

An Investigation of Clemency and Pardons in Death Penalty Cases in Southeast Asia from 1975-2009

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Abstract

Four of the contemporary practitioners of the death penalty in Southeast Asia: Indonesia, Malaysia, Thailand and Singapore, performed judicial executions on a regular basis between the years 1975 and 2009. Notwithstanding this similarity, the number of death sentences passed by courts that were subsequently reduced to a term of imprisonment through grants of *clemency* by the executive (or where the prisoner sentenced to death is exonerated by way of a *pardon*) varied remarkably between these jurisdictions over this 35-year period: some of these countries commuted the sentences of death row prisoners often, others rarely. In this DPhil thesis, I employ the methodology of comparative criminal justice to explore the discrepancies and similarities in capital clemency practice between these four Southeast Asian jurisdictions, seeking to document the known examples of clemency grants over the course of their modern history, and to investigate the reasons why retentionist countries exercise clemency at vastly different 'rates' in finalised capital cases.

As clemency and pardon deliberations by the executive are usually performed in secret, academic study of the subject has remained scarce, and the suspected reasons behind death sentence commutations, and their relative frequency, are rarely analysed. My inductive, qualitative study in comparative criminal justice will attempt to address these deficiencies in analysis as they apply to four Southeast Asian countries that continue to practice capital punishment as a form of criminal sanction. Moving beyond Amnesty International's simplistic observation that 'nowhere in Asia has the ready availability of such clemency been marked', I examine the intricacies of the clemency practice in each jurisdiction, and arrive at regional trends and patterns.

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List of Abbreviations

ADPAN – Anti Death Penalty Asia Network (Coalition of Individuals and Non-Government Organisations, Coordinated by Amnesty International)

AI – Amnesty International (London-based NGO)

ANFREL – Asian Network for Free and Fair Elections (Bangkok-based NGO)

ASEAN – Association of Southeast Asian Nations

CRC - *United Nations Convention on the Rights of the Child* 1989

FIDH – *Fédération Internationale des Droits de l'Homme* (International Federation for Human Rights)

GOLKAR – *Golongan Karya* (Indonesian political party of Presidents Suharto and B.J.Habibie)

HOC – Hands Off Cain (Rome-based NGO)

HRW – Human Rights Watch (New York-based NGO)

ICCPR - *International Covenant on Civil and Political Rights* 1966

MARUAH – Working Group for an ASEAN Human Rights Mechanism (Singapore-based NGO)

MDP – Mandatory Death Penalty

NGO – Non-Government Organisation

PAP – People's Action Party (ruling political party in Singapore)

PKI – *Partai Komunis Indonesia* (Indonesian Communist Party 1914-1966)

SUHAKAM - *Suruhanjaya Hak Asasi Manusia Malaysia* (Malaysian Human Rights Commission)

TAPOL – *Tahanan Politik* ('Political Prisoner' in Suharto-era Indonesia and also the name of a London-based NGO)

UMNO – United Malays National Organisation (largest political party in Malaysia)

UN – United Nations

*Other abbreviations for selected sources are listed in the Reference List at the end of the dissertation

List of Cases, Statutes and International Instruments

Republic of Singapore

Chng Suan Tze v Minister of Home Affairs [1988] SLR 132

Constitution of Singapore 1965

Constitution of the Republic of Singapore (Amendment) Act 1991

Criminal Law (Temporary Provisions) Act 2000 (original enactment 1955)

Criminal Procedure Code 2010 (original enactment 1955)

Hamsah v Public Prosecutor [1997] 2 SLR(R) 842

Internal Security Act 1985 (original enactment 1960)

Jabar v Public Prosecutor [1995] SGCA 18

Kalimuthu v Attorney-General [2012] SGHC 39

Kidnapping Act 1961

Misuse of Drugs (Amendment) Act 1975

Misuse of Drugs (Amendment) Act 1993

Misuse of Drugs (Amendment) Act 2012

Misuse of Drugs Act 2008 (original enactment 1973)

Official Secrets Act 2012 (original enactment 1935)

Penal Code (Amendment) Act 2012

Penal Code 2008 (original enactment 1871)

Public Prosecutor v Koh Swee Beng [1990] SLR 405

Ravinthran v Attorney-General [2012] SGCA 2

Singapore Armed Forces Act 2000 (original enactment 1972)

Singapore Arms Offences Act 1973

Terrorism (Suppression of Bombings) Act 2007

Yong Vui Kong v Attorney-General [2011] SGCA 9

Yong Vui Kong v Public Prosecutor [2010] SGCA 20

Federation of Malaysia

Arms Act 1960

Chang Liang Sang v Public Prosecutor [1982] MLJ 231

Child Act 2001

Constitution (Amendment) Act 1994

Constitution of Malaysia 1957

Criminal Justice Act 2006 (original enactment 1953)

Criminal Procedure Code 2006 (original enactment 1935)

Criminal Procedure Code (Amendment) Act 2010

Dangerous Drugs (Amendment) (No 2) Act 1977

Dangerous Drugs (Amendment) Act 1975

Dangerous Drugs (Amendment) Act 1983

Dangerous Drugs (Special Preventive Measures) Act 1985

Dangerous Drugs Act 1952

Emergency (Public Order and Crime Prevention) Ordinance 1969

Essential (Security Cases) Amendment Regulations 1975

Essential (Security Cases) Amendment Regulations 1981

Essential (Security Cases) Regulations 1975

Firearms (Increased Penalties) Act 1971

Hashim v Public Prosecutor [1983] 2 MLJ 232

Husin v Lembaga Pengampunan Negeri Pahang [2001] 3 MLJ 458

Internal Security Act 1960

Juvenile Courts Act 1947

Kidnapping Act 1961

Penal Code (Amendment) Act 2004

Penal Code 1997 (original enactment 1936)

Public Prosecutor v Soon Seng Sia Heng [1979] 2 MLJ 170

Public Prosecutor v Yee Kim Seng [1983] 1 MLJ 252

Water Services Industry Act 2006

Kingdom of Thailand

Constitution of Thailand 1959

Constitution of Thailand 1968

Constitution of Thailand 1972

Constitution of Thailand 1974

Constitution of Thailand 1976

Constitution of Thailand 1977

Constitution of Thailand 1978

Constitution of Thailand 1991

Constitution of Thailand 1991 (Interim)

Criminal Code 1956

Criminal Code 2003

Criminal Procedure Code 2004

Fireworks and Other Equivalence Act 1947

Harmful Habit-Forming Drugs Act (No. 4) of 1961

Military Criminal Code 1911

Narcotics Act 1979

Republic of Indonesia

Constitution of Indonesia 1945

Explanatory Memorandum to Law 22/2002 (*Tambahan Lembaran Negara Republik Indonesia* 4234 (Supplement to the State Gazette of the Republic of Indonesia Number 4234), 22 October 2002)

Law 3/1950 on Clemency

Law 5/1969 on Subversion

Law 9/1976 on Narcotics

Law 8/1981 on Criminal Procedure

Law 14/1985 on the Supreme Court

Law 26/1999 on the Annulment of the Anti-Subversion Law

Law 22/2002 on Clemency

Law 15/2003 on Terrorism

Law 5/2010 on Clemency

Presidential Decree 345/1951 on Remissions

Presidential Decree 11/1963 on the Eradication of Anti-Subversive Activities

Presidential Decree 16/1963 on the Extraordinary Military Tribunal

Supreme Court Decree 1/1986 on Clemency

United Kingdom

Murder (Abolition of Death Penalty) Act 1965

Ong Ah Chuan v Public Prosecutor [1981] AC 648 (Privy Council)

Ramalan v Public Prosecutor [1978] 2 WLR 130 (Privy Council)

United States

Biddle v Perovich 274 US 480 (1927) (US Supreme Court)

Ex Parte Grossman [1924] 69 Law Ed 527 (US Supreme Court)

Furman v Georgia 408 US 238 (1972) (US Supreme Court)

Gregg v Georgia 428 US 153 (1976) (US Supreme Court)

Herrera v Collins 506 US 390 (1993) (US Supreme Court)

In re Sapp 188 F. 3d (1997) 460 (US Court of Appeals for the 6th Circuit)

International Instruments

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

UN Economic and Social Council Resolution 1989/64 (24 May 1989)

United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

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Chapter One - Introduction

All five contemporary practitioners of the death penalty in Southeast Asia: Indonesia, Malaysia, Thailand, Singapore and Vietnam, have performed executions on a regular basis over the past few decades.¹ Notwithstanding this common willingness to execute, the number of death sentences passed by courts that are reduced to a term of imprisonment, or where the prisoner is released from custody altogether, through grants of *clemency* or *pardon* by the executive branch of government² varies remarkably among these neighbouring countries. In this doctoral study, I analyse the differences in clemency practice among the Southeast Asian jurisdictions that continue to employ the death penalty as a form of criminal punishment, minus Vietnam,³ in an inductive search for patterns which will not only illuminate the identity of clemency *recipients*, but will also help to explain why some countries make use of clemency more often than others. Moving far beyond Amnesty International's simplistic observation that 'although, in many countries, there is provision for act of presidential clemency, nowhere in Asia has the ready availability of such clemency been marked',⁴ I will examine the intricacies of the clemency practice in Indonesia, Malaysia, Singapore and Thailand through a *qualitative*

¹ AI-Index ASA 03/01/97, 1; AI-Index ACT 50/001/2011, 45; Appendices A-D.

² See Chapter Three, *Further Terminology*, for detailed definitions of the terms 'clemency' and 'pardon' that I have adopted. For present purposes, 'clemency' refers to the substitution of a sentence of death with a lesser punishment, usually a term of imprisonment (Palmer, 110; Coyne and Entzeroth, 838). I will include 'pardons' (where the prisoner is granted an unconditional release from prison) within this broader definition, as pardons in death penalty cases are exceedingly rare (Burnett (2002), 14; Scott, 96).

³ The reasons why I have chosen to exclude Vietnam from my study of actively retentionist countries in Southeast Asia are described below, in the section '*Why is the Death Penalty in Southeast Asia worthy of Academic Study? Why is Clemency in Southeast Asian Death Penalty Cases Suitable for Regional Comparison?*'.

⁴ AI (1979), 67. See also AI-Index ASA 01/023/2011, 32, for a more recent statement on the rarity of clemency in the Asia-Pacific region.

comparative criminal justice study, informed by relevant theory and previous comparative empirical studies. While extrapolating the findings of a study of only four retentionist jurisdictions to other parts of the world must be undertaken with caution, this piece of research has the potential to add to what are scarce bodies of literature on clemency and pardons in capital cases (globally) and the death penalty in Southeast Asia (locally), and to formulate theories and hypotheses that may be tested in future academic studies of the death penalty.

Two Research Questions

I address two research questions in this dissertation. As clemency and pardons are often secretive decisions that are either kept from the public, or are announced without justification and explanation,⁵ it is first important to attempt to document each country's clemency *practice* in as precise a fashion as possible, before any further analysis can be undertaken. As such, my first research question (what I label the 'micro' question), for the four Southeast Asian jurisdictions under analysis is as follows:

1. *Who were the granters, and recipients of clemency and pardons in Southeast Asian death penalty cases from 1975 to 2009?*

My second research question (what I label the 'macro' question), although more complex, is dependent on a thorough set of results arising from the first enquiry, above:

2. *What are the structural and cultural determinants of capital clemency and pardon frequency in retentionist Southeast Asian jurisdictions from 1975 to 2009?*

⁵ Sebba (1977a), 228-229; Kobil (1991), 608-609; Scott, 98; Acker et al, 188.

One assumption implicit within this second research question is that I will be able to calculate the relevant jurisdiction's clemency 'rate' (namely the *proportion* of condemned prisoners, who have exhausted their *judicial* appeals, who are then granted clemency by the executive) with a reasonable degree of accuracy. While I will not attempt to answer this second research question through a quantitative regression analysis,⁶ I nonetheless aim to arrive at a few general observations about the potential determinants of clemency frequency in the region after completing a *qualitative* comparative study.

Justifications for Research – Intersecting Features

Why Study Clemency and Pardons in Death Penalty Cases (Anywhere in the Retentionist World)?

As noted above, clemency deliberations by executive decision-makers the world over are usually performed in secret, with public justification for the exercise of clemency rarely given.⁷ Accordingly, academic study of the subject has remained scarce, and the possible reasons behind death sentence commutations are rarely analysed in any systematic way.⁸

⁶ The three reasons why a quantitative regression analysis would *not* be appropriate in this case are:

- a) I only have a small sample of four jurisdictions to work with, and previous quantitative regression analyses of the death penalty such as those undertaken by Neumayer (2008a); Greenberg and West (2008); Miethe et al (2005), and Anckar (2004) have pursued a global focus, sampling a much larger number of retentionist jurisdictions;
- b) Significant state secrecy surrounds the implementation of the death penalty in Southeast Asia, resulting in substantial gaps in the coverage of quantitative data available; and similarly,
- c) The previous comparative criminal justice literature suggests that *qualitative* analysis is the most appropriate methodology where only a handful of jurisdictions are to be studied (Bennett, 6, 15; Miethe et al, 124, 128). Moreover, qualitative methodology is more appropriate for an *inductive* study (where theory follows observation, rather than the other way around) (Kohli et al, 45; Miethe et al, 121, 124; Bottoms, 97).

⁷ Sebba (1977a), 229; Kobil (1991), 608-609.

⁸ Landes and Posner, 62; Kobil (1991), 608-609.

As Kobil observes, clemency and pardons now demand academic explanation to an even greater degree:

... like the monarchical power from which it derives, clemency is shrouded in mystery and often fraught with arbitrariness at a time when other aspects of [criminal justice systems] are becoming more open and fair.⁹

Despite the lack of information about how clemency decisions are made, they usually determine whether or not a prisoner sentenced to death (who, by the time of the clemency petition, will almost always have exhausted available judicial remedies) ultimately lives or dies, and hence are of vital importance in a criminal justice system that retains capital punishment.¹⁰ Although the frequency and consequent importance of clemency and pardons appears to have declined in an entire range of jurisdictions throughout the course of the 20th century,¹¹ clemency is still the final avenue of appeal for a condemned prisoner, the recourse to which is mandated by the ICCPR,¹² and perhaps even by customary international law.¹³ As Scott succinctly observes, ‘as long as capital punishment continues, power to [grant clemency or] pardon is bound to remain an important element in the administration of criminal justice.’¹⁴

⁹ Kobil (1992-1993), 202.

¹⁰ Burnett (2002), 16; Scott, 95; Kobil (1992-1993), 214.

¹¹ Acker et al, 184; Kobil (1998), 673, 678; Kobil (2007), 37; Strange, 14.

¹² ICCPR, art 6(4): ‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.’ See Chapter Three, note 390, on the ratification status for retentionist countries.

¹³ AI-Index ASA 01/023/2011, 31.

¹⁴ Scott, 95.

Although clemency and pardon decisions, at first glance, appear to constitute arbitrary ‘decrees’ from the executive decision-maker,¹⁵ a systematic inspection of clemency practice in any particular retentionist jurisdiction will often reveal that the power is exercised in accordance with particular patterns, values and presumptions. Although in no jurisdiction are decision-makers bound by previous analogous decisions, the patterns observed in US studies on clemency and pardon suggest that precedent often does play a significant role in the decision.¹⁶ Clemency decisions deserve socio-legal academic scrutiny because they occur at the intersection of law and politics: an apparently plenary political or constitutional power that is nonetheless subject to informal legal constraints and is often exercised pursuant to a particular decision-making paradigm.

As I discuss further in Chapter Two, a number of previous academic studies have focused on the specific determinants of death penalty *retention* or *abolition*, or even the long-term political and historical *processes* leading to abolition, but very few have explored the differences in death penalty practice among neighbouring retentionist jurisdictions. The existing academic literature is missing analyses of the determinants of national execution rates, average length of time spent on death row, the designation of particular crimes as capital or not, and, in the present case, the proportion of cases granted clemency.¹⁷ On this final point, Sarat observes that in a world that increasingly questions the use of capital punishment as a criminal sanction:

¹⁵ Kobil (1992-1993), 213-214, 214 n61, 226; Sarat (2005), 69; Meyer, 64.

¹⁶ Hawkins, 43; Abramowitz and Paget, 182; Morison, 153; Burnett (2002), 175

¹⁷ See Johnson and Zimring (2006), 92, 94, for a summary of the ‘missing research’ in the Asian context.

a sustained focus on the right to impose death sometimes eclipses the essential corollary of the definition of *vitae et necis potestatem*: the sovereign right to spare life. In a modern political system this power to spare life remains in the form of executive clemency.¹⁸

A further instrumental and activist reason to study clemency and pardons in death penalty cases is to generate findings with clear policy implications. Unlike other social science studies driven by methodological ends, a primary aim of comparative criminal justice is to increase understanding of real-world aspects of criminal justice systems, and to improve on present policy.¹⁹ A comparative study of executive discretion in death penalty cases, irrespective of the jurisdictions covered, has the potential to contribute to the body of research that exposes the death penalty as an arbitrarily-imposed and excessive punishment, and helps to chip away at the punishment's legitimacy over time.²⁰ While vociferous calls for an *individual* prisoner's clemency sometimes risk being interpreted as *enhancing* the legitimacy of capital punishment as an institution (by focusing on the *exception* that enhances the *rule*),²¹ an effective and humane campaign strategy against the death penalty involves not only challenging capital punishment on an *institutional* scale, but also attempting to stop executions, one by one, by any legal

¹⁸ Sarat and Hussain, 1313; Strange, 7.

¹⁹ Bennett, 4; Kohli et al, 46; Nelken (2011), 394.

²⁰ Such research includes studies on the death penalty and deterrence, public opinion, the 'most serious crimes' limit enunciated in the ICCPR (art 6(2)), the MDP, the death penalty for juveniles or the mentally ill, public executions, the 'death row' effect and reinterpretation of religious texts such as the Bible or the Koran.

²¹ Thurschwell, 288.

means.²² In this context, arguments for *incremental restriction* of the death penalty often disguise abolitionist intentions:

the most vociferous critics of the system for administering capital punishment are not reformers seeking a fair death penalty; they are abolitionists seeking no death penalty at all... some people begin with the belief that capital punishment is inherently immoral and seek to abolish it by attacking the way it is applied[.]²³

Therefore, in accordance with my own abolitionist sentiment, the results of the present exploratory study may have the potential to assist criminal defence lawyers as they prepare judicial appeals and clemency petitions for prisoners sentenced to death in Southeast Asia, and possibly elsewhere in the retentionist world.²⁴

Finally, the findings of a study of clemency and pardons in the *death penalty* context may have a degree of analogous application to non-capital cases. The results of the ‘micro’ or ‘macro’ research questions mentioned above may further help to shed light on the nature of other forms of executive discretion in the criminal justice system, even within abolitionist countries. Pertinent examples here include sentence reductions and remissions, unconditional pardons granted by the executive for defendants sentenced to

²² Interview with London-based Death Penalty Lawyer; Thurschwell, 287-288: ‘That is reassuring, at least, for the lawyers, legislators, and activists who are in the trenches today, trying to save individual lives and hoping that their efforts serve (rather than hinder) the larger project of abolition.’

²³ Kaminer, 155.

²⁴ By April 2013, organisations that had already shown an interest in the findings from my MPhil and DPhil research include the Thailand Union for Civil Liberties, the Anti-Death Penalty Asia Network (ADPAN) administered by the Amnesty International Secretariat in London, Amnesty International Malaysia, Indonesian NGOs Imparsial and LBH Masyarakat and UK-based NGOs Reprieve and the Death Penalty Project.

a term of imprisonment, or alternatively institutionalised yet discretionary release procedures such as parole and probation.

Why is the Death Penalty in Southeast Asia worthy of Academic Study? Why is Clemency in Southeast Asian Death Penalty Cases Suitable for Regional Comparison?

Overall, there is enough similarity and difference in the region's death penalty practice to prompt and justify a comparative explanatory study. There are five countries in Southeast Asia that continue to pass death sentences and to execute prisoners: Indonesia, Malaysia, Singapore, Thailand and Vietnam (in alphabetical order). Of the other nations in the region, Cambodia and the Philippines abolished the death penalty in 1989 and 2006 respectively, while Brunei (last execution in 1957), Burma (1993), and Laos (1989) may be defined as abolitionist *de-facto*, not having conducted a judicial execution for over 10 years.²⁵ All five aforementioned *actively* retentionist jurisdictions in Southeast Asia have carried out executions on a reasonably regular basis since 1975, and none has gone ten years without an execution during this period.²⁶ In a world where retentionist jurisdictions are becoming fewer in number,²⁷ Southeast Asia constitutes one of the few remaining regions where a *transnational* comparative study of the death penalty can be undertaken,²⁸ focusing on the similarities and differences of near geographical neighbours

²⁵ Johnson and Zimring (2009), 7, 16; Hood and Hoyle (2008), 88-89; Schreiber, 266. Timor-Leste was a province of Indonesia until voting for independence in 1999, after which it did not adopt the death penalty under UN transitional rule (New South Wales Council for Civil Liberties).

²⁶ See Appendices A-D.

²⁷ See generally Hood and Hoyle (2008), 9-39, on the global abolitionist movement.

²⁸ Johnson and Zimring (2006), 91. The other world regions where a comparative study of retentionist countries would be presently possible are the Caribbean, Africa and the Middle East (Hood and Hoyle (2008), 66-84, 103-111).

and political allies (as part of the ASEAN - Association of Southeast Asian Nations - bloc).²⁹ Moreover, as the death penalty has evolved from a purely domestic crime and punishment issue, to one of the central concerns of the international human rights movement,³⁰ an international comparative study of the frequency with which the death penalty is applied seems ever more appropriate.³¹

As for the specific issue of *clemency* in death penalty cases, the key puzzle demanding explanation is why, over a 35-year period since 1975, have some Southeast Asian countries granted clemency to far more condemned prisoners (both in terms of absolute volume, and more significantly in terms of a percentage of exhausted judicial appeals) than others.³² As I list below, the differences among retentionist jurisdictions in this respect are striking, and cannot be simply explained away by stating that some countries appear to be more committed to the death penalty as a tool of criminal punishment than others, or that some countries have more compassionate leaders: notably, all five nations have sentenced to death *and executed* prisoners on a regular basis over the decades. The relevant clemency 'rates' that I have identified for explanation in my second research question are as follows:

²⁹ Johnson and Zimring (2009), 37 n27, 315, 340-341; Turnbull, 633-636; AI-Index ASA 03/01/97, 1. As Miethe et al noted in 2005 (at 128), 'the variability of capital punishment practices within nations with similar socio-political structures suggests that future research should investigate more fully the sources of international differences.'

³⁰ Anckar (2004), 168; Neumayer (2008a), 252; Zimring (2003), 29-30; Hood (2001), 337; Bae (2007), 116.

³¹ Schreiber, 267.

³² See Strange, 9.

- Singapore: 1 percent (based on data from the period 1975-2009);³³
- Thailand: 91 percent to 92 percent (1975-2008);³⁴
- Vietnam: 6 percent to 23 percent (1997-2008);³⁵
- Indonesia: 22 percent to 32 percent (1975-2009);³⁶
- Malaysia: 26 percent to 40 percent (1975-1986; 2000-2008).

I engage in a thorough discussion of the sources of these statistics, potential inaccuracies with the data relied upon, the inadequacy of a quantitative comparison across different time-periods, and other methodological stumbling-blocks in Chapter Four: Treatment of Sources. However, for present purposes, it is singularly important to note Southeast Asia's stark differences in clemency practice, from Singapore - where little more than *one in a hundred* condemned prisoners escapes execution, to Thailand - where *execution* is deemed the exceptional measure, and instead it is *clemency* that is the overwhelmingly expected outcome in a finalised death penalty case.³⁷ In Chapter Four and Chapter Nine, I discuss my categorisation of Southeast Asian jurisdictions into those with 'low' clemency rates of below 5 percent of finalised cases; 'medium' rates of 5 to 50 percent; and Thailand, with its 'high' clemency rate of over 50 percent. Categorising the jurisdictions in such a manner will help when making analogies with other retentionist jurisdictions

³³ Excepting the years 1976-1977 and 1979, for which complete figures are unavailable.

³⁴ Excepting the years 1976-1981, 1985, 1988-1989, 1993 and 2006.

³⁵ The approximate clemency percentage for Vietnam is based upon material compiled for my MPhil thesis, which I did not add to during my DPhil research, and therefore may be considered less accurate than the figures provided for other nations.

³⁶ Excepting the years 1978-1979.

³⁷ Pouaree; Interview with Singaporean Criminal Defence Lawyer #2; Johnson and Zimring (2009), 405.

(particularly the USA and pre-abolition Britain), and will also be useful when explaining the determinants of clemency ‘rates’ in Chapter Nine: Discussion.

Notably, I have chosen to omit Vietnam from consideration in the substantive chapters (Five to Nine) of the present DPhil dissertation, when I had originally included the country as one of *five* jurisdictions covered in my MPhil thesis. Vietnam has been excluded for three main reasons: my inability to read articles in the Vietnamese language or to conduct in-country fieldwork there given the state secrecy on the death penalty,³⁸ the dearth of available English-language criminal justice information on Vietnam in any case,³⁹ and moreover because Vietnam’s post-unification Communist governance makes the country’s criminal justice policy better suited to comparison with the People’s Republic of China, rather than most other ASEAN states.⁴⁰ As for the other countries in

³⁸ On state secrecy, death sentences and executions in Vietnam only started to be widely reported in the state media and to foreign governments around 1994/1995 (AI-Index ASA 41/02/96; AI-Index ASA 03/01/97, 22). Johnson and Zimring (2009), 388 n9 and 389, report that, thereafter, death penalty statistics became a state secret in 2004, partially motivated by criticism from foreign governments and international NGOs. See also FIDH (2008), 2.

On conducting fieldwork on politically sensitive topics in Vietnam, Abuza wrote, in 2004, that ‘Foreign publications are still subject to direct censorship if they are critical of the Vietnamese government, and some foreign journalists have not been able to renew their visas... Those [Vietnamese] who try to express their views freely are often thrown in jail.’ Likewise, in 2000, Human Rights Watch concluded that ‘Those who go too far in criticizing or confronting the government... still risk being subjected to house arrest, administrative detention or prison sentences’ (Human Rights Watch (2000)). In 2012 the UK Foreign and Commonwealth Office observed that, within Vietnam:

Freedom of expression and access to information continue to be suppressed through a combination of stringent legislation, tight control of the state-run media, internet restrictions and the arrest and imprisonment of bloggers and political activists.

³⁹ See Buhmann, 66, and Johnson and Zimring (2009), 387. However, see also Chapter Four, notes 431-432 and associated text, on my treatment of material in the Thai language.

⁴⁰ Interview with American Academic Expert on Capital Punishment; Harding (2002), 49; Johnson and Zimring (2009), 132, 382-386; Buhmann, 60, 410-411. Johnson is of the opinion that *regime type* sometimes inhibits comparison between jurisdictions (Interview with American Academic Expert on Capital Punishment). Likewise, Nicholson observes that the underlying assumptions guiding Socialist legal systems make comparative studies with ‘western’ systems difficult (Nicholson, 304, 308). In this sense, minor or major differences in death penalty policy between Vietnam and its retentionist Southeast-Asian neighbours can be explained on the basis of regime difference (i.e. authoritarian, hardline communist government, vs

the region that were once actively retentionist (Burma, Brunei, Laos, Cambodia and the Philippines), I have chosen to limit my study to *current* practitioners of the death penalty, so that a proper comparison of the entire 35-year period 1975-2009 may be made among each of the chosen jurisdictions. I elaborate further on my choice of time parameters below.

The final factor justifying a comparative study of the death penalty focusing on Southeast Asia is that the vast majority of existing death penalty scholarship focuses on the United States,⁴¹ despite the fact that, in 2009, between 75 and 95 percent of the world's executions took place in Asia.⁴² The dearth of literature on the death penalty in Asia is conspicuous, leading Professors David Johnson and Franklin Zimring to conclude, in 2006, that 'research on capital punishment outside the USA is so thin that [even] guesswork must sometimes be considered progress'.⁴³ However, despite this striking deficit in information, the Asian continent is undoubtedly the region where the major debates and battles for global abolition of the death penalty will be staged over the next few decades.⁴⁴

Moreover, within greater Asia itself, the academic literature that *does* exist has predominantly analysed the death penalty practice of *East Asian* countries (namely China, Japan, South Korea, and Taiwan).⁴⁵ *Southeast Asia* is greatly understudied, in terms of

semi-authoritarian free-market government), rather than the remaining structural and cultural factors that make for interesting comparisons between the remaining four countries.

⁴¹ Boulanger and Sarat, 18, 31; Johnson and Zimring (2009), xii; Hood (2002), 5; Johnson and Zimring (2006), 94.

⁴² Johnson and Zimring (2009), xii; AI-Index ACT 50/003/2009, 13; Zimring and Johnson, 104.

⁴³ Johnson and Zimring (2006), 94.

⁴⁴ Zimring and Johnson, 104.

⁴⁵ Ibid, 108; Johnson and Zimring (2009), 37-39.

comparative law generally,⁴⁶ but also specifically in terms of *death penalty* policy and practice.⁴⁷ Unfortunately, the death penalty in Southeast Asia has historically only received prolonged media coverage in western nations when a citizen of a developed country has been sentenced to death (usually for drug trafficking).⁴⁸ As outlined in the preceding paragraphs, there are ample reasons for an Australian citizen, studying in the UK, to engage in a comparative study of the death penalty in the faraway Southeast Asian region other than to highlight isolated cases where national self-interest is threatened. I am hopeful that this dissertation will perform some of the academic groundwork on the Southeast Asian death penalty, to be taken up by other researchers in the future.

Why Limit the Research to the Time-Period 1975 to 2009?

Why is the year 1975 an ideal starting point for a comparative study of the death penalty in Southeast Asia? There are three explanations: first, all Southeast Asian nations (except Brunei, in 1984) had gained independence from their respective colonial powers by this date,⁴⁹ and hence were free to choose their own political direction and implement their own criminal justice policies (even if the latter, in the case of the death penalty, have often been influenced by colonial legacies).⁵⁰ Although inevitable political and historical changes have taken place in each Southeast Asian nation in the decades since, by 1975 all

⁴⁶ Lindsey (2002), 3; Harding (2002), 47-48, 47 n43, who laments that 'The depressingly small number of scholars in the field of law in South East Asia have in truth trodden a somewhat lonely path'. Hardie-Bick et al observe (at 3) that 'Much of the comparative literature is limited to the OECD countries (the economically developed countries), and this begs questions about crime in places that are more peripheral to the circuits of transnational global capital.'

⁴⁷ Johnson and Zimring (2006), 91; Boulanger and Sarat, 18.

⁴⁸ Zimring (1999), 3-4; Johnson and Zimring (2009), 318.

⁴⁹ Chandler et al, 353-355, 417.

⁵⁰ Johnson and Zimring (2009), 20-21, 37-38.

currently retentionist jurisdictions in Southeast Asia⁵¹ had adopted the forms of government that continue into the present day (other than Indonesia, which underwent a democratic transition after the fall of autocratic President Suharto in 1998).⁵² For example, 1975 saw the end of the Vietnam War between the Republic of Vietnam in the South and the Democratic Republic of Vietnam in the North, which completed Vietnam's transition to a unified communist state.⁵³ Moreover, 1975 also witnessed the triumph of the Khmer Rouge regime in Cambodia, the Pathet Lao Communist regime in Laos, and the overthrow of the monarchy in both of those jurisdictions.⁵⁴ As Fifield observes, the region 'Southeast Asia' had become a household expression in the West by the end of the Vietnam War in 1975.⁵⁵

Second, as I repeat in Chapter Two, in a transnational comparative criminal justice study such as the present one, a multi-year (and in this case, multi-decade) time frame is essential in order to maximise the number of dependent variable 'sightings' (in this case, clemency or pardon grants), where the required observations arise infrequently and irregularly.⁵⁶ Consider the example of Singapore: if I simply compared the 2010 (or even post-2000) clemency practice of four or five Southeast Asian nations, Singapore would come across as a nation entirely devoid of mercy at the executive stage of death penalty proceedings (the most recent successful clemency petition came about in 1998).⁵⁷

⁵¹ Singapore, Malaysia, Thailand, Vietnam, Laos, Burma, Brunei, plus Indonesia (HOC Country Status 2011).

⁵² Smith (2001), 79; Lynch, 554.

⁵³ Chandler et al, 369.

⁵⁴ Johnson and Zimring (2009), 320 n25; Leifer, 199; Kershaw, 4-5, 88.

⁵⁵ Fifield, 151.

⁵⁶ Steinmo, 135; Lijphart, 686.

⁵⁷ HOC Singapore 2012.

Looking back a few decades earlier, we can see that clemency in Singapore, while still extremely rare, has been awarded in *six* cases since 1975.⁵⁸ Basing the study on 35 years worth of observation therefore helps to complete the picture, as far as the modern use of the death penalty and clemency is concerned.

Third and perhaps most importantly in terms of death penalty policy, towards the end of the Vietnam War transnational *drug trafficking* began to be perceived as a major crime problem in the Southeast Asian region,⁵⁹ and consequently trafficking in specified quantities of drugs was made a capital offence in Singapore, Malaysia and Indonesia in the year 1975.⁶⁰ The current domination of Southeast Asian death sentences by drug offences can be sourced from this point in time, and in 2009, Southeast Asia was the only region of the retentionist world where a *majority* of death sentences were imposed for drug offences.⁶¹ Again, although other changes have taken place in Southeast Asian death penalty laws and practices over the 35-year period 1975-2009, the beginning of the regional anti-drug 'paradigm' is an ideal place to begin a comparative study.

Why conclude the study in December 2009, rather than in May 2013, with the dissertation's submission? As my DPhil dissertation originally started its life as an MPhil thesis, 2009 was the year that I began to research the issue of the death penalty in Southeast Asia at Master's level. Placing a 'forward' limit on the scope of the research is a

⁵⁸ Ibid.

⁵⁹ Fuller; AI (1979), 66.

⁶⁰ Johnson and Zimring (2009), 414; Marr. Thailand introduced the death penalty for narcotics in 1979, although summary executions of heroin traffickers had been carried out throughout the 1960s and 70s (Pouaree).

⁶¹ Johnson and Zimring (2009), 309; Human Rights Watch (2009); AI-Index ASA 01/003/2007. This attracts the attention of western scholars and human rights activists, as the western trend has been to see drug abuse as a social problem, rather than an issue of *state security*, as it is usually designated in Southeast Asia (Lines, 12, 24-25; see also US Department of State (2009)).

practical measure ensuring each of the chapters planned are written on time, and that the completion of the dissertation is not weighed down by constant searches for new cases. Despite this consideration, in each country chapter I do still make a number of observations regarding the 'current' (i.e. 2010-2013) clemency practice of each of the four relevant jurisdictions, particularly where it becomes a helpful means of interpreting that nation's 1975 to 2009 practice.

Chapter Structure of the Dissertation

This dissertation is divided into nine chapters, four of which directly relate to the Southeast Asian jurisdictions under analysis: Singapore, Malaysia, Thailand and Indonesia. Before elaborating on the respective jurisdictions' death penalty and clemency policies however, it is important to summarise the relevant literature that informs my study, with a clear sense of the purpose to be gained from such a 'literature review'.⁶²

As King and Wincup acknowledge, in any social science study there may be a number of different bodies of literature the researcher needs to review.⁶³ In the present case, the later findings of my research (contained in 'country' Chapters Five to Eight, and the Discussion and Conclusion in Chapter Nine), are guided and informed by the amalgam of previous literature on: a) clemency and pardons in death penalty cases, b) the techniques employed in studies of *comparative criminal justice*, c) the role of data triangulation and other methodological questions of validity and reliability, as well as d) specific regional material on the death penalty itself. As such, Chapters Two, Three and Four set the invaluable *context* within which I later present the factual and interpretive

⁶² King and Wincup, 18.

⁶³ Ibid.

material on clemency in Southeast Asia collated through library and interview-based research, in order to stimulate discussion of the determinative 'independent' variables of clemency in Chapter Nine.

Chapter Two – The Rationale for

Comparative Criminal Justice

Introduction

In Chapter One: Introduction, I identified the shortage of research on the death penalty in Southeast Asia, and the reasons why clemency and pardon decisions in death penalty cases make for a compelling socio-legal analysis. I move on in the present chapter to discuss the rationale for *comparing* the criminal justice policies and practices of four different national jurisdictions: Indonesia, Malaysia, Singapore and Thailand. What can academic researchers learn from the comparison of two or more criminal jurisdictions that we cannot learn from a study of one? How do we undertake the comparative task? What limits must be placed on the analysis, both in terms of research design, but also with regard to the generalisability of potential findings? These and other questions may be largely resolved by a detailed study of the theoretical literature on the subject of *comparative criminal justice*, a subset of the academic discipline of comparative criminology.⁶⁴

⁶⁴ Newman and Howard, 8. The study of clemency and pardons, as these are acts generally authorised by political figures, could arguably be analysed using the methodologies prescribed by the more established field of comparative *politics*, rather than comparative criminal justice. Reasons for employing the techniques suggested by practitioners of comparative criminal justice are:

- a) my own academic background in law and criminology, rather than political science;
- b) the fact that clemency and pardon decisions form the *back-end* of a criminal case, and therefore constitute *sentencing* decisions taken within the broader criminal justice system (Barkow (2009), 155), rather than being stand-alone political acts; and,
- c) the distancing of some serving politicians from the clemency decision-making process, whether intentional or not. Examples here include the use of advisory boards to guide decision-making, the involvement of prosecutors, judges and criminal justice bureaucracy in the decision itself, and in extreme cases the abdication of political responsibility for the clemency decision through indefinite postponement (for example, see Iyer; Interview with London-based Death Penalty Lawyer #2).

Why Compare the Criminal Justice Policies and Practices of Different Jurisdictions?

Studies of capital punishment, or indeed any other criminal justice phenomena, that refer to the similarities and differences of those phenomena across two or more systems may be categorised as work within the field of ‘comparative criminal justice’.⁶⁵ While sovereign *countries* are the fundamental source of comparison within this methodology,⁶⁶ an analysis of different criminal justice phenomena *within* a national setting (for example, comparing differences within a federated state, or within the same jurisdiction between different temporal periods as a longitudinal study) will also be properly classified as comparative criminal justice.⁶⁷ In the present case, before justifying the comparison of the death penalty policies of Indonesia, Malaysia, Singapore and Thailand as particular countries of interest, it will be useful to outline the benefits of conducting research on contrasting jurisdictions per-se.

What can we learn from a comparison of two or more criminal justice systems that we cannot ascertain from in-depth research of one? There are two main benefits to undertaking such a task: first, without referring to the state of affairs in otherwise similar jurisdictions, we have no way of knowing what is ‘normal’ or what is ‘exceptional’ within any criminal justice system.⁶⁸ As Nelken acknowledges, ‘It is easy enough to find striking examples of contrasts in criminal justice’:⁶⁹ striking contrasts that are common even

⁶⁵ Hardie-Bick et al, 1; Bennett, 4; Nelken (2011), 396.

⁶⁶ Nelken (2010), 14.

⁶⁷ Bennett, 7; Zimring (2006), 617; Nelken (2011), 396; Nelken (2010), 14.

⁶⁸ Nelken (2011), 395-396; Johnson and Zimring (2009), 38.

⁶⁹ Nelken (2011), 393, 400.

amongst countries that share similar histories, governance structures and demography. Although normative evaluation of a single jurisdiction's set of criminal justice policies and practices may be possible through the application of theory alone to a single 'case-study',⁷⁰ such an analysis will prove far richer and better informed if it is done *contextually*, hence the need for parallel countries, provinces, time periods, cultures or even neighbourhoods as sites of comparison.

Almost any *object* of criminological or criminal justice research can benefit from inter-jurisdictional comparison,⁷¹ such as policing standards and techniques, crime statistics, incarceration rates, sentencing guidelines, or public perceptions of crime, to name a few commonly compared topics. The frequent use of the death penalty for example, when justified within the national context, can appear ordinary, utilitarian, and benign (and this is indeed what a number of authoritarian governments would like their constituents to think about the ultimate punishment), but it is only when compared with the penal policies of more liberal and humane societies that state killing takes on a more repressive character.⁷² In the present context, with a focus on clemency and pardons in death penalty cases, how are we to know whether clemency is 'normally' granted in a majority, or minority of finalised cases, absent statistical data or qualitative narrative from a number of different jurisdictions? Without international comparison, we cannot know whether clemency has largely vanished along with the absolute monarchies that gave

⁷⁰ Kohli et al, 4.

⁷¹ Nelken (2010), 1.

⁷² Daems (at 813) acknowledges as much, in noting that 'Large-scale abolition of capital punishment is a novelty of recent times. For the most part of human history putting people to death was considered to be a normal practice. In that sense one could argue that the real puzzle that needs to be solved is not so much the question why [retentionist nations still stick to] this penal practice, but rather why European (and other) nations have done away with it.'

birth to the concept,⁷³ or whether it remains very much an essential cog in the functioning of modern retentionist criminal justice systems.

Second, the field of social science, for many researchers, revolves around ‘the search for systematic regularities and generalizable laws’.⁷⁴ While the description of individual cases and specific historical events may make for intriguing reading (and interesting research), it will take a number of comparable events or cases espousing similar characteristics to provide a broader explanation, and perhaps even a cautious prediction,⁷⁵ of social and historical phenomena.⁷⁶ The approach I have chosen here is sometimes termed inductive ‘quasi-experimentation’: a matching of broadly similar cases (‘like with like’) which nonetheless result in different outcomes, in order to isolate plausible explanatory factors in the formation of that outcome.⁷⁷ Nelken is one commentator who has written on the requirement for balance between similarity and difference in social science research:

⁷³ Sebba (1977a), 221-228; Sebba (1977b), 83; Kobil (1991), 571.

⁷⁴ Steinmo, 133; Øyen, 8; Nelken (2011), 398; Nelken (2010), 14, 17.

⁷⁵ However, see note 83 and associated text, below, on the caution to be taken when attempting to predict future events based upon the findings of socio-political or historical research.

⁷⁶ Steinmo, 133; Kohli et al, 3; Bennett, 9; Nelken (2011), 398.

⁷⁷ Kohli et al, 17; Lijphart, 687. Nelken (2010) asserts that ‘The choice of which variables to study will be based on previous research by the community of scholars; each new [study] then seeks to take matters further’ (at 41).

What is meant by comparing 'like with like' is the effort to hold constant in our comparison those factors – regarding time frames, threats, legal systems, economies, politics or whatever – which would otherwise take away the point of a given comparison. At the same time, however, it is usually reference to those factors that will also form part of our explanation of difference.⁷⁸

What then are the key inquiries involved within a comparative criminal justice study?

Buhmann, in the course of comparing the human rights laws and traditions of China and Vietnam, neatly summarises the primary tasks of comparative scholarship in general:

[the function of] comparative law is to compare... different legal systems with the purpose of *identifying and assessing similarities and differences*; and *analysing such differences and similarities with respect to their origin*... in search of common cores.⁷⁹

In his definition of the comparative method, Zimring focuses on description:

The tradition of comparing rules of behavior across a wide variety of environments primarily *to document the common themes discovered and the range of variations found* is the sort of scholarship usually classified as comparative in law and in criminology.⁸⁰

⁷⁸ Nelken (2010), 35; Lijphart, 687; see also Johnson and Zimring (2009), 38, for a discussion in the East Asian context.

⁷⁹ Buhmann, 57, emphasis added.

⁸⁰ Zimring (2006), 617, emphasis added.

Nelken's own work on comparative criminal justice espouses similar goals: 'the *identification* of similarities and differences over space and time'⁸¹ and '*explaining* [those] variation[s] and difference[s]'⁸²

As is evident, the two common features of comparative research in criminal justice that the definitions listed above share are:

1. Documenting cases' similarities and differences; and,
2. Explaining the origin of those commonalities and variations.

Accordingly, in the context of the present study of clemency and pardons in death penalty cases in Southeast Asia, the general comparative aim is to assess the commonalities and differences evident between the practice of clemency and pardons in each jurisdiction, in search of common structural and cultural factors that at least appear correlated with and are perhaps even determinative of a particular model of clemency use in the region. In the following section, I will elaborate on and further refine the specific parameters of the comparative method that best fit the present study. However, first a warning about the potential generalisation of my findings is appropriate – Steinmo and Garland have both cautioned against using the results of comparative studies as a tool to 'predict' future developments in politics, sociology or other fields of social science. The very subjects of such studies, namely human beings and human institutions:

⁸¹ Nelken (2010), 31, emphasis added.

⁸² Ibid, 13, emphasis added. See also Howard et al, 144.

adapt and are affected by history itself. Prediction and the related conception of ['hard'] science imply a linear analysis of variables that can be distinguished from one another and which react to one another in predictable ways... For many *social* scientists, such analysis denies the realities of the world in which we live.⁸³

For Garland:

The fact that we have been able – through empirical research and theoretical reflection – to discern the kinds of determinants and functional requirements which tend to shape punishment, does not mean that we can predict, in any particular instance, how penal developments will turn out.⁸⁴

Even within the same four jurisdictions, great care must be taken in employing the results of comparative analysis in an attempt to predict future death penalty developments. In the present study, it is highly unlikely that the observations from four national jurisdictions in a specific geographic region will, by themselves, be enough to lead to a general theory of clemency and pardon rates valid throughout the retentionist world! My aims must be more modest: to document parallel yet contrasting phenomena within a set of previously understudied criminal justice systems, and to uncover a few common themes initially relevant to retentionist Southeast Asian nations only.⁸⁵ Future research of

⁸³ Steinmo, 134, emphasis added.

⁸⁴ Garland (1990), 285.

⁸⁵ As recommended by Anckar (2004), 122.

the type called for by Professors Johnson and Zimring⁸⁶ may extend these themes to other regions, continents and timeframes.

The Mechanics of Comparative Studies

Qualitative or Quantitative Research?

Although Boulanger and Sarat advise that the comparison of criminal justice systems across international jurisdictions should never be subject to a 'methodological straightjacket',⁸⁷ it is well worth reciting methodological advice from the authors of previous comparative studies.

Comparative criminal justice generally entails a *qualitative* analysis of different cases in a search for potential explanatory factors.⁸⁸ a quantitative regression analysis is not necessarily needed to come to convincing conclusions about the determinants of social and historical phenomena. Particularly for an *inductive* study involving only a few jurisdictions, where the explanatory candidates are not known ahead of time,⁸⁹ qualitative work that identifies and assesses relevant patterns evident across criminal justice systems is an equally scientifically-accepted means of generating further theories,⁹⁰ perhaps to be subjected to quantitative testing in the future.⁹¹ In this vein, a

⁸⁶ See Johnson and Zimring (2006), 92: 'Asia is hardly a death penalty flatland. Future research should explore more of the dimensions of variation in Asian death penalty policy and practice. The building blocks of such accounts will include descriptions of the types and frequencies of capital crimes, the number of death sentences and executions per year, and the size of "death row" and the length of time condemned persons spend on it.'

⁸⁷ Boulanger and Sarat, 4. See also Bottoms, 99.

⁸⁸ Bennett, 6, 15; Miethe et al, 124, 128. See Neumayer (2008a), 264, in the context of comparative studies of capital punishment.

⁸⁹ Merriam, 52; Tavallaei and Abu Talib, 571

⁹⁰ Kohli et al, 45; Miethe et al, 121, 124; Bottoms, 97 ; Neumayer (2008a), 264.

⁹¹ Lijphart, 685.

narrative or *descriptive* analysis of cases and comparative aspects is the method of investigation that I will favour throughout my thesis. However, in order to tell the story of clemency and pardons in Southeast Asian jurisdictions in as detailed a fashion as possible, it would be unwise to disregard illustrative quantitative material.⁹²

Qualitative comparative studies start with the collection of data and a ‘compelling interpretation’ of individual cases: these are the building-blocks upon which further analysis can be based.⁹³ However, the comparative task does not finish with description;⁹⁴ the method used in comparative criminal justice must involve more than a mere juxtaposition of similarities and differences between the criminal justice processes of different jurisdictions. Listing shared and differing aspects of each nation’s use of the death penalty, as with any related criminal justice phenomenon, ‘does little to advance the goal of explanation or understanding.’⁹⁵ It is comparative *analysis* that is key: a significant portion of any qualitative study in comparative criminal justice should be devoted to an *explanation* of variation between cases. In the present study, while it will initially be important to describe each country’s death penalty and clemency practice in detail in Chapters Five to Eight, the difference between a landmark *academic* study of the Southeast Asian death penalty and a well-researched NGO Report (such as those periodically published by Amnesty International, Hands off Cain or Harm Reduction

⁹² Kohli et al, 49; Bennett, 7. I discuss my limited use of quantitative data such as statistical tables in Chapter Four: Treatment of Sources.

⁹³ Nelken (2010), 15; Kohli et al, 4.

⁹⁴ Nelken (2011), 398; Nelken (2010), 15.

⁹⁵ Nelken (2002), 180.

International with a multi-jurisdictional focus)⁹⁶ comes in the shape of analysis. The former texts analyse and explain the *reasons* for national difference, while the latter are primarily useful as a compendium of facts and figures to guide further advocacy and lobbying work and to influence public opinion.

Refining the Subject Matter – Number of Jurisdictions, Time-Limits and Substance of Comparison

After opting for a qualitative method of analysis, in designing a comparative criminal justice study the next question is one of scope, both in terms of geography and in terms of timeframe. How many jurisdictions is it appropriate to compare at once? On the face of it, there is no clear answer to this question: both studies of a meta-analytical/global reach, together with ‘bilateral’ analyses have obvious limitations. A meta-analysis, whether qualitatively or quantitatively-grounded, will suffer from being too abstract, while it may also be difficult to come up with variables that have cultural application in each individual case.⁹⁷ On the other hand, a detailed qualitative analysis of two jurisdictions in the forms of two ‘case-studies’ cast side-by-side, in the words of Newman and Howard, may turn out to be overly ‘descriptive, impressionistic or interpretive.’⁹⁸ Nelken has argued that such small ‘n’ comparative studies, while originally intended to improve on individual case studies by providing greater context, risk missing the bigger picture altogether.⁹⁹ In the present case, if I can demonstrate that the four identified jurisdictions (Indonesia, Malaysia, Singapore and Thailand) are similar enough in their major attributes to enable

⁹⁶ These include: AI (1979); AI (1989); AI-Index ACT 51/02/95; AI-Index ASA 03/01/97; AI-Index ACT 50/003/2009; AI-Index ACT 50/001/2010; AI-Index ACT 50/001/2011; Harm Reduction International (2010; 2011); Lines; HOC Reports 2003, 2009, 2010, 2011.

⁹⁷ Newman and Howard, 4; Nelken (2010), 29.

⁹⁸ Newman and Howard, 4.

⁹⁹ Nelken (2010), 29-30; Heidensohn, 213.

effective comparison, the small number of cases will not preclude some interesting and potentially useful findings emerging, bearing in mind the above discussion regarding the generalisability of results.

Moreover, comparison of the criminal justice policies of different jurisdictions can be based upon a cross-sectional assessment at the time of writing, at a particular point in the past, or by taking averages or trends over a multiple-year period.¹⁰⁰ For a study with a small number of observed cases, the multiple-year option may be preferable. Importantly in the present case, if we assume that in most jurisdictions clemency is an unusual measure, denied to a prisoner on death row more often than it is granted, the extension of the study over a longer historical period expands the number of observable cases for study, and leads to more comprehensive and representative findings.¹⁰¹ For Greenberg and West, a cross-sectional analysis is particularly inappropriate for a qualitative study across a small number of jurisdictions, such as the present one:

The limitations of cross-sectional data for studying a process that unfolds over time are more significant for a qualitative comparison of one country with a small number of others than for a statistical study of almost two hundred countries. Whereas one country's profile can be distorted briefly for transient reasons, in a larger data set one country does not count for very much. Ephemeral shocks may lead to single country being misclassified [in a small 'n' study].¹⁰²

¹⁰⁰ Buhmann, 58-59; Nelken (2010), 31.

¹⁰¹ Steinmo, 135; Lijphart, 686.

¹⁰² Greenberg and West, 333.

Accordingly, although the analysis I plan to undertake is not *longitudinal* in character (as it is not based on a comparison of different temporal periods), I nonetheless make use of a multi-year timeframe (the 35 year period from the beginning of 1975 to the end of 2009)¹⁰³ for each country that forms part of the narrative, in order to observe trends and patterns over that longer period.¹⁰⁴

Finally, on the *object* of comparison, should a regional analysis of capital punishment practice such as the present one focus on formal legal structure (i.e. enacted laws, the structure of legal and political institutions, and codified bureaucratic practices), or also on *culture*? Arguably, both are relevant. Culture is the all-important *context* in which law and its related institutions finds itself.¹⁰⁵ Unsurprisingly, national culture as a set of repeated values, behaviours and beliefs is relevant to an understanding of legal processes.¹⁰⁶ In his comparative research on East Asian legal systems, Buhmann was not only interested in studying law as it appears on the statute books, but also those: ‘normative elements, institutions, concepts and conceptions of law and rights, and other elements which make up *legal culture*.’¹⁰⁷ This consideration is particularly relevant in a study of clemency and pardons: highly discretionary decisions sourced in the executive

¹⁰³ In Chapter One, *Why Limit the Research to the Time-Period 1975 to 2009?*, I described the reasons why 1975 makes for an ideal starting date, and moreover why I conclude the study in 2009.

¹⁰⁴ It will be occasionally necessary to break the analysis of different jurisdictions into sub-units based on time: for example in Indonesia, where the 1975-2009 timeframe incorporates the military-authoritarian government of President Suharto (1967-1998) and his democratically elected successors from 1999 onwards. In Malaysia, more executions may have been carried out in the 1980s than in any other Southeast Asian nation, yet by the 2000s the death penalty usage there could be labelled relatively benign (see Appendix B; Johnson and Zimring (2009), 306 n11; AI-Index ASA 03/01/97, 11-12). While the death penalty usage of all four jurisdictions has of course varied from year to year and decade to decade, only the common *themes* that arise from each of these narratives will be analysed in Chapter Nine: Discussion and Conclusion.

¹⁰⁵ Lazarus, 11.

¹⁰⁶ Nelken (2010), 48; Fairchild and Dammer, 11.

¹⁰⁷ Buhmann, 57, emphasis added; see also Lazarus, 14, and Nelken (2010), 49.

branch of government, which may be influenced as much by culture, traditions and values as by formal processes and structures.¹⁰⁸ Significantly, Greenberg and West recognise that culture will define the perceived seriousness of a criminal offence, and will underpin crime policy,¹⁰⁹ if not directly determining the application and severity of criminal sanctions.¹¹⁰ As long as executive clemency is capable of description by commentators as a discretionary power falling ‘outside of, or beyond, the law’,¹¹¹ or as requiring ‘*human* as well as legal considerations, in light of all circumstances’¹¹² by the decision-maker, then cultural and sociological norms will be as relevant as legal structures and precedents in any detailed analysis.¹¹³

Previous Comparative Studies of the Death Penalty

To date, the vast majority of multi-jurisdictional academic studies of clemency and pardons in death penalty cases have focused on the United States as a federation of criminal justice jurisdictions.¹¹⁴ The work by authors such as Barkow (published in 2009); Harris and Redmond (2007); Sarat (2005); Argys and Naci Mocan (2004); VanBrocklin (2003); Burnett (2003); Heise (2003); Ortiz (2002); Acker and Lanier (2000); Pridemore

¹⁰⁸ Morison, 153; Hawkins, 38-43; Schneider, 87; Baumgartner (1992), 130

¹⁰⁹ Greenberg and West, 303; see also Karstedt, 23.

¹¹⁰ Karstedt, 23; Daems, 806.

¹¹¹ Sarat (2005), 69.

¹¹² Ibid, 36, quoting Sanford, 552.

¹¹³ Nelken (2002), 192.

¹¹⁴ The two most prominent global exceptions, both published by Israeli academic Leslie Sebba in 1977 (Sebba (1977a); Sebba (1977b)), focus less on the relative *incidence* of clemency in death penalty cases and more on the formal mechanisms for its exercise: the statutory and constitutional provisions that give rise to the power, both for capital and non-capital crimes, in different national jurisdictions. Schreiber (1996) also authored a comparative study of executive discretion in capital cases, comparing the position of the United States with those of India and the Philippines.

(2000) and Abramowitz and Paget (1964) provide extremely useful *theoretical* ideas, but arguably these findings have only limited applicability in Southeast Asia: a far different part of the retentionist world. I will deal further with the theoretical implications of previous studies of clemency and pardons in Chapter Three.

Other prior comparative studies of the death penalty in an *international* context include both quantitative and qualitative analyses, primarily authored since the global ‘wave’ of abolition began during the late 1980s.¹¹⁵ The authors have generally attempted to answer one of two (overlapping) questions:

1. Why do some countries retain the death penalty when others do not; and,
2. What political and historical *processes* lead to abolition of the death penalty?

The major academic studies with a global, or at least an Asia-Pacific focus, include those by McGann and Sandholtz (2012), Zimring (2011c), Johnson (2010), Johnson and Zimring (published in 2009), Hood and Hoyle (2009 and 2008), Neumayer (2008a and 2008b), Bae (2007), Miethe et al (2005); Boulanger and Sarat (2005), Anckar (2004), Greenberg and West (2003), Hood (2001 and 1989), following on from the original study of the graduated processes of abolition by French scholar Marc Ancel in 1962. Assessing the academic contribution of the various studies, the authors’ collective achievement is to generalise what are, in reality, complex political decisions and developments.¹¹⁶

¹¹⁵ See Hood and Hoyle (2009), 4-8; Anckar (2004), 177.

¹¹⁶ Bae (2007), at 124, notes that ‘State compliance with [international] norms is too complex a political phenomenon to have only a single cause. A particular case of norm compliance may be a function of one or more... factors.’ Boulanger and Sarat (at 18 and 34) are even more pessimistic over the power of explanatory variables to predict abolition: ‘It is our conviction that there is no single theoretical paradigm, and no definite set of independent variables which can account for the various lives of the ultimate penalty across time and space... Like globalization in general, the globalization of the discourses on state killing should not blind us to the very local nature of punishment.’ Moreover, Anckar (2004) casts doubt on the ability of academic studies to predict retention and abolition *in the future*, given the increasing influence of

In general, these studies and others have answered the first question described above (on the influential *attributes* of retentionist vs abolitionist states) by first isolating the *political structures* associated with abolition:

- unitary systems of government, as opposed to federations, lend themselves to making unpopular political decisions, such as to abolish the death penalty for all crimes;¹¹⁷
- democratic government increases the odds of abolition,¹¹⁸ and hence authoritarian governments tend to be retentionist;¹¹⁹ and,
- more specifically, left-leaning executives are more likely to abolish than their right-wing counterparts.¹²⁰

Second, the subject nation's economic development appears to be relevant: with the glaring exceptions of the United States and Japan, retentionist nations tend to be at a lower stage of economic development.¹²¹

Third, specific colonial inheritances appear to correlate with death penalty retention: countries with a colonial heritage are more likely to be retentionist per-se¹²² (and further, Neumayer finds a related link between retention and the inheritance of a

globalisation and regional effects (at 102): 'Perhaps it is not too venturesome to suggest that generalizations of the determinants of the death penalty will be less and less deterministic as time goes on.'

¹¹⁷ Bae (2007), 120. However, contrast Miethe et al, 120.

¹¹⁸ Anckar (2004), 96-97, 100, 167-170; Neumayer (2008a), 250, 263; Zimring (2011a), 7; Zimring and Johnson (2008), 109. Contrast Miethe et al, 126.

¹¹⁹ Johnson and Zimring (2009), 290; Boulanger and Sarat, 5, 9; Greenberg and West, 298; McGann and Sandholtz, 278.

¹²⁰ Neumayer (2008a), 263; Johnson and Zimring (2006), 92; Greenberg and West, 299; Johnson and Zimring (2009), 92-94.

¹²¹ Miethe et al, 122-123, 127; Johnson and Zimring (2009), 289-290, 295.

¹²² Anckar (2004), 96-97, 100-101.

common-law legal system).¹²³ Moreover, countries with a history of slavery are more likely to be retentionist.¹²⁴

Fourth and finally, in terms of religion, Christian majority countries are more restrictive in their use of the death penalty than Muslim or Buddhist majority countries;¹²⁵

More specifically, within the Asia-Pacific context, further *regional* attributes of actively retentionist states include a high national population, a history of conflict, a high level of corruption,¹²⁶ and a lack of engagement with regional or global human rights institutions.¹²⁷

Common findings on the second question, the *processes* that contribute towards abolition, first consist of explanations based on domestic and international politics:

- abolition in many countries was only achieved after capital punishment developed from a domestic criminal justice issue to a central concern of the *international* human rights movement;¹²⁸
- strong political leadership (perhaps pressured by international developments), rather than a change in domestic public opinion, is generally required for abolition;¹²⁹ and similarly,

¹²³ Neumayer (2008a), 265.

¹²⁴ Ankar (2004), 96-97, 100-102.

¹²⁵ Ibid, 91, 100; Boulanger and Sarat, 5; Miethe et al, 122. McGann and Sandholtz (at 285) found that after 1960, Catholicism as a dominant religion was strongly correlated with the odds of abolition, whereas Islam and Protestantism did not have statistically significant effects on abolition.

¹²⁶ Ankar (2004), 127, 130. Other Asia-Pacific specific findings within Ankar's study that only applied when explaining retention *in 1985* included high crimes rates and high regime stability.

¹²⁷ Zimring (2011a), 2; Zimring (2011b); Bae (2008b), 230; Johnson and Zimring (2009), 82, 315-316.

¹²⁸ Bae (2007), 116; Ankar (2004), 168; Neumayer (2008a), 252; Zimring (2003), 29-30; Hood (2001), 337; Hood and Hoyle (2008), 18-20.

- abolition of the death penalty exhibits regional contagion effects, the classic example being Eastern European nations abolishing in order to further their ambitions of European Union membership;¹³⁰

Second, abolition of the death penalty is, in many cases, a graduated process rather than an abrupt one. States failing to carry out executions for a number of years become ‘abolitionist de-facto’ before finally abolishing the death penalty in law;¹³¹ perhaps accompanied by restrictions in death-eligible crimes and the MDP,¹³² together with legal challenges that gradually whittle away the scope and legitimacy of death penalty practices, pending abolition.¹³³ Those states that *do* transform from enthusiastic executioners to outright abolitionists within a short space of time tend to be states emerging from conflict and undergoing radical political change, where a newly-installed government treats abolition as a symbolic and necessary ‘break from the past’.¹³⁴

In contrast, quantitative or qualitative comparative research that addresses *procedurally* or *operationally* specific questions in retentionist countries, such as why specific crimes possess a capital or non-capital status, or the structural and cultural determinants of high or low death sentence totals, the number of prisoners on death row, the length of time they spend there, yearly execution totals and of course judicial (i.e.

¹²⁹ Bae (2007), 119; Bae (2008b), 232; Hood (2001), 338-339; Johnson and Zimring (2009), 112.

¹³⁰ Ankar (2004), 102, 174; Neumayer (2008a), 253, 263; Hood and Hoyle (2009), 22-31.

¹³¹ Johnson and Zimring (2009), 112; Hood and Hoyle (2009), 4; Fitzpatrick and Miller, 301. As described in Chapter One, Brunei, Laos and Burma are Southeast Asian nations that presently fall into this category, as they do not carry out executions but have not yet abolished the death penalty in law.

¹³² Hood and Hoyle (2008), 278-279; Hood and Hoyle (2009), 4.

¹³³ Hood and Hoyle (2009), 24-28, 34-37.

¹³⁴ Bae (2007), 121; Neumayer (2008a), 250; Hood (2001), 339. There are a couple of examples of this practice in the Southeast Asian region: Cambodia and East Timor (Johnson and Zimring (2009), 381-382 n1; Cambodian League for the Promotion and Defence of Human Rights; Schabas (2002), 3)

court-based) or executive (i.e. clemency) appeal ‘success’ rates is much harder to come by.¹³⁵ Five of the transnational studies mentioned above: those authored by Zimring (2011c), Johnson (2010), Johnson and Zimring (2009), Neumayer (2008b) and Ankar (2004) were the only ones to engage in substantial analysis of the differences between high-executing and low-executing retentionist states, rather than the differences between abolitionist and retentionist nations per-se. Their general findings, somewhat echoing the results of abolition/retention studies described above, were as follows:

- retentionist *authoritarian* governments execute far more than retentionist *democratic* governments, whether they are situated at the extreme left or the extreme right of the political spectrum;¹³⁶
- economic development reduces execution rates,¹³⁷ with the notable exceptions of Japan and Singapore in the Asia-Pacific context;¹³⁸
- countries with a history of slavery, together with majority-Islamic countries are more likely to consistently execute than other retentionist countries;¹³⁹ and,
- retentionist countries with a common-law heritage execute at higher rates than do retentionist countries with a civil-law heritage.¹⁴⁰

Importantly for present purposes, one of Johnson and Zimring’s findings in their seminal 2009 comparative study of capital punishment in the Asia-Pacific region was that a

¹³⁵ See Johnson and Zimring (2006), 92.

¹³⁶ Zimring (2011c) (Asia-wide reference); Johnson (2010), 338 (Asia-wide reference); Johnson and Zimring (2009), 289-290 (worldwide reference).

¹³⁷ Johnson and Zimring (2009), 290; Johnson (2010), 342.

¹³⁸ Johnson (2010), 342.

¹³⁹ Ankar (2004), 40, 165. However, Zimring and Johnson (2008) (at 105) observed that Islamic-majority countries in the Asia-Pacific region tended to execute at low-rates.

¹⁴⁰ Neumayer (2008b), 11.

supposed pan-Asian *culture* favouring harsh punishments and the advancement of the family and state over the individual (or, to use the more commonly-advanced epithet, 'Asian Values') did not exist other than as a political construct to justify repression. It is authoritarian government, rather than 'Asian Values' that better explains the high execution rates in particular Asian countries.¹⁴¹

Why does the deficiency described in the academic literature exist, with most studies focusing on retention and abolition rather than the functional aspects of active death penalty practice? In some cases, the requisite data has proven hard to find or does not exist at all for each jurisdiction in such a comparative study,¹⁴² the statistical data that is available is of questionable reliability,¹⁴³ or alternatively national or regional differences in the *operational* specifics of the death penalty have proved harder to account for and explain, as compared with more general studies of patterns of retention and abolition.¹⁴⁴ Moreover, the authors of prior comparative studies of the death penalty appear to have seen the most important global issue as not the drivers of greater numbers of death sentences or executions, but instead the determinants of outright abolition, especially in cases where, as abolitionists, they hope for policy impact arising from their research. Nevertheless, so long as there remain a wide variety of capital punishment policies and

¹⁴¹ Johnson and Zimring (2009), 83, 290, 297-299. According to the authors, an overarching theory of 'Asian Values' consistent with retention of the death penalty cannot account for death penalty developments in Hong Kong, South Korea, Taiwan and the Philippines during the 1990s and 2000s.

¹⁴² Hood and Hoyle (2008), 148; Johnson and Zimring (2009), 39 n29.

¹⁴³ Hood and Hoyle (2008), 148-149, 154; Bennett, 14; Johnson and Zimring (2009), 39 n29.

¹⁴⁴ Ankar (2004) produced an innovative quantitative analysis of global death penalty retention and abolition, whereby abolition, retention of the death penalty for 'exceptional' crimes only, retention with a small number of cumulative executions and retention with a larger number of executions were all able to be incorporated within the same dependent variable (at 6-16).

practices in the Asia-Pacific region, future academic research has a significant role to play in explaining the source of these differences.

Why Compare the Clemency Policies of Indonesia, Malaysia, Singapore and Thailand?

In Chapter One, I discussed the rationale for choosing to research the death penalty in Southeast Asia, and briefly alluded to my reasons for selecting Indonesia, Malaysia, Singapore and Thailand as the four jurisdictions comprising the study. Other than the fact that the region is greatly understudied in terms of comparative law (in general),¹⁴⁵ and the death penalty (more specifically),¹⁴⁶ how then does the selection of these four jurisdictions fit within the aims and methods recommended by previous authors of comparative studies of criminal justice?

Similarities and Differences of the Four Jurisdictions

As a starting point, jurisdictions that are sufficiently 'alike' are those best suited to comparison.¹⁴⁷ What does this requirement involve, in the context of transnational research studies? Arguably, the jurisdictions chosen must exhibit as many similar attributes as possible, which can then generate discussion of why the outcome in each case (i.e. the clemency rate) varies so markedly.¹⁴⁸ In other words, the different jurisdictions must be similar enough so as not to defeat the purpose of comparison. To start with, in terms of law and politics, 'It is fair to expect that countries that are

¹⁴⁵ Harding (2002), 47, 47 n43.

¹⁴⁶ Johnson and Zimring (2006), 91; Boulanger and Sarat, 18.

¹⁴⁷ See notes 77-78, above.

¹⁴⁸ Nelken (2002), 180; Nelken (2010), 34-35; Przeworski and Teune, 33; Lijphart, 687.

geographically close to each other are similar in many respects’,¹⁴⁹ and as far as a death penalty practice is concerned, contiguity often matters.¹⁵⁰ However, case matching cannot begin and end with geography alone. A more detailed look at the legal, political and death penalty systems of Southeast Asian nations will be required.

Reiterating the initial justifications provided for the research in Chapter One: Introduction, there are five countries in the Southeast Asian region that can be classified as actively retentionist: Indonesia, Malaysia, Singapore, Thailand and Vietnam.¹⁵¹ All of these jurisdictions have carried out executions on a reasonably regular basis since 1975, and none has gone ten years without an execution during this period,¹⁵² thereby escaping classification as ‘abolitionist de-facto states’. Further, all five nations have adopted similar purported justifications for the use of capital punishment for those three categories of crimes that have led to the greatest numbers of executions in recent decades:

1. The death penalty is the only punishment that provides adequate retribution and public condemnation for the crime of *murder*;¹⁵³
2. Capital punishment must be used to deter, and eliminate, those individuals and groups who pose a fundamental threat to the survival of the state in its

¹⁴⁹ Anckar (2004), 122. See also: Johnson and Zimring (2009), 38; Abel, 222, and Lijphart, 688-689.

¹⁵⁰ Neumayer (2008a), 253; Baumgartner (2012); Anckar (2004), 174.

¹⁵¹ AI-Index ACT 50/001/2011, 45.

¹⁵² See Appendices A-D.

¹⁵³ Hor (2013); Interview with Singaporean Academic Expert and Singaporean NGO Staff (with reference to Singapore); Handley, 374 (Thailand); Interview with Australian Academic Expert on Indonesia #4 (Indonesia); Human Rights Commission of Malaysia, 7 (Malaysia); AI-Index 41/04/99, 8; ‘Australia-Vietnam dialogue: the currents of change’, 18 (both Vietnam).

present political form.¹⁵⁴ This label has been extended since 1975 to alleged communist insurgents in Indonesia, Malaysia, Singapore and Thailand;¹⁵⁵ Muslim extremists in Indonesia;¹⁵⁶ military coup-plotters in Thailand,¹⁵⁷ and anti-communist political dissidents in Vietnam;¹⁵⁸ and finally,

3. The transit of narcotic drugs through Southeast Asia, together with their sale to the region's youth, must be deterred by the death penalty, as drugs are a long-term threat to the stability of the state.¹⁵⁹ The supply and use of narcotics drugs is a serious criminal issue, rather than a public health issue.¹⁶⁰ Moreover, the narcotics problem is more acute in Southeast Asia than in other parts of the world due to the proximity of the 'Golden Triangle', an area that once produced up to 70 percent of the world's opium.¹⁶¹

Despite these similarities however, the five aforementioned nations vary significantly in relation to the stringency with which their death penalty statutes are actually enforced. This latter aspect includes the exercise of clemency and pardons in death penalty cases, as

¹⁵⁴ Zimring (2011b). This is sometimes legally deemed through the possession of firearms and explosives, as I outline in the remaining country chapters.

¹⁵⁵ Interview with Singaporean Academic Expert and Singaporean NGO Staff (in relation to Singapore); Interview with Member of the Malaysian Bar Council; Interview with Malaysian Member of Parliament (both Malaysia); Interview with Australian Academic Expert on Indonesia; Kontras; Interview with London-based Indonesian Human Rights Activist (all Indonesia); Funston, 'Thailand: Reform Politics', 332; Interview with Thai Human Rights Commissioner; 'Death Penalty Should be Abolished' (all Thailand).

¹⁵⁶ Interview with Australian Academic Expert on Indonesia; Murray (4/1991); Kaye; Glasius, 98-99.

¹⁵⁷ For example, AI, 'Two Executed without Trial in Thailand'; AI (1979), 66.

¹⁵⁸ Johnson and Zimring (2009), 386; Nguyen Van Canh, 125, 195-196; AI (1979), 103.

¹⁵⁹ Johnson and Zimring (2009), 308-309; Hor (2004), 108 n30; Hood and Hoyle (2008), 138-139; Harring, 371; Nguyen Xuan Yem; Lindsey (2008); Polglaze and Fatachi.

¹⁶⁰ Interview with FIDH Staff.

¹⁶¹ Johnson and Zimring (2009), 308 n14; Interview with Singaporean NGO Staff #2; Phuong.

well as the exercise of discretion at other stages in the process: extra-judicial sanctions, police and prosecutorial discretion, and judicial discretion in sentencing. Importantly, all five jurisdictions vest the power to commute judicially-sanctioned death sentences to a term of imprisonment in the executive branch of government.¹⁶² As I described in Chapter One: Introduction, and I will return to in Chapter Four: Treatment of Sources, one of these countries grants clemency or pardon in very few cases, as compared to the number of cases where an execution is eventually carried out (Singapore); one country grants clemency or pardon in the *vast majority* of finalised cases (Thailand); whereas Indonesia, Malaysia and perhaps Vietnam fall somewhere in between, as far as their clemency ‘rates’ are concerned. It is the percentage of finalised death penalty cases (i.e. cases where all of the prisoner’s judicial appeals have failed) that end in commutation through clemency or pardon that I consider the primary factor demanding explanation in the present study.

