



Clock ticking faster for Aussies on Bali's death row

A new fatwa means the Bali Three could be executed sooner,

write **Tim Lindsey and Simon Butt**

THE execution dates for three young Australians on death row in Bali's Kerobokan prison just got a little closer. The rest of the Bali Nine are serving prison terms ranging from 20 years to life, but Myuran Sukumaran (aged 25 when arrested), Andrew Chan (21) and Scott Rush (19) still await execution for their role in attempting to smuggle heroin from Indonesia into Australia in 2005.

They have one last level of appeal open to them, the PK or Reconsideration, a review of their failed appeals to the Supreme Court by a different panel of judges from that same court.

The last PKs brought by Bali Nine members Si Yi Chen (21 when arrested), Matthew Norman (18) and Tan Duc Thanh Nguyen (28), the so-called Melasti Three, led to their death sentences being commuted to life in jail in 2008, but this was a surprise result. Many observers feel that it may not be repeated, given an atmosphere of increased nationalism generated by approaching general elections this year. On this view, the Bali Three on death row — especially Sukumaran and Chan who, rightly or wrongly, are seen as ringleaders — would be wise to wait until 2010, when the sensitive mix of the politics of drugs, foreigners and crime they represent will attract less attention.

Until last week, the Bali Three could have been confident they had plenty of time up their sleeves. Article 264 of the Indonesian Code of Criminal Procedure (KUHAP) says the right to bring a PK in criminal cases cannot be restricted by a time limit. Obviously, this does not stop executions taking place eventually, but it has long been exploited by death row inmates, including Bali bombers Mukhlis, Imam Samudra and Amrozi. They repeatedly put off their executions by announcing they would soon lodge PKs. After much tactical delay, they did bring their PKs, lost, then faced the firing squad, but using Article 264, they bought themselves years of respite.

Other prisoners have adopted the same strategy with success, to the annoyance of the authorities.

In the past fortnight, Indonesia's Chief Prosecutor Hendarman Su-

pandji extracted a highly controversial document from the Chief Justice of the Supreme Court, Harifin Tumpa. By all accounts, it was not sought with the Bali Three in mind. It will almost certainly speed up executions and take years away from death row inmates, including the Bali Three.

The document is a response to a request from the Chief Prosecutor for a legal opinion from the Supreme Court (commonly referred to as a fatwa). And it is just that: as an opinion it is a guideline and not legally binding. It is more like what Australian courts call practice notes. But in practice it will probably be treated by the Indonesian authorities as if it were law.

The Supreme Court legal opinion is, in fact, largely a restatement of existing law, but it adds that the prosecution can set an "appropriate time" for prisoners to lodge a PK request or seek clemency. The legal opinion says that prosecution can do this by telling the convict that it has set an appropriate date for execution. As to what is an appropriate time, the opinion is vague but seems to imply that the 180-day time limit for lodgement of PKs that applies in civil cases may be acceptable.

It has always been open to the prosecution to set a date for execution if no PK or clemency bid is in train. In the past, the prosecution has usually stopped the process automatically as soon as the prisoner signalled they intended to lodge a PK at some future time. The lodging of a PK does not legally stop implementation of the original appeal decision, but the practice in death penalty cases has been that the prosecutor has not executed until PK and clemency are fully resolved.

Now the Supreme Court opinion seems to be saying the only way to stop the clock is for the prisoner to go ahead and lodge an application for a PK or clemency before the execution day. Only this will stop time running. Telling prosecutors of a plan to lodge a PK or clemency is no longer enough.

If a PK is lodged within time and fails, then presumably the process starts again, with a new rescheduling of execution that can be interrupted

by a clemency. This would be faster than in many cases in the past, but would still mean about 18 months from a failed appeal would be a likely minimum, given how long it takes the courts to process such requests.

The Supreme Court opinion may breach Article 264 of the Criminal Procedure Code, which states that PKs in criminal cases are not subject to limitations of time. The argument against that would be that the new Supreme Court guidelines do not expressly impose a time limit on PKs but set a process for execution that just happens to have that effect. After all, dead people can't lodge PKs.

But how could such a challenge be brought? The catch is that the Supreme Court opinion cannot be judicially reviewed because it isn't a law. And, even if it were a law and a prisoner challenged the execution procedure, such a challenge could probably be heard only in the Supreme Court itself. The court is unlikely to overrule an opinion issued by its own Chief Justice.

If the PK fails, then the last, slim hope for the Bali Three would be a request to the President for clemency. It is a slim hope because until very recently the growing world trend against capital punishment hadn't had much traction in Indonesia. The administration of President Susilo Bambang Yudhoyono has so far executed more people than the three previous presidents. And, in 2007, Constitutional Court judges rejected a claim that the death sentence breached the extensive human rights guarantees — including the right to life — recently inserted in Indonesia's newly democratic constitution.

But change may finally be on its way. Although SBY has repeatedly said he will never grant clemency to drug offenders, last week he did exactly that. His decision to reduce the life sentence of Frenchman Michael Loic Blanc to 20 years suggests there is still a chance for the Bali Three to escape execution.

The polls say SBY will likely be returned in the mid-year elections, so he will probably decide any application for clemency by the Bali Three, if it comes to that.



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Inevitably, Australian diplomacy will play a big part in any decision SBY makes. The official relationship between Jakarta and Canberra is the warmest it has probably been, with much goodwill on both sides.

Let's hope it's enough to encourage SBY's newly revealed merciful side and keep three young Australians alive in the face of a renewed prosecutorial enthusiasm for the abhorrent practice of judicial murder.

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