

The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003*

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Translators' Introduction

The following decision was handed down by Indonesia's newly established Constitutional Court (*Mahkamah Konstitusi*) on Friday 23 July 2004.¹ The defendant was Masykur Abdul Kadir, whom the Denpasar District Court had sentenced to 15 years' imprisonment for assisting those convicted of the Bali bombings in October 2002.

Lawyers for Masykur claimed that he had been investigated, charged, prosecuted and convicted under an unconstitutional law (Law No 16 of 2003), because the law did not exist at the time he allegedly committed the crime. They argued that art 28I(1) of the Indonesian Constitution provides citizens with a right not to be prosecuted under retrospective laws. The court agreed, exercising its powers of constitutional review to declare Law No 16 of 2003 to be invalid.

This short introduction describes and discusses the background to the case, including the defendant's alleged involvement in the Bali bombings, and the laws under which he was investigated, prosecuted and convicted. The arguments put forward by the defendant, government and parliament during the court hearings, and the decisions handed down by the court will be summarised. The introduction then examines some of the implications of the decision and the way it was being interpreted by the police, prosecutors, judiciary and government at the time of writing. Translated extracts from the judgment then follow.

This case was one of the first in which powers of constitutional review were exercised by an Indonesian court. This introduction, therefore, begins with a brief discussion of the establishment, jurisdiction and composition of the Constitutional Court.

The Constitutional Court

For a number of decades Indonesian judges and lawyers have argued that an Indonesian Superior Court – either the existing Supreme Court or a newly established court – should have the authority to determine the constitutionality of statutes. This, it was argued, would improve the

accountability of the Indonesian government and assist to ensure that its actions conformed to the Constitution. They were unsuccessful. However, the end of Soeharto's New Order in 1998 witnessed a revived interest in such reforms.

Accordingly, provision was made for the establishment of the Constitutional Court in the third amendment to Indonesia's Constitution, approved on 9 November 2001. The fourth amendment (10 August 2002) required the Constitutional Court to be established by 17 August 2003 and allowed the Supreme Court to exercise its jurisdiction in the meantime (Transitional Provisions, art III).² The Constitutional Court Law (No 24 of 2003) was passed on 13 August 2003. Soon after, its judges were installed by Presidential Decree and the court began accepting cases.³

The Constitutional Court's jurisdiction is explained in art 24C(1) of the 1945 Constitution, which states:

The Constitutional Court has the authority to adjudicate with finality at first and final instance the review of legislation as against the Constitution, disputes on the jurisdiction of state institutions whose authority is provided for in the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections.

Article 10(1) of the Constitutional Court Law is almost identical to this provision. Under art 24C(2) of the Constitution and art 10(2) of the Constitutional Court Law, the court is also to provide a decision in the event that the Indonesian Legislative Assembly (DPR)⁴ suspects that the President or the Vice President has violated the law by committing an act of treason, corruption, or bribery; other serious crimes or improper conduct; and/or no longer fulfils the constitutional requirements to hold office.

The Defendant

Masykur was born in Bali and lived in Denpasar before his arrest. Prosecutors proved that he met twice with groups of the Bali bombers arriving from Java, including the notorious Muklas, Iman Samudra, Imron and Amrozi. Masykur helped them rent accommodation, hired vehicles and drove them around the southern part of Bali to survey targets. He also met up with Samudra, Imron and Idris several hours after the blasts.

During his trial at Denpasar District Court in 2003, no evidence linking Masykur to the assembly or delivery of the bomb was adduced. Masykur constantly claimed that he 'knew nothing' of the bomb plot; that he was working as a 'tourist guide'; and that his clients later 'turned out to be' the bombers. However, he was found guilty under art 13(a) of Law No 15 of 2003 (see below) for assisting the bombers.⁵

The Law Masykur Challenged

Masykur's lawyers challenged the constitutionality of Law No 16 of 2003.⁶ To explain the effect of this Law, three other laws must be discussed. The first of these is Interim Law No 1 of 2002,⁷ passed on 18 October 2002, six days after the Bali bombings took place. This is a general anti-terrorism law, and contains broad definitions of terrorism, provides substantial penalties for terrorists or those who help or fund them, and introduces procedures designed to make investigating, prosecuting and convicting terrorists easier. This Law was issued by President Megawati Soekarnoputri under her emergency legislative powers. Ordinarily, the Indonesian President can issue only decisions and instructions. However, in emergencies, art 22 of the Constitution permits the President to issue Government Regulations in Lieu of Law (*Peraturan Pemerintah sebagai Pengganti Undang-undang* (PERPU) – translated in this document as 'Interim Law'), which have authority equivalent to a statute. These laws are relatively rare and must be ratified by the DPR at its following sitting to remain valid (see art 22 of Indonesia's Constitution). Interim Law No 1 was adopted by the DPR through Law No 15 of 2003 on 4 April 2003.⁸ Interim Law No 1 remains Indonesia's Anti-Terrorism Law – Law No 15 simply confirms its status as a statute.