Politically, with the exception of Vietnam (leading to that country’s exclusion from the final analysis),¹⁶³ all of the jurisdictions mentioned have been ruled by authoritarian or semi-authoritarian governments of the right over large periods of the 35-year time-frame I have isolated for the present study. Singapore and Malaysia’s politics through to 2009, despite the retirement of Malaysian Prime Minister Mahathir in 2003, were both characterised by ‘government[al] structures that are authoritarian and [were] dominated by a single “strongman” who now wields authority informally’ – Lee Kwan Yew in Singapore’s case and Mahathir Mohamad in Malaysia’s.¹⁶⁴ From 1967 to 1998 Indonesia

¹⁶² Constitution of Singapore, art 22P; Thailand Department of Corrections; FIDH (2005), 28; Sidel, 52-53, 72, 98-99; Constitution of Indonesia, art 14; Smith (2001), 88; Constitution of Malaysia, art 42(1); Habib.

¹⁶³ See note 40 and associated text, above.

¹⁶⁴ Johnson and Zimring (2009), 305-306; see also Welsh, 3 and Case (2009b), 261.

was ruled by military dictator Suharto, but since his fall and the resignation of his former deputy and successor B.J Habibie in 1999, has arguably become the most democratic nation in Southeast Asia.¹⁶⁵ Thailand has endured a succession of military coups throughout its history,¹⁶⁶ with Thaksin Shinawatra the only Prime Minister to successfully serve a full four-year term (2001-2005; 2005-2006), before he too was ousted in a coup.¹⁶⁷ In all four jurisdictions, the strong executives of the right were backed by the United States as a bulwark against the spread of communism during the Cold War.¹⁶⁸ During the past 10 to 15 years, albeit to differing extents, the politics of each country has become more pluralist and inclusive, and less authoritarian.¹⁶⁹

Legally and historically however, the commonalities between jurisdictions start to break down. Singapore and Malaysia share the closest historical ties between any two of the five countries identified: they are both former British colonies and indeed were briefly part of the same Federation of Malaya before Singapore was expelled from the Federation and became independent in 1965. As such, the legal systems of both countries are extremely similar, being based on the English common law and the Westminster constitutional tradition.¹⁷⁰ Indonesia's legal system is based upon the European civil-law model inherited from its Dutch colonial masters,¹⁷¹ while Thailand's legal system exhibits features of Buddhist and Hindu jurisprudence, as well as western

¹⁶⁵ Case (2009b), 256; Interview with ANU Academic.

¹⁶⁶ There have been 18 military coups since the absolute monarchy was abolished in 1932 (Johnson and Zimring (2009), 399).

¹⁶⁷ Johnson and Zimring (2009), 398-399; Yimprasert.

¹⁶⁸ Emmerson, 10, 18; Steedly, 434.

¹⁶⁹ Case (2009a), 311-312; Interview with Singaporean Academic Expert and Singaporean NGO Staff.

¹⁷⁰ Johnson and Zimring (2009), 305; Tan (2005), 81; Harding (1996a), 88-89.

¹⁷¹ van den Berg, 257; Heryanto, 108; Al (1979), 67.

influences (including elements of European civil-law penal codes).¹⁷² Notably, Thailand is the only mainland Southeast Asian nation to have never been colonised.¹⁷³

Overall however, that such near neighbours and political allies (as part of the ASEAN bloc)¹⁷⁴ choose to enforce their death penalty laws in such different ways makes my 'macro' research question '*What are the structural and cultural determinants of clemency and pardon frequency in retentionist Southeast Asian jurisdictions?*' such a compelling one to answer. Yes, the four jurisdictions I have chosen to analyse do exhibit historical differences, particularly with regard to colonial influence (and therefore associated differences in legal systems and death penalty practices), however these differences are not enough, by themselves, to invalidate the forthcoming findings.¹⁷⁵ Perfect 'case-matching' on the basis of like characteristics in the context of comparative criminal justice is an almost impossible task.¹⁷⁶ The way forward is simply to acknowledge the possible 'spurious' influences, if any, of historical and legal differences on clemency 'rates' in Chapter Nine: Discussion and Conclusion, rather than to completely alter the scope of my research.

Conclusion

Although there are infinite possible reasons for variation in death penalty usage across different national jurisdictions,¹⁷⁷ the attempt to discover differences, commonalities and

¹⁷² Choosup, 81-82; Fairchild and Dammer, 359; Union for Civil Liberty.

¹⁷³ Choosup, 81, 83; Alarid and Wang.

¹⁷⁴ See AI-Index ASA 03/01/97, 1 n1.

¹⁷⁵ Johnson and Zimring (2009), 38.

¹⁷⁶ Kohli et al, 21; Lijphart, 684.

¹⁷⁷ Boulanger and Sarat, 4; Przeworski and Teune, 31.

patterns and subject those to a vigorous qualitative analysis is a worthy academic endeavour: a task that enables a researcher to learn more about individual jurisdictions as compared with a single-state case-study.¹⁷⁸ Exploratory research on a greatly-understudied topic (clemency and pardons) in an understudied part of the world (Southeast Asia) can only add to criminological understanding, even if reliance is placed upon non-official sources of data,¹⁷⁹ the use of inferences and findings that are not yet subject to testing through a rigorous quantitative regression analysis.

Throughout the present chapter I have discussed the justifications for engaging in a comparative study of the clemency and pardon practices of those Southeast Asian nations (minus Vietnam) that continue to utilise the death penalty as a form of judicial punishment: Indonesia, Malaysia, Singapore and Thailand. I have described the reasons why a multi-year study would be more appropriate than a cross-sectional analysis, and moreover why it is important to compare legal *culture*, and not merely formal death penalty *structures*. Finally, it is evident in looking at previous multi-national studies of the death penalty that there exists a gap in the comparative academic literature relating to the *operational specifics* of each retentionist country's use of the ultimate punishment. A number of previous studies have discussed the reasons for retention or abolition of the death penalty, but there have been far fewer researchers who have been prepared to analyse the *differences between the death penalty practice of retentionist nations*, for which clemency (or its conspicuous absence) amongst finalised cases is a key component.¹⁸⁰

¹⁷⁸ Nelken (2011), 395-396.

¹⁷⁹ See Chapter Four, *Introduction: Combining and Triangulating Sources*.

¹⁸⁰ Hood and Hoyle (2008), 261.

Chapter Three – Previous Literature on Clemency and Pardons

Introduction – Why Refer to Theory and Previous Empirical Studies?

In the previous chapter I discussed the benefits, potential shortcomings, and research design specifics of a *comparative criminal justice* study of four countries in Southeast Asia. In the present chapter I move on to a review of the literature on clemency and pardons in death penalty cases, which, as described in Chapter One: Introduction, form the object of comparison within each country of study.

The first question to be addressed here is: why refer to theory and previous empirical findings when conducting an *inductive* (i.e. hypothesis-generating)¹⁸¹ comparative study such as the present one? As first described in Chapter One: Introduction, the purpose of my dissertation is to document the respective national uses of clemency and pardon and to make general observations about the possible determinants of clemency in the region (adopting an *inductive* approach), rather than *testing* observations of the Southeast Asian reality against European or American-sourced theory (an example of the *deductive* approach).¹⁸² Nevertheless, it is still vital to establish a proper grounding in theory and the results of previous empirical studies before moving on to the outlining of data, within the respective country chapters. Without reference to theory, it would be extremely difficult to delineate the set of potential explanatory factors that could contribute to clemency and pardon rates, as the range of potentially determinative features within a country's criminal justice system, political system, and

¹⁸¹ Lijphart, 692.

¹⁸² Bottoms, 95; Neuman, 59.

wider culture is almost infinite!¹⁸³ As Kohli et al describe, theoretical frameworks are used in this manner to discover ‘mechanisms that make the behavior of actors and institutions causally plausible.’¹⁸⁴

This use of theory is especially important in a *qualitative multi-jurisdictional* study where, as discussed in Chapter Two, perfect case-matching on the basis of like characteristics is almost impossible.¹⁸⁵ Using theoretical perspectives and the results of previous empirical studies on clemency and pardons, even from otherwise unrelated jurisdictions such as the United States, will help to overcome this problem, and will also assist in the interpretation of the factual information gleaned from fieldwork and library based research.¹⁸⁶ Again, in the words of Kohli et al:

we must theorize about the mechanisms by which the observations [i.e. clemency and clemency ‘rates’] are generated and then use this knowledge to compensate for the nonrandom nature of the observable world.¹⁸⁷

In the present chapter, after first clarifying the precise meaning of ‘clemency’ and ‘pardon’ as features of the death penalty landscape, I list the array of decision-makers within the executive branch of government who exercise these powers, describe the kinds of circumstances that usually give rise to their use (relevant to the ‘micro’ research

¹⁸³ Parsons, 15, 20; Boulanger and Sarat, 4. Przeworski and Teune summarise: ‘the number of the relevant determinants of any kind of social behavior is likely to exceed the number of accessible social systems’ (at 31).

¹⁸⁴ Kohli et al, 5, 47, emphasis added; Parsons, 15. Lijphart adds that what is most important is to *scan* all possible variables, rather than *include* all in the final study: to guard against ‘an unrealistic and eventually self-defeating perfectionism’ (at 690). I have adopted that approach within the dissertation, so that not all variables mentioned in theoretical studies will form part of Chapter Nine: Discussion and Conclusion.

¹⁸⁵ Kohli et al, 21; Lijphart, 684.

¹⁸⁶ Neuman, 76.

¹⁸⁷ Kohli et al, 21.

question described in Chapter One), and finally, I begin an elucidation of the array of plausible *determinants* of a high or low rate of clemency and pardons (addressing the ‘macro’ research question described in Chapter One). I return to this latter thread of discussion in Chapter Nine, where I isolate the relevant themes arising from a comparison of the four retentionist Southeast Asian jurisdictions.

Meaning and Terminology

Defining ‘Clemency’ and ‘Pardon’ Grants

Once a defendant is sentenced to death by a court of law and has exhausted all available *judicial* appeals, his or her last remaining procedural hope is a grant of clemency or pardon from the executive.¹⁸⁸ In its modern American usage, the term ‘clemency’ denotes the conversion of a sentence of death into a sentence of imprisonment, while a ‘pardon’ or ‘unconditional pardon’ means that the executive not only halts the execution of the death sentence, but also grants the recipient an unconditional release from prison altogether,¹⁸⁹ sometimes accompanied by the complete erasure of criminal responsibility.¹⁹⁰ These will be the definitions I adopt for the remainder of the current study.

¹⁸⁸ Sebba (1977a), 230; Sarat (2005), 19; see also note 201 (below) on clemency being granted by the legislature.

There is generally no reason why clemency or pardon cannot be granted prospectively, *before* the prisoner has exhausted all judicial options, or even before criminal charges are laid (Acker and Lanier (2000), 204; Palmer, 110), but nonetheless this course of action is rarely resorted to. Clemency granted before the exhausting of judicial appeals, and the problems it poses for quantitative data in this study, is analysed in Chapter Four: Treatment of Sources, note 488, and associated text.

¹⁸⁹ Palmer, 110; Coyne and Entzeroth, 838.

¹⁹⁰ Acker et al, 184; Acker and Lanier (2000), 204-205; Abramowitz and Paget, 138.

While the unconditional pardon and release from prison of a convict previously condemned to death was once the most common form of executive leniency in capital cases,¹⁹¹ the advent of long-term imprisonment and rehabilitatively-geared punishments in the 19th century,¹⁹² together with the development of additional layers of judicial review following conviction, means that when an executive order for leniency is now made, it normally comes in the form of clemency:¹⁹³ a substitution of the sentence of death with a term of imprisonment, such as a 20 year sentence or life in prison without the possibility of parole. In the modern context, an unconditional pardon is extremely rare for a prisoner sentenced to death, irrespective of the relevant jurisdiction,¹⁹⁴ unless there are significant doubts over the propriety of the prisoner's conviction.¹⁹⁵ For this reason, during the remainder of the present study my focus will primarily be on *clemency* as a form of executive leniency, with full pardons considered a definitional sub-category of clemency as the reduction of a death sentence to a punishment less than death.

Further Terminology

Throughout the relevant literature, a variety of other terms are commonly used in the same context, reflecting the broad array of powers an executive will have in the decision to reduce, substitute or abrogate a punishment imposed by a court. For present purposes, the meanings of these terms are as follows:

¹⁹¹ Abramowitz and Paget, 138.

¹⁹² Kaminer, 171; Fairchild and Dammer, 251.

¹⁹³ Acker et al, 184; Lardner and Colgate Love, 212-213; Acker et al, 184.

¹⁹⁴ Burnett (2002), 14; Kobil (1998), 674; Acker and Lanier (2000), 205. Kobil (1998) notes that, as pardons in death penalty cases are so rare in the modern context, there is often a great deal of terminological confusion between pardons and clemency grants (at 674-675).

¹⁹⁵ Scott, 96-97.

- *Commutation* - essentially the same meaning as I have ascribed to ‘clemency’, above.¹⁹⁶ Commutation is the preferred term of the ICCPR for the substitution of a death sentence with a sentence of imprisonment;¹⁹⁷
- *Reprieve or Respite* - a *temporary* stay of execution, usually granted in order to have a pending legal issue resolved,¹⁹⁸ or to enable further investigation of the case.¹⁹⁹ Writing in 1998, Kobil asserted that reprieves were the most common form of leniency exercised in the United States death penalty context.²⁰⁰
- *Amnesty* - a grant of clemency or pardon to an entire *class* of prisoners, often granted by legislation or executive decree for many of the same ‘utilitarian’ or even ‘festive’ reasons as is spelt out below, in the context of individual prisoners;²⁰¹
- *Conditional Pardon* - where the prisoner is released from prison or condemnation to death on the *condition* that he or she promises to perform a

¹⁹⁶ Acker et al, 184; Kobil (1998), 674.

¹⁹⁷ ICCPR, art 6(4).

¹⁹⁸ Burnett (2002), 14; Burnett (2003), 191; Acker et al, 184.

¹⁹⁹ Burnett (2002), 178; Acker et al, 184.

²⁰⁰ Kobil (1998), 674.

²⁰¹ Robertson, 296. Earlier in this chapter I defined the granting of ‘clemency’ and ‘pardons’ as acts taken by members of the *executive* branch of government. In the case of an amnesty, depending on the jurisdiction and historical context, the law can be promulgated as an executive decree through the exercise of sovereign prerogative, as with clemency, or by the *legislature* passing an act to commute or dissolve the sentences of an entire class of prisoners (Sebba (1977a), 232). The key similarity between the two types of amnesty is that both involve *political* decisions to remit punishment, rather than sentences reduced on *judicial* appeal. While I generally refer to *executive* clemency throughout my thesis, I will extend this definition to the granting of amnesties by the legislature where appropriate. See also note 259, below.

particular duty, such as serving in the armed forces or some other form of public service;²⁰²

- *Mercy* - an overarching term relating, in the present context, to the exercise of leniency in the criminal justice system.²⁰³ However, the notion of ‘Mercy’ is often associated with clemency or pardon decisions made *for the benefit of the decision-maker*, or in the name of *compassion*, where there appears to be no retributive justification for the pardon.²⁰⁴ Both of these concepts are discussed in greater detail below.

The Southeast Asian Context

In the country chapters that follow, it will also be important to bear in mind the local terms used for ‘clemency’ and ‘pardons’ in Indonesia, Malaysia, Singapore and Thailand. While I will describe the clemency regime in each country in detail throughout country Chapters Five to Eight, to avoid confusion it is initially important to note that a ‘Royal Pardon’ in Thailand can (when granted to a prisoner on death row) take the form of a grant of *clemency*, reducing a death sentence to a term of imprisonment.²⁰⁵ A prisoner will often receive a series of Royal Pardons, over a number of years or decades, in order to reduce a death sentence to a term of years, followed by eventual release from prison.²⁰⁶ In Malaysia, the State and Federal ‘Pardons Boards’ are the main decision-making bodies

²⁰² See note 255, below.

²⁰³ Rapaport (1998-2000), 1503.

²⁰⁴ Kobil (2007), 36; Acker et al, 184; Moore (1989), 129.

²⁰⁵ Thailand Department of Corrections, ‘Royal Pardon & the Impact on Death Penalty’; Criminal Procedure Code, s 259-267.

²⁰⁶ ‘Death Penalty Should be Abolished’; ‘Capital Punishment Called into Question’; ‘Amnesty for Drug Offenders Reflects King’s Generosity’.

for executive discretion in that jurisdiction. Their mandate extends both to the commutation of death sentences to a term of imprisonment (known locally as a pardon), the reduction of prison sentences to a lesser term, and the unconditional release of prisoners from jail.²⁰⁷ In the Indonesian and Singaporean context, the English language term ‘clemency’ is the word commonly used amongst lawyers, politicians and academic or journalistic commentators to refer to the commutation of a death sentence to a term of imprisonment, despite the fact that the overarching term ‘pardon’ is used in the Singaporean Constitution.²⁰⁸ The *Bahasa Indonesia* word *Grasi*, listed as a Presidential prerogative power in the 1945 Constitution,²⁰⁹ incorporates both the commutation of death sentences, the reduction of prison sentences to a lesser term, together with the granting of outright release.²¹⁰ Despite then the variety of different terms and local meanings employed in Southeast Asia, through the remainder of the dissertation I continue to refer to ‘clemency’ and ‘pardon’ with those terms having the same meanings as I assigned earlier in this chapter.

I will elaborate in Chapters Five to Eight on each jurisdiction’s precise clemency and pardon *structure* and *procedure*, together with the relevant criminal justice and political *culture*, and what effect these factors have on the type and proportion of commutations granted. Before doing so however, it is important to review the previous literature on clemency decision-makers and the prisoners who benefit from those

²⁰⁷ Criminal Procedure Code, art 281; Talib, 67-72; Damis (17/11/04).

²⁰⁸ Constitution of Singapore, art 22P (a)-(c): the Singaporean President also has the power to ‘remit’, ‘reprieve’ or grant ‘respite’ from any lawfully-imposed sentence. A death row prisoner has never been granted a *full* pardon, with immediate release from prison, during Singapore’s history as an independent state (see Appendix A).

²⁰⁹ Constitution of Indonesia, art 14.

²¹⁰ Rachman; Judicial System Monitoring Programme, 4.

decisions, in order to place the Southeast Asian clemency practice in context, and potentially to clarify the reasons for clemency grants, where none are given by the relevant decision-maker (which directly relates to my 'micro' research question).

Who Grants Clemency and Pardons? Why are they Granted, and to Whom?

Varieties of Executive Decision-Makers

It is instructive to begin a list of clemency decision-makers by initially confirming who is *not* empowered to grant commutations. Grants of clemency and pardon can be distinguished from the *personal* forgiveness afforded to a convicted criminal by a victim or the wider community, in that the former carries institutional backing, and is the decision of a prevailing *political authority*²¹¹ rooted in the executive (or occasionally, legislative) branch of government.²¹² Likewise, although the very definition of the clemency and pardon power presupposes that such decisions effectively override those of the judiciary, judicial or quasi-judicial bodies do sometimes provide *advice* on the exercise of clemency throughout the retentionist world.²¹³ Nonetheless, the final say on the decision is made within the executive branch of government.

Officially, a grant of clemency or pardon can be made by a range of executive decision-makers, from a monarch or head of state, a senior government minister, a provincial governor, a parliamentary committee, to a specially-constituted clemency or pardons board.²¹⁴ Depending on the jurisdiction, the relevant authority can have a

²¹¹ Abramowitz and Paget, 138; Heise, 255.

²¹² Sebba (1977b), 112; Heise (at 240) describes clemency as an 'extrajudicial check on the discretion of courts', thereby encompassing both executive and legislative action. See also note 201, above.

²¹³ Sebba (1977b), 115; Lardner and Colgate Love, 213.

²¹⁴ Sebba (1977b), 111-115; Robertson, 147.

written constitutional, legislative, or even informal conventional mandate for the carrying out of these functions.²¹⁵ As I describe later in this chapter, commentators have observed that the identity of the decision-maker, together with the precise legal formulation of the clemency power can have a significant impact on the proportion of finalised death sentences that are eventually commuted.

Recipients of Clemency and Reasons for the Power's Exercise

Clemency and pardons, almost by definition, are legally unreviewable executive 'decrees' that are not subject to the dictates of precedent, sentencing guidelines, or administrative law principles that now guide many of the decisions made in the executive and judicial branches of government.²¹⁶ Although the way in which the power to grant clemency and pardons is exercised is often perceived as arbitrary and capricious,²¹⁷ a close examination of previous empirical studies on the topic, together with relevant theoretical literature, reveals particular patterns of use. Even though clemency deliberations are usually performed in secret, and moreover public reasons and justifications for a clemency grant are not generally required,²¹⁸ over a long historical period we can observe prisoners receiving the benefit of commutation in the same kinds of cases.

Based on my summary of the theoretical literature, the four essential paradigms of clemency practice consist of the following:

²¹⁵ Sebba (1977b), 111; Vicenzi, 234; Hewison, 73.

²¹⁶ Sarat (2005), 79, 113; Meyer, 64; Barkow (2007-2008), 1335; Pridemore, 162.

²¹⁷ Sarat (2005), 69; Meyer, 64.

²¹⁸ Sebba (1977a), 228-229; *In re Sapp*, 465; Kobil (1991), 608-609.

1. Mercy from the sovereign;
2. Retributivist clemency;
3. Clemency as redemption; and,
4. Clemency for political advantage or utilitarian reasons.

Whether or not these patterns extend to clemency and pardons as practised in *Southeast Asian* jurisdictions forms part of my first research question (the ‘micro’ question), as described in Chapter One. The following hypothetical and observed justifications for clemency and pardon grants will need to be borne in mind throughout each of the four country chapters that follow.

1. *Mercy from the Sovereign*

According to this model, clemency is considered a merciful ‘gift’ from the executive to the prisoner, and as such its granting may be more a reflection of the benevolent nature of the ruler²¹⁹ and his or her desire for social control and to exercise of the power ‘power over life and death’,²²⁰ rather than any particularly deserving features of the case. Clemency granted by a monarch or dictatorial ruler, often to an entire *class* of condemned persons,²²¹ generally comports with this kind of classification. As Pufendorf observes, ‘by

²¹⁹ Kobil (1991), 571. Acker and Lanier (2000) (at 201) describe the appropriateness of the festive metaphor where an absolute monarch grants pardons – prisoners in such societies have sometimes ‘cheated the executioner through the fortuitous timing of royal births, coronations, and other official celebrations.’

²²⁰ Sarat (2005), 16; Hay, 42, 48; Coyne and Entzeroth, 839; Kobil (1991), 582. Strange (at 4) observes that the power to grant pardons may have been appropriated by pre-modern autocratic rulers as a means of demonstrating semi-divinity, when it was previously believed that only God could forgive.

²²¹ Botsman, 45; Sebba (1977a), 232; see note 201, above.

the granting of pardon in the proper place and time, the safety of a state is not undermined but is in fact *sometimes strengthened*.²²²

In modern democracies, where national leaders' decisions are scrutinised through electoral choice rather than having to be justified to the public as examples of benevolence, clemency of this kind is unlikely to remain a viable political option.²²³ Unlike the case with monarchs or autocrats who rule through charisma, grace, or even coercive terror alone,²²⁴ the leaders of modern democracies must instead govern and gain legitimacy through legally prescribed and predictable rules.²²⁵ However, as we will see below, clemency for *implicit* political advantage does still exist in democratic societies.

2. *Retributivist Clemency*

Where 'mercy from the sovereign' is dispensed on a purely discretionary and perhaps even arbitrary basis,²²⁶ clemency in the name of retributivism requires the commutation of a death sentence to a term of imprisonment in a number of pre-determined circumstances, where strict conformity with the original sentence imposed would result in undeserved or disproportionate punishment.²²⁷ Pardons or grants of clemency in this

²²² Pufendorf S, *De jure naturae et gentium*, quoted in Sitze, 186, emphasis added. See also Garland (2010), 78.

²²³ Sarat (2005), 108; Kobil (2007), 36-37, 47.

²²⁴ Of course, there is nothing stopping an autocratic sovereign, accustomed to relieving condemned prisoners as a show of benevolence, from also granting clemency for *retributive* or *redemptive* reasons, as I describe in further detail below.

²²⁵ See Weber, 33-36; Strange, 3.

²²⁶ Sarat (2005), 20-21; Kobil (1991), 574.

²²⁷ DeCoste, 9; Moore (1989), 129. Sarat (2005), 113, offers a critique of this retributivist, 'legal' basis for clemency. Clemency 'cannot be granted to all similarly situated offenders without becoming something other than mercy... mercy always contains an element of arbitrariness.'

context are justified on the basis that they are seen to *enhance* retributive justice, rather than detract from it.²²⁸ Relevant examples include:

- wrongful conviction, due to procedural improprieties in the original trial, error or procedural bars at the appeal stage, or the discovery of new evidence exonerating the prisoner;²²⁹
- one or more dissenting judgements contained in the original conviction, casting a degree of doubt over the accused's guilt;²³⁰
- the death sentence being a far more severe punishment than is usually imposed in cases of comparable severity,²³¹ or likewise where the death sentence is disproportionate as compared with prison sentences imposed on co-offenders;²³²
- the crime was committed 'out of necessity, coercion or adherence to moral principles';²³³
- similarly, where the facts of the case, while insufficient to found a full defence in law, suggest a degree of mental incapacity, intoxication, provocation, duress, self-defence, or 'battered woman syndrome';²³⁴

²²⁸ Meyer, 86; Acker et al, 185.

²²⁹ Sebba (1977a), 229; Kobil (2000), 572; Ledewitz and Staples, 234; Sarat (2008), 220.

²³⁰ Robertson, 147; Burnett (2002), 158; Abramowitz and Paget, 170.

²³¹ Coyne and Entzeroth, 843; Rapaport (1998-2000), 1521; Sarat (2005), 155.

²³² Burnett (2002), 158; Berlow, 91, quoted in Sarat and Hussain, 1310.

²³³ Coyne and Entzeroth, 843; Moore (1989), 97, 156-165; Meyer, 67.

²³⁴ Meyer, 67; Abramowitz and Paget, 165, 168; Burnett (2002), 158.

- the age of the prisoner: either extreme youth or old age,²³⁵ or other mitigating factors in the offender's background that ordinarily might have been considered at the sentencing phase;²³⁶
- the gender of the prisoner: political leaders and the public may believe that the execution of a woman is never justifiable;²³⁷ moreover, international law is clear on the view that a *pregnant* woman should never be executed;²³⁸
- compassionate grounds, for example where the prisoner has young children, or a dying spouse or parent;²³⁹ and,
- medical grounds, such as a prisoner being diagnosed with a terminal illness while in prison, or developing a serious mental illness rendering the prisoner unfit for execution.²⁴⁰

3. Clemency as Redemption

Clemency is granted here not as a criticism of the original conviction and sentence or the way that languishing on death row affects the prisoner over time, but in reference to the prisoner's character, behaviour or meritorious activities *before arrest and before*

²³⁵ Blumenthal; Heise, 284; Crouch, 25; Pridemore, 164.

²³⁶ Sarat (2008), 205-206; Berlow, 91; Burnett (2002), 192.

²³⁷ Rapaport (2001), 968, 982; Heise, 275, 277; Moore (1989), 208-209; Robertson, 150.

²³⁸ Robertson, 149; ICCPR, art 6(5). Strange (at 15) notes that pregnant women 'pled the belly' for centuries in England in order to avoid hanging. However, in other societies, pregnancy may only have resulted in a temporary *reprieve* from execution, in order to deliver the child (Kobil (1991), 578).

²³⁹ Rapaport (2001), 987; Heise, 287-288; Kobil (2007), 44-45; Rapaport (1998-2000), 1522.

²⁴⁰ Blumenthal; Ministry of Justice, 17; Death Penalty Information Center, 'Clemency'.

conviction or (most commonly) in prison *after* conviction.²⁴¹ For example, clemency may be granted pursuant to:

- demonstrated rehabilitation, remorse and repentance by the prisoner during the time spent in detention (similar to the institutions of parole and remission for sentences of imprisonment);²⁴²
- the prisoner embracing religion in prison;²⁴³
- compensation paid to and/or forgiveness granted by the victim's family in a murder case,²⁴⁴ which is particularly significant under Islamic *Sharia* Law;²⁴⁵ or,
- clemency granted on the basis of previous national service of some form.²⁴⁶

Usefully, clemency as redemption (in addition to some elements of clemency for political advantage, below) largely fits within Baumgartner's influential theoretical model of discretionary decision-making.²⁴⁷ According to this argument, those who benefit from the exercise of leniency in the exercise of administrative discretion tend to have a pre-existing 'relational distance' with the decision-maker, a respectable and morally unblemished

²⁴¹ Harris and Redmond, 7; Moore (1989), 204-205; Rapaport (1998-2000), 1523.

²⁴² Sebba (1977a), 230-231; Rapaport (2001), 987, 998; Blumenthal. A London barrister with significant experience in death penalty cases also mentions a practice, recommended by the Judicial Committee of the Privy Council in particular cases, of granting clemency to a condemned prisoner whose case was 'used' to clarify a particular point of law (if the defendant's appeal was rejected) (Interview with London-based Death Penalty Lawyer). The operative basis for clemency in this situation might also be the long time the prisoner spends on death row, invoking compassionate considerations and a chance for rehabilitation.

²⁴³ Moucarry, 271; Abramowitz and Paget, 168.

²⁴⁴ Acker and Lanier (2000), 209.

²⁴⁵ Abou El Fadl, 93; Hood (1989), 77; Moore (1989), 97, 146. See *Islam – State Religion in Malaysia and Dominant Religion in Indonesia*, below, for further detail.

²⁴⁶ Moore (1989), 204; Kobil (2003), 222.

²⁴⁷ See generally Baumgartner (1992).

public record, are cooperative with legal officials, or possess a high 'social status' (especially in relation to any victim of their crime).²⁴⁸ These characteristics, Baumgartner notes, have held up throughout different world regions and across different historical periods.²⁴⁹

4. *Clemency for Political Advantage or Utilitarian Reasons*

This paradigm might be conceived of as the *secular* form of mercy from the (semi-divine) sovereign, as exercised by modern elected leaders.²⁵⁰ Here, clemency is granted in order to gain political benefit for the executive,²⁵¹ or for the general public benefit,²⁵² rather than on the basis of any redeeming qualities of the prisoner or his or her case. For example:

- an amnesty granted to combatants on both sides of a civil war, in order to facilitate societal 'healing';²⁵³
- similarly, the commutation (and probable release) of the death sentences of political prisoners after a transition from autocracy to democracy;²⁵⁴
- clemency in exchange for a promise to act in the armed forces, to be deported to a penal colony, or to undergo some other form of conduct in the national interest;²⁵⁵

²⁴⁸ Baumgartner (1992), 131-146; Strange, 9-10.

²⁴⁹ Baumgartner (1992), 146.

²⁵⁰ Sarat and Hussain, 1319.

²⁵¹ Crouch, 3; Sebba (1977a), 231; Heise, 289; Coyne and Entzeroth, 842.

²⁵² Crouch, 28-29; Moore (1989), 199-200.

²⁵³ Kobil (2003), 222; Crouch, 20; Sarat (2005), 20.

²⁵⁴ For example, Schabas (2004), 1086-1087; 'Question About Amnesty'.

- clemency granted to the citizen of an abolitionist nation (or in response to a request made by a powerful international ally), in order to maintain good diplomatic and trade relations with that nation;²⁵⁶
- clemency for a prisoner who acts as an informant or as a witness in a case against his or her accomplices;²⁵⁷
- where the clemency recipient has intervened ‘to assist the prison authorities in preventing [another prisoner’s] escape, injury or death’;²⁵⁸
- changing public, political, judicial or international law views on the ‘morality, justice and effectiveness’ of the death penalty after the sentence has been imposed;²⁵⁹ and most obviously,
- clemency to gain direct political, or even financial, support.²⁶⁰

²⁵⁵ Meyer, 74; Moore (1989), 90, 199.

²⁵⁶ Johnson and Zimring (2009), 318, 334; Neumayer (2008a), 242.

²⁵⁷ Sebba (1977a), 227, 229; Blumenthal; Robertson, 297; Kobil (1991), 589. Robertson has described this practice, whether it attaches to clemency in death penalty cases or where the initial sentence is merely one of imprisonment, as a form of ‘plea-bargaining’ (Robertson, 318).

²⁵⁸ Ministry of Justice, 17. Clearly this ground, together with acting as an informant or witness (above) could also fall within the ‘redemptive’ category. In both scenarios, the state benefits from the prisoner’s actions, and issues clemency as a ‘reward’. The subtle difference between the two categories is that ‘redemptive’ clemency is awarded to prisoners who have demonstrated virtue *for themselves*, whereas ‘utilitarian’ clemency rewards a specific and practical action that benefits the state or the general public.

²⁵⁹ Sebba (1977a), 230, 232; Rapaport (2001), 1001; UN Doc A/HRC/4/20, 14; Sarat (2005), 67. Clemency may be awarded en-masse (by *any* of the three branches of government) if a death penalty statute is found to be unconstitutional or otherwise legally invalid (Burnett (2002), 192; Acker and Lanier (2000), 208), or perhaps if other sentencing options such as a life without parole had been available at the time the death sentence was originally passed (Sarat (2008), 220).

²⁶⁰ Sebba (1977a), 231; Rapaport (2001), 982; Heise, 289, 298; Crouch, 4.

Structural and Cultural Determinants of Clemency and Pardon ‘Rates’

In Chapter Two, I examined major academic studies that have attempted to isolate the determinants of *retention* and *abolition* of the death penalty, together with a shorter section concerning those studies that attempted to distinguish high-executing and low-executing states. In comparison, the cultural and structural determinants of clemency and pardon ‘rates’ are subtly different. A simplistic account of a state with a high rate of death sentences ‘overturned’ by clemency might conclude that the country’s rulers were simply not very committed to capital punishment as a penal sanction. While in some cases this observation might be generally correct, the strength of a government’s policy commitment to the death penalty is only one possible determinant of clemency rates: it should be borne in mind that all four Southeast Asian nations contained within the present study have carried out executions on a reasonably regular basis since 1975 (none have fallen within the category of ‘abolitionist de-facto’ over that time), yet their clemency rates are *vastly* different, from little more than one percent, to ‘medium’ rates of 20-40 percent, to over 90 percent in the case of Thailand. A more nuanced explanation of clemency and pardon frequency will take into account the jurisdiction’s system of government, separation of powers, clemency decision-making process, criminal justice system and its values, together with public opinion on the death penalty and the predominant religion practised, to name just a few possibilities. As with the true reasons for commutations themselves,²⁶¹ the potential determinants of the *proportion* of cases ending in clemency or pardon are numerous and overlapping, and relate to both

²⁶¹ Abramowitz and Paget, 159.

structural *and* cultural factors.²⁶² I consider the way that the theoretical and empirical literature has approached these and other explanations below.

Clemency, Democracy and Authoritarianism; Clemency and the 'Separation of Powers'

The origin of clemency as one of the key sovereign prerogative powers of absolute monarchies,²⁶³ along with the ability to wage war, sign international treaties, establish diplomatic relations,²⁶⁴ together with the *execution* of the death penalty itself,²⁶⁵ suggests that centralised, authoritarian governments in the contemporary world will continue to demonstrate state power by remitting criminal punishments, as has been done for hundreds of years. This pattern of institutional behaviour can and does arise irrespective of the precise form of government control, whether an absolute monarchy, right-wing 'military strongman' government, or a Communist/Socialist regime: the key feature is the state's *authoritarian* bent, and the executive's need to legitimise its policies through the *threat of coercion* and the *relief* from that threat,²⁶⁶ rather than through public scrutiny at the ballot box. This theoretical prediction accords with the findings of comparative international studies of the death penalty, mentioned in the previous chapter, holding that authoritarianism is one of the primary drivers of death penalty *retention*.²⁶⁷ Moreover, past state practice suggests that authoritarian governments may also grant

²⁶² Ibid, 183; Morison, 165-166; Heise, 261. See Chapter Two, *Refining the Subject Matter – Number of Jurisdictions, Time-Limits and Substance of Comparison*, for examples of relevant Structural and Cultural factors.

²⁶³ Sarat (2005), 16; Hussain and Sarat, 6; Sitze, 200-201. Garland (1996) describes sovereignty as the 'claimed capacity to rule a territory in the face of competition and resistance from external and internal enemies' (at 448).

²⁶⁴ Turpin and Tomkins, 146, 464-468.

²⁶⁵ Garland (2010), 77; Sarat (2005), 18-19; Sitze, 186; Sarat (2008), 185.

²⁶⁶ Botsman, 46-49; Tait, 2.

²⁶⁷ Johnson and Zimring (2009), 290; Boulanger and Sarat, 5, 9; Greenberg and West, 298.

clemency on an individual or collective basis in order to win support and legitimacy within the international community, when such legitimacy cannot arise as a result of popular election.²⁶⁸

Conversely, the writings of Professor Austin Sarat and other influential commentators suggest that a modern, democratic state governed strictly by the ‘rule of law’, in the sense of equality of treatment of all persons by the law, and of non-arbitrary decision-making by the executive,²⁶⁹ is not the kind of setting where we would expect to find clemency being granted on a frequent basis.²⁷⁰ For a state committed to the idea that government action should be regulated by law, and therefore *rule-bound*, the power to remit punishment imposed by a court of law would be seen as ‘dangerous, undemocratic [and] unaccountable.’²⁷¹ Hawkins neatly summarises the values that inform attitudes towards the exercise of discretion in modern democracies:

In the liberal state, law is to be applied consistently, openly, and dispassionately; *rules* are regarded as the most appropriate means to these ends. Discretion represents the opposite; it is *subjective justice* where rules are *formal justice*.²⁷²

Similarly, for Barkow:

²⁶⁸ Interview with American Academic Expert on Capital Punishment; Johnson and Zimring (2009), 392. See note 256 and associated text, above.

²⁶⁹ Turpin and Tomkins, 77, 88, 95.

²⁷⁰ Sarat (2005), 2, 69, 113; Meyer, 64; Strange, 3; Barkow (2007-2008), 1339.

²⁷¹ Sarat (2005), 2-3; Barkow (2007-2008), 1339.

²⁷² Hawkins, 15, emphasis added; see also Lacey, 369, and Strange, 3.

The rise of administrative law undercuts executive clemency power... the development of the administrative state is a significant part of the reason that [modern, democratic] legal culture focuses on the courts – *and courts alone* – to prevent unfair applications of the law.²⁷³

The patterns observed in contemporary retentionist democracies commonly show a trend towards overall declines in the volume of clemency grants, and where clemency and pardons are still granted, they tend to be employed for retributive reasons only.²⁷⁴ Bearing in mind the findings of general comparative studies of the death penalty, mentioned in Chapter Two, we would expect to find that autocratic states carry out more executions, but also show more leniency²⁷⁵ (in terms of overall volume of clemency grants, as well as a percentage of finalised cases), whereas retentionist democracies execute less but also grant fewer clemencies and pardons: the death sentences confirmed by judicial appeals are likely to remain intact before the executive.²⁷⁶

Similarly, the proportion of cases granted clemency may be influenced by the nature of the relationship between the clemency-bestowing executive, the death

²⁷³ Barkow (2007-2008), 1335, emphasis added.

²⁷⁴ Kobil (2007), 37; Barkow (2009), 153. However, the former author nonetheless recognises that ‘it is impossible to establish whether the divergence of [compassionate] mercy and [retributively-based] clemency is responsible for, or a symptom of, the overall decline in clemency’.

²⁷⁵ An overlapping but *inversely* influential factor that is evident within a number of authoritarian regimes is state *secrecy* surrounding the death penalty. Although I argue in the present section that autocracies are likely to grant a higher proportion of clemency grants than democracies, state secrecy in death penalty practice clearly undermines safeguards against abuse and error in the imposition of death sentences (FIDH (2006)), and of course makes it very difficult for family members, legal counsel, activists and other concerned persons to make pleas (on legal or compassionate grounds) for a death row reprieve (see Greenberg and West, 335). In Chapter Nine, I argue that in such circumstances, clemency may be granted *on the ruler’s terms only*, even if it becomes more frequent in actual numbers.

²⁷⁶ Thurschwell (at 278) describes ‘the Foucauldian distinction between the ancient state that exercises the right to kill or let live and the modern state that exercises the right to foster life or allow to die.’ See also Sarat and Culbert, 5-6.

sentence-imposing judiciary, and the capital statute creators, the legislature. For the past few centuries, while state practice is far from uniform,²⁷⁷ most democratic governments have at least paid lip-service to the maintenance of a Montesquieuan ‘separation of powers’ between the three major branches of government.²⁷⁸ However, the specific way in which each state interprets this doctrine will shape the attractiveness of executive clemency as a policy preference. The theoretical literature suggests that two different ways of thinking about the doctrine will have wide-ranging practical consequences for clemency: the first theory being that the executive, legislature and judiciary should neither impede nor exercise each other’s functions within the state, and the second conception that each of the three branches of government has a role in circumscribing the powers exercised by the other two, as part of a system of ‘checks and balances’.²⁷⁹

Adopting the first conception, a chief executive who interprets his or her role as one of ‘deference’ to the other two branches of government will arguably grant fewer clemencies and pardons, seeing as he or she will likely see clemency as form of *interference* in the proper role of the judicial branch in passing sentence upon a convicted

²⁷⁷ Bellamy, 36.

²⁷⁸ Bellamy, 34-35; Turpin and Tomkins, 103, 107; Crouch, 14; Sebba (1977a), 226.

²⁷⁹ Marshall, 99-100; Turpin and Tomkins, 106-107; Shane, 384-385. However, note Marshall’s ambivalence at 102:

neither [Montesquieu] nor many others down to the present day seem clear as to whether [the] “checking” of one branch by another is a participation in the other’s function and a partial *violation* of the separation of powers doctrine, or whether it is actually an *exemplification* of the doctrine, which carries out the very purpose of the separating and balancing off against each other of the three branches of government [emphasis added].

Other than the power to grant clemency and pardons, the other major ‘checks and balances’ contemplated by constitutional theorists include the executive’s right to veto legislation, the legislature’s right to impeach members of the executive and the judiciary’s ability to review and invalidate legislation or executive action that does not conform with the constitution (Bellamy, 33; Marshall, 99).

defendant.²⁸⁰ On the other hand, an interventionist chief executive will see his or her role as a *check* on the powers of the judiciary and the legislature.²⁸¹ His or her role will be to *invalidate* death sentences in particular cases where the punishment is not deserved (or where public interest considerations trump execution),²⁸² to indirectly facilitate *law reform* through focussing public attention on a structural problem in the legal system (such as the unavailability of a defence),²⁸³ or in the most extreme sense to effect ‘functional *nullification* of the death penalty without actual statutory repeal, by the route of mass commutations’.²⁸⁴ States that have adopted the formalist approach, keeping the three institutions of government strictly separate in their functions will not exhibit this form of executive intervention.

The Decision-Making Process

Another structural influence on clemency rates is the formal decision-making *process* in each jurisdiction. As I described earlier in this chapter, clemency decisions throughout the retentionist world are made through a variety of individual or collective decision-making structures. The United States, a federal country comprising many retentionist state jurisdictions, provides constitutional examples of all three main types of decision-making body (with the relevant State Governor acting as the ‘chief executive’ decision maker in

²⁸⁰ Harris and Redmond, 8; Burnett (2002), 16; Sebba (1977a), 221, 226. Sebba (at 226) notes that, ironically, ‘Montesquieu himself... did not object to the use of pardons. On the contrary, in his view: “*ce pouvoir que le prince a de pardonner, exécuter avec sagesse, peut avoir d’admirables effets*” [the power to pardon, when carried out wisely, can have admirable uses].

²⁸¹ *Ex Parte Grossman*, 535.

²⁸² Burnett (2002), 16; Pridemore, 162; Crouch, 14.

²⁸³ Colgate Love (2001), 128-129.

²⁸⁴ Bedau, 193, emphasis added.

the examples below): Heise has described the three systems as *executive*, *administrative* and *blended* decision-making structures.²⁸⁵

- A) the clemency decision is made by the chief executive *acting alone*;²⁸⁶
- B) the clemency decision is made, on a consensus or majority basis, by a pardons board (which may or may not include the chief executive as a member);
- C) the pardons board only possesses the power to make a *recommendation* to the chief executive, who then has to decide whether or not to follow it.²⁸⁷

Previous US research suggests that in situation C), where the board makes a *non-binding* recommendation to the State Governor, it is likely that neither party will want to bear the political responsibility for commuting a death sentence, and therefore commutations become extremely rare.²⁸⁸ For Mandery and Gershowitz, these findings accord with the general observations of behavioural science studies such that positive, assertive action by individuals is less likely when there exists a ‘diffusion of responsibility’ amongst a number of decision-makers. Such a division of responsibility already exists between judges and state governors in the US, as the death penalty is a *discretionary* judicial punishment – the extra layer of bureaucracy added by the ‘pardons board’ only makes abdication in

²⁸⁵ Heise, 297.

²⁸⁶ Of course, even chief executives apparently acting *alone* may well have advisers to review clemency petitions and make recommendations, as is the case with the US Pardon Attorney (see US Department of Justice) or in pre-abolition Britain, the Secretary of State for Justice (see Ministry of Justice (UK), 15). Nonetheless, what is most important for the purposes of the distinction here is the public appearance put forward that the chief executive is acting alone and that he or she is ultimately *politically responsible* for the benefits or adverse consequences flowing from the decision.

²⁸⁷ Burnett (2002), 15, 155; Acker and Lanier (2000), 217; Scott, 96.

²⁸⁸ Hull, 25; Gershowitz, 672; Heise, 300, 309; Mandery, 614-615. Mandery (at 614-615), together with Abramowitz and Paget (at 157, 183) observe that the recommendations given by a pardons board are almost invariably followed by the governor.

decision-making even more likely.²⁸⁹ In situation B), where the Pardons Board makes the *final* decision (perhaps with the Governor's input), the application of the same principles of behavioural research suggests that each board member may experience the 'diffusion of responsibility' vis-a-vis each other in a meeting,²⁹⁰ resulting in a corporate 'lowest common denominator' approach to decision-making.²⁹¹ In contrast, the individual decision-maker in situation A) may be more ready to bear the political drawbacks or benefits of commutation,²⁹² or grant clemency 'on a whim',²⁹³ particularly if they take the form of an autocratic ruler described above.

A second relevant observation about the decision-making process is that in jurisdictions with large numbers of clemency *petitions*, guidelines and informal 'rules of thumb' will need to be developed, as a pragmatic measure to deal with the decision-making case-load,²⁹⁴ despite the fact that the decision-maker, legally speaking, has the absolute discretion to accept or reject any petition. Where many petitions must be processed, the merits of a particular case may not be closely analysed. The case might be categorised by class (on the basis of crime committed, behaviour in prison, or some other measure), or will be subject to a prevailing presumption that all petitions will be rejected, or accepted, unless extraordinary circumstances exist. Conversely, Hawkins suggests that

²⁸⁹ Mandery, 614-615; Gershowitz, 672-673, 700.

²⁹⁰ Mandery, 615; Gershowitz, 700.

²⁹¹ Interview with London-based Death Penalty Lawyer. Conversely, Barkow (2009, 155) instead asserts that clemency has been more frequent in US States that have used pardons boards independent of the State Governor.

²⁹² Abramowitz and Paget, 183; see also note 286 above. Contrast Heise (at 260, 298) who argues that, in the United States, 'Administrative boards are more *politically insulated* and therefore more likely than governors to resist public opinion and remove a defendant from death row.'

²⁹³ Interview with Senior Singaporean Prosecutor.

²⁹⁴ Hawkins, 39.

where there are *very few* cases, the decision-maker/s 'are likely to approach the matter in a more complex way, taking more time and considering more information.'²⁹⁵ Accordingly, precedent, even if it does not play a formal *legal* role in clemency decisions,²⁹⁶ nonetheless becomes more important in jurisdictions with greater caseloads, from year to year in the same jurisdiction, or cumulatively before the same decision-maker. Over time, decisions that were once made on an individualised basis 'can acquire the same binding force as legal rules', at least within the same political administration.²⁹⁷

Clemency and Specific Features of the Criminal Justice System

Legal systems throughout the world originated in different historical periods, exhibit different justifications for punishment, different procedural idiosyncrasies, and of course provide varying degrees of due process protections for defendants.²⁹⁸ It is likely that, irrespective of the regime type, predominant religion or public and political views on the death penalty, these specific features of the legal system in each retentionist jurisdiction will, to a certain extent, affect the number of clemencies and pardons granted.

The general *values* and *justifications for punishment* that underpin judicial and administrative decisions in the criminal justice system may influence executive decision-makers as to clemency: a system that places primary emphasis on retribution, deterrence, and the rights of victims will leave minimal room for executive action,²⁹⁹ whereas within a

²⁹⁵ Ibid, 39-40.

²⁹⁶ Abramowitz and Paget, 176.

²⁹⁷ Ibid, 177, 182; Hawkins, 43; Morison, 153.

²⁹⁸ Greenberg and West, 299. See also Buhmann, 63.

²⁹⁹ Acker et al, 186; Sarat (2005), 28, 144; Harris and Redmond, 7. Greenberg and West (at 302) state simply that 'Countries that are more likely to be punitive *in general*, we argue, are more like to *use* capital punishment' (emphasis added).

system that prioritises the rehabilitation of prisoners, and the reconciliation of former enemies, the decision-maker will find him or herself with a legitimate choice of whether or not to commute the death sentence,³⁰⁰ perhaps on the basis of demonstrated rehabilitation during time spent on 'death row', or else the forgiveness of family members or the wider community in a murder case. Clemency can still be found in systems that prioritise retribution and deterrence, but it will generally only be granted pursuant to *retributivist* justifications, such as wrongful conviction or excessive severity (as described above).³⁰¹

The importance of clemency within the criminal justice system will also be determined by the due process protections, defences and alternative (i.e. non-lethal) sentences available to the sentencing judge. Notably, amongst European monarchies and within the early American republic, a full pardon was at one time the *primary* means of obtaining relief from the harshness of a death sentence imposed at trial, if the prisoner's case exhibited significant mitigating circumstances.³⁰² Rights of appeal against conviction or sentence were only introduced much later,³⁰³ and moreover absolute or partial defences such as self-defence, provocation, duress and mental incapacity were not recognised at law in many nations until the late 19th century or more recently. The facts on which judicial appeals and defences are now argued were instead relevant to a 19th century head of state's decision to grant relief through executive clemency or pardon.³⁰⁴

³⁰⁰ Sarat (2005), 22, 35; Kobil (2007), 37.

³⁰¹ Rapaport (1998-2000), 1502; Acker and Lanier (2000), 215.

³⁰² Burnett (2002), 14; Acker and Lanier (2000), 206; Abramowitz and Paget, 188; Lardner and Colgate Love, 213. See also *Herrera v Collins*, 412.

³⁰³ Sebba (1977b), 83; Colgate Love (2010), 16; Vicenzi, 236.

³⁰⁴ Acker and Lanier (2000), 206; Colgate Love (2010), 17-18; Burnett (2002), 14.

Moreover, in earlier historical periods, *mandatory* death sentences (meaning the judge trying the case had no choice other than to impose a death sentence on conviction), which were originally the *only* form of capital statute, were tempered by the frequent granting of pardons.³⁰⁵ In England during the 18th and 19th centuries, where over 200 crimes were subject to the mandatory death sentence, as many as seven out of every eight capital offenders were pardoned.³⁰⁶ Moreover, even in the early 20th century and after the development of further procedural safeguards such as the Court of Criminal Appeal in 1907,³⁰⁷ the commutation rate for mandatory death sentences for murder in Britain remained at approximately 35-40 percent,³⁰⁸ and likewise between a third and a half of cases in other common-law jurisdictions.³⁰⁹ We would expect that, in modern times, states retaining MDP statutes would be forced to take account of mitigating factors at the *back end* of the criminal justice process, i.e. by the mechanism of executive clemency,³¹⁰ in many cases via a recommendation from the trial judge, who will have reviewed at least some of the mitigating evidence in court.³¹¹ The alternative arrangement, whereby the *prosecutor* exercises the discretion to charge the defendant with a non-capital crime (or no crime at all), is discussed below.

³⁰⁵ Acker et al, 193; Acker and Lanier (2000), 206.

³⁰⁶ Acker and Lanier (1999), 211-212; Krents, 16. Acker et al, 187, quote a figure of clemency in six out of every seven cases.

³⁰⁷ Vicenzi, 236.

³⁰⁸ Potter, 192; Interview with British Academic Expert on the Death Penalty.

³⁰⁹ Interview with London-based Death Penalty Lawyer.

³¹⁰ Acker et al, 193; Abramowitz and Paget, 165; Interview with London-based Death Penalty Lawyer #2.

Contrast Ledewitz and Staples (at 230), who argue that mass clemency does not necessarily flow as a matter of course from the enactment of MDP laws: 'Commutation is [merely an infrequent] *act of grace* in this context. Commutation is never deserved because the mandatory penalty dictates that *death* is deserved... The legal system has determined that such inmates *deserve to die* for what they did' (emphasis added).

³¹¹ Lardner and Colgate Love, 213; Krents, 37-38, 40, 125; Sarat (2005b), 616.

I have so far focused exclusively on discretion to remit punishment being exercised by members of the executive at the *back-end* of the criminal justice process. However, the largest measure of discretion in most systems of justice is exercised at the *front-end* of the process, by the *prosecuting* authorities.³¹² The extent to which prosecutors filter cases away from potential death sentences will therefore have a direct impact on the proportion of worthy cases coming before chief executives after sentencing.³¹³ Doubts over guilt, mitigating factors, potential defences and so forth, may equally be taken account of by *prosecutors* as they are by chief executives. Where a judge's 'hands would be tied' by the MDP or the lack of special defences available to the accused, mercy may instead be exercised at the *previous* stage in the criminal justice process: the decisions by prosecutors whether or not to bring charges, and if so, whether the charge should be a capital one. Hawkins suggests that where mercy is restricted at one stage of the criminal justice process (i.e. through a restrictive interpretation of executive clemency or judicial sentencing discretion), it will be transposed elsewhere, potentially in the form of prosecutorial discretion.³¹⁴ Lenient discretion exists in every criminal justice system, but its degree of *visibility* varies considerably.

Throughout the preceding discussion, we have observed that clemency is a far less important outlet for lenient discretion in a highly *developed* legal system with due process

³¹² Zimring (2011b); Sarat (2005), 133, quoting former Illinois Governor George Ryan; Barkow (2007-2008), 1351.

³¹³ Hawkins, 36; Acker et al, 193; Interview with Canadian Academic Expert on the Death Penalty.

³¹⁴ Hawkins, 32, 36; Interview with Canadian Academic Expert on the Death Penalty. Note however that Acker et al (at 193) argue that it is unlikely that prosecutors will be able to 'absorb' all of the discretionary leniency lost through the enactment of mandatory sentencing laws: executive clemency will continue to have a role to play.

safeguards against both wrongful convictions and excessively punitive sentences.³¹⁵ For example, the various death penalty jurisdictions of the United States, with their ‘super due-process’ model of justice, are not the kind of setting in which we would expect to find clemency being granted in significant numbers.³¹⁶ As Colgate Love describes:

History teaches that the demand for clemency increases when the legal system lacks other mechanisms for delivering individualized justice, recognizing changed circumstances, and correcting errors and inequities. Clemency is less necessary, and is therefore less justifiable, when mercy ‘shines in the [penal] code’.³¹⁷

Finally, the percentage of successful clemency petitions will, of course, be influenced in any particular jurisdiction by the *procedural peculiarities* and *general idiosyncrasies* of the clemency laws in each jurisdiction. These, at a very minimum, include the following:

- *automatic* consideration of a clemency petition without any action required by the prisoner or his or her representatives (increasing the likelihood of clemency);³¹⁸
- time limits within which the prisoner must apply (reduced likelihood);³¹⁹

³¹⁵ Interview with American Academic Expert on Capital Punishment; Burnett (2002), 14; Rapaport (1998-2000), 1506-1507; Morison, 161.

³¹⁶ Cobb, 394; Breslin and Howley, 240; Hood (1989), 76; Interview with British Academic Expert on the Death Penalty.

³¹⁷ Colgate Love (2010), 39, quoting Beccaria.

³¹⁸ Pridemore, 180; Sebba (1977b), 116. Notably, since the reinstatement of the death penalty in 1976, around 12 percent of executed prisoners in the United States have ‘volunteered’ to die, meaning they instruct their lawyers not to pursue further judicial appeals, and do not file a clemency petition to the relevant State Governor (Cooper, 107; Davis (2004)).

³¹⁹ Interview with London-based NGO Staff #2.

- the converse situation, where for deliberate reasons of policy or else pure negligence,³²⁰ the prisoner spends a long period of time (such as 10 years or more) waiting for the processing of their clemency appeal (increased likelihood);³²¹
- a requirement for victim notification or consent before a grant is made (reduced likelihood);³²²
- the practice, as followed in some jurisdictions, of the executive decision-maker consulting the case *prosecutor* as to whether the death sentence should be commuted (reduced likelihood);³²³ and,
- most restrictively, although it is prohibited by the ICCPR,³²⁴ an outright *prohibition* on clemency applications and grants for particular crimes, which does occasionally appear in retentionist jurisdictions.³²⁵

Public Opinion, Media and Religion

Does *public opinion* on the death penalty generally, or on any particular capital case, make a difference on the likelihood of clemency? It is inescapable that, in general, if public

³²⁰ Batra; Iyer.

³²¹ Acker et al, 195; Abramowitz and Paget, 168. Abramowitz and Paget (at 153) describe the reasons for this increased likelihood:

the passage of time may substantially [impact on clemency proceedings]. New factors relevant to a determination of clemency may emerge during this prolonged period and there may be a change in the personnel vested with the clemency power.

³²² Barkow (2007-2008), 1349.

³²³ Abramowitz and Paget, 184-185; Barkow (2009), 156. For the former authors:

Professional pride would militate against a change in position on the part of the prosecuting attorney, unless there are developments *subsequent to the trial* which would, if timely, have resulted in his seeking something less than the death penalty [emphasis added].

Contrast this practice with the vesting of discretionary decision-making power in the prosecutor *before* indictment, described above (notes 312-314, above, and associated text).

³²⁴ ICCPR, art 6(4). See also note 390, below, on retentionist state parties to the Covenant.

³²⁵ Barkow (2007-2008), 1349.

opinion strongly supports the death penalty in a particular jurisdiction, most attempts by the executive to ameliorate punishment through the use of clemency will prove unpopular.³²⁶ This does not mean that the executive need always act in accordance with popular demand, but nonetheless adverse public opinion does constitute an obstacle to independent decision-making on clemency petitions.³²⁷ Significantly, in recent times, crime and punishment have become increasingly politicised issues in a range of democratic countries.³²⁸ We would therefore expect clemency, at least when granted on non-retributive grounds, to become extremely rare in democracies where a 'tough on crime' rhetoric is a useful means of gaining political legitimacy.³²⁹ Streib's comments, although made in reference to the United States, have resonance in any retentionist democracy: 'clemency decisions are intensely political decisions, being made by political leaders beholden to the voting public for their present jobs and... re-election'.³³⁰

Again, in the United States context, the role of the *media* in influencing clemency decision-makers is also well-known.³³¹ It is possible that a jurisdiction with a free and independent press could prove more amenable to clemency grants than a country that places tight restrictions on the media.³³² However, whether or not this assumption is compatible with the theoretical view, described earlier, that publicly accountable,

³²⁶ Sarat (2005), 22, 24, 36; Kobil (1998), 680; VanBrocklin. Abramowitz and Paget, 175, contrast public campaigns for clemency that focus not on the merits and drawbacks of capital punishment per-se, but instead take an individualised approach to the case, highlighting extenuating circumstances that merit clemency.

³²⁷ Kobil (2007), 49; Kobil (1998), 680; Breslin and Howley, 253; Kobil (1991), 610.

³²⁸ Sebba (1977b), 120; Sarat (2005), 22-23; Kobil (1998), 674.

³²⁹ Kobil (2007), 47; Abramowitz and Paget, 174; Argys and Naci Mocan, 274.

³³⁰ Streib, 209; see also Strange, 14, and Acker et al, 183.

³³¹ Burnett (2002), 175-176.

³³² See note 275, above, on state secrecy.

democratically-elected governments will grant fewer clemencies and pardons is unclear. A free media, while aiding campaigns for individual clemency, may also facilitate the politicisation of crime and crime policy,³³³ and will widely expose any compassion shown by chief executives as counter to the 'tough on crime' political rhetoric currently predominant in the United States and other jurisdictions.³³⁴

How do the major *religions* practised in the Southeast Asian region affect the granting of clemency? In the following section, I focus primarily on the impact of religion on *clemency* per-se, rather than the relevant religion's general dictates on the intentional taking of life and the propriety of the death penalty – doctrines which can be manipulated to favour both retentionist *and* abolitionist sentiments in a variety of religious traditions.³³⁵ For present purposes, religion will have an effect on clemency in so much as it shapes the general value systems of executive decision-makers, even if it is not doctrinally relevant to the *penalty* provisions of criminal laws, as is the case for all major world religions, other than Islam.³³⁶

A) Islam – State Religion in Malaysia³³⁷ and Dominant Religion in Indonesia³³⁸

Islamic law, known as *Sharia*, prescribes that crimes mandatorily punishable by death consist of armed robbery, rebellion, adultery and apostasy: part of the *Hudud* scheme of crimes, classified as the most serious existential threats to Islam. Serious offences against

³³³ Miller (2012).

³³⁴ Strange, 14; Barkow (2007-2008), 1349; Kobil (1998), 678.

³³⁵ Owens and Elstain, 6. Larsen observes generally that there is great variation in death penalty practice even amongst states sharing the same official (or majority) religion.

³³⁶ Greenberg and West, 302; see also Abel, 221.

³³⁷ Constitution of Malaysia, art 3(1); Hussain, 381.

³³⁸ 85 to 90 percent of Indonesians are adherents of the Muslim faith: Baswedan, 670; Suryodiningrat.

the person, defined by the *Qisas* system as including murder, theft and slander, must also be judicially punished by death but it is the victim (or his relatives) who decide on the punishment's enforcement, and whether or not to pardon a murderer who has paid *Diya*, or a sum of money in restitution.³³⁹ A murderer can even be pardoned without the payment of such 'blood money' in some circumstances – his or her fate depends almost entirely on the forgiveness of the aggrieved party, rather than the state.³⁴⁰ The third category of crimes in Islamic penal law is known as *Ta'zir*, where death is not a mandatory but a discretionary judicial punishment.³⁴¹ The death penalty for *Ta'zir* crimes is discouraged by the availability of alternative punishments that better reflect proportionality.³⁴²

Contrary to occasional western perceptions, Islamic penal law and jurisprudential tradition, while allowing for and mandating death sentences for particular crimes, are dedicated to upholding the sanctity of human life,³⁴³ and arguably are 'characterized by a strong undercurrent of clemency and sympathy for the oppressed.'³⁴⁴ Punishment's aims are generally deterrent, rather than retributive,³⁴⁵ and moreover there appears to be little consensus in the contemporary Islamic world about the scope of criminal laws and punishments to be implemented in national legal systems:³⁴⁶ a strict interpretation of

³³⁹ Schabas (2000), 231-232; Moucarray, 274, 278; Abou El Fadl, 93, 99; Postawko, 285-287, 302-303.

³⁴⁰ Moucarray, 274-275; Abou El Fadl, 93.

³⁴¹ Simon and Blaskovitch, 9; Mehat, 199-200; 318.

³⁴² Postawko, 285, 301; Esposito; Madkoar.

³⁴³ Abou El Fadl, 79-80, 87.

³⁴⁴ Schabas (2000), 230; Interview with London-based Death Penalty Lawyer; Interview with Australian Academic Expert on Indonesia #4; Mulia; Abou El Fadl, 92.

³⁴⁵ Schabas (2000), 230, 232; Mulia.

³⁴⁶ Schabas (2000), 230, 232; Moucarray, 282; Abou El Fadl, 77-79; Lev (2000), 163.

Sharia criminal law is only found in a small minority of countries with an Islamic majority,³⁴⁷ and in no Southeast Asian nation.

Where Islamic penal law *does* apply as a part of the national criminal law for offences against the person (as opposed to its frequent invocation in political and moral debates),³⁴⁸ its enforcement is characterised by the imposition of harsh punishments tempered by mercy.³⁴⁹ Indeed, Moucarry observes that an orthodox reading of Islamic jurisprudence suggests that 'legal punishment should be carried out only against non-repentant criminals.'³⁵⁰ However, such leniency derives not from the commutation of death sentences by political figures at a final stage of appeal (for which there is generally *no* provision under *Sharia* law),³⁵¹ but from the precepts of strict legality, the burden of proof imposed on the accuser, the strict evidential requirements required to prove death-eligible crimes,³⁵² the availability of complete defences in some circumstances,³⁵³ or if the death sentence survives these procedural hurdles, the forgiveness of the aggrieved party.³⁵⁴ As Abou El Fadl describes:

³⁴⁷ Moucarry, 282; Al Saqqaf.

³⁴⁸ Moucarry, 271; Abou El Fadl, 94.

³⁴⁹ Abou El Fadl, 91. See note 203, above, and associated text.

³⁵⁰ Moucarry, 282; Abou El Fadl, 102; Bassiouni, 82-83. One Interviewee also suggests that Islam's strong sense of religious redemption would especially benefit a condemned prisoner who shows religious piety on death row (Interview with Australian Academic Expert on Indonesia #4).

³⁵¹ Hood (1989), 77.

³⁵² Abou El Fadl, 101-102; Postawko, 285, 287; Mulia.

³⁵³ Postawko, 285-286.

³⁵⁴ Abou El Fadl, 97.

While [Muslim jurists] accepted the death penalty *in principle*, at the level of the process and implementation, they made the infliction of the death penalty difficult. In effect, at the micro-technical level, Muslim jurists closed the doors on the possibility of implementing the death penalty, while they left the doors wide open for lesser discretionary criminal punishments and for repentance and pardon.³⁵⁵

Whether or not this undercurrent of mercy and compassion in the administration of lethal punishment extends to clemency decision-makers in Indonesia and Malaysia, countries that have not adopted Islamic penal codes,³⁵⁶ I next consider in Chapters Six and Eight, relating to those two jurisdictions.

B) Confucianism – Dominant Moral Philosophy in Singapore³⁵⁷

Confucianism could be more accurately described as a world philosophy or system of values, rather than a world religion incorporating belief in a higher power.³⁵⁸ The philosophy originates in the teachings of Chinese scholar Confucius (551–479 BC),³⁵⁹ and

³⁵⁵ Ibid, 104, emphasis added; see also Lynch, 543.

³⁵⁶ See Kamali; Lynch, 569. However, Milner (at 26) asserts that ‘Among the Muslim states of South-East Asia... indications exist of the presence of Islamic law and legal administration *prior* to the era of colonial rule’ (emphasis added). See Hussain for details of the implementation of *Sharia* law in the non-criminal sphere in Indonesia and Malaysia.

³⁵⁷ The religion with the largest official number of adherents in Singapore is actually Buddhism, with 33 percent of the population in 2010, and 43 percent in 2000, followed by Christianity (18 percent and 15 percent, respectively) (Singapore Department of Statistics, 13). However, since the 1980s at least, Confucianism can be considered the operative governance philosophy, or ‘state ideology’ of Singapore (Kuah, 375, 379; Englehart, 555-558).

³⁵⁸ Bae (2008a), 53; Kuah, 378; Weightman, 10.

³⁵⁹ Chan, 29.

its influence has spread across each section of the Chinese diaspora over the East Asian and Southeast Asian regions.³⁶⁰

Confucianism is often cited as a justification for the differences between supposed communitarian 'Asian values' and individualistic 'western values'.³⁶¹ Likewise, Confucianism has been used as a justification and explanation for the retention of, and the frequent use of, the death penalty in East Asian nations. Although one of Confucianism's core values is said to be 'humanism',³⁶² several Asian commentators have asserted that Confucian moral ethics favour strong *retribution* and *deterrence*,³⁶³ leading to an acceptance and normalisation of the death penalty.³⁶⁴ Although ethical considerations have not necessarily influenced the formal structure of the criminal law in East Asian nations,³⁶⁵ they have the potential to guide the decisions of the arbiters of clemency. As Buhmann explains:

The normative role of Confucianism was and in many ways continues to be considered at the level of ethics or moral behavioural norms, superior to law. Confucianism is an operative philosophy... seriously concerned with governance.³⁶⁶

³⁶⁰ Interview with Amnesty International Hong Kong Staff; Chan, 44; Ooi, 8.

³⁶¹ Bae (2008a), 53; Interview with Amnesty International Hong Kong Staff. It remains important to note that not all of the advocates of the 'Asian Values' thesis were from Confucian-inspired cultures, such as former Malaysian Prime Minister Mahathir Mohamad (Hahm, 267 n47).

³⁶² Bae (2008a), 54; Craig, 536.

³⁶³ Ho (2005a), 284-285; Cho (2008), 196; Kuppusamy (3/12/2007).

³⁶⁴ Hood and Hoyle (2008), 103; Cho (2004), 271.

³⁶⁵ Hahm, 257-258.

³⁶⁶ Buhmann, 71; Boxer, 596-597.

In Singapore in particular, the public and political establishment appear to be heavily influenced 'by the traditional Chinese view which held that harsh punishment deterred crime, restored normalcy and maintained "Confucian peace and harmony"'.³⁶⁷ However, it is a matter of debate as to whether these views constitute an accurate interpretation of Confucian doctrine. In South Korea, the East Asian country where Confucian precepts have most influenced governance over the centuries,³⁶⁸ 'the religious influences of Buddhism and Confucianism and the social norms of Confucian morality have collectively acted to constrain the practice of capital punishment' throughout history.³⁶⁹ Likewise, throughout imperial Chinese history the death penalty was frequently administered as a means of criminal punishment, *despite* the perceived moral limitations imposed by 'the widespread and persistent influence of Confucius' principles of benevolence and humaneness'.³⁷⁰

In summary, while the Confucian notion of rigid social order and authoritarian governance has sometimes been interpreted as requiring the 'situational administration of "retributive justice"' and strong deterrence, the competing notion of 'humanitarian punishment' in light of the individual's circumstances gives rise to alternative, more compassionate implications for criminal justice policy.³⁷¹ Moreover, governance in accordance with Confucian precepts is not adverse to the exercise of personal discretion

³⁶⁷ Kuppusamy (3/12/2007).

³⁶⁸ Hahm, 257; Weightman, 10.

³⁶⁹ Cho (2008), 173.

³⁷⁰ Liang et al, 120; Boxer, 598.

³⁷¹ Cho (2008), 174; Liang et al, 120.

by elites, in preference to the rigid application of rules of conduct,³⁷² suggesting that a condemned prisoner need not invariably be executed, particularly if this does not suit the needs of general deterrence.

Arguably, the supposed influence of Confucian morality on modern death penalty policy (leading to its rigid and merciless application in countries like Singapore and the People's Republic of China) comes as the result of a misinterpretation of the doctrine.³⁷³ Bae, together with Johnson and Zimring, have argued that no aspect of traditional Confucian or 'Asian' values implores a state to ruthlessly enforce the death penalty: it is authoritarian government, rather than cultural values that determine the severity with which capital punishment is employed in the countries of East Asia heavily influenced by Confucianism.³⁷⁴

C) Buddhism – Dominant Religion in Thailand³⁷⁵

Buddhism is usually thought of by academic commentators as a religion that is incompatible with the retention of the death penalty, due its compassionate requirement to refrain from intentional killing.³⁷⁶ However, this is not to say that capital punishment does not exist in Buddhist-majority countries, and in fact most states where Buddhism is the *official religion* have exercised capital punishment at some point during their

³⁷² Cho (2008), 174, 190; Boxer, 596. Contrast Davis (1987), who instead asserts that the infusion of Confucian principles into imperial criminal codes in China brought 'fairness and predictability' to punishment (at 307).

³⁷³ Cho (2004), 271-272.

³⁷⁴ Bae (2008a), 55; Johnson and Zimring (2009), 297-299.

³⁷⁵ FIDH (2005), 14. 95 percent of Thais are followers of Theravada Buddhism (Johnson and Zimring (2009), 397; Hubert).

³⁷⁶ Greenberg and West, 309; Boulanger and Sarat, 5; Cho (2008), 173; Alarid and Wang.

history.³⁷⁷ In modern times, while Buddhists in secular nations might adopt an anti-death penalty stance on the basis of the first precept's injunction against taking life, in Buddhist-majority countries such as Sri Lanka and Bhutan, as well as Thailand, the Buddhist religion is seen as separate from politics and its moral teachings separate from state laws.³⁷⁸ Greenberg and West conclude that, within such countries, 'Buddhist precepts may not carry weight when it comes to the formulation of criminal justice policy.'³⁷⁹

However, despite the continued imposition of death sentences in Buddhist countries, a forgiving attitude towards many of those condemned to die might be expected.³⁸⁰ Buddhist teaching recognises the capacity of all human beings to change and reform, a notion which extends to even the most dangerous convicted criminals.³⁸¹ Miethe et al state the point succinctly:

Punishment in Buddhism is restricted to the purpose of protecting society from further criminal activity and should be administered in the spirit of compassion. The goal of punishment from this religious perspective is to help offenders correct their path of life.³⁸²

³⁷⁷ Alarid and Wang; Keyes, 158; Breen (2/2010). Alarid and Wang suggest that capital punishment as a cultural institution long pre-dated the arrival of Buddhist influence in India in 400-500 BC, hence its continued use by Buddhist rulers there and elsewhere.

³⁷⁸ Breen (2/2010); Interview with Thai Law Professor. Bhutan abolished the death penalty in 2004, in part due to the influence of a devoutly Buddhist King (Johnson and Zimring (2009), 406). Moreover, the overarching influence of Theravada Buddhism may be responsible for the failure of the military regime in Burma to carry out a judicial execution since 1989 (ibid, 320 n25).

³⁷⁹ Greenberg and West, 309; see also Alarid and Wang.

³⁸⁰ Greenberg and West, 309; Miethe et al, 119; AI (1990), 8. Cho (2004, at 270-271) observes that death penalty moratoriums in Japan (from 1989 to 1993) and South Korea (1973-1974) derived from 'the personal belief of Ministers of Justice who seemed to be influenced by Buddhism.'

³⁸¹ FIDH (2005), 14; Hubert; Alarid and Wang; AI (1990), 8-9.

³⁸² Miethe et al, 119; AI (1990), 8. See also 'Seminar on Religious Aspects of Death Penalty'.

