

ABOLITION OF NATURAL LIFE SENTENCE IN MALAYSIA: A CRITICAL ANALYSIS

MOIN UDDIN*

Abstract

A natural life sentence is a severe punishment in which prisoners remain in prison until death. This sentence is used as an alternative to the death penalty in exceptional situations which do not mandate the punishment of death. In Malaysia, the Court was empowered by the law till 3rd April 2023 to impose a natural life sentence in the criminal justice system based on Section 130A(f) of the Penal Code. This law aroused the vexed issue that a natural life sentence does not achieve the purposes of sentencing in the criminal justice system. In addition, a natural life sentence violates human rights laws as it is inhumane or degrading to the accused. This paper aims to critically analyse and examine the rationales and consequences of imposing a natural life imprisonment. The qualitative research method has been used in gathering and analysing data. This study concludes that a natural life sentence contradicts human rights, fails to achieve public interest, violates the freedom and dignity of the prisoners, and also fails to attain penological goals. This research suggests that the natural life sentence should be abolished around the world with an option of parole to establish human pride and dignity and protect the social and human rights of the prisoners.

Keywords: Natural life sentence, public interest, human rights, pardon and natural life sentences, *Shari'ah* and natural life sentences.

I INTRODUCTION

The implementation of sentencing in a criminal justice system plays a vital role in reducing recidivism.¹ The main objective of all categories of punishments is to avoid unfairness, inconsistency, and prejudice.² Different terms of detention are used to punish the criminal and a natural life sentence is one of them. However, in Malaysia, the term 'natural life sentence' was not used in the penal code, but it was known as 'imprisonment for life'

* PhD Candidate, Faculty of Law, Universiti Malaya, Kuala Lumpur, Malaysia; Master of Comparative Laws (IIUM); LLB (Hons) (IIUM).

The author expresses his sincere appreciation and gratitude to the anonymous reviewers for their helpful suggestions and comments.

¹ Recidivism is the propensity of a person to regress to a prior behaviour or repeat undesirable actions, particularly relapse into criminal activities. It could be measured in various forms such as re-engagement, re-arrest, reconviction, or re-imprisonment.

² Gerald Gardiner, 'The Purpose of Criminal Punishment' (1958) 21 *Modern Law Review* 117.

which is defined as ‘imprisonment until the death’ of the convict.³ A second terminology of imprisonment is used in the Penal Code which is ‘life imprisonment’ which means imprisonment for 30 years.⁴ In a natural life incarceration scheme, the prisoners are incarcerated for the whole of their natural lives⁵ with no date for release⁶ while life imprisonment prisoners can be released after serving a certain, i.e. 30 years imprisonment in Malaysia.⁷ Legal scholars have categorised natural life imprisonment as the most punitive punishment for sensationalised crimes after the death penalty. However, a pardon is an exception to the general rule to quash or alter any type of punishment imposed by the Court.⁸ Kandelia has rightly mentioned that natural life sentence is an imprisonment for a severe crime under which the condemned person is to remain in prison for the rest of his or her lifetime.⁹

It is generally known that all offences are regarded as crimes against society while the Courts normally determine the appropriate punishment for each offender. The variations in the facts of each case and the legal elements involved are the leading reasons for imposing different types of punishment or durations thereof.¹⁰ In these situations, the Court must have vast knowledge of all the goals of sentencing. These are retribution, deterrence, incapacitation and rehabilitation to maintain justice. It can be summarised by referring to the enunciation of Francis Guan who has claimed that natural life sentence is considered as the most punitive sentence as it is incarceration until the death of the criminal.¹¹ Therefore, this law became a highly controversial issue in Malaysia and even in many other countries around the world to take out natural life sentence from the criminal justice system because it contradicts human rights, fails to protect the interest of the public and the accused, violates freedom and human dignity and fails to attain penological goals.

A qualitative research method is adopted to analyse the perspective of laws involving the implementation of natural life sentences in Malaysia. This research utilised published as well as unpublished materials to enrich the current analysis of laws. The study also refers to related Islamic law materials to discuss the wisdom of punishment in the *Shari’ah*.

³ *Penal Code (Act 576)* (Malaysia) s 130A(f).

⁴ Malaysian Prison Department, FAQ: Prisons terms and definitions (online, 5 May 2023) <http://www.prison.gov.my/portal/page/portal/english/soalan_en>.

⁵ Marieke Liem and Jan Maarten Elbers, ‘The Role of Human Rights in Long-Term Sentencing’ (2015) 26(2-4) *Security and Human Rights* 282.

⁶ Malaysian Prison Department (n 4).

⁷ Ibid.

⁸ Daniel T. Kobil, ‘The Quality of Mercy Strained: Wrestling the Pardoning Power from the King’ (1991) 69(569) *Texas Law Review* 636.

⁹ Seema Kandelia, ‘Life Meaning Life: Is There Any Hope of Release for Prisoners Serving Whole Life Orders’ (2011) 75(1) *Journal of Criminal Law* 70.

¹⁰ *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (RCRJ Ipoh) 256 (‘*Loo Choon Fatt*’).

¹¹ Francis Guan, *Criminal Procedure* (LexisNexis Malaysia, 2nd ed, 2006) 419; Dirk Van Zyl Smit and Catherine Appleton, *A policy briefing on life imprisonment* (University of Nottingham, 2018) 1-2.