Interim Law No 2 of 2002⁹ was passed on the same day as Interim Law No 1. It was later approved by the DPR in the form of Law No 16 of 2003. Interim Law No 2 merely states that Interim Law No 1 can be used with respect to the Bali bombings. This was the nub of the problem – Interim Law No 2, in effect, authorised police, prosecutors and judges to benefit from the provisions of Interim Law No 1, even though Interim Law No 1 was not in force at the time the bombs were detonated, planned or prepared. In other words, Law No 16 of 2003 purported to allow the retrospective application of Interim Law No 1. Masykur's lawyers, therefore, focused their attack on Law No 16 of 2003, not on the Anti-Terrorism Law itself, which can quite legitimately be applied prospectively.

The Parties' Arguments

Masykur argued in the Constitutional Court that, under Indonesian law, no person can be punished for performing an act that was not prohibited at the time the act was performed. In other words, the state cannot legislate to make an act illegal and then apply that legislation to a person who performed that act before that legislation was enacted. Masykur relied on a number of different laws to support this position. He referred to art 1(1) of the Criminal Code (see below) and art 28I(1) of the 1945 Constitution (as amended) which states that 'the right not to be prosecuted

under retrospective laws [is a] basic human [right] that must not be diminished under any circumstances’.

He argued that the words ‘under any circumstances’ meant that the protection from having a retrospective law applied to him was absolute. The applicant also argued that the ability to make law with retrospective operation provided the government with too much power and enabled it to act arbitrarily.

In response, the government made a number of points. First, it argued that the laws in existence at the time the Bali bombing occurred were not sufficient to handle terrorism effectively, so the new laws were a necessity. Second, it claimed that its actions had to be viewed in the context of its international responsibilities to criminalise and deal with terrorism.

Third, the government claimed that art 28I(1) of Indonesia’s 1945 Constitution does not stand alone. It is limited or ‘balanced out’ by art 28J(1) and (2) of the Constitution. Article 28J(1) states, in essence, that each person must respect the basic human rights of others. Article 28J(2) states that ‘[w]hen exercising their rights and freedoms, each person must submit to limits determined by legislation with the sole purpose of guaranteeing recognition and respect for the rights of others ...’.

In this context, the government argued, the right of the Bali bombers to not be subjected to retrospective laws was outweighed by the death, injuries and loss of property that occurred as a result of the bombings.

Finally, (and this argument overlaps with the second argument), the government argued that terrorism was an extraordinary crime – even a ‘crime against humanity’ – and that, therefore, retrospective legislation was permissible to address it.

The Court’s Decision

The declaration of unconstitutionality was made by the narrowest of margins. Of the nine judges presiding over the case, five thought that the law was unconstitutional and four believed that it was not. What follows here is only a very brief general summary, given that extracts of the decision are translated below.

The majority interpreted the prohibition on prosecutions using retrospective laws relatively strictly, emphasising that art 28I(1) states that the right ‘cannot be diminished under any circumstances’. The court discussed international law’s treatment of the retrospectivity issue and the rationales that were employed to justify the application of retrospective laws in the Nuremberg trials. However, the court held that international treaties generally prohibit the enactment and application of

retrospective criminal laws, unless they are used to pursue gross violations of human rights. Because Indonesian law defines gross violations of human rights to include only genocide and crimes against humanity, the court held that the bombing, although deplorable, was not a crime to which the recognised exceptions to retrospectivity applied. The court also emphasised arguments often put forward in opposition to retrospective laws – such as that they are unfair and can be misused by political regimes against their political opponents.

The majority's extensive discussion of international law appears to have been unnecessary, given that its decision was, in essence, based on the strictness of the words 'under any circumstances' used in art 28I(1). Resort to principles of international law might have been useful if the words used in art 28I(1) were unclear or ambivalent, but they were not. International norms generally cannot trump the clear words of the Indonesian Constitution, absent some mechanism giving that international norm constitutional authority. In this case there was none.

The minority, however, noted that the right not to be subjected to retrospective laws was not absolute and that retrospective criminal laws were generally acceptable on an international level in very serious cases, such as crimes against humanity, genocide and war crimes. In such cases, justice for victims was more important than the rights of perpetrators. Although the Bali bombings were not cases that fit into these categories, they were well organised and had devastating social, economic and political effects. Their seriousness, combined with the fact that the anti-terrorism laws did not make an act criminal that was not criminal beforehand – that is, the bombings were prohibited acts under general criminal laws at the time they were committed – meant that the ban on retrospective laws could be set aside. The minority ignored the unequivocal words of s 28I(1).

The Aftermath

Most understandably, the victims of the bombings and their families, both Indonesian and Australian, saw this decision as a travesty of justice. Quite rationally, the Indonesian and international legal community presumed that those prosecuted and convicted under the law would be released. The assumption was that, because the law was declared unconstitutional by the court, it had never been constitutional. The court had declared the law to no longer have binding force, because it was unconstitutional, so the law could be deemed never to have had binding force. However, the process under which the unconstitutionally convicted bombers could have the Constitutional Court's decision enforced in their favour is unclear and untested – the Constitutional Court Law is silent on

this issue and the Constitutional Court, which is only a year old, has not yet tested enforcement mechanisms.

