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Legal Dilemmas in Releasing Indonesia's Political Prisoners

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LEGAL DILEMMAS IN RELEASING INDONESIA'S POLITICAL PRISONERS

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Abstract

In May 2015, in an effort to foster peace in the restive Papua and West Papua Provinces, Indonesian President Joko 'Jokowi' Widodo granted clemency to five political prisoners, releasing them from sentences ranging from 20 years to life. The president also stated that there would be 'a follow-up granting clemency or amnesty to other [political prisoners] in other regions' (Jakarta Post, 10 May 2015). However, with up to 50 political prisoners still incarcerated in prisons around Indonesia (mostly Papuan and Moluccan separatists), Jokowi's selective release policy faces several legal and political obstacles. This article outlines the various options open to Jokowi in facilitating future political prisoner releases (including amnesty, clemency, remissions and conditional release), the advantages and disadvantages of each, before suggesting an acceptable way forward for all parties.

Keywords: *amnesty, clemency, Indonesia, political prisoners, West Papua, Maluku, transitional justice, forgiveness*

I. Introduction

On 9 May 2015, in an effort to foster peace in the restive Papua and West Papua Provinces, Indonesian President Joko 'Jokowi' Widodo granted executive clemency to five political prisoners.² Apotnaholik Lokobal, Linus Hiluka and

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² The term 'political prisoner' has no standard international definition, although NGO Papuans Behind Bars has put forward a definition applicable to the Indonesian context, based upon a 2012 Parliamentary Assembly of the Council of Europe resolution. Here, political prisoners:

include those prisoners where there is reason to believe that they have been detained for exercising rights and freedoms which are guaranteed in Indonesia's Constitution [particularly Article 28(E)(2)-(3)], the Universal Declaration of Human Rights, and other international instruments which Indonesia has signed up to.

("No Political Prisoners? The suppression of political protest in West Papua April 2013," *Tapol*, April 2013, accessed 27 January 2017, <http://tapol.org/sites/default/files/sites/default/files/pdfs/Suppression%20of%20political%20protest%20in%20West%20Papua.pdf>.)

Kimanus Wenda had each been sentenced to 20 years' imprisonment, while Numbungga Telenggen and Yafrai Murib were both sentenced to life imprisonment.³ The five men were released as Jokowi handed them documents confirming that the remainder of their prison sentences would be set aside. At the time, the release of the five prisoners was publicly interpreted as a symbolic move towards reconciliation with the Free Papua Movement (*Organisasi Papua Merdeka* - OPM) in Indonesia's Papua and West Papua provinces,⁴ while the president also stated that there would be 'a follow-up granting clemency or amnesty to other [political prisoners] in other regions'.⁵ However, with up to 50 political prisoners still incarcerated in prisons around Indonesia as of February 2016 (primarily Papuan and Moluccan independence activists imprisoned for treason or rebellion after peacefully expressing their political views),⁶ Jokowi's release policy still

Human Rights NGO Amnesty International, on the other hand, prefers the term 'prisoner of conscience':

[A] person imprisoned or otherwise physically restricted because of their political, religious or other conscientiously held beliefs, ethnic origins, sex, colour, language, national or social origin, economic status, birth, sexual orientation or other status – who has not used violence or advocated violence or hatred. The organization calls for their immediate and unconditional release.

(Amnesty International, *Indonesia: Jailed for Waving a Flag – Prisoners of Conscience in Maluku* (AI-Index: ASA 21/008/2009 (2009)), accessed 24 September 2016,

http://www.univie.ac.at/bimtor/dateien/indonesia_ai_2009_jailed_waving_flag.pdf, p.6)

³ Ina Parlina and Nethy Dharma Somba, "In Papua, Jokowi frees 5," *The Jakarta Post* (10 May 2015).

⁴ Indonesian NGO staff, personal interview, Oslo, Norway, 23 June 2016; "Indonesian President Joko Widodo grants clemency to Papuan political prisoners," *ABC News* (9 May 2015), accessed 29 January 2017, <http://www.abc.net.au/news/2015-05-09/indonesian-leader-grants-clemency-to-papuan-political-prisoners/6457862>. The *Organisasi Papua Merdeka* is a Papuan rebel group that has been campaigning against Indonesian sovereignty over what are now West Papua and Papua provinces since 1965.

⁵ Parlina and Somba, "In Papua, Jokowi frees 5"; Ina Parlina, "Govt to take 'soft approach' in Papua," *The Jakarta Post* (5 January 2016). Conversely, Harsono asserts that the Indonesian government has not fully explored a release strategy for Moluccan political prisoners, having only considered amnesty and clemency for Papuans (Andreas Harsono, "Indonesia's Forgotten Political Prisoners," *Jakarta Globe* (16 March 2016), accessed 28 January 2017, <http://jakartaglobe.id/opinion/commentary-indonesias-forgotten-political-prisoners/>).

⁶ Yohannie Linggasari, "Amnesty International: Jokowi Gagal Penuhi Perlindungan HAM," *CNN Indonesia* (24 February 2016), accessed 16 September 2016, <http://www.cnnindonesia.com/nasional/20160224164145-20-113236/amnesty-international-jokowi-gagal-penuhi-perlindungan-ham/>. Separate but more recent reports place the numbers at 28 Moluccan prisoners in March 2016, and 17 remaining prisoners in Papua and West Papua in September 2016. See Harsono, "Indonesia's Forgotten Political Prisoners" and "Update on Political Prisoners in Papua," *Papuans Behind Bars* (September 2016), accessed 28 January 2017,

faces significant obstacles. The *Dewan Perwakilan Rakyat* (DPR), Indonesia's lower house of parliament, has thus far refused to endorse any general amnesty for rebel groups, for fear of legitimising their activities. Moreover, many of Indonesia's political prisoners are loathe to admit guilt so as to receive executive clemency for offences that they either a) did not commit and/or b) do not seek to legitimise. In January 2017, at the time of writing, both sides still remain at an impasse, wary of condoning the other's activities.

This article discusses a way forward on political prisoner releases in Indonesia. I begin by clarifying the legal scope of Indonesia's clemency and amnesty laws based upon textual interpretation, prior state practice, as well as relevant theoretical and comparative literature. I particularly focus on the role played, if any, by *forgiveness* when clemency and amnesty are granted to prisoners. I then proceed to outline the various options open to Jokowi in facilitating future political prisoner releases (including amnesty, clemency, remissions and conditional release), the advantages and disadvantages of each, before finally suggesting an acceptable way forward for all parties.

II. Clemency, Amnesty and Forgiveness in Theoretical and Comparative Perspective

Clemency and amnesty are terms whose precise definition may vary from jurisdiction to jurisdiction. However, in its technical legal meaning, 'clemency' encompasses a wide variety of lenient actions by the executive branch when dealing

<http://www.papuansbehindbars.org/wp-content/uploads/2016/11/PBB-July-September-2016.EN.pdf>.

Under Indonesian law, treason and rebellion are known as *makar* (Indonesia, *Kitab Undang-Undang Hukum Pidana (Indonesian Criminal Code)*, UU No. 27 Tahun 1999 (Law Number 27 Year 1999), art. 106, 108, 110), with the completed offence carrying a maximum penalty of life imprisonment. Article 106 states: 'an attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof shall be punished by life imprisonment or a maximum imprisonment of twenty years.'

During the Dutch colonial era, the original application of these provisions was to violent protests or demonstrations, but since 2003, peaceful protestors have also been prosecuted under this provision in both Papua and in Maluku (Indonesian NGO staff #2, personal interview, Jakarta, Indonesia, 11 October 2016; "About the Data (September 2016)," *Papuans Behind Bars*, accessed 27 January 2017, http://www.papuansbehindbars.org/?page_id=315). The provisions' vague nature opens them to exploitation by police and prosecutors (Amnesty International, *Indonesia: Jailed for Waving a Flag*, p.13), such that acts including raising a flag associated with regional independence can be prosecuted as *makar*. Both the Papuan Morning Star Flag and the *Benang Raja* (Rainbow) flag of the Republic of South Maluku are banned by the Indonesian government, in addition to other symbols of separatist movements (Parlina and Somba, "In Papua, Jokowi frees 5"; Indonesia, *Peraturan Pemerintah Tentang Lambang Daerah (Government Regulation on Regional Symbols)*, PP No. 77 Tahun 2007 (Government Regulation Number 77 Year 2007)).

with a conviction and punishment pronounced by the judiciary.⁷ The most familiar examples of clemency are pardon (an order releasing the prisoner from incarceration altogether, and perhaps also restoring the prisoner's good name and civil rights), and commutation (whereby the prisoner's sentence is reduced, or is altered to a different type, for example from a death sentence to a life sentence).⁸ Some jurisdictions enable clemency in these forms to be granted unilaterally, whereas others require that the prisoner address a petition to the relevant clemency decision maker (usually the head of state), and a third group enable either approach.⁹

Amnesty, on the other hand, denotes a mass grant of leniency, awarded based on prisoner categorisation, and issued by the executive *or* legislative branch of government.¹⁰ Importantly, the amnesty decision maker generally takes little regard of each prisoner's individual characteristics.¹¹ As such, amnesty operates as more of a political tool than does clemency. Amnesty reduces or abrogates criminal punishments for what are frequently political ends,¹² and while clemency may be granted by an executive authority for precisely the same political reasons,¹³ clemency is also frequently dispensed on *retributive* grounds (i.e., due to excessive or unwarranted punishment), or as a redemptive reward for prisoner *rehabilitation* or prior national service.¹⁴

⁷ Sarah Lucy Cooper, "The State Clemency Power and Innocence Claims: The Influence of Finality and Its Implications for Innocents," *Charlotte Law Review* 7 (2015): 52 n 5; Dan Markel, "Against Mercy," *Minnesota Law Review* 88 (2004): 1440.