II NATURAL LIFE SENTENCE IN MALAYSIA

Natural life imprisonment is imposed on the offender when there are exceptional or mitigating circumstances which do not justify the imposition of the death penalty.¹² This sentence is sometimes considered as an alternative to capital punishment. This severe punishment was imposed in Malaysia by virtue of Sections 173(b), 173(j) (i) and 173(m) (ii) of the Criminal Procedure Code (Act 593) of Malaysia. Further, Section 130A(f) of the Penal Code (Act 574) of Malaysia provided that, “imprisonment for life means (subject to the provisions of any written law conferring power to grant pardons, reprieves or respites or suspension or remission of punishments) imprisonment until the death of the person on whom the sentence is imposed.”¹³ On the other hand, the Malaysian Prison Department has introduced separate terminology for fixed term incarceration that is ‘life imprisonment’ which is defined as “Prisoners sentenced to 30 years’ imprisonment.”¹⁴

The main objective of section 130A(f) of the Penal Code of Malaysia was to safeguard the community by separating criminals who are a serious threat to the lives and personal security of others. Another purpose of this section was to condemn behaviour that society deems to be extremely shameful and that seriously violates basic human rights and values. In the case of *Che Ani Bin Itam v PP* (*‘Che Ani’*), the Federal Court of Kuala Lumpur pronounced that this section does not violate the Federal Constitution of Malaysia (‘FC’).¹⁵ Therefore, this law became a highly debatable issue in Malaysia. Eventually, on 3rd April 2023, Parliament decided to abolish this harsh and degrading punishment from the criminal justice system in Malaysia.

III NATURAL LIFE SENTENCE IN OTHER COUNTRIES

Law is a form of social science that needs to be developed in line with the demands of the people and national goals.¹⁶ This development must be just and fair and without any kind of discrimination. There are approximately 65 out of 216 countries in the world that are currently imposing “natural life sentences”¹⁷ in their jurisdictions such as Bangladesh, Indonesia, Denmark, Austria, Canada, Italy, England and Wales, Turkey, the United States, Sweden, Ukraine, Nigeria, South Africa, Kenya and Bulgaria.¹⁸ However, many other countries have successfully abolished the natural life imprisonment by classifying it as indefinite, cruel, and severe in nature. These abolitions are mostly initiated by the

¹² Michael L. Radelet and Ronald L. Akers, ‘Deterrence and the death penalty: The views of the experts’ (1996) 87 *Journal of Criminal Law & Criminology* 1.

¹³ *Penal Code* (n 3) s 130A(f).

¹⁴ Malaysian Prison Department (n 4).

¹⁵ [1984] 1 MLJ 113 (Federal Court), 114-115.

¹⁶ Sridevi Thambapillay, ‘Recent Developments in Judicial Review of Administrative Action in Malaysia: A Shift from Grounds Based on Common Law Principles to the Federal Constitution’ (2007) *Persidangan Undang-undang Tuanku Ja’afar* 276.

¹⁷ “Natural life sentences” is defined as ‘imprisonment until the death’ of the convict. On the other hand, “life imprisonment” is defined by the Malaysian Prison Department as imprisonment for 30 years. The term of imprisonment for “life imprisonment” may vary in different jurisdictions.

¹⁸ Penal Reform International, ‘Life imprisonment’ (online, 27 April 2023) <<https://www.penalreform.org/global-prison-trends-2021/life-imprisonment/>>.

cultural influence of former colonial masters, Portugal, or Spain. It is noteworthy that 183 jurisdictions of the globe officially enforce life imprisonment, which typically entails a period of incarceration ranging mostly from 20 to 30 years. Some European countries including Bosnia, Croatia, and Herzegovina implement the maximum term of custody at 45 years.¹⁹

A *Natural Life Sentence under the ECHR*

The European Court of Human Rights (ECHR) emphasises the protection of life and liberty of all human beings. According to this Court, if an offender is sentenced to a natural life sentence with a potential hope of release by any local law of the county, the punishment will not be categorised as a violation of basic human rights. A worthy explanation about natural life sentence can be found in the case of *Kafkaris v Cyprus* ('*Kafkaris*')²⁰ where the European Court of Human Rights (ECHR) acknowledged that the implementation of an irreducible life imprisonment on an adult criminal may be violation of Article 3 of ECHR.²¹ The Court, however, viewed that in several cases where incarceration was subject to review for the purpose of parole after the passing of the minimum term for serving natural life imprisonment, it could not be alleged that the life sentence prisoners had been deprived of any hope of release from prison. The Court had additionally established that even in the lack of a minimum term of unconditional sentence and even when the possibility of parole is narrowed down for convicts serving a life imprisonment, the prisoners are having a faith that one day they will be released from prison. The Court had presented that in such situations a life sentence does not become 'irreducible' by the mere point that in practice it may be served in full. Therefore, the Court concluded that it is sufficient for the purposes of Article 3 of ECHR that a life incarceration is de jure and de facto reducible.

Furthermore, the ECHR decided that the imposition of an irreducible life imprisonment on an adult criminal may violate Article 3 because the convict had no prospect of release, de jure (legal recognition) and de facto (factual recognition). Therefore, an irreducible sentence establishes inhuman or degrading action which violates Article 3 of ECHR. However, in the *Kafkaris* case Judge Bratza opined that non-existence of any review and protections attaching to the executive discretion conditionally to relieve a life prisoner is important in relation to Article 5(4).²² In addition, Judge Bratza reaffirmed that Article 5(4) of ECHR required the lawfulness of the constant custody of a natural life sentence inmate to be ascertained by "a sovereign body with the power to mandate release and following a procedure containing the necessary judicial safeguards, including the possibility of an

¹⁹ Ibid.

²⁰ [2008] ECHR 143 (European Court of Human Rights).