Interpretations of classical Buddhist scripture (*Dhamma* – the divine law of Kings) suggest that a devout ruler should pardon a majority of convicted criminals, whose behaviour will instead be cosmically judged through *karma*. To rule through piety (and moreover to guarantee the *ruler's* good *karma* and re-incarnation), violence should be countered by non-violence.³⁸³

Of the three religions mentioned here then, Buddhism appears to be faith most likely to embrace a generous use of the clemency power, particularly in light of the fact that its limited influence on the formal criminal law has not brought about *abolition* of the death penalty in Buddhist-majority societies. I revisit and elaborate on the extent to which Buddhism influences Thai death penalty and clemency practice in Chapter Seven.

Conclusion

On the basis of the theoretical discussion in this chapter, what kinds of societies would we expect to dispense clemency freely? What kinds of societies would we expect to be extremely cautious about granting clemency?

A logical, if simplistic response would be that a truly *compassionate* society does not perform many executions, and instead commutes many of the death sentences imposed on defendants. However, a truly compassionate society would probably not *sentence* an offender to death in the first place, or even legislatively retain the death penalty as a form of criminal punishment. The institution of clemency, in most jurisdictions that use it with some frequency, plays a far greater role than simply acting as an official outlet for compassionate sympathy for the defendant. The clemency power creates instrumental benefits for the chief executive who exercises it: frequent use might

³⁸³ van Oosten, 258; Interview with Thai Human Rights Lawyer; AI (1990), 8.

cast the decision-maker (usually the head of state) in a benevolent light, increase the ruler's hold over the 'life and death' of his citizens, enable the ruler to assert his precedence over the legislative and judicial branches of government, or may conform with the ruler's conception of religious piety.

Moreover, clemency's *retributive* utility within the criminal justice system will largely depend on the existing due-process protections available to the defendant and the justice system's ability to identify and abrogate undeserved or disproportionate punishment *without* the influence of the chief executive. The modern 'administrative' state, with its decentralised and diffused notion of political power, codified guidelines for discretionary decision-making and ample opportunity for *judicial* review of unfair punishments, is not the kind of setting where we would expect to see clemency granted on a frequent basis.³⁸⁴

The Declining Use of Clemency

The observations contained within the present chapter, when considered together, explain why clemency and pardons have, on the whole, declined in importance within the processing of cases through the criminal justice system amongst those countries that still retain the death penalty:³⁸⁵ a trend that is very likely to continue in the immediate future, even in countries that do not take any recognisable steps towards abolition. Sarat has speculated that as the scepticism of citizens in democratic states about their government's sovereign capacity continues to grow in the face of globalisation, the use of the death penalty will remain a potent and popular reminder of state power.³⁸⁶ This

³⁸⁴ Barkow (2007-2008), 1335; Hawkins, 15; Colgate Love (2010), 39.

³⁸⁵ Kobil (2007), 37; Strange, 14; Acker et al, 184.

³⁸⁶ Sarat (2005), 18, 35.

feature of retentionist jurisdictions, when combined with the prediction that clemency will become harder to grant as public scrutiny on government officials becomes more intense,³⁸⁷ and governance becomes increasingly bureaucratised and more legalistic,³⁸⁸ suggests that clemency, where it is not granted on a widespread basis as an intermediate step towards *abolition* of the death penalty,³⁸⁹ will continue to be gradually marginalised as a power, perhaps until it exists in name and procedure only.³⁹⁰

In Chapters Five to Eight, covering each of the four jurisdictions under analysis, together with Chapter Nine: Discussion and Conclusion, I use the theoretical findings of the present chapter to first explain the nature of clemency practice in each relevant jurisdiction, particularly in circumstances where the reasons for the granting of clemency and pardons are not always publicised by the executive (addressing the ‘micro’ research question). Moreover, Chapter Three provides the framework upon which the patterns evident within the four named jurisdictions may be projected, in order to come up with new plausible hypotheses for the frequent or infrequent granting of clemency and

³⁸⁷ Burnett (2002), 159; Breslin and Howley, 253.

³⁸⁸ Cobb, 389; Sarat (2005), 75.

³⁸⁹ See Fitzpatrick and Miller, 301, and note 284, above, and associated text.

³⁹⁰ As described in Chapter One, signatories to the ICCPR are required to grant anyone sentenced to death the right to seek the commutation of their death sentence (art 6(4)). At the beginning of 2011 there were 167 parties to the Covenant, including 45 actively retentionist states and 30 states that retain the death penalty but are classified as abolitionist *de-facto*, according to Amnesty International (AI-Index ACT 50/001/2011, 45). None of the retentionist jurisdictions had made reservations as to art 6(4). The ratification status for actively retentionist Southeast Asian nations is: Indonesia – acceded in 2006; Thailand – acceded in 1996; Vietnam – acceded in 1982. Malaysia and Singapore have not signed the treaty.

Other major global instruments that mention clemency include the ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’ document, adopted by the UN Economic and Social Council in 1984, and UN Economic and Social Council Resolution 1989/64 (24 May 1989). Outside the multilateral context, ADPAN also notes that the right to seek clemency is found within ‘the domestic practice of almost every country applying the death penalty’ (AI-Index ASA 01/023/2011, 31; see also Sebba (1977b), 84).

pardons in Southeast Asian death penalty cases (the 'macro' research question).³⁹¹

Whether or not these hypotheses are able to be applied more generally, becoming part of a global 'macro' theory of clemency and pardons, or at least are able to add to and refine the theoretical perspectives described in this chapter,³⁹² awaits further research.

³⁹¹ Bottoms, 100.

³⁹² See Bottoms, 99-100 and Neuman, 76, on the adaptation of existing theory in light of the results of subsequent research.

Chapter Four – Treatment of Sources

Introduction – Combining and Triangulating Sources

In the previous three chapters I described the justification for conducting a comparative study of clemency and pardons in Southeast Asian death penalty cases, the mechanics for conducting this type of qualitative comparative research, and moreover the theoretical and empirical background to the subject matter. In the present chapter, I move away from the abstract framework and on to a specific discussion of the data relied upon, and the difficulties associated with its acquisition and interpretation, setting the scene for a comprehensive analysis of each country's death penalty and clemency and pardon practice in Chapters Five to Eight.

How effective are the sources I have collected and collated in answering the 'micro' and 'macro' research questions first posed in Chapter One: Introduction ? Although the complete list of sources I have relied upon in writing this dissertation is contained within the Reference List after Chapter Nine: Discussion and Conclusion and Appendices A-D, a compendium of sources on its own, absent any context or analysis, will not provide a complete picture. In a scholarly thesis comprising an *inductive* study, each group of sources relied upon must be critically analysed, in terms of origin,³⁹³ reliability (or accuracy/truth of measurement)³⁹⁴ and validity (the latter term a measure of whether the qualitative source in question is the most appropriate means of understanding of the phenomenon being studied).³⁹⁵ Moreover, throughout this chapter I also discuss the

³⁹³ Merriam, 52, 56.

³⁹⁴ Kirk and Miller, 19-21; Perakyla, 283.

³⁹⁵ Davies, 77; Berry, 679; Kirk and Miller, 19.

significant barriers to conducting research on the death penalty in Southeast Asia, and the consequent unavailability of vast swathes of useful data, due to state secrecy (both in terms of the failure to release official documents and the possible existence of those documents at all), language difficulties and of course the limited amount of written and interview-sourced material I could find within reasonably short (4-6 week) stays in each of the four relevant Southeast Asian capitals, to name but a few impediments to comprehensive data collection.

My 'macro' research question requires the limited use of *quantitative* data to establish, with a rough degree of accuracy, the proportion of finalised death penalty cases granted clemency in each jurisdiction, which I refer to as the clemency 'rate' throughout the dissertation. These estimations of clemency 'rates', while they need not be (and probably never will be) perfectly accurate are nonetheless of crucial importance in *ranking* Indonesia, Malaysia, Singapore and Thailand as to each jurisdiction's usage of clemency as discretionary relief from the death penalty. Accordingly, the peculiar difficulties and inaccuracies of quantitative data will be addressed separately at the end of this Chapter, so that Appendices A-D and the clemency 'rates' themselves can be interpreted with a degree of caution and flexibility.

In an ideal world, the primary material relied upon in completing a doctoral thesis on a criminal justice topic would come from official (government) sources only, in order to maximise its reliability and authenticity. However, researchers working on capital punishment, a highly politicised and sensitive criminal justice issue in Southeast Asia as in other retentionist regions, are often left to rely on incomplete data sets, speculative recounts and interpretations of factual events, unclear reasoning behind official decisions, and perhaps even apathy or downright hostility from potential interview subjects. These

shortcomings initially contributed to the removal of Vietnam as a country of comparison from my original five-country study, as described earlier. For the four jurisdictions that remain, as each of Indonesia, Malaysia, Singapore and Thailand continue to expose their government decisions to greater domestic and international scrutiny, and question the death penalty as a criminal justice policy, more information relevant to academic research on capital punishment will surely enter the public domain. However, until this gradual process reaches a conclusion, researchers must make the best use of whatever partially flawed information is available.

The accepted academic means of overcoming defects and omissions within official sources is an epistemological technique known as ‘triangulation of proof’, which involves cross-referencing various official and non-official, quantitative and qualitative sources of data, in the hope that the aggregate of a number of flawed sources will reveal the ‘true’ picture on sensitive topics.³⁹⁶ The ‘triangle’ metaphor relates to the overlap of 1) first-hand or documentary sources; 2) secondary, interpretative materials and 3) interview-based information.³⁹⁷ As such, I have relied upon both official (government press releases and reports, speeches, autobiographies) and non-official sources (such as independent media, journal articles and NGO publications), together with ‘elite’ interviews in my research. Each group of sources has its own strengths and weaknesses, as outlined in the forthcoming sections addressing reliability and validity, together with the special problems posed by quantitative data.

³⁹⁶ Johnson and Zimring (2009), 234; Davies, 75, 78; Miller (2003), 327; Merriam, 54.

³⁹⁷ Lilleker, 211-212; see also Merriam, 54.

Sources for the Dissertation – Inclusion and Exclusion

In this section I will focus on the material making up the *substantive* part of my dissertation, in other words sources that illuminate each of the four relevant jurisdictions' use of capital punishment and clemency, rather than texts with methodological and theoretical lessons (i.e. material unconnected with events on the ground in Southeast Asia). Many sources of the latter type have of course been cited throughout my dissertation, and with particular emphasis in Chapters Two, Three and the present Chapter Four.

The jurisdiction-specific sources essentially fall into two broad categories *on the basis of validity*.³⁹⁸ First are sources that illuminate the clemency decision-making process and outcome in particular cases and second are interpretive sources that help to explain why clemency (or conversely, execution) is practiced frequently or infrequently in one particular country. The former usually consist of qualitative descriptions of individual cases and the outcomes therein: why the prisoner was sentenced to death, why clemency was granted or denied and the process leading up to this decision, and finally the resulting outcome of the case (i.e. eventual release from prison, ongoing imprisonment, death in prison, escape, execution and so forth).³⁹⁹ Case reports also appear, particularly in the mass media, in summary form – making it difficult to ascertain exactly why each individual prisoner was granted or refused clemency, but nonetheless offering particular clues. For the secondary, interpretive sources, the list of potential factors explaining why each jurisdiction exercises clemency frequently or infrequently can be found within texts on a broader range of subjects, from material discussing *structural* factors (such as the political

³⁹⁸ See notes 395 and 463 and associated text, above and below.

³⁹⁹ See notes 483-486, and associated text, below.

system, criminal justice system and precise death penalty laws) to *cultural* factors (such as religion, legal culture, public opinion and the role of the mass media), amongst others. In a generalised, theoretical sense, most of these structural and cultural factors were discussed in the previous chapter.

As noted above, a full list of sources is contained in the Reference List at the end of the dissertation, so what follows is merely a summary of those sources and, more significantly, where I gained access to them. Listed below are materials sourced from a variety of libraries, from the internet, conference proceedings, and of course ‘elite’ interviews conducted in the four relevant Southeast Asian jurisdictions, and elsewhere in the world.

Library-Based Sources

Libraries in the UK, Southeast Asia and elsewhere have provided the majority of written material I have relied upon in compiling information on the use of clemency and pardons in Southeast Asia over the past few decades. Information on the Southeast Asian death penalty (in general), and executive leniency through clemency and pardons (in particular), together with cultural and historical background on each of the countries concerned can be found in the following types of written publications:

- Books, including monographs, edited collections and political biographies;
- Journal articles, in the fields of law, criminology and criminal justice, sociology, political science and international relations, area studies, Southeast Asian history, religious studies and others;
- NGO reports, such as those authored by major international campaign groups like Amnesty International, Harm Reduction International, Hands off Cain and Human Rights Watch, as well as those created by local or regional outfits;

- Official press releases, speeches, and reports published by national governments and international organisations such as the United Nations;
- Newspaper, magazine and other media reports;
- Law reports, legislation, constitutional papers, international instruments and other legal documents; and,
- Academic theses and dissertations.

Given the fact that national governments are often reluctant to publicise the granting of clemency to a prisoner on death row, the leading contemporaneous sources of information on affirmative clemency decisions are probably independent media reports and NGO reports, hence my heavy reliance on those materials in Chapters Five to Eight. Later in this chapter, I discuss the significance of this fact in terms of the *reliability* of the data contained therein and the plausibility of my findings.

In terms of specific libraries, from mid-2009 to mid-2012 I visited the following British institutions:

- The University of Oxford (containing many different constituent libraries as part of the Bodleian network and within individual colleges);
- The British Library at St Pancras, London;
- The School of Oriental and African Studies (SOAS), University of London; and,
- The Marylebone Public Library, which stores a complete archive of Amnesty International's annual reports and shorter publications.

Additionally, I conducted library-based research in Australia, and of course during in-country fieldwork in Southeast Asia, at the following institutions (in the order that I first visited):

- The Australian National University, Canberra;
- The National Library of Australia, Canberra;
- The University of Malaya, Kuala Lumpur;
- The University of Melbourne;
- Chulalongkorn University, Bangkok;
- Thammasat University, Bangkok;
- The University of Western Australia, Perth;
- The National Library of Indonesia, Jakarta;
- The National Archives of Indonesia, Jakarta; and,
- The National University of Indonesia, Jakarta.

Internet-Based Sources

Of course, many media reports, NGO papers, journal articles and even entire books are now available on the internet. The fact that my study traverses the pre- and post-internet eras has implications for the availability of data, and I will discuss the potential imbalances in material drawn on below.

In summary, the type of information available on the internet largely mirrors that from library-based sources. Unique material here includes web-based news, together with blog posts. The multi-jurisdictional online databases I most frequently used in my research included:

- Factiva;
- NexisUK News;
- Westlaw;
- Google News;
- Google Scholar;

- Google Alerts;
- Academic Search Premier;
- the Hands off Cain website and database;
- the Amnesty International database for post-1993 material;
- the Death Penalty Worldwide website.

Finally, internet book retailers enabled me to order books that were unavailable in the libraries mentioned above.

Conference Proceedings

Other than library or web-based material, the final two source categories relied upon consisted of conference proceedings and 'elite' interviews. The relevant conferences I attended while conducting my research were:

- The 4th World Congress Against the Death Penalty, Geneva, February 2010;
- An International Conference on Capital Punishment in Asia: Progress and Prospects for Law Reform, City University of Hong Kong, November 2011; and,
- Southeast Asia Symposium 2012: Contemporary Issues in Southeast Asia, St Antony's College, Oxford, March 2012.

Papers and discussions at these conferences have been cited at certain points throughout the dissertation.

'Elite' Interviews in Southeast Asia, the United Kingdom, Australia and Elsewhere

'Elite' Interviews perform a crucial role within my study, in light of the fact that the death penalty in an issue shrouded in official secrecy in a number of Southeast Asian jurisdictions, and moreover because the operative reasons for clemency and pardon decisions are often not revealed by the decision-making executive to the public. Early in

the design of my research, I identified ‘elite’ interviews as of critical importance to research in the death penalty field, as such interviews have the potential to provide:

insights into events about which we know little: the activities that take place out of the public or media gaze, behind closed doors... interviews can provide immense amounts of information that could not be gleaned from official published documents or contemporary media accounts.⁴⁰⁰

Although ‘elite’ interviews appear, at first glance, to be an ideal solution to the problem of inaccessible data on politically sensitive topics such as capital punishment, care must naturally be taken in identifying an individual as a relevant ‘elite’ or ‘expert’ in the field being studied.⁴⁰¹ The academic literature on elite interviewing also suggests that the information gleaned from interviews should mainly be used to corroborate data taken from existing *archival* sources.⁴⁰² I have adopted this approach in the analysis of interview transcripts, reflecting the requirement to triangulate sources of data covering politically sensitive fields.

Given my specific research questions then, ‘elite’ interviews are an important means of acquiring primary data within the context of the first, ‘micro’ research question (either through the interviewees sharing their knowledge of individual clemency grants, or else providing a general overview of past practice in the country concerned). Of secondary importance is the way that the views of experts contribute towards analysis of the reasons behind differing clemency ‘rates’, or the ‘macro’ research question.

⁴⁰⁰ Lilleker, 208; Seldon, 353-355. With this in mind, I completed a training course on ‘elite’ interviewing in Trinity Term (April-June) 2011, offered by the Oxford Department of Politics and International Relations, before undertaking my first round of ‘in-country’ fieldwork later the same year.

⁴⁰¹ Nelken (2002), 182; Smith (2006), 645.

⁴⁰² Davies, 77-79; Lilleker, 208, 212; Seldon, 354-355.

The kinds of people I approached for interview, through letters, emails, SMS messages and phone calls, included:

- Academic Staff;
- Journalists;
- Criminal Defence Lawyers;
- Non-Governmental Organisation (NGO) Staff and Volunteers;
- Civil Service Personnel (Including Judges, Prosecutors, and other members of the Criminal Justice Bureaucracy); and,
- Politicians (who were members of both Government and Opposition parties).

In accordance with advice from the elite interviewing literature, the interview subjects were chosen on the basis of their proximity to decision-making power in the criminal justice and political hierarchy of the jurisdiction concerned, or else their own expertise on the issues of relevance to my two research questions.⁴⁰³ Some were *individuals* that I contacted, and some were *organisations* (in seeking an individual representative to interview). Specifically, the names of potential (individual and collective) candidates for interview were taken from government and non-government websites, from articles, reports and books that they had authored, from quotations in the media and via word-of-mouth recommendations from interview subjects and academic mentors in the UK and Australia. Most of the Southeast-Asia-based interviewees I identified and contacted a week or two before arrival in the relevant jurisdiction, however, others were referred to me after I arrived, again through word-of-mouth recommendations (the ‘snowballing’

⁴⁰³ Leech, 663; Lilleker, 207.

method), a tried and tested means of gaining access to elites working in secretive or politically sensitive fields.⁴⁰⁴

For those experts who gave their verbal consent to be interviewed,⁴⁰⁵ I carried out ‘semi-structured’ interviews with an open-ended set of questions⁴⁰⁶ relating to the use of the death penalty in Southeast Asia, the role of clemency in the administration of the punishment and broader questions about the functioning of the criminal justice system and the domestic and international politics of each of the four relevant jurisdictions, in addition to the typical introductory questions on the expertise of the interviewee him or herself.⁴⁰⁷ Although all the interviews shared common features, each set of questions was tailored to suit what was already known about the interviewee’s relevant expertise and, of course, jurisdiction.⁴⁰⁸ For example, the questions I asked criminal defence lawyers or NGO staff were subtly different to the questions I asked civil service personnel, judges or politicians. It was particularly important to maintain an impression of neutrality on the political merits of the death penalty,⁴⁰⁹ whether I was interviewing abolitionists or

⁴⁰⁴ Davies, 76; Rivera et al, 683.

⁴⁰⁵ Each letter or email I used to approach potential interview candidates contained the following passage, as stipulated by the University of Oxford Central University Research Ethics Committee (CUREC):

On the ethical aspects of my research, I will ensure that your confidentiality will be protected, your identity would be anonymised within my thesis and that any insights and information I gain by way of ‘elite’ interviews will be used for academic purposes only. With your permission I will either digitally record our conversation or else take written notes. Note that my fieldwork plans have of course been reviewed by, and received ethics clearance through, the University of Oxford Central University Research Ethics Committee (CUREC). Further information regarding CUREC policy is available at:
<http://www.admin.ox.ac.uk/curec/policystatement/>

⁴⁰⁶ See Davies, 76; Peabody et al, 452; Hammer and Wildavsky, 57.

⁴⁰⁷ Rivera et al, 686; Davies, 77.

⁴⁰⁸ See Berry, 681; Hammer and Wildavsky, 60.

⁴⁰⁹ See Hammer and Wildavsky, 72-73.

retentionists (a categorisation that did not always correlate with interview subjects from the 'defence side' and the 'prosecution side', respectively). Here, I would explain the way in which I was interested in the use of 'discretion' in the system of capital punishment, and in particular at *which stage* it was exercised in the relevant jurisdiction (i.e. by police, prosecutors, the judiciary or finally at the clemency stage). I deliberately asserted my scholarly interest in the practical 'implementation' of capital punishment, rather than the emotive, political arguments over its relative merits as a form of criminal punishment.

Each interview, if the participant consented, was recorded using a digital tape-recorder, and I transcribed the MP3 recording into written form at a later point in time. On a few occasions the interviewee would not consent to recording, meaning I would need to take written notes during the interview (and supplement them from memory shortly after the conversation). Certain passages from a number of interviews were, expectedly, relayed to me 'off the record', meaning they could not form part of the transcripts. I conducted interviews in a variety of public and private locations, including at the interviewees' homes and offices, cafes, bars and restaurants, a public library and even a religious seminary. Given these diverse locations and the broad array of participants, some interviews were conducted in a more formal atmosphere than others – in some cases the use of a digital recorder and a list of questions to guide the conversation seemed entirely appropriate, whereas at other times I would apologetically begin recording halfway through what the participant perceived as an informal conversation over dinner or coffee. As Davies advises, it is important to adapt semi-structured interviews to the situation that the researcher finds him or herself in.⁴¹⁰

⁴¹⁰ Davies, 77.

Although the primary component of the ‘elite’ interview research I conducted took place during three separate periods of ‘in-country’ fieldwork in Singapore and Malaysia (October to December 2011), Thailand (September 2012)⁴¹¹ and Indonesia (April 2013) (listed in the order that I visited), I also took the opportunity to interview Southeast Asia and death penalty specialists wherever I could visit them, including in Oxford and London, in Geneva during the course of the 4th World Congress Against the Death Penalty in February 2010, in Hong Kong before and after the International Conference on Capital Punishment in Asia (November 2011), and in Australia while visiting family and renewing student visas from July to September 2009, from December 2011 to January 2012, and in January 2013. Although reliance on UK, Hong Kong or Australian-based experts contributes to understanding a foreign legal culture by being ‘virtually there’ (according to Professor David Nelken’s classification), there is no real substitute for conducting a period of in-country fieldwork, or ‘researching there’.⁴¹² With this in mind, the trips I made to Southeast Asia during the course of my field research, even if these were more resource-intensive (financially, logistically and time-wise) than simply conducting library-based research in the UK and Australia, have been essential in completing as detailed a study as possible in the circumstances.⁴¹³

Finally, other than in-person interviews, occasionally it was necessary to conduct telephone and email interviews, where the respondent lived in a jurisdiction or city I could not visit or where they preferred this means of communication.⁴¹⁴ The precise date and

⁴¹¹ My original fieldwork trip to Bangkok, Thailand in November 2011 was cancelled due to severe flooding in central Thailand.

⁴¹² Nelken (2010), 93-95.

⁴¹³ See Hammer and Wildavsky, 90.

⁴¹⁴ If the interviewee was not available to talk in person or over the phone, then the interview, conducted by email, became much more ‘structured’ with a more rigid set of questions being asked.

format of each interview is noted in the List of 'Elite' Interviews Conducted at the end of the Reference List.

Of course, not everyone I contacted for interview wished to participate, far from it. The politically sensitive nature of the questions, the very specific knowledge required to answer questions on *clemency* in death penalty cases,⁴¹⁵ the fact that so-called 'elites' have busy professional lives (or secretaries and other 'gatekeepers' who perceive they do), and in some cases my limited time in each fieldwork jurisdiction all combined to produce a large number of unanswered calls, SMS messages, emails and letters. Moreover, with frequently-changing email addresses, office and mobile phone numbers in the business context, some of those individuals identified for interview may simply have not received the invitation to contribute.

Later in this chapter I deal with the potential criticism that a number of non-responses from government sources may imply a particular bias in the political disposition of my interview subjects and consequent impact on validity. Despite the fact that many scholars find it difficult, if not impossible, to obtain a 'representative' sample of interviewees in terms of their views on a contentious political issue,⁴¹⁶ in looking at the interview results as a whole, I certainly did manage to canvass views from individuals who *supported* the death penalty as a tool of criminal punishment, as well as those who actively campaigned against its use.⁴¹⁷ In all four countries, but particularly in Singapore

⁴¹⁵ A common opening phrase uttered by interview subjects was 'I know very little about clemency in death penalty cases in the jurisdiction you mention, my expertise is limited to ..., however I can provide some relevant background information', or some variation on that theme.

⁴¹⁶ Richards, 200.

⁴¹⁷ As opposed to survey-based research, where the 'fieldwork' data collected constitutes the *primary* source of information to be analysed and interpreted, it is not nearly as important in my research design to obtain a perfectly *representative* sample of pro and anti-death penalty interviewees, when the information gleaned from interviews is only intended to *supplement* and *complement* archival sources (see Seldon, 353-

and in Malaysia (as countries with a British colonial heritage), being a researcher from a world-renowned institution such as Oxford University counted in my favour in gaining access to government and political officials that anti-death penalty activists or even defence lawyers would struggle to reach.

Below, I provide a summary list of interview subjects, categorising each individual by his or her occupation or position (at least as it relates to the topic of the death penalty in Southeast Asia).⁴¹⁸ Multiple interviews with the same person are counted only once, and likewise where the interview was conducted with more than one person at a time, I tally only the identity of the 'leading' interviewee below. All interviewees' anonymised identities, and the location and date of each interview are provided in full at the end of the dissertation.⁴¹⁹

I have arranged the following tables by the potential interviewee's place of residence, at the time I attempted to make contact, even if the interview was subsequently carried out by telephone, or via email.

355; Lilleker, 208; Richards, 204; Davies, 75). So long as a cross-section of experts are consulted (regardless of the overall numbers favouring either activist or establishment positions), 'elite' interviews remain an extremely useful research methodology in the present case, whereby data collection can be moulded to suit my own research questions.

⁴¹⁸ Recall that Vietnam was included as one of the jurisdictions in my original MPhil study. I have excluded from the tables and reference list one interview (and four attempts to contact interview sources) where the subject matter solely consisted of death penalty practice in Vietnam.

⁴¹⁹ Of course, merely because an interview was carried out does not mean that the information obtained was necessarily of relevance and importance in writing up my findings. Nonetheless, a complete list of all interviews conducted during the course of my fieldwork is found in the Reference List.

Table 1A: Interviews in Singapore

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia	1	1
NGO Staff/Volunteer	5	1
Lawyer	3	7
Civil Service		
Journalist		1
Politician	2	
TOTAL	11	11

Table 1B: Interviews in Malaysia

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia		2
NGO Staff/Volunteer	3	3
Lawyer	3	4
Civil Service	1	2
Journalist		1
Politician	2	5
TOTAL	9	17

Table 1C: Interviews in Thailand

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia	1	3
NGO Staff/Volunteer	6	2
Lawyer	3	8
Civil Service	3	12
Journalist		1
Politician		1
TOTAL	13	27

Table 1D: Interviews in Indonesia

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia		7
NGO Staff/Volunteer	2	6
Lawyer	2	6
Civil Service	3	11
Journalist		1
Politician		3
TOTAL	7	34

Table 1E: Interviews in the United Kingdom – Oxford and London

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia	3	1
NGO Staff/Volunteer	6	5
Lawyer	2	2
Civil Service		
Journalist	1	
Politician		
TOTAL	12	8

Table 1F: Interviews in Australia – Canberra, Melbourne, Sydney, Perth

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia	8	2
NGO Staff/Volunteer		
Lawyer		3
Civil Service		
Journalist		
Politician		
TOTAL	8	5

Table 1G: Interviews in Other Countries (USA, Canada, Hong Kong, Netherlands)

<u>Position/Occupation</u>	<u>Interviewed</u>	<u>Declined/Did Not Respond</u>
Academia	2	1
NGO Staff/Volunteer	2	1
Lawyer		
Civil Service		
Journalist		
Politician		1
TOTAL	4	3

Analysing the Information

Although they are of course related to each other, and are therefore addressed sequentially in my dissertation, each of the two research questions posed present their own particular difficulties on the analytical questions of availability of data, reliability and validity. I will consider how the results of my two research questions are adversely affected by problems of data collection and interpretation in the following section.

Challenges and Limitations relating to the Qualitative and Quantitative Data Collected – Availability of Data

To answer comprehensively the first, ‘micro’ research question would require a very large amount of primary data: every clemency grant awarded in a death penalty case from 1975 to 2009, in each of four jurisdictions would need to be unearthed and recorded. Moreover, it would not be enough to simply list the reprieved prisoner’s demographics (such as gender, age, nationality), even if these were available in every single case. For a truly exhaustive analysis, the executive decision-makers’ *reasons* for all documented clemency grants would need to be publicly available. As noted earlier, these reasons

often remain secret,⁴²⁰ and where public justifications *are* offered the explanation given will often be framed in an extremely general or politically convenient manner, encapsulated by expressions such as ‘because of the peculiar circumstances of the crime’ or ‘because it is considered that justice will be satisfied without the taking of this [person’s] life’.⁴²¹ Of course, even outwardly convenient explanations are an improvement (in terms of a researcher’s needs at least) on the whimsical, spur-of-the-moment judgment by a single decision maker to grant a condemned prisoner a reprieve, a decision that an authoritarian ruler can make without having to publicly justify reasons, let alone record them.

Rather than requiring access to the entire pantheon of clemency information for each jurisdiction, I answer the first research question based upon the available *sample* of affirmative clemency decisions where either the demographics or the suspected reasons for the decisions are publicly available. In some cases (especially Singapore, and within particular years, Malaysia) where the total number of clemency grants listed in the Appendices are reasonably complete, the guesswork is limited to the Cabinet or President’s reasons for commuting the death sentence. In Indonesia, Thailand and late 1980s to 1990s Malaysia, the clemency totals, demographic information of recipients, and the reasons for commutation are, for the most part, incomplete. As such, I am forced to come to conclusions based only on the limited information available. In this context, it

⁴²⁰ Kobil (1991), 608-609; Acker et al, 188. It may be that the true reasons for the affirmative clemency grant are adequately set out in the clemency *petition* previously prepared by the prisoner’s lawyers, family members or supporters. This information *is* sometimes available within the public domain, and I asked detailed questions about the framing of written clemency appeals to the criminal defence lawyers that I interviewed. However, without the input of an ‘insider’ close to the decision-making process, it cannot be known for certain whether or not the factors set out in the clemency petition were the decisive ones relied upon in making the grant, or whether extraneous legal or political factors were instead relevant.

⁴²¹ Scott, 98; Acker et al, 188.

must be borne in mind that the present study is not exhaustive, but merely an *exploratory* analysis of the reasons behind clemency grants and their frequency, echoing Johnson and Zimring's observations about carrying out death penalty scholarship on China, for which their research was necessarily 'constructed around limits that sound scholarship would ordinarily find unacceptable',⁴²² and across the Asian continent in general:

Research on the death penalty... [is] so thick in some parts of the subject that no one can master it, yet so thin in others that storytellers are 'reduced to guesswork, weaving great swatches of narrative from little rags of data'... research on capital punishment outside the USA is so thin that [even] guesswork must sometimes be considered progress.⁴²³

While engaging in frivolous 'guesswork' (to employ the above term) would not of course produce an academically rigorous thesis, some liberties must be taken, as the two authors note. Most revealingly, even in the United States, the retentionist jurisdiction that has attracted the vast majority of English-language academic attention:⁴²⁴ 'debates about what factors influence clemency decisions within the death penalty context often take place without the benefit of data'.⁴²⁵ In this context, my heavy reliance on independent media reports, NGO-authored documents and 'elite' interviews to compile information on the clemency practice of each national jurisdiction, while falling short of comprehensive government data in terms of coverage, nonetheless represents a significant improvement on the status quo. Here, the method of 'triangulation' described above acts to minimise

⁴²² Johnson and Zimring (2009), 225.

⁴²³ Johnson and Zimring (2006), 94, quoting Friedman (1993), ix; Interview with American Academic Expert on Capital Punishment.

⁴²⁴ Johnson and Zimring (2006), 94.

⁴²⁵ Heise, 262; Hoffman.

the unavoidable shortcomings in each type of ‘unofficial’ data source relied upon. Future research studies can then build on and enrich the data presented here, to present a gradually more complete picture.⁴²⁶

As alluded to above, the information required to answer the ‘micro’ research question, in its entirety, will probably never be available to academic researchers. The solution to such shortages of data is to explicitly acknowledge where the problems lie,⁴²⁷ and to provide *qualified* (rather than final, authoritative) conclusions on the basis of available samples of data, allowing the reader make his or her own judgment on these conclusions.⁴²⁸ The use of *theory* on clemency and pardons, outlined in detail in Chapter Three, has an important role to play in order to make sense of such political decisions, especially in cases where the data on the reasons for decision-making are incomplete.⁴²⁹

More specifically, a number of ‘sampling biases’ and general problems of missing data are evident in the collection of clemency grants I have compiled across the four jurisdictions. These are that:

- I have primarily relied upon English language sources; however I could also read Indonesian and Malay sources where available (given my reasonable fluency in those languages).⁴³⁰ However, regrettably, a number of Thai language sources

⁴²⁶ See further *Introduction – Combining and Triangulating Sources*, above.

⁴²⁷ Richards, 200.

⁴²⁸ Interview with American Academic Expert on Capital Punishment; see also Johnson and Zimring (2009), 226.

⁴²⁹ Kohli et al, 5, 47; Parsons, 15; Neuman, 76.

⁴³⁰ The Reference List contains 13 Malay and Indonesian sources that I have cited, including examples of books, media reports, government publications, theses and a website. In addition, there were other sources in those languages I consulted but did not cite.

could not be incorporated.⁴³¹ Instead, I relied upon ‘elite’ interviews conducted in English (sometimes with a Thai interpreter), official websites and other documents that were published in both English and Thai versions,⁴³² and Thailand’s English-language newspapers, particularly *The Nation*, and the *Bangkok Post*. In Indonesia, most of my ‘elite’ interviews were conducted in English, however I also conducted two interviews in a mixture of English and *Bahasa Indonesia*;

- Media reports and secondary academic analysis will often focus on the crime committed, the subsequent trial, and perhaps the eventual execution, rather than clemency appeals (whether successful or not);⁴³³
 - Likewise, for governments that continue to strongly support the death penalty as a tool of criminal punishment, the official publication or gazetting of sentencing or execution data may be more widespread than that of clemency grants.⁴³⁴
- Conversely, for governments seeking to avoid the international embarrassment of

⁴³¹ These included a 1990 Master of Laws thesis on the Royal Pardon process in Thailand written at Chulalongkorn University, two detailed government manuals on Royal Pardons, together with Thai-language newspaper articles and NGO reports. While in Bangkok I enquired at a couple of translation services, in particular in relation to the Master of Laws thesis, but the cost and time required to have the material translated into English proved prohibitive.

⁴³² Prominent examples I make use of are the Thailand Department of Corrections website: <http://www.correct.go.th/eng.htm> ; the website for Bangkok Prison, holding all male prisoners under sentence of death: <http://www.bangkokprison.net/>; the memoirs of Thailand’s last machine-gun executioner, Chavoret Jaruboon; the Death Penalty Thailand Blog: <http://deathpenaltythailand.blogspot.co.uk/>, the website of prominent NGO Thailand Union for Civil Liberty: <http://www.ucl.or.th/>, and the library websites for both the Chulalongkorn (<http://library.car.chula.ac.th/>) and Thammasat (<http://search.library.tu.ac.th/>) Universities.

⁴³³ Burnett (2002), xvi; Strange, 7.

⁴³⁴ An Australian academic describes the ‘political capital’ that the execution of the death penalty can bring Southeast Asian governments (Interview with Australian Academic Expert on Indonesia).

too many executions, official execution figures may be suppressed while clemency grants may be publicly feted as an example of compassion;

- Countries with fewer affirmative clemency decisions (i.e. Singapore) allow for what Pridemore calls 'case-by-case qualitative research' into the reasons behind each clemency grant, in search of common patterns.⁴³⁵ However, for jurisdictions where clemency is common, such as Thailand, the exercise of the power of Royal Pardon must be considered in an aggregate manner instead, with far less attention paid to individual cases;
- As noted above, unless they are expressly promulgated by the executive in the form of a press release or interview, the true reasons for clemency decisions are usually not made public and are not capable of any kind of review,⁴³⁶ and it is left to analysts to deduce the possible reasons for the commutation through the prisoner's demographic data,⁴³⁷ the jurisdiction's history of clemency in death penalty cases and statements by legal representatives of the accused. It is for this reason that 'elite' interviews play such a crucial role in my research design;⁴³⁸

⁴³⁵ Pridemore, 181. However, I also recognise the danger of over-analysing infrequent instances of clemency: where there are very few affirmative clemency grants in any one jurisdiction over a long period of time, there are few generalisations that can be made about the circumstances that 'lead to' clemency there, as Burnett (2002) found with low-clemency American jurisdiction Missouri (at 177).

⁴³⁶ Ibid, 163.

⁴³⁷ Ibid, 163, 165.

⁴³⁸ See note 400 and associated text, above.

- For 'elite' interviews in particular, although I attempted to hear from both government and non-government sources,⁴³⁹ given the official policies of state secrecy on the death penalty in a number of Southeast Asian countries, a greater number of non-government, abolition-favouring interviewees were willing to talk on the record, creating a distortion in the sample of experts,⁴⁴⁰ and potentially costing me the chance to find out about more affirmative clemency grants in each jurisdiction's modern history. Bennett's observation is relevant here:

Governments do not like to be embarrassed... What does a government have to gain by granting access to sensitive areas of operations [i.e. clemency decision-making] to an outsider over whom it probably has little control?⁴⁴¹

- Attempting to cover the entire period 1975 to 2009 leads to a shortage and consequent imbalance of information on clemency cases from the 1970s and

⁴³⁹ As per the advice given by Seldon (at 356): 'Unrepresentative sampling is an obvious error that can be avoided by drawing up systematic lists of potential interviewees from a wide variety of different organizations, backgrounds, sympathies, or whatever distinctions may be relevant.' However, also bear in mind note 417, above.

⁴⁴⁰ See Goldstein, 669; Richards, 200, and Bennett, 12. As Lilleker summarises (at 213), 'The more controversial the research the less response you will get and fewer of those who do respond will be willing to speak entirely on the record. This is a commonly recognised law of research interviews.'

Similarly, I travelled to all four fieldwork destinations on tourist/visitor visas, rather than professional or academic visas (the appropriate visa status to travel on was, in reality, quite unclear as I was neither a salaried academic, nor a student at a local university, nor a journalist). With the twin goals of 1) seeking to minimise the risk of causing any trouble with the immigration authorities in each country (and with Thailand's stringently-enforced *lèse-majesté* laws prohibiting criticism of the Royal Family – see generally Streckfuss and Hewison) and 2) seeking to maximise the chances of a response, I usually attempted to contact persons in the 'middle' of the respective government's criminal justice hierarchy, rather than those politicians and civil servants at the very top.

⁴⁴¹ Bennett, 12.

1980s, as compared with the greater detail available on the 1990s and 2000s. The contrast is particularly stark once the influence of the internet, and the digitisation of media reporting is taken into account.⁴⁴² Likewise, even in the rare instances where they *did* serve in decision-making or advocacy roles over most of the project's 35-year scope, the memories of elite interview subjects are bound to have faded on earlier cases; and finally,

- A lack of interest in the death penalty as an international human rights issue until the early 1990s⁴⁴³ is reflected in the lopsided exposure of cases from the past two decades in the domestic and international media. Moreover, western media outlets have lamentably failed to report in any detailed fashion on death penalty cases in Southeast Asia unless a western foreigner has been sentenced to death.⁴⁴⁴
- Similarly, reports in the local *or* international media often tend to focus on prisoners sentenced to death for *political or security-related crimes*, rather than the more mundane cases of drug trafficking 'mules' or domestic murders, even though the latter two categories of crime may outnumber more newsworthy political offences.

⁴⁴² For example, newspaper searches on relevant English-language publications are assisted greatly by digital archiving. Articles from the following major periodicals were not available in digital searches: *The Jakarta Post* (pre-1986); *New Straits Times*, Malaysia (pre-1991); *Straits Times*, Singapore (pre-1989); *The Nation*, Thailand (pre-1998); the *Bangkok Post* (pre-1990). Digital coverage of major western newspapers relied upon such as *The Times*; *New York Times*; *The Economist* and the *Sydney Morning Herald* is far more complete. For one of my leading NGO sources, the archives of Amnesty International, digital records are available only back to around 1995 for most documents; publications covering the period 1975-1994 were accessed in microfiche form from the Marylebone Public Library. Likewise, the extensive individual country reports on the NGO Hands off Cain's website extend back only to 1999.

⁴⁴³ See Chapter Two, note 128.

⁴⁴⁴ Zimring (1999), 3-4; Johnson and Zimring (2009), 318.

The general problem with the *official* data available is not that Southeast Asian governments have systematically lied or deliberately downplayed the number of death sentences issued, clemency grants made and executions carried out, but instead that they adopt deliberate policies of non-disclosure towards any information concerning capital punishment,⁴⁴⁵ even if (unlike the case in Vietnam) the information is not technically ‘classified’ as a state secret.⁴⁴⁶ Although actively retentionist Southeast Asian countries are, on the whole, upfront (and even enthusiastic) about their use of the judicial death penalty, they usually do not report on individual cases and statistical summaries, with only a few exceptions.⁴⁴⁷ The four jurisdictions have slightly different policies on data publication, which will be discussed in detail in each country chapter. However, on the whole, Singapore, Malaysia and Indonesia have published very little official information on the administration of the death penalty, whereas Thailand appears to adopt a more open approach.⁴⁴⁸

Challenges and Limitations of the Qualitative Data Collected – Reliability

Reliability, in the social sciences, refers to the accuracy and ‘truth’ of the information collected.⁴⁴⁹ In the death penalty context, the main issue is whether or not the information collected is ‘believable’, with a focus on the *primary* data answering my first

⁴⁴⁵ Interview with Amnesty International Hong Kong Staff (Asia-wide relevance); Interview with Singaporean Blogger and Human Rights Activist; Interview with Singaporean NGO Staff #3 (both Singapore); Interview with Amnesty International Malaysia Staff (Malaysia); AI-Index ASA 36/004/2009; ‘Death Sentence for Canadian Father, Son’ (Thailand); AI-Index ASA 21/003/2008, 29; AI-Index ASA 21/017/1994, 104; Mulya Lubis (Indonesia).

⁴⁴⁶ See Chapter One, note 38, above. Singapore’s Official Secrets Act may be the exception here.

⁴⁴⁷ However, recall note 434 and associated text, above.

⁴⁴⁸ Interview with Thai Human Rights Activist (2012); Malakunas. See also note 445, above, and the death penalty statistics on the Thailand Department of Corrections website.

⁴⁴⁹ Davies, 77; Berry, 679; Merriam, 55: in ‘hard’ experimental sciences, the reliability of data revolves around its replicability, following repeated measurements.

(‘micro’) research question. The secondary, interpretative material referred to is not being relied upon as factual ‘truth’, but merely as professional and academic *opinion* that, when combined with my own interpretations of the primary data in each particular national context, will help to explain why some countries grant clemency more often than do others (the ‘macro’ research question). A plurality of responses will help the latter process, rather than hindering it.

I address the shortcomings of the death penalty *statistics* relied upon in illustrating my chapters in the section on quantitative research, below. This leaves the collection of *qualitative* data on the incidence, background to and, in particular, the *reasons* for clemency grants as the remaining set of sources for which reliability must be questioned. Here, the starting point is that absent full and honest disclosure from the executive decision-maker/s in each case of clemency, the political or legal reasons for the grants (even if later provided through an official channel, such as a press release or government gazette) can only be speculated on. Without the input of the decision-maker him or herself, the researcher is limited to making assumptions based on a pattern of previous decisions (such as clemency granted in cases of youth or old age, to women, for a particular crime and so forth),⁴⁵⁰ or relying on the opinion of analysts and so-called ‘experts’ on the law and politics of each national jurisdiction (such as newspaper editors and authors, NGO staff, and academics). In most cases, even the lawyers of the prisoners granted clemency have no right to receive information on the reasons for the grant, or its refusal (even if they do make representations before the decision-making body, depending on the jurisdiction).⁴⁵¹ Accordingly, legal case reports and transcripts, together

⁴⁵⁰ Pridemore, 163, 165.

⁴⁵¹ Interview with Malaysian Criminal Defence Lawyer; Interview with Singaporean Criminal Defence Lawyer #2; FIDH (2005), 27; Interview with Thai Human Rights Activist (2012); Interview with Former Employee of

with media articles, can provide the background to the factual circumstances of the case and the offender, but the official reasons for the clemency grant will usually remain a mystery.

Even the direct input of an insider close to the decision-making process will not always constitute an authoritative and reliable source on the reasons for clemency grants. ‘Elite’ interviews, which form an integral part of my research design, pose particular problems of reliability here. As Nelken describes:

The issue ‘whom can you trust?’ is therefore as relevant to the process of doing research as it is to understanding criminal behaviour and responses to it... Who is ‘authorised’ to speak for a given legal system or specific practice?⁴⁵²

Likewise, Smith admits to being fundamentally ‘uncertain how easy it is to identify the people who influence “important decisions”’.⁴⁵³ In the clemency context, with many layers of bureaucracy potentially contributing to the final recommendation and decision, who is the right ‘decision-maker’ to contact for interview? Further, for ‘elite’ interviewees on the government side, there will usually be an ‘official’ line to be promulgated.⁴⁵⁴ Will the answer provided to the question ‘why was clemency granted in that particular case?’

the Thailand Department of Corrections; Interview with Senior Indonesian Human Rights Lawyer; see also note 420, above.

⁴⁵² Nelken (2010), 92. Seldon (at 356) identifies further issues of reliability that arise in many studies employing ‘elite’ interviews: the interviewee over-simplifying events, exaggerating his/her own (individual or corporate) role and importance in decision-making; general bias; and finally, the distorting influence of hindsight.

⁴⁵³ Smith (2006), 645.

⁴⁵⁴ Nelken (2010), 92.

be based upon one person's input or opinion,⁴⁵⁵ a lowest common denominator 'corporate' approach to decision-making,⁴⁵⁶ or alternatively the kind of generic response designed to disguise more calculated political reasons for the decision?⁴⁵⁷ For these and other reasons, even interview responses from prominent civil servants or serving politicians must be treated with caution.

Throughout my period of 'in-country' interviews, in no case was I able to interview a member of the highest prima-facie decision-making body for clemency (i.e. the Singaporean Cabinet, the King of Thailand or Principal Private Secretary or Privy Council, members of the Malaysian State Pardons Boards; the Indonesian President, and so forth).⁴⁵⁸ Even if I had been able to, their identities have not, of course, remained consistent throughout the period 1975-2009. Over three and a half decades, official policies and subjective inclinations to grant or refuse clemency will change with the personnel involved,⁴⁵⁹ and even this assumes that the decisions are actually made at the highest political level, rather than the *constitutionally-empowered* decision-maker/s simply rubber-stamping recommendations made by the judiciary, prosecutors, prison authorities or elsewhere in the civil service, as analysts have observed in jurisdictions where clemency is most frequently granted.⁴⁶⁰ At best, interviews form part of a strategy

⁴⁵⁵ Lilleker gives the example of Cabinet discussions: 'it would be impossible to discover what took place within a Cabinet meeting simply by asking *one* Cabinet member' (at 208, emphasis added).

⁴⁵⁶ Interview with London-based Death Penalty Lawyer.

⁴⁵⁷ See Davies, 75, and note 421, above.

⁴⁵⁸ The sole exception here was the interview I conducted of a leading Judge in the Indonesian Supreme Court's Criminal Chambers.

⁴⁵⁹ See generally Aberbach and Rockman, 675.

⁴⁶⁰ Interview with London-based Death Penalty Lawyer; Abramowitz and Paget, 184-185; Sebba (1977b), 115; Lardner and Colgate Love, 213.

of triangulation, where the responses must be reconciled with information contained within written, archival sources.⁴⁶¹ The interpretive nature of ‘elite’ interviews is described succinctly by Richards:

By their very nature, elite interviewees provide a *subjective* account of an event or issue. Thus, elite interviewing should be conducted with a view to establishing ‘the truth’, in a crude, positivist manner. Its function is to provide the [researcher] with an insight into the *mind-set* of the actor/s who have played a role in shaping the society in which we live and an interviewee’s subjective analysis of a particular episode or situation.⁴⁶²

Challenges and Limitations of the Qualitative Data Collected –Validity

In contrast to reliability, *validity* (when used to describe measurement in qualitative research) is a test of whether or not the otherwise accurate, truthful information collected is still of best use in answering the research questions posed.⁴⁶³

Relevantly here, where the information is collected *specifically for the purpose of the research project*, as with highly structured surveys, or even semi-structured ‘elite’ interviews, the material obtained will have a high degree of validity.⁴⁶⁴ For the written material I have relied upon, on the other hand, very few longer pieces, such as books, journal articles, academic theses and even the more detailed thematic NGO reports have been written with the aim of addressing questions similar to my two research questions. While newspaper reports (whether found in hardcopy, microfiche or digitised form), and

⁴⁶¹ Davies, 77-79; Lilleker, 208, 212; Richards, 204.

⁴⁶² Richards, 200, emphasis added. See also Davies, 77.

⁴⁶³ Davies, 77; Aberbach and Rockman, 673; Kirk and Miller, 19, 30; Merriam, 53.

⁴⁶⁴ Davies, 77; Aberbach and Rockman, 674; Perakyla, 289.

shorter NGO case-reports focus on clemency in individual cases, speculating on the reasons that the prisoner was granted a reprieve (and hence, reliability problems aside, being of relevance to the first of my research questions), I found precious few complete longitudinal *compilations* of clemency grants, with the exception of Singapore, where description of the (only) six successful clemency appeals since independence in 1965 proved brief enough to fit within a number of newspaper articles.⁴⁶⁵ Accordingly, one of my principal and most resource-intensive tasks was to compile reports of affirmative clemency grants, which were only reported on an *individual* basis in the majority of cases. Even conscientiously-undertaken research is bound to overlook relevant cases, as I explained in the section *Challenges and Limitations relating to the Qualitative and Quantitative Data Collected – Availability of Data*, above.

Information collected and used to address the second, ‘macro’ question also suffers from shortcomings of validity. As I noted in Chapter Two, those articles attempting to answer the question ‘why do some jurisdictions grant clemency more often than do others?’ have been primarily concerned with a comparison of retentionist American states, rather than independent nations (anywhere in the world). Where death penalty scholars *have* focused on the Asian continent (let alone the Southeast Asian sub-region), documentary material has focused on the factors determining retention or abolition,⁴⁶⁶ the pros and cons of the death penalty or what might broadly be termed the ‘politics’ of capital punishment, rather than a detailed examination of the *exercise of discretion* at different stages of the process. Overcoming this particular issue of validity is a matter of selective reading on potential structural and cultural explanations, and

⁴⁶⁵ See ‘A list of death row inmates in Singapore who were granted clemency’; HOC Singapore 2009; ‘Keep Death Penalty but Allow Leeway’.

⁴⁶⁶ See Chapter Two, *Previous Comparative Studies of the Death Penalty*.

identifying the relevant sections of each document for use and citation in my dissertation, as informed by a detailed reading of the *theoretical* literature on clemency (in terms of justification, together with explanations for frequency and magnitude). Moreover, as noted above, conducting an extensive set of ‘elite’ interviews in Southeast Asia and elsewhere was the best chance to collect information specifically tailored to my two research questions, rather than exclusively being forced to adapt the findings and conclusions of previously-published documents written for other purposes.⁴⁶⁷

Shortcomings in Quantitative Data and the Estimation of each Jurisdiction’s Clemency ‘Rate’

In Chapter Two, I mentioned that although inductive research on criminal justice systems relies primarily on qualitative material,⁴⁶⁸ adopting a holistic approach to such research means engaging a variety of different sources, both qualitative *and* quantitative.⁴⁶⁹ The main *quantitative* material used to illustrate my analysis consists of death penalty statistics, both from official and non-official sources. These are referred to throughout the four country chapters (Five to Eight) but are also summarised in Appendices A-D. The present section discusses the format of these appendices, and the problems in compiling and interpreting quantitative data on capital punishment in the jurisdictions I have chosen

⁴⁶⁷ Note however that the evolution of the project over time will affect the validity of ‘elite’ interview responses to the ‘macro’ research question. Working backwards from Chapter Nine: Discussion Conclusion (drafted in March and April 2013), it is obvious that if I had conducted the same set of in-country interviews in Singapore, Malaysia, Thailand and Indonesia again, together with even earlier discussions in the UK and in Australia, I would ask slightly different interview questions – questions evincing a higher degree validity, that would better serve to answer my two research questions (and to better complement the archival material I had read by the middle of 2012). I might even have attempted to contact a different set of experts for interview, but as I explained earlier, merely having a ‘wish list’ of interviewees is no guarantee that they will all consent to be interviewed.

⁴⁶⁸ Bottoms, 97; Bennett, 6.

⁴⁶⁹ See, for example, Kohli et al, 49; Bennett, 7 and Bottoms, 99.

to analyse: problems that are often distinct from the shortcomings in reliability and validity for related *qualitative* material, described above.

In Appendices A-D, each table sets out the relevant jurisdiction's death penalty and clemency statistics in the following format, with a list of references placed after the table:

Year ⁴⁷⁰	First Instance Death Sentences Passed ⁴⁷¹	Death Row Prisoners ⁴⁷²	Clemency & Full Pardons Issued ⁴⁷³	Executions
1975				
1976				
etc..				
2009				

The foremost methodological obstacle in compiling these statistics is a significant amount of missing data, as is obvious from even a cursory glance at the tables in Appendices A-D, with their many empty fields. The salient reasons for this absence of data are covered in the section *Challenges and Limitations relating to the Qualitative and Quantitative Data Collected – Availability of Data*, above. For the remainder of this section I will focus on the *interpretation* of the quantitative data available.

⁴⁷⁰ Shaded areas in any column refer to multi-year figures provided in a particular source.

⁴⁷¹ This figure includes death sentences imposed at first instance, together with prison sentences that are increased to death sentences on appeal (as sometimes occurs in Indonesia, as a civil-law jurisdiction).

⁴⁷² Numbers in brackets here indicate prisoners who have *exhausted all judicial appeals*, in other words clemency is their final procedural hope of avoiding execution.

⁴⁷³ Numbers in brackets here indicate full pardons, i.e. where a prisoner under sentence of death is released from prison. In Appendix C: Thailand, I split this column into clemency granted pursuant to *Individual* Royal Pardon and clemency granted as part of a *Collective* Royal Pardon.

Where death penalty statistics *are* available in some form, the shortcomings of the data include the following:

- Contrasting figures for the same year from different sources, as is obvious from multiple figures provided in many fields. The ‘triangulation of proof’ technique relied upon demands that multiple sources be considered even within the same field, in order to arrive at an average or median position;
- Multiple-year ranges provided by a source, rather than single year figures;⁴⁷⁴
- As noted earlier in this chapter, there exists a significant problem with government censorship of official figures. However, as NGO-sourced statistics are often themselves based upon government publications or media reports, they best serve as reliable *minimum* estimates for executions in a particular year in systems that are otherwise ‘closed’ to the outside world.⁴⁷⁵ Given executions (and potentially, numbers in the other fields above) are likely to be under-reported by governments, the ‘+’ symbol is used to denote a ‘minimum’ figure in each case, following the practice adopted by Amnesty International⁴⁷⁶

⁴⁷⁴ See Neuman et al, 324. I do not consider multiple year figures if they relate to years outside of the 1975 to 2009 timeframe. Nor do I record clemency grants or executions *in the Appendices* if it is unclear which year/s they occurred in. However, if they clearly fall within the period 1975-2009 I do of course consider them during the substantive discussion in Chapters Five to Eight.

⁴⁷⁵ Interview with Amnesty International Hong Kong Staff; Johnson and Zimring (2009), 235, noting that for example ‘Amnesty [International] bends over backward not to overestimate execution numbers.’ Hood and Hoyle (2008), 146, also assert that ‘the annual number of executions recorded by Amnesty International in China has fluctuated so much from year to year that they have accounted for between 55 and 90 per cent of all executions recorded worldwide.’

⁴⁷⁶ See, for example, AI-Index ACT 50/001/2012, 2. One pertinent example here is the far greater number of executions documented for Singapore than death sentences over the period 1975 to 2009 (see Appendix A). Arguably, the ‘+’ symbol is far more important here than the available numerical figure.

- A failure by media sources in particular to properly differentiate between executions and death sentences for *drug* crimes and for all crimes, which primarily include (in the Southeast Asian context) *murder* cases and *firearms/national security* offences;⁴⁷⁷
- Similarly, media reports sometimes confuse death *sentences* with *executions*, will list sentences and executions imposed pursuant to *mandatory* death penalty crimes only rather than for all death-eligible crimes, or even the Thai practice of reporting *extra-judicial* executions (sanctioned by Prime Ministerial decree)⁴⁷⁸ undifferentiated from judicial executions;
- Media reports of ‘clemency’ or ‘pardon’ may in fact refer to death sentences that have been reduced to a term of imprisonment *following a judicial appeal*, rather than by executive action after the failure of judicial appeals; likewise, the term ‘pardon’ is often confused with ‘clemency’;⁴⁷⁹
- At least in the case of Thailand, if not other jurisdictions, annual summaries of ‘Royal Pardon’ grants may only refer to clemency granted based on *individual* petitions, and will not include *Collective* Royal Pardons issued to celebrate important national events (or vice-versa); and finally,

⁴⁷⁷ For example, if a newspaper article concerns a death sentence for drug trafficking, sometimes the summary of sentences and executions provided in the article will only relate to convictions for drug trafficking, rather than all death-eligible crimes.

⁴⁷⁸ See Chapter Seven: Thailand, *Extra-Judicial Executions – ‘Constitutional’ and ‘Unofficial’*.

⁴⁷⁹ See Kobil (1998), 675, Neuman et al, 325, and Chapter Three, *Meaning and Terminology*.

- What appear to be ‘yearly’ figures are in fact collected and released before the end of the calendar year.⁴⁸⁰

The figures in the table described above are collated not only as a source of quantitative illustration for each country chapter, but also, crucially, in order to ascertain the country’s clemency ‘rate’, which I define as the percentage of *finalised* death penalty cases where the prisoner receives clemency.⁴⁸¹ I calculate this figure not by comparing death sentences or numbers of death row prisoners with clemency grants,⁴⁸² but rather by comparing cumulative clemency grants with cumulative executions over the temporal limits of the study (1975-2009, inclusive). A clemency ‘rate’ of 20 percent would mean that of the total sum of prisoners executed and granted clemency, 20 percent are granted clemency, or one in five ‘finalised’ death penalty cases are reprieved by the executive, either through reduction to a term of imprisonment or by way of outright release. While a prisoner executed in a particular year may have been sentenced to death at a completely different time to another prisoner granted clemency in that same year (given different lengths of time spent on death row due to different appeal processes), the

⁴⁸⁰ I require ‘yearly’ (calendar year) figures only for executions and death sentences, but record figures for death row prisoners collected at any time of year: the latter figure may be constantly changing as prisoners are sentenced to death and move off death row for various reasons. For clemency grants, because of their comparative rarity in most jurisdictions, where ‘yearly’ figures are not available I have added individual reports together and try to come up with a cumulative figure where possible. Again, use of the ‘+’ symbol to denote a *minimum* figure is prominent here.

⁴⁸¹ This is similar to the definition adopted by Argys and Naci Mocan, 265.

⁴⁸² One well credentialed interviewee noted that a comparison of death sentences with clemency grants is unhelpful, unless it is known how many of the death sentences have gone through all judicial stages of appeal (Interview with British Academic Expert on the Death Penalty). An alternative option would therefore have been to compare yearly clemency grants with the number of death row prisoners who have exhausted all judicial appeals. However, a comparison of this type would suffer for statistical scarcity (see Appendices A-D), and also would not take account of a prisoner’s removal from death row for reasons other than clemency (see notes 483-486, below).

cumulative ratio of executions to clemency grants in a particular year, or over the entire period 1975-2009, is generally indicative of the importance accorded to clemency as a form of discretionary relief.

Of course, other than the impact of missing data on the numbers (in terms of execution statistics and affirmative reports of clemency grants), further caveats with the concept of a clemency 'rate' must be acknowledged: shortcomings that impact on the accuracy and legitimacy of the 'rate' as a measure of how frequently clemency is granted to prisoners under sentence of death:

- There are more than two binary outcomes (execution or clemency/pardon) once judicial appeals have been exhausted for a condemned prisoner: some prisoners die in prison before execution,⁴⁸³ some escape,⁴⁸⁴ a few might be moved to mental health facilities if they are unfit for execution,⁴⁸⁵ and some are cruelly held indefinitely on death row (until their later death from natural causes), without an order for clemency or warrant for execution ever being issued;⁴⁸⁶
- Research in the United States, as noted in Chapter Three, suggests that a significant minority of prisoners eventually executed are death row 'volunteers',

⁴⁸³ Scott, 99; Argys and Naci Mocan, 265, 271.

⁴⁸⁴ Scott, 99.

⁴⁸⁵ Argys and Naci Mocan, 265, 271.

⁴⁸⁶ Interview with London-based Death Penalty Lawyer #2; Interview with British Academic Expert on the Death Penalty; Iyer.

meaning they have renounced their right to appeal against the sentence of death, either at the judicial or clemency stage of proceedings.⁴⁸⁷

- Clemency being granted at an *earlier* stage of the proceedings (i.e. before all judicial appeals have failed) will distort the figures – however, this is far more unlikely than clemency being granted at the final stage of appeal;⁴⁸⁸
- In Chapter Three I extended the definition of ‘clemency’ for the purposes of my study as including any *political* remission of a death sentence, including an *amnesty* imposed on an entire class of prisoners by either the executive *or* the legislature. In contrast to the careful vetting of individual prisoners for infrequently-granted clemency over a number of years, a single act of amnesty will greatly increase the average clemency ‘rate’ over the entire 1975-2009 period, as is evident in the United States’ recent clemency practice;⁴⁸⁹
- The clemency ‘rates’ I calculate are expressed as low-to-high *ranges* rather than as single, precise percentages: this is caused by the availability of contradictory yearly figures for clemency and for executions (adopting the process of data

⁴⁸⁷ Cooper, 107; Davis (2004). No source I have come across discusses in a thematic way the phenomenon of death row ‘volunteers’ in any Southeast Asian country. Notably, in his (US-focused) study, for the sake of simplicity Pridemore chose to assume that every person eventually executed had applied for clemency, or least had an application prepared by a lawyer or family member (at 180). This appears a sensible approach to follow here. See further Chapter Nine, notes 1325-1326 and associated text, on the Southeast Asian context here.

⁴⁸⁸ Acker and Lanier (2000), 204; Palmer, 110.

⁴⁸⁹ See note 494 below, on the emptying of Illinois’ death row by Governor George Ryan in 2003.

‘triangulation’), as noted above. I combine four figures to produce a clemency ‘range’ over a multi-year period:

- 1) the potential *minimum* number of clemency grants;
- 2) the potential *maximum* number of clemency grants;
- 3) the minimum execution total over the same period; and,
- 4) the maximum execution total.

Note here that the ‘minimum’ figure, for both clemency grants and executions, usually only represents the *lowest ‘minimum’ figure given by the range of available sources*. Likewise, the ‘maximum’ figure here is, in fact, *the highest ‘minimum’ figure given by the range of available sources*. This is the inevitable result of the use of unofficial data, in particular NGO-sourced statistics.⁴⁹⁰

Despite these difficulties, incomplete statistics do still enable rough calculations to be made. What I term the jurisdiction’s ‘low-end’ clemency percentage is calculated by comparing the *minimum clemency* total with the *maximum execution* total, and likewise the ‘high-end’ clemency percentage is calculated by comparing the *maximum clemency* total with the *minimum execution* total over the common temporal limits of the available data. A narrower final clemency range here implies that there are fewer discrepancies in the triangulated range of figures for clemency and executions, but whether this comes as a result of increased *accuracy* is uncertain.

⁴⁹⁰ See note 475 above.

- As is clear from Appendices A-D, the annual totals relied upon (for clemency, and for executions) are not always available for the entirety of the period 1975-2009. Although I do not require that complete figures be available in *consecutive* years, I do not consider years in the cumulative total unless *both* execution and clemency figures are available for the year in question. This leads to the unfortunate, yet largely unavoidable result whereby countries' clemency 'rates' are being compared on the basis of data compiled in different sets of years (but all within the 35-year period 1975-2009). It also means that I only include years where clemency totals *are reported as zero*, rather than years where clemency totals are not reported at all;⁴⁹¹
- Accordingly, shorter-term trends where a higher number of clemency grants are made during the period where data *are* available will potentially create what Greenberg and West have termed 'ephemeral shocks [leading] to a single country being misclassified',⁴⁹² in this case misclassified as having a falsely high clemency 'rate'.

After ascertaining each country's clemency 'rate', I am then able to classify that country alongside others in three groups of magnitude: those with 'low' clemency rates (of below 5 percent), those with 'medium' clemency rates (of between 5 and 50 percent) and those with 'high' clemency rates (of above 50 percent). Countries with 'low' rates of clemency only use the measure very sparingly, in what are deemed exceptional cases. Countries

⁴⁹¹ This form of data selection might well artificially inflate the calculated clemency 'rate', if we assume that years without any executions will be reported as 'zero' execution years with more publicity by NGOs such as Amnesty International, as compared with years with 'zero' clemency grants.

⁴⁹² Greenberg and West, 333.

with ‘high’ rates of clemency actually reprieve more prisoners than they execute: it is *execution* that constitutes the unusual measure here, rather than clemency. Between these two extremes come the countries with ‘medium’ rates: although in a majority of cases the sentence of the court is upheld and ordered to be carried out by the executive, clemency still appears to play a significant role in the criminal justice system as an extra layer of appeal against the harshness of a death sentence, or perhaps as a demonstration of political benevolence, as I described in Chapter Three. Importantly, by way of comparison, the post-1976 death penalty practice of the United States⁴⁹³ places that jurisdiction firmly within the ‘medium’ category,⁴⁹⁴ alongside pre-abolition 20th century Britain.⁴⁹⁵ I elaborate further on the significance of these three clemency ‘bands’ in Chapter Nine: Discussion and Conclusion.

⁴⁹³ Capital punishment was suspended in 1972 by the United States Supreme Court, as a result of the *Furman v Georgia* decision declaring the imposition of capital punishment unconstitutional. Capital punishment was subsequently re-instated by the Court in 1976 in *Gregg v Georgia*, on the basis of reformed capital statutes enacted by retentionist states.

⁴⁹⁴ Following *Gregg v Georgia*, between 1977 and 2008 there were 1136 executions carried out in the United States, and 244 prisoners granted clemency for *humanitarian* reasons, i.e. excluding clemency granted only in order to avoid a re-trial or for other procedural reasons (Acker et al, 186), resulting in a clemency ‘rate’ of approximately 18 percent. However, if the 167 death sentences commuted by Illinois Governor George Ryan in a single 2003 executive decree are removed from these statistics (Death Penalty Information Center, ‘Illinois Death Row Inmates Granted Commutation by Governor George Ryan on January 12, 2003’), the national clemency percentage drops to approximately *seven* percent.

During the pre-*Furman* period in the United States, the greatest percentage of death sentences commuted came about during the early to mid-1940s, when 20-25 percent of standing death sentences were commuted by the various state governors (Burnett (2002), 157; Scott, 99; Sarat and Hussain, 1310). Coyne and Entzeroth (at 840) calculate the country-wide clemency rate from 1960-1970 at approximately 44 percent, dropping to around 17 percent during the period 1976-1996 (which is very similar to my calculation above, based on figures provided by Acker et al).

⁴⁹⁵ Potter, 192; Interview with British Academic Expert on the Death Penalty; Interview with London-based Death Penalty Lawyer. The latter interviewee noted that the 50 percent threshold of ‘high’ clemency was certainly reached in some retentionist Commonwealth jurisdictions throughout the twentieth century.

Of the four jurisdictions comprising the current study then, on the basis of calculations using the tables listed in Appendices A-D, I assess the four jurisdictions' clemency 'rates', in ascending order, as:

- Singapore: a 'low' rate of clemency at 1 percent (based on data from 1975-2009);⁴⁹⁶
- Indonesia: a 'medium' rate of clemency at 22 percent to 32 percent (1975-2009);⁴⁹⁷
- Malaysia: a 'medium' rate of clemency at 26 percent to 40 percent (1975-1986; 2000-2008); and,
- Thailand: a 'high' rate of clemency at 91 percent to 92 percent (1975-2008).⁴⁹⁸

Above, actively retentionist Southeast Asia provides examples of each of the three categories of clemency use I have identified – clemency granted at low, medium and high rates. As Carolyn Strange notes in her historical study of clemency and pardons in common-law jurisdictions: 'The most striking aspect of pardoning is that rates of commutation differed between jurisdictions and varied over time within jurisdictions',⁴⁹⁹ a perceptive observation of equal application and importance for today's retentionist Southeast Asian nations.

⁴⁹⁶ Excepting the years 1976-1977 and 1979, for which complete figures are unavailable.

⁴⁹⁷ Excepting the years 1978-1979, for which complete figures are unavailable.

⁴⁹⁸ Excepting the years 1976-1981, 1985, 1988-1989, 1993 and 2006, for which complete figures are unavailable.

⁴⁹⁹ Strange, 9.

Conclusion

As is evident, conducting exploratory research of this type creates many different methodological challenges to do with sources. In particular, the unavailability of vast swathes of death penalty statistics and finalised case reports from official sources in Southeast Asia creates special difficulties in coming to academically rigorous findings. Nevertheless, it should be borne in mind that my research agenda and literature review begins from a very low base, in the sense that I address an understudied issue (clemency)⁵⁰⁰ in an understudied part of the world (Southeast Asia), at least in terms of comparative legal scholarship.⁵⁰¹ I have demonstrated in the current chapter that through a combination of qualitative and quantitative data, archival sources and ‘elite’ interviews, and research conducted at home and abroad, death penalty and clemency data can be compiled in a compelling and persuasive way through the method of ‘triangulation of proof’, so as to provide strong evidential support for the findings on my two research questions I outline in Chapter Nine: Discussion and Conclusion.

During this initial phase of my dissertation, in Chapters One to Four I have established the rationale for conducting a comparative criminal justice study of clemency and pardons in Southeast Asian death penalty cases, have analysed the existing literature on clemency and capital punishment, ascertained how my study fits into this body of research, and in the current chapter described the methodological challenges posed by the collection of qualitative and quantitative data to answer the research questions posed. These four chapters set the scene for a more exhaustive exploration of the death

⁵⁰⁰ Landes and Posner, 62; Kobil (1991), 608-609.

⁵⁰¹ Harding (2002), 47-48, 47 n43; Lindsey (2002), 3.

penalty and clemency practice within each of Singapore, Malaysia, Thailand and Indonesia over the period 1975 to 2009, to which I devote the next four chapters.

Chapter Five - Republic of Singapore

Introduction

During the 1990s and early 2000s the island state of Singapore achieved worldwide notoriety as the most frequent executioner in the world, calculated on a per-capita basis.⁵⁰² The same level of severity is evident in the Singaporean Cabinet's refusal to grant no more than *six* clemency applications,⁵⁰³ amongst in excess of five hundred petitions received since Singapore became a fully independent state in 1965,⁵⁰⁴ making Singapore by far the most frugal jurisdiction in terms of clemency amongst the four retentionist Southeast Asian countries under analysis. Revealingly, one of Singapore's most experienced criminal lawyers, Subhas Anandan, related in his autobiography that the filing of a petition for clemency with the President was usually 'a waste of time' as it was invariably rejected.⁵⁰⁵

What is special about the political, legal and historical characteristics of this highly-commercialised and prosperous city-state that, generally speaking, precludes the use of executive clemency in death penalty cases? This question, together with detailed descriptions of each of the six successful clemency petitions to date are addressed in this chapter. First, in order to provide the relevant background information, I describe the recent history of Singapore's use of the death penalty and granting of clemency. I then

⁵⁰² AI-Index ASA 36/001/2004, 1; Thio (2004a), 215; Hood (2002), 51.

⁵⁰³ Lee (2006), 477.

⁵⁰⁴ See note 533, below.

⁵⁰⁵ Anandan, 90.

move on to list the four factors that, together, explain Singapore's extremely low clemency 'rate'.

Death Penalty and Clemency Practice 1975-2009

Death Sentences and Executions

Hanging was the method of execution favoured by the British administration in colonial Singapore, yet as with neighbouring Malaysia (the country from which Singapore split to form an independent state in 1965), the death penalty has long outlasted both British colonial rule and eventual abolition in the vast majority of European countries.⁵⁰⁶ Since 1975, the death penalty, despite the apparent post-2004 declines in execution rates,⁵⁰⁷ has been an integral and *operational* part of Singapore's criminal justice system. Throughout most of Singapore's modern history, executions have performed a strong deterrence and crime control (i.e. incapacitation/removal) function,⁵⁰⁸ unlike the 'symbolic' function of capital punishment in Asian nations with low rates of executions (such as Japan and Indonesia).⁵⁰⁹ The *Mandatory* Death Penalty largely gives effect to this policy: every defendant convicted of murder, various firearms offences or drug trafficking⁵¹⁰ (in addition to the rarely-prosecuted crimes of piracy and mutiny and the

⁵⁰⁶ Cater; Oehlers and Tarulevicz, 301.

⁵⁰⁷ See Appendix A; Johnson and Zimring (2009), 292.

⁵⁰⁸ Johnson and Zimring (2009), 8, 22, 410-411; Tey, 356.

⁵⁰⁹ Johnson and Zimring (2009), 23.