⁸ Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Abingdon: Routledge, 2016), p.4.

⁹ Leslie Sebba, "The Pardoning Power – A World Survey," *Journal of Criminal Law and Criminology* 68(1) (1977): 113-114, 116. See Novak, *Comparative Executive Clemency*, pp. 15, 19-20, 33, 140, 149, 174, 183, 187, for examples.

¹⁰ Leslie Sebba, "Clemency in Perspective," in *Criminology in Perspective: Essays in Honour of Israel Drapkin*, ed. Simha F. Landau and Leslie Sebba (Lexington Massachusetts: Lexington Books, 1977), p. 232; Markel, "Against Mercy," p. **Error! Bookmark not defined.**1140; Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008), pp. 6, 31-34.

¹¹ Josepha Close, "Amnesty Provisions in the Constitutions of the World: A Comparative Analysis," *International Law Blog* (5 January 2015), accessed 21 September 2016, <https://aninternationallawblog.wordpress.com/2015/01/05/amnesty-provisions-in-the-constitutions-of-the-world-a-comparative-analysis/>.

¹² Scott Veitch, "The Legal Politics of Amnesty," in *Lethe's Law: Justice, Law and Ethics in Reconciliation*, ed. Emiliios Christodoulidis and Scott Veitch (Oxford: Hart Publishing, 2001), p.34; Mallinder, *Amnesty, Human Rights and Political Transitions*, p.4.

¹³ Austin Sarat, *Mercy on Trial: What it Means to Stop an Execution* (New Jersey: Princeton University Press, 2005), pp.20-21.

¹⁴ See generally Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* (New York: Oxford University Press, 1989) and *ibid.*, pp. 23, 96, 108-109.

Both academic scholarship as well as state practice remain conflicted on clemency and amnesty's relationship with guilt and innocence. There are two possible consequences of a clemency grant: first, where clemency cancels or reduces only *punishment*, without erasing the prisoner's guilt for the offence (which may or may not be accompanied by the prisoner's civil rights being restored); and second, where executive clemency completely vindicates by putting the prisoner back in the same position as if the crime had never been committed, by erasing both the punishment and the prisoner's conviction.¹⁵ Recalling the two most familiar examples of executive clemency, all *commutations* maintain guilt. Moreover, with its plain English meaning, the word 'pardon' also implies the same: that the still-guilty defendant is extended leniency by the state as a gift, rather than a revocation of punishment due to innocence.¹⁶ Although pardons are sometimes extended throughout the world for innocence (occasionally referred to as 'free pardons'),¹⁷ this practice arguably arises from the executive performing a judicial function. A pardon for innocence is, to quote Stephen, 'an exceedingly clumsy mode of procedure'.¹⁸ Likewise for Hoffstadt: in the United States context, despite the US Supreme Court's endorsement of clemency as a 'fail safe' procedure in *Herrera v Collins*,¹⁹ 'clemency is not currently designed to serve as an extrajudicial corrective mechanism.'²⁰ Novak neatly summarises the views of academic commentators:

¹⁵ Louise Mallinder, "Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States," *Oregon Review of International Law* 14 (2012): 320; Jennifer Schweppe, "Pardon me: the contemporary application of the prerogative of mercy," *Irish Jurist* 49 (2013): 222-223.

¹⁶ Samuel Williston, "Does a Pardon Blot Out Guilt?" *Harvard Law Review* 7 (1915): 648; Adam Sitze, "Keeping the Peace," in *Forgiveness, Mercy, and Clemency*, ed. Austin Sarat and Nasser Hussain (Stanford California: Stanford University Press, 2007), p.159.

¹⁷ Sebba, "Clemency in Perspective," p. 229; Novak, *Comparative Executive Clemency*, pp.87, 159 (generally); Daniel T. Kobil, "Chance and the Constitution in Capital Clemency Cases," *Capital University Law Review* 28 (2000): 572; Mallinder, "Power, Pragmatism, and Prisoner Abuse," p. 7 (US States); Michael Naughton, "Conclusion," in *The Criminal Cases Review Commission: Hope for the Innocent*, ed. Michael Naughton (Basingstoke: Palgrave Macmillan, 2009), p. 226 (United Kingdom); Lynne Weathered, "Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia," *Current Issues in Criminal Justice* 17 (2005-2006): 203-216 (Australia).

¹⁸ James Fitzjames Stephen, *A History of the Criminal Law of England, Vol.1* (London: Macmillan and Company, 1883), p.312.

¹⁹ *Herrera v Collins*, 506 U.S. 390 (1993).

²⁰ Brian M. Hoffstadt, "Normalizing the Federal Clemency Power," *Texas Law Review* 79 (2001): 572, 588.

*While undoubtedly an important part of post-conviction relief in claims of actual innocence, scholars have noted that the clemency and pardon power is likely an insufficient safeguard, on its own, to adequately protect the right of the innocent.*²¹

As criminal justice systems have developed more advanced measures to review convictions and individualise sentences such as multiple levels of appeals, general defences to liability, discretionary sentencing, parole and post-conviction review, the executive's need to resort to pardon for innocence or to commutation for excessive punishment has been much reduced.²²

Amnesty attracts similar controversy. Amnesty's primary modern function is to allow the state to 'keep the peace,'²³ although amnesty has also been used to celebrate important national events, reduce prison overcrowding, endear political subjects to the sovereign, to transition from autocracy to democracy, to populate colonies, and to provide manpower for armies and industrial projects.²⁴ With present significance, amnesty was historically the power used to remit punishment in the case of political crimes,²⁵ to the exclusion of clemency. Although the word 'amnesty' comes from the Greek word *amnestia* meaning 'forgetfulness', a mass grant of amnesty may or may not carry with it the implication of guilt.²⁶ If it is an *unconditional* amnesty, the granter of the amnesty is suspending judgment on guilt or innocence.²⁷ This kind of amnesty 'does not entail that any of the parties accept responsibility for wrongs done, detail the nature of those wrongs, or compensate

²¹ Novak, *Comparative Executive Clemency*, p.88.

²² *Ibid.*, pp. 5-6.

²³ P.E. Digeser, "Forgiveness & the Law: Executive Clemency and the American System of Justice," *Capital University Law Review* 31 (2003): 161-178, 174; Sitze, "Keeping the Peace," p.158.

²⁴ James R. Acker and Charles S. Lanier, "May God – Or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems," *Criminal Law Bulletin* 36(3) (2000): 201; Daniel T. Kobil, "How to Grant Clemency in Unforgiving Times," *Capital University Law Review* 31 (2003): 222; William A. Schabas, "Conjoined Twins of Transitional Justice - The Sierra Leone Truth and Reconciliation Commission and the Special Court," *Journal of International Criminal Justice* 2 (2004): 1086-1087; Linda Ross Meyer, "The Merciful State," in *Forgiveness, Mercy and Clemency*, ed. Austin Sarat and Nasser Hussain (Stanford California: Stanford University Press, 2007), p.74; Moore, *Pardons: Justice, Mercy and the Public Interest*, pp. 90, 199.

²⁵ Sitze, "Keeping the Peace," p.209; Mallinder, *Amnesty, Human Rights and Political Transitions*, p.6; Michigan Women's Justice & Clemency Project, "Clemency Manual: Chapter II – Introduction to Clemency (2008)," University of Michigan, accessed 27 January 2017, http://umich.edu/~clemency/clemency_mnl/ch2.html.

²⁶ Digeser, "Forgiveness & the Law," p. 173; Mallinder, *Amnesty, Human Rights and Political Transitions*, p.6.

