



# IDSS COMMENTARIES (38/2004)

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## **Constitutional Court ruling on Bali trials: Indonesia on road to country of law?**

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Indonesia's counter-terrorism efforts suffered a major setback when the new Constitutional Court ruled as unconstitutional a law that allowed retroactive application of an anti-terrorism law to persons accused of carrying out the Bali bombings on 12 October 2002.

The Law No. 16/2003 adopted by the House of Representatives (DPR) on 6 March 2003, was designed to provide for retroactive prosecution of the Bali bombers under Law No. 15/2003 for the Eradication of Terrorism Crimes. They endorsed and replaced similar laws which were issued as Government Regulations in lieu of Law by President Megawati Soekarnoputri on 18 October 2002, just a week after the Bali bombings.

Several suspected perpetrators were charged and convicted under these laws. However, on 23 July 2004, the Constitutional Court, established in August 2003, ruled that one of the accused, Masykur Abdul Kadir, who had been sentenced to 15 years in jail, should not be subject to retroactive use of the anti-terrorism law. The reason was that the act of bombing could not be classified as an extraordinary crime, as defined by the Rome Convention, which considers genocide, human rights violations, war and aggression in that category. The ruling, by five of the nine justices on the Constitutional Court, effectively prohibited the use of the anti-terrorism law for future trials of about 100 other Bali suspects, and could set off a wave of appeals from those already convicted under that law.

The Indonesian judiciary could take pride in the decision, which had been based on legal literature, documents, international conventions and precedents and principles established in Europe and the United States. In view of the transitional state of democracy and legal reform in Indonesia, the judiciary could be commended for its efforts to uphold the Constitution and rule of law, besides asserting its independence.

In countries with well-developed judicial systems, the creation of ex post facto laws is generally forbidden, i.e. legal provisions that apply retroactively thereby criminalizing a conduct that was not illegal when originally performed. Article 28(i) Clause 1 of the 1945 Indonesian Constitution provides that the right against retroactive prosecution is a basic human right that cannot be diminished under any circumstance. This right is jealously and rightly guarded in Indonesia because of the fear that retroactive application of a law could open the door to abuse by an authoritarian regime.

The *Reformasi* of political and legal institutions in Indonesia have underscored the need for stronger checks and balances to prevent the recurrence of abuses of the New Order regime. One of the objectives of the Constitution Court is to examine laws suspected of violating the

Constitution. The Court won general approval when it ruled against Law No 16/2003, which provided for retroactive use of Law No 15/2003. However, the ruling did not nullify the law No 15/2003 itself, which empowers prosecution of acts of terrorism carried out after the promulgation of the law.

### **Controversy on implications**

Controversy continues on the implications of the ruling. The Minister of Justice and Human Rights, Yusril Mahendra, asserted that while the Government respected and would abide by the ruling of the Constitutional Court, the sentences passed on those who had been tried for the Bali bombings, would remain in force.

Legal experts are divided on this interpretation. Some point to Article 58 of the Constitutional Court Law, which states that the law was presumed to be legal when the case was being heard. However, once the court decided that the law was unconstitutional then it became invalid from the time of its enactment. Others argue that if a law is found to be unconstitutional it does not mean it's necessary to rectify all the actions taken under its provisions. It is not practical to undo all the damage done in history, if any. As the Constitutional Court did not even exist when the Bali bombing occurred, its jurisdiction could not stretch back in time. These experts say that the enactment of the laws and the retroactive provisions need to be understood against the extraordinary circumstances prevailing after the Bali carnage.

For a transitional democracy like Indonesia, the independence of the judiciary is crucial in erasing the public's perception of corruption and abuse of the system. They want to see a clear separation of powers between various organs of the state and the independence of the judiciary to be upheld. The Constitutional Court's ruling was a landmark in establishing this separation and independence of the judiciary, and augurs well for the system of checks and balances to be put in place and consolidated.

Nevertheless, it does not mean that Indonesia has exhausted its legal instruments to administer justice, should those convicted under the anti-terrorism law exercise their right of appeal. Even those who have exhausted their routes to appeal can now appeal for a judicial review and/or presidential pardon. By the same token the prosecutors can push for retrials under the Criminal Code. However, this raises the issue of double jeopardy. Should a retrial take place, the legality of every shred of evidence and the manner by which it is gathered, will be scrutinized by the defence. Still the forensic evidence collected with the help of foreign experts should withstand the closest scrutiny. Even under the Criminal Code the Bali bombers would not be able to walk free, as many would think.

### **Prosecuting terrorists; protecting human rights**

Indonesia is one of the few countries in the world to have prosecuted terrorists since September 11, 2001. While the government deserves to be commended for its efforts, there is no cause for violating the Constitutional rights of its citizens in the hasty attempt to satisfy international demands. The Constitutional Court ruling therefore is right and proper.

Elsewhere in the world, concerns have been raised about the extraordinary legal provisions adopted to deal with terrorism. Once the military tribunals begin hearings of the Guantanamo Bay detainees and the courts process begins in Europe, more issues concerning human rights

will be raised. The Indonesian experience has demonstrated the importance of having appropriate legislation that can be applied in prosecuting the special nature of terrorist crimes, without subverting the established legal provisions and systems through hasty measures.

Greater public participation in debating the terrorism legislation and more understanding and patience on the part of the international community for Indonesia's fledging democracy could help produce a better law reflecting the emerging norms of *Reformasi*, *musyawarah* and respect for human rights of its citizens, which the judiciary would be honour bound to protect and defend. Indonesia would then be well set on the road to becoming a *Negara Yang Berhukum* or a Country of Law.

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