²¹ Article 3 of the ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

²² Article 5(4) of the ECHR provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

oral hearing.”²³ Likewise, in the *Vinter and Others v United Kingdom* (*‘Vinter’*)²⁴ case, the Grand Chamber of the ECHR governed that all inmates punished to life imprisonment had two rights namely prospect of relief and the right to have their sentence reviewed. . If the sentencing authority fails to provide these two rights, the inmates will be eligible to file a petition to be free from inhuman or degrading treatment.²⁵

B Natural Life Sentence under International Laws

Many international instruments are urging Member States to legislate rules offering the conditional release of all inmates in certain circumstances. For example, neither the Council of Europe recommendations on the management of long-term prisoners nor the United Nations Recommendations on Life Imprisonment in 1994 grants the possibility of lifetime imprisonment although both recognise following a steady and rigorous review that some life-sentenced inmates may never be deemed safe for release. The main objective of providing a review process is that the guidelines envisage rehabilitation as an integral part of the penal process.²⁶ Similarly, Article 10(3) of the International Covenant on Civil and Political Rights in 1966 provides that “the penitentiary system shall comprise treatment of prisoners the necessary target of which shall be their reformation and social rehabilitation.”²⁷ Bohlander has indicated that the importance of an independent review process is stipulated by the Rome Statute of the International Criminal Court 1998 under Article 77, although a natural life sentence is permissible as the extreme penalty for the most serious offences. Article 110 requires that the court must review after 25 years to determine whether a natural life sentence should be reduced.²⁸

It can be identified from the international human rights principles that the European Court of Human Rights and many other international organisations have proposed eradicating natural life imprisonment. The Malaysian criminal justice system was wise to abolish the natural life sentence to protect the fundamental rights of those incarcerated for life.

IV REASONS FOR THE ABOLITION OF NATURAL LIFE SENTENCE

The abolition of a natural life sentence, or imprisonment until the death of the criminal, is advocated for several reasons rooted in humanitarian, social, ethical, legal, and practical considerations. Here are some of the supporting arguments:

²³ *Kafkaris* (n 20), 3, 38, 40-41, 62, 63, 65, 68.

²⁴ Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013 (GC).

²⁵ Dirk Van Zyl Smit and Pete Weatherby, Simon Creighton, ‘Whole life sentences and the tide of European human rights jurisprudence: what is to be done?’ (2014) 14(1) *Human Rights Law Review*.

²⁶ United Nations office at Vienna Crime Prevention and Criminal Justice Branch, Recommendations on Life Imprisonment: 2, 4, 6-7.

²⁷ *International Covenant on Civil and Political Rights* (23 March 1976), art. 10(3).

²⁸ Michael Bohlander, ‘The Remains of the Day: Whole Life Sentences after Bieber’ (2009) 73(1) *The Journal of Criminal Law* 34, 35, 36, 47.

A Natural Life Sentence Contradicts Human Rights

Imprisonment of a person for the rest of his life opposes fundamental human rights. It has been challenged as a violation of human rights on the basis that it generates debilitating psychosis which is an inhumane or degrading treatment of the accused person.²⁹ Hodgkinson opined that incarceration for natural life makes life far more depressing and meaningless than life normally is in prison.³⁰ Hodgkinson and Kandelina, Gyllensten argued that many countries justified the imposition of a natural life sentence as a punishment for the most serious offences. In many countries, although it is possible to file a petition to the Head of State, President, King, Ruler or Governor for a pardon, or petition to the court for a determinate tariff after serving a certain period of time, this process aids those under the capital punishment and not the natural life sentence.³¹ In other words, the death penalty is replaced with a natural life sentence to avoid the execution of the culprits. This has no benefit to society or even to the family of the convict because the person is going to live in prison for his whole life. It is the silent execution of the death sentence. The offenders who are suffering such punishment are rarely able to humanise or to reform to a legal path because of having no hope of release.³² In comparison between prisoners who are serving long-term sentences with a prospect of release and those incarcerated for their whole life, the latter group suffers heavily due to feelings of futility.³³ Therefore, a natural life sentence is labelled an inhumane or shameful treatment of the felon in international human rights laws unless a reformation is confirmed by the legal authority.³⁴

B Violation of Human Nature

No human being is free from perpetrating errors. Thus, a person may commit a crime because of his human nature or his need or by mistake or for any other reason. According to John Finnis, it is in the nature of human beings that they will be rehabilitated or reformed by the moral teachings which are good for everyone.³⁵ In that context, having education is one of the fundamental rights of every human being. If a person has committed a severe offence, it doesn't mean that the person must be killed or put in jail until he dies but a reformation process must exist to influence or convince him to become law abiding and a better person.³⁶ Therefore, when the person is able to prove that he is reformed and

²⁹ Smit and Weatherby, Creighton (n 25) 59.

³⁰ Peter Hodgkinson, 'Europe A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies' (2000) 26(3) *Ohio Northern University Law Review* 625-664.

³¹ Peter Hodgkinson and Seema Kandelina Lina Gyllensten, 'Capital punishment: a review and critique of abolition strategies' in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Ashgate, 2008) 249.

³² Simon Hattenstone and Eric Allison, 'UK criminal justice: Are whole-life prison sentences an infringement of human rights?' *The Guardian* (online, 5 December 2012) <<https://www.theguardian.com/law/2012/dec/05/whole-life-prison-sentence-human-rights>>.

³³ The Public Interest Litigation Project, 'Lifelong imprisonment' *Law and democracy* (online, 16 October 2017) <<https://pilpnjcm.nl/en/dossiers/lifelong-imprisonment/>>.

³⁴ Smit and Weatherby, Creighton (n 25) 65-71.

³⁵ John Finnis, *Natural law and natural rights* (Oxford University Press, 2011) 23.

³⁶ Julian H. Wright Jr, 'Life-without-parole: An alternative to death or not much of a life at all' (1990) 43 *Vanderbilt Law Review* 529.

educated enough to contribute to social welfare, then parole must be given. Hence, the person will live in society and will have a natural life which will protect the interest of the convict as well as the interest of the public.