²⁷ Digeser, "Forgiveness & the Law," pp.174-175; Sitze, "Keeping the Peace," p.168.

the victims for their suffering.’²⁸ As Digeser suggests, ‘The beauty and danger of an [unconditional] amnesty is that because the past is not dredged up, no official determination is made as to which party is correct.’²⁹ Accordingly, it is inaccurate to suggest that an unconditional amnesty re-establishes complete *innocence*. Yet nor do unconditional amnesties maintain the protagonists’ guilt either.³⁰ The alleged crime is merely ‘forgotten’ to promote utilitarian objectives.³¹

On the other hand, if it is a *conditional* amnesty that releases prisoners or precludes future prosecution, the effect may be no different from that of clemency, described above - ‘conditional’ amnesty may merely be a more efficient means of granting pardon or commutation to many hundreds or thousands of prisoners at once. As with the widely-respected South African Truth and Reconciliation Commission, conditional amnesties may require the recipients to reveal the full extent of their involvement in the crime in order to enjoy lenient treatment.³² Conditional amnesties may also be granted in exchange for some further act or omission on the part of the recipient. Leniency may be contingent ‘on any number of things, including payment of restitution or reparations, agreement not to hold positions of public trust, and public and personal apologies for criminal behavior.’³³ If the conditions attached require an admission of criminality, conditional amnesty actually *confirms* guilt, instead of eliminating it.

What role does *forgiveness* play in granting clemency or amnesty? Although certain authors assert that forgiveness may only be granted by victims of crimes as private individuals, rather than by the state,³⁴ other academic commentators believe that both clemency and *conditional* amnesty as acts of the state may be interpreted as measures of official, collective forgiveness.³⁵ In a criminal justice context,

²⁸ Digeser, “Forgiveness & the Law,” p.173.

²⁹ Ibid., p.175; Markel, “Against Mercy,” p.1140 n61.

³⁰ Sitze, “Keeping the Peace,” p.159.

³¹ Contrast Mallinder, *Amnesty, Human Rights and Political Transitions*, p.5.

³² Veitch, “The Legal Politics of Amnesty,” p.39; Mallinder, *Amnesty, Human Rights and Political Transitions*, p.15.

³³ Shawn Fields, “Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime,” *International Journal of Civil Society Law* (2007): 11.

³⁴ Moore, *Pardons: Justice, Mercy and the Public Interest*, p.184; Martha Minow, “Keynote Address: Forgiveness and the Law,” *Fordham Urban Law Journal* 27, no.5 (2000): 1401, 1404; Austin Sarat and Nasser Hussain, “Toward New Theoretical Perspectives on Forgiveness, Mercy and Clemency: An Introduction,” in *Forgiveness, Mercy and Clemency*, ed. Austin Sarat and Nasser Hussain (Stanford California: Stanford University Press, 2007), p.5.

³⁵ Digeser, “Forgiveness & the Law,” pp.166, 173; Moore, *Pardons: Justice, Mercy and the Public Interest*, p.183; Hussain and Sarat, “Toward New Theoretical Perspectives,” p. 3; Meir Dan-Cohen, “Revising the Past: On the Metaphysics of Repentance, Forgiveness, and Pardon,” in *Forgiveness, Mercy and Clemency*, ed. Austin Sarat and Nasser Hussain (Stanford California: Stanford University Press, 2007), p.133. Note also Mallinder’s assertion that:

forgiveness may be defined as a desire to remit punishment that is otherwise justly due.³⁶ It may also be defined as dispensing with any ill feelings toward the accused (such as resentment), regardless of whether the original punishment remains.³⁷ Either way, forgiveness evidently depends on guilt, as it is a forward-looking response to past wrongdoing.³⁸ The state can only forgive if the alleged perpetrator admits his or her guilt to the public, either implicitly or explicitly. As Digeser suggests:

*[P]art of what is assumed in this communication [between the government decision-maker on clemency or amnesty and the offender] is a common, public understanding of who did what to whom. Without such a common understanding, the [state, as a] victim could 'forgive' the offender for an offense that he or she may not have committed. And, to forgive an innocent individual is a misrepresentation and an insult. In this small way, political forgiveness in general requires a minimal level of justice in discerning the history of what happened.*³⁹

Forgiveness' inherent link to guilt is a recurring theme throughout this article. While not all grants of clemency might be framed as 'political forgiveness,' Indonesia's own legislation indeed suggests this kind of model, as I now move on to explain.

III. Clemency, Amnesty, Remissions and Conditional Release in the Indonesian Legal System

Within this theoretical model I situate the Indonesian legislative and constitutional system of discretionary leniency. At the time of the clemency grants he made to the five Papuan prisoners in May 2015, Jokowi's stated preference was to release many of Indonesia's remaining political prisoners as gesture of goodwill,

A government choosing to forgive crimes against the state is not particularly problematic as the state has standing to do so. But a state encouraging individuals to forgive one another is contentious [Mallinder, *Amnesty, Human Rights and Political Transitions*, p.56.].

³⁶ Digeser, "Forgiveness & the Law," p.167; Moore, *Pardons: Justice, Mercy and the Public Interest*; Mallinder, *Amnesty, Human Rights and Political Transitions*; Bas van Stokkom, Neelke Doorn and Paul van Tongeren, "Public Forgiveness: Theoretical and Practical Perspectives," in *Public Forgiveness in Post-Conflict Contexts*, ed. Bas van Stokkom, Neelke Doorn and Paul van Tongeren (Cambridge: Intersentia, 2012), p.3.

³⁷ Moore, *Pardons: Justice, Mercy and the Public Interest*, pp.184, 186; Minow, "Keynote Address," p.1402; Markel, "Against Mercy," p.5; Hussain and Sarat, "Toward New Theoretical Perspectives," p.4.

³⁸ Moore, *Pardons: Justice, Mercy and the Public Interest*, p.186.

³⁹ Digeser, "Forgiveness & the Law," p.166.

in order to promote peace in restive outlying provinces such as Papua, West Papua and Maluku.⁴⁰ What further options does the Indonesian president have to do so, and which legal and political consequences flow from each? Within this section I present the four available solutions: clemency, amnesty, remissions and conditional release.

Article 14 of Indonesia's 1945 Constitution sets out a number of quasi-judicial powers available to the president, exercisable via *Keputusan Presiden* (Presidential Decree). Each of the powers is a means of providing immunity from the effects of criminal litigation. The most common of these, clemency (*grasi*), involves the alteration, reduction or abrogation of criminal punishment, and is prominently used to convert a death sentence to life imprisonment. Although it can be granted at any stage after conviction at first instance, prisoners frequently await the result of their final appeal before petitioning the president for clemency.⁴¹ Amnesty (*amnesti*) operates in a similar manner to clemency, but is employed to release an entire class of prisoners from incarceration.⁴² Amnesty may be granted before or after a conviction, with present DPR lawmakers preferring the latter approach.⁴³ Rehabilitation (*rehabilitasi*) is granted in order to restore the civil rights of a person previously accused of criminal offences.⁴⁴ Abolition (*abolisi*) resembles amnesty, but is only granted before conviction, while the case against a prisoner is still pending.⁴⁵ As this article focuses on political prisoners still incarcerated in the Papua, West Papua and Maluku provinces, *amnesti* and *grasi* are the presidential powers worth considering in greater detail.

Unusually, given the legislature's primary decision-making role in 79 of the 105 national constitutions that mention amnesty and clemency powers, Indonesia's 1945 Constitution vests both the clemency and the amnesty powers in the president.⁴⁶ At first glance, Indonesia's constitutional quasi-judicial powers appear highly centralised, alongside 13 similar jurisdictions where the head of state holds

⁴⁰ Parlina and Somba, "In Papua, Jokowi frees 5".

⁴¹ Amnesty International, "Recent Executions in Indonesia and the Application of the Death Penalty," in *Law and Political Liberty in Indonesia*, ed. Indonesia Publications (Lanham-Seabrook MD: Indonesia Publications, 1988), p.6.

⁴² Tim Lindsey and Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Oxford: Hart Publishing, 2016), p.104.

⁴³ Nurul Fitri Ramadhani, "Aceh Militants to be Granted Amnesty Despite Objections," *The Jakarta Post* (22 July 2016).

⁴⁴ Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, p.104.

⁴⁵ Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, p.104.

⁴⁶ Close, "Amnesty Provisions in the Constitutions of the World". Indonesia is one of only 13 states with similar constitutional arrangements.

similar entitlements.⁴⁷ However, Article 14 of the Indonesian Constitution also mandates that the president pay regard to the advice of the Supreme Court (*Mahkamah Agung*) when granting clemency or rehabilitation, and equally to heed the advice of the DPR when granting amnesty or abolition. Moreover, the president routinely consults other parties for advice on clemency petitions, albeit as a matter of practice rather than law.⁴⁸ Indonesia's constitutional scheme therefore combines features of common law jurisdictions such as the United States and Singapore (where the head of state holds the pardon power, but where no constitutional 'amnesty' provisions exist), with those of civil law nations such as France and Russia, where constitutional amnesty is frequently granted by the legislature.⁴⁹ Although several other civil law jurisdictions such as Finland, Greece and Suriname require the head of state to consider the views of the judiciary before issuing pardons, throughout the world only Indonesia's constitutional system contains provision for the head of state to consider *non-binding* advice on amnesty from the legislature.⁵⁰

As for recent Indonesian practice using the clemency and amnesty powers, although he has steadfastly refused to grant clemency for any prisoners sentenced to death for drug trafficking,⁵¹ Jokowi has already commuted the death sentences of five murder convicts (with a total of five petitions granted and 23 rejected in death penalty cases through to February 2016),⁵² and in December 2014 released agricultural rights activist Eva Susanti Bande from prison through the use of

⁴⁷ Ibid. The other jurisdictions with similar arrangements are Bhutan, Bolivia, Czech Republic, Denmark, Eritrea, Iceland, Japan, Monaco, Myanmar, Slovakia, Spain and Turkmenistan.