⁵¹⁰ See Penal Code, s 302 (for murder); Misuse of Drugs Act, s 5-7 and sch 2 (trafficking, manufacturing, import/export in scheduled narcotics); Arms Offences Act, s 4, 4A, 5 (using or attempting to use arms, being an accomplice thereto), and Internal Security Act, s 58(1) (carrying firearms, ammunitions or explosives in a security area).

The MDP for murder was first introduced under British rule in 1883 (see *Yong Vui Kong v Public Prosecutor*, [84]). The MDP for firearms offences has existed since 1960 (pursuant to the *Malaysian* Internal Security Act, largely superseded by the Arms Offences Act in 1973), while the MDP for drug offences was established

recently-enacted MDP crimes of genocide and terrorism)⁵¹¹ *must* be sentenced to death upon conviction. Together, these three crimes (murder, firearms offences and drug trafficking) perceived as most serious by the Singapore Government have provided the vast majority of Singapore's death sentences and executions in recent decades,⁵¹² with drug offences alone leading to around 72-74 percent of executions from 1978 to 2001, based on the limited data available.⁵¹³ In contrast, the remaining larger range of crimes subject to the *discretionary* death penalty have led to few, if any executions during the past 35 years.⁵¹⁴

A rough estimate of the number of executions carried out in the 30 years from 1980 to 2009 (the period for which full statistics are available) is *at least* 484 (the 'low-end minimum' figure), and probably many more: the 'high-end minimum' figure over the same

by the Misuse of Drugs (Amendment) Act 1975, as a response to increased rates of heroin addiction and the 'perceived influence of a decadent western culture' during the Vietnam War period (Ganapathy, 166).

The two original drugs invoking the MDP pursuant to the Misuse of Drugs (Amendment) Act 1975 were heroin (15 grams) and morphine (30 grams). In 1989 cocaine (30 grams), cannabis (500 grams), hashish (200 grams) and opium (1200 grams) were added to the list, followed by cannabis mixture (1000 grams) in 1993 and methamphetamine (250 grams) in 1998 (Phang, 233; AI (1979), 44; AI (1979), 97; Misuse of Drugs (Amendment) Act 1993). The 1993 amendments enabled MDP convictions for the possession of specified drugs for the *purpose* of trafficking, rather than merely the action of trafficking in drugs.

⁵¹¹ Penal Code, s 130B (piracy), s 130E (genocide causing death); Singapore Armed Forces Act, s 15 (mutiny); Terrorism (Suppression of Bombings) Act, s 3(1) (terrorist bombing causing death).

⁵¹² See AI-Index ASA 36/001/2004, 1; Hor (2011), 20-21 and note 514, below.

⁵¹³ See note 637, below.

⁵¹⁴ Discretionary death sentence offences in Singapore consist of the Kidnapping Act, s 3 (kidnapping); Arms Offences Act, s 6 (trafficking in arms); Penal Code, s 121-121A (treason), s 132 (abetment of mutiny), s 194 (perjury intending to lead to a death sentence), s 305 (abetting suicide), s 307 (attempted murder), s 364 (kidnapping to commit murder), s 364A (kidnapping to compel the government), s 396 (gang robbery with murder); Internal Security Act, s 59 (firearms and explosives offences); Singapore Armed Forces Act, s 11 (misconduct in action), s 12 (assisting the enemy), s 39 (offences by officer serving on a vessel). Sections 121 and 121A of the Penal Code, constituting treason, were MDP offences until amendment in 2007.

Hor (2011), 20-21, 20-21 n76 and Kow, 1120-1122, assert that a discretionary death sentence for kidnapping has not been handed down in Singapore since the early 1970s, while only a small number of discretionary death sentences for gang robbery with murder were passed in the 1990s. The majority of the Penal Code offences listed above 'have no record of ever being used' (Hor (2006), 503 n15).

period is 559. This total corresponds to roughly 16+ to 19+ executions per year, although there are significant variations from year to year, with a standard deviation of 21 to 23 over the aforementioned 30-year period.⁵¹⁵ The high rate of executions from 1991 to 1999 (and with Singapore's relatively low population as a city-state, perhaps the global leader on a per-capita basis during this period), compared with the low official total during the 1980s (18 for the entire decade)⁵¹⁶ has been explained by the foremost academic expert on the Singaporean criminal justice system, Professor Michael Hor of the National University of Singapore, as a temporary execution 'bulge' arising as a result of the clearing of a 'backlog' of finalised cases from the 1980s. During the 1980s, the need for two judges to try capital cases in the Supreme Court meant that, for a period, defendants were charged with capital offences more frequently than the Court could dispose of their trials and appeals. A backlog of pending cases gradually built up. From 1992, legislative amendments were made so as to require only one judge to dispose of capital cases, together with the imposition of stricter time limits. Cases could be processed through the system at twice the rate, hence the much higher number of executions during the 1990s.⁵¹⁷ Nevertheless, the stark contrast in execution figures between the 1980s and 1990s has led Professors Johnson and Zimring to speculate whether or not:

⁵¹⁵ Appendix A. Execution totals are unavailable for the years 1976, 1977 and 1979, however there were at least 11 executions recorded by Amnesty International in 1975. In a 2005 interview Singapore's former executioner Darshan Singh revealed he had hanged approximately 850 people since 1959 – an average of 18 per year (Johnson and Zimring (2009), 421).

⁵¹⁶ See Appendix A.

⁵¹⁷ Hor (2004), 115.

The apparent rise in Singapore's execution rate after the 1980s could be an artefact of reporting changes by the government... [perhaps] there was a 'hidden toll of executions' before the 1990s that studies could not capture.⁵¹⁸

While this remains a possibility, it is notable that even *abolitionist* 'elite' interviewees in Singapore remained sceptical over any assertion that misleading statistics may have been provided by the government.⁵¹⁹

Even after taking into account the apparent anomaly in execution rates during the 1990s, developments since 2004 point to a significant reduction in the use of the death penalty,⁵²⁰ probably by design, as the Singapore Government has become sensitive about its international image as 'world execution capital'⁵²¹ and has encouraged the public prosecutor (the Attorney-General of Singapore and his Deputies) to downgrade charges to non-capital offences in a number of cases.⁵²² Certainly, the other potential explanations for substantial drops in executions: a greatly increased number of acquittals, or a reduced incidence of serious crimes, have not arisen at the rates necessary to explain such

⁵¹⁸ Johnson and Zimring (2009), 414; see also Johnson (2013), 53. See also note 515, above.

⁵¹⁹ Singapore's technocratic government has not been known to provide misleading statistics, but may instead 'stonewall' requests for information on sensitive topics (Interview with Singaporean Blogger and Human Rights Activist; Interview with Singaporean NGO Staff #3; Interview with Singaporean Academic Expert and Singaporean NGO Staff).

⁵²⁰ Zimring, Fagan and Johnson, 9; Interview with Singaporean Academic Expert and Singaporean NGO Staff. In this interview the Academic Expert asserted that the 'usual' figure (with no backlog of outstanding cases) might be around 20-30 executions per year.

⁵²¹ 'Singapore, World Execution Capital'; AI-Index ASA 36/001/2004, 1; Interview with Amnesty International Staff #2; Interview with Singaporean Human Rights Lawyer.

⁵²² Hor (2011), 24; Statement by Singaporean Academic Expert; Interview with Singaporean Criminal Defence Lawyer #2. The independent power of public prosecution is vested in the Attorney-General of Singapore, pursuant to art 35(8) of the Constitution of Singapore. Capital cases are generally argued by the Deputy Public Prosecutor, rather than the Attorney-General himself (Interview with Singaporean Human Rights Lawyer).

substantial falls in execution totals.⁵²³ When official execution figures for the preceding decade were finally released by the Singapore Prison Service in 2011,⁵²⁴ ending a multi-year period of government secrecy over death penalty statistics,⁵²⁵ it was apparent that no more than eight executions had been conducted in any of the years 2004 to 2009, at an average of just over six per year,⁵²⁶ a significant fall compared with the 1990s and early 2000s.

However, despite the rising and then falling rate of executions during Singapore's modern history, clemency grants have remained extremely rare, with the large number of executions interspersed by only six confirmed cases of clemency, leaving Singapore's 1975-2009 clemency 'rate' at a frugal 1.0 to 1.2 percent.⁵²⁷ Given the remarkable consistency over time of this apparent 'no-clemency' policy, the most important question to answer in explaining Singapore's low clemency-to-executions ratio is not why executions have increased or declined during different historical eras, but rather why granting Presidential clemency has remained an anathema to the People's Action Party (PAP) Government,⁵²⁸ despite the 1965 Singaporean Constitution's clear mandate for its exercise.⁵²⁹ In the next two sections, I provide further background through descriptions of Singapore's constitutional, legislative and conventional clemency procedures, together

⁵²³ Interview with Singaporean Criminal Defence Lawyer; Hor (2011), 20-23.

⁵²⁴ See Toh.

⁵²⁵ Interview with Singaporean Academic Expert and Singaporean NGO Staff; Zimring, Fagan and Johnson, 26.

⁵²⁶ 'Executions in Singapore'; Hor (2011), 20.

⁵²⁷ See Appendix A. This does not include figures for the years 1976, 1977 and 1979.

⁵²⁸ The PAP has ruled Singapore continuously since 1959 (US Department of State (2011a), 1), and held all the seats in the Parliament from 1968 to 1981 (Silverstein, 93).

⁵²⁹ See Constitution of Singapore, art 22P.

with the six cases that stand as exceptions to the general rule that the law will take its course once a conviction for a capital crime is upheld by Singapore's highest criminal court, the Court of Appeal.

Clemency Procedures in Death Penalty Cases

Singapore's 1965 Constitution empowers the head of state, the President, to grant clemency in death penalty cases, 'on the advice of the Cabinet'⁵³⁰ (numbering 21 ministers in 2009).⁵³¹ In this context on 'advice' means that in a practical sense, pursuant to the Westminster model of government which Singapore inherited from the UK, the Cabinet will collectively make the decision and the President must follow it, as has been confirmed by a recent Court of Appeal judgment.⁵³² Irrespective of whether or not a prisoner asks for clemency, the Cabinet is mandated to consider the possibility of commuting every death sentence confirmed on appeal.⁵³³

The Cabinet will rely on a number of documents in the course of clemency deliberations. First of all, the Singaporean Constitution requires that the Attorney-General (who is not a member of the Cabinet) should have regard to reports written by the trial judge and lead appellate judge in the case, together with the evidence notes from the first-instance trial in making a written recommendation as to whether or not the death sentence should be commuted.⁵³⁴ These four documents are put before the

⁵³⁰ Constitution of Singapore, art 22P. See note 522, above.

⁵³¹ Singapore Government; 'Second Lee Hsien Loong Cabinet'. By contrast, Singapore's original 1959 Cabinet had only nine members ('Our Cabinet Ministers Then and Now – The Old and New Guards of Singapore').

⁵³² *Yong Vui Kong v Attorney-General*, [126], [150], [175], [180]; 'President has no discretion in clemency appeal'; We Believe in Second Chances (2011); Lee (1994), 442-443.

⁵³³ *Yong Vui Kong v Attorney-General*, [82]-[83]; Loh.

⁵³⁴ Constitution of Singapore, art 22P(2); Lee (2006), 472.

Cabinet for consideration as the constitutional ‘clemency materials’,⁵³⁵ and are read in conjunction with the prisoner’s clemency petition, the submission of which through the Prisons Department has become an established practice in capital cases, although it is not a formal constitutional or legislative right accorded to a capital prisoner.⁵³⁶ Singaporean commentators have confirmed that in practice, within Cabinet deliberations on clemency, the Attorney-General’s constitutionally-mandated advice is heavily relied upon.⁵³⁷ The impact that the Cabinet’s decision-making process has on the likelihood of clemency being granted is explored in further detail towards the end of this chapter.

Before 1997, if clemency was granted, a death sentence would be reduced to a 20-year term of imprisonment, during which the petitioner could become eligible for full release after serving two-thirds of the term at roughly 13 years,⁵³⁸ as happened in all six of the cases I describe below. However, since a Court of Appeal ruling in 1997, clemency now results in the substitution of a death sentence with imprisonment for the term of the offender’s natural life, with no prospect of parole.⁵³⁹

Features of Cases where Clemency Was Granted by the Singaporean President

As described earlier, clemency has been granted in only six death penalty cases during the period under study (1975-2009), there being no evidence of any cases in the post-

⁵³⁵ Constitution of Singapore, art 22P(2); *Yong Vui Kong v Attorney-General*, [82].

⁵³⁶ *Yong Vui Kong v Attorney-General*, [114], [135]; Hor (2011), 12.

⁵³⁷ We Believe in Second Chances (2011); Lee (2006), 472, 477; Ghui; Trembat; Interview with Singaporean NGO Staff #3.

⁵³⁸ Othman; Siyuan, 1-2.

⁵³⁹ *Hamsah v Public Prosecutor*, [49]-[70]. This *prospective* decision nonetheless did not prevent the most recent clemency recipient (Mathavakannan Kalimuthu) from successfully arguing in favour of a 20 year term (*Kalimuthu v Attorney-General*; see notes 556-560 below, and associated text).

independence decade 1965-1975, either.⁵⁴⁰ The six cases, in the order clemency was granted, are as follows:

- 1) 1978: Mohamad Kunjo Ramalan, 'a 56-year-old man convicted of murdering a friend during a drunken argument',⁵⁴¹ despite the defences of intoxication and 'sudden fight' being advanced by his lawyers.⁵⁴² A Singaporean academic expert notes that the clemency grant here was partially brought about by a recommendation from the Privy Council in London: Singapore's highest court of appeal until 1994.⁵⁴³ The Privy Council in its judgment referred to the mitigating factors of the case, and moreover the defendant's longer than usual wait on death row in recommending clemency by the Singaporean authorities.⁵⁴⁴
- 2) 1980: Bobby Chung Hua Watt, who 'stabbed a man to death after his sister asked him to help her resolve her marital problems',⁵⁴⁵ constituting an apparently 'spontaneous' murder, or a 'crime of passion'.⁵⁴⁶ Watt was released from prison in 1993.⁵⁴⁷

⁵⁴⁰ HOC Singapore 2009; Ravi, 79.

⁵⁴¹ 'A list of death row inmates in Singapore who were granted clemency'. See note 644, below, on the aftermath of this case.

⁵⁴² *Ramalan v Public Prosecutor*, 132; 'Clemency plea to Sheares by man sentenced to die'.

⁵⁴³ Statement by Singaporean Academic Expert; Lee (2006), 477.

⁵⁴⁴ *Ramalan v Public Prosecutor*, 136.

⁵⁴⁵ 'A list of death row inmates in Singapore who were granted clemency'.

⁵⁴⁶ 'President Grants Clemency to Mum on Death Row'; Statement by Singaporean Academic Expert.

⁵⁴⁷ 'Drug trafficker was given second chance but she blew it'.

3) 1983:⁵⁴⁸ Siti Aminah Jaafar -

the first woman in Singapore to be sentenced to death for drug trafficking in 1978, was also the first drug trafficker to be given clemency in modern Singapore's history. Siti was 18 when convicted, and President Devan Nair's grant of clemency led to a term of life imprisonment, which was later reduced to 20 years.⁵⁴⁹

Jaafar had been convicted 'for abetting her live-in lover in trafficking 43.5g of heroin... Her lover, who was 32, was hanged'.⁵⁵⁰ Further mitigating circumstances may have included being the mother of a two-year-old son at the time of conviction,⁵⁵¹ and the impression that the accused had been 'used' by her lover to carry the drugs.⁵⁵²

4) 1992: Koh Swee Beng, 'convicted of killing a man who assaulted his foster father when he was 22' was granted clemency by President Wee Kim Wee,⁵⁵³ reportedly due to the fact that he had been diagnosed with the AIDS virus in prison;⁵⁵⁴

5) 1992: Sim Ah Cheoh, 50, whose sentence for heroin trafficking was commuted by President Wee Kim Wee to life imprisonment, as she was suffering from terminal

⁵⁴⁸ 'Keep Death Penalty but Allow Leeway'; Alfred. Also reported as being granted in 1982 in 'A list of death row inmates in Singapore who were granted clemency'.

⁵⁴⁹ 'A list of death row inmates in Singapore who were granted clemency'.

⁵⁵⁰ 'Keep Death Penalty but Allow Leeway'; Vijayan (2007).

⁵⁵¹ Alfred.

⁵⁵² 'President Grants Clemency to Mum on Death Row'.

⁵⁵³ 'A list of death row inmates in Singapore who were granted clemency'.

⁵⁵⁴ Statement by Singaporean Academic Expert. The defence of provocation was also raised at trial (*Public Prosecutor v Koh Swee Beng*, 410).

cancer. Sim was released from prison to allow her to 'spend the last few months of her life with her sons' and died six weeks later;⁵⁵⁵

- 6) 1998: '19-year-old Mathavakannan Kalimuthu, who killed a 25-year-old gangster in a fight',⁵⁵⁶ in the company of two other men.⁵⁵⁷ Kalimuthu pleaded that 'it was the victim who had attacked and injured him first, and that he had not planned for [the victim] to die. He added that he was deeply remorseful... His petition was supported by five letters, including one from his mother and another from her employer.'⁵⁵⁸ Two Singaporean interviewees also speculated that Kalimuthu may have played a lesser role in the attack, compared with his co-accused.⁵⁵⁹ The two accomplices were hanged later in the same year.⁵⁶⁰

Accordingly, although Cabinet deliberations and the official reasons for grants of clemency are kept secret (even from the petitioners and their lawyers),⁵⁶¹ it is possible to deduce that commutations have historically been granted in selected cases of:

- terminal illness;⁵⁶²
- youth or first offence;⁵⁶³

⁵⁵⁵ Vijayan (2007); 'A list of death row inmates in Singapore who were granted clemency'; 'Prisoner Suffering From Cancer Granted Clemency.'

⁵⁵⁶ 'A list of death row inmates in Singapore who were granted clemency'.

⁵⁵⁷ 'Keep Death Penalty but Allow Leeway'.

⁵⁵⁸ Boon.

⁵⁵⁹ Statement by Singaporean Academic Expert; Interview with Singaporean Criminal Defence Lawyer #2.

⁵⁶⁰ See AI-Index ASA 36/03/98.

⁵⁶¹ Interview with Singaporean Criminal Defence Lawyer #2; 'Keep death penalty but allow leeway'; AI-Index ASA 36/001/2004, 16.

⁵⁶² Vijayan (2007). A prominent interviewee stated that 'my own view is that terminal illness is the safest bet for clemency... I am almost [certain] that no-one who was known to be terminally ill has been executed' (Statement by Singaporean Academic Expert).

- a murder committed in spontaneous or provoked circumstances,⁵⁶⁴ or,
- the accused being an accomplice, rather than the primary offender.⁵⁶⁵

A senior officer in the Attorney-General's Department has also reported that over the course of Singapore's history, clemency has been granted in death penalty cases for reasons of 'mercy' (i.e. compassionate, humanitarian circumstances), and never as rectification of error by the judiciary or in response to the political dictates of western nations.⁵⁶⁶

One further possibility is that defendants have been granted clemency after cooperating with police and prosecutors in securing the convictions of their accomplices in the crime. Two of those granted clemency since 1965 (Siti Aminah Jaafar and Mathavakannan Kalimuthu) may have done so, based upon the known facts of their respective cases. The possibility of a full pardon or the reduction of a death sentence to

⁵⁶³ Statement by Singaporean Academic Expert; Interview with Singaporean Criminal Defence Lawyer #2. In Singapore, no prisoner under 18 years of age at the time of the offence may be executed (Criminal Procedure Code, s 314). Juveniles who would be sentenced to death for the same crime are generally detained for 10-12 years, at the pleasure of the President (Anandan, 205).

In relation to the cases of Jaafar and Kalimuthu, 'it is not known if age was a factor in the deliberations' ('Keep Death Penalty but Allow Leeway'). The same article reports the 1995 execution of Tong Chieng Mun, a female drug trafficker who was only just past her 18th birthday at the time of the offence. It is possible she may not have been granted clemency as she was carrying 1.5kg of high-grade heroin, with a street value of over S\$2 million. The Singapore Government has confirmed that around five percent of prisoners executed between 1993 and 2003 were aged between 18 and 20 years at the time of arrest (Ministry of Home Affairs (Singapore, 2004), [16]), which suggests that roughly 17 such young prisoners were executed during that decade (see Appendix A).

⁵⁶⁴ Statement by Singaporean Academic Expert. However, here the Interviewee cautions against a prediction of clemency in future cases of this type, as 'almost all killings in Singapore are crimes of passion – premeditated killing is extremely rare... Indeed there have probably been cases with facts like Mohamad Kunjo [Ramalan] and Bobby Chung [Hua Watt] where [clemency] was not granted' (Statement by Singaporean Academic Expert).

⁵⁶⁵ Interview with Singaporean Criminal Defence Lawyer #2. However, see also Chapter Four, note 435, on the dangers of drawing conclusions from too small a number of cases.

⁵⁶⁶ Lee (2006), 477-479.

life imprisonment is explicitly provided for in the Singaporean Constitution in these circumstances:

The President, as occasion shall arise, may, on the advice of the Cabinet... grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one.⁵⁶⁷

Notably, no other specific ground justifying the commutation or remission of a sentence is listed in Article 22P. One interviewee, however, argued that this constitutionally-sanctioned ground for clemency may have now become redundant, due to the short time-span of recent cases from arrest to execution date.⁵⁶⁸ As I explain below, testifying against co-defendants is now taken into account favourably at the *prosecutorial discretion* stage, rather than at the stage of clemency deliberations. However, for the two aforementioned instances of clemency, it remains an unverified possibility.

Explaining the Low Clemency Rate in Singapore

Above, I described the cases of the six defendants who have been spared from the execution of the death penalty *at the clemency phase* since 1965, together with the procedures that guide the Cabinet deliberations on clemency and pardons. Through archival research and ‘elite’ interviews, I have assessed four factors that, together, explain why capital clemency has remained so rare throughout Singapore’s independent history, irrespective of fluctuating rates of executions. Two of the possible explanations (rule of law rhetoric and deterrence in drug cases) reflect criminal justice philosophies long-

⁵⁶⁷ Constitution of Singapore, art 22P(1)(a).

⁵⁶⁸ Interview with Amnesty International Staff #2.

favoured by the PAP Government; one relates to the Cabinet's decision-making processes described above, and the remaining explanation concerns the resulting 'outlet' for mercy in death penalty cases: prosecutorial discretion. Below, I elaborate on the four possible explanations.

The Rule of Law and the Singapore 'Brand Name'

Members of Singapore's judiciary have observed that:

Singapore is a nation which is based wholly on the Rule of Law. It is clear and practical laws and the effective observance and enforcement of these laws which provide the foundation for our economic and social development...

and significantly, in this context,

The notion of a subjective or unfettered discretion is contrary to the rule of law.⁵⁶⁹

In the present context, the 'rule of law' embodies the notion that laws are applied equally to all citizens, all of the time,⁵⁷⁰ and that executive discretion should not be allowed to pervert judicial decisions that have established individual rights.⁵⁷¹ During the long period in which the PAP has ruled Singaporean politics, the purist philosophical position that defendants should be treated with absolute equality has been consistently applied in the

⁵⁶⁹ Silverstein, 77, 80, quoting first former Singapore Chief Justice Yong Pung How, and second the landmark 1988 Court of Appeal decision in *Chng Suan Tze v Minister of Home Affairs*, dealing with administrative review of detention without trial under the Internal Security Act. Chan Sek Keong CJ related this principle to the Presidential clemency power in *Yong Vui Kong v Attorney-General*, [77].

⁵⁷⁰ Nygh and Butt, 387.

⁵⁷¹ Zee, 38-39.

criminal justice context.⁵⁷² As the former long-serving Minister for Foreign Affairs Shunmugan Jayakumar observed in his memoirs, in the context of the enforcement of the MDP:

the integrity of our legal system and the standing of our Judiciary *are among the hard-earned assets of the Singapore brand name*. We do not jettison them for transient political convenience. The *law must take its course* and we just have to be prepared for any fallout.⁵⁷³

Significantly, an award of clemency in less than absolutely compelling circumstances would be regarded as creating an unwelcome ‘exception’ to the equal application of the law to capital defendants. As Dr Teo Ho Pin, Chairman of the Government Parliamentary Committee for Home Affairs and Law, stated in 2007: ‘I do not think that we should practise the King’s pardon approach as in other countries which can be *quite ad hoc and arbitrary*.’⁵⁷⁴ With such principles in mind, the Singapore Government takes pride in portraying the image that every convicted capital prisoner is treated equally in the clemency process, whether foreign or Singaporean,⁵⁷⁵ young or old,⁵⁷⁶ man or woman,⁵⁷⁷

⁵⁷² Interview with London-based Death Penalty Lawyer.

⁵⁷³ Jayakumar, 153, emphasis added. See also Silverstein, 73, for similar views expressed by Singapore’s long-serving Prime Minister Lee Kuan Yew.

⁵⁷⁴ Vijayan (2007), emphasis added.

⁵⁷⁵ Shadrake (2011b), 78; see note 586, below. For example, in 1994 S. Jayakumar stated that any grant of clemency made to a foreigner:

will be a serious breach in our battle to fight drug traffickers. All drug syndicates will start recruiting traffickers from countries opposed to [the] capital penalty once they know we will spare them. This is unacceptable. (Ngoo; see also note 573 and associated text, above)

⁵⁷⁶ Hor (2011), 10; see also note 563, above.

For example, in 2011 Minister for Law, K. Shanmugam, stated that if clemency were extended to a young drug trafficker: ‘drug lords would see it as a sign that young traffickers will be spared and would then use more of them as drug mules’ (Shadrake (2011a), 7-8).

well-known or not⁵⁷⁸ – the death sentence is upheld by the Cabinet in the vast majority of cases.

In this context, generating particular international attention is the number of *foreign nationals* put to death in Singapore, mostly for drug offences. Amnesty International data suggests that around 50 percent of executions from 1993 to 2003 were of foreign nationals,⁵⁷⁹ while the Singapore Government has admitted to a figure of 36 percent over this period,⁵⁸⁰ and up to 50 percent of drug traffickers (only) from 1975 to 1994.⁵⁸¹ Most of the foreigners executed come from neighbouring Southeast Asian nations,⁵⁸² however a number of westerners have also been executed in recent years.⁵⁸³ Shadrake has quoted former Foreign Minister Jayakumar giving justification for the President's failure to award clemency to a single foreign national over the course of independent Singapore's history:

⁵⁷⁷ Again, in a 2010 speech K. Shanmugam emphasised the impartiality of Singapore's application of the death penalty. A grant of clemency would amount to:

sending a signal to all the drug barons out there: Just make sure you choose a victim who is young, *or a mother of a young child*, and use them as the people to carry the drugs into Singapore (HOC Singapore 2010, emphasis added).

⁵⁷⁸ See note 585, below.

⁵⁷⁹ AI-Index ASA 36/001/2004, 7.

⁵⁸⁰ Ministry of Home Affairs (Singapore) (2004); Johnson and Zimring (2009), 416-417.

⁵⁸¹ Ngoo; 'Singapore delays hanging of HK drug offender'; Jayakumar, 150.

⁵⁸² 'Singapore, World Execution Capital'; Oehlers and Tarulevicz, 303.

⁵⁸³ Markham and Phillips; Fernandez; 'Singapore premier says West coddles citizens'.

[Jayakumar] said that granting clemency on the grounds that capital punishment was [an] anathema to the country of origin of an offender would undermine Singapore's integrity and *reputation for impartial enforcement of the law*.⁵⁸⁴

This is the international image that Singapore has sought to portray over the years. Neither widespread public support for death row prisoners,⁵⁸⁵ diplomatic pressure from foreign governments,⁵⁸⁶ nor vigorous campaigning from NGOs⁵⁸⁷ have worked to produce clemency grants for foreigners or Singaporeans, in the past. It appears that the Singaporean Cabinet relies solely on its own evaluation of the case in hand when deciding clemency appeals,⁵⁸⁸ apparently impervious to external political pressure *at the clemency phase*, which has been considered an 'interference in the administration of justice'.⁵⁸⁹ However, as I describe in the following section, the criminal justice system in Singapore is not entirely without mercy for defendants convicted and mandatorily sentenced to death: selective leniency in response to nominally extraneous factors such as foreign pressure has instead been exercised at the *prosecutorial discretion* stage, rather than at the executive clemency stage of capital cases.

⁵⁸⁴ Shadrake (2011b), 78, emphasis added. See also Lee (2006), 477-479.

⁵⁸⁵ See, for example, Anandan, 166, and Johnson and Zimring (2009), 417 n13 and n15.

⁵⁸⁶ See, for example, HOC Singapore 2004; AI-Index ASA 36/001/2004, 7, 11; HOC Singapore 2005.

⁵⁸⁷ See, for example, HOC Singapore 2006; Interview with Amnesty International Staff #2.

⁵⁸⁸ AI-Index ASA 36/001/2004, 16, quoting former Prime Minister Goh Chok Tong in 2003.

⁵⁸⁹ AI-Index ASA 36/001/2004, 7; Interview with Australian Academic Expert on Indonesia #3.

As described above, the MDP is imposed for drug trafficking, murder and firearms offences in Singapore: by far the three most numerous capital crimes. The Singapore Government explicitly and implicitly invokes three primary justifications for its retention of *mandatory* capital punishment for these crimes, despite evolving international human rights standards questioning the legality of such a sentence under customary international law.⁵⁹⁰ These three justifications are deterrence, retribution, and maintaining consistency of political policies.⁵⁹¹ Regarding the latter, given PAP political leaders' long history of strong statements in support of the MDP in domestic politics and international forums such as the UN,⁵⁹² arguably 'the Singapore government [has become] trapped by its own rhetoric',⁵⁹³ and cannot abolish these laws without creating political liabilities.⁵⁹⁴

On the justification of marginal deterrence (i.e. the purported increase in deterrent value between a *discretionary* death penalty and a stricter MDP), Professor Hor has observed that:

⁵⁹⁰ See Hood and Hoyle (2008), 280-284; *Yong Vui Kong v Public Prosecutor*, [43], [95]-[96]; McDermott, 43-46 and Hor (2004), 110.

⁵⁹¹ Hor (2013).

⁵⁹² See, for example, Thio (2004b), 66-67; 'Singapore Defends Death Penalty in First Rights Report to UN'; UN Doc A/HRC/8/3/Add.1; Kuppusamy (3/12/2007); Deen (1998); Deen (2007); 'Row at UN over call by EU for moratorium on death penalty'; Death Penalty Worldwide: Singapore.

⁵⁹³ Au (15/11/11); Interview with Founder of a Singaporean NGO; Hor (2011), 8.

⁵⁹⁴ However, a groundbreaking development in Singaporean death penalty practice occurred in July 2012, when the government announced that it was to reform the MDP for drug trafficking and murder offences, in order to curtail its application in particular cases. For murder, only homicide committed *with an intention to kill* is now subject to the MDP, with the other enumerated legal definitions of murder now attracting the discretionary death sentence (Penal Code (Amendment) Act 2012, s 2; Shanmugam, [17]; We Believe in Second Chances (2012)). For drug trafficking, the MDP will no longer apply if the defendant can prove that he or she was simply a courier in the trafficking operation, and that 'substantive assistance' is given to the authorities in an attempt to apprehend the drug 'kingpins', or if he or she possessed a mental disability at the time of the offence (Misuse of Drugs (Amendment) Act 2012, s 14; 'Parliament passes Misuse of Drugs (Amendment) Bill'; We Believe in Second Chances (2012)).

the attraction of a mandatory penalty to retentionist jurisdictions like Singapore is simple – if the purpose of the death penalty is maximum deterrence, then to make the penalty discretionary [at the judicial stage] would be likely to *dilute the expected deterrence*.⁵⁹⁵

I will return to the purported deterrent value of the MDP in the next section, on drug policy, where the necessity of the MDP has been most fiercely defended by the Singapore Government. Third and finally, from a purely retributive point of view, the mandatory death sentence is also intended to signify publicly that a crime is considered so serious that forgiveness is simply not an option, irrespective of the circumstances.⁵⁹⁶ Ledewitz and Staples proclaim that, in a criminal justice system such as Singapore's:

Commutation is never deserved because the mandatory penalty dictates that death is deserved... The legal system has determined that such inmates deserve to die for what they did.⁵⁹⁷

In light of these three factors underpinning legislative policy on the death penalty, the publicly-reported use of lenient discretion to mitigate punishment here would, in the eyes of the PAP Government, have the same compromising result irrespective of whether it were employed by the *judiciary* (i.e. in sentencing) or later by the *executive* (i.e. in sentence *administration*). The purported criminological and political benefits of retaining

⁵⁹⁵ Hor (2004), 110, emphasis added. Moreover, Lee Kuan Yew has, in the past, articulated the fear that judges would not make use of discretionary death penalties if they were given the option to choose an appropriate sentence (Au (21/8/10)).

⁵⁹⁶ See Ministry of Home Affairs (Singapore) (2004), [3].

⁵⁹⁷ Ledewitz and Staples, 230.

the MDP in Singapore strongly depend on very few *public exceptions* being made to the enforcement of death penalty laws.⁵⁹⁸

However, in this context it is notable that not all offenders who are arrested for the commission of capital crimes in Singapore end up being executed. In Singapore and in other retentionist jurisdictions, quietly-made discretionary decisions at the ‘front end’ of the criminal justice system (i.e. by prosecutors, and during police investigations) will have significant influence over the prospects for more public discretionary decisions at the ‘back end’ of the system (i.e. clemency, pardons, and the carrying out of executions).⁵⁹⁹ Due to the MDP being imposed in the vast majority of Singaporean capital cases, any mitigating circumstances should, in theory, be taken into account at the stage of clemency appeals,⁶⁰⁰ although in Singapore recent evidence instead points to *prosecutorial discretion* being the preferred means to save certain defendants from the imposition and execution of a death sentence.⁶⁰¹

In addition to the case-specific problems created by the MDP, after the adverse international attention brought to bear on Singapore following its labelling as ‘world execution capital’ and ‘a theme park with the death sentence’ during the 1990s and

⁵⁹⁸ Hor (2011), 10.

⁵⁹⁹ Lim and Yong; Johnson and Zimring (2009), 309; Han (2010).

⁶⁰⁰ Ho (2005b); Statement by Former Singaporean Politician.

⁶⁰¹ Statement by Singaporean Academic Expert; Lim and Yong; Interview with British Academic Expert on the Death Penalty; Lee (2006), 480. Han (2010) also mentions decisions by police during the investigatory period to drop charges.

A senior criminal lawyer observed that the reduction of capital charges to non-capital charges has taken place far more often since the retirement of Attorney-General Tan Boon Teik (1969-1992) (Interview with Singaporean Criminal Defence Lawyer #2).

2000s,⁶⁰² national leaders seeking to reduce the number of judicial executions could not afford to be seen to bow to international opinion by suddenly increasing the use of executive clemency, given the ongoing ‘rule of law’ political rhetoric described earlier.⁶⁰³

As Johnson and Zimring acknowledge,

For all of their bluster in the international community – “We are Asian! We are sovereign! We will do what we want!” – Singapore’s political elites are highly sensitive to foreign criticism.⁶⁰⁴

Avoiding executions by proffering non-capital charges (or, in a minority of cases, diversion to detention without trial)⁶⁰⁵ has been the acceptable, face-saving solution devised by the

⁶⁰² ‘Singapore, World Execution Capital’; Clammer, 142; Au (15/11/11); Interview with Amnesty International Staff #2.

⁶⁰³ Interview with Singaporean NGO Staff; Hor (2006), 539.

⁶⁰⁴ Johnson and Zimring (2009), 419; Interview with Amnesty International Hong Kong Staff. Two interviewees add that members of the Singapore Government have, in the past, publicly asserted that they have little regard for western criticism, but have subsequently taken ‘private steps that demonstrate they are actually concerned’ (Interview with Singaporean Academic Expert and Singaporean NGO Staff).

⁶⁰⁵ Detention without trial pursuant to the Internal Security Act (ISA) s 8(1), that Singapore inherited from Malaysia, had been used in Singapore since the aftermath of the Malayan Communist Emergency in order to detain leftist political opponents and suspected communists (Jacobs; Quah 303-304; Tremewan, 206; US Department of State (2011a), 9). Moreover, the Criminal Law (Temporary Provisions) Act, s 30, (CLTP Act) was also used throughout Singapore’s early independent history to detain members of organised crime groups (Ghows, 155; Interview with Singaporean Human Rights Lawyer). From the 1980s however, drug-trafficking suspects have also been detained for renewable one-year periods pursuant to the CLTP Act (Freedom House (2002a); Tremewan, 200; Interview with Singaporean Human Rights Lawyer; ‘366 Criminal Law detentions in five years’), together with terrorism suspects under the ISA (Lee (2012), 6; US Department of State (2011a), 4-5). The Misuse of Drugs Act, s 34(5) also allows the detention of drug addicts in rehabilitation centres for up to three years.

In some cases where the MDP might otherwise apply but where a case exhibits mitigating circumstances, administrative detention enables the Singapore Government to control the criminal threat without attracting even greater international scrutiny for adding to its total of judicial executions. However, it is unlikely that the diversion of cases away from prosecution to administrative detention is carried out in Singapore on such a scale as is conducted in Malaysia (as I describe in Chapter Six: Malaysia). The main cases relevant to preventive detention in Singapore are those where there is insufficient evidence to conduct a prosecution (Interview with Singaporean Human Rights Lawyer; ‘366 Criminal Law detentions in five years’; Erlanger), hence administrative detention would have little practical impact on the clemency-to-execution ratio.

Singaporean political establishment. As Supreme Court Justice Lee Seiu Kin and the Attorney-General's Chambers both have claimed, the primary function of public prosecutors in Singapore is not to secure criminal convictions, but instead to serve the public interest.⁶⁰⁶ During the 2000s, this public interest was served by reducing the number of judicial executions through prosecutorial discretion, in order to ward off international criticism.⁶⁰⁷

Above, I have described the way in which mitigating circumstances which justify a non-capital charge may be considered by public prosecutors in Singapore – mitigating factors which may have been given particularly close attention during the past 10 years, as the government has also sought to reduce the number of judicial executions for policy reasons.⁶⁰⁸ How does the exercise of prosecutorial discretion in death penalty cases work in practice? Instead of consideration by judges during judicial appeals or by the Cabinet during clemency deliberations, any evidentiary shortcomings,⁶⁰⁹ together with mitigating circumstances that justify a lesser punishment such as the relative youth (18-21 years) or

⁶⁰⁶ Lee (2006), 469; 'Public prosecutorial discretion exercised carefully'. Here, Public Prosecutors in Singapore 'work together with the Executive in the pursuit of legitimate governmental aims' (Hor (2006), 510).

⁶⁰⁷ Au (21/5/11); Au (15/11/11).

⁶⁰⁸ As noted earlier, a leading criminal lawyer observed that it had become more common for the Attorney-General to reduce capital charges from around 1992 (Interview with Singaporean Criminal Defence Lawyer #2). It may or may not be a coincidence that the last time a drug trafficker was granted clemency in Singapore was in 1992. The last clemency grant in a murder case arose in 1998, and there remains a possibility that an increasing use of prosecutorial discretion throughout the 1990s and 2000s has marginalised executive clemency even more so during the past 20 years.

⁶⁰⁹ 'Public prosecutorial discretion exercised carefully'; *Ravinthran v Attorney-General*, [24], [52]. Evidentiary shortcomings and possible defences are generally taken into account at the prosecutor's discretion stage, rather than at the adjudication and sentencing stage, where there are very few acquittals. As Professor Hor notes, in Singapore 'an acquittal is analogous to judicial disagreement with an executive decision as to guilt. Thus, judicial disagreement with the executive is rare' (Hor (2002), 507).

minimal criminal record of the offender,⁶¹⁰ mental impairment,⁶¹¹ testifying against co-offenders,⁶¹² other cooperation with the police,⁶¹³ favourable intelligence reports on the offender from Singapore's Central Narcotics Board,⁶¹⁴ or most controversially the offender's nationality (if he or she is from an abolitionist country or a powerful trading partner)⁶¹⁵ are instead taken into account during the prosecutor's consideration of the case, behind closed doors. Following the conclusion of this process, defendants whose cases have been assessed by public prosecutors as still deserving of capital prosecution will not, for the vast majority of petitioners, be able to find extenuating circumstances to present before the Cabinet for clemency that have not already been considered by prosecutors.⁶¹⁶

On the specific mechanics of charge reduction, the Attorney-General of Singapore and his Deputy Prosecutors are known to have, in select cases, reduced MDP murder charges to those of non-capital 'culpable homicide' (equivalent to manslaughter under Singaporean law), if they could classify the case as falling within one of the seven

⁶¹⁰ Statement by Singaporean Academic Expert; Interview with Singaporean Criminal Defence Lawyer; 'Yong Vui Kong gets to see his next birthday'.

⁶¹¹ Statement by Singaporean Academic Expert.

⁶¹² Lum; *Ravinthran v Attorney-General*, [52], [78]. Here, the ability to act as an informant or witness against co-offenders or members of a larger criminal enterprise may have evolved from a constitutionally-sanctioned ground for a grant of clemency (see note 568 and associated text, above), to become another factor taken into account by the *prosecutor* in determining the appropriate charge.

⁶¹³ Hor (2013).

⁶¹⁴ Interview with Singaporean Criminal Defence Lawyer #2.

⁶¹⁵ MARUAH, [6]; Shadrake (2011a), 67; Shadrake (2011b), 69; see also Au (15/11/11)). Former Foreign Minister S. Jayakumar had previously denied that Singapore uses prosecutorial discretion in this manner (Jayakumar, 152-153).

⁶¹⁶ See also note 670, below, on relevant mitigating factors that arise after arrest.

statutory exceptions to capital murder, even if the *real* reasons for reducing the charge fell outside the legislation (as suggested above):⁶¹⁷

- provocation;
- defence of property;
- exceeding powers of law enforcement;
- sudden fight;
- assisting suicide;
- infanticide; and,
- abnormality of mind.⁶¹⁸

Accordingly, Hor considers that the ‘death penalty for murder is only mandatory in so far as the *courts* are concerned’,⁶¹⁹ with the common practice being that defence lawyers write to the prosecutor after the preliminary hearing, in order to make representations to amend the charge,⁶²⁰ which may take place at any stage up to the eve of the trial.⁶²¹

Moreover, the artificial interference of prosecutorial discretion in potential MDP cases is indicated by the so-called ‘14.99 manoeuvre’, whereby the net weight of illegal drugs that an accused trafficker is found to be carrying is artificially reduced to an amount fractionally below the capital threshold - 15 grams or 30 grams for pure heroin and

⁶¹⁷ Hor (2006), 513-514, 533: tellingly, prosecutorial discretion has been exercised ‘in situations where murder would have been proven without much of a problem – presumably because of *overriding* mitigating circumstances’ (emphasis added).

⁶¹⁸ Penal Code, s 300. The maximum punishment for culpable homicide is life imprisonment (s 304).

⁶¹⁹ Hor (2006), 514.

⁶²⁰ Interview with Singaporean Criminal Defence Lawyer; Hor (2006), 513.

⁶²¹ Interview with Singaporean Criminal Defence Lawyer #2.

cocaine, respectively, or from 500 grams to 499 grams for marijuana.⁶²² Unlike the downgrading of murder charges, these reductions appear to have been *unilaterally* made by prosecutors,⁶²³ on the basis of the policy factors and mitigating circumstances described above.

In summary, by reducing capital charges to those that attract lesser penalties than death, the Singaporean Executive (in the Attorney-General's guise as Public Prosecutor) has been able to achieve a number of political and criminological aims. Compelling mitigating circumstances can be considered on a case-by-case basis, without outwardly compromising the marginal deterrence value of the MDP.⁶²⁴ Moreover, the annual number of judicial executions can be stabilised at a level that will attract far less international criticism, without abolishing the MDP entirely, which would run counter to the PAP's history of consistently strong and vocal support for the death penalty on the basis of safeguarding Singaporean citizens and preventing social disorder.⁶²⁵ While, as with clemency decisions, the official reasons for the downgrading of capital charges are not normally revealed to the public,⁶²⁶ Singapore's significant drop in judicial executions after 2004 (without a commensurate drop in the incidence of capital crimes or an increase in acquittals in capital cases), in addition to the '14.99 manoeuvre' witnessed in narcotics

⁶²² Tey, 317, 317 n15; Lum; Hor (2011), 23; Shadrake (2011b), 143; Au (15/11/11). See Hor (2006), 534 n114 for examples. The Singapore Court of Appeal has stated in a recent case (*Ravinthran v Attorney-General*) that in circumstances such as these:

the Prosecution *is not denying any scientific fact*, but is instead simply *reducing the quantity of drugs specified in the charge* against one offender in order to give effect to its decision to charge that offender differently from his co-offender [at [65], emphasis added].

⁶²³ Interview with Singaporean Criminal Defence Lawyer.

⁶²⁴ See Ministry of Law (Singapore).

⁶²⁵ See notes 593-594, above.

⁶²⁶ Lum; 'Public prosecutorial discretion exercised carefully'.

cases both provide compelling evidence that prosecutors have utilised their discretion to be lenient in a large number of potential capital cases during the past ten years (if not beforehand), thereby sidelining the executive clemency process as a means of halting executions for humanitarian or policy reasons.⁶²⁷

Drug Trafficking Policy: Maximising Deterrence of a 'Social Evil'

The Singapore Government's strong rhetoric against narcotics, and the number of executions of drug traffickers which have occurred since the institution of the MDP for drug offences in 1975 justifies consideration of the government's policy towards drug crime provides an additional explanation for Singapore's historically low clemency 'rate'.⁶²⁸ Drug trafficking is seen to amount to a kind of mass 'sabotage' of national economic productivity,⁶²⁹ and has been considered by the government as a more serious crime than domestic murder,⁶³⁰ or even serial killing,⁶³¹ due to its perceived implications for the long-term security of the state.⁶³² As Clammer notes, in Singapore:

⁶²⁷ See note 608, above, on the likelihood of the increasing importance of prosecutorial discretion in Singaporean capital cases.

⁶²⁸ In Chapter Six: Malaysia, I also consider the Mahathir Government's drug policy from 1983-1994 as a separate explanatory factor for low clemency rates, given the virulence of the Malaysian government's rhetoric against drug trafficking during that period.

⁶²⁹ Johnson and Zimring (2009), 415; Hor (2004), 109 n31; McDermott, 51.

⁶³⁰ Zimring, Fagan and Johnson, 25; Jayakumar (1989); McDermott, 51.

⁶³¹ AI-Index ASA 36/001/2004, 12.

⁶³² Hor (2004), 108 n30; Phang, 233-234.

crime is not just an assault on private property or the person, but reflects something deeper – a pollution or cancer are terms often heard locally – which like a germ or virus must be stamped out before it begins to infect even wider ranges of the social order... If crime in general is paradigmatic of social disorder in Singapore, drug offences are somehow the centre of that paradigm.⁶³³

Singapore likes to view itself as particularly vulnerable to drug trafficking syndicates, owing to its 'small size and location near the Golden Triangle'.⁶³⁴ However, while all four Southeast Asian nations under analysis use the same kind of justifications to retain the death penalty for drug trafficking, at least since 1990 Singapore has been 'singular in its willingness to carry out the threat [of execution]'.⁶³⁵ According to Amnesty International, roughly 70 percent of executions between 1991 and 2000 were of drug traffickers,⁶³⁶ with the combined set of available sources that discriminate between executions for different capital crimes likewise pointing to a range of 72 to 74 percent over period 1978 to 2001.⁶³⁷ This is, of course, one reason for the high proportion of foreigners executed – many are drug 'mules' caught attempting to smuggle narcotics into or out of Singapore from neighbouring Southeast Asian countries.⁶³⁸

⁶³³ Clammer, 142; Interview with Australian Academic Expert on Indonesia #4.

⁶³⁴ Ministry of Home Affairs (Singapore, 2004); Kow, 1116.

⁶³⁵ Johnson and Zimring (2009), 414-415.

⁶³⁶ AI-Index ASA 36/001/2004, 6; see also Zimring, Fagan and Johnson, 25.

⁶³⁷ A more inexact range for the period 1978 to 2009 is *58 to 70 percent* of executions for drug offences. This latter figure excludes the years 1979 and 2004-2006, for which *crime-specific* execution totals are unavailable. The drug trafficking-specific statistical sources relied upon in establishing this figure and the one provided in the text were 'Capital Punishment in Singapore'; AI (1979), 44-45; Tremewan, 221, Lyn and Vijayan (2005). See Appendix A for overall totals.

⁶³⁸ Johnson and Zimring (2009), 416; 'Singapore, World Execution Capital'.

It has long been the Singaporean political establishment's view that a rational 'calculus' is being made by drug traffickers, irrespective of their seniority within drug distribution networks. Traffickers are thought to weigh up the risk of arrest, together with the severity of punishment, against the financial rewards for importing or exporting narcotics.⁶³⁹ Accordingly, maintaining the 'purity' of deterrence against a crime regarded not only as the most serious criminal problem faced by Singapore's population, but also an offence the incidence of which can be, and has been, readily reduced by the *threat of severe punishment* (as opposed to 'spontaneous' or 'provoked' violent offences, against which general deterrence is not seen to be equally effective)⁶⁴⁰ forms part of the explanation for retention of the *mandatory* death penalty, and moreover the very infrequent grants of clemency in drug trafficking cases throughout Singapore's history.⁶⁴¹

As Professor Hor explains:

⁶³⁹ Interview with London-based Death Penalty Lawyer; Ministry of Law (Singapore); Hor (2006), 522; McDermott, 51.

⁶⁴⁰ Ministry of Law (Singapore); Kow, 1116; McDermott, 51; Hor (2006), 518 n64, 522.

Murder cases in Singapore consist primarily of 'crimes of passion', unable to be substantially reduced in number through deterrence (Statement by Singaporean Academic Expert; Hor (2006), 504; Interview with Singaporean Criminal Defence Lawyer). The MDP for murder is retained for historical reasons, and as *retribution* for killing (Hor (2006), 503-505; Interview with Singaporean Academic Expert and Singaporean NGO Staff; *Yong Vui Kong v Public Prosecutor*, [84]).

Firearms offences, constituting the other major category of capital crime in Singapore, *are* thought to be minimised through capital deterrence, however, the number of such cases is much smaller in comparison to murder and drug trafficking (Interview with Singaporean Criminal Defence Lawyer; Interview with Singaporean Academic Expert and Singaporean NGO Staff; Shanmugam, [19]), leaving little room for firearms cases to affect Singapore's prevailing clemency 'rate'. By illustration, in the decade 1991-2000, during Singapore's period as the world's highest per-capita executioner, only *eight* executions (just over two percent of the total) were carried out for firearm offences ('Capital Punishment in Singapore').

⁶⁴¹ Interview with London-based Death Penalty Lawyer; Interview with Singaporean Human Rights Lawyer; 'Parliament passes Misuse of Drugs (Amendment) Bill'; *Ong Ah Chuan v Public Prosecutor*, 673.

There have been repeated proclamations by key political leaders that *they think the death penalty to be essential to deter drug offending*. It is a central tenet of the drug policy in Singapore.⁶⁴²

To maintain this ‘purity’ of general deterrence, not only must the death penalty be mandatory at the judicial level, but also at the level of executive clemency: there can be no publicised exceptions made to its enforcement⁶⁴³ (although, as I explained earlier, *privately-facilitated* exceptions are made by prosecutors). The available statistics do suggest that drug trafficking is the crime for which Presidential clemency is *least* likely. Only two drug traffickers have ever received clemency, and both were Singaporean-born mothers with significant mitigating circumstances, as I described above.⁶⁴⁴ Taking into account these two commutations, the historical clemency ‘rate’ for drug cases stands at approximately 0.6 percent,⁶⁴⁵ an extraordinarily low figure and even lower than the overall rate of 1.0-1.2 percent over the period 1975 to 2009. As an experienced Singaporean criminal defence lawyer noted in interview, in drug cases, other than when terminal illness triggers a compassionate response from the Cabinet, once a defendant’s sentence is confirmed on appeal, ‘the law will take its course’.⁶⁴⁶

⁶⁴² Hor (2006), 530, emphasis added; see also Ministry of Law (Singapore).

⁶⁴³ Morison, 216; Hor (2011), 10.

⁶⁴⁴ Of the two drug traffickers granted clemency in Singaporean history, Sim Ah Cheoh died of cancer shortly after being released (Vijayan (2007)), however Siti Aminah Jaafar never completely recovered from her addiction, and was re-sentenced to a number of terms of imprisonment (as well as stints in drug rehabilitation centres) in the 10 years since her original release from prison in 1991 (‘Drug trafficker was given second chance but she blew it’). It is possible that the outcome in this case subsequently influenced the Singaporean Cabinet, as no trafficker has been granted clemency since 1992.

⁶⁴⁵ See note 637, above.

⁶⁴⁶ Interview with Singaporean Criminal Defence Lawyer.

Aspects of the Clemency Decision-Making Process: Cabinet Dynamics and Bureaucratic Efficiency

Finally, the Singaporean Cabinet's decision-making *processes*, placed in the wider context of the culture of efficiency promoted within the Singaporean bureaucracy, can be understood to affect the frequency of clemency grants. There are four possible factors at play here. First of all, the fact that the Singaporean President invariably accepts the recommendation of the Cabinet, in accordance with his general 'ceremonial' role pursuant to the Westminster tradition,⁶⁴⁷ has negated his chances of being able to grant clemency 'on a whim', with compassionate *mercy* as the guiding motive.⁶⁴⁸ Only the most compelling retributivist or utilitarian justifications have prompted grants of clemency by the Singaporean Executive, as I described earlier. Significantly, the Cabinet remains a forum where the massed,⁶⁴⁹ consensual decision-making structure may encourage what a senior British barrister with significant experience in clemency litigation labels a 'lowest-common denominator' approach,⁶⁵⁰ whereby a strong presumption against granting

⁶⁴⁷ *Yong Vui Kong v Attorney-General*, [177], [180]; 'A list of death row inmates in Singapore who were granted clemency'; Tan (2011), 81.

The President's decision-making role, in the award of clemency, does not appear to have become more prominent after the position was changed from appointment to election in 1991, with the first directly-elected President taking office in 1993 (Interview with Singaporean NGO Staff #3; Interview with Singaporean Human Rights Lawyer). Nonetheless, an elected President did gain new discretionary powers, most importantly in relation to the nation's monetary reserves (see Constitution of the Republic of Singapore (Amendment) Act 1991; *Yong Vui Kong v Attorney-General*, [178]-[179]).

⁶⁴⁸ Interview with Senior Singaporean Prosecutor. See Chapter Three, *Mercy from the Sovereign*.

⁶⁴⁹ See note 531, above.

⁶⁵⁰ Interview with London-based Death Penalty Lawyer. One interviewee observed that there may well have been Cabinet members over the years who were personally opposed to the death penalty in principle, but they could not openly express their disagreement with the majority consensus (Interview with Singaporean NGO Staff #3). See also note 655 and associated text, below.

clemency exists,⁶⁵¹ even if the Cabinet has a legal *duty* to consider each and every death sentence for clemency.⁶⁵² Here, two interviewees speculated that, given the high number of capital cases that pass before the Cabinet for consideration, unless specifically-concerned Ministers (such as those responsible for the Home Affairs, or Law portfolios) raise an issue with one of the petitions, a motion will be passed to reject all of them.⁶⁵³

A second strong possibility within Cabinet dynamics is that the views of Lee Kuan Yew, Singapore's first Prime Minister, were given high priority during his long stretch as a Cabinet Minister (from full Singaporean independence in 1965, through to retirement as Prime Minister in 1990 and latterly, until retirement from the Cabinet as Senior Minister in 2011). Lee was known to espouse strong, absolutist views on the maintenance of the 'purity' of deterrence in death penalty cases,⁶⁵⁴ and his authoritarian views on this policy and others may well have been deferred to by other Cabinet Ministers.⁶⁵⁵ As Professor Hor explains, 'the force of the deterrent value of a mandatory death penalty [policy] rests on there being few if any exceptions to its imposition',⁶⁵⁶ which of course include grants of executive clemency. The prediction that the aforementioned British barrister articulated in interview, echoing the views of Professors Johnson and Zimring, that the Singapore Government's position on the need for an absolute 'purity' of deterrence may

⁶⁵¹ As I first noted in Chapter Three (see notes 294-297 and associated text), the theoretical literature suggests that in jurisdictions where a large number of clemency petitions pass before the executive, particular presumptions or 'rules of thumb' will need to be relied upon in order to manage the caseload.

⁶⁵² *Yong Vui Kong v Attorney-General*, [82]-[83].

⁶⁵³ Interview with Singaporean Academic Expert and Singaporean NGO Staff. See also Jayakumar, 155.

⁶⁵⁴ Interview with London-based Death Penalty Lawyer; Statement by Former Singaporean Politician; Erlanger; Hor (2013).

⁶⁵⁵ Statement by Former Singaporean Politician; Quah, 291-292.

⁶⁵⁶ Hor (2011), 10.

change after Lee's departure from a senior decision-making role,⁶⁵⁷ appears vindicated after the legislative changes announced in 2012, circumscribing the MDP, in particular homicide and drugs cases, where legislatively-approved exceptions can be legally made out.⁶⁵⁸

Third, the Cabinet is known to be significantly influenced by the constitutionally-mandated written recommendation on clemency from the Attorney-General – a nominally non-political appointee as State legal adviser, who as described earlier concurrently performs the role of Singapore's Public Prosecutor.⁶⁵⁹ As I articulated in Chapter Three, in jurisdictions which rely on the prosecuting authority for a written recommendation on clemency, professional pride and bureaucratic inertia generally militate against the substitution of the death sentence.⁶⁶⁰ Singaporean opponents of the death penalty have even labelled this Constitutional arrangement a 'conflict of interest', a 'farce', or a breach of natural justice.⁶⁶¹ If prosecutorial discretion may initially be used to reduce the charge to a non-capital one if the case exhibits significant mitigating circumstances, why would the Attorney-General suggest a reduction at the *clemency* phase? A Singaporean NGO has neatly summarised the dilemma:

⁶⁵⁷ Interview with London-based Death Penalty Lawyer. Note also Johnson and Zimring (2009) (at 419):

There is no other leader in recent Asian history who has led so long and so completely as Lee Kuan Yew, and as his power wanes it stands to reason that some policies will change. Capital punishment could be one of them.

⁶⁵⁸ See note 594, above.

⁶⁵⁹ Interview with Singaporean Criminal Defence Lawyer #2; We Believe in Second Chances (2011); Lee (2006), 460-461, 477; Ravi, 79.

⁶⁶⁰ Abramowitz and Paget, 171; Barkow (2009), 156.

⁶⁶¹ Ravi, 79; Trembat; We Believe in Second Chances (2011). The Singapore Court of Appeal has recently denied that this procedure creates a legal conflict of interest: *Yong Vui Kong v Attorney-General*, [110].

After charging the offender, prosecuting him at trial, then fighting against his appeal, just how likely is [it that] the AG [is] going to say, “You know what, I was wrong to demand the death penalty in court, this person doesn’t deserve to die after all, let’s pardon him”?⁶⁶²

As I elaborate in the next chapter, on Malaysia, if the prisoner’s circumstances change after a long period spent on death row, this may be one foreseeable scenario for a recommendation in favour of commutation to be made by the case prosecutor.⁶⁶³ However, defendants in Singapore’s ultra-efficient criminal justice system rarely possess the luxury of a chance to plead for clemency as ‘redemption’,⁶⁶⁴ as I now move on to explain.

Last of all, the clemency outcomes in Singaporean death penalty cases are a reflection of the culture of efficiency found within the three branches of government.⁶⁶⁵ From arrest through to trial, appeal, and the determination of clemency, the average time a capital prisoner spends in detention in Singapore ranges from one year to eighteen months.⁶⁶⁶ Although, as noted above, a prisoner does not have a constitutional right to submit a clemency petition, the practice is to allow such a filing, within a ‘reasonable

⁶⁶² We Believe in Second Chances (2011).

⁶⁶³ See Abramowitz and Paget, 184-185; Chapter Six: Malaysia, *Long Stays on Death Row*.

⁶⁶⁴ The one exception here may have been the case of Mohamad Kunjo Ramalan, whose grant of clemency was recommended by the Privy Council on the basis of (only) two years spent on death row (see *Ramalan v Public Prosecutor*, 136) – a far shorter period than that witnessed in some cases in neighbouring Malaysia.

⁶⁶⁵ Interview with Amnesty International Staff #2.

⁶⁶⁶ Interview with Singaporean Criminal Defence Lawyer; Interview with Singaporean Criminal Defence Lawyer #2; Johnson (2013), 43. One interviewee asserted that cases attracting greater publicity may be fast-tracked through the system so as to minimise international criticism, leading to a shorter stay on death row before execution (Interview with Singaporean NGO Staff #3). The Singaporean Criminal Defence Lawyer (by Interview) adds that delays caused by judicial appeals were longer in the pre-1994 period, due to the consideration of some cases by the Privy Council.

period of time'.⁶⁶⁷ Thereafter, within the period under analysis, clemency deliberations have usually taken place over a period of two or three months,⁶⁶⁸ and after the denial of a clemency request, executions have taken place after as little as one week.⁶⁶⁹ As I first observed in Chapter Three, the expeditious processing of death penalty cases through the criminal justice system will reduce the chances of clemency, as there will be little time for new mitigating circumstances to arise (such circumstances might comprise evidence of remorse and rehabilitation in prison combined with the psychiatric effects of the 'death row effect', in particular, but also perhaps the ability to act as an informant or witness in future cases).⁶⁷⁰ As Professor Hor has summarised, 'there is no death row phenomenon in Singapore because executions are carried out with wonderful efficiency.'⁶⁷¹

Conclusion

Successful clemency applications in Singapore are so few and far between that it has been possible to list them, in their entirety, in this chapter. Of the four jurisdictions under study (and the five on which I began research for my MPhil dissertation, which included Vietnam), only for Indonesia is it possible to attempt a similarly wholesale sweep of the known incidence of clemency. Even in the Indonesian case, there are likely to have been

⁶⁶⁷ See *Jabar v Public Prosecutor*.

⁶⁶⁸ Anandan, 162; Ravi, 78; HOC Singapore 2002.

⁶⁶⁹ Anandan, 90. Ravi, 78, lists 'a few' weeks; 'Singapore: Took Leng How Hanged' lists two weeks.

⁶⁷⁰ Interview with Amnesty International Staff #2; Interview with Singaporean Criminal Defence Lawyer #2; Interview with Singaporean NGO Staff #2.

⁶⁷¹ Hor (2004), 115. Although outside of my period of analysis for clemency rates (1975-2009), it is of interest in this respect that counsel for convicted drug trafficker Yong Vui Kong were able to present arguments that the time spent on death row after sentencing (over three years by the end of 2011) should justify commutation of the death sentence, based on comparisons with other commonwealth jurisdictions (Han (2011); Interview with Singaporean Human Rights Lawyer). By March 2013, Vui Kong still remained on death row in Singapore (We Believe in Second Chances (2013)).

further commutations that have gone unreported in the public domain, as I describe in Chapter Eight.⁶⁷²

Accordingly, analysing clemency grants in death penalty cases in Singapore puts the researcher in a unique position, in considering the reasons that successful petitions, while clearly contemplated by the Constitution of 1965 and so far granted in six cases, have been so unlikely throughout the city-state's modern history. The factors that were deemed relevant in those rare cases: youth or criminal inexperience, terminal illness in prison, spontaneous or provoked homicide, playing a lesser role in the crime, and possibly testifying against accomplices, have served to separate the successful petitioners from the several hundred others who have been judicially executed by the Singaporean state since 1975. However, in many other cases with factually similar circumstances, the prisoner has been sent to the gallows after clemency was rejected. The apparent conclusion is that the Singaporean Cabinet, already constrained by its own restrictive decision-making processes, actively seeks to avoid granting clemency in as many cases as possible.

However, this is not to say that the Singaporean criminal justice system, replete with the MDP for the most numerous capital crimes (murder, drug trafficking and firearms offences), lacks any form of compassionate discretion exercised in favour of capital defendants. For the PAP Cabinet, authorising regular grants of executive clemency in capital cases would invite allegations that the state's uncompromising approach to the 'rule of law' was being undermined, and that Singapore's politicians were becoming 'soft' in their stance on the scourge of drug trafficking. Instead, it is clear that the preferred means of taking into account mitigating circumstances, as well as any political imperative

⁶⁷² See Chapter Nine: Indonesia, *Features of Cases where Clemency Was Granted by the Indonesian President*.

to reduce execution rates has been consistent reliance on *prosecutorial discretion*. Capital charges can be reduced behind closed doors before a trial takes place, without outwardly compromising either the general deterrence of capital crimes, or the political imperative (and historical tradition) of maintaining the MDP for crimes deemed the most serious by the Singapore Government.

Chapter 6 - Federation of Malaysia

Introduction

Inherited from the British colonial administration,⁶⁷³ along with the customary method of execution (hanging),⁶⁷⁴ the death penalty has a prominent place in Malaysia's judicial practice since the country became independent in 1957. In the period from 1960 to the beginning of 2011, 441 prisoners were executed, with drug trafficking the most prominent capital offence.⁶⁷⁵ During the 1980s and early 1990s, Malaysia's illicit drug laws were renowned as amongst the world's toughest,⁶⁷⁶ characterised by a MDP applying to all convicts. Within Southeast Asia, the world's only region where a majority of death sentences are passed on drug traffickers,⁶⁷⁷ Malaysia was at the forefront with punitive laws against the narcotics trade, at least until a marked decline in executions in recent years.

However, despite the government's heavy reliance on the use of the MDP to denounce and deter drug trafficking and other crimes perceived as extremely serious, it is curious that Malaysia's constitutionally-mandated State and Federal Pardons Boards have approved clemency for capital prisoners in a significant minority of cases since 1975. The Malaysian experience proves that legislating for a MDP across a variety of offences, and propagating a public image of government ruthlessness against crime is not necessarily

⁶⁷³ Cater; Fitzgerald.

⁶⁷⁴ AI-Index ASA 28/04/79, 50; see Criminal Procedure Code, s 281, form 34.

⁶⁷⁵ Shankar; Hector, 'Death Penalty in Malaysia: Time for Abolition'. HOC Malaysia 2002, on the other hand, quotes a figure of 539 executions from 1957-2002. Kuppusamy (30/10/2007) counts 434 executions from between 1960 and 2004.

⁶⁷⁶ Harring, 371; Swain; Schwarz.

⁶⁷⁷ See AI-Index ASA 01/003/2007.

inconsistent with the widespread use of clemency. Although academic investigation of Malaysia's death penalty policy is significantly hampered by the prevailing state secrecy over executions and Pardons Board decisions,⁶⁷⁸ this chapter analyses the factors at play enabling occasional grants of clemency despite the apparent obstacles.

Death Penalty and Clemency Practice 1975-2009

Death Sentences and Executions

In many ways, 1975 is an appropriate place from which to start analysis of Malaysia's death penalty practice, as it was from this year that the government's now well-publicised campaign against drugs began, with capital punishment introduced as a *discretionary* penalty for drug 'traffickers'.⁶⁷⁹ Moreover, the various mandatory and discretionary offences of possession of firearms and explosives under the Internal Security Act 1960 and the Firearms (Increased Penalties) Act 1971 became the subject of radical new trial procedures in 1975, to ensure a greater number of convictions.⁶⁸⁰ These two sets of offences were added to the MDP in force for murder since the British colonial period, to

⁶⁷⁸ A notable feature of what Johnson and Zimring label Malaysia's 'authoritarian' governance throughout its history as an independent state (Johnson and Zimring (2009), 305; Loh Kok Wah, 94-98; Yatim, 156-157) is state secrecy over death penalty matters. Throughout Malaysia's history, comprehensive death penalty statistics and information have proven difficult to come by, and no official criminal justice figures are published by the Federal Government (Harring, 400 n225; Statement by Malaysian Human Rights Lawyer). Detailed information on the use of capital punishment generally only appears in the public domain after a question by an opposition member of parliament (Interview with Amnesty International Malaysia Staff; Interview with Member of the Malaysian Bar Council). Government responses to these parliamentary questions, together with NGO reports and media articles, provide the figures relied upon throughout this chapter and in Appendix B.

⁶⁷⁹ Dangerous Drugs (Amendment) Act 1975, s 39B; Harring, 365. The definition of 'trafficking' here was expanded in 1977 to include 'manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug' (Dangerous Drugs (Amendment) (No 2) Act 1977, s 2). Under the original Dangerous Drugs Act 1952, the maximum penalty for trafficking was five years imprisonment (Harring, 373).

⁶⁸⁰ AI (1979), 89; AI-Index ASA 28/04/79, 50; Penna, 109-110; Lent, 445. These new trial procedures were imposed pursuant to the Essential (Security Cases) Regulations 1975.

comprise the three major categories of capital crimes enforced in modern-day Malaysia.⁶⁸¹

Although opium use had a long history amongst the ethnic Chinese population in Malaysia, the use of the country's seaports and airports as transit points for Golden Triangle heroin en-route to the West from the 1970s, together with 'the arrival of a western-type, youth-culture drug problem' in domestic markets focused the government's attention on the criminalisation of narcotics,⁶⁸² and led to the decision to implement a discretionary death penalty for drug crimes from 1975. However, until 1980 the Malaysian judiciary interpreted the discretion to choose between a prison sentence and the death penalty in narcotics cases as requiring the imposition of a *mandatory life sentence*.⁶⁸³ Consequently, until the early 1980s Malaysia's modest execution totals⁶⁸⁴ were dominated by murder offences and firearms/explosives offences, with Malaysia's first execution for drug trafficking only taking place in 1980.⁶⁸⁵

In 1983, citing an increased need for general deterrence given the inconsistent sentencing practices witnessed in the previous few years,⁶⁸⁶ the Malaysian Parliament made the death penalty *mandatory* for the trafficking of reduced quantities of illicit drugs

⁶⁸¹ AI (1983), 1.

⁶⁸² Harring, 368-369; Whiting; Deans; Schwarz.

⁶⁸³ Harring, 379; Schwarz; Abdullah.

⁶⁸⁴ Around three executions per year from 1970-1980: Harring, 382 n117; Kwai, 28. A number of other sources assert there was a moratorium on executions in place from 1969 to 1980 (Johnson and Zimring (2009), 18; AI Annual Report 1981, 241; AI, 'Malaysia: Nine Die in Security Act Executions').

⁶⁸⁵ Harring, 382 n117, 379 n94; Kwai, 28; see also AI-Index ASA 28/04/79, 50-51. The Internal Security Act 1960 was originally aimed at members of a Communist insurgency (Freedom House (2002b)). The higher number of executions in the early 1980s: up to 20 in 1980, 19 in 1981 and at least 14 in 1982 (see Appendix B) may have come about as post-1975 capital firearms cases were processed through the system.

⁶⁸⁶ Kamariah, 149; Abdullah.

(including 15 grams of heroin or morphine, 40 grams of cocaine, and 200 grams of cannabis).⁶⁸⁷ Malaysia had proclaimed itself as having the world's toughest anti-drug laws,⁶⁸⁸ and throughout the remainder of the 1980s and through to the mid-1990s, drug crime was considered the country's premier security concern, eclipsing the threat of communist insurgency and the mass influx of refugees from the communist regime in Vietnam.⁶⁸⁹ Prime Minister Dr Mahathir Mohamed, one of Asia's longest serving leaders, who remained in power between 1981 and 2003,⁶⁹⁰ labelled drug trafficking a 'security problem with implications for the country's continued viability and the maintenance of its national sovereignty'.⁶⁹¹ Pursuant to this paradigm and following the introduction of the MDP, more than 120 drug traffickers were executed from 1983 to 1992.⁶⁹²

However, the notable feature of Malaysia's capital punishment practice from the mid-1990s is the significant decline in executions carried out: from average yearly minimums of approximately 14+ to 17+ executions (during the 15 year period 1980-1994), to between 1+ and 6+ (during the 14 year span 1995-2008).⁶⁹³ Any absolute reduction in serious crime levels can only go so far in explaining this significant decline in the number of executions. The most likely possibilities, in addition to any widespread use of

⁶⁸⁷ Dangerous Drugs (Amendment) Act 1983, s 39B; Harring, 375; AI-Index ASA 28/014/01.

⁶⁸⁸ Harring, 371; Swain; Schwarz.

⁶⁸⁹ Sodhy, 1075, 1081; AI (1989), 18; Whiting; Sulong.

⁶⁹⁰ Jackson (2004), 48-55. At a Federal level, Mahathir's UMNO (United Malays National Organization) political party has held power as part of a coalition government (called the *Barisan Nasional*, or 'National Front' since 1973) continuously since Malaysian independence from Britain in 1957 (US Department of State (2011b); Marshall Cavendish Corporation, 1174-1177, 1216-1217).

⁶⁹¹ Harring, 371. Arguably, the peak of Malaysia's campaign against drugs arrived in 1987, when Prime Minister Mahathir was elected Chair of the Vienna International Conference on Drug Abuse and Illegal Trafficking (Sodhy, 1081).

⁶⁹² 'ASEAN to Impose Death Penalty for Drug Crimes'.

⁶⁹³ See Appendix B; Zimring and Johnson, 106.

clemency, are the creative use of judicial ‘discretion’ in narcotics cases where the MDP applies,⁶⁹⁴ alternative findings of manslaughter or culpable homicide in murder cases,⁶⁹⁵ together with increasing use of indefinite detention without trial provisions,⁶⁹⁶ as I explain below.

In 2009, at least 15 different categories of offences carried the death penalty in Malaysia.⁶⁹⁷ The MDP applied to drug trafficking, certain firearms/explosives offences and murder, as described above, together with offences against the person of the King (*Yang di-Pertuan Agong*), State Sultans, or State Governors, and rape where death results.⁶⁹⁸ The discretionary death penalty, on the other hand, was available as a sentence in cases of kidnapping, further firearms and explosives offences, treason, providing false evidence in a death penalty case, abetting mutiny in the armed forces, abetting the suicide of a child or an insane person, attempted murder by a life sentence prisoner, gang robbery where murder results, terrorist acts, hostage taking and serious water contamination.⁶⁹⁹ Death sentences may be passed by the High Court, the Court of Appeal, or the highest appeal court in Malaysia: the Federal Court.⁷⁰⁰

⁶⁹⁴ Harring, 400-401; ‘A peculiar purgatory’; AI-Index ASA 03/01/97, 13.