C Natural Life Sentence Fails to Achieve Public Interest

Natural life incarceration defeats the public interest as it is unsuccessful in rehabilitating offenders to work for the sake of their family or community or for the development of the country. An imprisonment that fails to formulate an appropriate mechanism for rehabilitating the offender fails to benefit society.³⁷ It fails to reduce the number of criminals. A punishment must make an appreciable contribution to penological improvement otherwise it should be considered an excessive sentencing.³⁸ Lord Taylor CJ in the case of *R v Cox* ('Cox')³⁹ adopted a basic rule of sentencing for custody that it is "the kind of offence which... would make all right thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one."⁴⁰

D An Outdated Practice of Law

The imposition of natural life sentence can be considered an outdated practice of law in the modern world. The Constitution is recognised as a dynamic, organic and living instrument which must be evolved continuously with the needs of the people and national aspirations.⁴¹ Many countries like India have paid considerable attention to the goals of sentencing. They have displayed their concern about what happens during the incarceration period and the provisions, if any, made for the criminal when released from punishment. India has developed a formula which is known as "the rarest-of-rare cases formula." This formula has no statutory definition, but it depends on facts and circumstances of a particular case, harshness of the offence, the demeanour of the criminal, past history of his connection with criminality, chances of reforming and integrating him into the society and so on. The Indian Supreme Court applied the rarest-of-rare cases formula in the case of *Surja Ram v State of Rajasthan* ('Surja Ram') wherein it stated that:

While considering the punishment to be given to the accused, the court should be alive to not only the right of the criminal to be awarded a just and fair punishment by administering justice tempered with mercy as the criminal may justifiably deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with public abhorrence for the heinous crime committed by the accused. On the facts

³⁷ Liem and Elbers (n 5) 290.

³⁸ J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence' (1993) 26(2) *Loyola of Los Angeles Law Review* 350.

³⁹ [1993] 1 WLR 188.

⁴⁰ Peter Welch, *Criminal Litigation and Sentencing* (Cavendish Publication Limited, 2nd ed, 1995) 316.

⁴¹ Thambapillay (n 16) 276.

and circumstances of the case, we are of the view that the crime committed by the accused falls into the category of rarest-of-rare cases for which the extreme death penalty is justified.⁴²

It can be pointed out from the above judgment that the court considered the nature of the specific offence and its seriousness in deciding the case to make sure that there is no miscarriage of justice in the case. Hence, it can be said that the formula leads judges to take into account all factors related to the offence and the offender.

In the case of *State of Rajasthan v Baisakha* ('Baisakha'), the Rajasthan High Court ordered that this was not a case which fell within the rarest-of-rare case category and held that the ends of justice would be served, having regard to the circumstances, by imposing life imprisonment.⁴³

E Natural Life Sentence Violates the Constitution

Natural life imprisonment violates the freedom and dignity of the person which are fundamental civil rights under the canopy of Article 5(1) of the FC. In this Article, the phrase 'save in accordance with law' justifies the deprivation of personal liberty only if the law allows. However, the word 'law' can be interpreted to refer to not only the statutes passed by the parliament but also natural justice⁴⁴ and a higher standard of due process.⁴⁵ As the Court of Appeal ruled in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Another* ('Tan Tek Seng')⁴⁶ that Art. 5(1) of the Federal Constitution can be interpreted broadly and liberally to form quality of life and fairness.⁴⁷ The rulings of the case also directed that the imposed punishment should not be severe, but it should be reasonable and fair, and proportionate to the crime committed. This principle was affirmed by the Federal Court in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* ('Sivarasa Rasiah').⁴⁸ In this case, the Court also stated that the enacted law must be just and fair.⁴⁹ In addition, the Court of Appeal in *Sugumar Balakrishnan v Director of Immigration, State of Sabah & Anor* ('Sugumar Balakrishnan')⁵⁰ sanctioned that Art 5(1) should read together with Art 8(1) to ensure the doctrine of substantive fairness which "requires ... to ensure that any punishment that he imposes is not disproportionate to the wrongdoing complained of."⁵¹ This principle was affirmed later in several cases namely in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* ('Dr Mohd Nasir')⁵²

⁴² AIR 1997 SC 18 (Indian Supreme Court) 8.

⁴³ [1999] Cri L.J. 1399 (Rajasthan High Court) 7.

⁴⁴ *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiasahu Suruhanjaya Pasukan Polis & Ors*, [1995] 1 MLJ 315 ('Raja Abdul Malek Muzaffar Shah'); Thambapillay (n 16) 275.

⁴⁵ Normawati Hashim, 'The Need for a Dynamic Jurisprudence of Right to "Life" Under Article 5(s) of the Federal Constitution' (2013) 101 *Procedia-Social and Behavioral Sciences* 299-306; Thambapillay (n 16) 276.

⁴⁶ [1996] 1 MLJ 261.

⁴⁷ Thambapillay (n 16) 275.

⁴⁸ [2010] 2 MLJ 333, 346.

⁴⁹ Ibid.

⁵⁰ [1998] 3 MLJ 289.

⁵¹ Ibid 315.

⁵² [2006] 6 MLJ 213, 219-220.

and *Lee Kwan Woh v Public Prosecutor* ('Lee Kwan Woh'),⁵³ *Alma Nudo Atenza v Public Prosecutor and another appeal* ('Alma Nudo Atenza').⁵⁴

Based on the above reasonings, it can be submitted that a natural life sentence is unreasonable and unfair, and disproportionate to the crime committed as it is enacted in disregard of public concerns and entirely at the will of the Parliament. The term 'law' should not exist at the will of the Parliament. The statutory law of natural life sentence is questionable from the point of view of constitutional supremacy.