⁴⁸ The president also receives advice on clemency from parties such as the coordinating minister for security; the minister for law and human rights; the attorney-general; the secretary of state; the chief of state; the cabinet secretary; the ministry of foreign affairs; the national police force and the vice-president, depending on the case under consideration (Former Indonesian civil servant, personal interview, Melbourne, Australia, 21 November 2016; Australian academic expert on Indonesia, personal telephone interview, 30 January 2013; Indonesian civil servant, personal interview, Jakarta, Indonesia, 15 April 2013).

⁴⁹ Close, "Amnesty Provisions in the Constitutions of the World"; Novak, *Comparative Executive Clemency*, pp. 8-9.

⁵⁰ See Constitution of Finland 1999, art.105; Constitution of Greece 2001, art. 47(1); Constitution of Suriname 1987, art. 109.

⁵¹ Margareth Aritonang and Slamet Susanto, "Jokowi to ban clemency for drug convicts," *The Jakarta Post* (10 December 2014), accessed 29 January 2017, <http://www.thejakartapost.com/news/2014/12/10/jokowi-ban-clemency-drug-convicts.html>.

⁵² Ade Mulyana, "KIP Sidangkan Setneg Soal Transparansi Pemberian Grasi," *RMOL* (15 February 2016), accessed 17 September 2016, <http://hukum.rmola.co/read/2016/02/15/235813/KIP-Sidangkan-Setneg-Soal-Transparansi-Pemberian-Grasi->.

clemency.⁵³ Mostly recently, in January 2017 Jokowi reduced by six years the 18-year prison sentence of former Anti-Corruption Commission Chairman Antasari Azhar, who was convicted of murder.⁵⁴ Although in November 2015 the Ministry of Law and Human Rights tabled a proposal to release 20,000 minor drug offenders from prison,⁵⁵ and in July 2016 the DPR recommended the release from prison for a group of up to 70 former rebels from Aceh,⁵⁶ Jokowi has not yet granted amnesty during his two and a half years as president.⁵⁷

Academic commentators cannot be absolutely certain of the factors justifying clemency in previous Indonesian cases, given that the president's official reasoning,⁵⁸ and since 2016 the decree itself, have not always been released to the public.⁵⁹ Nonetheless, clemency has been granted by post-1998 Reform-era (*Reformasi*) Presidents B.J. Habibie, Abdurrahman Wahid, Megawati Sukarnoputri, Susilo Bambang Yudhoyono and Jokowi for reasons such as:

⁵³ "Alasan Jokowi Beri Grasi ke Eva Susanti Bande," *Tempo* (22 December 2014), accessed 17 September 2016, <https://m.tempo.co/read/news/2014/12/22/063630205/alasan-jokowi-beri-grasi-ke-eva-susanti-bande>.

⁵⁴ "Jokowi Kabulkan Grasi Eks Ketua KPK Antasari, Ini Alasannya," *Tempo* (25 January 2017); "Jokowi Grants Antasari Azhar's Clemency Application," *Tempo* (25 January 2017).

⁵⁵ "Kemarin Hukuman Mati, Kini 20.000 Napi Narkoba Diusulkan Dapat Grasi," *Solopos* (3 November 2015), accessed 17 September 2016, <http://www.solopos.com/2015/11/03/kasus-narkoba-kemarin-hukuman-mati-kini-20-000-napi-narkoba-diusulkan-dapat-grasi-657912>.

⁵⁶ Marguerite Afra Sapiie, "House agrees to amnesty for surrendered Aceh rebels," *The Jakarta Post* (22 July 2016), accessed 28 January 2017, <http://www.thejakartapost.com/news/2016/07/22/house-agrees-to-amnesty-for-surrendered-aceh-rebels.html>.

⁵⁷ Indonesian Ministry of Law and Human Rights, "Amnesti Indonesia Dataset," (Unpublished list of historical Amnesty grants, 2016, copy on file with the author). At the time of writing in January 2017, the 'amnesty' for which Jokowi is best known for, Indonesia's Tax Amnesty, was actually enacted as a piece of legislation by the DPR on 28 June 2016 (Indonesia, *Undang-Undang Tentang Pengampunan Pajak (Law on Tax Amnesty)*, UU No.11 Tahun 2016 (Law Number 11 Year 2016)).

⁵⁸ Mulyana, "KIP Sidangkan Setneg Soal Transparansi Pemberian Grasi". Former Indonesian civil servant, personal interview; senior Indonesian lawyer, personal interview, Jakarta, Indonesia, 11 April 2013.

⁵⁹ Indonesia, *Peraturan Pemerintah Tentang Tata Cara Penyampaian Data Dan Informasi Oleh Instansi Pemerintah Dan/Atau Lembaga Swasta Dalam Pencegahan Dan Pemberantasan Tindak Pidana Pencucian Uang (Government Regulation about Procedures for Submission of Data and Information by Government Institutions and / or Private Institutions in Prevention and Eradication of Criminal Money Laundering)*, PP No.2 Tahun 2016 (Government Regulation Number 2 Year 2016).

The following list of justifications for clemency, based on media reports, therefore contains a sampling bias. Typically, clemency appeals from death row convicts or foreign nationals, are covered in detail in the Indonesian and international media, whereas the clemency appeals of Indonesian petitioners accused of lesser crimes receive far less attention.

- to free prisoners convicted of subversion during the Suharto ‘New Order’ administration from 1967-1998,⁶⁰ and ‘rebellion’ during the *Reformasi* period (discussed below),⁶¹ in order to make peace with critics and rebel groups, and as part of Indonesia’s ongoing democratisation;
- to maintain good relations with foreign nations;⁶²
- to encourage reciprocal clemency grants for Indonesians on death row abroad;⁶³
- to privilege mitigating factors such as disability, old age, youth or psychiatric illness;⁶⁴
- to take account of good behaviour in prison and expressed remorse;⁶⁵
- to recognise a disparity between sentences requested by prosecutors and sentences imposed by judges;⁶⁶
- the prisoner being a drug ‘mule’ rather than a large scale trafficker;⁶⁷
- the prisoner’s motives in committing the crime;⁶⁸
- strong public support for the prisoner;⁶⁹

⁶⁰ Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas, 2008), pp.149-150; Former member of the Indonesian National Human Rights Commission, personal interview, Jakarta, Indonesia, 8 October 2016; Don Greenlees, “Coup Leaders Kept in Prison,” *The Australian* (18 August 1998).

⁶¹ See infra Part IV.

⁶² e.g. Michael Vincent, “Corby clemency good for Bali Nine: expert,” *ABC News* (23 May 2012), accessed 17 September 2016, <http://www.abc.net.au/news/2012-05-23/corby-clemency-good-for-bali-nine-says-expert/4027542>; Former Indonesian civil servant, personal interview.

⁶³ e.g. “Clemency for drug convicts part of diplomatic effort, says govt,” *The Jakarta Post* (19 October 2012).

⁶⁴ e.g. Fabiola Desy Unidjaja, “President Commutes Oki’s Sentence to Life,” *The Jakarta Post* (31 October 2003); Dessy Sagita, “Indonesia Not Alone in Death Penalty Reticence,” *Jakarta Globe* (17 October 2012); Greenlees, “Coup Leaders Kept in Prison,”; Erwida Maulia, “President to grant clemency for 500 kids,” *The Jakarta Post* (19 February 2010); Arry Anggadha, “Grasi Syaukani, Kemanusiaan vs Keadilan,” *VIVAnews* (23 August 2010), accessed 26 January 2017, <http://fokus.news.viva.co.id/news/read/172606-grasi-syaukani-kemanusiaan-vs-keadilan>.

⁶⁵ e.g. Daniel Pascoe, “Three Coming Legal Challenges to Indonesia’s Death Penalty Regime,” *Indonesian Journal of International and Comparative Law* 2, no.2 (2015): 272; Greenlees, “Coup Leaders Kept in Prison”; Margareth Aritonang and Bagus Saragih, “Drug dealer clemency ‘a setback’,” *The Jakarta Post* (13 October 2012).