⁶⁹⁵ ‘A peculiar purgatory’.

⁶⁹⁶ US Department of State (2009).

⁶⁹⁷ Human Rights Commission of Malaysia, 5, 7.

⁶⁹⁸ See Dangerous Drugs Act 1952, s 39B; Firearms (Increased Penalties) Act 1971, s 3, 3A; Internal Security Act 1960, s 57(1); Penal Code 1997, s 121A, 302; 376(3).

⁶⁹⁹ See Kidnapping Act 1961, s 3; Internal Security Act 1960, s 58(1); Penal Code 1997, s 121, 130C, 130I, 130N, 130O, 132, 194, 305, 307, 307(2), 364, 374A, 396; Firearms (Increased Penalties) Act 1971 s 7(1); Arms Act 1960 s 14(1); ‘Sad State of Human Rights in Malaysia’; ‘Malaysia: Expanded Penalty Condemned’; Water Services Industry Act 2006, s 121(2); Penal Code (Amendment) Act 2004; HOC Malaysia 2008.

⁷⁰⁰ Majid, 364.

In recent years, over 60 percent of death row prisoners have been sentenced for drug offences, around 30 percent for murder, and the remainder for firearms/explosives possession and treason.⁷⁰¹ In terms of *executions*, in total from 1960 to 2011 approximately 52 percent were for drug offences, 18 percent for murder and 29 percent for firearms/explosives offences. The handful of remaining executions were carried out for treason and kidnapping.⁷⁰² Moreover, as noted above, only a very small number of executions took place from 1995 to 2009 (a ‘high-end minimum’ of 6+ since 1995, with zero confirmed executions in the years 1998, 1999 and 2003, and possibly also in 1997, 2000, 2004, 2005 and 2007, depending on which sources are relied upon).⁷⁰³ Malaysia’s contemporary death penalty policy therefore demonstrates a restrictive use of *executions*, despite death *sentences* (at least for cases at first instance) remaining in double-figures throughout the 2000s.⁷⁰⁴

Clemency Procedures in Death Penalty Cases

Clemency in death penalty cases in Malaysia does not require an individualised petition as each case is automatically considered by the State and Federal *Pardons Boards* established under the Constitution,⁷⁰⁵ together with a special Federal Pardons Board for Security Offences established by subordinate legislation in 1981.⁷⁰⁶ Each Board comprises

⁷⁰¹ ‘121 Convicts in “Death Row”’; Human Rights Commission of Malaysia, 6.

⁷⁰² Shankar.

⁷⁰³ See Appendix B.

⁷⁰⁴ Ibid.

⁷⁰⁵ Constitution of Malaysia, art 42(1); Habib; Talib, 62. The State and Federal Pardons Boards not only hear from prisoners sentenced to death, but also from petitioners facing long-term imprisonment (Talib, 46).

⁷⁰⁶ See Essential (Security Cases) Amendment Regulations 1981, reg 29(2). Between 1975 and the enactment of this amendment in 1981, the *Agong* possessed the power to grant pardons in security cases irrespective of where they were committed in Malaysia, *without* the advice of a Pardons Board (see Essential (Security Cases) Amendment Regulations 1975, reg 29(1)).

the Federal Attorney-General, the relevant State Chief-Minister (or the Minister responsible for Federal Territories in Federal Cases), and up to three appointed members of the public,⁷⁰⁷ and considers cases from within its own jurisdiction. The 16 different Pardons Boards make recommendations to the Islamic Hereditary Rulers (State Sultans, *Raja* and *Yang di-Pertuan Besar*) within nine States,⁷⁰⁸ the four appointed State Governors (*Yang di-Pertuan Negeri* – in States without a Hereditary Ruler),⁷⁰⁹ or the Malaysian King (the *Yang di-Pertuan Agong*) in federal, military and security cases.⁷¹⁰ The Rulers, Governors and the *Agong*, while not obliged to follow the Boards' recommendations,⁷¹¹ do so in the majority of cases,⁷¹² particularly as they preside over these meetings themselves as Chairmen.⁷¹³

Relevant materials before the Board relating to each case under consideration include:

- the evidence notes from the first-instance trial, and a recommendation from the trial judge as to whether or not the sentence of death should be carried out;

⁷⁰⁷ Constitution of Malaysia, art 42(5); Penna, 109; Harring, 381-382 n110; Essential (Security Cases) Amendment Regulations 1981, reg 29(2). The lay-members must not be Members of State or Federal Parliament (Constitution of Malaysia, art 42(7)). Moreover, Butler and Low (at 220-221) assert that the three members should be representatives from the major racial groups making up Malaysian society: Malay, Chinese and Indian.

⁷⁰⁸ The State Sultans (incorporating the *Raja* in Perlis, and the *Yang di-Pertuan Besar* in Negeri Sembilan) are the Hereditary Rulers of the nine Federated Malay states of Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Terengganu.

⁷⁰⁹ These are Penang, Malacca, Sabah and Sarawak: the *Unfederated* Malay States.

⁷¹⁰ Constitution of Malaysia, art 42(1), (4)(b); Singh, 92; Talib, 30-31, 39. In a unique constitutional system, the title of *Yang di-Pertuan Agong* as head of state rotates between the nine State Sultans every five years (Funston, 'Malaysia: Developmental State Challenged', 172; Ibrahim, 517).

⁷¹¹ Talib, 39; Faruqi; Addruse, 2. Contrast Talib, 3, who asserts that 'the advice of the various State Pardons Boards are binding upon the Rulers and *Yang di Pertua[n] Negeri*, but theoretically not so on the *Yang di Pertuan Agong*'. Contrasting views on the *Agong's* requirement to follow Pardons Board recommendations are also described by Suh and Oorjitham.

⁷¹² Sharif and Veera, '44 "Forgotten" Convicts'; Crook, 203; Addruse, 1-2.

⁷¹³ Constitution of Malaysia, art 42(8); Penna, 109; Talib, 40, 65.

- a report from the Federal Court on any appeal, and a similar recommendation as to whether the death sentence should be carried out from the sitting Federal Court Judge;⁷¹⁴
- police, psychologist and Prisons Department files on the case;⁷¹⁵ and,
- the Federal Attorney-General's written opinion on the case.⁷¹⁶

The precise decision-making structure of the Pardons Boards, and the impact this has on commutation rates is considered in more detail later in this chapter.

Grants of clemency by the Pardons Boards convert a death sentence to life imprisonment (which nominally stands at 20 years, but often results in release after around 14 years),⁷¹⁷ a 'natural life' term, immediate release through a full pardon, or at the very minimum a temporary reprieve from execution.⁷¹⁸ However, if clemency is *rejected*, the prisoner's execution can be expected within a short period of time,⁷¹⁹ variously listed as between a couple of weeks⁷²⁰ and a couple of months,⁷²¹ and is 'carried out discreetly and without any formal announcement'.⁷²² Importantly however, there is no legal time limit within which the *Agong*, Rulers or Governors must come to a final

⁷¹⁴ Criminal Procedure Code, s 281(b).

⁷¹⁵ AI (1983), 4; 'Perak Pardons Board Denies Backlog of Cases'; Damis (17/11/04); Interview with Malaysian Criminal Defence Lawyer; Tan (2010).

⁷¹⁶ Talib, 64.

⁷¹⁷ Sharif and Veera, '44 "Forgotten" Convicts'; see Criminal Justice Act 1953, s 3.

⁷¹⁸ Criminal Procedure Code, s 281(c)-(d); Damis (17/11/04); Talib, 67.

⁷¹⁹ Ross; Interview with Australian Academic Expert on Indonesia #3.

⁷²⁰ 'Death or Life: Decision on Penang Pair "This Weekend"'.

⁷²¹ AI (1983), 5.

⁷²² Kuppusamy (4/7/2007); Interview with Member of the Malaysian Bar Council.

decision on a clemency petition, and no upper time limit for an execution to be carried out.⁷²³ Again, I return to this point later in the chapter.

Based on the statistical calculations outlined in Chapter Four, Malaysia's clemency rate for finalised cases emerges at between 26 to 40 percent, although the real figure is likely to be close to the bottom of that range (or even lower), due to a) the government's habit of under-reporting annual execution totals,⁷²⁴ and b) the aforementioned calculation being made on the basis of statistics from the years 1975 to 1986 and 2000 to 2008 (those being the two periods where full yearly clemency totals were available). Significantly, the entirely *excluded* period 1987-1994 encompasses the most punitive death penalty era in Malaysia's recent history, particularly with reference to drug trafficking. Without a commensurate increase the number of clemency grants over the same period (which is possible, but unlikely), excluding the high number of executions that took place in the late 1980s and 1990s from the calculations will have artificially *increased* the documented clemency 'rate'. Nonetheless, Malaysia remains firmly within the 'medium' categorisation for clemency percentages I described in Chapter Four, alongside Indonesia.

Features of Cases where Clemency Was Granted by the Pardons Boards

Although clemency is not the *expected* outcome for a death penalty case considered by Malaysia's Pardons Boards, successful petitions are not unusual, with up to 70 confirmed cases I have documented between 1975 and 2009.⁷²⁵ Although the reasons for pardon

⁷²³ Tan (2010); *Husin v Lembaga Pengampunan Negeri Pahang*.

⁷²⁴ Statement by Malaysian Human Rights Lawyer.

⁷²⁵ See Appendix B.

grants (or rejections) are not often made public,⁷²⁶ it is possible to speculate on and narrow down the range of factors that may have proved influential across a variety of cases. Generally, scholars and journalists have seen extraneous *non-legal* factors as being of greatest importance to the decision-making of the State and Federal Pardons Boards.⁷²⁷ These opinions appear consistent with interpretations of the power to pardon by Malaysian courts rejecting legal challenges to the Sultans' exercise of the power,⁷²⁸ and perhaps also implicitly by the Malaysian Constitution, which sees the *Agong* as 'the fountain of mercy', rather than possessing a power resembling judicial review.⁷²⁹

However, a focus on 'extra-legal' matters by commentators may simply reflect the greater media exposure of 'public interest' death-penalty cases,⁷³⁰ rather than the more mundane petitions of murderers and drug 'mules' pardoned for retributivist reasons.⁷³¹ As two noted criminal defence lawyers have observed (and the statistics provided by Talib, Hands off Cain and the Bernama News Agency appear to confirm),⁷³² there are many cases where clemency has been granted by the State and Federal Pardons Boards whose precise details remain unknown.⁷³³ A holistic view of the factors relevant was preferred by Talib, who quotes a former Malaysian Attorney-General stating (in 1968) that the members of each Pardons Board:

⁷²⁶ Interview with Amnesty International Staff #2; Interview with Malaysian Criminal Defence Lawyer; Roy.

⁷²⁷ Talib, 31; 'Death or Life: Decision on Penang Pair "This Weekend"'; 'Insults could see convicted men hang: lawyer'; Aisbett; Azlan Shah, 86-87.

⁷²⁸ Abbas; Lim Kit Siang (27 July 1985).

⁷²⁹ 'Other Important Duties Of The Yang di-Pertuan Agong'; *Public Prosecutor v Soon Seng Sia Heng*, 171.

⁷³⁰ Interview with Malaysian Criminal Defence Lawyer.

⁷³¹ See Chapter Three.

⁷³² See Appendix B.

⁷³³ Interview with Malaysian Criminal Defence Lawyer; Statement by Malaysian Human Rights Lawyer.

have to consider very carefully all aspects of the case in the national and public interest, the nature and gravity of the offence, the circumstances in which the offence was committed and all grounds submitted by their counsel [i.e. the Federal Attorney General] before making their decision.⁷³⁴

Bearing in mind this potential reporting bias, the following are cases where some details *are* known about the prisoners and the circumstances in which they were granted clemency (as opposed to the cases merely appearing as part of statistical tallies listed in Appendix B):

- the normal practice of the Pardons Boards was to commute the sentence of those minors (under 18 years) sentenced to death to life imprisonment,⁷³⁵ before the death penalty was completely abolished for juvenile offenders in firearms and explosives cases in 2001;⁷³⁶
- cases where a complete or partial defence, while argued by defence lawyers at trial, could not be proven;⁷³⁷
- a number of western defendants had their sentences commuted in the late 1970s and early 1980s, as the Pardons Boards gave priority to Malaysia's international

⁷³⁴ Talib, 173, quoting Abdul Kadir Yusuf (Attorney-General from 1963 to 1977).

⁷³⁵ Ngui; Sharif and Veera, 'Plight of the Forgotten Prisoners'; Sharif and Veera, '44 "Forgotten" Convicts'; AI-Index ASA 03/01/97, 12; 'Rehabilitation is our top priority, says Prisons D-G'. The most prominent case here involved a 14-year-old boy sentenced to death for possession of a firearm in 1977. Protests from the Malaysian Bar Council and western nations may have been significant in the subsequent decision to issue a pardon (AI-Index ASA 28/04/79, 52; AI (1979), 90-91).

⁷³⁶ Child Act 2001, s 97(1), enacted after Malaysia acceded to the CRC in 1995. The Essential (Security Cases) Regulations 1975, s 3(3) allowed juveniles to be dealt with as adults in relation to security offences, overruling the original prohibition on the death penalty for minors found in the Juvenile Courts Act 1947, s 16.

⁷³⁷ Interview with Former Malaysian Federal Court Judge; Interview with Malaysian Government Lawyer.

standing ahead of the adoption of a consistent position across factually similar cases;⁷³⁸

- Mah Chuan Lim, convicted for firearms offences in 1981, was pardoned in light of irregularities in the procedures used in his case after the prosecutor had improperly amended his non-capital charge to a capital one;⁷³⁹
- Sirichai Sae Woon and Pote Kongkarn, two Thai nationals sentenced to death for possession of firearms, had their death sentences reduced to *six* years imprisonment in 1982 after petitions were submitted by relatives and a Thai NGO;⁷⁴⁰
- Mokhtar Hashim, a former government minister found guilty of murdering an UMNO colleague in 1983, was granted a commutation and later released,⁷⁴¹ due to 'previous service to his country',⁷⁴² and perhaps also evidential improprieties in the original conviction.⁷⁴³ Likewise, Khiew notes that the *Agong* has pardoned a number of UMNO politicians (for capital and non-capital offences) in the past;⁷⁴⁴
- a number of Indonesian migrant workers were granted commutations in the 1990s, 'following pressure from the Indonesian Government';⁷⁴⁵

⁷³⁸ Whiting; Lilburn; 'Malaysia hangs convicted drug dealers'.

⁷³⁹ 'Judicial Error and the Pardons Board'.

⁷⁴⁰ 'Campaign against capital punishment of two Thai prisoners', 20.

⁷⁴¹ Bass, 167; Crook, 195. See *Hashim v Public Prosecutor*.

⁷⁴² 'Insults could see convicted men hang: lawyer'.

⁷⁴³ Interview with Malaysian Government Lawyer.

⁷⁴⁴ Khiew.

⁷⁴⁵ AI-Index ASA 03/01/97, 13; Perry; Osman (2010); 'Menuju Tiang Gantung Malaysia'.

- Chu Tak Fai, a British national born in Hong Kong, whose death sentence for drug trafficking was commuted by the *Agong* to a life sentence in 2006, successfully argued that he was forced to smuggle drugs into Malaysia from Thailand by a money laundering group, to whom his family owed a significant debt;⁷⁴⁶
- In 2008, property developer Kenneth Lee Fook, the grandson of Malaysia's first finance minister, convicted for shooting dead a woman after a car crash, was granted a pardon by the *Agong*, and had his sentence reduced to life imprisonment.⁷⁴⁷ One significant factor here may have been the RM550,000 (approximately £90,000) civil award paid by Fook to his victim's family, although the family did not take kindly to the commutation.⁷⁴⁸

Evidently, in at least two of these cases political connections may have increased a prisoner's chances of a reprieve before the Pardons Boards. The cases of Indonesian migrant workers, British citizen Chu Tak Fai and moreover Filipino Andy Baguindah (who was given a *temporary* reprieve from execution in 2003),⁷⁴⁹ also hint at mercy being applied selectively in cases involving foreign nationals once more, after the hiatus during the 1980s and early 1990s where it was deemed important for the government that both

⁷⁴⁶ Reprieve UK, 'Chu Tak Fai'; AI-Index ASA 28/014/01.

⁷⁴⁷ HOC Malaysia 2008.

⁷⁴⁸ 'Family aghast after King pardons killer'; Babulal and Mokhtar. The failure to prove a defence of diminished responsibility or self-intoxication at trial may also have been an influential factor in the commutation (Interview with Malaysian Government Lawyer; Interview with Malaysian Criminal Defence Lawyer).

⁷⁴⁹ Drug trafficker Andy Baguindah's execution in 2003 was postponed by 30 days after the President of the Philippines, Gloria Macapagal-Arroyo, sought clemency for the prisoner. Macapagal-Arroyo subsequently changed her mind and withdrew the appeal to the Malaysian government (Pazzibugan; 'Philippines won't seek clemency for national arrested in Malaysia'). See also 'Malaysia lowers sentences of 3 death row Pinoys' and Hector ('Impose Immediate Moratorium on all Executions') for a recent case which, although outside the 1975-2009 timeframe, is a conclusive example of diplomatic efforts resulting in the commutation of the sentences of between three and five Filipino death row convicts.

Malaysian and foreign prisoners were treated with absolute equality within the criminal justice system.⁷⁵⁰ As an official from the Malaysian Foreign Affairs Ministry confirmed to the media in 2010, ‘there have been cases where appeals for clemency by foreign governments were entertained by Malaysia.’⁷⁵¹

Legal, or *retributive* criteria such as the youth of the prisoner, the procedural improprieties in the cases of Mah Chuan Lim and Mokhtar Hashim, and the availability of arguable defences (including duress by Chu Tak Fai) are also revealed by the cases above as of significant importance to Pardons Board decision-making. Likewise, a Malaysian criminal defence lawyer noted that pressing legal criteria demanding commutation can emerge during trial, and will be included in the Judge’s report to the Pardons Board on the case.⁷⁵²

In the latter half of the forthcoming section explaining Malaysia’s clemency ‘rate’, I also refer to depictions of clemency in Malaysian cases that potentially fit into the ‘Mercy from the Sovereign’ and the ‘Clemency as Redemption’ paradigms first described in Chapter Three. The former typology arises as a result of the influence of the State Sultans on their respective Boards, whereas the latter is a function of the long stays on death row before execution that many condemned prisoners have faced in Malaysia. These features of Malaysian death penalty practice, along with the practical limitations of the MDP as a tool of general deterrence, form the primary set of explanations for Malaysia’s regular use of clemency in death penalty cases. However, systemic factors that *promote* clemency

⁷⁵⁰ See note 799 and associated text, below.

⁷⁵¹ See Hing.

⁷⁵² Interview with Malaysian Criminal Defence Lawyer. See also Soong (1986), 6, who notes that ‘The Pardons Board[s] also consider the quality of the evidence adduced at the trial and the safeness of the conviction’.

are balanced by two interrelated structural features within capital cases that operate to shift lenient discretion *away* from the Pardons Boards and on to earlier stages of the criminal justice process: the frequent use of prosecutorial and judicial discretion and detention without trial, together with the role of the Federal Attorney-General on the Pardons Boards. Finally, political considerations in the form of the ‘no mercy’ drugs policy from 1983-1994 also worked to limit the ability and motivation of the Pardons Boards to mitigate capital punishment during this 12-year period.

Explaining the Medium Clemency Rate in Malaysia

Use of Prosecutorial/Judicial Discretion and Detention Without Trial

The Malaysian Government has typically justified the MDP for murder, drug trafficking and security offences by reference to the sentencing philosophies of retribution, deterrence and incapacitation, as well as the unacknowledged role of the death penalty in perpetuating state power over Malaysia’s citizens.⁷⁵³ However, this is not to say that prosecutorial authorities⁷⁵⁴ must proceed with every single capital prosecution possible in order to achieve these aims. There are three important legal and administrative mechanisms whereby defendants who might otherwise receive capital convictions are instead detained in prison. First, the prosecutor may proceed in court with a non-capital charge; second, judges in narcotics cases have creatively used judicial ‘discretion’ to find their way around the dual presumption of trafficking,⁷⁵⁵ and third, the prisoner may be

⁷⁵³ Harring, 383; Soong (1990), 30.

⁷⁵⁴ See note 783 and associated text, below, on the degree of independence of the prosecutor in Malaysia.

⁷⁵⁵ The two presumptions operative as part of the Dangerous Drugs Act 1952, s 37(d) and 37(da) work to 1) presume a defendant who has custody or control of anything containing a ‘dangerous drug’ as being in possession of the drug and of knowing its nature, and 2) presume a defendant who is in possession of a trafficable quantity of drugs (the precise amounts being defined elsewhere in the Act) to be trafficking those drugs.

detained indefinitely without trial pursuant to administrative detention laws instead of facing capital charges.

With regards to prosecutorial discretion, the use of plea-bargaining was not permissible in Malaysian MDP cases until an amendment to the Criminal Procedure Code in 2010.⁷⁵⁶ The prosecutor may instead bring a non-capital charge on his or her own initiative.⁷⁵⁷ Capital charges may also be dropped by police, if the defendant assists with more important ongoing investigations,⁷⁵⁸ or damningly, if bribes are paid to investigating officers.⁷⁵⁹ However, as a former Malaysian prosecutor and judge acknowledged in interview, despite the availability of such discretion there are still ‘some very bad cases which [the prosecutor] cannot do anything about’, that must then proceed to trial on capital charges.⁷⁶⁰ For example, if the requisite amount of trafficked drugs, in a narcotics case, is confirmed by chemists then prosecutors will have no choice but to bring the case as a capital prosecution,⁷⁶¹ unlike the ‘14.99 manoeuvre’ witnessed in Singapore.

Nevertheless, over time the Malaysian judiciary has developed several legal devices that avoid the need to send drug traffickers to the gallows in particular cases. One of the most prominent is a finding of ‘possession’ rather than ‘trafficking’.⁷⁶² Despite the operative double presumption enacted in order to make convictions easier, a

⁷⁵⁶ Criminal Procedure Code (Amendment) Act 2010, s 172C and 172D; Tamrin; Reprieve (2011).

⁷⁵⁷ Interview with SUHAKAM Staff.

⁷⁵⁸ Harring, 401.

⁷⁵⁹ Donoghue, 157; Interview with Malaysian Member of Parliament.

⁷⁶⁰ Interview with Former Malaysian Federal Court Judge.

⁷⁶¹ Interview with Malaysian Criminal Defence Lawyer.

⁷⁶² Harring, 404; Interview with Former Malaysian Federal Court Judge; Interview with Amnesty International Staff #2; AI-Index ASA 03/01/97, 13.

conviction for ‘trafficking’ now appears restricted to ‘cases where there is absolute, corroborated proof of the actual event of a drug *transaction*’.⁷⁶³ Moreover, the percentage of outright acquittals, on the basis of incomplete evidence, is much higher in Malaysia than in neighbouring Singapore, with 50 to 60 percent of defendants in capital cases receiving acquittals.⁷⁶⁴ Harring reports that outright acquittals, together with charges being dropped by police, had become far more common by the end of the 1980s (90 percent of MDP drugs cases ending in conviction in the mid-1980s, as opposed to a figure of only 60 percent by 1989).⁷⁶⁵ However, even when defendants in capital narcotics cases *are* acquitted, they are sometimes immediately incarcerated using indefinite administrative detention laws,⁷⁶⁶ which I now move on to discuss.

Last of all, the use of preventative administrative detention was, for most of the 35-year period under study, authorised by the Dangerous Drugs (Special Preventive Measures) Act 1985, the Emergency (Public Order and Crime Prevention) Ordinance 1969 (repealed in 2012) and the Internal Security Act 1960 (also repealed in 2012). Indefinite administrative detention enabled the Malaysian Government to control and deter drug trafficking and firearms/explosives offences,⁷⁶⁷ without risking the international criticism that high execution rates would invariably attract,⁷⁶⁸ and without potentially creating

⁷⁶³ Death Penalty Worldwide: Malaysia, emphasis added.

⁷⁶⁴ Interview with Singaporean Human Rights Lawyer; Interview with Former Malaysian Federal Court Judge.

⁷⁶⁵ Harring, 400-401.

⁷⁶⁶ Interview with Malaysian Criminal Defence Lawyer; Gallahue and Lines, 30. See also Lent, 445, in the context of security offences.

⁷⁶⁷ Interview with Amnesty International Staff #2; Harring, 405; Freedom House (2002b); US Department of State (2009). Both the Internal Security Act and the Emergency Ordinance allowed the detention without trial of suspects for up to two years. The Dangerous Drugs Act allows for indefinite rolling two year periods of detention, subject to periodic review by an administrative panel.

⁷⁶⁸ Harring, 403-405.

martyrs of terrorist convicts.⁷⁶⁹ The use of these measures had become so common by 2009 that the US Department of State observed that a majority of drug traffickers are confined to preventive detention, rather than being charged with capital offences.⁷⁷⁰

Significantly, all three procedures described above impact on death penalty clemency rates. If the discretionary ‘safety valve’ is utilised at an earlier institutional stage, by diverting cases exhibiting mitigating factors away from capital prosecutions, or alternatively where a judge takes into account the mitigating factors and ‘commutes’ a sentence through a finding of possession, those remaining prisoners who *are* convicted of capital offences will, in the opinion of the government, ‘deserve’ to be executed so much more. In the cases that are allowed to proceed all the way through the system, there will be no *retributive* grounds for clemency (based on the facts of the case or the prisoner’s background) that have not already been considered before charges are laid and before a judgment is passed.⁷⁷¹ Potentially, the *only* remaining set of prisoner-centric clemency grounds are *redemptive* grounds, which are generally only arguable after the prisoner has spent many years on death row. Accordingly, in Malaysia we see the discretion to reduce punishment on retributive grounds being transferred away from the Pardons Boards at the ‘back-end’ of the criminal justice process, and into the hands of police, prosecutors and judges. Mercy, in the broad sense of the word, may still exist in these circumstances, but its exercise will not increase Malaysia’s prevailing ‘clemency rate’, as defined in Chapter Four.

⁷⁶⁹ Interview with Member of the Malaysian Bar Council.

⁷⁷⁰ US Department of State (2009). This was confirmed by casework lawyers working for Reprieve UK (Reprieve UK (2011)).

⁷⁷¹ See Hawkins, 36; Acker et al, 193; Interview with Canadian Academic Expert on the Death Penalty.

The State and Federal Pardons Boards were constitutionally and legislatively established in order to provide advice to the State Sultans, Governors and the *Agong* on the exercise of their prerogative power to reduce or abrogate criminal sentences. As I describe later in this chapter, this 'advice' is interpreted in different ways by the different Rulers, leading to a state-by-state variation in clemency practice. However, the *composition* of and *materials* before each Board impact heavily on the kind of advice passed to the Ruler, particularly with regard to the role of the state prosecutor (the Federal Attorney-General) in the deliberations.

Despite the official position being that 'the Federal Government has no say in the power of pardon',⁷⁷² the implicitly or overtly political representatives serving on the Pardons Boards (in the form of the Federal Attorney-General, the local Chief Minister,⁷⁷³ and perhaps even politically sympathetic lay-members)⁷⁷⁴ are usually in a position to guarantee *recommendations* for pardon refusal to the *Agong* or Ruler that suit the UMNO-dominated government's 'tough on crime' agenda.⁷⁷⁵ Echoing Hashim's milder assertion that Federal government influence on these constitutional advisory bodies 'may

⁷⁷² Hashim, 42; Interview with Member of the Malaysian Bar Council.

⁷⁷³ At the end of 2009, *Barisan Nasional*-backed Chief Ministers or *Menteri Besar* held power in nine of the 13 States. By comparison, the pro-establishment figure in 1975 was 13 of 13 and in 1990 was 11 of 13 ('Chief Ministers in Malaysia'). See also note 690, above.

⁷⁷⁴ The lay-members of the Pardons Boards are appointed by the Ruler or Governor of the relevant State (Constitution of Malaysia, art 42(5)).

⁷⁷⁵ Two Australian-based academics observed that being 'tough on crime' has significantly helped UMNO politically (Interview with Australian Academic Expert on Thailand; Interview with Australian Academic Expert on Indonesia).

Conversely, government interference in the nominally independent pardon process may enable the few prisoners with political connections to the ruling party to escape execution (Interview with Malaysian Government Lawyer). The cases of Mokhtar Hashim and Kenneth Lee Fook, described earlier, are possible examples of this practice.

be brought to bear only *indirectly* through the good offices of the Attorney-General',⁷⁷⁶ Harding has more bluntly stated that the Federal Pardons Board, at least, has been subjected to *unconstitutional* governmental pressure from time to time.⁷⁷⁷

The Malaysian Constitution provides that before making a decision, the Pardons Board '*shall* consider any written opinion which the Attorney-General may have delivered thereon',⁷⁷⁸ presumably originally in reference to the Attorney-General's opinion on the legal (rather than political) reasons for either carrying out or commuting the death sentence in the case at hand.⁷⁷⁹ While judicial decisions have confirmed that the prisoner has no formal procedural right to make written or oral submissions to members of the Pardons Board,⁷⁸⁰ the Attorney-General's written representations *must* be considered. Moreover, interview sources have confirmed that it is the Attorney-General (or his delegate) whose written and verbal opinion is seen as having the most influential effect on all the Board members present.⁷⁸¹ As an influential interview source noted, the Attorney-General is the only author physically present at the meeting who can defend his tendered written report on the case.⁷⁸²

⁷⁷⁶ Hashim, 42, emphasis added.

⁷⁷⁷ Harding (1996b), 70 n58.

⁷⁷⁸ Constitution of Malaysia, art 42(9); Talib, 41.

⁷⁷⁹ Talib, 43-44, 184.

⁷⁸⁰ Penna, 126; Al (1983), 4. The Malaysian Government Lawyer (by Interview) asserted that the petitioner's lawyer is often able to make 'informal' representations to the Board, without elaborating. A noted Malaysian criminal defence lawyer (by interview) also asserted that defence lawyers do sometimes make such representations.

⁷⁸¹ Interview with Malaysian Government Lawyer; Interview with Malaysian Member of Parliament; Interview with Malaysian Criminal Defence Lawyer.

⁷⁸² Interview with Malaysian Government Lawyer; see notes 714-716 and associated text, above.

Importantly, the Federal Attorney-General - the State's chief legal adviser - doubles as Malaysia's chief prosecutor, and has often been accused of lacking independence from the executive in the exercise of this function.⁷⁸³ As the Malaysian Bar Council observed as far back as 1983:

If an accused person is apprehended after an offence has been committed the Attorney General has the following discretionary powers: to charge him, if so the type of charge, to issue a certificate to bring the case under the emergency legislation [on security offences], to transfer the case to the High Court, to appear in person at the trial, to appeal to the Federal Court against acquittal and to apply for the remand of the accused until the disposal of the appeal, *to give a written opinion to the Pardons Board if the accused is convicted and to sit on the Pardons Board when the pardon is considered...* The powers of the Attorney General make nonsense the doctrine of separation of powers.⁷⁸⁴

As outlined in Chapter Three, in jurisdictions where the case prosecutor is consulted before a decision to grant clemency or pardon is made, grants of clemency will be fewer in number.⁷⁸⁵ Why would the Federal Attorney-General recommend commutation if the state has already put significant resources into the prosecution of a death sentence, other than for circumstances arising well *after conviction*? As described in the previous section

⁷⁸³ AI-Index ASA 28/03/97; 'Malaysian PM pledges Police Chief, Attorney-General not involved in Anwar's sodomy case'; Interview with Australian Academic Expert on Malaysia; Interview with Malaysian Member of Parliament.

⁷⁸⁴ 'The Attorney General – The most powerful person in Malaysia?', emphasis added. See also Penna, 125-126. Hashim (at 42) and Harding (1996b) (at 70) observe that the Attorney-General's normal practice is to delegate this power to the State Legal Advisor, as permitted by art 42(5) of the Malaysian Constitution.

⁷⁸⁵ Abramowitz and Paget, 184-185; Barkow (2009), 156.

focusing on prosecutorial discretion, if after arrest, a case exhibits mitigating factors that justify a lesser punishment than death, a decision not to bring a capital prosecution in favour of administrative detention or a non-capital charge can be made *by the Attorney-General's Chambers* at the earliest possible opportunity, rather than at the final stage of clemency deliberations.

'No Mercy' Drugs Policy 1983-1994

As described above, in Malaysia the death penalty for drug trafficking became mandatory in 1983, and 120 traffickers were executed between 1983 and 1992.⁷⁸⁶ The prevailing executive government policy towards drug traffickers from the early-1980s to mid-1990s was one of stern punishment, in order to deter trafficking, protect the public, and express public and political indignation against a crime perceived to be the most serious on the statute books.⁷⁸⁷ Together with the influx of Vietnamese refugees fleeing the communist regime in that country, and the purported *domestic* threat of communist insurgency, in the 1980s drug trafficking was portrayed as a security issue with the potential to threaten Malaysia's future stability as a nation.⁷⁸⁸ During his second reading speech to parliament before the 1983 MDP amendment was passed, Prime Minister Mahathir described drug traffickers as 'cruel, mercenary killers, "traders in death, destruction and traffickers in suffering", and added that such persons were completely undeserving of forgiveness and compassion.'⁷⁸⁹ The government needed its domestic and international audience to

⁷⁸⁶ See notes 687 and 692, above.

⁷⁸⁷ See *Chang Liang Sang v Public Prosecutor*.

⁷⁸⁸ Sodhy, 1075; Whiting.

⁷⁸⁹ Tan and Harn, [3.0].

recognise that it was doing its utmost to bring the narcotics problem under control,⁷⁹⁰ and as such was unapologetic over the enforcement of the 'world's toughest drug laws'.⁷⁹¹

Accordingly, given the stated importance of harsh punishments for drug crime during this period, it is not surprising that clemency for traffickers was almost unheard of in capital cases in the years after the 1983 enactment of the MDP,⁷⁹² and by 1992, 'Almost all convicted drug traffickers' appeals for clemency to Malaysian pardons boards [had] been rejected.'⁷⁹³ Based on data collected by Talib (as the only comprehensive source available), from 1983 to 1986, there were 39 executions *for drug offences*, and only *one* grant of clemency made, in 1986.⁷⁹⁴ Based on the same source, the overall clemency rate for drug crimes, from 1975 to 1986 stands at roughly 5 percent, in comparison with 33 percent for murder, and 23 percent for all crimes over the same period.⁷⁹⁵ Overall, the infrequency with which clemency was granted by the Pardons Boards in drugs cases from 1983 to 1994, a 12-year period that saw *nearly 50 percent* of the total number of executions from 1960 to 2011,⁷⁹⁶ is worthy of separate consideration as a contributing political feature pushing Malaysia's total clemency rate lower.

⁷⁹⁰ Interview with Malaysian Member of Parliament; Interview with Former Malaysian Federal Court Judge.

⁷⁹¹ Harring, 371; Swain; Schwarz.

⁷⁹² Robinson; Donoghue, 119-120.

⁷⁹³ 'Rocky Man to Hang'; Baker. In 1990, Donoghue (at 119-120) stated, in what is probably a slight exaggeration, that 'In reality clemency does not exist for drug traffickers in Malaysia, for since death for drug traffickers became mandatory in 1983 no pardons board has commuted a death sentence imposed for a drug offence.'

⁷⁹⁴ Talib, 109.

⁷⁹⁵ Ibid, 109, 113, 118.

⁷⁹⁶ See Appendix B and Shankar. These figures are for *all* capital crimes, not just drug crimes. Amnesty International reports that from 1975 to 1995, 'over 200' prisoners were executed for drug offences (AI-Index ACT 51/02/95, 7 n20).

Furthermore, as Malaysia's drug laws become more punitive with the advent of the MDP, they discriminated far less between prisoners from western and Asian nations, and between Malaysia's own ethnic groups (Malay, Chinese and Indian). After a number of death sentences imposed on westerners in the late 1970s and early 1980s were commuted,⁷⁹⁷ leading to a public backlash with racial overtones,⁷⁹⁸ from the mid-1980s the Malaysian Government decided to toughen enforcement of the death penalty, no matter what the nationality or ethnic background of the defendant.⁷⁹⁹ Australian Geoffrey Chambers and British-Australian Kevin Barlow became the first westerners to hang in Malaysia, in 1986, after their clemency appeals were rejected by the Penang Pardons Board.⁸⁰⁰ In 1990, the deputy director of Malaysia's Anti-Narcotics Task Force summarised the government's policy at the time: 'It doesn't matter if you are local or foreign, man or woman, the sentence is one... We feel that consistency is very important'.⁸⁰¹ Traffickers from the following nations were hanged in the 1980s, despite appeals from foreign heads of state: Australia, Great Britain, Hong Kong, Indonesia, the Philippines, Singapore and Thailand,⁸⁰² while one report revealed that around a quarter of drug executions from 1983 to 1990 were of foreign nationals.⁸⁰³ The manner in which the government's 'no mercy' drugs policy was emphasised before the State Pardons Boards is described in the preceding section, with ruling coalition-aligned State Chief Ministers and

⁷⁹⁷ See note 738, above.

⁷⁹⁸ Harring, 381-382.

⁷⁹⁹ Whiting; Pillai (1990); Sulong; Aisbett; Winchester.

⁸⁰⁰ Sulong; Roy; Crossette.

⁸⁰¹ Deans; see also Baker.

⁸⁰² See Maniam; HOC Malaysia 2008; 'Dadah Doesn't Pay'.

⁸⁰³ Pillai (1990).

the compliant Federal Attorney-General being able to ensure that petitions in cases involving politicised crimes were recommended for rejection.⁸⁰⁴

Finally, although the MDP still remains in force for drug trafficking in 2013, since the decline of narcotics as a security issue in the 1990s,⁸⁰⁵ foreign nationality may again be considered a 'mitigating factor' as far as the execution of the death sentence is concerned (as outlined in the earlier section *Features of Cases where Clemency Was Granted by the Pardons Boards*). I now move on to discuss three systemic features of the Malaysian death penalty landscape that have worked to counterbalance the preceding three factors in order to produce commutations, at the very minimum, in approximately 70 confirmed cases from 1975 to 2009.⁸⁰⁶

Role of the Malay Monarchy on the Pardons Boards

As described earlier, the constitutional function of each Pardons Board is to make a recommendation to the respective Hereditary Ruler, Governor, or *Yang di-Pertuan Agong*, who sits as Chair of the Board. Although the Rulers and Governors are known to follow a majority of recommendations made in *State* cases,⁸⁰⁷ they are far from mere figureheads in the clemency process, and are not legally obliged to follow the advice.⁸⁰⁸ Of course, as Chairmen of the Pardons Boards, the Rulers and Governors actively participate in the discussions themselves, even if they subsequently have the ultimate say over a pardon

⁸⁰⁴ Winchester; Hashim, 42.

⁸⁰⁵ Swinnerton, 82-83.

⁸⁰⁶ See Appendix B.

⁸⁰⁷ Interview with Former Malaysian Federal Court Judge; Interview with Malaysian Criminal Defence Lawyer.

⁸⁰⁸ See note 711, above; Interview with Member of the Malaysian Bar Council. However, see also note 822 below, on the unclear legal position of the *Yang di-Pertuan Agong* in Federal, Military and Security cases.

decision.⁸⁰⁹ This kind of decision-making process is at odds with the traditional concept of Constitutional Monarchy, whereby prerogative powers are only exercised in a ceremonial fashion, *on advice* given by the government of the day. Talib has observed that even though the drafting of the Malaysian Constitutional power to grant pardons was significantly influenced by the ‘royal prerogative of mercy’ as practised in pre-abolition Britain, the State Sultans had been exercising their traditional power to pardon well before British possession of Penang, Malacca and Singapore in 1825, and as far back as the sixteenth century.⁸¹⁰ Raja Azlan Shah (a former Malaysian Chief Justice and himself the Hereditary Ruler of Perak state since 1984) portrays the Malay Sultans in a manner that suggests they frequently exercised clemency in the form of ‘Mercy from the Sovereign’, as described in Chapter Three:

A Malay Sultan during the Malacca period [1402-1511 AD] held absolute power and his subjects gave him absolute loyalty... The Sultan declared war, decided on life and death of his subjects, administered justice, and maintained law and order.⁸¹¹

Moreover, in a similar vein, even relatively recent pardons have been granted in conjunction with Rulers’ Birthdays and on the first day of Ramadan (although it is unclear whether the festivities were the *reason* for the grants, or simply affected the *timing* of grants decided by other criteria).⁸¹² Whether because of the continuation of historical

⁸⁰⁹ Talib, 40.

⁸¹⁰ Ibid, 21-24.

⁸¹¹ Azlan Shah, 77.

⁸¹² ‘Perak Sultan Grants Four Prisoners Royal Pardon’; ‘Johor Sultan Pardons Eight Prisoners’; Interview with Singaporean Criminal Defence Lawyer; Interview with Malaysian Member of Parliament; Interview with Malaysian Criminal Defence Lawyer #2.

practice associated with the Sultanates and with Islam,⁸¹³ a desire to re-assert traditional royal powers after the enactment of the Constitution (Amendment) Act 1994,⁸¹⁴ or simply by force of personality, a number of modern Rulers (particularly the Sultans of Johor, Selangor and Perak, of the nine non-federated states) have demonstrated their independent discretion in constitutional matters in recent years.⁸¹⁵ In politically contentious death penalty cases, the *Barisan Nasional* executive⁸¹⁶ may be able to influence the outcome of the petition by making a strong recommendation through the Attorney-General and/or the relevant State Chief Minister,⁸¹⁷ however the Rulers are also empowered to authorise what would be politically unpopular pardon grants.⁸¹⁸ Royal discretion, exercised in accordance with or against the advice of the Board, is therefore likely to be considered one of the contributing factors to the medium number of pardons granted in death penalty cases during Malaysia's recent history.

A number of interview and archival sources have further suggested that the Pardons Board dynamics will differ depending on whether the Board is chaired by one of the nine

⁸¹³ The State Sultans are the constitutional guardians of the Islamic religion in their jurisdictions (Azlan Shah, 78-79; Bari, 60). In Chapter Three, *Public Opinion, Media and Religion*, I described that the use of lenient discretion in death penalty cases is not an anathema to Islamic rulers.

⁸¹⁴ See Richardson. The 1994 amendments to the Constitution removed many of the legal immunities previously enjoyed by the Sultans, and legally compelled the *Yang di-Pertuan Agong* to act on the advice given in matters beyond his personal discretion under the Constitution. These amendments were the culmination of a campaign by PM Mahathir to restrict the residual royal prerogatives beginning in 1983 (Kershaw, 160).

⁸¹⁵ Interview with Australian Academic Expert on Malaysia; Interview with Amnesty International Malaysia Staff; Interview with Malaysian Government Lawyer.

⁸¹⁶ See note 690, above.

⁸¹⁷ Winchester; Harding (1996b), 70 n58; Lim Kit Siang (28 July 1985); Hashim, 42. One prominent example is given by Amnesty International: in 1976 'the Sultan of Selangor said that he would not grant clemency to anyone who had been sentenced to death. This was his conclusion after a briefing on the security situation in the State on 20 November 1976, at which the Chief Minister, the Chief Police Officer of the State, and the Commander of the Kuala Lumpur garrison were present' (AI-Index ASA 28/04/79, 51).

⁸¹⁸ Addruse, 2.

Islamic Hereditary Rulers with a long collective history of granting pardons, or one of the four government-appointed *Yang di-Pertuan Negeri*, or State Governors. The latter, being appointed by the *Agong* on the political advice of the State Chief Minister and pursuant to each State's Constitution,⁸¹⁹ are thought to demonstrate less independence from *Barisan Nasional* policy in their decision-making on matters of royal prerogative.⁸²⁰ Moreover, the *Yang di-Pertuan Agong* himself holds a rotating throne created only by the Malaysian Constitution in 1957, rather than a stand-alone hereditary title stretching back hundreds of years.⁸²¹ The *Agong's* decision-making independence on pardons in federal, military and security cases is the subject of debate.⁸²² Suh and Oorjitham quote a senior lawyer's view that may reflect the *Agong's* largely ceremonial role in relation to pardons:

'The decision is exclusively his'... [However] the king 'will not see it as his function to take a different view from that advised. *He's the head of state, not a political leader.*'⁸²³

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

⁸¹⁹ Ibrahim, 519; Azlan Shah, 76; Harding (1996b), 63 n16.

⁸²⁰ Interview with Australian Academic Expert on Malaysia; Interview with Amnesty International Malaysia Staff.

⁸²¹ Harding (1996b), 67; Bari, 60.

⁸²² The Malaysian Constitution itself is highly ambiguous on the decision-making independence of the *Yang di-Pertuan Agong* in pardons cases. It is unclear whether or not art 40(1A), inserted in 1994 in order to compel the *Agong* to act in accordance with 'advice' when given, applies to art 40(3) and 42(4)(a), describing the Federal Pardons Board as a forum for 'consultation' with or 'recommendation' to the *Agong* (rather than a body to dispense 'advice'). See note 814, above, on the 1994 amendments.

⁸²³ Suh and Oorjitham.

the rulers are likely more able to assert their influence as they, unlike the *Yang di Pertuan Agong*, practically reign for life. This enables the rulers to influence the administration of [their] states.⁸²⁴

Notably, all drug trafficking and murder cases committed outside the Federal territories, together with a minority of firearms and explosives cases, still fall within the prerogative of the respective Hereditary Ruler or Governor. As I have described, the Hereditary Rulers in particular will be free to make up their own mind on the merits of granting clemency, irrespective of the recommendation made by the relevant Pardons Board. Further evidence of the Rulers' independent powers on clemency decision-making is described in the next section.

Long Stays on Death Row

One consequence of the concentration of power held by the Hereditary Rulers in a Federated country such as Malaysia is the extremely long wait on death row for condemned prisoners. It is common for prisoners sentenced to death in Malaysia to wait for up to 15 years for a decision by the relevant State Pardon Board, due to the infrequency of their meetings,⁸²⁵ although the precise interval between sittings varies between the individual Boards.⁸²⁶ A meeting of each Pardons Board must be initiated by one of the Board members requesting an audience with the respective Ruler or Governor,⁸²⁷ but it is entirely within the latter's discretion as to when (or whether) the

⁸²⁴ Bari, 60, emphasis added; Interview with Amnesty International Malaysia Staff.

⁸²⁵ Aziz; 'Some Pardons Boards have not met for years'; 'Review parole system and Pardons Board'; Habib.

⁸²⁶ 'Review parole system and Pardons Board'; Interview with Malaysian Government Lawyer.

⁸²⁷ Talib, 64; Interview with Malaysian Government Lawyer.

meeting will take place,⁸²⁸ with no legal time limit within which clemency appeals must be heard.⁸²⁹ The logistical difficulties in requiring all six members to meet face to face, in addition to the (alleged) low priority accorded to Pardons Board meetings by the nine Hereditary Rulers (in particular) have been known to cause multiple-year delays before each meeting.⁸³⁰

Moreover, up until the streamlining of the judicial process in the 1990s, it was normal for suspects to wait for up to five years on remand for their capital trials to proceed.⁸³¹ Even today the judicial appeal process alone can still take up to 10 years,⁸³² with some prisoners unable to make timely appeals against their convictions as presiding judges had abrogated their responsibility to provide written judgments.⁸³³ In 2006, the *New Straits Times* reported that those prisoners on death row in Malaysia for the longest periods of time had been imprisoned for 22 years (sentenced for drug trafficking) and 25

⁸²⁸ Interview with Amnesty International Malaysia Staff; Interview with Member of the Malaysian Bar Council; Interview with SUHAKAM Staff. The Malaysian Government Lawyer interviewee, in contrast, asserted that it is the *Attorney-General* who is the reason for the speed or delay in initiating sittings: the Rulers are asked only out of 'politeness'. If so, this would significantly change the nature of my conclusions on Malaysia, as the Rulers would not have operated to frustrate the government's desire for more executions: a high number of pardons would instead be partially caused by *political ambivalence* over executions.

⁸²⁹ See note 723 above, and associated text. Several sources provide differing accounts of the frequency of meetings: an article in the *New Straits Times* asserted that most Pardons Boards met at least once a year ('Rehabilitation is our top priority, says Prisons D-G'). The Malaysian Government Lawyer interviewee asserted that the normal practice of the Boards was to meet every four years in order to consider cases of long-term imprisonment (similar to a parole board), and that death sentences may have been considered during these meetings. A similar view, that death row prisoners can launch a new petition for pardon every *four years* is also held by the Attorney-General's Chambers (Tan (2010)).

⁸³⁰ Interview with Member of the Malaysian Bar Council; Interview with Amnesty International Malaysia Staff: one Ruler allegedly did not want to consider *any* petitions, creating a de-facto moratorium on executions in his State.

⁸³¹ Pillai (1992).

⁸³² '121 Convicts in "Death Row"'; Human Rights Commission of Malaysia, 5; HOC Malaysia 2008.

⁸³³ Kuppusamy (26/8/2007).

years (firearms possession), with their cases yet to be decided by the respective Pardons Boards.⁸³⁴

Whether it occurs by accident (negligence) or design (ambivalence over executions, or even deliberate long-term punishment on death row), lengthening the time a prisoner spends on death row waiting for a pardon decision actually increases the chances of a pardon eventually being granted.⁸³⁵ After many years spent on death row as punishment for a serious crime, as long as a commutation by the relevant Pardons Board is not widely publicised (and the capital cases of Malaysian prisoners receive scant media attention anyway, compared with those of foreigners),⁸³⁶ the conversion of a death sentence to a life (or natural life) term of imprisonment will not compromise the government's strong political stance against drug trafficking, terrorism, firearms possession and other capital crimes. A Malaysian Government Lawyer also observed that in these types of cases, the Pardons Boards may evince a collective *guilty conscience* in the commutation of a death sentence to a term of imprisonment.⁸³⁷

Of course, as in other death penalty jurisdictions, very long stays on death row provide prisoners in Malaysia ample time to reform, and demonstrate remorse for having committed the crime.⁸³⁸ While it must be acknowledged that there are only very few publicly-reported cases of prisoners being granted pardons after many years of good

⁸³⁴ 'Some Pardons Boards have not met for years'; 'A peculiar purgatory'; see also 'Dead Wait'.

⁸³⁵ Talib, 183; Acker et al, 195; Abramowitz and Paget, 168.

⁸³⁶ Donoghue, 158.

⁸³⁷ Interview with Malaysian Government Lawyer.

⁸³⁸ Tan (2010); Shiel; 'Death to Corruptors, Perhaps?'; Aisbett; Interview with Malaysian Government Lawyer.

behaviour on death row,⁸³⁹ rehabilitation in prison has been confirmed by the Attorney-General's Chambers as one of the Rulers' criteria for clemency in capital cases,⁸⁴⁰ and moreover *natural life* sentence prisoners (i.e. who were once designated never to be released after sentencing) have also seen their sentences reduced by the Pardons Boards as a result of time served and good behaviour.⁸⁴¹ The unpublicised commutation of the sentences of long-term death row prisoners may be one explanation (other than convictions being overturned on appeal) for the much larger gap between death sentences and executions in Malaysia from 1995 onwards, as compared with the 1980s.⁸⁴²

Limits to the Mandatory Death Penalty

Three more of Malaysia's modern death penalty practices demonstrate that, despite the enactment of a variety of MDP offences appearing to *guarantee* harsh and non-negotiable punishments for transgressors, the same laws still leave room for mercy in particular cases. First, in recent years it is the deterrent aspect of the mandatory *sentence* of death that has received particular emphasis from the Malaysian Government.⁸⁴³ The *symbolic* value of retaining and widely publicising the existence of MDP offences is seen as a more far humane and internationally-tolerable method of deterring drug trafficking in

⁸³⁹ Five examples (where the prisoners had waited on death row for between 8 and 24 years) from a 2012 sitting of the Johor Pardons Board are described in 'Johor Sultan pardons eight prisoners'. Notably, the prisoner who had served 24 years on death row was released from prison outright.

⁸⁴⁰ Tan (2010).

⁸⁴¹ Damis (25/12/04).

⁸⁴² See Appendix B. The other plausible explanation is the ever-expanding number of prisoners on death row, with more and more prisoners yet to receive an answer on their pardon petitions (Interview with Amnesty International Malaysia Staff; Interview with Member of the Malaysian Bar Council; Interview with Former Malaysian Federal Court Judge). In 1983 the size of death row was around 50 prisoners (AI (1983), 5), increasing to roughly 300 by 2008 (Kuppusamy (23/1/2008)). Unlike the remaining three jurisdictions, very few figures for *finalised* death sentences are available for Malaysia.

⁸⁴³ Interview with Malaysian Government Lawyer.

particular, as compared with the execution of large numbers of prisoners every year.⁸⁴⁴ If the *threat* of the imposition and execution of a death sentence is given substantially more public exposure than the low-key, behind-closed-doors decisions of the State and Federal Pardons Boards, then tempering a system which at first glance appears extremely punitive with an element of mercy is less likely to cause political harm to Malaysia's ruling coalition.⁸⁴⁵ This type of approach contrasts with a previous policy, adopted in the wake of the 1983 legislative changes to wage the campaign against drugs, to encourage the local media to report widely on *executions* in order to increase the deterrent effect.⁸⁴⁶

Second, of those crimes subject to the MDP, drug crime is no longer seen as the great social 'evil' that it once was.⁸⁴⁷ By the late 1990s, drug trafficking had dropped from the list of most pressing security issues facing the Malaysian Government.⁸⁴⁸ The shift to viewing narcotics more as a *social* problem than a threat to the viability of state *security* is evident through increased funding for harm reduction strategies in the public health sphere, instead of criminalising drug users,⁸⁴⁹ a move taken by a government that has *privately* acknowledged the ineffectiveness of the MDP in curbing drug trafficking or addiction in Malaysia.⁸⁵⁰ Despite these changes however, it would have been regarded as a retrograde political step to have publicly announced a decision to remove the MDP for

⁸⁴⁴ Harring, 403-404.

⁸⁴⁵ See note 775, above.

⁸⁴⁶ Soong (1986), 3.

⁸⁴⁷ Interview with Australian Academic Expert on Malaysia.

⁸⁴⁸ See Swinnerton, 82-83.

⁸⁴⁹ Human Rights Watch (2009).

⁸⁵⁰ US Department of State (2009); Lines, 14; Interview with Malaysian Member of Parliament.

drug offences altogether.⁸⁵¹ As with Singapore's PAP government since 1975, in Malaysia frequent government statements since 1983 have trumpeted the view that 'drug dealers deserve death', which has backed UMNO into a public-relations corner on the issue.⁸⁵² As a consequence, the current practice is to selectively prosecute drug offenders, utilise administrative detention laws to detain suspected traffickers without trial, and to allow the commutation of death sentences by the Pardons Boards in appropriate cases.

Third, throughout the entire history of its use in Malaysia, the MDP (first for murder under British rule, and since independence for security offences and latterly drug trafficking) has arguably *created* the opportunity for lenient discretion through commutation. Normally, the enactment of a MDP points to crimes 'where execution outcomes are expected and normal'.⁸⁵³ However, as I described in Chapter Three, in reality a MDP will instead transfer sentencing discretion away from the judiciary, towards both the 'front end' of the criminal justice process (as described above in the section on prosecutorial discretion) *and* the 'back end' of the process,⁸⁵⁴ which consists here of executive intervention by the Pardons Boards, Rulers and Governors. One illustrative example is the enactment of the Essential (Security Cases) Amendment Regulations 1981, which created the specific Federal Pardons Board for *Security Offences*, such that the *Yang di-Pertuan Agong* is provided with advice on pardons in security cases, even if they were originally tried outside Federal jurisdiction.⁸⁵⁵ Addruse reports that the new Board was

⁸⁵¹ Interview with Malaysian Member of Parliament.

⁸⁵² Ibid.

⁸⁵³ Johnson and Zimring (2009), 309; Ledewitz and Staples, 230.

⁸⁵⁴ Acker et al, 193; Abramowitz and Paget, 165; Interview with London-based Death Penalty Lawyer #2; Hawkins, 32, 36; Interview with Canadian Academic Expert on the Death Penalty.

⁸⁵⁵ See note 706, above.

established to facilitate the grant of pardons and reprieves to those prisoners mandatorily sentenced to death for the mere possession of firearms or explosives but who were subsequently proven not to have any 'communist or subversive connections'.⁸⁵⁶ Therefore, the framers of the Regulations themselves appeared to foresee that the MDP would require the *shift* of discretion to other stages of the process, rather than its complete elimination. As with Singapore, we can see here that the retention of the MDP serves as much as a *political statement* as it does a guarantee that particular crimes will be punished with death.

Although, as discussed earlier, the use of *prosecutorial* discretion will result in fewer cases with mitigating factors being considered for commutation, Acker et al have argued that it is unlikely that prosecutors will be able to 'absorb' all of the discretion taken away through the enactment of MDP laws: clemency will still have a role to play.⁸⁵⁷ In Malaysia it is commonly the trial or appeal judge who writes in favour of mitigation,⁸⁵⁸ recommending clemency for circumstances that become known, but cannot be considered at trial, due to the mandatory penalty on conviction.⁸⁵⁹ The very fact that the Malaysian Pardons Board procedure legally requires the trial and appeal judges to write reports on the case, making a recommendation as to whether the death sentence should

⁸⁵⁶ Addruse, 2.

⁸⁵⁷ Acker et al, 193.

⁸⁵⁸ Talib, 63; Al (1983), 4; Interview with Malaysian Government Lawyer. Although the trial and appeal judges' confidential reports are only addressed to the Pardons Boards, occasionally definitive recommendations for pardon do come into the public domain within a written judgment on a case or in a media report. Three examples here are: *Public Prosecutor v Yee Kim Seng* (for an Internal Security Act offence); 'Ex-cop goes back on Death Row' (in a murder case) and 'Dadah man, 84, loses appeal' (a drug trafficking case).

⁸⁵⁹ Interview with Malaysian Government Lawyer; Hong; Interview with Malaysian Criminal Defence Lawyer.

be carried out or not,⁸⁶⁰ forces each judge, at the very minimum, to open their mind to the possibility of clemency. If the judge does not adopt this approach, the main alternative to a likely execution is to acquit the defendant outright. Since jury trials were completely abolished in 1995⁸⁶¹ (and only took place in murder cases before that), mandatory death sentences create a significant moral burden for a judge in drugs or firearms/explosives cases, for example.⁸⁶² It is not surprising then that judges may prefer to 'delegate' their sentencing discretion in capital cases to the Pardons Board in the manner described, and it is equally unsurprising that the Pardons Board will consider such recommendations influential,⁸⁶³ alongside the report of the Attorney-General referred to above, in the decision whether or not to pardon.

Conclusion

Since the decline of drug crime as a major political and state security concern in Malaysia, *executions* are no longer as important as a means of crime control through deterrence and the elimination of offenders. Clemency now forms part of a number of judicial and political devices that enable the government to 'spare much of the difficulty of administering [the death penalty for drug offences] and the international embarrassment of too many executions.'⁸⁶⁴ However, it is erroneous to believe that the incidence of clemency has only fluctuated in Malaysia's recent history in inverse proportion to the political appetite for executions. That is to say, increased clemency does not merely

⁸⁶⁰ See Criminal Procedure Code, s 281(b).

⁸⁶¹ Ibrahim.

⁸⁶² Harring, 383-384.

⁸⁶³ AI (1983), 4; Interview with Former Malaysian Federal Court Judge.

⁸⁶⁴ Harring, 404; Interview with Malaysian Member of Parliament.

represent political ambivalence over executions. Instead, *systemic* features of the Pardons Board decision-making process, such as the significant role played by the Hereditary Rulers in exercising their prerogative powers to commute sentences, or in failing to respond to requests to convene Pardons Boards, have allowed commutations to take place *throughout Malaysia's modern history* as a practitioner of the MDP, not only for drug offences but also in murder cases, and security (firearms and explosives) cases, *in spite of* the government's desire to carry out more executions. The role of the Malay Monarchy, together with the sentencing and appeal judges whose reports to the Pardons Boards prove influential, have had a significant countervailing effect in overcoming the factors that would otherwise minimise the possibility of clemency for retributive, redemptive or merciful reasons in a large number of cases: the Federal Attorney-General's role on each Pardons Board, and the availability of administrative detention as an alternative punishment.

Chapter Seven - Kingdom of Thailand

Introduction

Of the four countries under examination in this study, Thailand is the notable outlier in terms of clemency rates. Indeed, in finalised Thai death penalty cases, clemency appears to be the *rule* rather than the *exception*,⁸⁶⁵ the reverse of the situation in Indonesia, Malaysia and Singapore. The most compelling reason to investigate the granting of clemency in Thailand is the influence of the reigning monarch, although Thailand's lengthy clemency procedures, history of summary executions and reluctance to execute foreigners may also help to explain the high incidence of Royal Pardons. All 18 Thai Constitutions since the abolition of the absolute monarchy in 1932 have conferred on the monarch the prerogative to grant Royal Pardons in death penalty cases,⁸⁶⁶ a power which the present king, Bhumibol Adulyadej, has frequently exercised over the course of his 65-year reign, in keeping with a longstanding royal tradition.⁸⁶⁷ While the Prime Minister and other members of the Thai political establishment and civil service have indeed had some influence on the pardons process in recent years, Thailand constitutes an important case study of the effect of a traditionally powerful yet constitutionally-constrained monarchical system of government on executive discretion in death penalty cases.⁸⁶⁸ Although heads of state in the four countries under review all have a formal role to play in the granting of clemency, the influence of the Thai monarch in such cases merits special attention.

⁸⁶⁵ Johnson and Zimring (2009), 401; FIDH (2005), 27.

⁸⁶⁶ Muntarbhorn.

⁸⁶⁷ Chotibal; Interview with Australian Academic Expert on Thailand.

⁸⁶⁸ Johnson and Zimring (2009), 406.

Death Penalty and Clemency Practice 1975-2009

Death Sentences and Executions

Thirty-five different civilian offences carry the death penalty in Thailand, contained within the Criminal Code 1956, the Narcotics Act 1979 and the Firearms and Accessories, Explosives, Fireworks and Other Equivalence Act 1947.⁸⁶⁹ Sixteen different offences under the Military Criminal Code also carry the death sentence as a maximum punishment.⁸⁷⁰ I will not attempt to list the entire set of Thai capital offences in this section, as only a minority has been used in practice. Of most importance are the types of offences for which *executions* have been carried out over the course of Thailand's history as a constitutional monarchy (from 1932):

- murder;
- robbery and murder;
- murder of a government official;
- rape and murder;
- manufacturing/importing/exporting 'type 1' drugs for commercial purposes, possession of trafficable quantities of 'type 1' drugs;⁸⁷¹
- offences against the monarchy;
- offences against the Royal Family.⁸⁷²

⁸⁶⁹ See FIDH (2005), 18-19 and Death Penalty Worldwide: Thailand for a full list of all 35 offences.

⁸⁷⁰ See FIDH (2005), 19, for a full list of all 16 offences.

⁸⁷¹ In practice, the narcotic drugs that are the cause of death sentences in Thailand now consist of heroin and methamphetamines (Gallahue and Lines, 33). While heroin trafficking and possession attracted the death penalty as part of the Narcotics Act 1979 (s 7, 65), methamphetamines were only added to the list of 'type 1' drugs in 1996 (AI-Index ASA 39/002/1997; Pouaree).

Executions are now carried out by lethal injection (which replaced shooting in 2001).⁸⁷³ During the past two decades, the majority of death *sentences* have been imposed for murder, narcotics offences, or for rape with murder.⁸⁷⁴ Similarly, while comprehensive figures remain unavailable,⁸⁷⁵ during the 1980s death sentences appear to have primarily been imposed for murder, robbery with murder and rape with murder.⁸⁷⁶ The traditional offences against the monarchy and Royal Family therefore appear to have been enforced primarily in the pre-1975 era,⁸⁷⁷ with the exception of a handful of death sentences for threatening national security during the 1970s and 80s.⁸⁷⁸

While the statutory provisions regulating capital punishment in Thailand appear to impose the *mandatory* death penalty for offences deemed the most serious (regicide, murder, drug trafficking, murder of a government official),⁸⁷⁹ the Thai Criminal Code also allows certain extenuating circumstances to mitigate punishment in all cases,⁸⁸⁰ and as such, death is in practice only a *discretionary* sentence in Thailand. As the Thai Union for Civil Liberty observes:

⁸⁷² Thailand Department of Corrections, 'Number of Execution and Type of Offense'. These figures reflect 280 executions where the offence type was known from 1935 to 2001.

⁸⁷³ Thailand Department of Corrections, 'Death Penalty'; FIDH (2005), 12; Johnson and Zimring (2009), 403-404 n9.

⁸⁷⁴ FIDH (2005), 9, 18; AI-Index ASA 39/02/99.

⁸⁷⁵ AI-Index ASA 39/002/1997, 5; see also note 888, below.

⁸⁷⁶ 'Death Sentences', 10-11; '31 Were Sentenced to Death', 27-28; '17 Persons Executed and Sentenced to Death During April and May', 10-11.

⁸⁷⁷ Interview with Thai Law Professor.

⁸⁷⁸ 'Persons Detained by Special Orders and Condemned to Death'; 'Human Rights Situation'; AI (1979), 102.

⁸⁷⁹ AI-Index ASA 39/002/1997; AI-Index ASA 39/01/99; Criminal Code 2003, s 107, 289; Narcotics Act 1979, s 65, 93.

⁸⁸⁰ See Criminal Code 2003, s 78. The enumerated extenuating circumstances include low intelligence, a minimal criminal record, distress, voluntary surrender, repentance, and cooperation with the authorities.

Judges in Thailand heavily rely on evidence of aggravating or mitigating circumstances from the offender's background and take into account the offender's behaviour, even during the trial. A well respected man will be condemned to a lighter sentence than another one for exactly the same offense.⁸⁸¹

With particular importance in capital cases, under Thai law a guilty plea at the earliest possible stage will, in a majority of cases, reduce a death-eligible crime to one attracting a term of imprisonment.⁸⁸² Moreover, the execution of pregnant women,⁸⁸³ juveniles,⁸⁸⁴ and the mentally disabled⁸⁸⁵ is also now prohibited.

Statistically, the general pattern over the period from 1975 to 2009, for which intermittent figures are available, is the imposition of a very large number of death sentences in the Courts of First Instance (175 is the highest 1980s figure for a single year, 109 in the 1990s, 447 in the 2000s),⁸⁸⁶ a moderate number of death sentences remaining after judicial appeals are exhausted (65 being the highest death row population in the

⁸⁸¹ Union for Civil Liberty (2011), 9.

⁸⁸² Pouaree; Union for Civil Liberty (2011), 9; Interview with Thai Criminal Defence Lawyer #2; Interview with Thai Human Rights Lawyer.

⁸⁸³ Criminal Procedure Code, s 246-247. Before amendment in 2007, the Thai criminal code simply delayed by one year the execution of women pregnant *at the time of the trial*, to save the life of the unborn child (HOC Thailand 2007; Charoonbara, 52 n47), however the vast majority of new mothers were granted Royal Pardon anyway ('Death Penalty Should be Abolished').

⁸⁸⁴ Criminal Procedure Code, s 18. The execution of 14 to 18 year-olds was only officially prohibited as recently as 2003 (HOC Thailand 2003; HOC Thailand 2009). In prior cases involving younger prisoners (variously listed as under 18 or under 20 years), death sentences were always commuted to a term of imprisonment by Royal Pardon (HOC Thailand 2001; FIDH (2005), 20, 33).

⁸⁸⁵ Criminal Procedure Code, s 246, 248: if treatment for a death row convict's psychiatric illness runs for more than one year, the death sentence will be automatically commuted to life (HOC Thailand 2002; 'Death Penalty Should be Abolished').

⁸⁸⁶ See Appendix C.

1980s, 70 in the 1990s, 127 in the 2000s),⁸⁸⁷ but only a comparatively small number of executions (an average of 3.7 per year from 1975-2009, with a minimum of zero and a maximum of 16).⁸⁸⁸ With a condemned prisoner afforded two stages of judicial appeal (in the Court of Appeal and in the Supreme Court) against both conviction and the severity of sentence,⁸⁸⁹ the significant discrepancy in sentences and executions, together with the intermediate figures for finalised death sentences, suggest that not only are many death sentences reduced on judicial appeal (or the defendant acquitted), but also that executive clemency is widely utilised in relation to the remaining cases.⁸⁹⁰

Clemency Procedures in Death Penalty Cases

In contrast to Singapore and Indonesia, clemency in Thailand is an institutionalised, formalised procedure within the criminal justice system,⁸⁹¹ rather than a hopeful chance to make new retributive and redemptive arguments in mitigation that have not already been considered in judicial appeals. The King of Thailand is empowered by the Criminal Procedure Code to grant two kinds of clemency: an *Individual* Royal Pardon or a *Collective* Royal Pardon.⁸⁹² The former, as its name suggests, involves the detailed consideration of

⁸⁸⁷ See Appendix C. In stark contrast to the lenient discretion exercised by the Attorney-General in capital cases in Malaysia and Singapore, a leading academic expert has labelled Thailand the ‘world capital of overcharging’ and the large number of first-instance and finalised death sentences is testament to this view (Interview with American Academic Expert on Capital Punishment).

⁸⁸⁸ See Appendix C: complete annual figures for executions in Thailand are published by the Department of Corrections, while statistics on death sentences, the death row population and clemency are only intermittently available.

⁸⁸⁹ Finch and Tangprasit; Union for Civil Liberty (2011); Interview with Thailand Department of Corrections Staff. Unlike in Indonesia, the other civil law country forming this study, sentences cannot be *increased* on appeal (Interview with Thai Criminal Defence Lawyer #2).

⁸⁹⁰ Interview with British Academic Expert on the Death Penalty.

⁸⁹¹ Interview with London-based NGO Staff #2; Thailand Department of Corrections, ‘Royal Pardon’.

⁸⁹² Thailand Department of Corrections, ‘Royal Pardon & the Impact on Death Penalty’. See Criminal Procedure Code, s 259 and s 261 bis (on Individual and Collective Royal Pardons, respectively).

an individual petition submitted through prison authorities by the prisoner, by a relative, or by a diplomatic representative (for foreign prisoners).⁸⁹³ A prisoner has 60 days to submit a petition in capital cases, after the final appeal judgment.⁸⁹⁴ Once completed, the petition for Individual Royal Pardon will contain the following information:

- a letter from the prisoner to the King, written in formal royal language, containing information such as the petitioner's personal background, previous employment details, family ties, details of the vocational and religious courses undertaken in prison, what the prisoner would do if the death sentence were to be commuted (or if released), why the prisoner committed the crime, any mitigating circumstances arising within the facts of the case, and finally if the pardon were to be granted, how might it affect public respect for the Royal Family;
- extrinsic documents such as children's birth certificates and marriage certificates; and,
- supporting letters from family, friends, employers and NGOs.⁸⁹⁵

The Department of Corrections, charged with the running of the prison system, will then build on the petition by adding other documents:

- the prisoner's criminal record;
- prisoner's record of behaviour in prison;⁸⁹⁶ and,

⁸⁹³ Thailand Department of Corrections, 'Royal Pardon'; Finch and Tangprasit.

⁸⁹⁴ Criminal Procedure Code, s 262; Thailand Department of Corrections, 'Royal Pardon'. This deadline is not always strictly enforced, as it will take some time for court documentation to arrive at the prison (Interview with Thai Human Rights Activist (2012)).

⁸⁹⁵ Interview with Thailand Department of Corrections Staff; 'King's Pardon Application'; Union for Civil Liberty (2011), 9; Interview with Thai Criminal Defence Lawyer #2; Interview with Thai Prison Caseworker; Interview with Thai Criminal Defence Lawyer; Interview with Thai Criminal Defence Lawyer and Thai NGO Staff.

- court documents from the prisoner's case.⁸⁹⁷

Individual petitions will then be considered by the Department of Corrections, the Ministry of Justice (or before a reshuffle in the 1990s, the Ministry of Interior), the Prime Minister and the Cabinet, the King's Principal Private Secretary, and the Privy Council, before a recommendation on whether to commute or affirm the death sentence finally makes its way to the monarch.⁸⁹⁸ In practice, the chief decision-makers on such a recommendation in cases of Individual Royal Pardon will be officials within the Ministry of Justice/Ministry of Interior,⁸⁹⁹ although Cabinet Ministers retain the power to veto pardons in particularly serious cases.⁹⁰⁰ Moreover, the monarch retains absolute discretion to act against any recommendation from bureaucrats or politicians.⁹⁰¹ A petition can be rejected, can result in the commutation of a sentence of death to life imprisonment (in which case the prisoner can submit another pardon request immediately, in order to have the term of imprisonment reduced), or can, in rare cases, lead to unconditional release.⁹⁰² As I explain below, the tedious bureaucratic decision-

⁸⁹⁶ Interview with Thailand Department of Corrections Staff.

⁸⁹⁷ Interview with Former Employee of the Thailand Department of Corrections; Interview with Thai Criminal Defence Lawyer and Thai NGO Staff.

⁸⁹⁸ Thailand Department of Corrections, 'Death Penalty'; Thailand Department of Corrections, 'Royal Pardon'; FIDH (2005), 28; Boriboonthana, 354; Interview with Thai Human Rights Lawyer. See note 907, below, on the function of the Thai Privy Council.

⁸⁹⁹ Thailand Department of Corrections, 'Royal Pardon'; Finch and Tangprasit; Interview with Thai Law Professor; Interview with Thai Criminal Defence Lawyer. An official I interviewed from the Department of Corrections viewed officers of his Department as making the decision, while the Ministry of Justice merely *confirmed* it (Interview with Thailand Department of Corrections Staff). The latter official also mentioned that a recommendation from the Office of the Narcotics Control Board (ONCB) will be asked for in relation to drug trafficking convicts.

⁹⁰⁰ Interview with Thailand Department of Corrections Staff.

⁹⁰¹ 'Chavalit honours anti-drug efforts'; Interview with Thai Law Professor; Interview with Thailand Department of Corrections Staff.

⁹⁰² Criminal Procedure Code, s 259-267; Thailand Department of Corrections, 'Death Penalty'.

making process, allied to the innate respect accorded to the monarch's formal role within the petition process combine to indirectly increase the chances of a pardon being granted.