F Natural Life Imprisonment Fails to Attain Penological Goals

Natural life sentence is excessive in the nature of punishment in the criminal justice system as there is no hope of parole or release of the convicts from prison. Lawyer Baljit Sidhu has said that "a natural life imprisonment term (means that the) prisoners are likely to die there."⁵⁵

In order to understand the concept of excessiveness of sentence, it is required that one must evaluate the reasons for imposing the punishment. A punishment is an instrument to protect the common benefits of the community from usurpation as well as illegal motives of personal greed. The justification of punishment is underlined largely based on two basic theories namely the utilitarian and the retributive.⁵⁶ The utilitarian model validates punishment on the ground that it balances the benefits and detrimental effects of criminal punishment. The supporters of this idea believe that it is a potential theory which reduces recidivism from the society. However, the justification of retributive theory is that it suitably responds to the voluntary violation of any law. This theory does not ponder on its effects on society.⁵⁷ Therefore, the purposes of sentencing emerged from these two theories are mainly retribution, deterrence, incapacitation and rehabilitation.⁵⁸

G Violation of the Purposes of Punishment

The theory of retribution prevents risk of recidivism by removing personal avenge and hostility from the individual or society.⁵⁹ A proper implementation of this theory creates a feeling in people that the criminal procedure and law enforcement forces are working efficiently, so that criminals are punished adequately. Moreover, deterrence creates fright among people as it punishes convicts effectively for their commission of crimes. It deters potential offenders from committing further or repeating crimes in society with the feeling that the same conditions will happen if they too commit the

⁵³ [2009] 5 CLJ 631.

⁵⁴ [2019] MLJU 280.

⁵⁵ V Anbalagan, 'Lawyers warn of the other death sentence' *FMT News* (online, 16 October 2018) <<https://www.freemalaysiatoday.com/category/nation/2018/10/16/lawyers-warn-of-the-other-death-sentence/>>.

⁵⁶ Australian Law Reform Commission, *Family Violence - A National Legal Response* (ALRC Report 114, 2010) vol 1, 175.

⁵⁷ C. L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (Oxford University Press, 1987) 7, 46-47.

⁵⁸ Australian Law Reform Commission (n 56) 175-76, 179.

⁵⁹ Joel Meyer, 'Reflections on some theories of punishment' (1968) 59(4) *The Journal of Criminal Law, Criminology, and Police Science* 595.

offence.⁶⁰ Furthermore, incapacitation removes criminals from the society for reducing the sensationalised crimes by executing death penalty, imposing natural life imprisonment, or house arrest. It is also known as prevention as criminals are kept in custody or issued the death penalty to incapacitate them from committing further serious crimes. In the case of *R v Sargeant* ('*Sargeant*'),⁶¹ Lawton LJ opined that natural life sentence is justified in special circumstances. He said that if an offender has no possibility of deterrence and rehabilitation, he should be locked up until death. On the contrary, it can be argued that the stated two theories namely retribution and incapacitation do not establish civil justice that a person can be free from prison if it can be guaranteed that he will not harm anyone again and will lead a better life than before.

Rehabilitation is the only process which prevents future crime by changing behaviour of offenders. It provides training programme, counselling, education, treatment centre and so forth to alter the criminal mentality of the public. It is the only effective punishment which provides an opportunity to rehabilitate criminals without focusing on the crime.⁶² As a result, they will possess more understanding of the evil nature of crime, a new set of moral values, human dignity and a desire to act for social development. Rehabilitation plants interior purification, redemption, and repentance.⁶³ In reality, most of the prisons of the world are incompetent to provide adequate and quality services for the prisoners.⁶⁴ It can be noted from all theories of the purpose of sentences that transforming people from criminal behaviour to a natural life or life with dignity should be the supreme concern of all kinds of punishments.

H Violation of the Concept of Rehabilitation: The Behaviourist Approach

The core penological goal is rehabilitating or naturalising human behaviour from criminality. The legalistic approach of implementing punishment is that all crimes are committed by the free will of the criminals, thus, they must suffer for their wrongdoings. However, it is opposed by the behaviouristic approach which believes that crime is not entirely controlled by the offender but an effect of forces.⁶⁵ This approach claims to investigate the behaviour and personality of an offender so that the community can understand the problems and workout to overcome them.⁶⁶ Both theories require punishment of the criminals while the major purpose is to purify the interior behaviour and to show repentance for their criminal activities.⁶⁷ Therefore, the convicted person can come back to society as a better person than before and can contribute to the betterment of humanity. This moral purification process can adequately preserve human dignity and

⁶⁰ Meyer (n 59) 596.

⁶¹ [1974] 60 Cr App R 74.

⁶² Smit and Weatherby, Creighton (n 25) 65.

⁶³ Meyer (n 59) 597.

⁶⁴ T. D Hutto, 'Goals and Service Delivery in Corrections Facilities' in Miles B Santamour and Patricia S Watson (eds), *The Retarded Offender* (Praeger Publishers, 1982) 387.

⁶⁵ Albert W. Alschuler, 'The changing purposes of criminal punishment: A retrospective on the past century and some thoughts about the next' (2003) 70(1) *The University of Chicago Law Review* 19.

⁶⁶ Sol Rubin et al, *The Law of Criminal Correction* (West Publishing Company, 1963) vol 2.

⁶⁷ Meyer (n 59) 598.

social rights of the offenders.⁶⁸ This is also the major concern of imposing punishment under Islamic criminal justice system.⁶⁹ However, imprisonment for life ignores such inner purification and repentance of the prisoners. Their moral corrections and repentance do not benefit them unless the Head of the State issues a pardon. Hence, natural life sentence fails to protect social rights of the prisoners as it does not permit them to work for the social welfare after the moral correction from criminality.

