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Su'ud Rusli's Constitutional Court Challenge: Overhauling Clemency in Indonesian Death Penalty Cases?

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Since the formation of the modern Indonesian state in 1945, the Indonesian president has always possessed the constitutional power to grant clemency. This article provides an overview of the provisions of, and rationales for, Indonesia's clemency regulation, including the most recent Clemency Law passed in 2002, and its amending legislation in 2010. The article then outlines the Indonesian Constitutional Court's ruling in the Rusli decision (107/PUU-XII/2015 (15 June 2016)), which found the one-year deadline for applying for clemency set out in the 2010 amending legislation to be unconstitutional. It argues that the Rusli decision has significantly expanded the availability of clemency to death row prisoners in Indonesia. Only through deliberate waiver, rather than through artificial timelines, should prisoners now be lawfully excluded from the right to apply for mercy from the Indonesian president.

This article summarises the potential impact of Indonesian Constitutional Court Decision 107/PUU-XII/2015 (15 June 2016) on the presidential clemency process in Indonesian death penalty cases. The article builds upon the author's earlier research on potential challenges to Indonesian death penalty laws (Pascoe, 2015). Decision No 107/PUU-XII/2015, brought to the Constitutional Court by former naval officer Su'ud Rusli and two other petitioners, is notable for declaring unconstitutional the one-year deadline to apply for presidential clemency under Law No 5 of 2010 on Clemency. The 'Rusli decision', as this article will label it, has the potential to affect much of Indonesia's death row and long-term prison population,[1] particularly those prisoners who had not yet applied for clemency as at 15 June 2016.

However, to a significant extent, the Rusli decision's future influence depends upon whether future Indonesian courts view it as operating prospectively or retrospectively. Even with a traditional interpretation favouring prospective operation only, different readings of the Rusli decision have the potential to either deny certain groups of prisoners the right to apply for clemency in the future, or else compromise the plans of the Indonesian Attorney General's Office (AGO) for more rapid executions. In line with the views of the Indonesian Ombudsman in its recent findings on the execution of Nigerian national Humphrey Ejike, this article argues that the Rusli decision has significantly expanded the 'clemency franchise' among capital prisoners in Indonesia. Only through deliberate waiver, rather than through artificial timelines, should prisoners now be lawfully excluded from the right to apply for mercy from the president.

Background: Operation of the 1950 and 2002 Clemency Laws

While the operational specifics of the clemency process in Indonesia have changed through legislative and executive intervention several times over the years, since the formation of the modern Indonesian state in 1945, the Indonesian president has always possessed the constitutional power to grant clemency. Article 14(1) of the 1945 Constitution grants the president the power to grant clemency (*grasi*), by commuting criminal punishment or by releasing a prisoner through a pardon (Rachman, 2010; Judicial System Monitoring Programme, 2010: 4). The Constitution's only formal decision-making requirement is that the president must consider (*mempertimbangkan*) the Indonesian Supreme Court's recommendation in disposing of the case at hand, although this

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1 Prisoners serving sentences of two or more years of imprisonment are entitled to petition the Indonesian president for clemency (*grasi*), pursuant to Law No 22 of 2002 on Clemency, Art 2(2). This includes prisoners sentenced to life imprisonment and death.

recommendation is not binding.[2] The president may follow the Supreme Court's recommendation, disregard it, or instead follow the recommendations of other advisors and state agencies (Pascoe, 2017a: 320).

Independent Indonesia has enacted three clemency laws, Law No 3 of 1950, Law No 22 of 2002, and Law No 5 of 2010, to regulate the broad clemency power found in the 1945 Constitution.[3] Until the amendments introduced by Law No 5 of 2010, the defendant him or herself, a family member, a lawyer or the prison authorities were able to request clemency from the president, after a final unsuccessful court appeal, by a written petition (art 2(1) of Law No 3 of 1950; art 6 and art 8 of Law No 22 of 2002). Under the 1950 statute, there was a 30-day time limit for the prisoner to request presidential clemency (art 2(1) of Law No 3 of 1950), whereas no time limits were prescribed in the 2002 revision. When completed by the prisoner or his representative, the petition was processed and forwarded to the president by the AGO, and an execution could not be performed until a Presidential Decision (*Keputusan Presiden*) was issued, rejecting the petition (art 13 of Law No 22 of 2002, art 2(3) of Law No 3 of 1950). Until the 2002 law was passed (fixing a limit of three months: art 11 of Law No 22 of 2002), there was no time-limit for the issuing of the Presidential Decision (McRae, 2008).

Under the 1950 law, there were no restrictions on the number of times that a prisoner could request clemency (Fidrus, 2003). However, from 2002, if a death penalty prisoner's first petition was rejected, and he or she was not executed within a two-year period, as was most often the case, Law No 22 of 2002 authorised a *second* application for clemency, and the death sentence could not be carried out until the second petition had been rejected (art 2(3) of Law No 22 of 2002; Amnesty International, 2004: 2). The practical effect of the Law was that no execution could be carried out after a prisoner had spent more than two years on death row after the first petition, with the president needing to wait until the second petition was filed before rejecting it and authorising the execution. Although the president had to work to strict time-limits (three months to reject the petition), the prisoner had no deadline. For the president and the AGO, the only way around this was to carry out an execution within two years of rejecting the first petition, which was difficult to achieve with regularity, unless an individual case was given high priority and rushed through the system. Two examples of this expedited process from the 2000s were three Christian militants executed for murder in 2006 (Sijabat, 2006; McRae, 2012: 7), and the three Bali bombers executed for terrorism offences in 2008 (McRae, 2012: 7).

The 2010 Clemency Law

The inability to conduct regular executions pursuant to the 1950 and 2002 clemency laws then led the Indonesian legislature to revise and streamline the clemency procedure through a series of amendments to Law No 22 of 2002, by way of Law No 5 of 2010, enacted on 23 August 2010. The 2010 amendments updated the 2002 Clemency Law in the following key ways:

- the Minister of Law and Human Rights is now entitled to *unilaterally* apply for clemency on a prisoner's behalf if the prisoner, his lawyer, or a family member does not do so (art 6A);[4]
- prisoners initially had a time-limit of one year to apply for clemency from the date the conviction has attained 'permanent legal force' (*kekuatan hukum tetap*) (art 7(2));
- the Supreme Court now has a time-limit of 30 days to transmit its compulsory recommendation on the clemency petition, together with the case file, to the president (reduced from three months under the 2002 law) (art 10); and,

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2 Indonesian Constitutional Court Decision 107/PUU-XII/2015, 15 June 2016 (Rusli), 38

3 See also Constitution of Indonesia 1949, art 160; Constitution of Indonesia 1950, art 107; Government Regulation 67/1948 on Clemency.

4 This provision is designed to ensure that all prisoners have their death sentences considered for clemency, whether or not they apply for it (as mandated by the International Covenant on Civil and Political Rights, art 6(4)). Although a similar provision allowing the Supreme Court to submit clemency petitions (Supreme Court Regulation 1/1986) was enacted during the Soeharto period, this aspect of the 2010 Law appears to have been enacted in order to benefit prisoners, rather than merely to remove procedural barriers to execution.

- the prisoner's right to pursue a *second* clemency appeal after two years was removed (art 2(3)).