Some legal commentators cited art 263(2)(a) of the Criminal Code, claiming that it enabled many of the accused to lodge a Supreme Court review against the sentences imposed upon them, using the Constitutional Court's decision and the constitutional invalidity of the law as a 'new circumstance' that, if known at the time of trial, would have resulted in an acquittal, dismissal or lighter sentence, or led to the court's rejection of the public prosecutor's indictment. Others claimed that the accused could simply lodge appeals against their convictions in the general courts.

Apparently fearing that the convictions would be lost, Justice Minister Yusril Ihza Mahendra and Constitutional Court Chief Justice Professor Dr Jimly Asshiddiqie announced their own interpretation of the decision to the press. They claimed that the bombers would remain in jail because the Constitutional Court's decision itself could not operate retrospectively. In other words, the decision, whilst binding, only prevents future investigations, prosecutions and convictions being carried out retrospectively. It would not, therefore, impact upon convictions that have already been obtained. This statement, particularly from Asshiddiqie, constitutes an inappropriate politicisation of the court. That Asshiddiqie's statement and that of the Justice Minister were announced at around the same time, and conveyed the same view, gives the impression that Asshiddiqie may have collaborated with the government, even though he might not actually have done so. Just as bad, any implications of the decision should have been contained in the decision itself; Asshiddiqie has attempted to unilaterally alter the logical implications of the court's decision.

It is unclear whether the Mahendra–Asshiddiqie interpretation will be followed by the Indonesian courts. What is clear, however, is that Indonesia's newly established rule of law will be seriously damaged or even destroyed if the convictions made under Anti-Terror law stand. It has taken the Indonesian judiciary more than 30 years to win from the government the power to review the constitutionality of statutes. If the courts do not have effective powers of constitutional review, the Indonesian government can enact laws which breach Indonesia's constitutional bill of rights with impunity. If Constitutional Court decisions only apply prospectively, it would take a benevolent litigant aggrieved by an apparently unconstitutional law to challenge the legality of that law knowing that the decision will not actually benefit him or her in any way, but may benefit others in the future. An association such as an NGO could make it its business to lodge constitutional challenges to prevent the application of unconstitutional laws. But such a body would probably need to have its own constitutional rights undermined by the law in question in

order have standing to bring a case (see art 51 of the Constitutional Court Law). In any event, the unconstitutional law would apply until the court could hear the case, during which time the law could do significant damage.

It is clear that the actions of the Justice Minister and the Constitutional Court Chief Justice have undermined the authority of the court. This is all the more concerning in that this damage was probably avoidable.

Many of those who were direct perpetrators of the bombing were also charged and convicted of offences under laws that existed well before the bombings were planned, prepared and detonated – Emergency Law No 12 of 1951 and the Criminal Code. For example, the Emergency Law provides a maximum penalty of death for the possession of firearms or explosives. The result is that, even if the charges and convictions obtained under the Anti-Terrorism Law are lost because of the decision of the Constitutional Court, the convictions under the 1951 Law should stand.

If this approach is taken, it is likely that the bombers will argue that they were arrested and detained unconstitutionally and that this invalidates their convictions. As mentioned above, the Anti-Terrorism Law is intended to make investigating, prosecuting and trying terrorists easier. As a result, most of the defendants were detained under the Anti-Terrorism Law for amounts of time exceeding that which would otherwise have been permitted. Those detentions may, therefore, be illegal. However, given that the defendants either did not challenge their arrests or detentions, or did so unsuccessfully, in a pre-trial hearing (*praperadilan*), any imperfections in their arrest or detention should not invalidate their convictions under Indonesian law.

The situation appears to be quite different for those who have been charged, prosecuted or convicted only under the unconstitutional laws, and not the Emergency Law or the Criminal Code. Those in police custody who have not been tried should be re-charged under laws which existed at the time the bombing and preparations for it took place, such as murder or arson. Any prosecutions and trials which are underway or which have been completed should be re-started or re-placed using Laws which predated the bomb.

There are two main legal obstacles to the new trial alternative for those charged only under the Anti-Terrorism Law. The first is the double jeopardy principle. Article 18(5) of Indonesia's Human Rights Law (Law No 39 of 1999) 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, however, strongly arguable that prosecutions pursued and

judicial decisions 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. If either of these views are accepted, then the bombers should be able to be tried again because, legally, they would not have yet been tried.

Second, some commentators have claimed that, on average, penalties under the Criminal Code might not be as severe as those that could have been or were obtained under the Anti-Terrorism Law. However, the death penalty would still be available if perpetrators were found guilty of premeditated murder (art 380 of the Criminal Code) and even those who assisted more indirectly with the commission of the crime should face not insignificant prison terms.

In summary, it is possible for those involved in the Bali bombing to remain in prison, despite the Anti-Terrorism Law being unconstitutional. This can be achieved in a way that salvages the integrity and legitimacy of the Constitutional Court and the Constitution. Decisions of the Constitutional Court which invalidate legislation should apply retrospectively to that legislation – the effect of such decisions should be to invalidate the statute from its enactment. Statements to this effect should be made by the Justice Minister and Constitutional Court Chief Justice, or their previous comments ignored.