Collective Royal Pardons are granted by Royal Decree, and take place to celebrate an 'important national event' such as the King or Queen's birthday or a significant event in the reign of the monarch.⁹⁰³ The full summary of Collective Royal Pardon grants to capital prisoners, where known, is provided in Appendix C. Unlike the procedure for an Individual Royal Pardon, no separate petition is necessary,⁹⁰⁴ but as with individualised clemency, only prisoners who have exhausted judicial appeals are eligible.⁹⁰⁵ Here, the Ministry of Justice and the elected government will form a committee to formulate a pardon decree in honour of the royal occasion,⁹⁰⁶ with the draft being forwarded for discussion and approval to the Cabinet, the Council of State (legal advisors to the government), the King's Principal Private Secretary and the Privy Council, before the decree is passed to the King himself, for final approval and signature.⁹⁰⁷ While many thousands of inmates sentenced

⁹⁰³ Thailand Department of Corrections, 'Royal Pardon'; Interview with Thai Prison Caseworker. For a full list of Collective Royal Pardons from 1977 to 1996, see Boriboonthana, 358. For a full list from 1999 to 2007, see 'Royal Pardon'. Collective Royal Pardons do not always take place on the same day year after year, i.e. the King or Queen's Birthday, as prisoner releases in 'celebration' generally only occur every *few* years (Willcox; Interview with Thai Criminal Defence Lawyer #2).

⁹⁰⁴ Thailand Department of Corrections, 'Royal Pardon'; Thailand Department of Corrections, 'Death Penalty'.

⁹⁰⁵ Union for Civil Liberty (2011), 16. Prisoners have been known to drop their final (Supreme Court) appeal against the death sentence in order to become eligible for a forthcoming Collective Royal Pardon (Interview with Thai Criminal Defence Lawyer #2).

⁹⁰⁶ The Committee contains representatives of the following Departments and agencies: Ministry of Interior; Office of the Attorney-General; Ministry of Defence; Royal Thai Police; Office of the Narcotics Control Board; Ministry of Justice; Department of Corrections; Secretariat of the Cabinet; Office of His Majesty's Principal Private Secretary and Office of the Council of State (Thailand Department of Corrections, 'Collective Royal Pardon').

⁹⁰⁷ Criminal Procedure Code, s 261 bis; Thailand Department of Corrections, 'Collective Royal Pardon'; Thailand Department of Corrections, 'Death Penalty'. The Privy Council's precise role at the penultimate stage remains unclear, however the Councillors' general function is to 'debate with the king on actions he could take' (Stevenson, 251).

to a term of imprisonment will receive sentence reductions or releases pursuant to the decree,⁹⁰⁸ death sentences have also been commuted to life or lesser terms of imprisonment in all recent grants of Collective Royal Pardon,⁹⁰⁹ and in some cases *all* finalised death sentences passed before a particular date have been commuted.⁹¹⁰ When only a fraction of existing death sentences are commuted in this manner, cases are assessed ahead of the pardon decree, according to clear criteria based on the type and severity of crime committed and the prisoner's assigned category of behaviour in prison.⁹¹¹ Nonetheless, the chronological regularity of important national events such as royal birthdays and anniversaries and the long tradition of pardons being granted to celebrate these occasions give hope to most death row prisoners that their sentences will eventually be commuted, even if their application for *Individual* Royal Pardon has already failed, or as is more likely, has been pending for a long period of time.⁹¹² In practice, it is

⁹⁰⁸ See Boriboonthana, 358; 'Royal Pardon'; Thailand Department of Corrections, 'Collective Royal Pardon'. Collective Royal Pardons, for prisoners sentenced to a term of imprisonment rather than those condemned to death, are used primarily as a 'remissions' measure in order to reduce prison overcrowding and motivate good behaviour in prison (Union for Civil Liberty (2011), 16; Interview with Thai Human Rights Activist #2 (2012); Interview with Former Employee of the Thailand Department of Corrections). However, the Department of Corrections also operates separate procedures for Parole (since 1937) and Sentence Remission (since 1978) (Boriboonthana, 353-354).

⁹⁰⁹ Thailand Department of Corrections, 'Death Penalty'; 'Amnesty for Drug Offenders Reflects King's Generosity'.

⁹¹⁰ FIDH (2005), 27; 'Sornchai Prefers Lethal-Jab Executions'. However, with the large number of death sentences passed each year, the number of capital prisoners always increases again quickly (Interview with Amnesty International Thailand Staff).

⁹¹¹ Union for Civil Liberty (2011), 16; Jaruboon, 87; Pouaree. See also HOC Thailand 1999; 'Prisons to Free 15,000 under amnesty'. The government's role is crucial here in deciding which categories of crimes or prisoners to 'veto' from eligibility for Collective Royal Pardon (Interview with Thai Prison Caseworker).

⁹¹² FIDH (2005), 27; Pouaree; 'Pardoned Inmates "Must Serve at Least 25 Years"'. See also note **Error! Bookmark not defined.**, below.

via *Collective* Royal Pardon that most death row prisoners who have exhausted judicial appeals escape execution,⁹¹³ as is evident from the figures provided in Appendix C.

Features of Cases Where Royal Pardon was Refused (and the Prisoner was Executed)

From the limited data available during the period 1975 to 2009 (with complete data for many intermediate years missing), the annual average for Royal Pardon grants of both types ranges from 40 to 43, as compared with the much smaller annual average for executions (3.7).⁹¹⁴ The clear pattern, as evident in Appendix C, is that a Royal Pardon is the *expected*, rather than the remote, outcome in each capital case, with the overall clemency ‘rate’ standing at a very high 91 to 92 percent. This estimate, even if compiled on the basis of incomplete statistics, nonetheless demonstrates Thailand’s status as a notable exception to the general observation that ‘Southeast Asian nations only grant clemency in very rare cases’.⁹¹⁵ A number of sources have similarly asserted that Royal Pardons have been granted to a *majority* of prisoners sentenced to death during the present King’s reign (from 1946), and not merely during the past 35 years.⁹¹⁶ As with the incidence of grants of capital *clemency* in the other three jurisdictions under examination, *executions* in Thailand have taken place on a spasmodic basis, as is evident from Appendix C. Accordingly, in Thailand’s case it is more pertinent within the current section to consider cases and criteria where a Royal Pardon was *not* granted: through the refusal of Individual Royal Pardon, in addition to the exclusion of the prisoner from a series of

⁹¹³ Interview with Thailand Department of Corrections Staff; Interview with Thai Human Rights Lawyer.

⁹¹⁴ See Appendix C.

⁹¹⁵

⁹¹⁶ Interview with Australian Academic Expert on Thailand; Interview with Thai Human Rights Lawyer; Johnson and Zimring (2009), 405.

Collective Royal Pardons promulgated during the time spent on death row, followed by his or her eventual execution.

Those executions that *have* taken place over the past few decades (130 from 1975-2009)⁹¹⁷ have generally served the political purpose of highlighting the state's lack of tolerance for a particular form of crime.⁹¹⁸ Only in cases deemed especially shocking, or where the government seeks to 'make an example' of the offender, has an execution actually proceeded.⁹¹⁹ Since the establishment of the constitutional monarchy in 1932, the majority of executions have been for murder and robbery with murder, or else offences against the monarchy and the security of the Kingdom;⁹²⁰ however, as described earlier, during the past two decades murder and drug trafficking cases have become the most numerous crimes leading to executions.⁹²¹ Furthermore, the crimes for which prisoners have been considered 'disqualified' from Collective Royal Pardons in past grants, providing an additional key indicator of the government's punishment priorities, consist of:⁹²² drug trafficking,⁹²³ treason or offences against the state,⁹²⁴ and rape with murder⁹²⁵

⁹¹⁷ See Appendix C.

⁹¹⁸ Interview with Australian Academic Expert on Thailand.

⁹¹⁹ Interview with Singaporean Criminal Defence Lawyer #2; Interview with Thai Human Rights Activist (2012).

⁹²⁰ Johnson and Zimring (2009), 403; AI (1979), 102; Thailand Department of Corrections, 'Number of Execution and Type of Offense'. Crime-specific statistics are unavailable for the period 1975 to 2009.

⁹²¹ See note 874, above.

⁹²² See note 911, above.

⁹²³ 'Pardon for Drug Convicts Possible'; 'Amnesty for Drug Offenders Reflects King's Generosity'; 'Persons Detained by Special Orders and Condemned to Death'.

⁹²⁴ 'Persons Detained by Special Orders and Condemned to Death'; 'Human Rights Situation'.

⁹²⁵ 'Royal Pardon to Mark Bicentennial'; 'Prisons to Free 15,000 under amnesty'.

during the 1980s and early 1990s, and drug trafficking alone since the resumption of executions from the mid-1990s and into the 2000s.⁹²⁶

As briefly alluded to above, Thailand's practice of executions has been uneven and spasmodic in the era of constitutional monarchy since 1932.⁹²⁷ Since 1975, perhaps the most notable feature is the undeclared moratorium that took place from 1988 to 1995.⁹²⁸ The King's personal role in commuting sentences or failing to answer petitions, along with the other factors I outline during the remainder of this chapter, may have prevented the carrying out of executions during this eight year stretch, together with the year 1983, and during the earlier undeclared moratoriums in 1946-1950, 1952-1954 and 1957-1958.⁹²⁹ However, in the early 1990s during this most recent multi-year break in executions, concern grew within the Thai political establishment that the country's serious violent crime problem, particularly murders involving police officers, both as perpetrators and victims,⁹³⁰ and the permissive attitude to drug abuse was not being addressed.⁹³¹

⁹²⁶ Union for Civil Liberty (2011), 36; Willcox; AI-Index ACT 50/001/2002, 11. For the 1999 Collective Royal Pardon, the Bangkok Post reported the more flexible criteria that 'a royal pardon should be carefully considered on a case by case basis' for drug convicts ('Criteria set for granting royal pardon').

⁹²⁷ Johnson and Zimring (2009), 403, 405.

⁹²⁸ FIDH (2005), 12. A Thai Human Rights Commissioner (by Interview) speculates that this moratorium arose during Thailand's period of democratisation and political compromise, where economic policy was prioritised over security issues, and former Communist insurgents allowed to rehabilitate and return to society.

⁹²⁹ Johnson and Zimring (2009), 403, 405. The lack of judicial executions in the years 1975 and 1976, on the other hand, can almost certainly be explained by the imposition of martial law, during the leftist student uprising of the period (Interview with Thai Human Rights Commissioner; Interview with Thai Human Rights Lawyer). Numerous *summary* executions were carried out over this period (see Funston, 'Thailand: Reform Politics', 331-332), but the large number of court-sanctioned executions in 1977 (14) also suggests that judicial processes were simply suspended and then later resumed. Periods such as 1975-1976, during which there are no judicial executions in Thailand, can be misleading as an indication of an undeclared 'moratorium' on state-sanctioned violence, given the summary executions frequently engaged in by security forces (see *Extra-Judicial Executions – 'Constitutional' and 'Unofficial'*, below).

⁹³⁰ Handley, 374; 'Ex-Police Officer Executed'; Alford; AI-Index ASA 39/002/1997; Interview with Thai Human Rights Activist (2012).

Accordingly, executions in murder cases were resumed from January 1996,⁹³² while large-scale narcotics traffickers were also judicially executed for the first time since the 1970s,⁹³³ although whether or not the King specifically approved these executions or merely acquiesced in them remains unknown.⁹³⁴

Since the resumption of executions in 1996, drug trafficking is the crime in which political imperatives may have most directly clashed with the King's prerogative to adjudicate on Individual Royal Pardon petitions.⁹³⁵ While drug traffickers had long been excluded from consideration in the majority of Collective Royal Pardons in cases stretching back to the enactment of Thailand's Narcotics Act in 1979,⁹³⁶ former Prime Minister Thaksin Shinawatra also moved (unsuccessfully) to legally prohibit newly-sentenced drug traffickers from submitting petitions for Individual Royal Pardon in 2001 pursuant to his administration's 'war on drugs'⁹³⁷ (which included the summary killing of

⁹³¹ Handley, 374-375, 425; Interview with Thai Human Rights Activist (2010).

⁹³² AI-Index ASA 39/002/1997. Specifically, see 'Murderer First Convict to Be Executed in Eight Years'.

⁹³³ Thailand's Narcotics Act, explicitly authorising the death sentence for drug trafficking, only came into effect in 1979, and was not invoked to execute a drug trafficker until 1999 (Pouaree; AI-Index ASA 39/05/99). Since then, approximately 15 heroin and methamphetamine traffickers have been executed pursuant to this law (Gallahue and Lines, 33). However, 12 suspected drug traffickers were executed pursuant to constitutional national security provisions in the 1960s and 70s (Pouaree; AI (1979), 102), as I describe later in the chapter.

⁹³⁴ Statement by Australian Academic Expert on Thailand; Johnson and Zimring (2009), 406. See also note 937, below.

⁹³⁵ Interview with London-based NGO Staff; Pouaree.

⁹³⁶ See notes 923 and 926 and associated text, above.

⁹³⁷ AI-Index ASA 39/002/2002; AI-Index ASA 39/005/2001; FIDH (2005), 27. Thaksin's purported move proved legally impossible, due to the constitutional right of all convicted criminals to apply for pardon (Interview with Thai Human Rights Activist (2012); Interview with Thai Human Rights Lawyer).

Handley (at 425) speculates that Thaksin's move to ban serious narcotics traffickers from submitting pardon applications may have been a convenient way for the government to employ the death penalty as a deterrent and to make a strong political statement condemning drug crime, while also allowing the King to save face (as he privately approved of certain drug-related executions).

around 2500 drug dealers and users during 2003).⁹³⁸ After the lifting of Thailand's unofficial moratorium in January 1996, roughly 30 percent of executions have been undertaken for drug trafficking offences,⁹³⁹ including the two most recent executions, conducted in August 2009.⁹⁴⁰

Aside from the nature and severity of the offence, which impacts on both Individual *and* Collective Royal Pardons,⁹⁴¹ the various other criteria for the granting of Individual Royal Pardons invoked in past cases have included the following demographic, utilitarian and rehabilitative/redemptive considerations:

- the prisoner's nationality, which is of critical importance, as I explain later;⁹⁴²
- rehabilitation as demonstrated within prison, which is also of significant importance;⁹⁴³
- admitting to the crime and showing remorse;⁹⁴⁴
- wrongful conviction, on the rare basis of new evidence being produced;⁹⁴⁵
- gender (a female prisoner, especially with young children, being more likely to receive a pardon);⁹⁴⁶

⁹³⁸ FIDH (2005), 8-9; Yimprasert; Interview with Thai Human Rights Activist (2012).

⁹³⁹ See Appendix C, and Gallahue and Lines, 33.

⁹⁴⁰ HOC Thailand 2009; Thamnukasetchai (2009).

⁹⁴¹ Interview with Thai Law Professor; Pouaree.

⁹⁴² See *International Relations and Foreign Prisoners*, below.

⁹⁴³ See notes **Error! Bookmark not defined.-Error! Bookmark not defined.** and associated text, below.

⁹⁴⁴ 'Legality of Pardon Move Doubted'; 'Of Amnesties and Royal Pardons'; HOC Thailand 1999; Crawford.

⁹⁴⁵ Interview with Thai Criminal Defence Lawyer; Interview with Thai Human Rights Activist (2010). Retrials on the basis of new evidence are legally possible but extremely rare in practice (FIDH (2005), 28).

⁹⁴⁶ Death Penalty Worldwide: Thailand; 'Death Penalty Should be Abolished'. From 1935 to 2005, until Thailand amended the method of execution from shooting to lethal injection, men executed in Thailand outnumbered women by 316 to 3 (FIDH (2005), 33; HOC Thailand 2009).

- age (both teenage and elderly prisoners almost certain to be granted commutation);⁹⁴⁷
- employment in the civil service or the military;⁹⁴⁸
- terminal illness in prison (including ‘untreatable cancers, organ failure, AIDS or mental diseases’);⁹⁴⁹ and,
- providing assistance with ongoing police investigations.⁹⁵⁰

Accordingly, prisoners who satisfy none of these criteria have faced a higher risk of execution, although throughout the period 1975 to 2009, failing to qualify on this ‘list’ would have been a necessary *but not sufficient* criterion for execution. The condemned prisoner would first of all have been found guilty by the courts, after pleading not guilty at first instance, and would need to have failed in two judicial appeals against conviction and sentence. Thereafter, the case would need to have been finalised within a period of time where the Thai Government had sought to initiate a ‘crackdown’ on particular crimes, such as large-scale drug trafficking, child rape, murder involving state officials, or offences against the monarchy, as described above. Otherwise, the capital prisoner could expect to have his or her death sentence commuted as part of a Collective Royal Pardon, at the very least, in the absence of these specific mitigating circumstances justifying an Individual Royal Pardon.

⁹⁴⁷ HOC Thailand 2006; HOC Thailand 2001; FIDH (2005), 33; Interview with Thai Prison Caseworker. The Thai human rights activist I interviewed in 2010 asserted that in practice, no-one is executed above the age of 65. See also note 884, above, on youth.

⁹⁴⁸ Death Penalty Worldwide: Thailand; Interview with Thai Human Rights Lawyer.

⁹⁴⁹ Thamnukasetchai (2007); HOC Thailand 2006; ‘When Couriers Fail to Deliver’. See also note 885, above.

⁹⁵⁰ Burrell; ‘Activities of CGRS’.

Explaining the High Clemency Rate in Thailand

There are four noteworthy factors that operate to explain the very high proportion of clemency grants in finalised capital cases in Thailand. First and probably most influential are Thailand's system of government and national religion: a constitutional yet occasionally interventionist monarchy steeped in Buddhist tradition,⁹⁵¹ with the longest reigning monarch in the world.⁹⁵² Second is the process by which Individual and Collective Royal Pardons are granted, leading to protracted stays on death row for capital defendants before a decision on clemency is finalised. Third is the Thai political establishment's long-time use of constitutional and extra-legal summary execution procedures to control petty crime and to eliminate political opponents. Finally, particularly in light of the fact that foreigners make up a significant minority of those prisoners executed for drug offences in Singapore and Malaysia over the period of study,⁹⁵³ some explanatory power for the prevalence of clemency can be found in the Thai authorities' general reluctance to carry out executions of foreigners, particularly those prisoners from western nations.

King Bhumibol and the Buddhist Monarchy

Thailand remains the only country in Southeast Asia never to have been colonised,⁹⁵⁴ a fact reflected in the continuity of the Chakri dynasty from 1782 to the present.⁹⁵⁵ In a fluid and unstable political system beset by 17 military coups and 18 different

⁹⁵¹ Johnson and Zimring (2009), 398.

⁹⁵² Ivarsson and Isager, 2; 'A Royal Occasion'.

⁹⁵³ See generally Chapter Five: Singapore, *The Rule of Law and the Singapore 'Brand Name'* and Chapter Six: Malaysia, *'No Mercy' Drugs Policy 1983-1994*.

⁹⁵⁴ Choosup, 81; Alarid and Wang.

⁹⁵⁵ 'A Royal Occasion'; Ivarsson and Isager, 6.

constitutions since the end of absolute monarchy in 1932,⁹⁵⁶ King Bhumibol Adulyadej (the ninth of the Chakri Kings) has proven a rare constant political influence.⁹⁵⁷ Two particular aspects of the Thai monarchy as a cultural and historical institution - the 1000-year history of granting pardons in order to demonstrate benevolence, and the monarchy's inalienable association with Theravada Buddhist doctrine - operate to substantially explain the continued award of Individual and Collective Royal Pardons in the vast majority of finalised capital cases within the timeframe of the present study: 1975-2009.

First, the long tradition of granting royal pardons to a majority of prisoners sentenced to death continues to be exercised as a key means of endearing the Thai monarch to the public. Despite strong public opinion in favour of the death penalty (a point to which I return below),⁹⁵⁸ politicians, sentencing judges and the public have rarely, if ever questioned King Bhumibol's generous exercise of the power to grant Royal Pardons over the decades of his rule since 1946.⁹⁵⁹ The desire to appear merciful and generous, rather than vengeful and punitive is by no means unique to the Thai monarch, and is

⁹⁵⁶ Harding and Leyland, 2. The authors note that since 1932, no other country has enacted as many different written constitutions as Thailand (at 34, 34 n62).

⁹⁵⁷ Johnson and Zimring (2009), 398; Funston, 'Thailand: Reform Politics', 342; Harding and Leyland, 34; Handley (at 433) quotes Bhumibol himself: 'when a constitution is abrogated or a parliament abolished... the people's mandate reverts to me'.

⁹⁵⁸ FIDH (2005), 8; HOC Thailand 2001; Interview with Amnesty International Thailand Staff; Johnson; 'Seminar on Religious Aspects of Death Penalty' quotes a recent survey finding that 84 percent of Bangkok residents favour the continued use of the death penalty, while Levett and a Thai Human Rights Lawyer (by interview) likewise suggest that support across Thailand stands at approximately 80 percent.

⁹⁵⁹ FIDH (2005), 12; Sherwell. See Pouaree and 'Capital punishment called into question' for exceptions involving sentencing and appeal judges. The failure to hold royal actions to account is not only explainable through public respect and adulation for King Bhumibol, but also Thailand's increasingly-draconian *lèse-majesté* laws, prohibiting criticism of the Royal Family, which have been most prominently exercised since 1976. For a leading academic expert on *lèse-majesté*, 'It is a dubious distinction that Thailand has what may well be one of the most repressive laws restricting freedom of speech in the world' (Streckfuss (2010), 109, 138).

generally associated with absolute monarchies, whereby popular approval is gained not through election, but through ‘strategies of benevolence’.⁹⁶⁰ As identified in Chapter Three, ‘Mercy from the Sovereign’ is one of four main clemency ‘paradigms’ identified by commentators. According to this theoretical framework, a grant of clemency by a sovereign ruler does not necessarily reflect the deserving nature of a particular case, but is instead carried out to demonstrate the monarch’s power over life and death, and his or her merciful nature.⁹⁶¹ In Thailand, this phenomenon is best demonstrated by the granting of *Collective* Royal Pardons as a *symbol* of royal power,⁹⁶² although Individual Royal Pardons may also, in selected individual cases and when taken as a cumulative whole, help to endear the Thai Monarch to his subjects. As Chotibal noted in a major piece of research on the history of the Thai Royal Pardon, for almost 1000 years the institution of clemency has helped to bind the Siamese absolute monarchs and their royal subjects together,⁹⁶³ while in the post-1932 era, all 18 national constitutions promulgated since the end of absolute monarchy have explicitly empowered the king to pardon convicted criminals.⁹⁶⁴ Pardons in capital (and non-capital) cases have thus been an important means of maintaining the monarchy’s power, prestige and popularity.

Nevertheless, one important caveat to note is the declining frequency with which King Bhumibol *personally* adjudicates on individual pardon petitions and formulates proposals for collective pardons, given the large number of such documents, and his

⁹⁶⁰ Interview with American Academic Expert on Capital Punishment. Bhumibol has ‘frequently pointed out how the law was used unjustly to benefit a powerful few and harm the weak, while his own actions were just and fair’ (Handley, 433).

⁹⁶¹ See Chapter Three, *Mercy from the Sovereign*.

⁹⁶² Interview with Thai Criminal Defence Lawyer and Thai NGO Staff; Interview with Thai Human Rights Commissioner.

⁹⁶³ Chotibal; reiterated by a Thai Criminal Defence Lawyer and Thai NGO Staff member (by interview).

⁹⁶⁴ Muntarbhorn; Thongpao (2001). See also note 956 and associated text, above.

advanced age (82 at the end of 2009).⁹⁶⁵ One of the recent features of Thailand's pardoning process (both for Individual and Collective Royal Pardons), as described by the Department of Corrections and reiterated by 'elite' interview sources in Bangkok, is the ceremonial or signatory function of the king following the extensive vetting of each case or collective proposal by successive levels of government bureaucracy.⁹⁶⁶ Arguably, the long *tradition* of the monarch granting clemency to condemned prisoners (over 1000 years for the monarchy as a whole, as described above, and since coronation in 1946 for the present king)⁹⁶⁷ is currently more significant in explaining the high number of pardons than the personal influence of King Bhumibol himself. As described earlier, the institution of Royal Pardon is now largely retained as a *symbol* of royal power and prestige. The exact point at which the process evolved from the detailed personal consideration of individual petitions and collective proposals by the Chakri monarchs, to the exercise of a rubber-stamping function is uncertain. The political establishment and the bureaucracy may have usurped the power to grant Collective Royal Pardons, on behalf of the King, as far back as the establishment of Constitutional Monarchy in 1932,⁹⁶⁸ and under Bhumibol the rate of royal assent to proposed Collective Royal Pardon decrees has approached 100 percent.⁹⁶⁹ Individual Royal Pardons, on the other hand, were certainly considered in detail by monarchs prior to 1932.⁹⁷⁰ Although reliable evidence is not available on this

⁹⁶⁵ See note **Error! Bookmark not defined.** and associated text, above; Johnson and Zimring (2009), 405-406.

⁹⁶⁶ Thailand Department of Corrections, 'Process for Individual Royal Pardon and Petition Submitting'; Thailand Department of Corrections, 'Collective Royal Pardon'; Interview with Australian Academic Expert on Thailand; Interview with Thailand Department of Corrections Staff.

⁹⁶⁷ See Chotibal and note 916, above.

⁹⁶⁸ Chotibal.

⁹⁶⁹ Interview with Thailand Department of Corrections Staff; Interview with Thai Human Rights Lawyer.

⁹⁷⁰ 'Execution by sword'; Tips, 28; Interview with Thai Criminal Defence Lawyer and Thai NGO Staff.

point, given the lack of access to Palace officials, it is likely that Bhumibol has read all or at least a majority of individual petitions during the course of his reign.⁹⁷¹ However, since the King's health problems increased in severity from 2003, the roles of the Ministry of Justice and the Ministry of Corrections have become more influential, as unread petitions have 'piled up' on the king's desk.⁹⁷² Although the official position set out by government sources remains that the king reads every document put before him, a leading Thai human rights activist asserts that this has probably not been practicable in 'many years'.⁹⁷³

The second explanation for high rates of pardon in relation to the Thai monarchy is the historical influence of *Buddhist philosophy* on royal and bureaucratic decision-making on capital punishment. Around 95 percent of Thailand's population are followers of Theravada Buddhism.⁹⁷⁴ In Thailand, Buddhism has attained the status of:

a social institution which is important in giving meaning to and being a symbol of national unity. It is a source and medium of the culture and traditions of the Thai nation.⁹⁷⁵

Significantly, the Buddhist religion is generally regarded as incompatible with the practice of capital punishment,⁹⁷⁶ providing one possible explanation for the general reluctance of

⁹⁷¹ Interview with Thai Human Rights Activist (2012); Interview with Thai Law Professor.

⁹⁷² Interview with Thai Human Rights Activist (2012); Interview with Thai Human Rights Activist (2010); Interview with Thailand Department of Corrections Staff. A Thai Prison Caseworker, by interview, mentioned (in September 2012) that the backlog of Individual Royal Pardon petitions, for all sentence types, stood at roughly 4000.

⁹⁷³ Interview with Thai Human Rights Activist (2012).

⁹⁷⁴ Johnson and Zimring (2009), 397; Hubert; FIDH (2005), 14.

⁹⁷⁵ Somboon Suksamran, quoted in Jackson (1989), 2.

⁹⁷⁶ AI (1990), 9; Simon and Blaskovich, 11; Miethe et al, 119; Ankar (2004), 100.

the Thai authorities to carry out judicial executions.⁹⁷⁷ As I described in Chapter Three, Buddhist teaching eschews the deliberate taking of life, promotes pacifism and compassion,⁹⁷⁸ and recognises the capacity of all human beings to change and reform, a notion which extends to convicted criminals.⁹⁷⁹

Ironically then, public opinion polls in Thailand have long demonstrated mass support for capital punishment,⁹⁸⁰ and even the majority of Buddhist monks are known to support executions.⁹⁸¹ The retention of capital punishment as a criminal sanction is thus sometimes justified by the Thai political establishment as being in accordance with the will of the public, and consistent with the principles of democratic government.⁹⁸² Nonetheless, in the context of *Royal Pardon*, it is the piety of the Thai King and higher-level bureaucratic decision-makers on clemency recommendations, together with the monarchy's historical roots in the tradition of Buddhist kingship, rather than the views of the general public that are relevant to a consideration of Buddhism's impact on death penalty practice. Handley asserts that King Bhumibol has appeared to view many capital crimes 'in a Buddhist sense, [such] that criminal behavior was unmeritorious conduct and up to the criminal to correct lest he suffer bad karma.'⁹⁸³ The practice by successive

⁹⁷⁷ Interview with Australian Academic Expert on Thailand; Interview with Thai Human Rights Lawyer; Thongpao (2007); Torode. Executions are not carried out during Buddhist holidays or festivals in Thailand (AI-Index ASA 39/005/2001).

⁹⁷⁸ Johnson and Zimring (2009), 397; Alarid and Wang.

⁹⁷⁹ FIDH (2005), 14; Hubert. See also 'Seminar on Religious Aspects of Death Penalty'.

⁹⁸⁰ See note 958, above.

⁹⁸¹ Johnson and Zimring (2009), 397; Interview with Amnesty International Thailand Staff; Interview with Thai Human Rights Activist #2 (2012); Interview with Thai Human Rights Activist (2012).

⁹⁸² Johnson (2009). As noted in Chapter Three, historically capital punishment has been used in all majority Buddhist countries in Asia (Alarid and Wang; Keyes, 158).

⁹⁸³ Handley, 375.

Chakri monarchs of commuting the majority of death sentences passed accords with the Buddhist law of kingship: *Dhamma*,⁹⁸⁴ which has informed the use of the prerogative of pardon since the thirteen century Sukhothai period.⁹⁸⁵ For Handley,

In the Buddhist paradigm, the leader steers his people not by harsh laws and punishments but by the suasive power of example, the sheer force of his virtue. Karma governs the cosmos, not constitutional law and secular judges. If people do wrong, they will eventually suffer their deserved consequences naturally.⁹⁸⁶

Importantly, irrespective of whether the most important decision-makers in the formulation of Collective Royal Pardon decrees along with the consideration of Individual Royal Pardon petitions are politicians, members of the state bureaucracy, or the king himself, personally-held views on the impropriety of state-sanctioned killing and the need to *portray* the royal family as strictly adhering to traditional Buddhist doctrine have informed the commutation of the vast majority of finalised death sentences over the course of Thailand's modern history.

Pardoning Process and Long Stays on Death Row

Among the side-effects of Thailand's protracted judicial appeal and clemency process, described earlier, are the long periods of time prisoners spend on death row before the decision to pardon or to proceed with execution is finalised. Unlike in Singapore for example, where the judicial and political machinery of the state is renowned for its

⁹⁸⁴ van Oosten, 258; Interview with Thai Human Rights Lawyer.

⁹⁸⁵ Chotibal; Anand, 2. Harding and Leyland (at 2-3) assert that the tradition of Buddhist kingship was developed even earlier, under King Asoka (304-232 BCE).

⁹⁸⁶ Handley, 434.

efficiency,⁹⁸⁷ the more languid process evident in Thailand may increase the chances of an eventual pardon,⁹⁸⁸ in the same way I described in the Malaysian case.⁹⁸⁹ To reiterate, following arrest, trial and sentencing in the Courts of First Instance and two levels of judicial appeals (which alone will often take between 5 and 10 years),⁹⁹⁰ a prisoner's petition for Individual Royal Pardon, when made within the 60-day deadline, will pass through multiple government departments and political committees where recommendations are made on the case, before making its way to the King for ratification.⁹⁹¹ Although the Thai Criminal Procedure Code has always permitted an execution to proceed if the petition is neither accepted nor rejected by the King within a further 60 day period after its receipt by the Royal Palace,⁹⁹² in practice the Department of Corrections acts extremely cautiously in the majority of capital cases. Officers within the Department will usually wait for Royal approval before initiating execution procedures, however long this may take.⁹⁹³ Poignantly, a Department officer was quoted in the *Bangkok Post* in 1999 as stating: 'What would happen if the pardon [decree] arrived after we had killed the convict? How could we bring back his life?'⁹⁹⁴

⁹⁸⁷ Interview with Amnesty International Staff #2.

⁹⁸⁸ Pouaree; 'Convicted traffickers might face quicker execution'.

⁹⁸⁹ See Chapter Six: Malaysia, *Long Stays on Death Row*.

⁹⁹⁰ Union for Civil Liberty (2011), 9, describes a range of 7 to 10 years. A Thai Law Professor (at interview) asserted the time period is 5.5-7.5 years. A Thai Criminal Defence Lawyer and a Thai NGO Staff member (by joint interview) estimated 6-10 years.

⁹⁹¹ Thailand Department of Corrections, 'Death Penalty'; Thailand Department of Corrections, 'Royal Pardon'. See also note 894, above.

⁹⁹² Criminal Procedure Code, s 247(1); Pouaree.

⁹⁹³ Pouaree; FIDH (2005), 28; Breen (12/2010); Interview with Amnesty International Thailand Staff.

⁹⁹⁴ Pouaree.

Past practice for a majority of capital prisoners who have *not* received *Collective* Royal Pardon in the interim has been for Individual Royal Pardon petitions to neither be rejected nor approved by the King until the prisoner has served 5 to 10 years in jail *after* exhausting judicial appeals, at which time the sentence is officially commuted.⁹⁹⁵ The Thai bureaucracy and the Royal Palace appear to have taken the view that the 5-10 year period officially spent on death row, followed by a term of imprisonment of similar length (and in many cases then followed by release from prison), will constitute adequate retributive and deterrent punishment in response to a majority of serious crimes. In summary, a senior Thai judge interviewed by Pouaree stated that, in a majority of cases ‘those who receive the death sentence could leave prison – alive – after spending between 15 to 20 years behind bars.’⁹⁹⁶ Moreover, in the view of two Bangkok-based elite interviewees, as King Bhumibol has advanced in years, the frequency with which he adjudicates on or approves recommendations on Individual Royal Pardon petitions has declined, contributing to an enlargement in Bangkwang Prison’s death row (listed in Appendix C), and much longer waits for condemned prisoners if they are not granted Collective Royal Pardons in the interim period.⁹⁹⁷

⁹⁹⁵ Handley, 375; Interview with Thai Prison Caseworker; Interview with Former Employee of the Thailand Department of Corrections. The *Bangkok Post* (‘Pardoned Inmates “Must Serve at Least 25 Years”’) reported in 1995 that capital prisoners served an average of 12 years in prison, taking into account Collective Royal Pardons. Union for Civil Liberty (2011), 10, reported a range of anywhere from one to ten years for the consideration of an application for Individual Royal Pardon. Average figures for years spent on death row should be treated with caution, however, as not all condemned prisoners leave death row through clemency or through judicial execution. In Thailand, ‘historically a large percentage of those on death row are not executed but die of natural causes’ (Union for Civil Liberty (2011), 42).

⁹⁹⁶ Pouaree. Rojananphruk, in contrast, estimated ten years. Kelly (1991) also estimated ten years for *westerners*.

⁹⁹⁷ Interview with Thai Human Rights Activist (2012); Statement by Thai Human Rights Activist (2009); Interview with Thailand Department of Corrections Staff.

So how does the long period generally spent on death row affect the proportion of cases granted clemency? As I first noted in Chapter Three and repeated in Chapter Six: Malaysia, utilitarian considerations (such as assisting with ongoing police investigations or acting as a prison informant) and rehabilitation within prison are far more likely when a prisoner spends a long time on death row.⁹⁹⁸ Importantly here, good behaviour and demonstrated reform in prison have been acknowledged by the Thai authorities as one of the two most important criteria for the award of an Individual Royal Pardon (along with the nature of the crime committed).⁹⁹⁹ Moreover, although the process for granting *Collective* Royal Pardons is more streamlined, the long period of time already spent in custody during court appeals and while awaiting consideration for pardon will be influential in determining the prisoner's assigned 'category' on the basis of behaviour in prison – a crucial precondition determining eligibility for Collective Pardons.¹⁰⁰⁰ Overall, Corrections Department officials have opined that, even on death row, 'it is our duty to correct the behaviour of prisoners. If a prisoner has better behaviour, he or she should be eligible for pardoning.'¹⁰⁰¹

Extra-Judicial Executions – 'Constitutional' and 'Unofficial'

As described earlier, the commutation of the vast majority of finalised death sentences by King Bhumibol has passed almost without comment over the course of his reign. One of

⁹⁹⁸ See Chapter Three, note 321; Interview with Amnesty International Staff #2.

⁹⁹⁹ 'Amnesty for Drug Offenders Reflects King's Generosity'; Interview with Thailand Department of Corrections Staff; Pouaree. An officer from the Department of Corrections has even revealed that the petition review process is so slow that sometimes a prisoner's papers are returned to the Department for amendment, given a change in circumstances during processing (Interview with Thailand Department of Corrections Staff).

¹⁰⁰⁰ Jaruboon, 87; Pouaree; Interview with Thai Criminal Defence Lawyer and Thai NGO Staff.

¹⁰⁰¹ Pouaree.

the reasons that Thailand's many elected civilian and unelected military governments have been able to tolerate (or encourage, depending on the correct interpretation) this apparent 'thwarting' of the executive government's criminal justice objectives by royal prerogative is the concurrent availability of *extra-judicial* alternatives to judicial executions in order to control crime. Here, the enduring image of the monarch as a benevolent God-like figure,¹⁰⁰² the sanctity of the ancient Buddhist law of kingship: *Dhamma*, together with the long Chakri tradition of granting pardons are able to be upheld, whereas summary executions carried out by the military and police do the 'dirty work' of eliminating political opponents and undesirable criminal elements. As Handley notes, especially under Thailand's frequent military caretaker governments, 'the law was seen as a barrier to public order', hence the use of summary killings.¹⁰⁰³ Particularly during periods of political turmoil, the bypassing of conventional judicial processes allowed for rapid and more certain executions for crimes that posed a perceived threat to national security,¹⁰⁰⁴ whereas the conventional route of trial, adjudication, sentencing and (in most cases) Royal Pardon was still used for crimes that were undoubtedly serious yet not perceived as an *existential threat to the state* – domestic murders, robbery with murder, and rape with murder.¹⁰⁰⁵

Extra-judicial executions have taken place by two methods throughout Thailand's modern history: in an 'official' manner as sanctioned by a number of 20th century

¹⁰⁰² Ivarsson and Isager, 2-3; Streckfuss (2011), 309.

¹⁰⁰³ Handley, 375; 'Death Penalty Should be Abolished'; Interview with Thai Human Rights Commissioner.

¹⁰⁰⁴ Hickling, 218.

¹⁰⁰⁵ AI (1979), 102; 'Death Sentences', 10-11; '31 Were Sentenced to Death', 27-28; '17 Persons Executed and Sentenced to Death During April and May', 10-11. Historical anomalies do exist here, such that persons accused of rape with murder, or arson have also been summarily executed pursuant to constitutional provisions (see note 1008 and associated text below).

constitutions, and in an ‘unofficial’ manner as targeted or negligent killings by security forces. Relevant to the first conception of extra-judicial killings are Thailand’s numerous military coups since the overthrow of the absolute monarchy in 1932, together with the 18 separate constitutions enacted.¹⁰⁰⁶ A number of the documents from 1959 through to 1991 made allowance for the Prime Minister to bypass the legal process (and therefore, the Royal Pardon procedure) and authorise summary executions of perceived security threats to the nation, known as the ‘Article 17’ or ‘Article 21’ order.¹⁰⁰⁷ The power was widely utilised throughout the 1960s and 1970s under Thailand’s post-coup military ‘caretaker’ governments against leftist or communist political opponents, failed right-wing military coup leaders, rapists, arsonists and drug traffickers.¹⁰⁰⁸ By around 1982, the use of these procedures had declined, in view of Thailand’s stabilising political situation, with the Ministry of Justice instead choosing to rely on *judicially imposed* capital punishment in response to crime.¹⁰⁰⁹ Importantly, as far as confirming extra-judicial executions as an explanatory factor for Thailand’s high clemency rate – a majority of those suspects summarily executed under constitutional provisions would, in a system governed strictly

¹⁰⁰⁶ Harding and Leyland, 2.

¹⁰⁰⁷ See 1959 Constitution of Thailand, art 17; 1972 Constitution of Thailand, art 17; 1976 Constitution of Thailand, art 21; 1977 Constitution of Thailand, art 27; 1978 Constitution of Thailand, art 200; 1991 Interim Constitution of Thailand, art 27; Pouaree; ‘Death Penalty Should be Abolished’. The power did not exist in the democratic constitutions of 1968 and 1974.

The power of summary executions by executive decree breaches the ICCPR’s art 6(2), but Thailand did not become a party to the Covenant until 1996.

¹⁰⁰⁸ Pouaree; Gray; ‘Death Penalty Should be Abolished’; ‘Coups Leader Executed’; ‘Thailand: You Can’t Have it Both Ways’; Thak, 127-128; AI (1979), 66, 102; AI Annual Report 1978, 194; Interview with Thai Human Rights Commissioner.

¹⁰⁰⁹ ‘31 Were Sentenced to Death’. Thailand’s communist insurgency was defeated by government forces in the early 1980s (Keyes, 172; Funston, ‘Thailand: Reform Politics’, 332).

This move may explain the apparent spikes in executions in the mid-1980s, with 15 prisoners executed in 1984 and 16 executed in 1987, after the cases of these prisoners progressed through the criminal justice system (Appendix C).

by law and not executive decree, face capital charges in the *judicial* system, and would be at high risk of execution given their perceived threat to national security.¹⁰¹⁰ Drug offenders are also especially significant in this context, as traffickers have been subject to the judicial death penalty from 1979 (if not earlier),¹⁰¹¹ yet none were executed pursuant to conventional, *legal* means until 1999.¹⁰¹² Instead, 12 suspected drug traffickers were executed under the constitutional powers of summary execution described above, during the period 1961 to 1978,¹⁰¹³ before the enactment of the Narcotics Act 1979, which mandated the death sentence for heroin trafficking. Additionally, as I describe below, *after* the enactment of the 1979 Act, drug traffickers have often been subject to ad-hoc killings by police, instead of capital prosecution.

The second category of extra-judicial executions in Thailand consists of those carried out *without* constitutional backing, on a more ad-hoc basis by military and police personnel in the field. Thailand has a long history of extra-judicial killings by security forces. Most notably in Thailand's modern period of constitutional monarchy, during the period of civil and political unrest in the mid-1970s, security forces conducted targeted killings of leftist political leaders, protestors and communist insurgents¹⁰¹⁴ (some but not all of whom could have been brought to justice by judicial means). Likewise, for non-

¹⁰¹⁰ See notes 877-878 and associated text, above.

¹⁰¹¹ See the Narcotics Act 1979, s 65. Thailand's Harmful Habit-Forming Drugs Act (No. 4) 1961 also carried the death penalty for heroin distribution, disposal or sale, but it is unclear whether or not it ever authorised any judicial death sentences, given the summary execution power available within the 1959 constitution and later constitutions. Pouaree is certain that drug *executions* only took place pursuant to summary execution procedures during this period.

¹⁰¹² AI-Index ASA 39/05/99; Pouaree.

¹⁰¹³ Pouaree.

¹⁰¹⁴ Funston, 'Thailand: Reform Politics', 331-332; Yimprasert.

political crimes, a 2002 Freedom House report, even before Prime Minister Thaksin Shinawatra's later 'war on drugs' crackdown, observed that:

Thailand's poorly trained police frequently are implicated in wrongful killings and rights violations against criminal suspects and detainees. Officers at times kill armed drug traffickers and other criminal suspects while apprehending them. While police in some of these cases may be justified in using lethal force, at least some of the killings are unwarranted, according to nongovernmental organizations (NGOs) and the press.¹⁰¹⁵

Similar allegations of killings by police and the army in the 1980s and 1990s have been made by Thai NGO the Coordinating Group for Religion in Society, author Paul Handley, Amnesty International, the *Bangkok Post* and the US Department of State.¹⁰¹⁶ A 1982 report alleged that the Thai 'government combats crime through "death squads" in rural areas: as "investigator, prosecutor, judge, [and] executioner"'.¹⁰¹⁷

Thereafter, Thaksin Shinawatra's policy of ordering or permitting the summary execution of around 2500 drug dealers and users during 2003 has been interpreted as a means of bypassing the slow court system and Royal Pardon petition process, in order to shock the public and deter future criminal activity.¹⁰¹⁸ Thaksin's policies were continued, to a lesser extent, by his successors Samak Sundaravej and Abhisit Vejjajiva, through to

¹⁰¹⁵ Freedom House (2002c).

¹⁰¹⁶ See 'To Our Readers'; Handley, 375; AI-Index ASA 39/004/2002; AI-Index ASA 39/002/1997, 3, 6-7; 'Human Rights – US Document Cites Abuses in Thailand'; US Department of State (2000).

¹⁰¹⁷ 'To Our Readers'.

¹⁰¹⁸ Interview with Thai Human Rights Activist #2 (2012). Bhumibol may have approved of these killings, as alleged in *The Economist* ('Thailand's King and its Crisis').

the end of the period of study (2009).¹⁰¹⁹ The ad-hoc extra-judicial policies adopted over the past three decades, described above, have had the same kind of overall effect on capital cases as with the summary actions of military regimes of the 1960s and 70s: true threats to national security and crimes of particular political concern were severely dealt with without procedural barriers and extra monetary cost to the state,¹⁰²⁰ whereas King Bhumibol (knowingly or not) continued to play the traditional role of the benevolent Buddhist monarch.

International Relations and Foreign Prisoners

Unlike in Singapore and Malaysia, as described in the two preceding chapters, no citizen of a western nation has been executed in Thailand during the period 1975-2009,¹⁰²¹ and the execution of foreigners from developing nations is also relatively rare, with media sources asserting that none took place from the early 1960s at least to the resumption of executions in the mid-1990s.¹⁰²² The first execution of a foreigner from any nation during the course of my study may have been Burmese national Htaho Pauy, convicted of murder, in 1999.¹⁰²³

Commentators assume that this statistical disparity between the execution by the state of foreigners and of Thai citizens over the same period is explained by the

¹⁰¹⁹ Robertson (2010); Interview with Thai Human Rights Activist (2010); Interview with Thai Human Rights Commissioner.

¹⁰²⁰ Interview with Thai Human Rights Activist (2010); Jaruboon, 132.

¹⁰²¹ Interview with London-based NGO Staff; Kelly (1991); Kelly (1988); Drummond.

¹⁰²² 'Death Sentence for Canadian Father, Son'; Crawford; Bellett; HOC Thailand 2002. In 2009, 94 percent of foreign prisoners in Thai jails were from fellow Asian nations, with Burmese, Lao and Cambodian prisoners by far the most numerous ('Thai Prison Statistics'; Interview with Thai Prison Caseworker).

¹⁰²³ See AI-Index ASA 39/05/99.

importance of trade and tourism to the Thai economy.¹⁰²⁴ Even for trafficking in large amounts of narcotics, where proceeding to execution (extra-judicially from 1961-1978, and judicially after 1996) would be deemed a political priority in the case of Thai nationals, westerners have traditionally had their sentences commuted to a term of imprisonment,¹⁰²⁵ and might even obtain release from prison after around 10 years.¹⁰²⁶ It is not that westerners are completely excluded from the application of the criminal law, merely from the *execution* of the death sentence. Notably, the first westerner to be sentenced to death at first instance for drug trafficking in Thailand was convicted in 1985.¹⁰²⁷ While full statistics for foreigners sentenced to death are unavailable, in 1994 for example, there were over 1600 westerners incarcerated in Thai prisons (on sentences of various type and length) for narcotics offences.¹⁰²⁸ It does therefore appear that foreigners (and especially westerners) are treated in a sympathetic manner, compared with local prisoners convicted of capital offences.

At this point it is important to question why, given the Thai authorities' reluctance to compromise relations with other governments by executing foreign citizens, would death sentences be reduced to a term of imprisonment *by way of Individual or Collective Royal Pardon*, rather than by the three stages of judicial adjudication, in a system of

¹⁰²⁴ Interview with London-based NGO Staff; Skehan. Westerners, or other prisoners with money and connections may also benefit from corruption at the *earlier* stages of police investigations, before recommendations are made to prosecutors (Interview with Thai Human Rights Activist (2010); Interview with Thai Human Rights Activist #2 (2010); Interview with Thai Criminal Defence Lawyer #2; Interview with Former Employee of the Thailand Department of Corrections).

¹⁰²⁵ Interview with Thai Criminal Defence Lawyer.

¹⁰²⁶ Kelly (1991); 'American Given Life for Trafficking in Heroin'. A 2012 article reported the release from prison of the westerner who had served the longest ever stint in Bang Kwang prison, at 18 years (after being initially sentenced to death) – Friedman (2012).

¹⁰²⁷ Kelly (22/10/1985); Kelly (6/11/1985).

¹⁰²⁸ 'Asian Drug Executions Climb with Virtually No Opposition'.

discretionary death penalties (sentencing in the Courts of First Instance, and appeals within the Courts of Appeal and the Supreme Court)?¹⁰²⁹ The answer may be that foreigners are treated on a par with locals within the generally well-regarded judicial system,¹⁰³⁰ with the prevalence of acquittals on appeal, and legislatively-enumerated mitigating factors sufficient to reduce death sentences to a term of imprisonment in many, but not all, cases. Where a death sentence imposed on a foreigner reaches the Royal Pardon phase, it is here that extra-legal considerations such as the maintenance of good international relations become relevant. As I described in Chapter Three, clemency may be interpreted by the relevant executive decision-maker not only as an extra ‘layer’ of judicial appeal or as an incentive or reward for good behaviour and rehabilitation in prison, but also as a forum in which non-legal (political or utilitarian) considerations can be given weight.¹⁰³¹ While the other three countries represented in this study have, to varying degrees and at varying points in their history, emphasised publicly a policy of enforcing the criminal law in an impartial manner, including the provision that no-one should be exempted from the death penalty on the basis of their citizenship,¹⁰³² the Thai political authorities have openly adopted a contrasting position.

By what procedure does foreign nationality affect the process of commutation in capital cases, and why then were Hong Kong and Nigerian nationals amongst the 27

¹⁰²⁹ See notes 880-882, 889, above.

¹⁰³⁰ Interview with Thai Human Rights Activist (2010); Interview with Thai Criminal Defence Lawyer #2; Interview with FIDH Staff.

¹⁰³¹ See Chapter Three, *Clemency for Political Advantage or Utilitarian Reasons*.

¹⁰³² See Chapter Five, *The Rule of Law and the Singapore ‘Brand Name’*; Chapter Six, *‘No Mercy’ Drugs Policy 1983-1994*; Chapter Eight, *Democratisation, the ‘Rule of Law’ Rhetoric, and Drug Trafficking Cases during the Reformasi Era*.

prisoners judicially executed during the period 2000-2003,¹⁰³³ in the midst of Prime Minister Thaksin Shinawatra's judicial and extra-judicial crackdown on drug traffickers? It is generally within petitions for *Individual* Royal Pardon that foreign nationality will influence commutation in Thailand, rather than acting as a distinguishing criterion within the regular amnesties granted by Collective Royal Pardon.¹⁰³⁴ Evidently crucial is the advocacy role played by foreign embassies, governments and heads of state: while in 2001 it was claimed by western diplomats in Thailand that it was only a matter of time before a citizen of a developed country was executed for a narcotics offence,¹⁰³⁵ *high-level* representations by foreign governments have thus far invariably resulted in the commutation of death sentences to terms of imprisonment.¹⁰³⁶ How then are the executions of certain non-westerners, including those described above, to be explained? European diplomats have suggested that, for crimes where execution is deemed a political priority in Thailand, a *self-initiated* pardon petition by a foreigner would fail unless there was high-level backing for clemency from the relevant foreign government.¹⁰³⁷ For abolitionist countries and nations that adopt a 'protectionist' attitude to their citizens living and travelling abroad, such consular support will, in the vast majority of cases, be forthcoming and will form part of the Royal Pardon petition. Where the Thai authorities *have* executed foreigners after the lifting of the moratorium in 1996, 'elite' interview sources have speculated that the condemned prisoners hail from countries that:

¹⁰³³ Appendix C; HOC Thailand 2002; Corben.

¹⁰³⁴ Interview with Thailand Department of Corrections Staff; Union for Civil Liberty (2011), 16.

¹⁰³⁵ 'Western prisoners face Thai firing squad'.

¹⁰³⁶ HOC Thailand 2001; Bellett; Interview with Thai Human Rights Activist (2012); Interview with Amnesty International Thailand Staff.

¹⁰³⁷ HOC Thailand 2001; Interview with Thai Criminal Defence Lawyer #2; see also Friedman (2012).

- a) do not play a major role in the Thai economy through trade and tourism or do not otherwise have a special bilateral relationship with Thailand;¹⁰³⁸ and/or,
- b) do not engage in the zealous protection of citizens arrested and sentenced to death abroad¹⁰³⁹ (which is sometimes correlated with the negotiating nation's own stance on abolition).¹⁰⁴⁰

However, despite these few executions over the past 15 years, the commutation of the vast majority of finalised death sentences imposed on foreign nationals, particularly for offences that would lead to the execution of Thai citizens during periodic political campaigns against particular crimes, stands as an operative reason contributing to Thailand's high clemency 'rate' of over 90 percent over the period 1975 to 2009.

Conclusion: Explaining *Executions* in Thailand, Rather than Clemency

In regard to Thailand's high rate of Royal Pardons, together with the large number of death sentences reduced on appeal, Professors Johnson and Zimring pointedly observe that:

¹⁰³⁸ Interview with Thai Prison Caseworker; Interview with Australian Academic Expert on Thailand.

¹⁰³⁹ Interview with Amnesty International Thailand Staff; Interview with Thai Criminal Defence Lawyer #2; Interview with FIDH Staff; see also 'Pardon for Drug Convicts Possible'.

¹⁰⁴⁰ Interview with FIDH Staff; Interview with Thai Human Rights Lawyer. The latter interviewee also asserted that countries that impose the death penalty for drug trafficking themselves may not seek pardon, on the basis of upholding international relations, in a narcotics case.

The gap between death sentences and executions in Thailand is among the largest to be found in jurisdictions that retain capital punishment, perhaps matched only by California, Pakistan, and the Philippines before its second abolition. The Thai government reported 27 executions and 2150 death sentences in the seven years after January 2000, a ratio of one execution for every 80 death sentences.¹⁰⁴¹

The gap between first-instance death sentences and executions remains striking, even taking into account two phases of judicial appeals. Significantly, the number of death row prisoners who have *exhausted* judicial appeals stood at relatively high and increasing figures at different points throughout Thai's modern history: 16 in 1982, 65 in 1987, 40-53 in 1999 and 91-127 in 2009.¹⁰⁴² Given the average number of annual executions at 3.7 over the period 1975-2009, it is immediately apparent that clemency must play a substantial role in Thai capital cases. As is evident from even a cursory glance at Appendix C, commutation is the *expected* outcome in a capital case, which is far different from the position in Singapore, Malaysia and Indonesia over the same period.

Rather than individual case-based factors that inform clemency grants, throughout this chapter I have outlined a number of structural and historical features of the Thai criminal justice system that have instead combined to lead to an *institutionalised* system of Royal Pardons, delivering clemency rates of over 90 percent. Most significant here are the traditional influence of and reverence accorded the devoutly Buddhist king, the complicated bureaucratic system behind Individual and Collective Royal Pardons, the

¹⁰⁴¹ Johnson and Zimring (2009), 405. See also note 887, above.

¹⁰⁴² See Appendix C.

importance of foreign tourism and investment to the Thai economy, and the concurrent 'crime control' function of frequent extra-judicial executions.

Given these four factors leading to frequent grants of clemency, the final pertinent question to address in this chapter is how any non-summary executions have been allowed to take place *at all* over the course of Thailand's modern political history. Given such strong incentives against the carrying out of executions (with particular emphasis on the Buddhist and benevolent traditions of the Thai monarchy), why is Thailand the subject of academic comparison with the actively retentionist countries in the Southeast Asian region, rather than the abolitionist or abolitionist *de-facto* Asian monarchies ruling Bhutan and Brunei?¹⁰⁴³ Here, the initial point to be made is that, despite the monarch's traditional role (or the Thai bureaucracy's perpetuation of it) in commuting finalised death sentences, Thailand's political establishment has remained in favour of the retention of the death penalty and the *occasional* use of executions as a deterrent measure, at least since the enactment of the present Criminal Code, in 1956.¹⁰⁴⁴ As a Thai human rights activist sees it, Thai history on this topic has followed the path of a 'continual conflict between the people who want to stop [executions], and the people who want to start'.¹⁰⁴⁵ Unlike Bhutan and Brunei, Thailand's status as a *constitutional* rather than *absolute* monarchy results in the necessary balancing of and tension between Royal and political interests. In a constitutional monarchy, decisions on matters of Royal Prerogative (such as clemency and pardons) are generally carried out *in accordance with the advice*

¹⁰⁴³ See Johnson and Zimring (2009), 16, 406.

¹⁰⁴⁴ Interview with Thai Human Rights Activist (2012); FIDH (2005), 10; Interview with Thai Human Rights Commissioner.

¹⁰⁴⁵ Interview with Thai Human Rights Activist (2012).

given by the elected executive government.¹⁰⁴⁶ The king of Thailand is not in a position to effect ‘functional nullification’ of the death penalty through the blanket issuing of Collective Royal Pardons, if this is not the wish of the elected government.¹⁰⁴⁷

Throughout Thailand’s modern history, capital punishment by firing squad or by lethal injection, when it *has* been carried out, has been solely enforced on death row prisoners whose offence category was deemed particularly serious at the time, or who behaved badly in prison, thereby disqualifying the prisoner from the most reliable source of clemency - that of *Collective* Royal Pardon.¹⁰⁴⁸ As for the additional rejection of those prisoners’ petitions for Individual Royal Pardon, the three competing explanations set out by commentators are:

- a) where the government seeks to execute a convict, they are legally empowered to do so if the king does not rule on the petition within 60 days.¹⁰⁴⁹ In important cases, officials from the Ministry of Justice or Department of Corrections can be pressured to carry out an execution in these circumstances, in breach of the conventional protocol to wait on a royal response;¹⁰⁵⁰
- b) Handley’s speculation that King Bhumibol, towards the end of his long rule, has grown impatient with the drug and violent crime problems afflicting Thai society,

¹⁰⁴⁶ See Sebba (1977b), 111-115; Sebba (1977a), 221.

¹⁰⁴⁷ See note 969 and associated text, above.

¹⁰⁴⁸ See ‘Features of Cases Where Royal Pardon was Refused (and the Prisoner was Executed)’, above. The two most recent executions, in 2009, may have taken place after authorities learned that the two inmates had contrived to deal narcotics within prison (Interview with Thai Prison Caseworker).

¹⁰⁴⁹ See Criminal Procedure Code, s 247(1).

¹⁰⁵⁰ Johnson and Zimring (2009), 406; Interview with Thai Human Rights Activist (2012).

and has therefore refused a number of individual petitions.¹⁰⁵¹ Data provided by the Thai Union for Civil Liberty and Johnson and Zimring appears to support this conclusion, in that at least 26 petitions were actively *rejected* by the king during the period 2001-2005.¹⁰⁵² However, this explanation (on its own) does not account for the judicial executions that occurred in Thailand from 1951 to 1987.¹⁰⁵³ Here, a Thai human rights activist asserts that Bhumibol has granted many, but explicitly *rejected* the odd petition throughout the course of his rule.¹⁰⁵⁴ Finally;

- c) an amalgam of the previous two theories, such that Thailand's political leaders, *with the acquiescence of the Royal Palace*, have rushed through executions, contrary to normal bureaucratic procedures, after the lapse of the 60-day period for royal adjudication, but have also taken the ultimate political responsibility for the order, so as to protect the King's benevolent reputation and to maintain royal patronage.¹⁰⁵⁵

¹⁰⁵¹ Handley, 375; note 934, above.

¹⁰⁵² Union for Civil Liberty (2011), 17; Johnson and Zimring (2009), 404 n10.

¹⁰⁵³ See Johnson and Zimring (2009), 403.

¹⁰⁵⁴ Interview with Thai Human Rights Activist (2012).

¹⁰⁵⁵ For example, see note 937, above.

Chapter 8 - Republic of Indonesia

Introduction

The recent history of capital punishment in Indonesia can be divided into two distinct sections on the basis of political regime: the 'New Order' period (1975-1998) period under autocratic President Suharto, and the period known as *Reformasi*, or Indonesia's 'Reform Era' (1999 to the present).¹⁰⁵⁶ Death penalty developments during the Suharto era were dominated by the repercussions from a single event: the failed coup that took place on 30 August and 1 September 1965, subsequently attributed to members and associates of the Indonesian Communist Party (PKI), at the time the third largest communist party in the world (behind those of China and the Soviet Union).¹⁰⁵⁷ The failure of the coup allowed then-General Suharto to claim the Indonesian Presidency from Sukarno and institute a crackdown on PKI members, sympathisers, and Suharto's own political opponents, resulting in an estimated half a million people imprisoned and up to one million massacred during the following few years.¹⁰⁵⁸ Around 60 PKI members and associates labelled most responsible for the coup attempt were sentenced to death in 'show' trials in military and civilian courts in the late 1960s and 1970s.¹⁰⁵⁹ During the period 1975-1999,

¹⁰⁵⁶ Smith (2001), 79; Lynch, 554. The administration of Indonesia's third President, B.J.Habibie (May 1998 – October 1999) is considered a transitional period here. Habibie was the author of a number of democratic reforms but still came from Suharto's GOLKAR party and was an unelected President (Smith (2001), 77, 89, 109).

¹⁰⁵⁷ Thomas, 370; Lev (2011), 223.

¹⁰⁵⁸ AI-Index ASA 21/43/96; Cribb, 557-559; Smith (2001), 77. Here, Lev (2011) (at 223) asserts that 'calculating how many died is nearly impossible because of the lack of hard evidence; the figure of 500,000 commonly referred to is simply midway between low and high estimates.'

¹⁰⁵⁹ AI (1988), 2; Lev (2011), 233-234, 346; AI-Index ASA 21/33/85. TAPOL quotes a figure of *at least* 66 death sentences (TAPOL Bulletin 40, 1-2), while Southwood and Flanagan list 74 sentences (at 156).

22 of these prisoners were executed,¹⁰⁶⁰ and between 16 and 22 were granted clemency, depending on the sources relied upon.¹⁰⁶¹

Following Suharto's resignation in May 1998 (and the subsequent resignation of his former deputy and immediate successor, B.J.Habibie, in October 1999),¹⁰⁶² Indonesia's democratically-elected leaders have pursued a more populist and legalistic criminal justice policy, involving the rise in prominence of drug-related crime, and the re-emergence of Islamic terrorism, as issues of national security.¹⁰⁶³ Moreover, clemency has become exceedingly rare, at least for publicly-reported cases. Prior to a 2012 announcement that the death sentences of four drug traffickers had been commuted during the period 2004 to 2011,¹⁰⁶⁴ the available documentation suggests that clemency was only granted in a *single* case during the administrations of Abdurrahman Wahid (October 1999 to July 2001), Megawati Sukarnoputri (July 2001 to October 2004) and Susilo Bambang Yudhoyono (October 2004 to the present).¹⁰⁶⁵ The challenge in conducting research on capital punishment in Indonesia is therefore to document common death penalty and

Most of the suspects tried and convicted for their role in orchestrating the 'Coups' were not actually involved in the events at all; instead the 'Coups' served as an ideal excuse for Suharto to attain power and rid himself of political enemies (Interview with London-based Indonesian Human Rights Activist).

¹⁰⁶⁰ Kontras; AI-Index ASA 21/017/1994, 104-105.

¹⁰⁶¹ See Appendix D. By 1975, between 10 and 15 of the PKI prisoners sentenced to death had already been executed (AI (1988), 2; AI-Index ASA 21/33/85), while a number of other '1965' prisoners died in prison before being executed (van den Berg, 297; TAPOL Bulletin 40, 1-2). Based on the sources available, none of the prisoners sentenced to death were granted *clemency* prior to 1975.

¹⁰⁶² See note 1056, above.

¹⁰⁶³ Perry.

¹⁰⁶⁴ See note 1111 and associated text, below.

¹⁰⁶⁵ See notes 1115-1116, below.

clemency trends that span what are two very different political eras (autocratic and democratic) – a unique conundrum amongst the four jurisdictions under study.¹⁰⁶⁶

Death Penalty and Clemency Practice 1975-2009

Death Sentences and Executions

Indonesia inherited the death penalty as a criminal punishment, together with the customary method of execution (firing squad) from the Netherlands,¹⁰⁶⁷ the colonial power from which Indonesia declared independence in 1945.¹⁰⁶⁸ Despite its large population (240 million in 2010),¹⁰⁶⁹ Indonesia has always practiced an sporadic method of capital punishment, characterised by very low annual totals of death sentences and executions, and unpredictable ‘stops and starts’ in annual execution totals.¹⁰⁷⁰ As with other Southeast Asian jurisdictions, the search for precise figures is hampered by prevailing state secrecy over the death penalty, particularly concerning the number of death sentences and the *death row* population,¹⁰⁷¹ rather than annual executions totals per-se. In terms of capital offences, from 1945 through to 2009, a wide variety of crimes contained within 14 different legislative and executive instruments have contained the death penalty as a discretionary punishment,¹⁰⁷² although in practice the set of crimes for

¹⁰⁶⁶ See Chapter One, note 104.

¹⁰⁶⁷ Imparsial (2010), 4, 8. See Sahetapy, 45-51, for an account of clemency practices in death penalty cases during the Dutch colonial era.

¹⁰⁶⁸ Anjaiah and Witular; Smith (2001), 78.

¹⁰⁶⁹ US Central Intelligence Agency.

¹⁰⁷⁰ Johnson and Zimring (2009), 313-314, 323 n28; Interview with Canadian Academic Expert on the Death Penalty; Death Penalty Worldwide: Indonesia.

¹⁰⁷¹ AI-Index ASA 21/003/2008, 29; AI-Index ASA 21/27/87, 1; McRae (2012), 18 n4.

¹⁰⁷² See Imparsial (2010), 17-18, and Bampton, 3, for a full list. See AI (1988), 4, for an equivalent list in 1985.

which death sentences have been passed and executions conducted is substantially smaller, limited to subversion (i.e. treason), aggravated murder, terrorism and drug trafficking.¹⁰⁷³

To illustrate Indonesia's historical ambivalence towards capital punishment, only three executions took place under Indonesia's first President Sukarno (1945-1967), for an attempt to assassinate the President in the late 1950s,¹⁰⁷⁴ while death sentences were not administered on a regular basis until the trials of alleged PKI conspirators in the late 1960s and early 1970s, under Suharto.¹⁰⁷⁵ In fact, in the post-independence era, no prisoner was executed for murder until 1978.¹⁰⁷⁶ Indonesian NGO KontraS lists executions for the following categories of crimes from 1975 to 1998, during the Suharto era:

Death sentences imposed by district courts (*Pengadilan Negeri*) can be appealed to a high court (*Pengadilan Tinggi*) and from there to the Indonesian Supreme Court (*Mahkamah Agung*). A prison sentence can also be increased to a death sentence on appeal (AI-Index ASA 21/27/87; McRae (2012), 6). Other than in the 'coup'-related trials at the Extraordinary Military Tribunal, as I describe later in this chapter, death sentences imposed at military tribunals may be appealed to a military appeal tribunal, and then on to the Indonesian Supreme Court (AI-Index ASA 21/26/97; AI (1987), 1).

¹⁰⁷³ Death Penalty Worldwide: Indonesia; AI-Index ASA 21/33/85; KontraS.

For murder cases, the criteria for issuing a death sentence are said to be that the killing 'is [first] clearly unnatural, sadistic... Second, the culprit does not show remorse or has a criminal record. Third, there is more than one victim. Fourth, his acts have caused social unrest. [Fifth] Can the culprit be reformed or not?' (Haryoso). A Senior Indonesian Human Rights Lawyer adds murder committed as part of sectarian or separatist violence to this list (by Interview).

The type and quantity of drugs seized, the accused's purported knowledge of the package's contents (Bampton, 6; Bachelard), together with the accused's seniority within the trafficking syndicate (Interview with Indonesian NGO Staff) are the important factors relevant to capital sentencing in a drugs case.

¹⁰⁷⁴ AI (1988), 2.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ AI-Index ASA 21/01/83, 5; AI (1979), 4.

- subversion, arising from the 1965 'Coups': 22 executions;¹⁰⁷⁷
- murder: 9;
- subversion, due to Islamic terrorism: 6;¹⁰⁷⁸
- narcotics: 1;
- (unknown crimes: 3).¹⁰⁷⁹

In contrast, since the fall of Suharto, around 60 percent of those sentenced to death had committed narcotics offences,¹⁰⁸⁰ and the remaining prisoners were convicted either of murder or terrorist offences.¹⁰⁸¹ Kontras's execution totals for 1999-2009 are as follows:

- murder: 14 executions;
- narcotics: 5;
- terrorism (relating to the 2002 Bali bombing): 3.¹⁰⁸²

Taking cumulative figures from all available sources, it is apparent that from 1975 to 2009, far more prisoners were sentenced to death (104+ to 191+) than were executed (52+ to 65+),¹⁰⁸³ as a result of successful judicial appeals, case reviews and grants of Presidential

¹⁰⁷⁷ The Subversion Law, established by Presidential Decree 11/1963 and legislatively confirmed by Law 5/1969, allows the discretionary death sentence for 'anyone who engages in subversive activities, including undermining the authority of the state, disseminating feelings of hostility and distorting or deviating from the [state] ideology' (AI (1988), 4).

¹⁰⁷⁸ Murray (4/1991), Kaye and Glasius (at 98-99) suggest that Suharto sought to strike a balance between executions of 'extreme right' Muslim political prisoners and 'extreme left' PKI prisoners, so as to satisfy the domestic audience.

¹⁰⁷⁹ Kontras. The non crime-specific combined execution totals in Appendix D are 31+ to 41+ for the period 1975 to 1998, under Suharto, excluding 1978 and 1979, for which no statistics are available.

¹⁰⁸⁰ Imparsial (2010), 44, 166; Death Penalty Worldwide: Indonesia; Pasandaran.

¹⁰⁸¹ Imparsial (2010), 44, 166; Pasandaran.

¹⁰⁸² Kontras. The non crime-specific combined execution totals in Appendix D are 21+ to 24+ for the post-Suharto period.

¹⁰⁸³ See Appendix D.

clemency,¹⁰⁸⁴ as I elaborate on below. Perhaps the primary explanation for the relatively low number of death sentences and executions throughout modern Indonesian history is the concurrent use of *extra-judicial* executions to eliminate persons who were deemed a threat to the state, as well as common criminals. Formal trials and judicial death sentences have mainly been carried out for *political* reasons, with actual crime control measures consisting of summary executions, disappearances and deaths in custody, as President Suharto and (to a much lesser extent) his successors bypassed formal legal processes.¹⁰⁸⁵ I discuss the manner in which extra-judicial executions affect Indonesia's historical clemency 'rate' below.

One trend demonstrating the apparent *political* function of executions during the entire period under analysis (1975-2009) is that the majority of executions conducted have taken place in two distinct blocks of time: between 1985 and 1990 (25+ to 31+ executions), and then again between 2004 and 2008 (19+ to 21+ executions), which together account for approximately *80 to 85 percent* of the total number of executions from 1975 onwards.¹⁰⁸⁶ Political campaigns denouncing particular crimes (primarily subversion and drug offences) have largely contributed to the timing of these executions.¹⁰⁸⁷ Most recently, both Brummitt and McRae have argued that the high number of executions in 2008 (between 10 and 12, consisting of murderers, drug traffickers, and the three 'Bali bombers' convicted on terrorism charges) approved by

¹⁰⁸⁴ Death Penalty Worldwide: Indonesia.

¹⁰⁸⁵ Interview with Australian Academic Expert on Indonesia; AI-Index NWS 11/07/90; see further note 1180, below.

¹⁰⁸⁶ See Appendix D.

¹⁰⁸⁷ Interview with Australian Academic Expert on Indonesia #3; AI-Index 21/017/1994, 104.

President Yudhoyono came in response to ‘mounting pressure to prove he is tough on crime’, given the impending presidential election in 2009.¹⁰⁸⁸

Clemency Procedures in Death Penalty Cases

While the operational specifics of the clemency process in Indonesia have changed a number of times over the years through legislative and executive intervention, since independence the Indonesian President has always possessed sole constitutional power to grant clemency.¹⁰⁸⁹ More specifically, the legislative framework for clemency in capital and non-capital cases was created by Law 3/1950 and subsequently amended by Law 22/2002.

After a final unsuccessful court appeal, the defendant him or herself, a family member, a lawyer or the prison authorities may request clemency from the President through a written petition.¹⁰⁹⁰ Under the 1950 statute, there was a 30-day time-limit for the prisoner to request Presidential clemency,¹⁰⁹¹ whereas no time limits were prescribed in the 2002 revision. When completed by the prisoner or his representative, the petition is processed and forwarded to the President by the Attorney-General’s Department, and an execution cannot be performed until a Presidential Decree (*Keputusan Presiden*) is

¹⁰⁸⁸ Brummitt; McRae (2008). Reza argues that: ‘during the 2008 election [campaign], the government tried to attract votes by executing people. It was horrible’. Arguably, the same might be said for the three narcotics executions leading up to the 2004 elections, in which the incumbent Megawati Sukarnoputri was defeated by Yudhoyono (Interview with Australian Academic Expert on Indonesia #2; Interview with Indonesian Human Rights Activist).

¹⁰⁸⁹ See Constitution of Indonesia, art 14.

¹⁰⁹⁰ See Law 3/1950, art 2(1); Law 22/2002, art 6, art 8.

Although clemency can be sought prior to the conclusion of the appeal process, this option is rarely taken by prisoners desperate to maintain their innocence before any remaining judicial appeal (Bampton, 24; Al (1987), 6).

