Indonesian Judiciary in Crisis: Part 2

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Indonesian Judiciary in Constitutional Crisis: Part 1of 2

If Constitutional Court decisions in constitutional review cases do only apply prospectively, then the absurd situation is created whereby no litigant -- no matter how deserving and badly treated -- could ever receive the benefit of a win in the court.

What would be the point of a litigant aggrieved by an apparently unconstitutional law going to the effort and expense of challenging the legality of that law knowing that the decision will not actually benefit him or her in any way? This is a particularly tragic outcome if the litigant is wrongfully facing long imprisonment or, worse still, the death penalty. Judicial review would fall into disuse.

Of course an association (an NGO for example), might make constitutional challenges in the public interest to prevent the application of unconstitutional laws. But these would be rare and the NGO would still need to have its own constitutional rights undermined to have standing to bring a case in the first place (Art 51 of the Constitutional Court Law).

For these reasons, the arguments of Asshiddiqie and Mahendra are out of step with the practice of Constitutional Courts internationally. They rely on Art 58 of the Constitutional Court Law, which says "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 Articles of this sort are common around the globe and are usually only used to maintain the status quo until a decision is made. In other words, the law is presumed legal while the case is being heard but if the court decides that the law is constitutional, it is considered invalid from the moment it was enacted.

There are a few other courts -- for example in Austria -- that allow only prospective application of their decisions, but they generally make an exception in criminal cases, to prevent the gross injustice of a person being deprived of life or liberty under a law that no longer applies. Yet this is precisely the outcome Asshiddiqie and Mahendra are now advocating.

Putting aside the grave issues of how government is to be checked by the judiciary, the uncertainty over how the Kadir decision is to be implemented has created chaos for existing anti-terror cases. Will prosecutions and trials underway or completed have to be re-started or re-tried using laws that predated the bombings?

At present, the decision to restart or retry trials has been left to individual judges hearing the cases currently on foot. There are indications that some judges will simply ignore the

Constitutional Court's decision, thus creating further chaos and uncertainty. And, as occurred in Idris's case, some prosecutors are continuing to use the unconstitutional law, regardless. The result is that many Courts are probably making mistakes that will create difficulties later on if the system eventually operates uniformly and predictably.

One significant drawback to re-charging and re-trying is that it will probably not be possible to use evidence put forward in trials already completed to prove the guilt of an accused in a retrial for a different crime, even for the same act. This would mean that evidence would have to be re-presented and witnesses or victims would suffer the trauma of testifying again.

Another oft-cited problem is the 'double jeopardy' (nebis in idem) issue, although this may not be so big an obstacle if the existing convictions are overturned. Article 18(5) of Law No 39 of 1999 on Human Rights states that "A person cannot be prosecuted for a second time in the same case for an act with respect to which a court has handed down a binding decision". Article 76 of the Criminal Code has a similar effect.

It is strongly arguable that prosecutions pursued and judicial decisions -- including convictions -- made under unconstitutional laws are themselves unconstitutional and, so the theory goes, should be considered to have never existed. At the very least, the cases should be considered to be 'mistrials'.

The bombers should therefore be able to be tried again because, legally, they would not yet have been tried. If this view is not accepted, then the issue becomes more complicated: Some of the convicted bombers are subject to 'binding decisions', because they have exhausted their avenues of appeal. Others are not, as their appeals remain pending (although it is not clear whether "appeal" here includes the PK or 'judicial review' stage).

Assuming the Anti-Terror Law No 16/2003 convictions are quashed, then the question arises as to what laws that were in force in Indonesia at the time of the Bali blasts could be used to convict the bombers?

First, it is important to remember that Anti-Terror Law No 15/2003 (Perpu 2/2002) is still in place. It was not struck out because it applies only to events after the bombs. It can still be used and there is no reason why it could not be applied to the bombers' activities while they were on the run, when they were still members of a terrorist organization, carried weapons and did other things caught by the Law.

Another prime candidate is Article 340 of the Criminal Code, which provides a maximum penalty of death, life imprisonment or 20 years jail for premeditated murder. There appears to be no reason why Article 340 could not be applied against all bombers. given that the bombings were premeditated and resulted in death.

It could also apply to most of those involved in the planning, financing and preparation of the bombing. Some lawyers and government officials argue that the Criminal Code is not strong enough to catch conspirators on the fringes but they are probably wrong. Article 55(1) of the KUHP states that those who participate in the commission of a crime or order it are to be

punished as would direct perpetrators. Article 56 states those who provide assistance at the time a crime is committed, or who provide an opportunity, the means, or information to commit an offense are to be punished as accomplices. However, under Article 57(1) of the KUHP, the maximum penalty for an accomplice is two-thirds of the maximum penalty for the crime. And if the crime committed attracts the death penalty or life imprisonment, an accomplice can only be imprisoned for a maximum of 15 years.

There are other alternatives in the Code, such as its arson provisions. If the arson was deliberate and caused death, then an accused faces life or 20 years' imprisonment (Article 187(3)). People who make, receive, attempt to obtain, hide, transport or import into Indonesia material that is used to create an explosion that endangers the life of a person or property face eight years imprisonment (Article 187 bis (1)).

Presuming that the judges presiding over these cases under these alternative charges are presented with sufficient evidence, take into account the gravity of the crime and exercise their discretion to impose the maximum penalty, or close to it, most of the Bali bombers and their associates could receive penalties of death, life imprisonment or up to 15 years' imprisonment under the Criminal Code.

And, much more importantly, the rule of law in Indonesia and the system of essential judicial checks and balances created by the recent constitutional amendments would be preserved. There is no need for the Constitutional Court to be made the latest casualty of the Bali terrorists.

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