Important Legislation Cited in the Decision

A number of provisions of Indonesian and international law were cited several times throughout the decision. Rather than repeating them as they are used in the decision, we have translated or reproduced them here.

Article 28I(1) of the Indonesian Constitution:

The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not to be prosecuted under retrospective laws are basic human rights that may not be diminished under any circumstances.

Article 28J of the Indonesian Constitution :

- (1) All people must respect the human rights of others within the confines of communal, national and state life;
- (2) When exercising their rights and freedoms, each person must submit to limits determined by legislation with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil just demands in accordance with moral considerations, religious values, security, and public order in a democratic community.

Article 1(1) of the Criminal Code:

No act is punishable under the criminal law, unless the crime is contained in a law in existence before the act takes place.

Article 11(2) of the United Nations Universal Declaration of Human Rights:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 15 of the United Nations International Covenant on Civil and Political Rights (1966):

- (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequently to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
- (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

A Note on the Translation

The following translation of the Constitutional Court's decision does not use the traditional, conservative style that might be expected in legal translations. It has been heavily edited for clarity and to remove repetition. The entire first section, which described the parties' arguments and evidence, was summarised above and is thus omitted.

The original decision was of a high quality by Indonesian standards, but it contained a number of unclear passages and mistakes, some of which have been noted in the translation. Some parts of the judgments that were wordy, unclear or not entirely relevant to the main arguments were omitted, or summarised within square brackets. We have also often shortened our translations of some key repeated terms. For example, we referred to Law No 16 of 2003 without mentioning its full title, even when the court used its full title.¹⁰

The result is a translation which is approximately one quarter of the size of, and (we hope) more readable than, the original decision, but which accurately conveys its meaning and legal effect.

The Majority Decision

Five justices of the Constitutional Court issued the following decision: Chief Justice Prof Dr Jimly Asshiddiqie SH, Prof Dr HM Laica Marzuki, SH; Prof HA Mukthie Fadjar, SH, MS; H Achmad Rustandi, SH; and Soedarsono, SH.

Before getting to the substance of the case, the Court must consider the following issues:

1. Does the Court have the authority to examine, adjudicate and decide an application for the review of Law No 16 of 2003 ...
2. Does the Applicant have legal standing to lodge an application for the review of Law No 16 of 2003 as against the 1945 Constitution.

With respect to these two issues, the Court is of the following opinion:

1. *Jurisdiction*

According to Article 24C(1) of the 1945 Constitution and Article 10(1) of Law No 24 of 2003 on the Constitutional Court, one of the Court's powers is to review legislation as against the 1945 Constitution. Under Article 50 of Law No 24 of 2003 and its Elucidation [only] statutes ... which were enacted after the first amendment to the 1945 Constitution of 19 October 1999 [can be reviewed]. Law No 16 of 2003 was enacted on 4 April 2003 (State Gazette 2003 No 46, Supplement to the State Gazette No 4285).

[Therefore] the Court has the authority to examine, adjudicate and decide the application.

2. *The Applicant's Legal standing*

According to Article 51(1) of Law No 24 of 2003 on the Constitutional Court, parties who believe that their constitutional rights and/or powers have been damaged by ... a statute can lodge an application for a review of the statute as against the 1945 Constitution. Parties [with standing] include individual Indonesian citizens; traditional communities, provided that they still exist and accord with community developments and the principles of the Indonesian Unitary Republic regulated by law; public or private legal entities; or state institutions.

The Applicant, Masykur Abdul Kadir, is an Indonesian citizen who is a defendant in the Bali bombing case ... and considers that his constitutional rights have been damaged by Law No 16 of 2003, that is, a right contained in Article 28I(1) of the 1945 Constitution. [The Court then set out Article 28I(1).] A retrospective law – that is, Law No 16 of 2003 – has been applied against the defendant. Interim Law No 1 of 2002 was enacted on 18 October 2002 (State Gazette 2002 No 106) but was applied to [an event] which occurred on 12 October 2002 (the Bali bombings).

Therefore, the Applicant has standing to lodge an application for a review of Law No 16 of 2003 as against the 1945 Constitution ...

Substance of the case

... There is a body of opinion which would allow the prospectivity principle to be set aside in certain circumstances ... using the following six arguments:

1. Gustav Radbruch's argument, which is that an act is punishable even if it had not been declared a crime [at the time the act constituting the crime was committed], because the superiority of justice can set aside the prospectivity principle. However, Radbruch argued that the prospectivity principle is so important that it can only be set aside in very extreme circumstances, such as with respect to the Nazi regime ...
2. ... If the perpetrator knew that the act that he or she committed was something for which punishment would be appropriate in the future, even if it is legal at the time the act was carried out ...
3. ... An act that was not a crime under applicable law at the time it was committed can be dealt with retrospectively if it conflicts with general principles of justice.
4. ... International law can override domestic law. Therefore even if under domestic law the act did not breach the law, the non-retrospectivity argument can be set aside because the act breached international law.
5. ... The prospectivity principle can be set aside through reinterpretation of the previously applicable law to make punishable an act that was not punishable when it was committed ...
6. ... The act was a clear violation of applicable law at the time it was committed.