Furthermore, transitional provisions outlined in the 2010 Clemency Law mandated that all outstanding clemency petitions under the 2002 law should be ruled on by 22 October 2012 (art 15A(1)). For death row prisoners who had not yet submitted clemency petitions under the 2002 law, they had one year to do so (from the enactment of the amendment on 23 August 2010 through to 23 August 2011 (art 15A(2)).

Su'ud Rusli's Challenge to the One-Year Clemency Deadline

Su'ud Rusli was an Indonesian sailor who was convicted of premeditated murder in 2005 by a Jakarta military court and sentenced to death (PUT/14-K/PM II-08/II/2005, 8 February 2005; Suriyanto, 2015). Rusli escaped from prison twice in 2005 but was recaptured, and by the end of 2018 has now spent more than 13 years on death row. After all of Rusli's regular judicial appeals failed,[5] he applied for presidential clemency in January 2015, only to be informed that he was no longer eligible to be considered for pardon or commutation as the one-year application deadline had already lapsed (Suriyanto, 2015). In August 2015, Rusli, along with two other petitioners (Marselinus Edwin Hardian, a student, and H Boyamin Saiman, Rusli's attorney), brought a constitutional challenge to the new clemency time-limit (art 7(2) of Law No 5 of 2010) in the Indonesian Constitutional Court, claiming that the artificial deadline contravened the constitution.

In June 2016, Rusli, Hardian and Saiman's legal challenge was successful. In a surprising decision, the Indonesian Constitutional Court ruled that the one-year deadline was unconstitutional and invalid, because it conflicted with:

- the prisoner's human right to apply for clemency, based on the non-derogable right to life enshrined in art 28A and art 28I of the 1945 Constitution;
- the Indonesian president's unlimited prerogative power to grant clemency under art 14(1) of the 1945 Constitution;
- Indonesian citizens' constitutional rights to enjoy equal treatment before and equal protection of the law in art 28D of the 1945 Constitution, and;
- prisoners' concurrent right to apply to the Indonesian Supreme Court for a case review (*peninjauan kembali* or 'PK'), which may take an indeterminate time to be resolved.[6] Law No 22 of 2002 on Clemency stipulates that if a prisoner files for PK and for clemency at the same time, the PK application is dealt with first (art 14(1)).

Intriguingly, the court also considered that restricting clemency with a one-year deadline could prove detrimental to the Indonesian state's interests (rather than merely the prisoners' interests).[7] Examples the Court provided were cases where a prisoner might receive clemency as a 'reward' for cooperating with the authorities (for example, as a witness against a co-accused), clemency granted to boost Indonesia's foreign relations, or if clemency was required to reduce prison overcrowding.[8]

For Su'ud Rusli himself, the Constitutional Court's decision may mean that he is entitled to resubmit his previously disbarred application for clemency to the president,[9] depending on whether

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5 Rusli first appealed to the Jakarta Military High Court (PUT/32-K/BDG/PMT-II/AL/VIII/2005, 4 August 2005) and then to the Indonesian Supreme Court (PUT/34-K/MIL/2006 Pid/2010, 7 July 2006). Unusually for a prisoner sentenced to death, Rusli did not apply for extraordinary case review (*peninjauan kembali*), because he wished to admit guilt and seek forgiveness through clemency as soon as possible (Nainggolan, 2017; Suriyanto, 2015)

6 Rusli, 11, 19, 21, 22, 37, 78-79. See Pascoe (2015: 266-276) on the interaction between the PK procedure and the one-year clemency deadline under Law No 5 of 2010 on Clemency. Lindsey and Nicholson note that the Supreme Court has handed down a practice ruling placing a 180-day deadline on applications for PK, after which the AGO may proceed to execute the prisoner (Supreme Court Chief Justice Guidance on Death Penalty No 029/KMA/III/2009, 17 March 2009; Lindsey and Nicholson, 2016: 96).

7 Rusli, 78.

8 Rusli, 78.

9 A separate Constitutional Court challenge that Su'ud Rusli brought alongside the former Anti-Corruption Commissioner Antasari Azhar, arguing that the 1945 Constitution of Indonesia guarantees a prisoner's right to submit multiple clemency petitions, as with Law No 3 of 1950 on Clemency and Law No 22 of 2002 on Clemency, was rejected the week

the decision operates prospectively or retrospectively, as this article explains in further detail below. However, since the Constitutional Court's decision in June 2016, there have been no subsequent media reports on any further petition or its disposition. An August 2017 report suggested that Rusli was again attempting to engage the presidential clemency process (Torik, 2017), although it is unclear whether he will ultimately prove successful.

Even though the Rusli decision has invalidated the formal legislative deadline on clemency, some prisoners who have not yet applied for presidential clemency remain in danger of being executed. The decision left open the possibility that a prisoner or the prisoner's family members could 'waive' the right to seek clemency, and hence staff from the AGO would have to ask each prisoner whether or not he or she intends to waive the right. Without providing further details, the Constitutional Court stated that waiver of the right to seek clemency would occur where the prisoner postpones petitioning for clemency *solely in order to delay* his or her execution.[10] In that case, the authorities would be entitled to execute the prisoner, given the usual execution procedures, such as providing 72 hours' notice (Lindsey and Nicholson, 2016: 103). The following section provides further analysis of the waiver procedure contemplated by the Constitutional Court, and what approach prisoners and their families might take in order to avoid waiving the right to seek clemency, which is an important quasi-legal safeguard against execution, guaranteed by art 6(4) of the International Covenant on Civil and Political Rights.[11] At the time of writing, the AGO is proceeding extremely cautiously before authorising a fourth 'round' of executions during President Joko Widodo's tenure, for fear of contravening prisoners' rights (Qodar, 2018; Hidayat, 2018).

Waiving the Right to Seek Clemency

One of the primary policy motivations behind the changes brought by Law No 5 of 2010 on Clemency was to prevent prisoners and their lawyers failing to submit a petition in order to delay execution indefinitely (Elucidation of Law No 5 of 2010 on Clemency). This is the reason that the one year time-limit was put in place. As the Constitutional Court opined in the Rusli decision, for those prisoners who benefit from the new Law, AGO representatives will now have to systematically visit all death row prisoners and ask whether the prisoner (or a family member) are still planning to apply for clemency, or whether they will waive the right.[12] To some extent, the AGO already engaged in this practice even before the Rusli decision, asking prisoners whether they would apply for PK or clemency (Pascoe, 2015: 268; Indonesian Ombudsman, 2017). Those prisoners who intended to exercise one or both options could not be 'listed' for imminent execution by the AGO.

For some prisoners, an appropriate response might be: 'Yes, I am still applying, but my lawyers and I require more time to collect information, refine our arguments and draft the petition.' The implication of the Rusli decision is that, to gain more time, a death row prisoner or a family member would have to convince the AGO *and* the Minister for Law and Human Rights (given the latter's legislative power to apply immediately for clemency on the prisoner's behalf) that a petition is in the process of being prepared,[13] and that the intention of the prisoner and his or her legal representatives is not to delay adjudication on the case indefinitely. So long as the prisoner's intention is not to abuse

after the Constitutional Court decision that is the focus of this article (The Jakarta Post, 2016a). See Decision No 32/PUU-XIV/2016 (21 June 2016).