⁶⁶ e.g. “Bali Nine: Joko Widodo grants clemency to death row inmates convicted of murder,” *The Australian* (17 March 2005), accessed 17 September 2016, <http://www.theaustralian.com.au/news/world/bali-nine-joko-widodo-grants-clemency-to-death-row-inmates-convicted-of-murder/news-story/2d39a1504ffcb3e984c8e22cdb34dbe0>.

⁶⁷ e.g. Aritonang and Saragih, “Drug dealer clemency”.

⁶⁸ e.g. Sagita, “Indonesia Not Alone in Death Penalty Reticence”; Bagus Saragih, “SBY approves clemency for 19 drug convicts,” *The Jakarta Post* (17 October 2012).

⁶⁹ e.g. relating to the Eva Susanti Bande case.

- the prisoner’s previous contribution to society;⁷⁰
- possible provocation in a murder case;⁷¹ and,
- any lingering doubts over the prisoner’s guilt short of that which would justify a full exoneration.⁷²

Sometimes, more than one of these listed reasons have motivated a president to grant clemency in a single case. The only legislative guidance is the general elucidation to the 2002 Clemency Law’s amending statute (Law 5/2010),⁷³ which provides only negative examples of cases where the president should be hesitant:

*in issuing a decision in relation to a clemency application, the president needs to wisely and judiciously consider ... cases where the crime has been commission repeatedly, is a crime against morality and crimes that are sadistic or premeditated in nature.*⁷⁴

Elsewhere,⁷⁵ I have suggested that, based on the limited statistical information available, various Indonesian presidents have granted clemency at ‘medium’ rates in death penalty cases. Approximately 24-33 percent of death row prisoners received clemency from 1975 to 2013 (with the remainder being executed). Statistics on how often the various Indonesian presidents have exercised the clemency power in *non-capital* cases remain unavailable, although a 2017 media

⁷⁰ e.g. “Inilah Dosa-dosa Syaukani yang Diampuni Presiden?” *Kompasiana Blog*, comment posted 25 August 2010, accessed 26 January 2017, http://www.kompasiana.com/harrybudiyanto/inilah-dosa-dosa-syaukani-yang-diampuni-presiden_55001b8ca33311307250fb04.

⁷¹ e.g. “Dua Terpidana Mati Dapat Grasi dari Presiden Jokowi,” *Seruu* (12 May 2016), accessed 17 September 2016, <http://utama.seruu.com/read/2016/05/12/282865/dua-terpidana-mati-dapat-grasi-dari-presiden-jokowi>.

⁷² Former Indonesian civil servant, personal interview. Another interview source stated that, despite Indonesian law’s view of clemency as forgiveness for guilt (see *infra* n 89-90), it is sometimes granted in cases of innocence, for pragmatic reasons (Indonesian NGO staff #2, personal interview).

Under President Suharto, there was at least one occasion where clemency was granted for wrongful conviction, given possible innocence: see Amnesty International, *Indonesia: A Briefing on the Death Penalty*, AI-Index: ASA 21/040/2004 (30 September 2004), accessed 24 September 2016, <https://www.amnesty.org/en/documents/asa21/040/2004/en/>, p.9.

⁷³ See *infra* n 91, and associated text.

⁷⁴ Indonesian Law 5/2010, on Amendments to Law 22/2002 on Clemency, Elucidation section. trans.

⁷⁵ Daniel Pascoe, “Clemency in Southeast Asian Death Penalty Cases,” Centre for Indonesian Law, *Islam and Society Policy Papers* 1 (2014): 5.

report asserted that the Indonesian Supreme Court had given its advice to the president on 548 clemency cases from 2010 to 2015 – around 90 cases per year.⁷⁶

Unsurprisingly, given its wider impact, amnesty has been used more sparingly by Indonesian presidents over the decades. During the Sukarno and Suharto administrations, only six amnesty decrees were promulgated between 1954 and 1998, most benefiting separatists who had pursued rebellions against Indonesia's territorial integrity.⁷⁷ In these cases, Sukarno's and Suharto's amnesty decrees were granted for the sake of national unity. The most prominent cases of amnesty in the post-Suharto era have also involved separatist rebels and activists. President B.J. Habibie released around 230 political prisoners (including imprisoned separatist leaders from East Timor, Papua and Aceh) through 12 separate executive decrees as a part of Indonesia's democratisation process during 1998 and 1999, to signal a break from Suharto's 'New Order' regime.⁷⁸ Of these prisoners, official figures indicate that at least 48 directly benefited from amnesty, as opposed to other forms of leniency, including clemency.⁷⁹ Then, in 2005, pursuant to a peace treaty, President Yudhoyono signed a decree granting amnesty and abolition to 1424 persons involved in the *Gerakan Aceh Merdeka* (Free Aceh Movement, or 'GAM'), whether they had been imprisoned for offences such as treason, were under investigation or were being prosecuted, or whether they had never previously been subject to criminal proceedings.⁸⁰ Both of these post-*Reformasi* acts of presidential leniency have been feted as successful and appropriate uses of executive powers in dealing with political prisoners.⁸¹

⁷⁶ Abdul Aziz, "Grasi-Grasi yang Diberikan Jokowi dan SBY," *Tirto.id* (25 January 2017), accessed 27 January 2017, <https://tirto.id/grasi-grasi-yang-diberikan-jokowi-dan-sby-chEU>. The yearly figures are as follows: 309 cases in 2010, 57 in 2011, 11 in 2012, 51 in 2013, 82 in 2014 and 38 in 2015.

⁷⁷ Harison Citrawan, "The Past is Another Country: Designing Amnesty Law for Past Human Rights Violators," *Indonesia Law Review* 6, no. 2 (2016): 233-235.

⁷⁸ Daniel Pascoe, "Jokowi's dilemma: amnesty or clemency for political prisoners?" *Indonesia at Melbourne Blog* (20 July 2015), accessed 17 September 2016, <http://indonesiaatmelbourne.unimelb.edu.au/jokowis-dilemma-amnesty-or-clemency-for-political-prisoners/>; Anthony Goldstone, *East Timor: A Difficult Transition*, WRITENET Paper 12/1999 (May 1999), accessed 26 January 2017, <http://www.refworld.org/pdfid/3ae6a6c7c.pdf>, p.6.

⁷⁹ Indonesian Ministry of Law and Human Rights, "Amnesti Indonesia Dataset".

⁸⁰ Renée Jeffery, "Amnesty and Accountability: The Price of Peace in Aceh, Indonesia," *The International Journal of Transitional Justice* 6, no. 1 (2012): 73.

⁸¹ Patrick Burgess, "De Facto Amnesty? The Example of Post-Soeharto Indonesia," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* ed. Francesca Lessa and Leigh A. Payne, (Cambridge: Cambridge University Press 2012), p.276 (on the 2005 GAM amnesty); Tim Lindsey and Mas Achmad Santosa, "The trajectory of law reform in Indonesia: A short overview of legal systems and change in Indonesia," *Indonesia: Law and Society*, 2nd ed., ed. Tim Lindsey (Singapore: The Federation Press, 2008), p.12 and Nadirsyah Hosen,

Returning to the present Indonesian administration, Jokowi's final two options to release political prisoners are by using *remisi* (sentence remissions) and/or conditional release (*pembebasan bersyarat* – equivalent to parole). Both powers are regulated by Law 12/1995 on Corrections and the latter further by the Indonesian Criminal Code. Granted on Indonesia's Independence Day (17 August) each year as General Remissions and also on various religious holidays throughout the year as Special Remissions, sentence remissions function as a statutory means of rewarding good behaviour in prison, of reducing prison overcrowding, as well as celebrating important national events,⁸² and more implicitly, as a means of endearing prisoners and the public to the administration. Many thousands of prisoners who have each served at least six months of their sentences are granted sentence remissions every year in Indonesia.⁸³ Whether remissions are granted as General Remissions or Special Remissions, the discount on the prisoner's sentence will be between four percent and seventeen percent of the total, and will never constitute more than a six-month reduction.⁸⁴

Conditional release, on the other hand, allows prisoners to be released after completing, at a minimum, two-thirds of the original sentence, or nine months' incarceration – whichever is of greater length.⁸⁵ Lindsey and Nicholson describe the criteria for obtaining and maintaining conditional release. The prisoner must have exhibited:

[G]ood behaviour in the previous nine months and have participated in rehabilitation activities with enthusiasm and diligence. The community must also 'be able to accept' the inmate... conditional release may be revoked if there are indications that the crime will be repeated or the person in question breaks the law, fails to report to prison officials on three consecutive occasions, fails to report a change in address, does not participate in a development program set by prison officials, or 'causes unrest in the community' (menimbulkan keresahan dalam masyarakat).⁸⁶

"Emergency powers and the rule of law in Indonesia," in *Emergency Powers in Asia: Exploring the Limits of Legality*, ed. Victor Ramraj and Arun Thiruvengadam (Cambridge: Cambridge University Press, 2010), p.281 (on the post-Suharto releases).

⁸² Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, p.108.

⁸³ *Ibid.*, pp.108-109.

