should require declaring reasons for the pardon grants. This pardon process should also focus on the rehabilitation of the offenders and value their proper repentance and remorse after the commission of crime. Therefore, it is hoped that the proposed harmonised pardon decision-making mechanism would ensure justice and fairness for both disputing parties as it would protect the rights of the victim of the crime or victim's relatives in murder cases. In addition, it would create an opportunity for inmates to rehabilitate from their criminal behaviour and apply for pardon with the hope and incentive to return to society and lead their lives better than they were before.

CONCLUSION

The power of pardon is a constitutional scheme vested in the executive head of state to remove the rigidity and harshness of law in common law countries and to correct inadvertent mistakes of the judiciary to ensure justice in all criminal cases. However, this noble power is currently prone to arbitrariness, favouritism and abuse of power in many common law countries (Majdah and Nasimah, 2015, p. 47). Therefore, this study explains and harmonises the power of pardon principles under selected common law jurisdictions and the *Shari'ah*, presents a logical and creative discussion in order to formulate a just and balanced pardon decision-making mechanism which can assist and enhance justice in deciding pardon petitions. It is hoped that this harmonised pardon policy can eliminate occasional abuse of the pardon power in the exercise of constitutional power of pardon of the government and ensure justice for the victim or his relatives and the convicted person, reduce revenge and carry nobility in the society, and protect the public interest in the pardon process.

This study further demonstrates that the *Shari'ah* pardon principle is not contradictory with the existing common law pardon principles, but it legally and rationally protects the rights of the victim or his relatives because they are the actual sufferers of the crime. This study has suggested to harmonise pardon principles of selected common law countries and the *Shari'ah*. This harmonisation requires reforming the current pardon laws and setting up a Pardon Advisory Board where the victim of the crime or his representative and the convict or his representative should be important members while the state authorities should play an important role as mediators in ensuring that the pardon decisions are made in a just and fair manner and public interest are well protected. Consequently, this study has the potential to minimise the sense of revenge and crime in the society and improve the penal system in the process of pardon.

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