10 Rusli, 79.

11 Indonesia acceded to the International Covenant on Civil and Political Rights in 2006.

12 Rusli, 79. '[P]rosecutors must ask the convict or the family whether they will use such rights… If they do not want clemency, the prosecutors can go ahead with the execution' (The Jakarta Post, 2016b). One implication here is that prisoners could not formally waive the right to seek clemency prior to the Rusli decision. Of course, in practice, a prisoner could simply not apply for clemency, thereby attracting the attention of the Minister of Law and Human Rights. See note 4 above, and associated text.

13 Although the power of the Minister of Law and Human Rights to ask for clemency on a prisoner's behalf is intended to promote 'just' and 'humanitarian' purposes (Law No 5 of 2010 on Clemency, art 6A(1)), for example where the prisoner is not able to request clemency because of mental incapacity, old age, or where the prisoner has no family members to plead for clemency on his or her behalf, there is a possibility that this power will be used more frequently by the government where a prisoner attempts to delay petitioning for clemency 'indefinitely'. It would, of course, be undesirable to see a return to the Soeharto era practice of forged or unilateral clemency applications by the authorities made solely to remove the last procedural barrier to execution. See n 4 above.

the process, then the Rusli decision appears to allow death row prisoners an open-ended timeframe, so as to afford every prisoner a fair opportunity to submit a clemency petition closely tailored to that prisoner's individual circumstances.

What, then, amounts to a 'waiver' of the right to seek clemency? Although, at a very minimum, AGO staff must now make enquiries of every prisoner on death row and close family members,[14] it is still uncertain following the Rusli decision whether the AGO may proceed to execute the prisoner if the prosecutorial representative returns a *second* time to request the prisoner or prisoner's family to file for clemency, and no petition is submitted soon afterwards (Indonesian Constitutional Court, 2016). A prisoner's publicly-expressed refusal to apply for clemency (which occurs frequently in Indonesia, given this is deemed a request for forgiveness after an admission of guilt (Preamble, art 1 and Elucidation of Law No 22 of 2002 on Clemency; Preamble of Law No 5 of 2010 on Clemency; Pascoe, 2017a: 326)), would certainly provide prosecutors a stronger argument that clemency was indeed waived. Much will depend on how often AGO representatives visit prisoners on death row to request information on clemency status, the language the AGO uses in doing so, the prisoners' responses to these requests, any statements the prisoner makes to the media, and the AGO's efforts to contact biological family members. In the United States, there is an established literature on death penalty 'volunteers', that is, death row prisoners who have waived their rights to seek judicial appeals and clemency (for example, McClellan, 1994; Chandler, 1998; Blume, 2005; Nelan, 2008; Cooper, 2009). Notably, in several of these cases, a prisoner's legal waiver only crystallised after rigorous questioning from defence counsel, trial court justices and prisons researchers, so that an active, informed, and consensual decision could be made (Cooper, 2009: 112; McClellan, 1994: 238).[15]

As mentioned, the language the prisoner uses in communications with the Indonesian authorities and media sources may be crucial, along with the precise contents of any purported waiver document the prisoner signs. As the Rusli decision itself suggested, prosecutors must ask prisoners if they intend to use their clemency rights before declaring these waived (Indonesian Constitutional Court, 2016; The Jakarta Post, 2016b), rather than merely asserting to prisoners that their opportunity to do so has passed after a lengthy period of inactivity. While the prisoner cannot logically respond by stating that he or she is waiting for arguable clemency grounds to develop slowly over time (as in certain Indonesian cases where clemency was granted, based on disability, old age, psychiatric illness, public support or good behaviour in prison: Pascoe, 2017a: 321-322), it seems unproblematic to demand additional filing time to seek information and refine arguments based on existing clemency grounds arguable in the present case.[16] This would not be withholding the petition solely for the purpose of delaying execution.[17]

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14 See Law No 22 of 2002 on Clemency, art 6(3): 'in the event that a prisoner is sentenced to death, a clemency petition may be filed by a family member of the prisoner without the consent of the convicted person'. Family is defined in the Elucidation of Law No 22 of 2002 on Clemency as 'husband or wife, biological children, biological parents and biological siblings'.

15 In Indonesia, based on the most recent NGO data available from October 2016, at least two death row prisoners had declined to submit any judicial or clemency appeals to their death sentences imposed at first instance. Both were Indonesian citizens convicted of murder (KontraS, 2016). Furthermore, current Attorney General Muhammad Prasetyo has stated that, in general, terrorism suspects have been reluctant to file for clemency. Prasetyo was quoted as saying 'They consider themselves innocent, and therefore they don't need to ask for forgiveness' (Ismail, 2018).

16 Based on available *Bahasa Indonesia* and English language media reports, Indonesian presidents since the fall of Soeharto have granted clemency in capital and non-capital cases for the following speculated reasons: as part of the democratisation and peace-building process after the fall of Soeharto, to maintain good relations with foreign nations; to encourage reciprocal clemency grants for Indonesians on death row abroad; to privilege mitigating factors such as disability, old age, youth or psychiatric illness, for good behaviour in prison and expressed remorse; to recognise a disparity between sentences requested by prosecutors and sentences imposed by judges; because the prisoner was a drug 'mule' rather than a large scale drug trafficker; because of the prisoner's motives in committing the crime; because of strong public support for the prisoner; because of the prisoner's previous contribution to society; because of the existence of possible provocation in a murder case; and due to any lingering doubts over the prisoner's guilt short of that which would justify a full exoneration (Pascoe, 2017a: 321-22). With clemency being a plenary prerogative power attaching to the presidency, this list of justifications may expand in the future. However, unless government officials personally explain each decision in the media, commentators may only speculate on the real reasons a clemency grant was made. In Indonesia, there is no legal obligation to provide public justifications for clemency grants (Amnesty International, 2015: 19 n 30, 53).

17 Rusli, 79.

Prospective Operation of the Rusli Decision?

Notwithstanding the extra time that the Rusli decision appears to afford capital prisoners in Indonesia,[18] the most pressing legal question is whether the one-year clemency deadline has been abolished for current death row prisoners, or only for prisoners whose cases will reach the clemency phase sometime in the future. This controversy evokes 'prospective-only' (or 'non-retrospective') overruling, a legal doctrine that has received significant academic attention in both civil law and common law jurisdictions (for example, Levy, 1960; Schaefer, 1967; Traynor, 1977; Koopmans, 1980; Juratowitch, 2008; Steiner, 2015b). Although a retrospective application of the Rusli decision remains possible and would be desirable to safeguard the procedural rights of present death row prisoners, the most likely outcome is a prospective-only interpretation, as with most previous Indonesian Constitutional Court decisions (Lindsey and Nicholson, 2016: 64; Butt and Lindsey, 2018: 107). Yet even the meaning and limits of a prospective-only interpretation are uncertain.

Prospective Overruling and the Indonesian Constitutional Court

Article 58 of Indonesia's Constitutional Court Law (Law No 24 of 2003) provides for the following consequence upon invalidation of unconstitutional laws:

> Statutes reviewed by the Constitutional Court remain in force until there is a [Constitutional Court] decision declaring that the statute conflicts with the Constitution.

