

# Independence of the Judiciary at Stake, Not the Bali Bombers' Fate

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A week ago Indonesia's new Constitutional Court decided that anti-terrorism legislation under which the Bali bombers were convicted was unconstitutional. This decision was probably right at law but it has created a crisis within the judiciary that now threatens to destroy the court.

Thirty-three defendants have been convicted in relation to the Bali bombings under the anti-terrorism laws introduced shortly after the appalling events at Kuta. Three are on death row and many more await trial.

These laws were designed to allow retrospective prosecution of the bombers but article 28I of the Indonesian Constitution says that the "right against retrospective prosecution is a basic human right that cannot be diminished in any circumstances at all."

The obvious argument that the anti-terrorism laws therefore could not be applied to the Bali bombings was raised in all these trials. Once the issue reached the Constitutional Court this outcome was always on the cards. The problem Indonesia now faces is what happens next.

There is widespread - but unjustified - panic among judges and politicians that the convicted bombers and suspects awaiting trial, including the alleged spiritual leader of Jemaah Islamiah, Abu Bakar Bashir, must now be released as their detention is based on the anti-terrorism laws.

Responding to huge domestic and international pressure, the Minister of Justice, Yusril Ihza Mahendra, and the Chief Justice of the Constitutional Court, Jimly Asshiddiqie, have been hurriedly making law by press release, announcing that the court's decision to strike out laws will only apply forward in time.

They say that the anti-terrorism provisions cannot be used for any of the future trials of the remaining 100 or so suspects but that existing convictions will stand - and incredibly that Amrozi and his fellow conspirators should serve time, or even be executed, under unconstitutional laws declared invalid by the highest judicial authority.

Asshiddiqie and Mahendra rely on article 58 of the Constitutional Court Law, which says that "a statute that is being reviewed by the Constitutional Court remains in force before there is a decision that declares that the statute conflicts with the Constitution".

But this article is intended to maintain the status quo until a decision has been handed down: the law that is being reviewed will continue to be applied until the court's decision is issued. In other words, the law in question is presumed legal while the case is being heard but once the court decides that the law is unconstitutional, it is considered invalid from the moment it was enacted.

The court was formed in August last year but its decisions have been notable for their high quality and for their concern for human rights.

Friday's decision was one of the better decisions in Indonesian judicial history. But if Asshiddiqie's interpretation of article 58 prevails, it will be made a mockery.

What is the point of any person convicted under an unconstitutional and thus invalid law going to the court if its decision will not apply to him or her?

Why bother having judicial review at all if Asshiddiqie's court can offer no relief to litigants who suffer under a bad law? This is why elsewhere in the world similar courts are understood to have the power to strike out legislation from its inception, as a matter of course.

An unconstitutional law is unconstitutional from the moment it is created, not from the moment a court formally recognises the fact. For it to be otherwise would be to deny rights and defeat the chief reason for having a constitutional court: it would become a dead letter.

But the implications are more dire for the fragile rule of law that has begun to emerge in Indonesia since Soeharto's fall in 1998. It is easy to imagine a legislature dominated by another dictator issuing, for example, a law for the arrest and imprisonment of political opponents in clear breach of the human rights guarantees in the new Chapter XA of the constitution.

Even if the court later strikes out that law, innocent detainees would still be behind bars, serving out unconstitutional sentences, even for life. Asshiddiqie's position would leave Indonesia without the protection of a judicial check on government. In any case, neutering the Constitutional Court to keep Bashir and the Bali bombers in jail is unnecessary.

First, some of the anti-terrorism charges he now faces apparently relate to events after the introduction of the legislation. These should still be valid.

Second, he and the bombers should immediately be charged with the range of conventional Criminal Code offences they should have faced at the outset – murder, arson, conspiracy, etc. These would not be effected by the ban on retrospectivity, as the code existed at the time of the Bali blasts.

Suyitno Landung, head of police criminal investigations, says they are considering this in respect of Bashir but they should do the same for all the bombers. At the trial they could all raise double jeopardy arguments but they would be weak, and the prosecution would almost certainly prevail.

Bashir and the Bali terrorists would never leave jail and the constitution would not need to be mangled to keep them there. The dilemma Indonesia now faces is that in a frantic effort to keep the Bali bombers behind bars, it risks needlessly jeopardising the introduction of constitutional review.

The Bali bombings were a tragedy. It would be another tragedy if Indonesia's fledgling judicial independence – and thus its hard-won reform process – was destroyed so quickly.

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