¹⁰⁹¹ Law 3/1950, art 2(1); ‘Oki to appeal for clemency over death sentence’.

issued, rejecting the petition.¹⁰⁹² Until the 2002 law was passed (fixing a limit of three months),¹⁰⁹³ there was no time-limit for the issuing of the Presidential Decree.¹⁰⁹⁴ Moreover, if the prisoner's petition was rejected and yet he or she was not executed within a two-year period, as was most often the case, Law 22/2002 authorised a *second* application for clemency, and the death sentence could not be carried out until this second petition was rejected.¹⁰⁹⁵ Pursuant to the 1950 law on the other hand, there were no restrictions on the number of times that a prisoner could request clemency.¹⁰⁹⁶ The consequences of allowing *two or more* clemency petitions per prisoner, the lack of time limits for the processing of appeals, and the fact that an execution cannot be carried out until an appeal is explicitly *rejected* by the President are addressed later in this chapter. Needless to say, the bureaucratic inertia created by the 1950 and 2002 laws finally led the Indonesian legislature to further streamline the clemency procedure in 2010.¹⁰⁹⁷

Throughout post-independence history the Indonesian President has been able to rely on the input from a variety of advisors in granting or refusing clemency. As noted above, the Jakarta-based Attorney-General's Department processes the appeal before it reaches the President, and will make a recommendation on the outcome of the petition, in conjunction with the office of the *local* prosecutor who considered the case.¹⁰⁹⁸

¹⁰⁹² Law 22/2002, art 13; Law 3/1950, art 2(3).

¹⁰⁹³ Law 22/2002, art 11.

¹⁰⁹⁴ 'Oki to appeal for clemency over death sentence'; McRae (2008); HOC Indonesia 2004.

¹⁰⁹⁵ See Law 22/2002, art 2(3); AI-Index ASA 21/040/2004, 2.

¹⁰⁹⁶ HOC Indonesia 2001; Fidrus (2003).

¹⁰⁹⁷ Indonesia's third and most recent clemency law, Law 5/2010, will not be considered in this chapter as it falls outside the temporal scope of my research.

¹⁰⁹⁸ Law 3/1950, art 8; AI-Index ACT 73/02/85; Elda, 89; Interview with Australian Academic Expert on Indonesia #2. See, for example, Indonesian Ministry of Justice, 189, 652, 742, 744.

Moreover, officials from the Ministry of Justice (known during the Yudhoyono administration as the Ministry of Law and Human Rights) provide their own opinion on the appeal,¹⁰⁹⁹ together with agencies such as the police, relevant prison authorities and latterly the National Narcotics Board (BNN).¹¹⁰⁰ However, most importantly, the Justices of the Indonesian Supreme Court and the Trial Judge will be relied upon for their advice on the merits of granting clemency to a prisoner sentenced to death, pursuant to the requirements of Law 3/1950 and Law 22/2002, and the Indonesian Constitution of 1945.¹¹⁰¹ Significantly, the Supreme Court is the only advisory body mentioned in the 1945 Constitution, and although it arises outside of the time-frame of my research, a leading human rights lawyer has observed that Indonesia's first President, Sukarno, usually followed the Supreme Court's advice on clemency and other matters.¹¹⁰² Suharto, in his autobiography, also stated that he usually followed the advice of the Supreme Court in either affirming or commuting the death sentence,¹¹⁰³ while media reports, 'elite'

¹⁰⁹⁹ Law 3/1950, art 8; 'Perjalanan Grasi Kusni Kasdut'; Interview with Australian Academic Expert on Indonesia #2; Interview with Indonesian Minister. See, for example, Indonesian Ministry of Justice, 189, 652, 742, 744. Edna (at 89) and Sya'ban (at 76) assert that the Ministry of Justice may ask for the advice of other Ministers, in turn.

¹¹⁰⁰ Law 3/1950, art 8(8); Marszalek; Interview with Indonesian Minister; Salna.

¹¹⁰¹ Law 22/2002, arts 4(1), 10, 11; Law 3/1950, art 8; Constitution of Indonesia, art 14(2); AI-Index ACT 73/02/85.

The advice of the District Court that first sentenced the prisoner to death is passed on to the Supreme Court, where the Chief Justice will choose a single judge from within the Court's criminal chambers to make the formal recommendation to the President (Law 3/1950, art 8; 'Explanatory Memorandum to Law 22/2002'; Interview with Indonesian Supreme Court Judge). McRae (2012) wrote that 'a senior Supreme Court judge told the author that the court far more frequently writes in opposition to granting clemency than in favour, and that he had never written in favour' (at 7); while the same view was expressed by the Deputy Chief Justice of the Supreme Court, whom I interviewed in Jakarta (Interview with Indonesian Supreme Court Judge).

¹¹⁰² Interview with Senior Indonesian Human Rights Lawyer.

¹¹⁰³ Soeharto, 337; see also Sya'ban, 82. However, a leading Indonesian human rights lawyer from the period acknowledges that such advice was usually tendered by the subservient Supreme Court based on a *prediction* of what Suharto wanted to hear (Interview with Senior Indonesian Human Rights Lawyer).

interviews and transcripts of speeches have also confirmed that President Yudhoyono has heeded the Supreme Court's advice, together with advice given by his Cabinet Ministers.¹¹⁰⁴ Ultimately however, the final decision on a clemency petition is the President's, and he or she is not bound by the advice given by any other party.¹¹⁰⁵ While civil servants may exercise the major role in finalising clemency decisions in the case of *prison* sentences (given their much greater numbers), in death penalty cases Reza opines that the President reads each petition carefully and takes a greater *personal* role in the decision.¹¹⁰⁶

Features of Cases where Clemency Was Granted by the Indonesian President

When the clemency rate is expressed as the percentage of finalised cases granted commutation, Indonesia's figure fits comfortably within the 'medium' category described in Chapter Four, at 22-32 percent (over the entire period 1975-2009, excluding the years 1978-1979, for which no clemency totals are available).¹¹⁰⁷ While taking this statistic at face value reveals that clemency is not uncommon in Indonesian death penalty cases, it does not, on its own, provide a truly accurate picture of the incidence of clemency over Indonesia's recent history. Notably, the post-1975 figures for clemency are dominated by two groupings, 1980-1982 and 1999, when 12 and (up to) 10 death row prisoners

¹¹⁰⁴ Kencana; Yudhoyono; 'Presiden Tidak Beri Grasi Penjahat Narkoba'; Interview with Senior Indonesian Human Rights Lawyer; Interview with Senior Indonesian Human Rights Lawyer #2.

¹¹⁰⁵ Statement by Australian Academic Expert on Indonesia #5; Kencana; Interview with Senior Indonesian Human Rights Lawyer #2; Mulya Lubis. A Supreme Court judge, by interview, informed me that although the President may *usually* act in accordance with the recommendation, there are definitely examples where the Supreme Court's advice has been disregarded (Interview with Indonesian Supreme Court Judge).

¹¹⁰⁶ Interview with Indonesian Human Rights Activist.

¹¹⁰⁷ See Appendix D.

(respectively) were granted commutations.¹¹⁰⁸ As I discuss in further detail below, during these two periods (1980-1982 under President Suharto, and in 1999 under Suharto's successor B.J.Habibie) political prisoners who were sentenced to death for their alleged role in orchestrating the attempted communist 'Coup' in 1965 were granted clemency, and in the latter case released from prison altogether.¹¹⁰⁹

In cases unrelated to the events of 1965, clemency has only been granted on *two* reported occasions from 1975 to 2009, although researchers at Amnesty International, an Australian academic expert on Indonesian law and even President Suharto (in his autobiography) have confirmed that a number of other death sentences have been reduced to life imprisonment, without the formal publication of clemency having been made through the media or the State Secretariat.¹¹¹⁰ Subsequently, in October 2012 it was announced that President Yudhoyono had granted clemency to four drug convicts on death row during the period 2004 to 2011, citing demonstrated remorse, and their status as drug 'mules' rather than large-scale traffickers. The announcement was also likely to have been an attempt to influence clemency decision-makers for Indonesian citizens on death row in other countries.¹¹¹¹ The exact timing of each of the recent grants has not been officially confirmed, however at least two of the prisoners (if not all four) were

¹¹⁰⁸ Glasius, 95; AI (1988), 9; AI-Index ASA 21/58/98; 'President Grants Clemency to 10 More Political Prisoners'; England; International Commission of Jurists, 97.

¹¹⁰⁹ AI-Index ASA 21/43/96; AI-Index ASA 21/58/98; AI-Index ASA 21/21/99; England.

¹¹¹⁰ AI (1988), 5; Statement by Australian Academic Expert on Indonesia #5; AI-Index ASA 21/27/87; Soeharto, 337.

Other *unconfirmed* grants of clemency in death penalty cases during the time-period of my study include five drug traffickers from 1994 to 2008 (Abdussalam), and a separate but perhaps overlapping report suggesting that between four and seven traffickers were, in 2010, serving prison sentences after previously having their death sentences commuted (Kontras).

¹¹¹¹ Aritonang and Saragih; Sagita; Osman (2012); Flores.

granted commutation after 2009, and therefore fall outside the formal temporal scope of my study.¹¹¹²

The two *confirmed* cases during the period 1975-2009 are as follows. First, President Suharto granted Thai drug trafficker Kamjai Kong Thavorn clemency in 1998.¹¹¹³ Thavorn, a sailor, was arrested in August 1987 in East Kalimantan:

after Indonesian customs officials conducting a routine inspection discovered 17.76 kilograms of heroin in his cabin. Evidence which emerged *after his trial* suggested strongly that Kamjai Kong Thavorn was either innocent or else a very minor actor in a large drug smuggling operation. According to defence lawyers, two men questioned by Thai police in June 1991 admitted that they had placed a bag containing 20 packages of heroin in Kamjai Khong Thavorn's cabin on instruction from a Japanese national.¹¹¹⁴

Second, President Megawati commuted the death sentence of convicted murderer Harnoko Dewantoro in 2003: 'sentenced to death in 1997 for killing three people... in Los Angeles, California, between 1991 and 1992' over a business dispute. Despite showing no remorse for his crimes, Dewantoro was granted clemency when reports of his psychiatric problems surfaced.¹¹¹⁵ His reprieve was announced in conjunction with a sentence remission for around 37,000 inmates to celebrate the Islamic holy day *Eid al-Fitr*.¹¹¹⁶ Both

¹¹¹² See Saragih; Kencana.

¹¹¹³ Imparsial (2004), 18; AI-Index ASA 21/040/2004, 9.

¹¹¹⁴ AI-Index ASA 21/040/2004, 9, emphasis added.

¹¹¹⁵ Unidjaja.

¹¹¹⁶ HOC Indonesia 2003; 'Indonesia's Megawati grants Muslim holy day amnesties'. However, note a conflicting report from Indonesian NGO KontraS, which stated that Dewantoro was still on death row as of 2010, with his first clemency appeal having been rejected. An academic expert recalled that the Minister of

commutations appear to have been made on the basis of wrongful convictions: because of new evidence proving Thavorn's innocence, and due to psychiatric illness in Dewantoro's case.

Explaining the Medium Clemency Rate in Indonesia

As with the present study's other 'medium' clemency jurisdiction, Malaysia, the approach I take in analysing the reasons for Indonesia's clemency rate is first to outline two groups of factors that, throughout modern Indonesian history, have worked to *minimise* the incidence of Presidential clemency grants. One is a feature of Indonesia's death penalty practice that both the Suharto and *Reformasi* eras share in common, while one relates specifically to the consequences of democratisation after the fall of the New Order regime. I then follow with three more considerations that explain, despite the aforementioned constraints, why up to a third of Indonesian capital prisoners were granted clemency from 1975 to 2009, rather than being executed. The first of these factors relates to the *political* rather than crime-control function of judicial executions under Suharto, the second concerns the commutations granted to a specific group of prisoners: those accused of directing and participating in the 1965 'Coups', whereas the third factor identifies a systemic feature of Indonesia's death penalty landscape, both pre and post-*Reformasi*, that has served to promote the unilateral granting of clemency on an unreported basis.

Justice had *recommended* clemency be granted to Dewantoro, but was unsure if this advice had been followed by the President (Interview with Australian Academic Expert on Indonesia #2).

Lenient Discretion Exercised at Earlier Stages: Corruption, the Discretionary Death Penalty and the Peninjauan Kembali ('PK') Case Review

While the democratic reforms that have taken place since the fall of Suharto have helped to add some measure of transparency to the Indonesian judicial system, on a historical level the corruption and nepotism endemic within the Indonesian bureaucracy is widely known.¹¹¹⁷ Although it cannot be easily substantiated, it is possible that political and business connections, together with outright bribery, favourably determined a number of clemency petitions during the Suharto era.¹¹¹⁸ Most significantly, under Suharto, the President possessed the *formal* right to interfere at any stage of the court proceeding: the judiciary was formally designated as an arm of the executive government,¹¹¹⁹ providing legal authorisation for the politically-motivated increase or reduction of sentences at *any* stage of appeal.

Since 1998 it is unlikely that corruption and nepotism alone could have decided the result of many *clemency* petitions. In the determination of petitions, President Yudhoyono and his closest advisors would prefer to distance themselves from the corruption scandals that have plagued state bureaucracy during the 2000s, and throughout Indonesia's history.¹¹²⁰ Bribery and political connections may have instead changed the outcome of potential capital cases at *earlier* stages, such as during police

¹¹¹⁷ Polglaze and Fatachi; Lynch, 558; US Department of State (2009); Butt and Lindsey, 189-190.

¹¹¹⁸ Interview with ANU Academic; Interview with Australian Academic Expert on Indonesia. For example, murderer Kusni Kasdut, executed in 1979, reportedly withdrew his clemency appeal after being told that RP200,000 (at the time, approximately £160) would be required to ensure its success ('Perjalanan Grasi Kusni Kasdut'). A 2013 newspaper article reported a rumour that capital prisoners 'could bribe their way to a life sentence for Rp 1 billion', or roughly £66,000 (Pasandaran and Sihombing).

¹¹¹⁹ International Commission of Jurists, 130; Rickard, 11.

¹¹²⁰ Interview with Indonesian Human Rights Activist; Johnson and Zimring (2009), 323 n28; US Department of State (2009); Yudhoyono.

investigations, the handling of the brief by prosecutors and finally during judicial adjudication.¹¹²¹ To illustrate, Butt has described a host of systemic corruption problems in the criminal justice sector:

Police, prosecutors and judges are often criticised for seeking illicit payments from suspects and defendants and their families, sometimes using their lawyers as ‘go-betweens’. Bribes are said to be commonly extorted or paid to police to avoid or delay arrest, investigation and detention; and to alter, remove or supplement statements or evidence in the case file... [Moreover,] Some prosecutors allegedly seek payment in return for indicting a suspect under a lesser charge or seeking a lesser sentence before the court.¹¹²²

How do corruption and nepotism impact on clemency ‘rates’ in Indonesia? Persons committing capital crimes who are either wealthy or who are connected to the political or military apparatus will be able to have charges dropped, or at least reduced to a punishment less than death at the prosecutorial or judicial stage, before their cases need to be considered for clemency.¹¹²³ While in other retentionist jurisdictions political or military influence, foreign nationality or wealth alone may be factors that help a death row prisoner *mitigate* his or her sentence at the executive clemency ‘phase’ of sentencing deliberations, in Indonesia it is less likely that such a case will proceed all the way through the death penalty system in the first place. Lev, writing at the end of the Suharto period, illustrates the practical effect:

¹¹²¹ Fidrus (2006); HOC Indonesia 2007; Langit; Michelmores; Lynch, 558.

¹¹²² Butt, 23; see also Lev (1999), 186, confirming the same kinds of practices during the Suharto era.

¹¹²³ Interview with Australian Academic Expert on Indonesia; AI (1987), 3; Lev (1999), 185.

Political or social prominence, for example, is on the face of it exculpatory.

Murder is not an indictable offense, or at least not subject to conviction, if committed by members of well-connected, well-known, or well-heeled families.¹¹²⁴

Second, unlike the case in common-law Singapore and Malaysia, the death penalty has always been a *discretionary* punishment for all capital crimes in Indonesia,¹¹²⁵ which is a reflection of Indonesia's Dutch civil-law heritage.¹¹²⁶ While there have undoubtedly been cases where Justices of the Supreme Court have recommended clemency to the President, as described above, this advisory function of the sentencing or appeal judge is not nearly as important where a *discretionary* death penalty exists, compared with MDP jurisdictions.¹¹²⁷ The judge in an Indonesian death penalty appeal may substitute a lesser punishment than death at the sentencing phase if he or she feels this is appropriate (or if directed to do so by politicians, as occurred during the Suharto era). Clemency in a discretionary death penalty setting will most likely be granted where the executive decision-maker finds independent *political* (rather than legal) reasons for doing so, yet as we have seen above, both Presidents Suharto and Yudhoyono have often claimed to have followed the Supreme Court's advice in either denying or granting clemency.¹¹²⁸

¹¹²⁴ Lev (1999), 185.

¹¹²⁵ Death Penalty Worldwide: Indonesia; AI (1979), 82; Bampton, 23.

¹¹²⁶ Interview with Former Malaysian Federal Court Judge; Lindsey and Kingsley.

¹¹²⁷ See generally Lardner and Colgate Love, 213; Sarat (2005b), 616.

¹¹²⁸ Moreover, as with Malaysia's Pardons Boards and Singapore's Cabinet, we see in Indonesia recommendations made by both the local prosecutor and the national Attorney-General on the clemency petition before it reaches the President and his closest advisors. The Jakarta-based national Attorney-General functions as the State Prosecutor, as well as head of the government department that administers judicial executions (McRae (2012), 12-13; ASEAN Law Association, 90). Although the precise content of such recommendations has never been publicly reported, Sya'ban noted in 1985 that the majority of

Finally, a third plausible explanation for the dearth of regular clemency grants during the post-Suharto period is the existence of a ready-made mechanism within the Indonesian legal system, the *Peninjauan Kembali* ('PK'), for a Supreme Court *case review* after the discovery of new evidence that 'if known at the time of trial, could have resulted in a lesser sentence or [more commonly, the] release of the accused,'¹¹²⁹ or where there has been 'contradictory evidence in another case, or... a judge at an earlier level has made a clear mistake.'¹¹³⁰ Although only one such review is allowed per prisoner, it has not been uncommon for the Supreme Court to reverse the trend of all previous judicial decisions on the case,¹¹³¹ although a leading Australian academic authority and a prominent Indonesian human rights lawyer observe that much will depend on the composition of the bench hearing the appeal and a reduction in penalty cannot automatically be assumed.¹¹³² The 'PK' procedure has evolved in importance since the Suharto era, and is now a more common move in serious criminal cases,¹¹³³ providing the courts with a further avenue through which to exercise their discretion (other than the reduction of sentence at the High Court and Supreme Court phases) to reduce a death sentence to a life sentence or term of imprisonment, before an appeal is made for

recommendations are for refusal (at 81), in line with the theoretical assumptions on such recommendations outlined in Chapter Three (see note 323).

¹¹²⁹ Conway; Bampton, 21; 'Attorney General Slow in Executing Death Penalty: Observers'.

¹¹³⁰ Conway; Lindsey (2010). For the full list of grounds authorising a PK review, see Law 14/1985, art 67, and Law 8/1981, art 263(2).

¹¹³¹ Lindsey, Butt and Subiakto; Conway.

¹¹³² Statement by Australian Academic Expert on Indonesia #5; Interview with Senior Indonesian Human Rights Lawyer.

¹¹³³ Interview with Australian Academic Expert on Indonesia; Statement by Australian Academic Expert on Indonesia #5; Interview with Indonesian Minister. Nonetheless, the procedure was still used occasionally during the Suharto period (Interview with Indonesian Human Rights Activist; Interview with Senior Indonesian Human Rights Lawyer #2).

Presidential clemency.¹¹³⁴ Moreover, a leading Indonesian human rights lawyer is also of the opinion that the 'PK' procedure constitutes a key route by which *political* considerations or *corrupt practices* have been taken into account during court processes, both under Suharto and throughout the *Reformasi* Era.¹¹³⁵ Whether the available discretion is truly exercised for legalistic, retributive purposes, or else in a corrupt or politically partial manner is largely inconsequential here. The key point is that the 'PK' procedure adds a *further layer* of discretion that does not exist in other jurisdictions, discretion that by law can only *reduce* the severity of a sentence, and not increase it (to death from life).¹¹³⁶

Democratisation, the 'Rule of Law' Rhetoric, and Drug Trafficking Cases during the Reformasi Era

With the resignation of Suharto and the beginning of the *Reformasi* era in Indonesian politics, strengthening the 'rule of law' became an important priority for national leaders,¹¹³⁷ who were keen to impress their domestic constituents. As with the contemporary leaders of Singapore,¹¹³⁸ successive democratically-elected Indonesian Presidents have interpreted adherence to the rule of law as requiring strict deference to court-imposed sentences in capital cases, precluding clemency in all but the most exceptional circumstances.¹¹³⁹ As I first described in Chapter Three, a modern, democratic state whose leaders proclaim the need for the equality of all citizens before

¹¹³⁴ Khalik (12/7/2004).

¹¹³⁵ Interview with Senior Indonesian Human Rights Lawyer.

¹¹³⁶ Law 8/1981, art 263, 266(3). See note 1072, above.

¹¹³⁷ Langit; Suhadji.

¹¹³⁸ See Chapter Five: Singapore, *The Rule of Law and the Singapore 'Brand Name'*.

¹¹³⁹ McDonald; AI-Index UA-064-2006; Bampton, 26.

the law and for non-arbitrary administrative decision-making will not provide an ideal setting for the frequent use of clemency.¹¹⁴⁰ In these circumstances, the exercise of mercy as a form of executive discretion can carry:

strong overtones of inevitable arbitrariness, favouritism, and potential corruption. Acknowledging discretion [can be] seen as abandoning the ‘impersonal’ ideal of the state and its ‘rule of law’.¹¹⁴¹

The evolution in Indonesia from a personalised, top-down system of justice under President Suharto to a bureaucratised and impersonal system has been accompanied by an enhanced reluctance to resort to clemency. To illustrate, Langit reports that when President Megawati rejected the clemency appeals of three death row prisoners in 2004, her decision was ‘significantly influenced by the country’s social and political atmosphere and the *public perception that the government was weak in enforcing laws*.’¹¹⁴² More recently, in a 2011 speech President Yudhoyono justified his decision to refuse a majority of clemency petitions in both capital and non-capital cases, stating that he would refuse appeals if this was necessary to uphold justice and the rule of law in Indonesia, and that every decision his administration makes must be justifiable, in accordance with applicable *rules and systems*,¹¹⁴³ an interpretation confirmed to me late in Yudhoyono’s second term by a senior official within the Ministry of Law and Human Rights, by interview.¹¹⁴⁴ Suhadji summed up the prevailing mood in Indonesian politics during the 2000s:

¹¹⁴⁰ See Chapter Three, *Clemency, Democracy and Authoritarianism; Clemency and the ‘Separation of Powers’*.

¹¹⁴¹ Nelken (2002), 194; Colgate Love (2001), 127.

¹¹⁴² Langit, emphasis added.

¹¹⁴³ See Yudhoyono.

¹¹⁴⁴ Interview with Indonesian Minister.

To stamp out corruption and uphold the law in Indonesia, there must be transparency from its governments and society... By granting clemency and pardons, it is going to weaken these efforts – an image that Indonesia believes it cannot afford to have.¹¹⁴⁵

One of the primary consequences of moves towards greater transparency and consistency in discretionary decision-making is that for clemency decisions, the Indonesian *President* (as opposed to police, prosecutors and judges, as discussed earlier) cannot be seen to favour foreign prisoners over locals; the rich and powerful over the poor,¹¹⁴⁶ or women over men (with Indonesia's first judicial execution of a woman occurring in 2005).¹¹⁴⁷ Although international pressure may have, to a certain extent, been able to influence Suharto's decisions regarding political prisoners,¹¹⁴⁸ with democratisation and true accountability at the ballot box for the first time during the post-1965 era, the domestic costs to more recent Indonesian governments of bending to international pressure are significantly higher,¹¹⁴⁹ especially in light of the fact that public opinion and various

¹¹⁴⁵ Suhadji.

¹¹⁴⁶ Ibid; Bampton, 6, 26; Lindsey and Kingsley. See also note 1120 above, and associated text.

¹¹⁴⁷ 'Woman executed in Indonesia, 1st in country's judicial history'; Interview with Australian Academic Expert on Indonesia #4; Unmacht.

¹¹⁴⁸ Fealy, 12-13; Glasius, 134; Interview with Indonesian Human Rights Activist. For example, in 1990, six condemned PKI prisoners were taken from their cells to be executed but did not face the firing squad, 'apparently due to international pressure' (Murray (4/1991); McCarthy).

¹¹⁴⁹ Interview with ANU Academic; Unmacht; Hargreaves. The exception to a disregard for international opinion here appears to be in relation to Islamic terrorism, which (re)emerged as a politicised crime in Indonesia during the 2000s, after executions were first carried out for such crimes in the 1980s under Suharto (see note 1078 and associated text, above). Since the September 11, 2001 terrorist attacks in New York and Washington D.C., Indonesia has been enlisted as a key partner in the US-led 'War on Terror' (Lynch, 578; Chew), one result being that the death penalty was included as a punishment within Indonesia's first dedicated anti-terrorism statute: Law 15/2003. Hargreaves has argued that granting clemency to Islamic terrorists would be interpreted as a weakness in Indonesia's resolve to tackle extremism, a prediction that was borne out by the executions of the three Bali Bombers in 2008, despite appeals from international NGOs, Islamic and church groups and even from the family members of some of the victims (Sheridan and Taher; 'Survivors, families mourn Bali lost ones'; Zwartz).

government institutions strongly favour retention.¹¹⁵⁰ Since the fall of Suharto, convicts from India, Thailand (two), and Nigeria (two)¹¹⁵¹ have been executed, and at least for first instance cases, 46 percent of death sentences have been passed on foreigners since *Reformasi*.¹¹⁵² During the Suharto era, in contrast, the available sources suggest that only one foreigner was judicially executed¹¹⁵³ – but whether or not executive clemency (rather than intervention at *earlier* stages of the criminal justice process) was responsible is unclear, given the lack of complete data on clemency and the possibility of unreported commutations.¹¹⁵⁴

Nevertheless, during the period 1999-2009, once death penalty cases did proceed all the way through the appeals process, respective Indonesian Presidents could not afford to show any kind of favouritism, as described above. Whereas only a single

¹¹⁵⁰ McRae (2012), 8.

¹¹⁵¹ See Imparsial (2010), 167.

¹¹⁵² Ibid (2010), 45, 167. Prisoners from around 27 nations remained on death row in 2009 (HOC Indonesia 2009). On the other hand, Imparsial (2010) reported 19 foreign nationalities on death row (at 45-46).

¹¹⁵³ Imparsial (2010), 119-131; KontraS.

¹¹⁵⁴ See notes 1123-1124 and associated text, above. A leading Indonesian criminal defence lawyer has confirmed that cases involving foreigners usually did not reach the clemency appeal phase under Suharto, with lesser sentences or acquittals instead ‘arranged’ following political pressure (Interview with Senior Indonesian Human Rights Lawyer). However, subsequent increases in the number of foreigners sentenced to death may not only have arisen as a result of *policy* changes during *Reformasi*, but also simply because of the higher number of foreigners visiting Indonesia in the late-Suharto period (Interview with Senior Indonesian Human Rights Lawyer; Interview with Indonesian Supreme Court Judge).

The only example I could find of a foreigner reaching the clemency phase in a capital case prior to *Reformasi* occurred in the case of American pilot Allen Pope, sentenced to death ‘on various charges of aiding the enemies of Indonesia and bearing arms against Indonesia’ in 1960 (Keefer and LaFantasie, 323-325). It remains unclear whether or not Pope was officially granted clemency by Sukarno, or merely allowed to ‘escape’ from prison and return to the United States (Interview with Indonesian Human Rights Activist; ‘Allen Lawrence Pope’).

confirmed commutation took place in that 11-year period,¹¹⁵⁵ executions were ongoing (numbering 21-24),¹¹⁵⁶ thereby lowering the overall clemency 'rate'.

Significantly, the majority of cases affected by the *Reformasi* leaders' zeal to enforce finalised court judgements pursuant to the 'rule of law' consist of prisoners convicted of *drug trafficking*. An Australian academic expert speculates that in a large and disorganised state such as Indonesia, the move to acknowledge drug trafficking as an issue of state security and the consequent tightening of the judicial process took much longer than in neighbouring countries Malaysia and Singapore. President Suharto and his successors had seen what was happening in the wider Southeast Asian region during the 1970s and 80s and eventually wanted to be seen as a 'legally responsible partner' in the fight against trafficking.¹¹⁵⁷ Thereafter, during the 2000s, the dominant political perception was that drug abuse and trafficking were threatening the viability of Indonesian political, community and religious institutions.¹¹⁵⁸ Up until the fall of Suharto, only one drug trafficker had ever been executed,¹¹⁵⁹ despite the death penalty for narcotics offences being first introduced as far back as 1976,¹¹⁶⁰ and four death sentences passed at first-instance in the decade thereafter.¹¹⁶¹ However, in the post-Suharto era

¹¹⁵⁵ See notes 1115-1116 and associated text, above.

¹¹⁵⁶ See Appendix D.

¹¹⁵⁷ Interview with Australian Academic Expert on Indonesia; see also Imparsial (2010), 13 and Imparsial (2004), 5.

¹¹⁵⁸ US Department of State (2009).

¹¹⁵⁹ Polglaze and Fatachi; 'Malaysian Put to Death in First Indonesian Execution for Drugs'; AI-Index ASA 21/040/2004, 2.

¹¹⁶⁰ See Law 9/1976, arts 4b, 5b, and 36; Hamzah and Sumangelipu, 22. An Australian academic expert suggests that given the Indonesian military's involvement in the narcotics trade, Suharto did not want to authorise prosecutions and executions for drug trafficking during the majority of his time in office, for fear of alienating his power base (Interview with Australian Academic Expert on Indonesia).

¹¹⁶¹ AI-Index ASA 21/27/87; Sakti.

five executions have so far been carried out for drug trafficking,¹¹⁶² and 72 first-instance and appeal death sentences issued from the beginning of the Habibie Presidency through to the end of 2009.¹¹⁶³ While President Suharto granted Thai drug trafficker Kamjai Kong Thavorn clemency in 1998, as described above, first term Presidents Megawati (2001-2004) and Yudhoyono (2004-2009) declined to grant clemency in a single capital narcotics case.¹¹⁶⁴ Even if murder cases remain the greatest source of executions during the *Reformasi* period, with 14,¹¹⁶⁵ the number of clemency grants rejected by Indonesia's Presidents in drug trafficking cases post-Suharto has already had an effect on the prevailing clemency 'rate', even if those prisoners have not yet been executed.¹¹⁶⁶

Judicial and Extra-Judicial Executions: Politics vs Crime Control under Suharto

It is unusual that the structural and cultural features of Indonesia's death penalty practice described above appear to point to a system that encourages very few commutations, yet the historical clemency 'rate' (subject to the constraints on available data mentioned earlier) remains firmly within the 'medium' range, at 22 to 32 percent. Indonesia's robust clemency percentage can instead be primarily explained by the particular historical and political circumstances leading to clemency for accused 1965 'Coups' prisoners in the early

¹¹⁶² Abdussalam; Kontras. A sixth execution for drug trafficking took place in March 2013 (Perdani).

¹¹⁶³ Imparsial (2010), 44. However, see also note 1053, above, on possible causes for an increased number of sentences.

¹¹⁶⁴ Suhadji; AI-Index ASA 21/040/2004, 5; Bampton, 24-25; HOC Indonesia 2004; Kearney. However, see also notes 1111-1112 and associated text, above, on Yudhoyono's four grants of clemency announced in 2012.

¹¹⁶⁵ See Kontras.

¹¹⁶⁶ Incomplete figures compiled by Indonesian NGO Imparsial in 2010 suggest that at least five narcotics prisoners sentenced to death have had Presidential clemency appeals rejected (Imparsial (2010), 119-165). Pensra, writing in 2007, listed eight narcotics prisoners whose capital clemency petitions had been rejected, two of whom have subsequently been executed (see Kontras). Indramaya (at 93-111) listed four rejected petitions, aside from the two prisoners subsequently executed, in December 2008.

1980s and late 1990s, although broader *systemic* features of the clemency legislation and practice in lower-profile cases have also played a role that is not entirely captured by the statistics presented in Appendix D, as I elaborate on towards the end of this chapter. First of all, I discuss the crime control function of *extra-judicial* executions during the Suharto period, in comparison with the political and denunciatory function of capital trials in both subversion and murder cases, and how these aims have endured despite the granting of clemency in a significant minority of cases. I then move on to refer specifically to the *collective* clemency grants made to two groups of 1965 ‘Coup’ prisoners, and to the manner in which long stays on death row have aided clemency during both the Suharto and post-Suharto eras.

With its large population, and sporadic mode of capital punishment throughout its history as an independent state,¹¹⁶⁷ Indonesia is a clear case of a nation in which the enforcement of the death penalty has played more of a *political* role than a functional one of *crime control*.¹¹⁶⁸ During the Suharto era, subversion was considered the most serious of capital crimes;¹¹⁶⁹ however, a large number of prisoners did not need to be tried and executed in order to punish, incapacitate and deter perceived anti-state activities during the New Order period, considering Indonesia’s long and bloody history of *extra-judicial* executions against political opponents and separatist groups.¹¹⁷⁰ After exhausting their appeals against the death sentence, those prisoners *judicially* executed during the 1980s and early 1990s primarily consisted of alleged 1965 ‘Coup’ plotters, together with six

¹¹⁶⁷ See note 1070, above.

¹¹⁶⁸ Interview with ANU Academic; Interview with Australian Academic Expert on Indonesia #3; AI-Index ASA 21/017/1994, 102; Interview with Australian Academic Expert on Indonesia #2.

¹¹⁶⁹ Interview with Australian Academic Expert on Indonesia; Lev (1999), 187.

¹¹⁷⁰ Interview with Australian Academic Expert on Indonesia; Imparsial (2010), 10; Butt, 8; Bouchier (1990), 177.

Muslim separatists convicted of the same crime, subversion.¹¹⁷¹ With regard to the alleged PKI prisoners tried in the late 1960s and early 1970s, in 1980 London-based NGO TAPOL¹¹⁷² posed the question:

Considering the ferocity and unrestrained nature of the [post-‘Coups’] massacres, it seems reasonable to ask why prisoners were tried at all. There is strong evidence that Aidit, Njoto and probably Lukman and Sakirman, all key PKI figures, were [summarily] executed after they had been arrested.¹¹⁷³

Instead, the death penalty imposed pursuant to *judicial* processes, when utilised against political opponents, served as a means of social control and of legitimisation for Suharto’s military regime.¹¹⁷⁴ The public broadcasting of the *trials* of alleged PKI prisoners in the Extraordinary Military Tribunal (the *Mahmillub*) initially served this function, well before many of the suspects were executed.¹¹⁷⁵ Moreover, by subsequently ordering executions of political prisoners after delays of many years, Suharto was able to keep before the Indonesian public evidence of the latent threat of communism, and hence justification for what had become a repressive and centralised form of government.¹¹⁷⁶ The execution of

¹¹⁷¹ Kontras; see also note 1078, above.

¹¹⁷² TAPOL is the Indonesian acronym for *Tahanan Politik*, or ‘Political Prisoner’ (TAPOL Bulletin 32, 6). Leading NGO (and source of archival information on the death penalty) the British Campaign for the Defence of Political Prisoners and Human Rights in Indonesia adopted this name some years after its formation.

¹¹⁷³ TAPOL Bulletin 37, 5, emphasis in original removed; see also Lev (2011), 223 and Antonov, 5.

¹¹⁷⁴ Imparsial (2004), 7; AI-Index 21/017/1994, 102; TAPOL Bulletin 37, 15; Interview with Australian Academic Expert on Indonesia.

¹¹⁷⁵ AI (1977), 45; TAPOL Bulletin 37, 5, 15; Interview with Senior Indonesian Human Rights Lawyer.

¹¹⁷⁶ Interview with Australian Academic Expert on Indonesia; Murray (4/1991); Glasius, 97.

However, Glasius and van den Berg have also noted that the executions of PKI prisoners throughout the 1980s and in 1990 were often kept secret *for a time*, so as to preclude foreign governments or NGOs

a number of PKI prisoners during the 1980s, sometimes more than two decades after their trials,¹¹⁷⁷ was explained in these terms by Suharto's biographer:

While [many different motives] may have played in Suharto's mind, it is difficult to avoid the conclusion that *the executions were a kind of symbol of what he took to be the final triumph of the New Order*. This action was the conclusive sign that, even if victory could never be taken for granted, *his political program was ascendant and its future assured*.¹¹⁷⁸

Importantly, not all political prisoners originally sentenced to death needed to be executed. Suharto's goals, to denounce communism and (later) Islamic insurgency, eliminate his political enemies, provide justification for the military regime, and also to demonstrate to western aid donors 'the New Order's commitment to legality and proper order'¹¹⁷⁹ could all be carried out through the use of extra-judicial executions and the *selective* use of the judicial death penalty, thereby opening up opportunities for clemency for a number of political prisoners. The case of those PKI prisoners who managed to avoid execution is considered later in this chapter.

Likewise, the judicial execution of hundreds or thousands of prisoners each year was not required to project a 'tough on crime' image in response to rising 'petty' criminality in Suharto's Indonesia, given the state's ability (via the military and police) to perform extra-judicial executions of common criminals, such as thieves, murderers and

pleading for clemency or expressing regret for the executions in their immediate aftermath (Glasius, 136; van den Berg, 262).

¹¹⁷⁷ No accused PKI prisoners were executed between the late 1960s and 1985 (TAPOL Bulletin 98, 2-3; Murray (6/1991), 19).

¹¹⁷⁸ Elson, 244, emphasis added.

¹¹⁷⁹ Lev (2011), 233; TAPOL Bulletin 37, 5, 15; Imparsial (2004), 7; Imparsial (2010), 10.

drug traffickers.¹¹⁸⁰ The few judicial executions for non-political crimes that took place during the Suharto period served either to make occasional deterrent statements about particular crimes,¹¹⁸¹ or alternatively to ‘re-establish’ the judicial death penalty from a period of dormancy after 1970, perhaps to pave the way for the subsequent executions of political prisoners.¹¹⁸² Either way, these executions performed no consistent crime-control function. While the public announcement of clemency grants in these circumstances may well have detracted from the message that the regime was trying to convey, the *quiet* commutation of lower-profile death row prisoners (sentenced for ‘common crimes’, particularly murder) could not have undermined the government’s hardline message nor the crime-control function of extra-judicial executions. I elaborate on the strong possibility of unreported commutations through an unofficial remissions procedure towards the end of this chapter.

Explaining the Clemency Grants in 1965 ‘Coup’ Cases

In jurisdictions such as Indonesia, with a low cumulative total of executions, it will only take a couple of isolated historical cases of *collective* clemency grants to achieve a clemency rate close to the ‘high clemency’ threshold of 50 percent identified in Chapter Four. Clemency will not need to be granted in a regular, *institutionalised* manner such as the practice witnessed in Thailand and Malaysia. Accordingly, I consider the 1965 ‘Coup’ cases separately here, as together they have contributed the vast majority of Indonesia’s

¹¹⁸⁰ AI (1987), 7-8; AI (1988), 10; van den Berg, 263; Bouchier (1988), 10; AI-Index ASA 03/01/87; Asian Human Rights Commission, 12. In the post-Suharto period, extra-judicial executions are still carried out with regularity, but it is unclear whether or not these occur *as a result of state policy* (Interview with Australian Academic Expert on Indonesia #2). A leading Indonesian human rights lawyer asserted, at interview, that it may still be state policy to conduct summary executions of terrorism suspects before or after arrest (Interview with Senior Indonesian Human Rights Lawyer #2).

¹¹⁸¹ AI-Index ASA 21/017/1994, 102.

¹¹⁸² Imparsial (2004), 10; Imparsial (2010), 10.

documented clemency grants since 1975. Although the executions of accused PKI prisoners did fulfil an important political function for the Suharto regime, as described above, up to a third of those *sentenced* to death were also spared execution through Presidential clemency. The present section explains why.

Here, the initial question to be answered is: which features distinguished political prisoners executed under Suharto from those who were granted clemency? Most importantly, those former PKI leaders who were granted clemency from 1980-1982, and in 1999, had each spent between 10 and 30 years in prison, were frail and elderly, had exhibited good behaviour, had shown remorse for their actions, and were no longer considered a political threat.¹¹⁸³ Others may also have escaped execution as a mark of respect for their surviving family members.¹¹⁸⁴ For the first group of prisoners granted clemency (12 commutations from 1980-1982),¹¹⁸⁵ the Suharto administration argued that the 10 to 15 year wait on death row before any commutations were granted represented the normal period of time required to exhaust all legal and political appeals against the death sentences,¹¹⁸⁶ thereby implying that those prisoners whose petitions were concurrently *rejected* would be executed without delay. However, in actual fact, those whose clemency appeals were unsuccessful were kept in prison until their execution was deemed politically useful.

Interpreted retrospectively, although this first group of political prisoners granted clemency could be seen to possess significant mitigating characteristics compared with

¹¹⁸³ 'Coup Plotter to be Freed After Years of Failed Efforts'; 'Indonesia to free 3 political prisoners'; 'President Grants Clemency to 10 More Political Prisoners'; AI-Index 21/017/1994, 105; England; Glasius, 95.

¹¹⁸⁴ Elson, 243, 347 n30.

¹¹⁸⁵ AI (1988), 9; Glasius, 95.

¹¹⁸⁶ Glasius, 94.

those executed, as I have described above, this fact by itself does not resolve the question as to why any of them were granted clemency *at all* by the regime. Here, two explanations are the most plausible. First, the clemency grants made in the early 1980s may have been publicly announced in order to deflect international criticism at a time when Indonesia was seen by western governments and human rights groups as one of the world's most serious transgressors in terms of international human rights standards.¹¹⁸⁷ As Fealy acknowledges, from 1975, after the executions of the first 'cohort' of PKI prisoners.¹¹⁸⁸

the Soeharto regime found itself confronted with a disturbing change in the nature of the *tapol*¹¹⁸⁹ problem. What had previously been regarded as a domestic policy matter to be dealt with on the basis of national political and security concerns now emerged as a significant and sensitive issue in Indonesia's international relations, with potentially serious implications for the flow of foreign aid.¹¹⁹⁰

The strong possibility that Suharto was reluctant to execute those prisoners with notable international profiles, such as Subandrio, 'a former deputy prime minister and foreign minister' in the Sukarno government and Omar Dhani, 'a [Sukarno] minister and commander of the air force',¹¹⁹¹ to avoid international criticism,¹¹⁹² provides some

¹¹⁸⁷ Interview with London-based Indonesian Human Rights Activist; Interview with Senior Indonesian Human Rights Lawyer; TAPOL Bulletin 130, 2.

¹¹⁸⁸ See also note 1177 above.

¹¹⁸⁹ See note 1172 above.

¹¹⁹⁰ Fealy, 12-13. This was confirmed by the Indonesian Human Rights Activist, by interview.

¹¹⁹¹ Glasius, 95.

¹¹⁹² AI (1979), 84; Interview with Australian Academic Expert on Indonesia; Interview with London-based Indonesian Human Rights Activist; TAPOL Bulletin 176, 23-24.

evidence of this shift. Both Subandrio and Dhani were part of the cohort granted clemency in the early 1980s, and both were eventually released from prison in 1995.¹¹⁹³ As an academic expert on capital punishment acknowledged in interview, authoritarian regimes are known to grant clemency to suit their own strategic interests,¹¹⁹⁴ with Suharto's actions in the early 1980s a likely example of this practice.

The second major explanation for the 12 grants of clemency made from 1980-1982 comes in the shape of the appeal process: most of the accused PKI prisoners who were sentenced to death in the aftermath of Suharto's ascent to power were tried by the Extraordinary Military Tribunal, the *Mahmillub*,¹¹⁹⁵ with civil court trials only beginning in 1969.¹¹⁹⁶ After convictions in these military 'show' trials, no right to judicial appeal existed, with Presidential clemency the *only* means to mitigate the sentence of death.¹¹⁹⁷ Whether for the crime of subversion or any other, the death penalty has never been mandatory on conviction in Indonesia, however in the trials of accused PKI prisoners, there was not a single acquittal: it was a finding of *guilt* that was, in effect, mandatory.¹¹⁹⁸ A leading scholar on the Indonesian legal system, the late Professor Daniel Lev, writing at the end of the Suharto era, poignantly observed that 'No significant political trial has ever resulted in an acquittal.'¹¹⁹⁹ An absence of appeal safeguards against wrongful conviction

¹¹⁹³ Glasius, 95; 'Clemency Granted to Political Prisoners'; Lev (2011), 363. Lev, in contrast to all other available sources, asserts that Subandrio's sentence was commuted to life imprisonment much earlier, in 1970 (at 250).

¹¹⁹⁴ Interview with American Academic Expert on Capital Punishment.

¹¹⁹⁵ Imparsial (2010), 10; Lev (2011), 233.

¹¹⁹⁶ AI (1979), 83; AI-Index ASA 21/30/85, 2.

¹¹⁹⁷ Presidential Decree 16/1963, art 7(2); AI-Index ASA 21/30/85, 2; Lev (2011), 239.

¹¹⁹⁸ Lev (2011), 233; AI-Index ASA 21/11/84, 1; AI-Index ASA 21/30/85, 2.

¹¹⁹⁹ Lev (1999), 187.

or excessively punitive sentences, as I described in Chapter Three, works to promote executive clemency as a means of mitigating the harshness of the death sentence.¹²⁰⁰ For the prisoners, referred to above, who possessed mitigating characteristics, Presidential clemency was the sole form of mercy available, with the trials and sentencing deliberations largely serving as a publicity exercise for the Suharto regime.¹²⁰¹ Some evidence that Presidential clemency provided a critical outlet for lenient discretion comes after observing the results of the later civil court trials of '1965' suspects, where the death penalty was less frequently imposed and sentences could be appealed to the Supreme Court, before any clemency petition was made.¹²⁰²

In contrast, the grants of clemency made to the 1965 prisoners by President Habibie in 1999, less than a year after Suharto's resignation, must be understood in the context of Indonesia's democratisation.¹²⁰³ During his 16 months in office, Habibie released up to 230 political detainees sentenced to prison terms and to death (including imprisoned separatist leaders from East Timor, West Papua and Aceh), in an attempt to signal a break from the New Order regime.¹²⁰⁴ The March 1999 release from prison of accused communist sympathisers Bungkus/Boengkoes, Marsudi/Marzuki, Asep Suryaman and Sri Rahardjo/Sri Suhardjo,¹²⁰⁵ possibly amongst others still under sentence of

¹²⁰⁰ Interview with American Academic Expert on Capital Punishment; Burnett (2002), 14; Rapaport (1998-2000), 1506-1507; Morison, 161.

¹²⁰¹ AI (1977), 45.

¹²⁰² AI (1979), 83.

¹²⁰³ 'President Grants Clemency to 10 More Political Prisoners'; Interview with Senior Indonesian Human Rights Lawyer. The number of prisoners granted clemency by Habibie might have been higher, if not for the deaths in custody of two of the '1965' prisoners in 1995 and 1997 (AI-Index ASA 21/43/96; TAPOL, 'Sukatno dies after 30 years in prison').

¹²⁰⁴ Smith (2001), 109; AI-Index ASA 21/84/98; Interview with London-based Indonesian Human Rights Activist.

¹²⁰⁵ 'President Grants Clemency to 10 More Political Prisoners'; TAPOL Bulletin 152, 17.

death,¹²⁰⁶ was part of this ongoing process of liberalisation. The reprieves granted to these prisoners could also be interpreted as a natural consequence of Habibie's repeal of the 1963 Subversion Decree, under which they were originally convicted, however the pardons did in fact pre-date the law's repeal by around two months.¹²⁰⁷ Rather than individualised grants of clemency issued for primarily *retributive* or *redemptive* reasons, Habibie's series of Presidential Decrees that collectively released capital and non-capital political prisoners can instead be interpreted as examples of an amnesty or a release of political prisoners pursuant to a democratic change in regime, which as I described in Chapter Three, will fall into the categorisation of clemency as a 'utilitarian' act.¹²⁰⁸

Indonesia is in a unique position of the four jurisdictions under analysis, as it is the only country that has undergone a complete political transition from autocracy to democracy during the period 1975 to 2009,¹²⁰⁹ which by itself is enough to explain over 40 percent of the definitive clemency and pardon grants reported during this period of Indonesia's modern history.¹²¹⁰

Unique Clemency Procedure and Long Stays on Death Row

In the above section '*Clemency Procedures in Death Penalty Cases*' I first described Indonesia's procedural framework for clemency, which is uniquely slow and drawn-out

¹²⁰⁶ England reports that of 10 accused PKI prisoners released from long-term detention, all but one were still under the sentence of death. The International Commission of Jurists (at 97) asserts that *all ten* still faced the death sentence. Other reports, in contrast, put *five* of the released prisoners still under sentence of death, including Isnanto ('Coup Plotter to be Freed After Years of Failed Efforts'; AI-Index ASA 21/43/96), or else listed Isnanto as the fourth prisoner, instead of Sri Rahardjo/Sri Suhardjo (TAPOL Bulletin 148, 16; AI-Index ASA 21/58/98, 11).

¹²⁰⁷ See England, International Commission of Jurists, 98-99, and Law 26/1999.

¹²⁰⁸ See Chapter Three, *Clemency for Political Advantage or Utilitarian Reasons*.

¹²⁰⁹ See Chapter One, note 52 and associated text, and Chapter Two, note 104.

¹²¹⁰ See Appendix D.

amongst Southeast Asia's retentionist jurisdictions. To reiterate, in the latter part of the *Reformasi* period if a prisoner's first petition was rejected and yet he or she was not executed within a two-year period, as was most often the case, Law 22/2002 authorised a *second* application for clemency, and the death sentence could not be carried out until the second petition had been rejected, after it had been filed.¹²¹¹ 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 their first petition, with the President needing to wait until the second appeal 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),¹²¹² the prisoner had no deadlines. For the President and the Attorney-General's Department, the only way around this problem 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.¹²¹³

Between 1950 and 2002, on the other hand, separate but related procedural obstacles stood in the way of regular executions being carried out. Although the 1950 clemency law set a legal time-limit of 30 days to apply for clemency,¹²¹⁴ the law did not specify the consequences of failing to submit a petition within that time, and also required a petition to be affirmatively *rejected* before an execution was carried out, in the

¹²¹¹ See Law 22/2002, arts 2(3), 3; AI-Index ASA 21/040/2004, 2. The right to a *second* clemency appeal was removed when the clemency law was subsequently amended in 2010 (Rachman; McRae (2012), 9).

¹²¹² Law 22/2002, art 11(3).

¹²¹³ See notes 1233-1234 and associated text, below. One example arose in 2006, when three Christian militants convicted for murder were promptly executed after only one of their appeals had been rejected (Sijabat).

¹²¹⁴ Law 3/1950, art 2(1).

same manner as the 2002 law.¹²¹⁵ Moreover, although unlike the 2002 law no *explicit* allowance for a second clemency petition exists within Law 3/1950, there is no explicit bar on second or subsequent petitions either.¹²¹⁶ Significantly, there are many different reports of prisoners (both during the New Order and *Reformasi* era) refusing to seek clemency for a first or second time for fear that their appeal will be rejected, paving the way for their prompt execution.¹²¹⁷ Suharto tried to deal with the impasse created by the 1950 law by enacting a separate decree in 1986, that *mandated* a first clemency petition to be submitted on a political prisoner's behalf by the District Court judge who had originally passed the death sentence, if the prisoner would not do so himself.¹²¹⁸ Likewise, in some cases prison officials are even reported to have forged or forced the signatures of death row prisoners in order to apply for clemency, in order to expedite their execution by firing squad.¹²¹⁹ The overall stagnation in the appeals process has been further exacerbated by the lack of time limits on the submission of a 'PK' case review.¹²²⁰

¹²¹⁵ Law 3/1950, art 2(3).

¹²¹⁶ HOC Indonesia 2001; Fidrus (2003). In 2009, there was a least one prisoner on Indonesia's death row whose *third* clemency petition was being considered by the President (Elda, 102, 106).

¹²¹⁷ For example, see UN Doc E/CN.4/1996/4, [244]; AI-Index ASA 21/017/1994, 103; Dean and Aleksander; Bampton, 24; AI-Index ASA 03/01/97, 10.

From 2002 to 2010, my reading of the legal situation is that the practice of most death row prisoners was to reasonably promptly submit a first clemency petition in the genuine hope that the death sentence would be commuted to life imprisonment (even though there was no time-limit for doing so). If the first petition was rejected and they were not executed with two years, they were able to rely on the lack of time limits within Law 22/2002 so as to indefinitely delay their second petition, and therefore prevent execution.

¹²¹⁸ Supreme Court Decree 1/1986; Fidrus (2003); Dean and Aleksander. Likewise, see note 1127 and associated text, above.

¹²¹⁹ AI-Index ASA 21/040/2004, 9; AI-Index ASA 21/016/2001; AI-Index 21/017/1994, 103, 106.

¹²²⁰ 'Attorney General Slow in Executing Death Penalty: Observers'; Sagita; 'Time Running Out For 109 Death Row Inmates'. See generally notes 1129-1136, above, and associated text.

at least from 1985 notification of an ‘intent to file’ a judicial review within 180 days of the final judgment is all that has been required to stop an impending execution.¹²²¹

The end result of this convoluted legal regime is, inevitably, very long stays on death row for condemned prisoners,¹²²² even before taking into account the fact that the Suharto administration deliberately delayed the execution of some political prisoners and ‘common criminals’ to ensure the timing would provide the greatest political impact, while attempting to expedite the execution of others.¹²²³ Towards the end of Suharto’s rule, the United Nations reported that a number of prisoners had been on death row for over 20 years,¹²²⁴ and by the end of 2009, Indonesian prisoners who had remained on death row for the longest periods of time were originally convicted in 1970, 1987, and 1988 (two prisoners): all convicted murderers.¹²²⁵ Elda, moreover, listed in 2009 the range of incarceration times for capital prisoners *following conviction at first instance*: 54 prisoners for less than five years; 41 prisoners for 5-10 years; 10 prisoners for 10-20 years and one prisoner for more than 20 years.¹²²⁶ For some of these condemned persons, it appears that *indefinite* detention on death row has been preferable to taking a chance on a first or a second clemency petition.

¹²²¹ Death Penalty Worldwide: Indonesia; Law 14/1985, art 69. From 1981 to 1985, there were no time limits on an application for case review, however the filing of such a request did not automatically operate to stop the enforcement of the original judgment (Law 8/1981, art 264(3), 268(1)).

¹²²² Glasius, 93; ‘Govt Denies Delaying Executions’; ‘Explanatory Memorandum to Law 22/2002’; Perdani.

¹²²³ Johnson and Zimring (2009), 323 n28; ‘Death Us Don’t Part’; Imparsial (2004), 11; AI-Index 21/017/1994, 104; HOC Indonesia 2004.

¹²²⁴ UN Doc E/CN.4/1996/4, [244].

¹²²⁵ See Kontras. See also AI-Index ASA 21/040/2004, 11-20. See also note 1229, below.

¹²²⁶ Elda, 102, 106. In the list compiled by Pensra, the average time spent incarcerated for capital prisoners who had not yet been executed or granted clemency stood at eight years.

Nonetheless, as I have observed in previous chapters focusing on other jurisdictions and in Chapter Three, the many years spent on death row do provide a prisoner ample time to demonstrate remorse for having committed the crime, to rehabilitate him or herself so as to be considered a law-abiding citizen,¹²²⁷ and also to reach old age, which will often aid clemency. In Indonesia commutation may also have been more likely for prisoners who were able to demonstrate a strong sense of religious piety in prison, given the Islamic religion's concept of redemption.¹²²⁸ Particularly for lower-profile prisoners who did not commit offences against the security of the state (which primarily consisted of subversion during the Suharto era, and drug trafficking in the 2000s), after spending 10-20 years on death row prisoners are generally 'forgotten' by the public,¹²²⁹ and may be quietly granted clemency, with or without an 'active' clemency petition, *without* weakening the government's stated resolve to tackle serious crime. For 'domestic' murder cases in particular, the political cost of granting clemency is far lower, compared with offences perceived to threaten Indonesia's national security, while *public* indignation against clemency for a murderer would also not be as pronounced,¹²³⁰ with the backlash against President Yudhoyono's four clemency grants in *narcotics* cases from 2004-2011 a particularly pertinent example.¹²³¹ Although throughout Indonesian history a

¹²²⁷ Andriyanto (2010); Shiel; 'Death to Corruptors, Perhaps?'; Interview with Amnesty International Staff #2.

¹²²⁸ Interview with Australian Academic Expert on Indonesia #4; Interview with Australian Academic Expert on Indonesia. See generally Chapter Three, *Public Opinion, Media and Religion*, on conceptions of clemency within the Islamic religion.

¹²²⁹ The most notorious example here is convicted murderer Bahar bin Matar, who was sentenced to death in 1970 and had his first clemency appeal rejected in 1972 (Kontras). Hands off Cain reported that an Indonesian parliamentary delegation visited the prison where Matar was being held in 2007, 'and after learning about [his] fate planned to do something to have his death sentence commuted' (HOC Indonesia 2008). Matar eventually died in prison, of natural causes, in 2012 *without* his death sentence having been commuted ('Attorney General Slow in Executing Death Penalty: Observers').

¹²³⁰ McRae (2008).

¹²³¹ See Mulya Lubis.

number of political (both PKI and radical Islamic) prisoners together with common murderers have been executed after spending over 15 years on death row,¹²³² the practice of proceeding to execute long-term prisoners has been far from uniform. McRae (writing in the *Reformasi* era) and Amnesty International (in the Suharto era) both observed that high profile cases with a potential political impact tended to be processed through the system at a faster pace,¹²³³ while NGO Hands off Cain reported that prisoners who ‘behaved badly, tried to escape, bribed guards or were uncooperative were put to death more quickly’.¹²³⁴

Although, according to confirmed sources, only one prisoner convicted of murder has been granted a commutation since 1975,¹²³⁵ it is likely that other such prisoners have been quietly reprieved through an unofficial ‘remissions’ system,¹²³⁶ thereby implying unilateral action by the prison authorities or the executive government, without reliance on a prisoner’s clemency petition. In the mid-1980s, Amnesty International reported that clemency for long-term prisoners may have actually become institutionalised under Suharto, by way of a discretionary procedure rewarding good behaviour on death row,¹²³⁷ possibly granted in conjunction with the *official* sentence remissions afforded to non-

¹²³² AI (1988), 3; Bampton, 7; Glasius, 93; Afrida.

¹²³³ See McRae (2008) and McRae (2012), 7; AI (1987), 3; Interview with Australian Academic Expert on Indonesia #2. An Indonesian Human Rights Activist, by interview, asserted that the identity of the victim/s will have a significant impact here.

McRae describes the practical justification for particularly important cases ‘jumping the queue’: by 2010 there was a backlog of over 2500 clemency cases awaiting decision, for capital and non-capital crimes (McRae (2012), 9).

¹²³⁴ HOC Indonesia 2008.

¹²³⁵ See note 1116 and associated text.

¹²³⁶ AI (1988), 3, 5.

¹²³⁷ Ibid, 5; AI-Index ASA 21/27/87; AI-Index ASA 21/20/87.

death row prisoners on Indonesia's Independence Day (17 August), and during religious holidays each year, known as *Remisi*. Such *official* remissions are granted separately from the Presidential clemency procedure, and have probably never included sentence reductions for death row prisoners, at least since 1979.¹²³⁸ However, while death row prisoners are excluded from the official remissions legislation, recommendations for the commutation of a death sentence can still be made by prison governors, on the basis of good behaviour, or where the crime committed is no longer regarded as particularly serious.¹²³⁹ As President Suharto confirmed in his autobiography: 'There have been cases when I have granted a pardon to someone sentenced to death... All of these cases were determined *without much publicity*'.¹²⁴⁰ However, it is unclear if this kind of policy has been maintained under Indonesia's *Reformasi* Presidents. By way of illustration, although most post-Suharto Presidential Decrees are recorded on the website of the Indonesian Secretariat of State, those authorising *or* refusing clemency are not.¹²⁴¹ During my

¹²³⁸ AI-Index ASA 21/20/87; AI-Index ASA 21/01/95, 12; AI, 'Appeal for Release of Prisoners of Conscience', 1; 'Aceh rebels granted remission by Megawati'.

The Independence Day prison remissions are a long Presidential tradition, first authorised by Sukarno through Presidential Decree 354/1951. The Presidential Decree in 1979 that reformed the official remission process covered only prisoners sentenced to life, or a lesser prison term. The decree did not change the requirement that a death sentence still had to be formally commuted by the President (AI-Index ASA 21/11/84, 3-4; AI-Index ASA 21/01/83, 4). A further 1987 decree appeared to excise *life* sentence prisoners from the group eligible for holiday remissions, and forced those prisoners too to rely exclusively on an ad-hoc grant of Presidential clemency to reduce their sentence (AI-Index ASA 21/01/95, 12; AI-Index ASA 21/11/93). Moreover, in the post-Suharto period capital prisoners have remained ineligible for official remission (Kuswandini (3/10/08); Interview with Indonesian Minister; 'Some 43,475 Prisoners Obtain Remission'). While it appears that the Indonesian remissions procedure substantially resembles the Thai practice of Collective Royal Pardons on important national occasions, the key difference here comes in the procedure's lack of application to death sentence cases.

¹²³⁹ Interview with Australian Academic Expert on Indonesia; see also Law 22/2002, art 8.

¹²⁴⁰ Soeharto, 337, emphasis added. Suharto's reference to granting 'pardon' here probably entailed the substitution of a death sentence with life imprisonment, rather than outright release. As an illustration, Sya'ban (at 81) reports that of petitions for clemency for *all* lengths of sentence, 30 percent were successful in 1982 and 41 percent were successful in 1983.

¹²⁴¹ Interview with Australian Academic Expert on Indonesia #2; Interview with Indonesian NGO Staff. See Kementerian Sekretariat Negara Republik Indonesia.

fieldwork in Indonesia, I found that only limited records of Presidential Decrees on clemency are available within the public domain, with the vast majority of those available records referring to Presidential clemency granted for lesser sentences of imprisonment, rather than for death sentences.

Overall, it appears that the availability of *two* clemency petitions per prisoner, together with the lack of legal time limits within which these petitions (and any case review) must be submitted is one contributing reason for the Indonesian state's low frequency of judicial executions and 'medium' clemency rate since 1975. Notably, given that the available historical figures for *executions* in Indonesia are reasonably complete¹²⁴² (even if the *unreported* commutations discussed above do not explicitly contribute to the observed statistical clemency rate), they have at the very least *taken the place* of potential executions and thereby prevent the stated clemency 'rate' from decreasing further from the 'medium' to the 'low' clemency category identified in Chapter Four. In this fashion, even unreported Presidential decisions in favour of commutation can be considered a 'contributory' factor *enhancing* Indonesia's historical use of clemency.

Conclusion

Although the political climate in Indonesia changed significantly between 1975 (under Suharto) to 2009 (under Yudhoyono), it is notable that these two Presidents have utilised capital punishment for similar purposes. Over the past 35 years, the death penalty has consistently been employed by Indonesia's leaders to identify and eliminate 'enemies of the state', be those suspected communist sympathisers, Islamic terrorists and insurgents,

¹²⁴² See Kontras; Imparsial (2010), 132, 166.

or drug traffickers.¹²⁴³ Political convenience has generally dictated the issuing and finalisation of death sentences, together with the timing of executions,¹²⁴⁴ in a country where much of the actual *crime-control* role has been taken up by extra-judicial executions by the military and by police.

However, despite the aforementioned similarities over time in the employment of death sentences and executions, the Indonesian President's use of the clemency power has differed greatly when the autocratic 'New Order' and the democratic *Reformasi* eras are compared. Within the present study, Indonesia remains the jurisdiction in which the greatest amount of longitudinal variation is found in terms of clemency, which by itself provides a key explanation for the overall clemency prevalence nestling firmly within the 'medium' category first defined in Chapter Four. If the clemency 'rates' of Presidents Suharto and Habibie (29-43 percent from 1975 to 1999) and the three *Reformasi* Presidents (4-5 percent from 2000 to 2009) were considered separately, their variation would be enough to place the two Indonesia entries in differing clemency bands instead ('medium' and 'low' respectively). Nonetheless, as first identified in Chapter Two, my research aim is not to make longitudinal comparisons within individual jurisdictions, but instead to compare the *accumulated* clemency practice of each country over the entire period 1975 to 2009, even if this appears an artificially imposed timeframe on certain occasions.¹²⁴⁵

Considering the potential causal explanations then, the cases of the accused PKI 'Coup' plotters described above suggest at first glance that clemency grants in Indonesian

¹²⁴³ Imparsial (2004), 7.

¹²⁴⁴ HOC Indonesia 2004; TAPOL Bulletin 56, 5; Interview with Australian Academic Expert on Indonesia #3.

¹²⁴⁵ See generally Chapter Two, *Refining the Subject Matter – Number of Jurisdictions, Time-Limits and Substance of Comparison* and Chapter Four, note 492 and associated text.

death penalty cases, at least under President Suharto and his successor Habibie, took place on a far more spasmodic and episodic basis than did the regular grants described in the chapters on Malaysia and Thailand. However, this is not to say that clemency grants throughout modern Indonesian history have been confined to the 1965 prisoners, or that clemency has always been granted on a *collective* basis, as it was in the early 1980s and in 1999. References to regular and even *institutionalised* commutations, granted on an individualised basis for mainly *redemptive* reasons are also found within the archival literature. Together, these two categories of clemency grants, enabled by the long stays on death row endured by prisoners as a result of Indonesia's unique clemency procedure together with the domestic and international political considerations that saw the commutation of death sentences imposed on accused PKI sympathisers in the early 1980s and late 1990s, explain why the leaders of a country where the majority of capital cases espousing any kind of mitigating characteristics do not survive judicial appeals, case reviews, political dictates and corruption at the prosecutorial and investigatory phase, have still exercised their Presidential prerogative power to commute finalised death sentences at a 'medium' rate since 1975.

Chapter Nine – Discussion and Conclusion

Introduction

In the preceding four chapters, I described in significant detail the 1975-2009 clemency policies and practice for each of the four jurisdictions under study, outlining: a) the known cases of clemency or pardon being granted and the reasons for those grants¹²⁴⁶ and b) the list of structural and cultural attributes that operate as plausible determinants of the *proportion* of finalised judicial cases granted clemency. Recalling Chapter One, these were my two research questions, ‘micro’ and ‘macro’ respectively. In this final chapter, I consider these four extended case studies as a whole, setting out both the common and contrasting findings on the two aforementioned research questions. I also suggest responses to these research questions that have *regional* application, in accordance with the model of comparative criminal justice studies outlined in Chapter Two.¹²⁴⁷

Although each of the four relevant jurisdictions possesses subtly different historical, cultural, legal and political attributes, there are indeed a number of common observations that can be made about their rationale for granting clemency or pardon to condemned prisoners. In accordance with the methodology of an *inductive* comparative study,¹²⁴⁸ within the present chapter I weave these commonalities and differences into plausible hypotheses of clemency incidence in retentionist Southeast Asia, describing the structural and cultural factors that serve as possible explanations for the relative incidence of clemency in each jurisdiction. Thereafter, I consider the means by which

¹²⁴⁶ In Chapter Seven, I noted that the more useful inquiry for Thailand concerned the identity of those prisoners *denied* clemency and subsequently executed, given the overwhelming presumption in Thai death penalty cases is *in favour* of clemency, either by Individual Royal Pardon or Collective Royal Pardon.

¹²⁴⁷ See Chapter Two, *Qualitative or Quantitative Research?*.

¹²⁴⁸ Neuman, 60, 76-77; Kohli et al, 17; Lijphart, 687.

these exploratory findings could be further tested through quantitative regression analysis, both within the four jurisdictions under study, together with other retentionist world regions.

However, before attempting to answer this ‘macro’ research question by qualitative or quantitative means, I will first outline the common and contrasting findings on the ‘micro’ research question (clemency decision-makers, and definitive examples of capital clemency grants). Within the present study, where relatively little was known about the historical data on capital clemency in each country before the archival research I conducted on this topic, the identity of clemency recipients and decision-makers, together with patterns observed within the collated *reasons* for the grants will have direct relevance to the *proportion* of prisoners reprieved, which I consider later in the chapter.

The ‘Micro’ Research Question: Summary of Findings on Clemency Decision-Makers and Recipients (Including the Reasons for Commutation)

Based on the data presented in Chapters Five to Eight that was obtained from archival research and ‘elite’ interviews, the following table sets out the identity of the executive *decision-maker/s* on clemency, addressing the first part of my ‘micro’ research question:

Table 2: Clemency Decision-Makers in Southeast Asia

Jurisdiction	Government	Formal Decision-Maker/s	Actual Decision-Maker/s
Singapore	Unitary Republic	President	Cabinet / Attorney-General
Malaysia	Federal Constitutional Monarchy	Hereditary Rulers, Governors, <i>Yang di-Pertuan Agong</i>	Federal Attorney-General / Hereditary Rulers, Governors, <i>Yang di-Pertuan Agong</i>
Thailand	Constitutional Monarchy	King	Ministry of Justice / Ministry of Corrections / Cabinet ¹²⁴⁹
Indonesia	Unitary Republic	President	President / Supreme Court's Criminal Chambers

As is evident, the head of state, who is the *formal* decision-maker in each case, is not always the *actual* decision-maker (excepting Malaysia's 13 *state* pardons boards, but not Malaysia's three *federal* pardons boards, chaired by the *Yang di-Pertuan Agong*, who is Malaysia's head of state). The *advisory role* of other parties vis-a-vis the head of state will often pre-empt the latter's formal, constitutional decision-making power. This phenomenon may be explained as the result of a worldwide shift away from absolute to constitutional monarchy during the 19th and 20th centuries, where the prerogative powers once synonymous with royal rule are now exercised *on the advice* of elected leaders or bureaucrats.¹²⁵⁰ Similarly, in the case of Singapore, the formal constitutional powers of

¹²⁴⁹ In Chapter Seven I observed that the King of Thailand's *personal* role in the adjudication of petitions for Individual Royal Pardon may well have declined over the years of his reign, with the Cabinet and the civil service bureaucracy playing a more and more important role. For *Collective* Royal Pardons, the rate of Royal Assent to government proposals for a decree has approached one hundred percent under King Bhumibol (see Chapter Seven, notes 965-973 and associated text).

¹²⁵⁰ Sebba (1977b), 111-115; Sebba (1977a), 221; see also Chapter Four, note 460 and associated text. See Chapter Three, notes 263-265 and associated text on prerogative powers and absolute monarchy.

the President of the Republic are, in fact, circumscribed by his largely-ceremonial role as head of state.¹²⁵¹

Second, the table below contains a summary of my findings on the remaining aspect of the ‘micro’ research question: who has been granted commutation from the death sentence, and for which ascertainable reasons, during the period 1975 to 2009? In order to sort the known examples of commutation, I have employed the four-way categorisation of clemency ‘paradigms’ outlined in Chapter Three:

- ‘Mercy from the Sovereign’;
- ‘Retributivist Clemency’;
- ‘Clemency as Redemption’; and,
- ‘Clemency for Political Advantage or Utilitarian Reasons’.

Note that I have included clemency grants in each category where there is some evidence that *at least one* grant has been made in accordance with the particular paradigm. This is not to say a country’s modern clemency history must fit neatly into one category, that all similar cases have been granted clemency in the past, or that case attributes and decision-maker justifications cannot overlap across more than one category. The aggregate table of results is merely a rough depiction of the types of grants which have been made by executive decision-makers over the period 1975-2009, where accurate data are available:

¹²⁵¹ See *Yong Vui Kong v Attorney-General*, [150], [175], [180].

Table 3: Varieties of Capital Clemency Grants in Southeast Asia

Jurisdiction	'Mercy from the Sovereign'	Retributivist Clemency	Redemptive Clemency	Utilitarian Clemency
Singapore	No	Yes ¹²⁵²	No	Maybe ¹²⁵³
Malaysia	Yes ¹²⁵⁴	Yes ¹²⁵⁵	Yes ¹²⁵⁶	Yes ¹²⁵⁷
Thailand	Yes ¹²⁵⁸	Yes ¹²⁵⁹	Yes ¹²⁶⁰	Yes ¹²⁶¹
Indonesia	(No direct evidence)	Yes ¹²⁶²	Yes ¹²⁶³	Yes ¹²⁶⁴

The main comparative conclusion to be drawn from this table is that, contrary to any assertions that clemency in Southeast Asian nations is exceedingly rare and/or arbitrarily awarded in death penalty cases, there is in fact a wide variety of principled circumstances in which such grants have been made since 1975. While not all jurisdictions appear to use clemency pursuant to the 'Mercy from the Sovereign' paradigm, there are circumstances in *all four* jurisdictions where clemency has been used *retributively* to mitigate excessive

¹²⁵² Clemency granted pursuant to: terminal illness, youth or first offence, provoked or spontaneous murder, being an accomplice.

¹²⁵³ Testifying against co-defendants (possibly Siti Aminah Jaafar and Mathavakannan Kalimuthu).

¹²⁵⁴ Granted by the Malay Hereditary Rulers and possibly also the *Yang di-Pertuan Agong*.

¹²⁵⁵ Young offenders; complete or partial defence unable to be proven; case irregularities.

¹²⁵⁶ Clemency after long stays on death row.

¹²⁵⁷ Certain foreign prisoners 1975-1982 and 1995-2009; ruling party-affiliated prisoners.

¹²⁵⁸ Individual and Collective Royal Pardons granted as part of a 1000-year-old royal tradition, moreover, frequent clemency granted to maintain the prestige of the monarchy as a revered Buddhist institution.

¹²⁵⁹ Wrongful conviction; gender or young children; youth or old age; terminal illness.

¹²⁶⁰ Rehabilitation and remorse; employment in the civil service or military.

¹²⁶¹ Foreign prisoners; assisting with ongoing police investigations.

¹²⁶² The two confirmed grants not involving PKI prisoners: Kamjai Kong Thavorn in 1998 and Harnoko Dewantoro in 2003. Also most PKI detainees (through old age, family connections and no longer being considered a political threat). Most PKI detainees eventually granted clemency had no right to a judicial appeal of their death sentence, with clemency to only route of appeal.

¹²⁶³ Most PKI detainees. Moreover, unconfirmed grants through an unofficial remissions procedure for 'common' criminals such as murderers, who had been on death row for a long period of time.