Unlike cases decided by the Indonesian Supreme Court (Asshiddiqie, 2012), the Constitutional Court normally interprets this provision as allowing for prospective-only overruling, such that the unconstitutional statute is only invalid from the moment the court finishes announcing its decision (Sutiyoso, 2010: 43; Butt and Lindsey, 2018: 107), rather than retrospectively from the date of the Law's enactment, or from the date on which the case facts first arose. A presumptive prospective-only position was confirmed in relation to Rusli's case by then Constitutional Court Chief Justice Arief Hidayat, when interviewed in the media after the decision (The Jakarta Post, 2016b).

The key consequence of prospective-only overruling is that any government action (such as refusing to accept or rejecting a clemency petition) taken under the relevant legislation before it is invalidated remains lawful (Butt and Lindsey, 2012: 120; Butt and Lindsey, 2018: 107). The unfortunate outcome of this rule is that a prisoner in whose name a challenge is brought, even if successful, cannot enjoy the benefit of that decision, thereby creating a disincentive to file the challenge in the first place. The court's decisions remain 'mere dictum' until applied in future cases (Steiner, 2015a: 7). As Butt and Lindsey have observed of the purported bar against retrospectivity in Indonesian Constitutional Court decisions:

> If Constitutional Court decisions in constitutional review cases … only apply prospectively, then the absurd situation is created whereby no litigant – no matter how deserving and badly treated – could ever receive the benefit of a win in the Court … This is particularly tragic outcome if the litigant is wrongfully facing long imprisonment or, worse still, the death penalty. (Butt and Lindsey, 2004)

On the other hand, for the Constitutional Court itself, this rule is justified by the Court's focus on interpreting generally-applicable statutory norms, rather than establishing remedies in individual cases (Butt and Lindsey, 2018: 107). Although Su'ud Rusli himself remains alive, several other prisoners have not proven so lucky in the aftermath of the Rusli decision, as the following section shows.

The July 2016 Executions and Indonesia's Current Death Row

Following the Rusli decision in June 2016, three prisoners, whose one-year clemency deadline had nominally expired (Seck Osmane, Freddy Budiman and Humphrey Ejike) were set to be executed,

[18] This assumes that, in the spirit of the Constitutional Court's decision, the AGO will wait at least a year before asking whether prisoners in future cases have 'waived' their clemency rights. However, this timeframe is by no means guaranteed.

in a continuation of President Widodo's hard-line position against drug traffickers.[19] Osmane, Budiman and Ejike submitted last minute clemency petitions to President Widodo, yet were still executed on 29 July 2016, in disregard of these petitions (Eddyono et al, 2016: 6; Amindoni, 2016; Budiman et al, 2017: 30). A fourth prisoner within the same group, Michael Titus Igweh, was executed while still in the process of submitting a second PK application (KontraS et al, 2016: 5; *News.com.au*, 2016). In the aftermath of these executions, the AGO maintained that the one-year time limit imposed by Law No 5 of 2010 on Clemency continued to apply to any cases decided before the Rusli decision. In the AGO's view, in any case where a prisoner has already enjoyed a year or more to seek clemency, and the prisoner was convicted at first-instance before the Rusli decision, he or she can be lawfully executed (*Republika.co.id*, 2016; Indrawan, 2017; Movanita, 2017).

Following the four July 2016 executions, legal NGO LBH Masyarakat filed a complaint with the Indonesian Ombudsman claiming that the execution of their client Humphrey Ejike was illegal due to maladministration. The Ombudsman investigated these claims. The Ombudsman's final report, released to the public on 28 July 2017, found several legal breaches by Indonesia's courts and prosecutorial agencies. At issue was not only Ejike's clemency application to President Widodo, received by the Central Jakarta District Court four days before his execution, but also the Central Jakarta District Court's failure to consider Ejike's second application for PK, and the timing of the prisoner's execution, which was conducted less than the mandatory 72 hours following notification (Indonesian Ombudsman, 2017). With respect to clemency deliberations, the Ombudsman's report found that the authorities should not have executed Ejike after he submitted his first and only clemency petition (Indonesian Ombudsman, 2017), thereby implicitly supporting either a retrospective interpretation of the Rusli decision, or, at the very minimum, a prospective interpretation favouring defendants whose petitions had not yet been dismissed as out of time before the Rusli decision was handed down. Although the Ombudsman's precise reasoning on the clemency issue was unclear, overall, the report's findings of maladministration in Ejike's case highlight the potential for deadly errors based on different interpretations of the Rusli decision.

Aside from three of the four men executed in July 2016, at the time of writing there are dozens of other prisoners among the 185 people on Indonesia's death row (Nurita, 2018) whose one-year clemency deadline (under the 2010 Clemency Law's original stipulation) has already expired and who now face imminent execution if the AGO provides them the same treatment (KontraS, 2016). Su'ud Rusli himself forms one of this group. The discussion below works towards clarifying the legal status of these prisoners. There are at least three possible interpretations as to how the Rusli decision might affect Indonesia's existing death row prisoners. The subsections below consider these interpretations in increasing order of utility for defence advocates.

The Attorney General's Position (the Most Conservative View)

Given the Constitutional Court's traditional preference for prospective-only overruling, the most conservative possible interpretation of the Rusli decision is that it only benefits prisoners who had not yet been convicted and sentenced at the District Court (that is, trial court) level as at 15 June 2016 (Movanita, 2017; Indrawan, 2017), or even that it solely applies to cases whose facts arise after that date (Steiner, 2015a: 6, 18). Pursuant to this latter interpretation, the prisoners to directly benefit from the Rusli decision's extended clemency timeline may not reach the clemency petition phase for several years yet.

Unsurprisingly, a conservative view of the Rusli decision is generally favoured by the current Indonesian Attorney General, Muhammad Prasetyo, when interviewed in the media (Republika.co.id, 2016; Movanita, 2017). For example, in a February 2017 interview, Prasetyo stated 'I think the Constitutional Court decision is not retroactive, so *existing verdicts* may be immediately implemented' (Indrawan, 2017, emphasis added). In other words, all prisoners who had been

[19] Osmane was Senegalese, Budiman was Indonesian and Ejike was Nigerian. For further information on the three cases, plus that of Nigerian Michael Titus Igweh, see Imparsial (2017: 16-18). Prior to these killings, there had been two previous 'rounds' of executions carried out under President Widodo, on 18 January 2015 and 29 April 2015. In total, 14 prisoners' lives were ended. All 18 prisoners executed under President Widodo were convicted of drug trafficking (Imparsial, 2017: 7-15).

convicted at first instance by 15 June 2016 would be subject to the old law, with a one year deadline to apply for clemency after their cases attain 'permanent legal force', which, for most prisoners, refers to the Supreme Court rejecting the defendant's cassation appeal (Elucidation of Law No 22 of 2002 on Clemency, art 2(1); KontraS, 2016).