⁸⁴ For a full list, see *ibid.*, p.109.

⁸⁵ Indonesia, *Kitab Undang-Undang Hukum Pidana (Indonesian Criminal Code)*, art. 15(1); Indonesia, *Undang-Undang Tentang Pemasyarakatan (Law on Corrections)*, UU No. 12 Tahun 1995 (Law Number 12 Year 1995), art. 14(1)(k); *ibid.*, p.109.

⁸⁶ Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, pp.110-112.

Although the Indonesian president does not possess a direct constitutional prerogative to grant remissions or conditional release, these remain legal options by which Jokowi, through the Ministry of Law and Human Rights,⁸⁷ could arrange the release of Indonesia's remaining political prisoners. The current Minister of Law and Human Rights, Yasonna Laoly, is a member of Jokowi's political party (*Partai Demokrasi Indonesia-Perjuangan*: Indonesian Democratic Party for Struggle, or PDI-P) and has a close working relationship with the president.

Having outlined the legal options available to the Indonesian president to achieve reconciliation with separatist rebel groups, in the following section I consider the benefits and drawbacks of each possible approach. Unfortunately, none of the four preceding options provides a straightforward solution.

IV. Discussion: Implications for Indonesia's Remaining Political Prisoners

In considering his legal options to release Indonesia's remaining political prisoners, President Jokowi now faces difficult choices. As I describe below, executive clemency (*grasi*) under Article 14 of the 1945 Constitution, while allowing for a prisoner's release, implicitly requires the recipient to acknowledge his or her guilt for the offence pardoned or where the punishment is commuted. Nevertheless, prisoners such as Eva Susanti Bande (an agrarian activist convicted for inciting violence), Schapelle Corby (drug trafficking), Antasari Azhar (murder), and Fabianus Tibo, Marinus Riwu, and Dominggus da Silva (jointly convicted and later executed for murder) all attempted to publicly maintain their innocence while simultaneously petitioning the president for clemency.⁸⁸ Although there is no *explicit* requirement to acknowledge guilt in the Indonesian Constitution or the implementing legislation on clemency (Law 22/2002 and Law 5/2010), both laws clearly define clemency as a form of official forgiveness (*pengampunan*) for

⁸⁷ Indonesia, *Keputusan Presiden Tentang Remisi (Presidential Decision on Remission)*, No. 174 Tahun 1999 (Indonesian Presidential Decision Number 174 Year 1999); Indonesia, *Peraturan Menteri Hukum Dan Hak Asasi Manusia Tentang Syarat Dan Tata Cara Pemberian Remisi, Asimilasi, Cuti Mengunjungi Keluarga, Pembebasan Bersyarat, Cuti Menjelang Bebas, Dan Cuti Bersyarat (Regulation of the Minister of Law and Human Rights on the Conditions and Procedures for Remission, Assimilation, Family Leave, Conditional Release, Leave Approaching Release and Conditional Leave)*, No. 21 Tahun 2013 (Indonesian Minister of Law and Human Rights Regulation Number 21 Year 2013).

⁸⁸ Pascoe, "Jokowi's dilemma"; Ali Kotarumalos, "3 Christians on death row for killing Muslims seek presidential pardon," *Associated Press Newswires* (28 August 2006); Fachrul Sidiq, "Antasari did not plead guilty to earn clemency: lawyer," *The Jakarta Post* (26 January 2017), accessed 27 January 2017, <http://www.thejakartapost.com/news/2017/01/26/antasari-did-not-plead-guilty-to-earn-clemency-lawyer.html>.

punishment imposed by a court of law.⁸⁹ Furthermore, in the elucidation section to Law 22/2002, clemency is described as a ‘gift from the president in the form of forgiveness... Thus, the granting of clemency is not a technical issue of justice and is not a [re]assessment of the judge’s decision.’⁹⁰ Although the elucidation section is not technically part of each Indonesian statute, courts use these as influential and often determinative aids to statutory interpretation.⁹¹

As I described in section II above, criminal justice theorists tend to agree that granting ‘forgiveness’ is only possible (whether by an individual victim or by the state) in cases of guilt – where wrongdoing has been proven or admitted. Given the Indonesian understanding of clemency based exclusively on forgiveness, a factually innocent and wrongly imprisoned defendant therefore faces pressure to implicitly acknowledge guilt for an offence he or she did not commit, in order to benefit from a reduced or abrogated sentence.⁹² This was evidently the bargain made by Bande, Corby, Tibo (when petitioning), and possibly other clemency beneficiaries in Indonesia, or at least the impression these defendants chose to give the outside world as they continued to protest their innocence as they appealed for merciful treatment.

In summary, within the Indonesian constitutional scheme, clemency is an executive edict to reduce or abrogate lawfully-imposed punishment, rather than a means to overturn a judicial finding of guilt and declare innocence based on new arguments or evidence. The implicit effect of the term *pengampunan* (forgiveness) in the two most recent clemency laws and in the elucidation section of Law 22/2002 is to preclude clemency being employed as a ‘free pardon’ bestowing innocence on

⁸⁹ See Indonesia, *Undang-Undang Tentang Grasi (Law on Clemency)*, UU No. 22 Tahun 2002 (Law Number 22 Year 2002), preamble, art. 1; Indonesia, *Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 22 Tahun 2002 Tentang Grasi (Law Regarding Amendments to Law No. 22/2002 on Clemency)*, UU No.5 Tahun 2010 (Law Number 5 Year 2010), preamble. A reference in the latter preamble to clemency for forgiveness *and/or* justice and human rights might open a small window to allow for clemency as revocation of guilt. However, the legislation may also simply be referring to clemency granted on a retributive basis for undeserved *excessive* punishment, rather than the conviction itself being undeserved.

The fact that the predecessor law, *Undang-Undang Permohonan Grasi (Law on Clemency Applications)*, UU No.3 Tahun 1950 (Law Number 3 Year 1950), failed to mention forgiveness at all may explain why President Suharto was able to grant at least one prisoner *grasi* on the basis of innocence (see *supra* n 72).

⁹⁰ ‘*Grasi, pada dasarnya, pemberian dari Presiden dalam bentuk pengampunan... Dengan demikian, pemberian grasi bukan merupakan persoalan teknis yuridis peradilan dan tidak terkait dengan penilaian terhadap putusan hakim.*’

⁹¹ Simon Butt, “Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia,” *Sydney Law Review* 32 (2010): 180 n 24.

⁹² Moore, *Pardons: Justice, Mercy and the Public Interest*, p.194.

the recipient. Although other jurisdictions may grant pardons for innocence,⁹³ in Indonesia the law seems to foreclose the possibility. Instead, for these purposes the *Peninjauan Kembali* ('PK', or case review) procedure is usually utilised.⁹⁴ Since the 1970s, PK has become the regular means of post-conviction review in Indonesia, exercised by the Indonesian Supreme Court after regular cassation appeals have failed.⁹⁵ Prisoners who proceed to petition the president for clemency are publicly perceived as admitting guilt, and as pleading for leniency in punishment only.

The implication is that, arguably, in May 2015 each of the five Papuan clemency recipients at least implicitly acknowledged responsibility for their crimes by accepting release from prison (although it remains unclear whether they submitted clemency petitions to the president themselves, or were pardoned unilaterally, as is now permitted by Law 5/2010).⁹⁶ There is no public record of their views on this implicit admission of guilt, although one interview source noted that the five men released had all received legal advice beforehand on the consequences of accepting executive clemency.⁹⁷

Similar cases have led to contrasting results. In 2010, President Yudhoyono, Jokowi's predecessor, also succeeded in granting clemency to two Papuan political activists jailed for raising the banned 'Morning Star' flag and for taking part in a pro-independence rally that turned violent.⁹⁸ However, on the basis that it would require an admission of guilt, dozens of other Papuan prisoners offered clemency refused to be released on the same occasion.⁹⁹ In August 2013, a further unilateral attempt at granting large-scale clemency to Papuan political prisoners by Yudhoyono failed, as the prisoners concerned again refused to acknowledge guilt for crimes that they say they did not commit.¹⁰⁰ Among the group refusing

⁹³ See supra n 17.

⁹⁴ Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, p. 85.

⁹⁵ Tim Lindsey, ed., *Indonesia: Law and Society*, 2nd ed. (Singapore: Federation Press, 2008), p. 349.

⁹⁶ See Indonesia, *Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 22 Tahun 2002 Tentang Grasi (Law Regarding Amendments to Law No. 22/2002 on Clemency)*, UU No.5 Tahun 2010 (Law Number 5 Year 2010), art. 6A. One interviewee asserted that President Widodo initiated the process himself (Indonesian NGO staff #3, personal interview).

⁹⁷ Indonesian Academic Expert, personal telephone interview, 19 January 2017.

