Limited hopes for Bali Nine

We can do little to stop the executions, suggest Tim Lindsey, Jeremy Kingsley and Simon Butt

The Bali Nine have all been convicted and sentenced. Ring-leaders Andrew Chan and Myuran Sukumaran have received the death penalty. The others have life in jail. These outcomes are not surprising. In Indonesia, death or life is usually the tariff for serious drug offences.

What happens next is also predictable. The Indonesian system gives the Bali Nine at least three more opportunities for a court to reconsider their convictions and sentences. The first step is an appeal to the Denpasar provincial High Court. They have seven days to lodge an appeal, which should be heard within 60 days. This first rung of appeal is a re-examination of the documentary records of evidence from the District Court, not a re-hearing.

But, as happened in the Schapelle Corby case, the High Court can decide to hear new witnesses.

The next rung of appeal is a cassation to the Supreme Court (Mahkamah Agung) in Jakarta. Again, there is usually no formal hearing at this level: it is all done on documents but new witnesses or further evidence can be considered. The Supreme Court must decide cases within a total of 170 days, including an additional 60 days because the Australians face more than nine years’ imprisonment.

If the Bali Nine lose in the Supreme Court, they can still ask it to review their cases one more time (the third rung of appeal) using an internal review procedure known as peningkatan kerawar. Here, the cassation decision is reviewed by a new panel of Supreme Court judges. The PK generally considers whether the accused should be released, rather than whether the sentence should be reduced, but it is not unknown for it to reverse the trend of all previous decisions.

But there is a catch. The court will only hear PK cases if a “novum” exists—a new fact or circumstance that, if known at the time of the trial, could have resulted in a lesser sentence, or acquittal. Other grounds for a PK include the emergence of contradictory evidence in another case, or if the judges who previously heard the case made a clear mistake. The good news is that a PK can be lodged at any time and the Supreme Court will usually take as long as it likes to hear it.

Unless the Bali Nine find a constitutional argument to take to the new Constitutional Court—which seems unlikely—the PK will be the end of the judicial process, so the group’s lawyers will have to work long and hard to find a novum. The last hope is an application for clemency. This involves the reduction, alteration or early termination of sentences by the president.

For this to happen, a sentence must have what is known as “legal certainty”: either all appeals are exhausted or the time periods for appeal have lapsed. Because of this, and because it implies an admission of guilt, clemency is usually the last hope.

Indonesia does not like to rush executions. The state usually waits for clemency applications to be rejected before proceeding and even then, may move slowly. The condemned can wait for years. Almost and other Bali bombers remain on death row.

The Constitution and Law No 22 of 2002 require the president to seek advice from the Supreme Court before deciding on clemency or amnesti (pardon) but he would not be bound by their advice. In fact, President Susilo Bambang Yudhoyono has already said on several occasions that he would not exercise his powers in favour of a convicted drugs offender.

This is where Australia may be able to help the Bali Nine. Officially, the Government’s powers are limited; their consular guidelines prohibit them from giving the Bali Nine legal advice and they are only obliged to ensure prisoners’ minimum humanitarian needs are met in jail. Likewise, our Government could not properly seek to influence Indonesian judges or prosecutors in their deliberations—as in our system, they should be independent—but it can legitimately seek to influence the executive on clemency.

History shows that Indonesia reacts very badly to foreign ultimatums. As with Singapore in the case of Nguyen Tuong Van, piling on the pressure will likely seal the doom of the Bali Nine. The best hope, albeit slim, lies with gentle diplomatic influence over the months, perhaps years, ahead, directed at the President and his advisers.

The Australia/Indonesia relationship is now better than it has ever been, largely thanks to our assistance after the tsunami and the personal warmth between John Howard and Yudhoyono. The PM will eventually have to decide whether he will cash in some of his credit in Jakarta to help heroin smugglers escape execution.

For a man whose Government thought the death penalty was “appropriate” for the Bali bombers and who has said he couldn’t see why people thought it “barbaric”, this may not be a straightforward decision. Maybe that’s why he has said we shouldn’t expect too much from his friendship with Yudhoyono.

Tim Lindsey is professor of Asian Law and director of the Asian Law Centre at the University of Melbourne, where Jeremy Kingsley is a principal researcher. Simon Butt is writing a PhD on Indonesia’s judicial system.