Adopting this interpretation, the AGO would retain tight control over the timing of executions for most prisoners on death row, excluding only those very recently convicted. Although the AGO budgeted for 30 executions in 2017, representing a minority of finalised cases (Eddyono et al, 2016: 2),[20] retaining maximum choice over which prisoners to list for execution is politically valuable to the prosecutorial agency. With a larger range of prisoners to list for execution, the AGO, armed with the president's informal input (Interview with Indonesian human rights lawyer, Jakarta, 12 April 2013; McRae, 2015), can prioritise prisoners convicted of particular crimes (namely, drug trafficking), from particular nationalities (those whose governments are unlikely to protest much, notably prisoners from African nations),[21] those prisoners with prominent public profiles, and those whose behaviour in prison has been reprehensible, for example, by attempting escape or dealing narcotics. In the past, these kinds of cases have jumped the 'queue' for execution (Hands Off Cain, 2008; McRae, 2008; McRae, 2012: 7), irrespective of when the prisoners concerned were first convicted.

The Less Conservative View

Nevertheless, even a prospective-only ruling in Rusli's case might be interpreted by future courts in different ways, some with less deleterious consequences for death row inmates. One less-conservative interpretation centres on cases where the judicial and clemency appeal timeframe in some way bisects 15 June 2016 – the date of the Rusli decision. Need the ruling only benefit prisoners whose case facts or first-instance convictions arise after the decision? What about prisoners who were convicted and sentenced to death before the Rusli decision was handed down, but were still appealing their sentences or convictions at the Provincial High Court or Supreme Court level on 15 June 2016? Or prisoners who have exhausted their regular judicial appeals (that is, excluding PK), but not more than 12 months before the Constitutional Court's ruling, such that on 15 June 2016, their original clemency 'deadline' had not yet elapsed?

Relevantly, art 7(2) of Law No 5 of 2010 on Clemency, the provision struck out by the Rusli decision, established clemency filing deadlines directed at cases that had reached the 'permanent legal force' stage. This reflects clemency's status as an extra-judicial mechanism to mitigate punishment, in Indonesia often granted for reasons beyond the Supreme Court's legal parameters.[22] If the now-invalidated provision were interpreted as restricting the clemency prospects of 'permanent legal force' cases, a prospective-only operation of the Constitutional Court's decision would presumably benefit all cases which had not yet reached such a status before the date of the decision. In other words, the only prisoners who would be prevented from filing for clemency after a one year deadline are those whose cassation appeals were already rejected by the Supreme Court before 15 June 2016.[23] On this interpretation, upon the one-year deadline being reached (even if some months after 15 June 2016), the right to apply for clemency would automatically extinguish, regardless of any enforcement action undertaken by the executive. For example, if a prisoner was convicted and sentenced to death in 2012, and the conviction attained 'permanent legal force' in early 2016, the one-year deadline would begin to run as soon as the prisoner lost his or her cassation appeal in early

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20 By the end of 2017, the AGO was unable to meet this 'target' and perform any executions at all, largely due to the legal uncertainty created by the Rusli decision and Constitutional Court Decision 34/PUU-XI/2013, as well as evolving political priorities. Constitutional Court Decision 34/PUU-XI/2013 held that restricting petitioners to only one PK and restricting the time for application could cause injustice, given the possibility of new evidence coming to light after the first PK. However, the Indonesian Supreme Court for some time refused to allow second PK petitions, thereby creating a conflict between the two institutions (Lindsey and Nicholson, 2016: 87-88).

21 Since the fall of Soeharto, 12 of Indonesia's 45 executions have involved Africans (27 percent). However, in 2015, African nationals comprised only 8 percent of Indonesia's death row. The equivalent figure in 2010 was 17 percent (data from KontraS, 2010; KontraS, 2013; KontraS, 2016; Reza, 2016; Amnesty International, 2013a; Amnesty International, 2013b).

22 See note 16 above.

23 The Indonesian Ombudsman asserted that this was the Attorney General's preferred interpretation of the Rusli decision (Indonesian Ombudsman, 2017), contradicting the AGO's position expressed in the news media reports described above.

2016. If no clemency petition had yet been lodged one year later, by early 2017, then the prisoner would be at risk of execution.[24] However, if the same prisoner's case had only reached 'permanent legal force' status at the end of 2016, after the Rusli decision, the clemency timeline would not apply at all.

The Defence Advocates' Position (the Most Expansive View)

A maximally-expansive prospective-only interpretation of the Rusli decision, naturally favoured by defence advocates, would benefit any prisoner who, at the time of the decision, had not yet attempted to file for clemency and who was serving a prison sentence of two or more years' duration, or who was under a sentence of death.[25] Precedents do exist here. For example, in the prominent case of the former Chair of the Corruption Eradication Commission (KPK), Antasari Azhar (1532/PID.B/2009/PN.JKT.SEL, 11 February 2010), the defendant was permitted to file for clemency in August 2016 (Ihsanuddin, 2017), even though the one-year deadline in Antasari's (non-capital) murder case expired in September 2011, almost five years before the Rusli decision was handed down (Fachrudin, 2017). In January 2017, President Widodo granted Antasari's clemency application, reducing his sentence from 18 years to 12 years (Ihsanuddin, 2017).

Similarly, for Seck Osmane, Freddy Budiman and Humphrey Ejike, prisoners whose cases had unquestionably reached 'permanent legal force' status before the Rusli decision,[26] former Constitutional Court Chief Justice Arief Hidayat contemporaneously labelled the legality of their post-Rusli executions 'debatable' in the media (The Jakarta Post, 2016b), given that they attempted to file clemency petitions as a last-ditch measure before their executions. As with Antasari Azhar, their first and only clemency petitions were filed after the Rusli decision, with all of these cases having reached 'permanent legal force' status well before the decision. As described above, the Indonesian Ombudsman appeared to favour this interpretation of the Rusli decision when handing down its report on the legality of Humphrey Ejike's execution in July 2017 (Indonesian Ombudsman, 2017).

Nevertheless, even on this most liberal interpretation, all prisoners who applied for clemency between August 2010 and June 2016 (within the previous one-year deadline) are, in effect, being penalised for complying with the law, whereas those who waited longer (except, of course, Osmane, Budiman and Ejike) now gain the benefit of the Constitutional Court's decision. This apparent unfairness is a natural consequence of prospective-only overruling. Absent retrospective overruling, discussed below, no interpretation of the Rusli decision would allow a capital prisoner to resubmit a rejected petition at a later date, seeking the extra preparation time that post-Rusli cases now enjoy.

Which Interpretation Applies?

At first glance, art 1(2) of the Indonesian Criminal Code 1918, cited by the Constitutional Court in the Rusli judgment,[27] appears to support the three prisoners executed in July 2016, along with any death row convict who had not yet petitioned President Widodo for clemency by 15 June 2016. The provision specifies that: 'In case of alteration in the legislation after the date of commission of the [criminal] act, the most favourable provisions for the accused shall apply.' In the clemency context, this clause supports the most expansive prospective-only operation of the Rusli decision, described in the preceding subsection, such that all eligible prisoners who had not yet applied for clemency by 15 June 2016 might still benefit from the new open-ended clemency timeframe. Nevertheless, the

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24 It is unclear whether the previous one-year deadline also bound unilateral clemency applications by the Minister of Law and Human Rights, which might have benefited prisoners in these circumstances (art 6A(2) of Law No 5 of 2010 on Clemency). The fact that in the Rusli decision, the Constitutional Court referred to the president's potentially frustrated ambitions to grant clemency for utilitarian purposes suggests that the deadline concurrently bound the Minister (Rusli, 78). Furthermore, the section also refers to the 'submission process' initiated by the Minister of Law and Human Rights (*proses pengajuan*), based on the same verb referred to in art 7(2) of Law No 5 of 2010 on Clemency, which imposes a submission deadline of one year.