Therefore, it could be pointed out that natural life imprisonment is an irrational, harsh and unusual monolithic punishment. It emphatically kills the hope of the prisoners for release from the jail, devalues and overthrows the humanity of the convicts because of causing severe psychological distress and depression as there is no incentive of freedom or no certain length of confinement before death.

V POWER OF PARDON IN MITIGATING A NATURAL LIFE SENTENCE

Imprisonment for life was practiced in Malaysia for serious crimes, but this sentence could be reduced or pardoned by the right to pardon by the *Yang di-Pertuan Agong* (YDPA) or the Ruler or the Governor of each State as provided in Article 42 of the Federal Constitution. Despite the fact that Article 42 provides for a Pardons Board, its composition and its procedure, the court held that the power of pardon is a “discretionary power” of the YDPA⁷⁰ and his decisions cannot be questioned or reviewed by the Court.⁷¹ Abdul Hamid CJ. also proclaimed that the federal law⁷² does not mandate the YDPA to follow the advice of the Pardons Board, but he makes pardon decisions based on his discretionary power specified under Article 42(1) of the Constitution.⁷³ A similar power is given to every Ruler of each State for crimes committed in that respective State. This special power is regulated to establish justice and protect public interest and conscience.⁷⁴

According to some legal scholars, the power of pardon should be exercised on the advice of the Pardons Board designed under Article 42(5).⁷⁵ It can be pointed out from this provision that the members of the Pardons Board of each State consist of the Attorney General of Malaysia, the Chief Minister of the State and not more than three other members, who shall be appointed by the Rulers or the *Yang di-Pertua Negeri*.⁷⁶ While the Pardons Board of the Federal Territories comprises the Attorney General of

⁶⁸ Gardiner (n 2) 118.

⁶⁹ Majdah Zawawi and Nasimah Hussin, ‘Forgiving the Enemy: A Comparative Analysis of The Concept of Forgiveness in Shari’ah and Malaysian Law’ (2015) 23 *Pertanika Journal of Social Sciences & Humanities* 49.

⁷⁰ *Sim Kie Chon v. Superintendent of Pudu Prison* [1985] 2 MLJ 385 (No.1) (‘*Sim Kie Chon*’).

⁷¹ *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529 (‘*Juraimi*’); *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 (No 2) (‘*Sim Kie Chon*’ No 2’); *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170 (‘*Lim Hiang Seoh*’).

⁷² *Federal Constitution of Malaysia* arts. 42(4) (a), 40(1), (1A), (3) (‘FC’).

⁷³ *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64.

⁷⁴ *Lim Hiang Seoh* (n 71).

⁷⁵ Shamrahyu Abdul Aziz, ‘The Continuing Debate on Death Penalty: An Exposition of International, Malaysian and the Shari’ah Perspective’ (2015) 23(1) *IJUM Law Journal* 73.

⁷⁶ FC (n 72) art. 42(5).

Malaysia, the Federal Territories minister, and a maximum of three other members chosen by the King as he is the chief of the Federal Territories Pardons Board. In the process of pardon under this Article, the Attorney-General would generate a conflict of interest as he was the prosecutor of the case and now playing a significant function to advice on all legal issues in the pardon petition. He also ascertains the bidding of the ruling government in the pardon meeting. If the offender is a member of the ruling party, then the pardon decision may be done by looking to the political involvement, but not for the public interest. As a result, the function of the power of pardon would be exercised as an instrument to patronise political benefits.⁷⁷

It can be identified from Article 42 that the pardoning authorities are relatively unknown to any of the disputing parties. As the third party to the dispute, they would arbitrarily decide on pardon petition without acknowledging the true pain and suffering of the disputing parties of the committed crime. Aside from that, the decision would be criticised by the public and would cause dissatisfaction to the victim or his relatives as they would feel that justice has not been achieved. This feeling of resentment would later grow and encourage the need for revenge. As a result, this would lead to a prolonged feeling of hatred and add to the possibility of causing unrest in society which might lead to further crime.⁷⁸ Therefore, it is submitted that the current practice of the power of pardon would not be properly utilised to establish social peace and justice unless the pardoning authorities decide the plea of pardon by creating a mutual understanding between the parties on the issue.⁷⁹ However, this study does not propose to empower sufferers of the committed crime to control pardoning authority but rather to allow them to contribute to enhancing the quality of the pardon process by expressing their unique perspectives.

VI NATURAL LIFE SENTENCE UNDER THE *SHARI'AH*

The protection of freedom and human dignity is one of the core purposes of imposing punishment in Islamic criminal justice system. According to this model, the prison authorities must safeguard the wellbeing of the inmates and their human pride. They need to treat the prisoners as free individuals with the exception of being confined to custody. However, Ayatollah has stated that the prisoners should carry out as little hardship as possible while it can still be called a prison sentence as necessity is relative.⁸⁰ It is also noted that if someone is imprisoned for a long term, the jail administration should not dehumanise or treat them less favourably than other prisoners. It is also imperative that the police and the prison service should not violate legal rights of the prisoners. When a prisoner commits a crime in the prison, he must be handed over to legal authorities in the same way as another free person who commits a crime outside the prison.⁸¹ They must

⁷⁷ Daniel Pascoe, 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us about Malaysia's Royal Pardon System' (2016) 18(1) *Asian-Pacific Law & Policy Journal* 72, 82.

⁷⁸ Majdah and Nasimah (n 69) 47.

⁷⁹ Pressreader, 'Hope within the prison walls' *The Star Malaysia* (online, 24 May 2015) <<https://www.pressreader.com/malaysia/the-star-malaysia/20150524/281539404548545>>.