⁹⁸ Niniek Karmini, "Indonesia Political Prisoners in Papua Reject Amnesty Plan," *The Irrawaddy* (4 June 2013), accessed 29 January 2017, <http://www.irrawaddy.com/news/asia/indonesia-political-prisoners-in-papua-reject-amnesty-plan.html>.

⁹⁹ Ryan Dagur, "Papua prisoners snub clemency offer," *UCA News* (3 June 2013), accessed 21 September 2016, <http://www.ucanews.com/news/papua-prisoners-snub-clemency-offer/68410>.

¹⁰⁰ This case demonstrates that even clemency offered unilaterally may be refused by the intended recipients (see *Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 22*

clemency in 2013 was Filep Karma, at the time the most well-known Papuan political prisoner, who was given a 15 year sentence in 2004 for raising the banned 'Morning Star' flag at a protest.¹⁰¹ Furthermore, many of the Moluccan prisoners who still remain incarcerated in 2017 have refused *grasi* from successive Indonesian presidents for the same reason.¹⁰² Given such prisoners' reluctance to accept presidential clemency, as far back as 2011 Indonesia's Human Rights Commission (KOMNAS HAM) recommended using the amnesty power to release political prisoners.¹⁰³ More recently, in 2015, New York-based NGO Human Rights Watch demanded that 'The Indonesian government should release all political prisoners with an immediate presidential amnesty rather than demand prisoners admit "guilt" for convictions that violated their basic human rights'.¹⁰⁴

As KOMNAS HAM and Human Rights Watch have suggested, based on its historical and theoretical rationale, granting *amnesty* for political prisoners in order to signal a break from the past, to facilitate societal 'healing' and to encourage constructive dialogue with separatist rebel groups appears the more appropriate choice for Jokowi, rather than attempting to make further grants of clemency.¹⁰⁵ Granting amnesty (in addition to *abolisi* (abolition) for prisoners whose cases are still pending in the court system) would release the beneficiaries from prison, would not necessarily imply guilt (as Indonesia's constitutional scheme fails to recognise *conditional* amnesty), and would return the political prisoners to a position as if they had not been convicted in the first place, by 'forgetting' rather than 'forgiving'. A blanket amnesty and abolition grant would certainly be preferable for most of the

Tahun 2002 Tentang Grasi (Law Regarding Amendments to Law No. 22/2002 on Clemency), UU No.5 Tahun 2010 (Law Number 5 Year 2010), art. 6A).

¹⁰¹ Amnesty International, *After a Decade in Jail for Raising a Flag, Filep Karma is Released* (19 November 2015), accessed 21 September 2016, <http://blog.amnestyusa.org/asia/after-a-decade-in-jail-for-raising-a-flag-filep-karma-is-freed/>.

¹⁰² Indonesian NGO staff #3, personal interview.

¹⁰³ Former member of the Indonesian National Human Rights Commission, personal interview; "Komnas HAM pertimbangkan ajukan amnesti Tapol/Napol Papua," *UCA News* (3 December 2012), accessed 25 January 2017, <http://indonesia.ucanews.com/2012/12/03/komnas-ham-pertimbangkan-ajukan-amnesti-tapolnapol-papua/>.

¹⁰⁴ "Indonesia: Free All Political Prisoners," *Human Rights Watch*, 9 May 2015, accessed 21 September 2016, <https://www.hrw.org/news/2015/05/09/indonesia-free-all-political-prisoners>.

¹⁰⁵ It is an open question whether President Widodo could grant clemency, followed by rehabilitation in order to re-establish the good name of the prisoner, as suggested by the Coordinating Minister for Political, Legal and Security Affairs, Tedjo Edhy Purdijatno (Anggi Kusumadewi, "Tahanan Politik Filep Karma Tolak Ajukan Grasi ke Jokowi," *CNN Indonesia* (27 May 2015), accessed 24 September 2016, <http://www.cnnindonesia.com/nasional/20150527133159-20-56010/tahanan-politik-filep-karma-tolak-ajukan-grasi-ke-jokowi/>). However, under one interviewee's interpretation, this course of action would not remove the prisoner's guilt, but would only dispense with the prisoner's criminal record (Indonesian NGO staff #2, personal interview).

prisoners themselves.¹⁰⁶ However, the major hurdle here is that granting amnesty would require that the president pay heed to the advice of the DPR, as noted above. Acting contrary to the Supreme Court's *confidential* advice is one thing, but ignoring the legislature's publicly-aired views is entirely another. Herein lies Jokowi's dilemma.

Although it is not mandatory for the Indonesian president to follow the constitutional advice of other government branches¹⁰⁷ (and there certainly have been cases where previous presidents have ignored the advice of the Supreme Court in granting or rejecting clemency),¹⁰⁸ disregarding the advice on amnesty of the DPR's Commission III (on Legal Affairs, Laws, Human Rights and Security) is an unlikely move for a relatively inexperienced president with a limited legislative mandate, both in 2015 when the PDI-P led a minority government, but also since July 2016 when support from the Golkar party gifted Jokowi's bloc a legislative majority for the first time.¹⁰⁹ In justifying the president's decision to grant clemency rather than amnesty to the five Papuan prisoners in May 2015, the Minister of Law and Human Rights Yasonna Laoly stated 'We are concerned about the political process at the House'.¹¹⁰ Then, as Laoly foreshadowed, in late June 2015 DPR

¹⁰⁶ Harsono, "Indonesia's Forgotten Political Prisoners"; Former member of the Indonesian National Human Rights Commission, personal interview. One interviewee, however, told of a generational split amongst Papuan political prisoners. Younger prisoners would not accept guilt as the price of release, whereas older prisoners were more willing to admit guilt if it meant that they could re-join their families (Indonesian academic expert, personal interview). The same interviewee also relayed the views of a minority of Papuan prisoners, who feared that even release *through amnesty* would cast an impression of guilt on them. However, this is not the prevailing position according to Indonesian law, as described above.

¹⁰⁷ Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012), p.35.

¹⁰⁸ Former Indonesian civil servant, personal interview; Senior Indonesian lawyer #2, personal interview. A sitting Indonesian Supreme Court Judge suggested that although the president may *usually* act in accordance with the recommendation, there are definitely post-*reformasi* examples where the Supreme Court's advice has been disregarded (Indonesian Supreme Court Judge, personal interview, Jakarta, Indonesia, 26 April 2013).

¹⁰⁹ At the time of writing in January 2017, Jokowi's party, the PDI-P, holds only 109 of the 560 seats in the DPR, although with the Golkar party recently pledging to support Jokowi's 2019 re-election bid, the PDI-P bloc has now established a working majority of 62 percent in the legislature, alongside Golkar and five other smaller parties (Francis Chan and Wahyudi Soeriaatmadja, "Golkar set to back Jokowi's coalition," *The Straits Times* (14 January 2016), accessed 28 January 2017, <http://www.straitstimes.com/asia/se-asia/golkar-set-to-back-jokowis-coalition>).

On the DPR's Commission III, only nine of 53 members come from the PDI-P, at the time of writing: Dewan Perwakilan Rakyat, "Daftar Anggota – Komisi III," List of Members of Indonesian Lower House Third Commission 2016, accessed 28 January 2017, <http://www.dpr.go.id/akd/index/id/Daftar-Anggota-Komisi-III>.

¹¹⁰ Parlina and Somba, "In Papua, Jokowi frees 5".

lawmakers failed to give support to Jokowi's further proposals to grant amnesty to remaining political prisoners due to fears of legitimising the Free Papua Movement, and the perceived risk that the beneficiaries of such amnesty would incite disaffection for the Indonesian administration in Papua and West Papua provinces upon their release.¹¹¹ The DPR's position on amnesty has remained the same since Golkar joined PDI-P in coalition, and by January 2017 the Indonesian legislature had stopped discussing the issue at all.¹¹²

It appears incongruous then that in July 2016 the DPR endorsed amnesty for up to 70 members of a former Acehese rebel group, with the proposed amnesty comprising prisoner releases of former rebels 'who have obtained [final] legal status,'¹¹³ and is 'aimed at showing the international community that Indonesia [can also] take a soft approach to rebels and respect human rights'.¹¹⁴ With the internationally-mediated Helsinki MoU of August 2005 paving the way for presidential amnesty and abolition to former GAM combatants,¹¹⁵ perhaps the DPR feels that the present Acehese group pose less of a threat to the Indonesian state's continued unity than, for example, OPM independence activists, given the ongoing hostilities between the OPM and the Indonesian government. By contrast, former GAM members are now active in Acehese provincial politics, having laid down their weapons pursuant to the 2005 MoU.¹¹⁶ Given that Yudhoyono's original amnesty decree was not intended to cover: 'members of GAM who had committed [non-political] criminal acts or those who continued to carry out acts of rebellion after the date of the signing of the [2005] Helsinki accord,'¹¹⁷ the present group of beneficiaries would require a separate legal instrument. Nevertheless, by January 2017 Jokowi had not approved and issued the DPR's proposed amnesty decree for this GAM 'splinter group'.