... [However,] the weight of opinion of the world's legal scholars [is that] ... the non-retroactivity principle cannot be set aside ... for the reasons referred to above. Regardless of the differences of opinion between Constitutional Court judges, the Court is of the opinion that:

1. Fundamentally, the law must operate prospectively. It is unfair if a person is punished for an act that was legal at the time it was performed ...
2. The prospectivity principle is [a part of] a retributive philosophy of penalisation, but this is no longer the main reference point for our state's system of penalisation, which [now] prioritises prevention and education.
3. ... [S]etting aside the prospectivity principle allows certain regimes to use the law to exact revenge against its previous political opponents. [This must not occur] ...
4. [E]fforts are currently being made to enforce the law (rule of law), including ... fair judicial processes. The minimum [requirements] of procedural justice include: the presumption of innocence; equality of opportunity for the parties; announcement of the decision open to the public; ne bis in idem [translator's note: the double jeopardy rule]; the application of less serious laws for pending cases and the prohibition against retrospectivity ... Law No 16 of 2003 ... clearly breaches one requirement ... that is, it applies the retrospectivity principle ...

Countries which have a long and stable history of law enforcement such as the United States [have] constitutions [which] prohibit the use of the principle of retrospectivity ... In their decisions, judges sometimes set aside this prohibition, but generally ... only in civil cases ...

The strong detestation with which the application of the retro-spectivity principle is viewed is evident from the following quote:

An ex post facto violation can occur in several ways. No legislative body may pass a law that makes criminal any conduct occurring prior to the passage of the law. Neither may a law redefine a statute to make previous conduct a more serious or aggravated violation. The ex post facto prohibition also precludes retrospectively increasing the severity of punishment for criminal conduct. No law may alter evidentiary rules in a way that makes successful prosecution more likely or diminishes any legal prosecutions a person may exercise. In sum, the ex post facto provision prohibits any legislative action that retrospectively disadvantages a person in a criminal context (Ralph C Chandler et al "The Dictionary of Constitutional Law page 615"). [Translator's note: this passage was set out in English in the judgment]

[T]he principle [of retrospectivity] was breached ... during the Nuremberg Trials. But, as mentioned above, this was an exception and was motivated by very strong desires to punish Nazi cruelty. Since the trials, the international community has stressed that the non-retrospectivity principle cannot be infringed.

This is evident in a number of human rights instruments created subsequently, such as:

[The court set out (in English) art 11(2) of the United Nations Universal Declaration of Human Rights; art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Eight Protocols; arts 4 and 15 of the United Nations International Covenant on Civil and Political Rights (1966); and art 9 of the American Convention on Human Rights, all of which essentially prohibit the use of retrospective criminal laws or the imposition of a heavier penalty than was applicable at the time the offence was committed, unless the act or omission was criminal under general principles of law recognised by the international community. The court also set out arts 22, 23 and 24 of the Rome Statute of the International Criminal Court (1998).]

The prohibition against the application of the principle of retrospectivity in Indonesian law has existed for a very long time.

1. [The court cited art 6 of the Algemene Bepalingen van Wetgeving voor Nederlands Indie (AB) Staatsblad 1847 No 23 of 1847]
2. [The court set out art 1(1) of the Criminal Code (see above).]
3. Law No 39 of 1999 on Human Rights,
Article 4 states: "The right to live, the right not to be tortured, the right to freedom of thought and conscience, the right to embrace a religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not to be prosecuted under retrospective laws are basic human rights that may not be diminished under any circumstances by any person".
Article 18(2) states that "every person must not be prosecuted to be punished or have a criminal penalty imposed upon them unless on the

basis of a law which was in existence at the time the crime was committed”.

4. [The court then set out art 28I(1) of the 1945 Constitution.]

Referring to the spirit of Article 1(1) of the *Wetboek van Strafrecht* [translator’s note: the Criminal Code], which is a universal principle, Prof Dr Harun Alrasaid, SH, an expert, expressed the opinion during the hearing that there is no possible interpretation other than that the non-retrospectivity principle is absolute ...

[According] to the expert opinion of Dr Maria Farida Indrati SH, MH, Article 28J(2) of the 1945 Constitution ... cannot be applied to Article 28I(1) because of the phrase “in any circumstances” ...

[T]he Court is of the opinion that all human rights can be restricted, unless the Constitution declares otherwise. This is consistent with Bryan A Garner’s conclusion in *Black’s Law Dictionary* on page 1318 ...: “A retrospective law is non [sic] unconstitutional unless it is constitutionally forbidden” [Translator’s note, this quote was set out in English in the judgment].

[The court stated that there was no single recognised definition of terrorism and that its definition was controversial.]