⁸⁰ Ayatollah Sayyid Muhammad Sadiq Al Shirazi, 'Rights of A Prisoner' in *The Rights of Prisoners according to Islamic Teachings*, tr Z. Olyabek (CreateSpace Independent Publishing Platform, 2014) 36.

⁸¹ Ibid.

not be transferred to any other authority to punish for their wrongdoings. According to the Islamic criminal justice system, a natural life sentence should not be supported for the following reasons:

A Contradicting the Nature of Punishment in Islam

Islamic criminal justice system provides certain punishments for murder and for some other offences which are known as *Qisas* offences. It also prescribes some specific punishments for many other wrongdoings. In the history of Islamic judicial system, no judge of the *Shari'ah* court has given the natural life sentence for any offence, but it has decided the cases based on the similarity of punishment for each case when the offender is proven guilty. The main two sources of the *Shari'ah* namely *al-Qur'an* and *Sunnah* of the Prophet Mohammad (PBUH) and even any analogy of *Shari'ah* judges do not apply natural life sentence for any offence. However, the *Shari'ah* has imposed a punishment based on the nature of the crime which is prescribed in the divine rulings as Surah Al-Baqarah has prescribed that: "O you who believe! *Al-Qisas* (the Law of Similarity in punishment) is prescribed for you in case of murder" (2:178). This verse can be interpreted that an offender should be punished based on the nature and harshness of the crime. It does not justify the natural life imprisonment which puts the offenders in the prison for their whole life. This punishment does not carry any rational benefit to the people. According to the majority Islamic schools of thought, an offender can be incarcerated until showing repentance from the crime.⁸² Therefore, natural life sentence should not be implemented in any case as it is not fair to the convict or the public.

B Violating the Rehabilitation Purposes of Islam

The Islamic criminal justice system has articulated that educational programmes may be set up by prisoners to teach fellow prisoners in any field of learning - material or spiritual, morality or, economics, politics or sociology - which will be considered as rehabilitation.⁸³ However, Magee has claimed that currently lifetime prisoners are controlled differently from other prisoners. None of the programs of education or rehabilitation available to others in even the strictest of the prisons is available to natural life prisoners. Their life is much more stressful and hopeless.⁸⁴ Karpal Singh who was a renowned Malaysian lawyer claimed that "Natural life imprisonment is like living dead ... cruel. It should be abolished like mandatory death penalty."⁸⁵ This sentence comes without any realistic chance of relief. Hence, indefinite nature of life imprisonment is inhuman, unjust and

⁸² Rudolph Peters, *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century* (Cambridge University Press, 2005) no 2, 34.

⁸³ Baroness Vivien Stern, 'Alternatives to the death penalty: the problems with life imprisonment' (2007) *Penal Reform International, Penal Reform Briefing No. 1*, 9.

⁸⁴ Dennis L. Peck, 'Book Review: Slow Coming Dark: Interviews on Death Row' (1986) 11(1) *Criminal Justice Review* 59.

⁸⁵ Athi Shankar, 'Do away with natural life sentence' (online, November 2012) <<http://www.freemalaysiatoday.com/category/nation/2012/11/11/do-away-with-natural-life-sentence/>>.

contrary to the principle of equality before the law which infringes the basic rights of the prisoners.

Islamic law has encouraged criminals to become regretful or remorseful after a commission of an offence. A similar ideology was established in Christianity.⁸⁶ It is pointed out that if a criminal has repented or apologised after the commission of a crime, he should be pardoned to protect human dignity. Additionally, if someone humiliates a person or practices oppression with the intention of upholding the pride of mankind, then his claim will be disregarded because human dignity will never be protected by disregarding someone's legal rights.⁸⁷ According to Al-Quran (9:105), "Work. Allah, His Messenger, and the Believers will observe your work: and you will be brought back to the Knower of the unseen and the seen, then will He show you the truth of what you did." In fact, in Islam the sentenced person may carry on his daily activities through his nominee. Prophet Muhammad (PBUH) said, "People have dominion upon their wealth and their selves."⁸⁸ Therefore, it can be highlighted from the prophetic teachings that the prisoner may choose to engage in all dealings and transactions inside the prison, personally or through a representative. However, at the present time it is very rare to find a prison where prisoners are allowed to deal business during the sentenced period. In addition, imprisonment confines the life of prisoners from all kinds of social activities in the current world. It is found in an event that Sam Kian Seng who was a life inmate was not given a chance to join in the funeral of his parents⁸⁹ which clearly indicates that natural life sentence disrupts the basic rights of prisoners to live as a natural human being. Islam disregards such a severe and inhuman punishment to signify the people's dignity and freedom by giving them a chance to repent after the commission of an offence instead of leading a lifetime imprisonment.

C The Current Pardon Practice Violates the Rights of the Victim in the Shari'ah

The concept of pardon in the tenets of Islamic law is different from current secular law practices. Islamic criminal justice system empowers the victim (in the case of injury) or his family (in murder cases) to participate in the pardon power based on the law of parity. There are limits on the discretionary power of the rulers or anyone else⁹⁰ as the unlimited discretion of the state in matters of pardon would not result in fairness in *Qisas* cases which require retaliation or compensation (*Diya*).

The *Shari'ah* recommends forming a fair and peaceful dispute resolution process where all disputing parties are directly involved in the decision-making process.⁹¹ This

⁸⁶ Gardiner (n 2) 118.

⁸⁷ Ayatollah (n 80) 7.

⁸⁸ Muhammad Bin Ali Bin Ibrahim AlAhsai, *Awali Al Laila Al Aziziah in Religious Hadiths* (Bayrut: Dar Ihya' al-Turath al-'Arabi lil-Tibaah wa-al-Nashr wa-al-Tawzi, 2009) vol 1, 222.

⁸⁹ Pressreader (n 79).