25 See note 1 above.

26 Osmane, Budiman and Ejike's cases reached 'permanent legal force' status in 2005, 2014 and 2006, respectively (KontraS, 2016; Kompas.com, 2014).

27 Rusli, 76.

provision in question regulates crimes and punishments found within the Criminal Code 1918, rather than clemency as a presidential prerogative aimed at mitigating or eliminating criminal punishment.

Butt and Lindsey have argued that the main effect of art 58 of the Constitutional Court Law is that any administrative action taken before legislation's prospective invalidation by the Court does not need to be 'undone' (Butt and Lindsey, 2012: 120; Butt and Lindsey, 2018: 107). The difficulty in cases such as Osmane's, Budiman's and Ejike's is in identifying the relevant government 'action' or 'decision' made under the superseded law.

Clues are provided by the wording of art 7(1)-(2) of the Law No 5 of 2010 on Clemency, which refers to a clemency petition being 'filed' or 'lodged' (*diajukan*) within the requisite one-year deadline after the case achieves 'permanent legal force' status. According to the provisions of Law 22 of 2002 on Clemency, which still remain in force, the prisoner may submit a clemency petition to the governor of the prison in which he or she is detained. The prison governor then submits a copy of the petition to the relevant District Court, and the original to the president. Alternatively, the prisoner's representatives may submit the petition to both the president and the District Court directly, bypassing the prison governor altogether (art 8).

If Butt and Lindsey are correct, then to enforce the 2010 Clemency Law's now superseded timeline, the Indonesian authorities possessed two options. Importantly, both methods hinged on the prisoner actively attempting to seek clemency beyond the deadline. First, depending on which method of submission the prisoner chose, the prison governor, the District Court registrar or the Presidential Palace could refuse to accept the clemency petition altogether. Therefore, after one year, the prisoner would not be able to physically 'file' or 'lodge' the petition at its required destination. Alternatively, as has been suggested in the controversy before the Indonesian Ombudsman and, likewise, in Su'ud Rusli's case itself (Rivki, 2015; Rahman, 2016),[28] the prisoner's representatives might mail or hand-deliver copies of the clemency petition, but the document itself would be legally invalid and therefore not formally 'filed' for processing, even if it were physically received by the correct institution. In either case, the 2002 Clemency Law's stipulation that a prisoner cannot be executed while his or her clemency petition is still pending, and that a prisoner must be notified that his or her petition has been rejected before being executed, would both be inapplicable (art 3 of Law No 22 of 2002).

In asserting illegality by the government, lawyers for the three of the four men executed in July 2016 may continue to argue along these lines: that the government's relevant enforcement action was either the physical rejection of, or else the failure to process, the men's clemency petitions shortly before they were executed. Crucially, these were actions performed *after* the Constitutional Court handed down the Rusli decision. In other words, they were actions enforcing a constitutionally invalid law. Refusing to physically receive or process the clemency petitions would be unlawful, as governed by the 2010 Clemency Law's new interpretation, with no formal time-limits for petitioners (Gultom, 2016).

Unfortunately for Su'ud Rusli himself, even on this most liberal interpretation of the Constitutional Court's decision, the dismissal of his overdue clemency application in 2015 will continue to remain lawful under this interpretation. The same would apply to any current death row prisoner whose attempt to 'file' or 'lodge' the clemency requisite paperwork was rebuffed by Indonesian state authorities before 15 June 2016 as out of time. These prisoners, along with those whose otherwise-valid clemency petitions have already been rejected by the president himself, and those who have voluntarily 'waived' the right to seek mercy (as above), form the group under immediate risk of execution.

There is one final interpretative twist. Even accepting that the Rusli decision might benefit some prisoners who had not yet filed for clemency by 15 June 2016, the Attorney General may instead seek to place greater significance on any prior written or oral communication between AGO

[28] Rusli, 16. 'When he reported [the case] to Komnas HAM [the Indonesian Human Rights Commission], Boyamin [Saiman, a lawyer acting as the complainant] brought an attachment of clemency plea receipt from the Court and Presidential Palace. Humphrey and Seck's clemency has been received by the court and the state palace. Meanwhile, Fredi's clemency was received by the West Jakarta State Court. However, the clemency pleas were ignored, and three of them got [sic] executed' (Rahman, 2016).

representatives and prisoners, forming the government's administrative 'refusal' to process clemency. Under this interpretation, to be legally effective in enforcing the one-year deadline, such communication would arguably have to go beyond the established practice of asking each prisoner whether he or she intends to file for PK or for clemency in the near future, which delays the execution protocol (Pascoe, 2015: 268; Indonesian Ombudsman, 2017). In certain cases, an AGO representative may have informed prisoners whose one-year deadline had lapsed prior the Rusli decision that they were, from that point, barred from seeking clemency. According to this view, any petition then submitted, whether before or after 15 June 2016, would already be legally invalid.

Yet, on closer inspection, this interpretation does not accord with a doctrinally coherent reading of the Rusli decision. A written or oral assertion to a prisoner that the time for clemency has passed does not appear to meet the test of 'administrative action' under the superseded law (Butt and Lindsey, 2012: 120; Butt and Lindsey, 2018: 107). As discussed above, art 7(2) of Law 5 of 2010 on Clemency regulates filing deadlines for petitions, rather than the validity or invalidity of a prisoner's right to apply for clemency in any abstract sense. The most coherent prospective-only interpretation of the Rusli decision matches that of the Indonesian Ombudsman within its 2017 report on Humphrey Ejike's case (Indonesian Ombudsman, 2017). Essentially, if the prisoner has not yet attempted to 'file' or 'lodge' the requisite clemency paperwork, then no administrative action can be performed to enforce the deadline. In fact, for the AGO, prior to 15 June 2016, there was no need to 'enforce' the deadline at all. If, 12 months after cassation, the prisoner had not applied for clemency, the AGO could proceed straight to execution, after providing a mandatory 72 hours' notice. Post-Rusli, the only way that the AGO might now speed the process after a period of inactivity is if the prisoner voluntarily 'waives' the right to apply for clemency, as described above. However, the legal limits of the waiver option remain presently uncertain. Failing to apply for clemency over a period of time does not necessarily equate to waiving the right altogether.[29]

According to the most recent NGO data from October 2016 (KontraS, 2016), there were at least 35 capital prisoners who would stand to benefit from this interpretation of the Rusli decision. These were death row prisoners whose cases reached 'permanent legal force' status sometime before October 2015, and who had not yet submitted a clemency petition by October 2016, at least to KontraS' knowledge. Following the Rusli decision, these prisoners would be best placed to withhold their clemency applications at least until they are approached by AGO representatives seeking further clarification, or until they are 'listed' for forthcoming execution. Not all will fall within the Indonesian government's immediate political priorities (and the AGO's budget) for execution, particularly for those convicted of murder or terrorist offences.[30] With clemency granted by previous Indonesian presidents for eclectic reasons such as disability, old age, psychiatric illness (Unidjaja, 2003; Greenlees, 2008; Viva.co.id, 2010; Maulia, 2010; Sagita, 2012), to take account of good behaviour in prison and expressed remorse (Greenlees, 2008; Aritonang and Saragih, 2012; Pascoe, 2015: 272), and strong public support for the prisoner (Pascoe, 2017a: 322), the longer such prisoners wait before submitting their petitions, the better the potential outcome will be in many cases.[31]

A Retrospective Operation of the Rusli Decision?