[T]he Court is of the opinion that all forms of terrorism must be eradicated, including the roots of the problem and its initial causes, in line with hopes which have developed in the international community. It was, therefore necessary to create legislation which provided guarantees for the prevention, avoidance and eradication [of terrorism]. This statute was intended not only to provide harsher punishments, but also to ensure that ... uncovering, handling and taking action against terrorism was made easier.

Law No 15 of 2003 ... has sufficiently fulfilled the hopes of jurists. However, it is not necessary for [it] to operate retrospectively, because the elements and types of crimes within terrorism are already types of crimes with serious penalties under prior laws.

The application of the retroactivity principle in criminal law is an exception permitted ... only in cases of gross violations of human rights ... According to the Rome Statute of 1998, gross human rights violations include genocide, crimes against humanity, war crimes, and crimes of aggression. Article 7 of [Indonesia’s] Law No 39 of 1999 on Human Rights classifies only genocide and crimes against humanity as gross human rights violations. Therefore, according to both the Rome Statute of 1988 and Law No 39 of 1999, the Bali bombing of 12 October 2002 cannot be categorised as an extraordinary crime to which the principle of retroactivity can be applied, but rather as an ordinary crime which was very cruel but which can still be dealt with under existing criminal laws ...

According to ... the generally-accepted ... *Stufen Theorie des Recht* of Hans Kelsen, legislation ... is to contain legal regulatory norms which are general and abstract. [It] can be said that in essence law-makers do not have authority to apply a legal norm ... to a concrete situation; this [power] should fall within the authority of judges, exercised through judicial processes, or the authority of administrative officials, exercised under ... administrative law.

Law No 16 of 2003, which derives from Interim Law No 2 of 2002 of 18 October 2002, declares the applicability of Law No 15 of 2003, which originates from Interim Law No 1 of 2002 of 18 October 2002. A declaration of the applicability of a legal norm to a concrete legal event is not appropriate and therefore cannot be justifiably included in ... legislation ... Therefore, the [legislative] application of Law No 16 of 2003 to a concrete incident – that is, the bomb blasts in Bali on 12 October 2002 which occurred before the law was issued – conflicts with the ... separation and sharing of powers which is adhered to in Indonesia's 1945 Constitution. In this case, law-makers can be considered to have exercised judicial power, referred to in Article 24(1) [of the 1945 Constitution] as a power independent from the power of the government ...

[The court went on to explain that if it held Law No 16 of 2003 to be constitutional, then it may set a bad precedent for law-makers who could then apply a legal principle in legislation to one or two concrete incidents that had occurred in the past, purely on the basis of the DPR's and government's political judgment. The court also stated that law enforcement bodies in Indonesia were required to act under just and certain laws, and could not simply create new laws to fit situations as they saw fit. Creating laws and applying them retrospectively is not consistent with art 1(3) of the 1945 Constitution which states that Indonesia is a state based on law.]

[For the reasons mentioned above, the court decided:]

To grant the Applicant's application for a review of Law No 16 of 2003 ... as against the 1945 Constitution;

To declare that Law No 16 of 2003 ... conflicted with Indonesia's 1945 Constitution ...;

To declare that Law No 16 of 2003 ... has no binding legal effect.

The Dissenting Opinion

Four justices of the Constitutional Court – Maruarar Siahaan, SH; I Dewa Gede Palguna, SH, MH; Prof HAS Natabaya, SH, LL.M; and Dr Harjono, SH, MCL [issued the following dissenting opinion].

I. In general, cases in which retrospective criminal laws have been applied have involved serious crimes against humanity, genocide, [and] war crimes. The application of retrospective [laws] has represented a demand for justice because if the human rights of the perpetrators were protected on the grounds that retrospective treatment was prohibited, this would be seen to strongly contradict human morality because it would, in fact, permit greater and grosser violations of human rights. Therefore, justice has been the rationale for overriding the principle of non-retroactivity with limitations in certain conditions.

How must we view Article 28I of Indonesia's 1945 Constitution which states that ... the principle of non-retroactivity is a human right which cannot be set aside under any circumstances? Its literal wording [implies]

that the principle of retroactivity is absolute. However, if viewed systematically, one human right is not absolute because in the exercise of [their] rights and freedoms people must respect the human rights of others and must be subject to limits as defined by Law ...

Reading Article 28J(2) together with Article 28I(1), we can conclude that the principle of non-retroactivity is not absolute. Exceptions can, therefore, be recognised within the framework of 'satisfying just demands in accordance with moral considerations, religious norms, security and public order.'

... [T]he principle of non-retroactivity incorporates the principle of Legality which ... is provided for in Article 1(1) of [Indonesia's] Criminal Code and has, in fact, long been accepted as a fundamental part of the law even though it was not stated explicitly in the Constitution ...

[I]t is insufficient to analyse only the articles of the constitution ... In order to truly understand the intention of a State's Constitution, we must ... study how the text came into existence, explanations for it, and the atmosphere in which the text was written ... [I]t is the task of Constitutional Court judges to interpret ... the Constitution when ambiguities arise because of contradictions between its articles ...

