

Indonesian Judiciary in Constitutional Crisis: Part 1

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The Constitutional Court's decision July 23 in the Masykur Abdul Kadir case may be one of the most important in Indonesian legal history.

In Kadir's case, the court exercised its powers of constitutional review to strike down Law No. 16/2003 because it conflicted with a new provision in Indonesia's recently amended Constitution. This was one of the first times this power has been exercised by an Indonesian court.

This watershed decision is one of the better argued and reasoned judgments ever handed down by an Indonesian court.

It could well be used as a template for legal analysis and decision-making by other Indonesian judges. It is also significant because the provision it upheld forms part of the new and impressive Bill of Rights in Chapter XA of the Constitution.

But the most important aspect of the decision is that the controversy it has generated now threatens to destroy the court itself -- and perhaps even the fragile *negara hukum* (law state) reformers have been building in the shadow of the New Order.

Kadir's lawyers claimed that their client had been investigated, charged, prosecuted, convicted and imprisoned for 15 years for his role in the Bali bombings of October 2002 under an unconstitutional law: No. 16/2003. This is because this Law did not exist at the time of the blasts, being introduced as Interim Law (Perpu) No. 2/2002 only week or so later.

Law No 16 attempted to authorize police, prosecutors and judges to use Indonesia's Anti-terrorism Law (Interim Law No 1 of 2002 / Law No 1/2003) to pursue the Bali bombers, even though the Anti-terrorism Law did not exist when the bombings took place. Kadir's lawyers argued that Article 28I(1) of the Indonesian Constitution provides citizens with a right to not be prosecuted under retrospective laws and sought a declaration from the court that the Law was invalid. By the narrowest of margins, 5 out of 9 judges agreed that the Law was unconstitutional.

The Indonesian and international legal community expected that Kadir and other bombers prosecuted and convicted under the law would now be released.

The assumption was that because Law No. 16/2003 was declared unconstitutional and of no binding force by the court, it had never been constitutional and had never had binding force. However, the process under which the unconstitutionally-convicted bombers could enforce the judgment in their favor is unclear and untested. And, unfortunately, both the Constitution and Law No. 24/2003 on the Constitutional Court are silent on this critical issue.

The Bali bombers' lawyers have cited Article 263(2)(a) of the Criminal Code, claiming that it enables many of their clients to lodge a Supreme Court application for 'judicial review' (Peninjauan Kembali or PK) against their sentences, using the Kadir decision and the resulting invalidity of the Law as a novum.

A 'novum' is a new circumstance that, if known at the time of trial, would have resulted in acquittal, dismissal or a lighter sentence or led to rejection of the prosecutor's indictment. Others claimed that the bombers could simply lodge 'appeals' against their convictions in the general courts. No one is certain if these strategies will work.

The result has been widespread legal confusion, even panic. We believe the way in which it is resolved could be a watershed for judicial power in Indonesia or the greatest set-back in Indonesia's recent judicial and constitutional history.

Apparently fearing that the convictions would be lost, Justice Minister Yusril Ihza Mahendra and Constitutional Court's Chief Justice Prof. Jimly Asshiddiqie issued their own interpretation of the decision by press release. They claim that the bombers must remain in jail because Constitutional Court decisions cannot operate retrospectively. In other words, the Kadir decision, although binding, only prevents future investigations, prosecutions and convictions under Law No 16/2003. They claim it cannot affect convictions already obtained.

The Chief Justice of the Supreme Court, Prof. Bagir Manan, has also sought to block the bombers' release, commenting publicly that the Constitutional Court decisions were not, in his view, a novum and couldn't be relied on for a PK, although this is not settled law.

The way these senior judges have made their views known is of grave concern. The fact that Asshiddiqie and the justice minister issued statements at around the same time and conveyed the same view gives the impression that they collaborated -- although this might not have been the case -- and this, of course, raises questions about judicial independence.

Likewise, any judicial analysis of the complex implications of the Kadir decision should be restricted to a formal court decision, where it can be dealt with by a full panel of justices. A single judge talking to the press should not attempt to unilaterally reinterpret a binding judicial decision of a superior court, particularly a case in which the court was split.

It is highly significant here that many of the bombers were also convicted under Emergency Law No 12 of 1951, which prohibits possession of weapons and explosives and carries the death penalty and significant prison terms. This should mean that even if their convictions under the Anti-terrorism law fail, their prison sentences should stand anyway, by virtue of their convictions under the 1951 Law. Others who were not charged under this Law can probably be recharged under other criminal laws that also existed at the time of the bombing.

These statements are, therefore, probably entirely unnecessary -- the Bali bombers and accomplices will probably remain in jail regardless. Their sole effect may be to seriously damage Indonesia's emerging new Rechtsstaat (law state).

It has been 30 years since Soeharto introduced Law No.14/1970, which made it clear that the New Order would deny the courts the power to review the constitutionality of statutes. Giving courts this fundamental power has since been a key demand of lawyers and, in particular, of post-1998 reformasi advocates. They understand well that it is a basic component of Trias Politika (separation of powers): If the courts cannot conduct constitutional review, then there is little to prevent Indonesian governments from persistently enacting laws in breach of the Constitution, as happened regularly under Soeharto. This is because, according to Asshiddiqie and Mahendra, wrongful acts performed by the state under such laws can never be undone, even if the unconstitutional laws that authorize them are later struck down.

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