

Review is not a Release

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This article was published in *The Australian* on Tuesday 27 July, 2004.

Indonesia's Constitutional Court is not yet a year old, but it has already won a reputation for competence and independence. On Friday, however, it became the centre of global controversy, finding that the prosecution of Maskur Abdul Kadir for his role in the Bali bombings that killed hundreds in 2002 was unconstitutional.

Urgent questions now have to be answered. Does this mean that Kadir is now free? Will the 32 terrorists serving jail sentences for the Kuta attacks – including, on death row, Amrozi, Mukhlas and Imam Samudra – also walk free or will they face new charges? If so, under what laws? Or will the double jeopardy principle mean they can never be tried again? As the confusion in Jakarta legal circles is making clear, these are complex issues. Indonesia's justice system is emerging from authoritarianism and dysfunction and it is not easy to find simple answers.

The first question is whether the Court's decision was correct. However unpalatable it may be, it was a reasonable finding to make. Art 28I of the Constitution states that the right not to be prosecuted retrospectively is a "basic human right that cannot be diminished under any circumstances at all". The anti-terror provisions under which the bombers were convicted were introduced soon *after* the Bali blasts but were designed to prosecute their perpetrators: they were thus retrospective and, to that extent, unconstitutional.

This argument was brushed aside by the District Court judges on the first day of the first Bali trial – Amrozi's. But, as we predicted a year ago on this page, the Constitutional Court found the argument more convincing. It rejected the prosecution argument that human rights provisions in the Constitution somehow overrode the clear words of 28I.

The next issue is the effect of the court's decision for the bombers. Article 24C of the Constitution states that the court has the authority "to make final decisions in the review of legislation against the Constitution". The Constitutional Court Law passed last year confirms this and adds that the court's decisions obtain "permanent binding force" once announced in an open court, as on Friday. Under Indonesian law this makes the decision immediately enforceable.

The bombers, however, were convicted in the general courts and some have appealed unsuccessfully to the Supreme Court. Kadir is the first to try the Constitutional Court. How will its finding in Kadir's case be applied to decisions made by other courts? The law does not clearly indicate a procedure for enforcement of the new courts' decisions in the general courts. Some judges even suggest that existing sentences will stand.

But lawyers for the Bali bombers have a strategy for this.

The Code of Criminal Procedure states that an accused can lodge a request for "judicial review" with the Supreme Court in criminal cases "if a new circumstance (novum) causes a strong

suspicion that if the circumstance was known at the time the hearing was taking place, the result would have been an acquittal or dismissal".

The lawyers could use the Constitutional Court's decision in Kadir's case as a "new circumstance" and would be likely to win his freedom. We can expect a wave of similar applications from the other 31 bombers to either or both courts.

An application for Supreme Court "judicial review" can, however, only be lodged once, so this argument may not assist any who have already had a review heard.

But it is hard to believe that anyone could be held for long, let alone executed, on grounds the highest constitutional authority has ruled are invalid.

The next question is what will happen if the Bali bombers do walk free? They probably wouldn't get much further than the footpath in front of jail, where they will be re-arrested for charges they should have faced from the start: murder, conspiracy, arson and the like. They may then undergo entirely new trials, at which their lawyers will raise the double jeopardy argument: a person cannot be tried twice for the same thing.

Indonesia's Criminal Procedure Law and Human Rights Law both provide that a person who is acquitted or released from charges cannot be tried again for the same act, if all avenues of appeal are exhausted. Many of the bombers, however, still have appeals afoot. Likewise, although new charges would likely be for the same acts (the Bali bombings) there is real uncertainty in Indonesian law as to what "act" means.

It might also be argued that if the original terror charges are ruled invalid and convictions quashed then there were never, legally speaking, any charges or convictions at all and so double jeopardy won't apply.

One way or another there will to be plenty of problems with double jeopardy for the Bali bombers. These will likely be seized upon by the courts to allow the trials and, ultimately, convict again. But, as in other democratic countries, resolving all of this will take time and many hearings – and that is, of course, how it should always be when the death penalty is involved.

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