¹²⁶⁴ PKI detainees' 1980-1982 clemency grants easing international pressure on Suharto. 1999 PKI detainees released pursuant to a process of democratisation.

or unjust judicial punishment. Moreover, aside from Singapore, the other three jurisdictions under study each exhibit examples of clemency granted in response to the prisoner's meritorious activities or good behaviour either before arrest or else within prison ('Redemptive Clemency'). In addition, clemency has potentially been granted in all four jurisdictions in circumstances where it benefits the majority of the population in some way, or it provides some form of political advantage ('Utilitarian Clemency'). As a result, it is plainly evident that clemency has not vanished as a feature of the criminal justice system in Southeast Asia following the demise of the absolute monarchy form of government traditionally associated with the prerogative of pardon.¹²⁶⁵ Echoing the observations of the US Supreme Court in *Biddle v Perovich*, at least in these four retentionist countries of modern Southeast Asia, clemency can now be largely regarded as 'part of the constitutional scheme'.¹²⁶⁶

The 'Macro' Research Question: Factors Contributing to Clemency 'Rates'

Low, Medium and High – the Statistical Findings on Clemency

In Chapter One and Chapter Four, I described my statistical findings on clemency in Southeast Asia, based on annual clemency and execution totals collected from archival sources relating to the years 1975 to 2009. These are set out in full in Appendices A-D. To repeat these findings, despite all four jurisdictions comprising the present study conducting *executions* on a reasonably regular basis since 1975, in retentionist Southeast Asia we find examples of an extremely low clemency rate of approximately 1 percent (for Singapore), two countries (Indonesia and Malaysia) where clemency, while not an exceptional measure, is nonetheless *not the expected* outcome in a capital case (with

¹²⁶⁵ Sebba (1977a), 221-228; Sebba (1977b), 83; Kobil (1991), 571.

¹²⁶⁶ *Biddle v Perovich*, 486.

rates of 22-32 percent and 26-40 percent, respectively), and finally the case of Thailand, where clemency is the form of legal relief that a prisoner who has exhausted judicial appeals can *expect* in the majority of cases (91 to 92 percent). Calculating these figures does present significant methodological challenges, as I described in detail in Chapter Four.¹²⁶⁷ Nevertheless, providing a set of statistical estimates, a process that has never been attempted with any precision in Southeast Asian jurisdictions (according to the available sources), is a novel step that can be built on within future capital punishment studies of the region.

How have I determined the percentile ranges ‘low’, ‘medium’ or ‘high’ as they apply to clemency rates here? While the three may be relative terms, it is instructive that in the United States, the country on which most of the theoretical work on the death penalty has been based, clemency ‘rates’ peaked in the mid-20th century at just over 40 percent, and since the reinstatement of capital punishment in 1976 have fallen to around 18 percent.¹²⁶⁸ In the United Kingdom, during the first half of the 20th century (before the death penalty was abolished in 1965),¹²⁶⁹ the proportion of cases granted clemency was similar, at around 35-40 percent. Moreover, the same kinds of proportions were evident in former British colonies espousing common-law legal systems.¹²⁷⁰ I have taken the US-UK figures as a median point of reference, and therefore placed them within the ‘medium’ clemency band. If we assume that clemency would, in a majority of contemporary retentionist jurisdictions, be denied more often than it is granted (given that the actions

¹²⁶⁷ See Chapter Four, *Shortcomings in Quantitative Data and the Estimation of each Jurisdiction’s Clemency ‘Rate’*.

¹²⁶⁸ See Chapter Four, note 494.

¹²⁶⁹ The death penalty was abolished by virtue of the Murder (Abolition of Death Penalty) Act 1965 in England, Scotland and Wales, but remained in use in Northern Ireland until 1973.

¹²⁷⁰ See Chapter Three, notes 308-309.

of the decision-maker effectively ‘overturns’ the prior sentencing judgment of the courts), then 50 percent appears an appropriate lower bound for the ‘high’ clemency threshold. As for the remaining ‘low’ clemency threshold, I intended that the band should indicate circumstances in which clemency, while technically existent as a legal right to condemned prisoners,¹²⁷¹ was nonetheless hardly ever used. As the NGO ADPAN noted in a 2011 report on the death penalty in the Asia-Pacific region, ‘In several countries in the region, clemency procedures are either absent or exist only on paper.’¹²⁷² Whether that threshold is placed at one percent, or anywhere up to five percent, in the present study it will still include the practice of Singapore, by far the most frugal of the jurisdictions when it comes to clemency.¹²⁷³

Finally, why is it that I have only categorised clemency within *three* bands, rather than smaller percentiles of 10, for example? The three-way classification is a reflection of inherent methodological problems: with vast swathes of quantitative data being unavailable and the need for the calculation of clemency ‘ranges’ rather than precise figures,¹²⁷⁴ a more exact ‘ranking’ of clemency in partially-closed death penalty systems would be a fruitless task. A case in point is attempting to differentiate between Indonesia (22-32 percent) and Malaysia (26-40 percent). With the potential inaccuracies of those

¹²⁷¹ See Chapter Three, note 390, on the worldwide existence of the right to have a death sentence considered for clemency.

¹²⁷² AI-Index ASA 01/023/2011, 32.

¹²⁷³ Future research studies adopting the same kinds of measurement methods for clemency may need to reconsider the scope of this ‘low’ threshold category. The ‘high’ threshold category, on the other hand, appears to have a more intuitive justification.

¹²⁷⁴ See Chapter Four, *Shortcomings in Quantitative Data and the Estimation of each Jurisdiction’s Clemency ‘Rate’*.

ranges,¹²⁷⁵ and the very fact that the statistics are expressed in ranges rather than precise percentages, it is more useful to consider those two jurisdictions as part of the same *class*.

After the meticulous collection of statistical and qualitative case-based data on clemency through archival research within a number of different countries and through internet-based sources, the primary interpretive challenge has been to explain each country's position on this broad 'spectrum' of clemency use. Despite the small number of countries covered, retentionist Southeast Asia provides an ideal setting for a comparative study of this phenomenon, at least on an inductive and exploratory basis, where perfect 'case-matching' on the basis of potential explanatory factors is not necessarily required.¹²⁷⁶

Summarising the Deterministic Factors for Clemency 'Rates'

Throughout the country chapters (Chapters Five to Eight), the narrative method I adopted was to list a single cohort of potential factors either enabling or preventing clemency for those two jurisdictions that fell at either end of the clemency 'spectrum': Singapore and Thailand. If the set of explanations identified in each case has theoretical significance, and all potential factors have been scanned, the difficulty in explaining clemency differences between those two jurisdictions is primarily limited to explaining the *counterfactuals* relevant in each case¹²⁷⁷ (i.e. reconciling the presence or absence of factors in either country that, in other jurisdictions, appear to point to the *opposite* outcome in terms of clemency). Accordingly, I discuss each potential explanatory factor in

¹²⁷⁵ See, for example, Chapter Six: Malaysia, *Clemency Procedures in Death Penalty Cases* on potential inaccuracies in the Malaysian case.

¹²⁷⁶ Kohli et al, 21; Lijphart, 684.

¹²⁷⁷ Kohli et al, 21.

a *dichotomous* fashion below and consider the counterfactuals as they apply to Singapore and Thailand in each case.

Those countries whose clemency practice is significantly more difficult to explain are the two (Indonesia and Malaysia) that exhibit ‘medium’ clemency rates – clemency is neither extremely rare, but nor is it the *expected* outcome in a finalised death penalty case. The narrative approach I chose to adopt in Chapters Six and Eight, covering these two jurisdictions, was to list a set of structural and cultural elements that *promoted* the use of clemency, followed or preceded by a list of further factors that acted to minimise or *inhibit* commutations. As I summarise below, both Indonesia’s and Malaysia’s overall set of explanatory factors substantially overlap with those theoretically-significant factors found in Singapore (with very low clemency) and Thailand (with very high clemency). While this factorial ‘balancing’ approach fails to differentiate, for example, between clemency rates of 10, 20, 30 and 40 percent, narrowing down the deterministic mix of factors to this level of precision is not required within an *exploratory, inductive* study. Nonetheless, other than to acknowledge that there are forces pushing clemency in either direction in both ‘medium’ rate jurisdictions, absent quantitative analysis it is difficult to be certain which individual factors have more traction than do others. To differentiate between the finer gradations of clemency ‘rates’ and provide scientifically-tested explanations for each band will require further regression-based research, a topic discussed later in this chapter.

The following table summarises the individual country findings I presented on clemency ‘rates’ throughout Chapters Five to Eight.

Table 4: Factors Enabling and Inhibiting Clemency in Southeast Asia

Jurisdiction	Potential Factors <i>Enabling</i> Clemency	Potential Factors <i>Inhibiting</i> Clemency
Ch 5: Singapore (‘Low’ Rate)	(none listed in Chapter 5)	1. The ‘Rule of Law’ and the Singapore ‘Brand Name’ 2. Prosecutorial Discretion 3. Drug Trafficking Policy: Maximising Deterrence 4. The Decision-Making Process: Cabinet Dynamics and Bureaucratic Efficiency
Ch 6: Malaysia (‘Medium’ Rate)	1. Role of the Malay Monarchy on the Pardons Boards 2. Long Stays on Death Row 3. Limits to the MDP	1. Police Corruption/Prosecutorial and Judicial Discretion, Detention Without Trial 2. Federal Attorney’s Role on the Pardons Boards 3. ‘No Mercy’ Drugs Policy 1983-1994
Ch 7: Thailand (‘High’ Rate)	1. Pardoning Process and Long Stays on Death Row 2. King Bhumibol and the tradition of Buddhist Monarchy 3. Extra-Judicial Executions 4. International Relations and Foreign Prisoners	(none listed in Chapter 7)
Ch 8: Indonesia (‘Medium’ Rate)	1. Extra-Judicial Executions 2. Clemency in the 1965 ‘Coups’ Cases 3. Clemency Procedure and Long Stays on Death Row	1. Lenient Discretion at Earlier Stages 2. Democratisation, ‘Rule of Law’ Rhetoric, and Drug Trafficking Cases during the <i>Reformasi</i> Era

While most of the explanatory factors described in the table above are backed by the US-centred theoretical literature on clemency and pardons described in Chapter Three,¹²⁷⁸ what has been largely missing until the present chapter is a cross-national *comparison* of clemency practice in the Southeast Asian region, reflecting the recommendations contained within the methodological literature on comparative criminal justice covered in

¹²⁷⁸ See Chapter Three, *Structural and Cultural Determinants of Clemency and Pardon ‘Rates’*.

Chapter Two. From the summary of ‘macro’ factors above, together with my findings on the ‘micro’ research question described earlier, we do see several cross-border trends begin to emerge, trends which span the set of actively retentionist ASEAN nations (minus Vietnam), but which may or may not extend to capital clemency in other parts of the world.¹²⁷⁹ Here, by adopting Lijphart’s sensible recommendations pertaining to comparative qualitative studies with a small number of jurisdictions and *combining* two or more potential explanations that ‘express an essentially similar underlying characteristic’, and moreover ‘simplifying a set of several categories into a dichotomy’,¹²⁸⁰ the contributing factors within the table above may be effectively simplified and channelled into a more succinct and intelligible thread of ideas, without making the grave methodological mistake of selectively ‘ignoring’ uncorroborated or unexpected findings.

Having undertaken this process, my preliminary conclusions are that in modern retentionist Southeast Asia, the proportion of finalised cases granted clemency is significantly influenced by *three* legal and political attributes of each jurisdiction, reflecting the three functions that clemency appears to perform in Southeast Asian nations. These influences are:

1. The amount of *lenient discretion* exercised at earlier stages within the criminal justice system;
2. The extent to which granting clemency enhances or detracts from *political power*, which is closely related to the *type of government* granting clemency; and,
3. The usual *length of time capital prisoners spend incarcerated* before execution.

¹²⁷⁹ See Chapter Two, notes **Error! Bookmark not defined.**-86 and associated text, for comment on the generalisation of results.

¹²⁸⁰ Lijphart, 687; Ankar (2007), 53.

I discuss each of these factors in turn, later in this chapter.

Each factor is capable of being expressed dichotomously, such that the intensity of its presence appears to bolster clemency ‘rates’ and its absence reduces the same measure. Moreover, the fact that the observed factors have substantial backing within the theoretical literature (on clemency ‘paradigms’)¹²⁸¹ enhances their quality as *plausible* explanations.¹²⁸² As is evident, the first observed explanation for clemency resembles the theoretical conception of ‘Retributivist Clemency’ I first outlined in Chapter Three. The second observed explanation overlaps with the ‘Mercy from the Sovereign’ paradigm, while the third observed explanation echoes the ‘Clemency as Redemption’ paradigm. However, what must be stressed here is that the relationship between the three ‘macro’ factors listed above and the three theoretical clemency ‘paradigms’ originating in Chapter Three is one of *cause and effect*. Specific attributes of the criminal justice system and the politics of each jurisdiction will promote or inhibit the granting of capital clemency to serve different societal functions – justifications which are captured and categorised by the Chapter Three ‘paradigms’. This is the nature of the relationship between Table 3 and Table 4, above.

Finally, as a preliminary note of caution, within the following sections expanding on clemency as associated with lenient discretion, political power and time on death row in retentionist Southeast Asia, these three responses to the ‘macro’ research question must be treated with great care as scientific ‘explanatory’ mechanisms for higher or lower clemency rates. Alongside detailed explanation of each factor, below, I will also consider whether or not the relevant factor can indeed be thought of as potential contributory

¹²⁸¹ See Chapter Three, *Who Grants Clemency and Pardons? Why are they Granted, and to Whom?*

¹²⁸² Kohli et al, 5, 47; Parsons, 15; Przeworski and Teune, 39.

cause of high or low clemency, or whether it is merely a *correlate*. In social-scientific studies, establishing causation involves three requirements:

1. temporal order (the effect occurring after the purported cause);
2. association (the dependent and independent variables appear to act together);
and,
3. no spuriousness, or the elimination of alternative explanations.¹²⁸³

A fourth requirement sometimes described within the academic literature, that the results accord with the general observations of theoretical writings on the subject,¹²⁸⁴ is already satisfied for all three findings if the ideas contained within Chapter Three are revisited (concerning the reasons for clemency *frequency*, rather than the subtly different decision-maker *justifications* for clemency).¹²⁸⁵

Clemency and Lenient Discretion

Within this first conception, clemency is considered as another form of lenient discretion exercised within the criminal justice system. Based on my interpretation of the Southeast Asian cases, clemency *does* exist in a significant proportion of finalised cases where the criminal justice system lacks other mechanisms to individualise punishments, or to keep the annual number of executions at a manageable level. Of the four countries under analysis, the pertinent examples here are the military ‘show’ trials of alleged PKI prisoners

¹²⁸³ Neuman, 64-66; Kraemer, 1403; Babbie, 90-92; Ruane, 78-82. Here, Jackman (at 172) pertinently observes that ‘The fact is, of course, that causation can never be empirically demonstrated: hence the normal emphasis on making causal *inferences*... we can never be completely sure that all other potentially confounding factors have been controlled as we try [to] gauge the effects of the causal variable.’

¹²⁸⁴ Neuman, 64; McQueen and Knussen, 48; Cook and Campbell, 31; Jackman, 175.

¹²⁸⁵ See Chapter Three, *Structural and Cultural Determinants of Clemency and Pardon ‘Rates’*.

during the early Suharto period in Indonesia,¹²⁸⁶ and the regular processing of death penalty cases through Thailand's criminal justice system. In the former case, the story of *publicly reported* clemency grants in Indonesia from 1975 is largely the story of the subversion trials of accused PKI members and associates following the failed coup of 1965. As I described in Chapter Eight, such prisoners were not accorded any rights to appeal the death sentences imposed in the *Mahmillub* (Extraordinary Military Tribunal), other than to appeal for clemency to the President. Moreover, convictions upon charges being laid were universal: not one prisoner was acquitted in either military or civil trials, although it appears death sentences were at least *reduced* on appeal in the civil courts.¹²⁸⁷

On the other hand, In Thailand, clemency as lenient discretion is prompted by the very large number of death sentences imposed at first instance (as I described in Chapter Seven and Appendix C), Thailand's status as one of the 'world capital[s] of overcharging',¹²⁸⁸ and the fact that despite two levels of judicial appeals the number of prisoners remaining on death row at the conclusion of the judicial process is by far the largest of any of the four jurisdictions under study.¹²⁸⁹ While some level of lenient discretion for retributive reasons, as well as corruption, is undoubtedly exercised by Thai police, prosecutors and judges, this is not enough to reduce the numbers of executions to a symbolic and manageable level, given that capital punishment's main purpose is to highlight the state's lack of tolerance for a particular form of crime and to *make an*

¹²⁸⁶ AI (1988), 2.

¹²⁸⁷ See Chapter Eight, *Explaining the Clemency Grants in 1965 'Coup' Cases*.

¹²⁸⁸ Interview with American Academic Expert on Capital Punishment.

¹²⁸⁹ See Chapter Seven: Thailand, notes 886-890 and associated text.

example of the offender.¹²⁹⁰ Grants of Individual and Collective Royal Pardon, authorised by King Bhumibol Adulyadej, operate here to fill the breach (amongst their other purposes, discussed later in this chapter).

The converse situation arises and clemency does *not* take place with any significant frequency where there are substantial mechanisms for the exercise of lenient discretion at *earlier* stages of the criminal justice system. Such discretion may consist of the decision by police and prosecutors to reduce charges or to discontinue prosecution altogether, acquittal and sentencing discretion at the first-instance trial, appeal and ultimate appeal stages, and in Indonesia the further ‘extraordinary’ legal mechanism of case review (*‘peninjauan kembali’*). Discretion is exercised through these various channels for three main reasons in capital cases: to consider mitigating factors associated with an individual prisoner or with the facts of the case and the legal proceedings surrounding it,¹²⁹¹ to keep execution numbers down to domestically and/or internationally tolerable levels, and especially in the case of Indonesia, where corruption at earlier phases operates to reduce the sentence or to absolve the defendant completely. In the present study, examples of jurisdictions where the death penalty system operates in such a fashion are Singapore (using prosecutorial discretion), Malaysia (using both judicial and prosecutorial discretion) and Indonesia (judicial and prosecutorial discretion, with the exception of the PKI cases, referred to above). Here, the practical effect of discretion exercised at earlier stages is that by the time the case reaches the head of state or government decision-maker for clemency, all relevant mitigating factors have already been considered and therefore very few *case-related* reasons remain to stop the

¹²⁹⁰ Interview with Australian Academic Expert on Thailand; Interview with Singaporean Criminal Defence Lawyer #2; Interview with Thai Human Rights Activist (2012).

¹²⁹¹ See Chapter Three, *Retributivist Clemency*.

execution proceeding.¹²⁹² For the test of causation here, it is abundantly clear that all other forms of discretion are exercised *before* a clemency grant is made and that the two concepts are indeed *associated*, clemency being merely another form of leniency. Accordingly, the widespread use of lenient discretion at earlier stages of criminal proceedings can be seen to ‘cause’ later frugality in clemency grants.

In analysing the exercise of discretion in a detailed manner, the most obvious *procedural mechanism* whereby clemency is sidelined arises as a result of written recommendations by the case prosecutor and presiding trial or appeal judge forwarded to and considered influential by the final executive decision-maker. Prosecutors or judges in capital cases usually have little incentive to recommend any kind of reprieve: they have the opportunity to exercise their own level of lenient discretion at earlier phases of the process, and could even consider a subsequent grant of clemency *on retributive grounds* as an affront to their assessment of the case, resulting in a waste of the time and public funding required to secure a capital conviction. Whether or not judges in MDP cases in Singapore and Malaysia are an exception, recommending clemency because their ‘hands are tied’ by the lack of sentencing discretion, awaits further research.¹²⁹³ Nevertheless, in

¹²⁹² Three pertinent examples here are 1) the statement by the Indonesian Supreme Court Judge (by Interview) that the usual recommendation made to the President (at least in the democratic era) is *against* commutation as ‘the [previous panel of] judge[s] already has the chance to consider the sentence.’ 2) A statement by the Singaporean Human Rights Lawyer (by interview) to the effect that the Singapore Attorney-General takes mitigating circumstances into account *before the trial begins* and therefore has no incentive to recommend clemency to the Cabinet at the later stage. 3) The Malaysian Government Lawyer (by interview) stated that the Malaysian Attorney-General is less likely to write and argue before the relevant Pardons Board in favour of commutation when he ‘chooses the charges’ to begin with as the case prosecutor.

¹²⁹³ Despite theoretical arguments to the contrary (see Chapter Three, *Clemency and Specific Features of the Criminal Justice System*), I found no overall correlation between the enactment of a MDP and the frequency of clemency grants in Southeast Asia. Malaysia and Singapore, which retain the MDP for an almost identical set of crimes (and were once both part of the same Federation of Malaya) have significantly different clemency ‘rates’. Of course, the MDP will shift lenient discretion elsewhere in the criminal justice system, but whether or not that discretion is exercised *before* sentencing (by prosecutors, or by judicial acquittal) or *after* (taking the form of clemency) appears to vary by jurisdiction.

those two jurisdictions, archival research and ‘elite’ interviews did confirm that it is the *Attorney-General’s* (i.e. public prosecutor’s) views on the case which exert the most influence on the relevant decision-making body.¹²⁹⁴

In Indonesia, as I described in Chapter Eight, with the clemency advice to the President customarily including documents from the national *and* provincial Attorney-Generals (prosecutors), the District Court, and the Supreme Court (amongst other institutions), the high level of discretion those bodies enjoy at earlier stages make it unlikely that a recommendation *in favour* of clemency would be made in a significant number of cases. Significantly, I previously observed that both President Suharto (1967-1998) and President Yudhoyono (2004-) have indicated that they usually relied on the Supreme Court’s advice in granting, or (as is more likely) refusing clemency.¹²⁹⁵ As for the test of causation, again the temporal and association tests clearly allow the legal requirement of prosecutorial and judicial recommendations to have a direct influence on the subsequent number of clemency petitions granted.

Finally within this section, the prevalence of *extra-judicial sanctions* may have an effect on the exercise of clemency as lenient discretion, although the results of the present study are inconclusive on the point. The countries under study where potentially prosecutable capital crimes have instead been dealt with by *extra-judicial* means for significant periods of modern history are Indonesia (consisting of the extra-judicial killing of common criminals, terrorists and alleged communist or Islamic fundamentalist political

¹²⁹⁴ See We Believe in Second Chances (2011); Lee (2006), 472, 477; Ghui; Trembat; Interview with Singaporean NGO Staff #3 (all relating to Singapore); Interview with Malaysian Government Lawyer; Interview with Malaysian Member of Parliament; Interview with Malaysian Criminal Defence Lawyer (all in relation to Malaysia).

¹²⁹⁵ However, see Chapter Eight, note 1103, on the possible lack of independence of the judiciary under Suharto.

opponents of the Suharto regime); Thailand (extra-judicial killing of leftist political opponents of the military, together with drug traffickers) and Malaysia (preventive detention of drug traffickers, terrorists and other security threats via the Dangerous Drugs (Special Preventive Measures) Act 1985, the Emergency (Public Order and Crime Prevention) Ordinance 1969 and the Internal Security Act 1960).¹²⁹⁶ Here, extra-judicial sanctions, outside the formal remit of the criminal justice system, may have the *reverse* effect on discretion exercised at earlier phases of the criminal justice system (described above). Instead of *lenient* discretion, extra-judicial sanctions represent the opposite approach: the presumption of guilt and the discretionary infliction of (often deadly) punishment, thereby *filtering out* what are possibly perceived as the most serious cases before the remainder of offenders are even considered for prosecution. The overall effect is to *maximise* the possibility of discretion exercised at some point within the criminal justice system, while the state's crime control aims nonetheless remain fulfilled. However, it is another matter entirely for such 'residual' lenient discretion to be exercised at the phase of *clemency* deliberations, rather than by police, prosecutors, or within judicial appeals. Here, the evidence is inconclusive and may require quantitative analysis in order to establish a positive relationship of correlation between extra-judicial sanctions and clemency.¹²⁹⁷

¹²⁹⁶ While I refer to Malaysia's three preventive detention laws on this list, I do *not* include Singapore's own administrative detention laws. At least since 1975, on the basis of the information available, extra-judicial detention in Singapore appears to have been resorted to primarily when there was *insufficient evidence* available to conduct a prosecution (see Chapter Five, note 605). If those indefinitely detained are *not* potential death row prisoners, it cannot be said that preventive detention, no matter how widespread, has any impact on the prevailing clemency to execution ratio.

¹²⁹⁷ The alternative means of interpreting extra-judicial sanctions is that these are synonymous with *authoritarian regimes* seeking to rule not by popular election, but by state terror. This interpretation is supported by the research undertaken by scholars such as Miethe et al (at 120-121, 127) and Johnson and Zimring ((2009), 443-451) who observe a positive relationship of correlation between *extra-judicial killings* and *judicial executions*. Pursuant to this logic, clemency runs hand in hand with both judicial *and* extra-judicial killings as a means to demonstrate power over life and death, and possibly also as a means to

Clemency and Political Power

Within this second conception of clemency, the power to spare a condemned prisoner's life is frequently utilised or alternatively sidelined in circumstances where it has a substantial effect on the *political power* or *prestige and popularity* enjoyed by the head of state or other relevant decision-maker.¹²⁹⁸ Based on the results observed within the four jurisdictions, clemency *does* exist in significant numbers where the head of state or head of government (whoever is publicly perceived as bearing the political responsibility for the decision to grant clemency or pardon) is *not* elected by popular vote. Here, in conjunction with the execution of capital punishment itself, clemency is used as a strategy to rule by benevolence, or as a demonstration of power over life and death so as to rule over domestic constituents by state terror and fear.¹²⁹⁹ Likewise, the selective or wholesale granting of clemency to foreign nationals (or to locals *in response* to significant foreign pressure) is a means of gaining greater international legitimacy despite a government's authoritarian characteristics in the domestic setting.

The most pertinent examples within Southeast Asia are the long-established and religiously-influenced traditions to exercise the power to pardon by Thailand's King Bhumibol, and Malaysia's nine Hereditary Rulers, all of whom (as I described in Chapters Six and Seven) receive multiple recommendations on each clemency petition as part of

redeem the decision-maker's domestic or international reputation in the face of such policies. As I first noted in Chapter Three, according to the theoretical framework, we would expect authoritarian regimes to execute more *and* grant clemency more (by aggregate and proportional figures) in comparison with democratic nations (see Chapter Three, notes 275-276 and associated text). This interpretation of the use of clemency moves away from 'lenient discretion' and instead bears a far closer relationship to the 'clemency as political power' explanation, which I consider in the next section.

¹²⁹⁸ See *The 'Micro' Research Question: Summary of Findings on Clemency Decision-Makers and Recipients (Including the Reasons for their Commutation)*, above.

¹²⁹⁹ Strange, 7; Botsman, 49; Interview with American Academic Expert on Capital Punishment; Johnson and Zimring (2009), 284.

the scheme of constitutional monarchy, yet they retain the absolute discretion to grant or withhold pardon as they see fit. The exercise of royal prerogative in these cases concurrently achieves the goals of portraying the traditional ruler as religiously pious (especially for the Thai king's actions in accordance with the Buddhist Law of Kingship, or *Dhamma*),¹³⁰⁰ as taking a close interest in the welfare of his constituents, as maintaining good relations with abolitionist nations,¹³⁰¹ and generally helps maintain the relevance and popularity of the monarchy as an institution within the constitutional scheme, where elected politicians alone determine state policy (and have actively sought to restrict the independent exercise of prerogative powers, in the case of Malaysia's Hereditary Rulers).¹³⁰² Indonesia, during the period of autocratic President Suharto's rule, also appears to fit within this conception of clemency, with clemency for the accused PKI prisoners in the early 1980s granted with the primary aim of easing international pressure on the regime, after foreign criticism over widespread human rights abuses. Essentially the same justification, together with the maintenance of domestic support for steps taken towards democratisation, is also applicable to President Habibie's revocation of the death and prison sentences endured by numerous political prisoners in 1998 and 1999.¹³⁰³ For these latter two Indonesian leaders, clemency grants awarded to political prisoners added to their international and domestic legitimacy, despite the fact they did not attain power through free elections.

An influential practical feature of the 'Mercy from the Sovereign' clemency paradigm first identified in Chapter Three is that, regardless of the relative merits of each

¹³⁰⁰ See Chapter Seven, notes 984-986.

¹³⁰¹ See note 1308, below, and associated text.

¹³⁰² See Chapter Six, note 814.

¹³⁰³ See Chapter Eight, *Explaining the Clemency Grants in 1965 'Coup' Cases*.

individual prisoner, clemency granted for reasons of power and prestige is often awarded in *aggregate* form. Within the study, relevant examples include the regular issuing of Collective Royal Pardons in Thailand, Suharto's and Habibie's pardons of Indonesian political prisoners en-masse, and also in some cases the results of Malaysian Pardons Board meetings (although the explanation in this latter jurisdiction may be more to do with the long intervals between sittings, rather than a desire to maximise the political impact of clemency by making multiple grants). Importantly, given the infrequency with which clemency and pardon are normally granted in most retentionist jurisdictions, any grants made on a *collective* basis will often skew the available statistics, dominating accumulated clemency totals (in this case, since 1975), and therefore having a significant and disproportionate influence over the historical clemency 'rate'.¹³⁰⁴

Conversely, the results of this study suggest that clemency does *not* exist on a widespread basis where a *popularly elected* government's criminal justice policy extends to the promotion of the *rule of law*, or the strengthening of legal enforcement efforts. Here, granting clemency (at least where reported publicly) constitutes a significant political *liability*, rather than being of political benefit (as was the case for autocratic regimes). Relevant examples within the present study are the PAP government in Singapore (during the entire period of study), the Mahathir-led government in Malaysia during the period 1983 to 1994,¹³⁰⁵ and the administrations of Indonesia's three democratically-elected Presidents from 1999 to 2009: Megawati Sukarnoputri,

¹³⁰⁴ See Chapter Four, notes 503 and 508, on the compelling example of Illinois Governor George Ryan, whose emptying of his state's entire death row in 2003 has had a major impact on historical death penalty clemency rates across the United States.

¹³⁰⁵ Although the Hereditary Rulers, Governors, and *Yang di-Pertuan Agong* have the final say on clemency in Malaysia, in Chapter Six I noted that the UMNO-led government is able to make strong recommendations to sway these ultimate decision-makers through the presence on the Pardons Boards of the Federal Attorney-General (or his delegate), the local Chief Minister and perhaps even politically sympathetic lay members.

Abdurrahman Wahid and Susilo Bambang Yudhoyono. Clemency has been reduced to extremely low levels within the preceding three jurisdictions where the ruling political leaders have considered it valuable to give priority to the 'rule of law' in the criminal justice system, and to treat cases as *impartially* as possible, with the courts alone to rule on unfair applications of the law. In practical terms, this has meant (at least at the clemency phase, rather than for intervention by prosecutors, which is far less visible publicly) a purportedly even-handed upholding of the death sentence for women and men, for the rich and poor, for the very young and very old, and (perhaps most visibly) for foreign nationals as against locals. Moreover, where clemency petitions are deliberated upon, they are considered strictly on an *individual* basis, unlike the collective grants described above.

It is in *drug trafficking* cases that such policies have had their greatest impact. This may not be a reflection of particular policies targeting drug trafficking as a capital crime (although, as described at various points throughout my thesis, large-scale drug trafficking is often perceived as a more serious crime than murder in Southeast Asia). Rather, a higher proportion of those sentenced to death for drug trafficking offences may be foreign nationals, may be women, or may be at either end of the age spectrum: either teenagers or in middle to old age, as compared with the remaining cohorts of capital prisoners convicted of murder, political crimes or firearms offences. The post-1975 policies of Singapore's PAP government, described in Chapter Five, are broadly representative of the three jurisdictions described within the present section. The need to enforce drug trafficking laws even-handedly (at least at the clemency phase, if not the sentencing phase of judicial proceedings) is a reflection of the priority accorded to maintaining the purity of *general deterrence* in such cases, and the belief that severe punishments do reduce the incidence of drug trafficking, as opposed to murder, terrorism

and other political offences where the justification for capital punishment is less deterrent and more *retributive or denunciatory*.¹³⁰⁶

Further, one of the most visible and controversial effects of the emphasis on the rule of law, and of uncompromising deterrence in drug cases comes with the case of foreign nationals. Within the jurisdictions and timeframes that the 'rule of law' rhetoric has been stringently applied in relation to criminal justice, and particularly in drug trafficking cases (Singapore since 1975, Malaysia from 1983 to 1994, Indonesia since 1999), it is significant that clemency has not been awarded to a foreign national following international pressure *in a single known case*.¹³⁰⁷ Preferential treatment at the prosecutorial phase is a different matter entirely, as the exercise of lenient discretion by prosecutors is not nearly as publicly *visible*, and will therefore not compromise the political and criminological imperative to be seen to administer capital punishment in an even-handed manner. In contrast, in Thailand since 1975, and in Malaysia from 1975 to 1982 and again since 1995, the appeals of numerous foreign nationals, particularly after receiving backing from the highest levels of the foreigner's government, have been approved.¹³⁰⁸ In Indonesia's case, it is unclear how many capital clemency requests relating to foreign nationals ever reached President Suharto for consideration,¹³⁰⁹

¹³⁰⁶ Recall the common regional justifications employed for the use of the death penalty in Chapter Two (notes 153-161 and associated text).

¹³⁰⁷ This trend came to an end in October 2012, when it was announced that Indonesian President Yudhoyono had granted clemency to four drug traffickers sentenced to death during his term in office, a group which included a Nepalese national (Saragih; Kontras). The second possible exception here may have been the clemency grants accorded to a number of Indonesian migrant workers sentenced to death in Malaysia in the 1990s, although the various sources suggesting the existence of these grants do not provide specific names or dates (see Chapter Six, note 745 and associated text).

¹³⁰⁸ See Chapter Six, *Features of Cases where Clemency Was Granted by the Pardons Boards* and Chapter Seven, *International Relations and Foreign Prisoners*.

¹³⁰⁹ See Chapter Eight, note 1053.

however there is conclusive evidence that only *one* foreign national (a Malaysian) was executed during the entire period 1975 to 1999,¹³¹⁰ compared with five foreign nationals during the *Reformasi* period, through to 2009.¹³¹¹

Clemency and Time Spent on Death Row

The third and final conception of clemency that the Southeast Asian data appear to support is clemency as a response to excessive *time spent on death row*, similar to the ‘redemptive’ clemency paradigm described in Chapter Three. Based on my observations of death penalty practice in Malaysia, Thailand, Suharto-era Indonesia and possibly also in *Reformasi*-era Indonesia, clemency *does* exist in significant proportions if loopholes in the precise legal procedures for clemency operate to *frustrate* the executive government’s desire to increase the processing pace, and volume of, executions. Within the three aforementioned jurisdictions, the languid pace of investigations, trials, judicial appeals and clemency proceedings will often exceed 10 years, and sometimes more than 20 years. When the length of time an offender spends in prison on remand, within judicial appeals, together with time on death row, begins to be measured in decades rather than in years, it becomes less likely (and even perceived as unconscionable) for an executive decision-maker to authorise an execution after the exhaustion of the appeal process. The one exception here has been the case of Suharto-era Indonesia, where the executions of accused PKI coup-plotters and associates were halted in the late 1960s due to pressure from foreign governments and NGOs, only to be resumed in 1985,¹³¹² with the justification of demonstrating to the Indonesian public the latent danger of

¹³¹⁰ Imparsial (2010), 119-131; Kontras.

¹³¹¹ Imparsial (2010), 167. In March 2013, Indonesia’s first execution since 2008 involved a Malawian citizen, Adami Wilson (Human Rights Watch (2013)), bringing the post-Suharto total to six.

¹³¹² TAPOL Bulletin 98, 2-3; Murray (6/1991), 19.

communism.¹³¹³ Additionally, in a number of other murder and Islamic subversion cases during Suharto's rule there were likewise executions conducted around 15 years after a first-instance death sentence had been pronounced.¹³¹⁴ However, in other Indonesian cases and within neighbouring jurisdictions, either through established, official procedures such as Malaysia's Pardons Boards or Thailand's system of *Individual* Royal Pardons, in addition to the unofficial remissions procedure that several commentators have identified as existing during New Order Indonesia (and possibly also in the *Reformasi* era),¹³¹⁵ death sentences have been commuted to a term of imprisonment, or prisoners released outright after serving their 'punishment' on death row for a long period. While, on the face of it, it is unclear whether or not the length of time spent on death row could be considered a *causative* factor for clemency, or a factor *caused by* general political ambivalence over the death penalty (which would also lead to frequent grants of clemency), clues may be found in the *reasons* why prisoners have spent as long as 20-30 years with an indeterminate fate. In many cases, these are *procedural* (or, at worst, highly negligent) rather than *political* and deliberate.

The precise legal and political mechanisms that have frustrated the desire to carry out executions more quickly were described in detail in Chapters Six, Seven and Eight.¹³¹⁶ In Malaysia, the slow pace of judicial appeals together with infrequent sittings of the Pardons Boards in a number of states have left prisoners waiting for a response on their appeals for periods of between 10 and 25 years. In Thailand, the slow judicial appeal

¹³¹³ See Chapter Eight, notes 1176-1177, 1232 and associated text.

¹³¹⁴ See Chapter Eight, note 1232 and associated text.

¹³¹⁵ See Chapter Eight, *Unique Clemency Procedure and Long Stays on Death Row*.

¹³¹⁶ See Chapter Six, *Long Stays on Death Row*; Chapter Seven, *Pardoning Process and Long Stays on Death Row* and Chapter Eight, *Unique Clemency Procedure and Long Stays on Death Row*.

process combined with the bureaucratic clemency appeal process for Individual Royal Pardons in particular, exacerbated by the ill health of King Bhumibol during the 2000s, have resulted in long and indeterminate stays in detention for many prisoners, particularly if they were barred from consideration for *Collective* Royal Pardon given their behaviour in prison, or the fact they were sentenced for a crime perceived as particularly serious at that point in time.¹³¹⁷ In Malaysia and Thailand, there is evidence to suggest that prisoners have been granted clemency, on an individual basis, after the relevant executive decision-makers considered their one or two decades spent on death row as sufficient 'punishment' for the crime. In Indonesia, the loopholes in the 1950 and 2002 clemency laws allowed *indefinite* time for the preparation of a clemency petition (in the former case) and likewise for a *second* petition (in the latter case). Significantly, a number of the PKI prisoners, together with the defendants in unspecified murder cases, have utilised these provisions in order to delay execution for as long as possible, rather than risk having their ultimate clemency appeal rejected. The decades these prisoners spent on death row, and the decline in political importance of their cases over time, have most likely been considered through an unofficial prisons remission policy, or by President Habibie in his release of political prisoners during 1998 and 1999.

As I first described in Chapter Three, the longer that procedural complications extend a prisoner's stay on death row, the greater the opportunity for the prisoner to demonstrate attributes making him or her worthy of commutation and eventual release. Here, demonstrated rehabilitation, religious piety and remorse may be the most common examples,¹³¹⁸ yet less obvious factors such as assistance with ongoing police

¹³¹⁷ See Chapter Seven, *Pardoning Process and Long Stays on Death Row*.

¹³¹⁸ In theory, these attributes could also be demonstrated outside of prison, while on bail, although it is unlikely within any of the four jurisdictions that bail would be granted on a death-eligible charge.

investigations, psychiatric or terminal illness, old age, family illness, the outright bribery of officials and (as we saw in the Indonesian example) an eventual change to a more liberal regime are also factors created by the passing of time that will greatly improve a prisoner's chances of clemency.

To consider the counterfactual example within the study, in Singapore the available data do point to precisely the opposite conclusion. Because of the maximal *efficiency* of the death penalty machinery in that jurisdiction,¹³¹⁹ clemency petitions have generally only been considered by the Cabinet on the basis of *retributive* principles:¹³²⁰ the time required for the advent of time-based mitigatory concerns simply did not exist before execution during the 1975-2009 timeframe. In contrast to the three jurisdictions described above, 'elite' interview sources generally revealed that the total time a prisoner spends in detention in Singapore, from arrest through to execution, seldom exceeds *two years*.¹³²¹ Accordingly, my assumption on this point is that the length of time spent in prison before either execution or clemency is the third major contributory factor explaining Southeast Asian clemency 'rates'.

Theoretically-Influential Factors Not Discussed Above

Aside from the three factors summarised above that appear best supported by the Southeast Asian evidence, in Chapter Three I described a range of other structural and cultural attributes with a potentially significant impact on a retentionist nation's calculated clemency 'rate'. In the end however, after a thorough comparative qualitative

¹³¹⁹ Hor (2004), 115; Johnson (2013), 43.

¹³²⁰ See notes 1252-1253, above.

¹³²¹ See Chapter Five, notes 666 to 669 and associated text. See also *Ramalan v Public Prosecutor*, 136, where after dismissing the prisoner's appeal the UK Privy Council nonetheless recommended clemency because the prisoner had been on death row for in excess of (only) two years.

analysis I did not find these residual factors sufficiently influential *across national borders* in Southeast Asia. While some of the features of national criminal justice systems and the broader societal response to crime may have had some influence within a single jurisdiction, I either could not find a clear transnational pattern in the data, or else the relevant factor was found to be present to the same extent in all four jurisdictions and therefore is incapable of serving as an *explanatory* feature for the vast differences in clemency ‘rates’.

The factors in this category, with a brief description (or link elsewhere) in each relevant footnote of the reasons for their non-inclusion within the final analysis, are as follows:

- the existence of a mandatory death penalty, as opposed to a discretionary death penalty;¹³²²
- single or group decision-making, as described in the US literature on clemency grants by State Governors;¹³²³
- the unavailability of criminal law defences (which is mainly of historical relevance);¹³²⁴

¹³²² See note 1293, above, for further explanation.

¹³²³ This was briefly discussed in Chapter Five: Singapore (see *Aspects of the Clemency Decision-Making Process: Cabinet Dynamics and Bureaucratic Efficiency*). Nevertheless, on closer analysis, in all four jurisdictions there exists a well-developed system of bureaucratic and political advice on a clemency petition before it reaches the final decision-maker. In none of the jurisdictions is there a genuinely *lone* decision-maker on clemency, which according to the American psychological research, would make clemency grants more likely (Abramowitz and Paget, 183). The grants of clemency regularly issued by single rulers: the King of Thailand, Malaysia’s Hereditary Rulers, Governors and *Yang di-Pertuan Agong*, and the President of Indonesia are in my opinion instead better explained by political factors such as authoritarianism, rather than behavioural decision-making research.

¹³²⁴ See Chapter Three, notes 302-304 and associated text.

- automatic or discretionary clemency appeals in death penalty cases (in all four jurisdictions, clemency will be automatically considered either in law or in practice),¹³²⁵ meaning that at a practical level the American phenomenon of death row ‘volunteers’¹³²⁶ does not exist in retentionist Southeast Asia;
- victim consent, or victim compensation (found in no Southeast Asian jurisdiction);¹³²⁷ and,
- public opinion and the media (only of peripheral reference to the clemency determinant ‘clemency and political power’).¹³²⁸

As Lijphart has argued, it is of primary importance to *scan* all possible variables when conducting a qualitative comparative study, rather than include them all in the final analysis.¹³²⁹ If possible, a smaller number of potentially ‘deterministic’ variables must instead be examined in detail, so that a wide range of factors do not ‘over-determine’ the

¹³²⁵ Clemency for every prisoner sentenced to death must legally be considered in Singapore and Malaysia (see Chapter Five, note 533 and Chapter Six, note 705). In post-1986 Indonesia, clemency petitions will be submitted on the prisoner’s behalf by the sentencing judge and corrections authorities, if the prisoner (or their representative) does not do so (see Indonesian Supreme Court Regulation 1/1986). Prior to 1986, an execution could not be carried out in Indonesia in any case before a clemency petition had affirmatively been *rejected* by the President (Law 3/1950, art 2(3)). In Thailand, while it would be technically possible for a prisoner to ‘volunteer’ for execution by not submitting a request for Individual Royal Pardon with 60 days, the fact that family representatives and foreign embassies are empowered to act on the prisoner’s behalf in the submission of a petition, and even more significantly the system of regular *Collective* Royal Pardon grants that do not require individual petitions, means that such a prisoner would probably not be executed (see Chapter Seven, *Clemency Procedures in Death Penalty Cases*).

¹³²⁶ See Chapter Three, note 318.

¹³²⁷ One possible exception is the case of Kenneth Lee Fook in Malaysia, although it remains unknown whether the settlement of the victim family’s civil claim contributed to the commutation or not (see Chapter Six, notes 747-748).

¹³²⁸ In all four jurisdictions the death penalty enjoys broad public support (Delaney; Hood (2012), 9) meaning this factor falls short as a stand-alone explanation of differing clemency ‘rates’. As for media influence, I came to the conclusion in Chapter Three (*‘Public Opinion, Media and Religion’*) that the relative freedom of (or restrictions placed upon) the media will create both advantages and disadvantages for clemency petitioners.

¹³²⁹ Lijphart, 690.

relevant outcome, or dependent variable (in this case, clemency 'rates').¹³³⁰ In this context, Professors David Garland and John Beattie have argued that comparative scholars in criminology should *embrace* over-determination, rather than avoid it. For Garland:

penal policies and institutions are formed not by a monolithic process but instead by a whole range of forces which converge upon the issues in any particular conjecture. Penalty is thus the overdetermined resultant of a set of conflicting and connecting forces.¹³³¹

However, Garland's warning is merely against the *over-simplification* of complex, multi-faceted causal explanations. The three-part model I suggest for Southeast Asian clemency rates appears compatible with concerns that comparative criminologists possess a:

tendency to explain penalty in terms of any single causal principle or functional purpose, be it 'morals' or 'economics', 'state control' or 'crime control'. Instead of searching for a single explanatory principle, we need to grasp the facts of multiple causality, multiple effects, and multiple meaning... The aim of analysis should always be to capture that variety of causes, effects, and meaning and trace their interaction, rather than to reduce them all to a single currency.¹³³²

To guard against this kind of over-simplification and *under*-determination, as I described above, not one specific but *three general* factors are seen to influence clemency rates in Southeast Asia. Moreover, no matter how polished my regional explanations relating to

¹³³⁰ Przeworski and Teune, 33-34; Lijphart, 690; Anckar (2007), 55-56.

¹³³¹ Garland (1990), 125. See also Beattie, 470.

¹³³² Garland (1990), 280. See also Gay, 187.

past instances of clemency, it remains unlikely that the present findings are enough, by themselves, to shape a general theory of clemency frequency throughout the retentionist world, or even to predict future developments in Indonesia, Malaysia, Singapore and Thailand, as I first noted in Chapter Two.¹³³³ There still remains a wide scope for future qualitative or quantitative studies to expand upon and complement the explanations for clemency described here – a topic that I move on to describe in greater detail within the following section.

Conclusion: Findings and Relevance for Future Research Studies

On the basis of the detailed archival and interview-based research conducted and the results obtained, within the limitations of an exploratory study dealing with a topic often shrouded in state secrecy, I am nonetheless able to make a number of general observations about the primary contributing factors to clemency ‘rates’ in those Southeast Asian nations that continue to practise capital punishment as a form of criminal sanction, minus Vietnam. While the constitutionally-sanctioned prerogative of pardon, as with any other source of political power, is not always exercised in a consistent, principled fashion, there are nonetheless three general observations that can be made about the functions that it plays in regional death penalty cases. The three most convincing explanations for Southeast Asian capital clemency, amongst the four nations under study and during the period 1975 to 2009, are as follows:

1) Clemency’s role as Lenient Discretion

For this first explanation of clemency, the proportion of death sentences commuted will be influenced by the extent to which lenient discretion is exercised at *earlier* points in the

¹³³³ See Garland (1990), 281, 285 and Chapter Two, notes 83-85.

criminal justice system, be that by police, prosecutors, within various judicial appeals or by extraordinary case review. Moreover, I have left open the possibility as to whether the widespread use of *extra-judicial punishments* (such as preventive detention or summary executions) exhibits a relationship of cause and effect with the proportion of finalised capital cases granted clemency.

2) Clemency's role as Political Power

For the second explanation of clemency, the proportion of commutations is determined by the nature of the political regime exercising the power to pardon: an authoritarian, unelected government stands to gain a great deal in power and popularity from making frequent and *collective* grants of pardon. In contrast, an elected government with a criminal justice agenda to promote the 'rule of law' will gain politically from *refusing* clemency grants and authorising executions. In Southeast Asia, this latter cause of action has had its most visible impact on prisoners convicted for drug trafficking offences.

3) Clemency's role as a Response to Time on Death Row

Finally, within the third construct of clemency, a greater proportion of cases will result in commutation if, for procedural reasons, prisoners remain in detention for a long period of time (extending to 10-20 years or more after arrest) before their clemency petitions or executions are finalised. Conversely, a jurisdiction with an efficient criminal justice bureaucracy and no procedural 'loopholes' will proceed to execute quickly the vast majority of convicted prisoners after rejecting their clemency appeals.

In the final part of this chapter, I describe proposals to test these hypotheses on a *quantitative* basis. However, it is possible to conduct a preliminary test of the model without engaging in a regression analysis, by means of a matrix of explanatory factors,

similar to the 'method of difference' favoured by certain scholars in the comparative historical methods field.¹³³⁴ Considering the three potential explanatory factors together, it is apparent that the country whose criminal justice and political system supports clemency grants in *none* of these three forms (Singapore) has an extremely low overall clemency 'rate'. Conversely, the country where clemency fulfils all three functions, Thailand, has an extremely high clemency 'rate'. Finally, the two countries with 'medium' clemency rates over their modern history both demonstrate mixed results on the same tripartite test, although 'scoring' the three factors for each of these two jurisdictions is more difficult, given significant policy changes over the period 1975 to 2009, and the unavailability of relevant data in both cases:

¹³³⁴ See Skocpol and Somers, 206-207; Anckar (2007), 54.

Table 5: Preliminary Test of the Three-Factor Model of Clemency ‘Rates’

Clemency Function	Singapore	Thailand	Malaysia	Indonesia
Lenient Discretion	X	✓	X	✓ and X ¹³³⁵
Political Power	X	✓	✓ and X ¹³³⁶	✓ and X ¹³³⁷
Time on Death Row	X	✓	✓	? ¹³³⁸
Clemency ‘Rate’ Indication	Rare	Common	Mixed	Mixed
Observed Clemency ‘Rate’	Low (1%)	High (91-92%)	Medium (26-40%)	Medium (22-32%)

The model is far from perfect: it suffers from significant data shortcomings, as I described in detail in Chapter Four and throughout the country chapters. Moreover, it is unclear whether or not equal or different weight should be given to each of the three potential explanatory factors, in determining the final clemency ‘rate’. However, bearing in mind those caveats, at least for the four Southeast Asian jurisdictions under study, the model does a serviceable job in explaining the relative incidence of clemency, according to theoretically-relevant explanations.

¹³³⁵ Clemency performs the role of lenient discretion following the PKI trials, but not in other cases either under Suharto or during the *Reformasi* period.

¹³³⁶ Note the 1983-1994 conflict between the ‘no mercy’ policy for drug trafficking and the continued exercise of royal prerogative by the Hereditary Rulers and *Yang di-Pertuan Agong*.

¹³³⁷ Clemency granted to enhance political power under Suharto, whereas the *Reformasi* Presidents have preferred an even-handed dispensation of justice, at the clemency phase.

¹³³⁸ This is likely during the Suharto period, and entirely possible within the post-Suharto period as part of an unofficial prisons ‘remission’ policy. The true incidence of ‘unreported’ clemency grants in Indonesia may never be known (Interview with Senior Indonesian Human Rights Lawyer). However, as I observed in Chapter Eight, a series of *unreported* commutations *do* in fact affect the prevailing clemency to execution ‘rate’, by taking the place of potential executions, which will be relevant in the analysis of countries such as Indonesia where the available execution totals are reasonably complete.

Following the completion of an inductive, qualitative study in comparative criminal justice, the logical next scientific step would be to test the general hypotheses developed through the *quantitative* mechanism of regression analysis.¹³³⁹ Of course, given the small number of cases necessarily considered within a qualitative exploratory study of a particular criminal justice phenomenon, it is difficult or impossible to ‘control’ for each potential independent variable – the number of potential explanatory variables will likely exceed the number of cases under study,¹³⁴⁰ leading Jackman to assert that such ‘small-n’ studies are ‘indeterminate, and can therefore be viewed as not more than *illustrative*’.¹³⁴¹ Moreover, the four Southeast Asian nations under study are not necessarily a *random* sample of the available set of retentionist countries, and so the results obtained may only have explanatory value on a local basis.¹³⁴² Accordingly, once a set of possible causative relationships has been established through the qualitative, inductive method, quantitative testing utilising a larger number of cases is recommended within the academic literature as a means of establishing the scientific accuracy of the findings and therefore helping to crystallise new theoretical models of explanation.¹³⁴³ Of course, this is a significant aim of social-scientific studies in the field of criminal justice: to search for ‘general laws that determine punishment patterns’.¹³⁴⁴

¹³³⁹ Lijphart, 685.

¹³⁴⁰ Ibid, 684.

¹³⁴¹ Jackman, 165, emphasis added.

¹³⁴² Kohli et al, 21.

¹³⁴³ Neuman, 76-77; Babbie, 410; Blaikie, 212.

¹³⁴⁴ Strange, 11; Steinmo, 133.

Neuman has observed that if a very general theory is to be tested, it can be helpful to break this larger theory into several smaller components before statistical testing of the relationships between variables.¹³⁴⁵ Converting the three factors that I found to be influential in the determination of clemency to execution 'rates', the following describe the possible statistical relationships to be explored through quantitative regression techniques in future studies. They are the relationship between:

- the final clemency 'rate' and the proportion of first-instance death sentences reduced or overturned by later judicial appeals (i.e. the death sentence 'attrition rate' in the courts);
- the clemency 'rate' and the number of arrests by police for potential capital crimes that do *not* result in a death sentence after all judicial appeals are concluded (i.e. a combination of the investigatory, prosecutorial *and* judicial case 'attrition rate': however, the precise data required here may be difficult to obtain);¹³⁴⁶
- the clemency 'rate' and the nature of the customary, constitutional or legislatively-mandated clemency *materials* put before the relevant decision-maker (e.g. written advice from the courts the prosecutor, and/or the Cabinet);
- the clemency 'rate' and type of clemency decision-maker (elected/unelected; authoritarian/non-authoritarian);
- the clemency 'rate' and the prevalence of extra-judicial executions or extra-judicial detention (although there exist special methodological problems in measuring extra-judicial sanctions);¹³⁴⁷ and finally,

¹³⁴⁵ Neuman, 67.

¹³⁴⁶ Empirical research of this type was recommended by Professor Roger Hood in a 2012 report to the EU (Hood (2012), 9).

¹³⁴⁷ See Johnson and Zimring (2009), 444, 446-447.

- the clemency ‘rate’ and the average or median length of time capital prisoners spend incarcerated before their case is finalised (either by clemency or execution).¹³⁴⁸

Such further research, dependent on the available data, could be carried out on the Southeast Asian nations contained within the present study,¹³⁴⁹ complemented by the other retentionist nations in the region, over as much of the same timeframe as is possible. These countries are Vietnam (actively retentionist from 1975-2009); Laos (actively retentionist to 1989); Burma (actively retentionist to 1993); Cambodia (actively retentionist to 1989) and the Philippines (actively retentionist, with a first period of abolition from 1987-1993, from 1975 to 2006).¹³⁵⁰ Likewise, the testing could be undertaken over the entire Asian continent, or another retentionist ‘region’ of the world (the Caribbean, Africa or the Middle East are possibilities), or most usefully for the confirmation of new theoretical ideas,¹³⁵¹ across the entire retentionist world over a particular multi-year timeframe,¹³⁵² adopting the global approach of quantitative studies on death penalty retention and abolition authored by Neumayer (2008a and 2008b), Miethe et al (2005), Ankar (2004) and Greenberg and West (2003).¹³⁵³ While there are significant methodological challenges in collecting death penalty statistics in closed or

¹³⁴⁸ See Chapter Four, notes 483-486 and associated text on prisoner outcomes *other than* clemency or execution.

¹³⁴⁹ Even if quantitative analysis vindicates the results contained within the present chapter, great care must be taken before attempting to use the three-stage model described to predict *future* clemency developments in any particular retentionist country: qualitative social-scientific studies are most useful as *explanation* of past observations, rather than as a means of predicting the future (see Ankar (2004), 102).

¹³⁵⁰ Johnson and Zimring (2009), 103.

¹³⁵¹ See Neuman, 76, and Lijphart, 685.

¹³⁵² See Chapter Two, *Refining the Subject Matter – Number of Jurisdictions, Time-Limits and Substance of Comparison*.

¹³⁵³ See further Chapter Two, *Previous Comparative Studies of the Death Penalty*.

partially-closed jurisdictions, together with separate obstacles in the calculation of each country's clemency 'rate' (as I described in detail in Chapter Four), it remains academically worthwhile to attempt to tackle the quantitative research questions described above, or some variant of them.¹³⁵⁴ The alternative, and even more challenging approach, would involve utilising the same qualitative methods, replete with archival research and 'elite' interviews, in order to determine the correlates of clemency 'rates' across other groups of retentionist nations, comparing the results obtained with those of the present study.

In Chapter Two I first observed that care must be taken in attempting to automatically extrapolate the findings from the present study to other parts of the retentionist world, assuming that the three explanatory findings have the potential to inform a 'global' theory of clemency rates. In time, quantitative testing may achieve this result. However, what the present study has already achieved is to shed light on a previously understudied phenomenon (clemency), in an understudied region of the world (Southeast Asia), at least as far as criminal justice is concerned. In the broader context of capital punishment studies, the data contained within this study also go a small way to rectifying the dearth of academic studies on the operational similarities and differences of death penalty practice *within retentionist jurisdictions* (as opposed to studies contrasting retentionist with abolitionist states).¹³⁵⁵ Moreover, the information contained within each 'country' chapter, together with the general comparative findings have the potential to assist criminal lawyers in framing clemency petitions for clients in Southeast Asia and elsewhere.

¹³⁵⁴ The findings contained within the present chapter also have the potential to assist with the academic interpretation of other forms of executive discretion within the criminal justice system, such as parole, remission and pardons in non-capital cases.

¹³⁵⁵ See Chapter Two, *Previous Comparative Studies of the Death Penalty*.

Within this study I have demonstrated that clemency and pardons, although at first glance appearing to represent an arbitrary, unprincipled and irregular exercise of executive power, are nonetheless granted pursuant to particular patterns and decision-making paradigms. It is indeed possible to explain why different countries make use of the clemency procedure more often than do others, *aside from* explanations solely concerned with varying levels of governmental commitment to the death penalty as a criminal punishment. Clemency symbolises far more than official ambivalence over capital punishment as a criminal justice policy, as its presence can coincide with both high *and* low rates of execution. The more information that is revealed about the way the prerogative of pardon is exercised, particularly in partially-closed systems such as the majority of Southeast Asian nations, the more clarity scholars and practitioners will have over the practice of capital punishment in general, given clemency's status as the crucial final avenue of appeal for a condemned prisoner: the last procedural obstacle separating life and death.

Appendix A: Singapore Death Penalty Statistics 1975-2009

Year	First Instance Death Sentences	Death Row Prisoners (Exhausted Judicial Appeals)	Clemency (Full Pardons)	Executions
1975			0	11+
1976	8+		0	
1977			0	
1978		9	1	1+
1979		11	0	
1980	0	5+	1	0
1981		8+	0	3
1982		(9)	0	0
1983	4	8+	1	2
1984		4	0	2
1985	3		0	1
1986	1		0	1
1987	6+		0	0
1988	7+		0	4
1989	2		0	5
1990	10		0	3
1991	3+		0	26
1992	7+		2	21
1993	26+		0	7, 12
1994	10+	93	0	76
1995	34+		0	73
1996	19+		0	50
1997	8+		0	15
1998	5+		1	28
1999	3+		0	43
2000	5		0	21
2001	7		0	27
2002	3		0	28
2003	4		0	10+, 19, c.70-80
2004	5		0	8
2005	4	8+	0	8
2006	7		0	8
2007	2, 3		0	3
2008	5, 6	(5+)	0	6
2009	6+		0	5

Note: see Chapter Four, *Shortcomings in Quantitative Data and the Estimation of each Jurisdiction's Clemency 'Rate'*, for background information on the compilation and interpretation of the four Appendices.

Appendix A Sources:

'A list of death row inmates in Singapore who were granted clemency'; AI (1979); AI Annual Reports 1978-2010; AI-Index 36/001/2004; AI-Index ACT 50/001/2008; AI-Index ACT 50/003/2009; AI-Index ASA 03/01/97; AI-Index ASA 36/004/2009; 'Capital Punishment in Singapore'; 'Drug trafficker was given second chance but she blew it'; Goodwin (15/4/2008); HOC Singapore 2001-2009; HOC Singapore 2009; Hood and Hoyle (2008); Hood and Hoyle (2009); Johnson and Zimring (2009); 'Keep death penalty but allow leeway'; Ministry of Home Affairs (Singapore, 2011); 'PM Goh says only 10 people executed, not 80'; 'S'pore: Capital punishment soars'; 'Show Mercy Mr Ong'; Simon and Blaskovich; Zimring, Fagan and Johnson.

Appendix B: Malaysia Death Penalty Statistics 1975-2009

Year	First Instance Death Sentences	Death Row Prisoners (Exhausted Judicial Appeals)	Clemency (Full Pardons)	Executions
1975	0, 7		2+	0
1976	5, 10		2+	0, 1
1977	47, 52	13	22+	0
1978	4, 6		1+	0, 1
1979	11, 13		4+	0, 1
1980	25, 31		4+	0, 12, 20
1981	26	50(11), 54	3+, 5 [1980-1981]	19
1982	27		5+	14+
1983	19, 22, 30	50+	2+	14
1984	24+, 38		1+	13+
1985	36, 45	c.55	0+	10
1986	48+, 57	100+	4+	15
1987	40+, 56			24
1988	31, 59+			16+
1989	71			16
1990	54+			12
1991	67+			8
1992	28+		2+	39+
1993	12+		1+	6+, 29+
1994	8+		1+	6+, 10+
1995	11+		1+	2+, 5+
1996	6+, 43+ (1993- 1996)	245		3+, 139 (1990- 1996)
1997	7+	(13+)		0, 2+
1998	6+			0
1999	1+			0
2000	18+	212		0, 2
2001	11+	159		5, 359 (1980-2001)
2002	16+			3+, 4
2003	19+	121, 159		0
2004	7+, 11+			0
2005	15+	c.173		0, 52 (2004-2005), 358 (1981-2005)
2006	19+	159	1+	1, 4
2007	12, 23+	c.300		0, 1, +
2008	22+, 34+	c.300	9 [2003-2008]	1+
2009	69+		14(2) [2000-2009]	+

Appendix B Sources:

'121 Convicts in "Death Row"'; '14 Death-Row Prisoners Get Pardon, Says Hishamuddin'; '159 Left Hanging on Death Row'; AI (1983); AI (1986); AI Annual Reports 1981-1995; AI, 'Recent Developments on the Death Penalty in Malaysia'; AI-Index ACT 50/001/2008; AI-Index ACT 50/003/2009; AI-Index ASA 03/01/97; AI-Index ASA 28/04/79; AI-Index ASA 28/12/97; Crook; Death Penalty Worldwide: Malaysia; Goodwin (15/4/2008); HOC Malaysia 2000-2009; Hood and Hoyle (2008); Human Rights Commission of Malaysia; Johnson and Zimring (2009); Kuppusamy (23/1/2008); 'Malaysia: Is Capital Punishment Justified?'; Malaysian Bar Council; 'Perak Sultan Grants Four Prisoners Royal Pardon'; Reprieve UK, 'Chu Tak Fai'; Sharif and Veera, '44 "Forgotten" Convicts'; Sharif and Veera, 'Plight of the Forgotten Prisoners'; 'Should the Death Penalty be Abolished'; Simon and Blaskovich; Talib; 'The Executioners'; UN Doc E/2010/10.

Appendix C: Thailand Death Penalty Statistics 1975-2009

Year	First Instance Death Sentences	Death Row Prisoners (Exhausted Judicial Appeals)	Individual Royal Pardon (Full Release)	Collective Royal Pardon (Full Release)	Executions
1975				40+	0
1976		c.80			0
1977					14
1978					7
1979					7
1980					4
1981	175				4
1982	48	54(16)		49+	5
1983	25+	48, 86, 121(16)	16+[a]		0
1984	76		2+[a]		15
1985	76+	100+			2
1986	26+		1+[a]		6
1987		200+(65)		65	16
1988	7+				0
1989	17+				0
1990	13+	c.200		100+	0
1991	7		2+[a]		0
1992	2+	108	1+	50	0
1993	8+	285(70)			0
1994	5+	100+	10+[a]		0
1995	4+	100, 109, 270+			0
1996	10, 97	c.100, 197		120+, 127	1
1997	103	c.100, c.105, 158			2
1998	13, 107	53, c.60, c.100	50 [1994-1998]		2
1999	109	(16), (36), 73(40), 134(39), 143(53), 145(45), 148(47)		24, 30+	16
2000	205	130		30+, 35+	1
2001	303	(19), (100), 212, 326, 337(15), 371	22(10)		11
2002	447	(55), 318, 649(21), 690	42(10)		11
2003	310	(53), (64), (68), c.950, 974(31), c.1000	65(2), 97 [2001-2003]		4
2004	270	874(68), 883, 971	78(2)	+ [b]	0
2005	311	955(95), c.1000(65)	98(0)		0
2006	304	1000+ (124)		+ [c]	0
2007	7+	c.900, 1000+	+ [d]	85	0
2008	57	c.850, c.900, 1000+	23+		0
2009	7+	(115), 743(112), 754(91), 832(127), 857(115)			2

[a] Unclear whether Individual or Collective Royal Pardon.

[b] Included all prisoners sentenced to death prior to 1999, and all sentenced between 1999 and 2004, excepting drugs cases.

[c] Clemency to 'some prisoners on death row'.

[d] Clemency to 'chosen prisoners'. Unclear whether Individual or Collective Royal Pardon.

Appendix C Sources:

'A 50-year-old machine gun'; AI (1979); AI Annual Reports 1981-2000; AI-Index ASA 03/01/97; AI-Index ASA 39/002/1997; AI-Index ASA 39/005/2001; AI-Index ASA 39/005/2001; AI-Index ASA 39/006/2006; AI-Index ASA 39/04/95; AI-Index ASA 39/05/99; Alford; 'Amnesty Regrets Thai Executions, Fears for Others on Death Row'; Bonner; Brooke; 'Death Sentences'; 'Drug Busts put Record Number of Thai Inmates on Death Row'; 'Executions, prison overcrowding mars Thai rights record: Amnesty'; 'Ex-police officer executed'; FIDH (2005); HOC Thailand 1999-2009; Hood (2002); Hood and Hoyle (2008); Johnson and Zimring (2009); Jones; Kelly (6/11/1985); Kwhankhom; Lerner; Levett; Malakunas; Malcolm; 'Murderer First Convict to Be Executed in Eight Years'; Peck; 'Persons Detained by Special Orders and Condemned to Death'; 'Prisons to Free 15,000 under amnesty'; Sherwell; Statement by Thai Human Rights Activist (2010); Thailand Department of Corrections; Thamnukasetchai (2007); Thamnukasetchai (2009); 'There's always room to do better'; Thongpao (2007); Traisophon; Union for Civil Liberty (2011); 'Updated Thai Death Penalty Figures'; 'When the killing hour arrives'; 'Word Awaited on 70 Death Row Prisoners'.

Appendix D: Indonesia Death Penalty Statistics 1975-2009

Year	First Instance Death Sentences *	Death Row Prisoners (Exhausted Judicial Appeals)	Clemency (Full Pardons) **	Executions
1975	0, 1+		0	0
1976	0, 1+		0	0
1977	0	50+	0	0
1978	0, 1+	39		0, 1+
1979	0, 1+	35, 39, 41-50		0, 1+, 2
1980	0	31		2+
1981	0, 1+	c.55		0
1982	1, 4+		12+ [1980-1982]	0
1983	0, 5+		0	1+
1984	0, 1+		0	0
1985	0, 1, 4+	24+	0	5, 6+
1986	1, 2+	23, 28+	0	10+, 11
1987	0, 4+	29+, c.30	0	2+, 3, 4+
1988	2, 4		0	3, 4+
1989	4, 6, 7	31+	0	1, 2+
1990	2, 3	29+(8)	0	4+
1991	0, 1, 4	33+(8)	0	1+
1992	0, 2, 3+	34+	0	0, 1+
1993	0, 1, 2	32+	0	0
1994	0, 3	35	0	0
1995	0, 4	26+	0	2, 3+
1996	0, 2	26+	0	0, 1
1997	2, 6, 7	26+, 33	0	0
1998	1, 5	30+	1+	0, 1
1999	0	16, 27+(16)	(4+), (5), (9), (10)	0
2000	9+, 10	16, 31, 34	0	0
2001	16, 17+	16(9+)	0	2, 3
2002	7, 9	16	0	0
2003	6, 12	55, 57	1+	0
2004	10, 14+	c.30, 54, 56, 63(33+), 65	0	3
2005	9, 14+	54+, 66+, 82	0	2+
2006	13+, 15	60+, 89+, 92, 134	0	3+
2007	10, 15+	90+, 91, 115+, 134	0	1
2008	10+, 15	(14), (39), 92, 107+, 110+(57), 112(7), 116+	0	10+, 12
2009	1+	(31), 109, 112, 117+, 119, c.132	0	0

* Includes death sentences increased from a term of imprisonment on appeal.

** May exclude murder convicts granted clemency in secret.

Appendix D Sources:

AI (1977); AI (1988); AI Annual Reports 1979-2010; AI-Index ACT 50/001/2008; AI-Index ACT 50/003/2009; AI-Index ACT 50/003/2009; AI-Index ASA 03/01/97; AI-Index ASA 21/010/2008; AI-Index ASA 21/011/2006; AI-Index ASA 21/022/2008; AI-Index ASA 21/03/93; AI-Index ASA 21/040/2004; AI-Index ASA 21/27/86; AI-Index ASA 21/43/96; AI-Index UA 109/2006; 'Amnesty International Urges Indonesia to Stop Executions'; Andriyanto (2009); Bampton; 'Coup plotter to be freed after years of failed efforts'; England; Glasius; Goodwin (12/8/2008); Goodwin (15/4/2008); HOC Indonesia 1999-2009; HOC Report 2009; Hood (2002); Imparsial (2004); Imparsial (2010); 'Indonesia's Megawati grants Muslim holy day amnesties'; 'Indonesian Court to Rule on Legality of Death Penalty for Drugs'; International Commission of Jurists; Johnson and Zimring (2009); Khalik (21/6/2004); KontraS; Kuswandini (15/11/08); Langit; Lynch; McRae (2008); McRae (2012); Moore (2004); Mulya Lubis and Lay; Murray (4/1991); National Human Rights Commission of Indonesia; Nugroho; 'Perjalanan grasi Kusni Kasdut'; Polglaze and Fatachi; 'President Grants Clemency to 10 More Political Prisoners'; Soedarjo; Southwood and Flanagan; TAPOL Bulletin 152; 'The Executioners'; 'Time Running Out for 109 Death Row Inmates'; Unmacht.

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Interview with Australian Academic Expert on Indonesia #3 (Canberra 15 September 2009)

Interview with Australian Academic Expert on Indonesia #4 (Canberra 16 September 2009)

Interview with Australian Academic Expert on Indonesia (Melbourne 14 December 2011)

Interview with Australian Academic Expert on Malaysia (Melbourne 15 December 2011)

Interview with Australian Academic Expert on Thailand (Canberra 16 September 2009)

Interview with British Academic Expert on the Death Penalty (Oxford 25 January 2010)

Interview with British Journalist (London 1 August 2011)

Interview with Canadian Academic Expert on the Death Penalty (London 26 August 2011)

Interview with Commonwealth Secretariat Staff (London 9 August 2011)

Interview with FIDH Staff (Bangkok 18 September 2012)

Interview with Former Employee of the Thailand Department of Corrections (Bangkok 17 September 2012)

Interview with Former Malaysian Federal Court Judge (Kuala Lumpur 1 December 2011)

Interview with Founder of a Singaporean NGO (Singapore 16 November 2011)

Interview with Indonesian Human Rights Activist (Jakarta 10 April 2013)

Interview with Indonesian Minister (Jakarta 15 April 2013)

Interview with Indonesian NGO Staff (Jakarta 16 April 2013)

Interview with Indonesian Supreme Court Judge (Jakarta 26 April 2013)

Interview with London-based Death Penalty Lawyer #2 (London 12 December 2009)

Interview with London-based Death Penalty Lawyer (London 8 September 2011)

Interview with London-based Indonesian Human Rights Activist (London 22 August 2011)

Interview with London-based NGO Staff #2 (London 30 January 2012)

Interview with London-based NGO Staff (Telephone Interview 1 February 2010)

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Interview with Malaysian Government Lawyer (Kuala Lumpur 30 October 2011)

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Interview with Thai Human Rights Activist #2 (Bangkok 16 September 2012)

Interview with Thai Human Rights Activist #2 (Geneva 26 February 2010)

Interview with Thai Human Rights Activist (Bangkok 7 September 2012)

Interview with Thai Human Rights Activist (Geneva 25 February 2010)

Interview with Thai Human Rights Commissioner (Bangkok 21 September 2012)

Interview with Thai Human Rights Lawyer (Bangkok 23 September 2012)

Interview with Thai Law Professor (Bangkok 14 September 2012)

Interview with Thai Prison Caseworker (Bangkok 11 September 2012)

Interview with Thailand Department of Corrections Staff (Bangkok 24 September 2012)

Interview with World Bank Employee (Jakarta 5 April 2013)

Statement by Amnesty International Canada Staff (Personal email correspondence 20 July 2011)

Statement by Australian Academic Expert on Indonesia #5 (Personal email correspondence 15 November 2011)

Statement by Australian Academic Expert on Thailand (Personal email correspondence 25 February 2010)

Statement by Former Singaporean Politician (Personal email correspondence 8 December 2011)

Statement by Malaysian Human Rights Lawyer (Personal email correspondence 4 February 2010)

Statement by Singaporean Academic Expert (Personal email correspondence 4 February 2010)

Statement by Thai Human Rights Activist (Personal email correspondence 22 February 2010)

Statement by Thai Human Rights Activist (Personal email correspondence 9 December 2009)