Although it is most likely that government agencies, as well as future courts will adopt a prospective-only interpretation of the Rusli decision, it is also worth considering the possibility of a retrospective exception to the Constitutional Court's usual practice. A prospective-only operation of the Constitutional Court Law's art 58 is not the only possible interpretation of that section. Butt and Lindsey have argued that:

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29 See also note 14 above and associated text.

30 The present Indonesian Attorney General has stated that forthcoming 'rounds' of executions will prioritise drug traffickers, rather than murder or terrorism convicts (Ador, 2016). According to NGO KontraS' October 2016 data, 10 of the 35 prisoners who stand to benefit from the most liberal interpretation of the Rusli decision were convicted of drug trafficking (KontraS, 2016).

31 In the Rusli decision, the Indonesian Constitutional Court also mentioned hypothetical situations where the prisoner would be 'useful' to the state (for example, acting as a witness), or where the prisoner suffers a terminal illness (Rusli, 78). Both are further justifications for clemency that become more salient as time passes.

> Article 58 could, alternatively, be interpreted to mean merely that while the Constitutional Court is reviewing a statute, that statute is presumed legal and remains in force. Once the Court decides that the statute is unconstitutional it is considered invalid *from the moment it was enacted* (Butt and Lindsey, 2012: 120, emphasis added).

Although the Constitutional Court has not yet adopted this exact line of reasoning, in at least four cases the Court has already declared that some of its decisions apply retrospectively: the *Sisa Suara* case, the *KPK Commissioners* case, the *MK Law Amendment No 2* case and the *State Audit Body Members* case (Butt, 2015: 111-13).[32] In the *Sisa Suara* case, while acknowledging the usual prospective operation of its decisions, the Court stated that:

> [Exceptions and discretion] are required in particular circumstances, [such as] to achieve the purposes of the statute under review… A decision that is not applied retrospectively can, in some circumstances, lead to the non-fulfilment of protections provided by legal mechanisms (Butt and Lindsey, 2012: 124).[33]

The Court later followed the *Sisa Suara* decision in the *KPK Commissioners Case*, stating that its decisions could apply retrospectively if this would serve the interests of 'utility'.[34] Although Butt and Lindsey have not found the Court's reasoning in either of these cases to be convincing, they have suggested that the execution of a prisoner would certainly pass the 'utility' test (Butt and Lindsey, 2012: 125-26). Moreover, as noted above, one of the primary drafting intentions behind the 2010 Clemency Law was to prevent prisoners from delaying their executions indefinitely, once a conviction reaches 'permanent legal force' status.

One argument supporting retrospectivity is that this key purpose of the statute under review can be still be achieved in relation to pre-Rusli cases without compromising a capital prisoner's right to apply for clemency under the same legislation (and the Indonesian president's plenary constitutional power to grant it). So long as some form of restriction is placed upon a prisoner's ability to stall the process, applying a one-year clemency timeline is not strictly necessary. Indeed, allowing prisoners to knowingly 'waive' their right to apply for clemency in a capital case already goes further in that direction than the previous position under the 2002 Clemency Law, under which capital prisoners could indefinitely delay their second clemency petition to avoid execution, at the cost of formally remaining under sentence of death. While the AGO and various media commentators have so far ignored a possible retrospective interpretation of the Rusli decision, it is open to future Indonesian courts to hold differently.

Revised Criminal Code (RKUHP)

One final point to consider is whether the impact of the Rusli decision will remain the same if the proposed revised Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana* or 'RKUHP') is passed by the Indonesian legislature in 2018 or 2019.[35] The current RKUHP draft contains several provisions that will interact with Indonesia's existing presidential clemency system, particularly as it pertains to death penalty cases. As at March 2018, extracts from the three most relevant articles of the legislative draft read as follows:

> Article 110
>
> (1) The death penalty may only be carried out after the prisoner's clemency petition has been rejected by the President. ...

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[32] Constitutional Court Decision 110-111-112-113/PUU-VII/2009, 07 August 2009; Constitutional Court Decision 5/PUU-IX/2011; Constitutional Court Decision 49/PUU-IX/2011; Constitutional Court Decision 13/PUU-XI/2013. Butt (2015: 113) has labelled these four decisions 'unexplained anomalies' to the Constitutional Court's general principle of prospectivity.

[33] Constitutional Court Decision 110-111-112-113/PUU-VII/2009, 106-107.

[34] Constitutional Court Decision 5/PUU-IX/2011, 76. See also Constitutional Court Decision 13/PUU-XI/2013, 78.

[35] At the time of writing in October 2018, the timeframe remains uncertain (Dewan Perwakilan Rakyat Republik Indonesia, 2018; Faisal, 2018).

Article 111

(1) The execution of capital punishment may be postponed for a probation period of 10 years, if a. the prisoner shows remorse and the potential for rehabilitation, or b. mitigating factors exist.
(2) The 10-year probation period begins 1 day after the court decision has attained permanent legal force.
(3) If the prisoner demonstrates commendable attitude and behaviour during the probation period, the death sentence may be converted to life imprisonment by Presidential Decision, after obtaining the advice of the Supreme Court.
(4) If the prisoner does not demonstrate commendable attitude and behaviour during the probation period and there is no prospect of rehabilitation, the death sentence may be executed on the order of the Attorney General.

Article 112

If the prisoner's clemency petition has been rejected but, other than due to escape from prison, the death sentence has not been carried out for 10 years thereafter, the death sentence may be converted to life imprisonment by Presidential Decision.

The first point to note here is that any prisoner sentenced to death will still remain entitled to petition the president for clemency in the normal way if the Revised Criminal Code is passed. Article 110 suggests as much, while art 111 and art 112 merely add to presidential clemency as discretionary means of averting execution. Law 22 of 2002 on Clemency and Law 5 of 2010 on Clemency will continue to apply in their current form, as will art 14(1) of the 1945 Constitution of Indonesia.

Of the two alternative means to permanently mitigate capital punishment, art 111 provides for a new 'suspended death sentence', purportedly modelled on the same mechanism that has long existed in the People's Republic of China (Interview with former Indonesian Minister of Justice, Jakarta, 9 May 2018; Interview with Indonesian law professor, Jakarta, 14 May 2018). Logically, the probation period provided by art 111(1) will only become applicable if the prisoner's presidential clemency appeal is rejected, yet art 111(2) also suggests that the probation period would overlap with any PK review, the prisoner's (now unlimited) period to apply for presidential clemency, and the president's period for deliberation on the petition. For example, if a prisoner's regular judicial appeals have failed, and the Attorney General (as the likely decision-maker on probation)[36] postpones execution for 10 years given sufficient grounds, the prisoner may proceed with a PK review and then a clemency appeal during the currency of the probation period itself. If both applications take five years in total to resolve, but are ultimately unsuccessful, the prisoner will still not be executed for a further five years, at a minimum. After five years, at the end of the 10-year probation period, the prisoner enjoys a further opportunity to avoid execution through presidential discretion, on the advice of the Supreme Court.