[The court then set out Article 1(1) of the Indonesian Criminal Code] ... [T]his Article contains important principles of Criminal Law ... and its aim is to provide Legal certainty, prevent the misuse of power and to strengthen the application of the Rule of Law.

... [W]e must consider whether a strict application [of the principle of non-retrospectivity] will give rise to injustice, and undermine religious values, security and public order ... [because] the Law did not intend to protect individuals in this manner. A balance must be struck between Legal certainty and Justice when attempting to ascertain the meaning of Article 28I(1) of the 1945 Constitution ...

[This] balance ... can be achieved using the following formula:

- a. Justice is not achieved through a high level of Legal certainty, but by balancing legal protection for the victims and perpetrators of crime;
- b. The more serious the crime committed, the greater the Justice that must be achieved over Legal certainty (Academic Research Paper on Human Rights, Supreme Court, 2003).

Justice is a higher value than legal certainty ... [T]hus, if there is a conflict between these two principles, the principle capable of bringing about real justice is prioritised. Therefore, enacting a limited Retrospective Law does not violate the 1945 Constitution, particularly in relation to crimes which are extraordinary in terms of the method [used to perpetrate the crime] and its consequences (victims). It was not the intention of those who made the 1945 Constitution to entrench the principle of Non-retroactivity absolutely without exception.

... [E]nacting [retrospective laws] of this type ... does not always constitute a violation of Human Rights and is assessed using three factors:

- The magnitude of the public interest which the Law must protect;
- The rights violated as a result of the Enactment of the Law being less significant than the public interest violated;
- The nature of the rights affected by the retrospective Law (Robin C Truworthly, 1997).

... The principle of Non-retroactivity essentially prohibits criminalizing an act that was not a crime when it was committed or increasing the proscribed penalty for a prohibited act ... [T]he Bali bombings ... were, essentially, already prohibited crimes and subject to the same maximum penalties under prior criminal Laws ...

Applying the three abovementioned factors for assessing the validity of ... a retrospective Law of limited operation, the great number of victims, that the acts were directed towards particular races or groups, the extensive and organised network and trans-national preparations, the extraordinary social, economic and political consequences ... and the public interest which needs to be protected, outweigh the individual Basic Rights of the applicant. The limited retrospective application of Law No 15 of 2003 ... [through] Law No 16 of 2003 is sufficiently acceptable as an exception to the general principle of Non-Retroactivity ...

[The court further discussed the principle of non-retroactivity, other legal principles, and a number of international treaties referred to in the translator's introduction.]

Further, during the Nuremberg Trials a number of arguments were put forward as to why the principle of non-retroactivity is not absolute ...

[The court set out five arguments: (1) The Radbruch argument of the superior and compelling needs of justice; (2) Knowledge of Guilt and/or Knowledge that the Action Could be Subject to Later Punishment; (3) General Principles of Justice Override Existing Domestic Law; (4) Non-Retroactivity Through Re-Interpretation of the Prior Law; and (5) Clear Violation of Prior Law. These were also discussed by the majority.]

[From the above discussion it can be concluded that] the essence of the principle of non-retroactivity is to protect against the criminalisation of an act that was not considered a crime when the act was perpetrated ... Also prohibited are new laws which stipulate a harsher penalty or punishment than the penalty or punishment applicable at the time the act was committed ... [Retrospective legislation is justified provided that] it does not violate the two prohibitions mentioned above ...

What about the Bali bombings? It is true that legally the bombings in Kuta, Bali were not war crimes and do not satisfy the legal definition of crimes against humanity. But the lack of a legal definition does not automatically mean it negates the event and legal consequences which arose from it or frees the perpetrators, because this would undermine an extremely fundamental principle of general criminal law ... that is, that 'a crime must not go unpunished' (aut punere aut de dere, nullum crimen sine poena).

[The court then set out the death and injury count, destruction to property and economic crisis caused by the bombing.]

[But even] without mentioning these figures and statistics, and by merely watching the television broadcast which captured the cruelty of the event, we believe ... that the bombings in Kuta, Bali were crimes that satisfy the

five arguments [which justify] the principle of non-retroactivity being set aside ...

Based on the above considerations, there are insufficient grounds to declare that ... Law No 16 of 2003 ... has deviated both from normative limitations recognised in various international legal instruments and practical arguments in relation to setting aside the principle of non-retroactivity because:

- a. The acts declared as crimes of terrorism by Interim Law No 1 of 2002 already constituted criminal acts or crimes under prior laws;
- b. Interim Law No 1 of 2002 does not increase the penalties for the acts which under Interim Law No 1 of 2002 were declared to be crimes of terrorism.

... [T]he next question is, does the principle of non-retroactivity adopted in Interim Law No 1 of 2002 violate the 1945 Constitution, particularly Article 28I(1)? [The court set out Article 28I(1) of the Constitution.]