⁹⁰ Ebru Aykut, 'Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire' (2017) 4(1) *Journal of the Ottoman and Turkish Studies Association* 17.

⁹¹ Daniel Pascoe and Michelle Miao, 'Victim-Perpetrator Reconciliation Agreements: What Can Muslim-Majority Jurisdictions and the Prc Learn from Each Other?' (2017) 66(4) *International and Comparative Law Quarterly* 969.

unique dispute resolution also expects to adopt a peaceful negotiation among people in the society.⁹² This rule offers the victim or his family to grant pardon with or without compensation (*Diya*) with their free choice and without any coercion or pressure. This pardoning power will also be implemented for the sake of Allah and His mercy. Thus, it is worth noting that the injured party may issue a pardon by accepting monetary compensation or charity or without any worldly compensation.⁹³ If the punishment is waived in lieu of pecuniary penalty, it must be paid from the own wealth of the convict.⁹⁴ The amount of the compensation could be negotiated between the disputing parties.

Islamic rule of pardon ensures justice through peaceful settlement between disputing parties.⁹⁵ Based on this notion, once the victim or his family has chosen to pardon the offender with or without remedies, there will be no longer any ill-feeling or dissatisfaction or vengeance towards the criminal. Anyone who wishes to avenge the death of the victim shall be given painful recompense. Once pardon is granted, even by only one member of the legal heirs of the deceased, the consequence would be the lifting of the imposed punishment.⁹⁶ However, the convict must provide the remedies to the aggrieved family accordingly. After getting a decision from the victim or his family, the Executive Head of the State may issue pardon to release the offender. It is expected that in the pardoning proceedings, the rights of the sufferer of the offence and the offender will be well protected. However, after proffering the above Islamic rule of pardon, the government may impose an additional punishment which is lesser than the original punishment to rehabilitate the offender to become a better person than before.⁹⁷ It is important to note that the author does not intend to adopt the *Shari'ah* perspective to the present pardon process, but rather to inspire pardoning authority to allow the sufferers of the committed crimes to express their views before the pardon decisions are made.

VII CONCLUSION

Incarceration for lifetime contravenes human rights, fails to protect the interest of the public, and disrupts social rights and human honour and dignity. It also violates the equality of law. It is submitted that the main objective of punishment should not be the punishing of criminals, but to eradicate crimes and have justice for the people at large and lead them to a peaceful life.⁹⁸ The public interest is best served if the imposition of punishment induces the offenders to return from criminal behaviour to an honest living. Wan Yahya Judge supported this theory and opined that the court never wanted to judge

⁹² Ridoan Karim and Shah Newaz, Ahmed Kabir, 'A Comparative Analysis of Retributive Justice and the Law of Qisas' (2017) 2(2) *Journal of Nusantara Studies* 174.

⁹³ Peters (n 82) 7-8, 39.

⁹⁴ Osama Adli, *Diyya Al-Qatl [Blood Money in Homicide]* (Cairo, Dar Al-Nahda Al-Arabia 1985) 66.

⁹⁵ Mohamed Azam Mohamed Adil, 'Islam prefers mercy over retribution' *International Institute of Advanced Islamic Studies (IAIS) Malaysia* (online 22 June 2022) <<https://iais.org.my/publications-sp-1447159098/dirasat-sp-1862130118/shariah-law-governance-halal/item/1343-islam-prefers-mercy-over-retribution>>.

⁹⁶ Majdah and Nasimah (n 69) 48.

⁹⁷ Ibid 49.

⁹⁸ Gardiner (n 2) 117.

as a vehicle of vengeance in imposing punishment to the accused.⁹⁹ The court always sends criminals to prison for rehabilitation and never intends to punish them. All these responsibilities are given to the prison authorities who should transfer prisoners to an institution of correction and teach them to self-reflect and consequently to respect the law. Therefore, an option of parole should be implemented if there is alteration of criminal behaviour towards honest living. In this situation, a parole board should be formed to decide about the fate of the convicted person.

Every prisoner should be subjected to custodial discipline during imprisonment. As long as offenders are incarcerated for a lifetime, they must be governed by the law of the prison. A conditional acquittal may play an incentive to ensure that prisoners follow prison rules and regulations because the more a prisoner follows the rules, the higher are the chances that he or she may be released at the earliest available opportunity. This incentive was not applicable to prisoners serving lifetime imprisonment who have neither hope of release nor anything to lose. The sentiment of accountability of lifetime prisoners is being killed because there is no way to return to the usual life to serve the community.¹⁰⁰ Although the law of the pardon may reduce the lifetime incarceration, it may not always bring justice to the disputing parties if it is influenced by the bad motive of politics. Additionally, if the pardoning authority decides arbitrarily, it may be an injustice to the victims of the crime. To overcome these ambiguities, the pardoning authority should ensure mutual understanding among the disputing parties and safeguard all prospective legal rights before coming to a decision of pardon. The purpose of this proposal is not to control the pardon power, but to improve the standard of the pardon decision-making process. Therefore, this study suggests that the legislature should not just abolish the law of natural life sentence, but reform the law by educating and taking care of the prisoners in such a way that they would be naturalised to an ordinary human being and would become effective members of the community to contribute to social prosperity.¹⁰¹ Consequently, this reforming exercise would uphold the human rights, interest of the public, social rights and dignity of the convicts.

⁹⁹ *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165 (ACRJ Malacca) 6 ('*Hari Ram Seghal*').

¹⁰⁰ Mohsan Alhamad, 'Prisons in Islamic Sharia Law' *Linked In* (online, 18 November 2014) <<https://www.linkedin.com/pulse/20141118131240-314687442-prisons-in-islamic-sharia-law>>.

¹⁰¹ Gardiner (n 2) 129.