With a very similar decision-making process, art 111(3) looks very much like a second opportunity for clemency, albeit to be exercised on rehabilitative grounds only,[37] and with no petition by the prisoner allowed. Over time, and despite the Rusli decision reinstating an indefinite timeframe for conventional clemency applications, the Presidential Decision in art 111(3) may eventually become the best chance for death row prisoners to avoid execution by showing good behaviour and remorse. Executive clemency, as traditionally conceived, will remain a useful remedy given other justifications for leniency, such as case-based mitigating factors, or the prisoner's previous service to the nation.[38] However, the extra time seemingly afforded to prisoners by the Rusli decision will not prove as important once the Revised Criminal Code is passed.

Article 112, on the other hand, deals with the situation where, despite clemency having been rejected and despite the Attorney General choosing not to apply a 10-year probation period,[39] the

[36] The current working assumption, confirmed through the author's recent interviews with relevant experts in Jakarta, is that it will be the AGO who will decide on the suspension period, given the AGO's present power to enforce court judgments and to schedule executions after the president rejects clemency (Interview with Indonesian criminal defence advocate, Jakarta, 3 May 2018; Interview with Indonesian law professor #2, Jakarta, 16 May 2018; Interview with Indonesian NGO staff member, Jakarta, 21 May 2018).

[37] See note 16 above, and Pascoe (2017b: 5, 6, 12).

[38] See note 16 above.

[39] See note 36 above.

prisoner is nonetheless not executed after 10 or more years on death row. Although no criteria for mercy are specified, again, this resembles a second chance for the prisoner to receive presidential clemency, for humanitarian reasons such as good behaviour in prison, old age, psychiatric or terminal illness (Interview with former Indonesian Constitutional Court Justice, Jakarta, 7 May 2018; Interview with Indonesian law professor, Jakarta, 14 May 2018), shifting political priorities towards particular crimes, or a change of presidential administration.[40] As with art 111(3), no petition from the prisoner is allowed, although art 112 differs from art 111(3) in that the president does not receive mandatory advice from the Supreme Court before making an art 112 Presidential Decision.[41]

For death row prisoners, art 112 will interact with the Rusli decision in an opposing manner. Unlike the probation period in art 111(1), in art 112 the 10-year period preceding presidential reconsideration only begins to run from the date clemency is initially rejected. Accordingly, it will usually be in a death row prisoner's interest to postpone the initial petition for as long as possible. There will then be two opportunities for 'time-based' justifications for clemency to develop,[42] one as the clemency petition is being prepared, and the other during the ten-year period after clemency rejection, provided the prisoner is not executed in the meantime. In these circumstances, the Rusli decision will remain very much relevant.

Conclusion

Summarising the analysis above, the mostly doctrinally coherent interpretation of how the Indonesian Constitutional Court's Rusli decision affects death row inmates in Indonesia is as follows:

- Any prisoner who did not attempt to file for clemency before 15 June 2016 retains the opportunity to do so, regardless of when his or her case achieved 'permanent legal force' status. The only way that prisoners in this category might lose their right to apply for and be considered for clemency is if they were to voluntarily 'waive' the right, as the Rusli decision envisages. Nevertheless, the circumstances in which such a waiver might crystallise remain unclear. A long period of inactivity, with no intervention by the AGO, would presumably not be enough to establish a waiver. However, a prisoner publicly refusing to apply in order to maintain innocence is one circumstance in which the right to seek clemency would appear waived.
- Given the previous point, at least three of Indonesia's four most recent executions (those of Seck Osmane, Freddy Budiman and Humphrey Ejike) appear to have been conducted unlawfully, as the Indonesian Ombudsman has suggested. These three prisoners should not have been executed before their legally valid clemency petitions had been rejected by President Widodo, and the petitioners notified of this (art 13 of Law 22 of 2002 on Clemency).
- Procedural idiosyncrasies within art 111 and art 112 of the RKUHP (March 2018 version) mean that, if or when the Indonesian legislature finally passes the Revised Criminal Code Bill, the Rusli decision will retain its importance for some death row prisoners, but will become superfluous for others. For future death row prisoners certified by the Attorney General as deserving of a 10-year probation period to prove rehabilitation, the Rusli decision will prove largely insignificant. Yet for prisoners not afforded this opportunity, the extra time to draft a clemency petition brought by the Rusli decision may increase the odds of eventually receiving presidential leniency, either through the constitutional clemency power itself, or else via the 'second chance' provision in art 112.

Finally, there remains a small possibility that a future Indonesian court may interpret the Rusli decision as retrospectively operative. In these circumstances, art 7(2) of the 2010 Clemency Law

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40 At present, Indonesian presidents and vice-presidents may serve a maximum of two five-year terms (Constitution of Indonesia 1945, art 7).

41 Nonetheless, the president may ask for the Supreme Court's advice in an informal manner. Moreover, the president might ask the advice of other parties such as prison authorities, the AGO, and the Minister for Law and Human Rights. See further Pascoe (2017a: 320, 320 n 48).

42 See note 31 and associated text, above.

would never have been constitutionally valid since its enactment on 23 August 2010. The implications would be profound: any prisoner who attempted to file for clemency between August 2010 and June 2016, only to be told that he or she was 'out of time', would presumably enjoy a renewed opportunity to apply. Nevertheless, even with a retrospective application of the Rusli decision, death row prisoners who have already filed for clemency since 2010 in compliance with the previous timeline are unlikely to receive a second chance to apply if their initial petition is still pending or was rejected. Only one petition is permitted by art 2(3) of Law 5 of 2010 on Clemency, and it may be a step too far for the courts to 'undo' a Presidential Decision (*Keputusan Presiden*) rejecting a petition, given that clemency represents a sovereign, prerogative power of Indonesia's head of state. In previous litigation, the Central Jakarta Administrative Court has already considered the clemency decision-making of Presidents Yudhoyono and Widodo as immune from judicial review, because it represents a constitutional, rather than an administrative, power (92/PLW/2012/PTUN-JKT, 27 September 2012; 29/PLW/2015/PTUN-JKT, 6 April 2015; 30/PLW/2015/PTUN-JKT, 6 April 2015).[43]

For Su'ud Rusli himself, the possibility of a retrospective interpretation represents the petitioner's best hope of successfully filing for and receiving a sentence commutation to life imprisonment by the president of Indonesia. Yet in other cases where the Indonesian Constitutional Court has employed retrospective overruling, this aspect of the decision has been quite clearly set out in the judgment (Butt, 2015: 111-13), something that is entirely lacking in the Rusli decision. The saving grace for Su'ud Rusli may be the Widodo administration's current preoccupation with drug trafficking convicts as candidates for forthcoming executions, instead of convicted murderers or terrorists (Ador, 2016). Indeed, if the proposed RKUHP provisions on 10-year reprieves are to have any retroactive effect, Rusli would be an ideal candidate to receive a sentence commutation after 10 years on death row, given his perceived status as a model prisoner (KontraS, 2016).

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