As noted above, Jokowi's final option is to release political prisoners through sentence remissions and/or conditional release, each issued under the direction of the Ministry of Law and Human Rights. Remissions may be granted to all prisoners, including political prisoners, in accordance with Law 12/1995 on Corrections. However, from the Papuan and Moluccan prisoners' point of view, remissions and

¹¹¹ Pascoe, "Jokowi's dilemma". The Indonesian military (TNI), still a potent source of power in the *Reformasi* era, also opposes the release of political prisoners (Former member of the Indonesian National Human Rights Commission, personal interview).

¹¹² Indonesian academic expert, personal interview.

¹¹³ Sapiie, "House agrees to amnesty for surrendered Aceh rebels".

¹¹⁴ Ramadhani, "Aceh Militants to be Granted Amnesty Despite Objections".

¹¹⁵ Burgess, "De Facto Amnesty?" pp.274-275.

¹¹⁶ Gyda Maras Sindre, "In whose interests? Former rebel parties and excombatant interest group mobilisation in Aceh and East Timor," *Civil Wars* 18(2) (2016): 194.

¹¹⁷ Burgess, "De Facto Amnesty?" p.274.

conditional release are, in effect, no different from receiving clemency. The prisoner's original conviction is unaffected and his or her guilt remains. Therefore, it was a surprise when Filep Karma was granted (and accepted) remissions so as to be released from prison in November 2015, after serving 11 years of a 15 year sentence.¹¹⁸ Karma's method of release was, in one sense, no different from the executive clemency that he had previously turned down. Whatever Karma and his supporters may now say in the media,¹¹⁹ to the Indonesian public, early release does not erase guilt or vindicate Karma's political positions.

Furthermore, the relevant legislation sets out a strict schedule for remissions based on the length of time already served.¹²⁰ If Jokowi wished to accelerate the release of certain prisoners in the name of reconciliation, there is little he could achieve quickly using remissions, particularly for prisoners serving longer-term sentences, given the maximum discount on sentence only stands at six months.¹²¹ Conditional release is a much quicker means of releasing political prisoners serving longer sentences, provided they have served at least two-thirds of the head sentence. The main barrier to receiving conditional release in treason or rebellion cases is the requirement to demonstrate remorse,¹²² thereby placing a potential recipient on the

¹¹⁸ Parlina and Somba, "In Papua, Jokowi frees 5"; Phelim Kine, *Dispatches: Indonesia Frees Papuan Political Prisoner*, Human Rights Watch Press Release (23 November 2015), accessed 21 September 2016, <https://www.hrw.org/news/2015/11/23/dispatches-indonesia-frees-papuan-political-prisoner>.

¹¹⁹ For example, see Amnesty International, *After a Decade in Jail*.

¹²⁰ Lindsey and Nicholson, *Drugs Law and Legal Practice in Southeast Asia*, p.109.

¹²¹ The website 'Papuan Behind Bars' lists at least five Papuan prisoners who are serving sentences of five or more years' duration: Oktovianus Warnares (seven years for flag raising); Wiki Meaga (eight years for flag raising); Meki Elosak (eight years for flag raising); Jefri Wandikbo (eight years as an accomplice to premeditated murder) and Yusanur Wenda (17 years for treason: *makar*) (Papuan Behind Bars, "Current Prisoners (2016)," NGO Website, accessed 29 January 2017, http://www.papuansbehindbars.org/?page_id=17). Wenda, whose sentence may still run until 2022, was released from prison on parole in January 2016, while Elosak and Meaga are also being considered for parole, but have not been release at the time of writing (Aliansi Demokrasi untuk Papua, "Tapol Yusanur Wenda Bebas Bersyarat, Meki Elosak Menyusul," 2016, accessed 17 September 2016, <http://www.aldp-papua.com/tapol-yusanur-wenda-bebas-bersyarat-meki-elosak-menyusul/>).

Although more recent data is not available for Moluccan political prisoners, in 2009 Amnesty International recorded 30 sentences of ten or more years' duration issued to Moluccans for pro-independence activities, flag-raising and taking part in protests during 2007 and 2008. (Amnesty International, *Indonesia: Jailed for Waving a Flag*, pp.28-33).

¹²² Indonesia, *Peraturan Menteri Hukum Dan Hak Asasi Manusia Tentang Syarat Dan Tata Cara Pelaksanaan Asimilasi, Pembebasan Bersyarat, Cuti Menjelang Bebas, Dan Cuti Bersyarat (Regulation of the Minister of Law and Human Rights on the Conditions and Procedures for Assimilation, Conditional Release, Leave Approaching Release and Conditional Leave)*, No. 1 Tahun 2007 (Indonesian Minister of Law and Human Rights Regulation Number 1 Year 2007), art. 6(1)(A).

same guilty footing as a prisoner who accepts presidential clemency. Nevertheless, over the past few years, the decline in numbers of political prisoners incarcerated has largely come about via conditional release, remissions, and prisoners completing their sentences in the entirety,¹²³ as opposed to the clemency and amnesty options discussed in this article.

V. Conclusion

From the perspective of the Papuan and Moluccan political prisoners, the pressing dilemma is how to achieve release from prison and re-join their families, while not a) legitimising the penal laws and the Indonesian security apparatus that placed them there in the first place, and in some cases, not b) admitting factual guilt for the offences charged. Prisoners such as Filep Karma might proudly admit that they carried out acts prohibited by the Indonesian state (e.g., raising the Morning Star flag¹²⁴) but would still be loath to endorse these laws as just laws by petitioning for forgiveness. In 2013, Karma admitted as much when he was quoted within prison stating: ‘I will only accept an unconditional release ... I did not commit any crime when I raised the Morning Star flag in 2004’.¹²⁵ In effect, Karma was advocating for presidential amnesty.

For Indonesia’s present political prisoners, to accept presidential clemency risks failure on both counts. To be released through remissions or conditional release does likewise. All three are solutions ‘within the system’ that fail to take account of the prisoners’ true preferences and their rejection of that system. Clearly the best solution from the prisoners’ perspective is presidential amnesty, combined with abolition for those defendants whose cases are still pending. Amnesty itself does not repeal the laws used to censor and punish independence activists, but at least it serves to denote reconciliation and dialogue as higher values than retributive justice based on Indonesia’s positive criminal law.

However, from Jokowi’s perspective, granting amnesty unilaterally (while legally possible), would anger his parliamentary backers and is an unlikely political step during his first five-year term as president (2014-2019). Clemency, remissions and conditional release remain the politically more straightforward options, and these were still being considered by the Indonesian executive as of 2016.¹²⁶ Significantly, unlike the 2005 Helsinki MoU concluded with Acehese rebel group GAM, the Indonesian government and the separatist rebel groups from which the

¹²³ Indonesian academic expert, personal interview; Indonesian NGO staff #3, personal telephone interview, 25 November 2016.

¹²⁴ See supra n 6.

¹²⁵ Amnesty International, *After a Decade in Jail*.

¹²⁶ Parlina, “Govt to take ‘soft approach’ in Papua”.

remaining Papuan and Moluccan political prisoners derive are not presently bound by any bilateral peace treaty. Even if an attempt at treaty negotiations were made, it is even uncertain whether the Indonesian government would find an authoritative negotiating partner amongst the OPM and RMS movements, given their scattered leadership.¹²⁷

The DPR's continuing concern is whether unconditional amnesty legitimises separatism and undermines the state's ethnic unity. Looking to Indonesia's previous state practice on amnesty, together with the theoretical literature, this article suggests that unconditional amnesty has neither of those effects. As noted above, amnesties have been frequently granted to separatist groups throughout Indonesia's independent history as a peacebuilding measure. In no previous case has a direct link been established between an amnesty grant and a subsequent upsurge in separatist violence, with one interviewee noting that, historically, most amnesty recipients have not returned to political activities at all.¹²⁸ Here, the amnesty recommended in July 2016 for up to 70 members of a breakaway Acehese rebel group is highly significant, demonstrating that current members of the DPR's Commission III are not intransigent, given the right arguments and incentives are put forward. Jokowi's best solution may be to convince Commission members from his own multi-party coalition to recommend amnesty as a *forward* looking measure to preserve peaceable relationships with Indonesia's citizens and with international allies, rather than a backwards looking move which appears to legitimise separatist movements by removing the burden of punishment.¹²⁹ Here, the language the president uses in the media and in the resulting amnesty decree itself will become critically important. Referring to Indonesian presidents' long history in utilising Article 14(2) of the 1945 Constitution as a peacebuilding measure, alongside the theoretical basis for amnesty laws and practice around the world, is one means of encouraging compromise on all sides.

¹²⁷ Indonesian NGO staff #2, personal interview.

¹²⁸ Former member of the Indonesian National Human Rights Commission, personal interview.

¹²⁹ Stokkom, Doorn and Tongeren, "Public Forgiveness," p.9.

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