... [T]he inclusion of this Article in the 1945 Constitution, which is an adaptation of Article 15 of the International Covenant on Civil and Political Rights (ICCPR), was coloured by long debate in both the Ad Hoc I Committee of the Peoples' Consultative Council – the committee which prepared the draft text of amendments to the 1945 Constitution – and hearings of Commission A during the Annual Session of the Peoples' Consultative Council in 2000 ... The source of debate was the term 'non-derogable rights' used in Article 15 of the ICCPR, which was translated as 'cannot be diminished under any circumstances' ... [S]ome interpreted this as absolute, while the majority of others held the opposite opinion. [They thought that the 'absolute' interpretation] would create contradictions, [b]ecause the implementation of a person's basic rights may contradict the same basic rights possessed by others. Differences of opinion continued until just before a decision was made by the Plenary Session of Commission A at the Annual Session of the Peoples' Consultative Council in 2000 and only after Article 28J was included ... [The court then set out Article 28J(1) and (2) of the Constitution.]

Therefore ... Article 28I(1) of the 1945 Constitution was never intended as an absolute provision ... provided that any limits upon it were imposed through or under law ...

... Hypothetically, if Article [28I] had to be applied literally, it would not be permissible to prosecute using a new retrospective law, even if the new law was more lenient for the defendant than ... the previous law. If not being prosecuted on the basis of a retrospective law is a right, but if the new law is more lenient, would the provision preventing prosecution on the basis of retractive law still constitute a right? ... The provision of Article 1(2) of the Criminal Code states that: 'If a law is changed after an act has been committed, the most advantageous law will be applied to the defendant.' ... [T]his means that ... it is a defendant's right to be dealt with under the new law, meaning that a retrospective law would be applied [to the defendant] ...

It would seem highly unjust to enforce new rules if these rules are harsher than old laws ...

The applicant's requests need to be studied on the basis of justice. Does ... the Law for which an application for review was made (terrorism) establish a new criminal act in absolute terms, that is, make an act previously not criminal into a criminal act? Crimes of terrorism are not new criminal acts at all because, despite the prior lack of a Terrorism Law, the actions subject to criminal penalty under the anti-terrorist law were subject to the previously applicable criminal law because causing the death of another was an ordinary crime ... Someone who perpetrated crimes of terrorism prior to the enactment of the Terrorist Law can still be punished under criminal laws which were previously applicable. This matter was fully understood by the perpetrators because they [felt they] had to hide from or avoid the authorities after these acts were committed

...

The principles of non-retroactivity and legality were initially intended to protect members of the community from arbitrary rulers who, through law-making institutions, could create laws in accordance with their overtly repressive desires and use the law as a tool of oppression solely in their own interests ... Terrorism is a crime which does not target distinct individuals; rather the community is the target. This differentiates terrorism from general crimes. Thus the Anti-Terrorist Law aims to directly protect the community from disturbances caused by acts that can create extraordinary fear or terror. The function of the State to protect members of the community is clear in this case; that is, it must exercise its mandate contained in the Preface to the 1945 Constitution: 'to protect all the people of Indonesia and their entire native land, improve public welfare, advance the intellectual life of the people and contribute to the establishment of a world order based on freedom, abiding peace and social justice'.

... During investigations into the Bali bombings, investigators had greater powers than [they have under] normal procedure. However, this does not mean that the defendants no longer had their rights arising from the presumption of innocence, the right to be tried by an independent tribunal, and the right to ... procedural fairness or due process of law. The defendants still have the right to obtain compensation or rehabilitation for treatment not grounded in law.

IV. According to international law, human rights and civil and political rights are not absolute. A person's right may conflict with the right of another, and [so] one person's right must be sacrificed for the right of another. Individual rights can violate community values and the public interest. Both the Universal Declaration of the United Nations (UN) on Human Rights and the International Covenant on Civil and Political Rights recognise that a State can limit rights if it considers it necessary to protect certain public interests. Article 29(2) of the Universal Declaration of the UN states: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in democratic society.'

Based on the above provisions of Article 29(2) of the Universal Declaration of the UN it can be concluded that limitations on human

rights are permissible and [can] even satisfy the criteria of 'justice' in accordance with morality, public order and general welfare in a democratic society.

[The court then set out art 4 of the International Covenant on Civil and Political Rights, which states that 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. The court then considered whether international human rights were universal. It referred to the International Conference on Human Rights in Vienna of 1993 in which it was declared that all human rights are universal.]

Indonesia recognises that Human Rights are universal. However, it is necessary to note that the international community, as declared in the Vienna Declaration of 1993, recognises and agrees that their implementation is the authority and responsibility of all state governments in observance of the diversity of value systems, history, culture, political systems, levels of social and economic growth and other factors of the nation in question.

... [T]here are proponents and opponents of the use of the non-retroactivity principle in criminal law – known as the principle of 'nullum delictum, nulla poena sine praevia lege poenali'.

[The court then summarised a number of arguments it had discussed in favour of retrospectivity and set out art 11(2) of the Universal Declaration of Human Rights and art 15 of the International Covenant on Civil and Political Rights.]

From the above two articles in the Universal Declaration and the International Covenant on Civil and Political Rights, it is apparent that the principle of Nullum Delictum only applies if the relevant crime was not a crime under national or international law. Consequently, if the crime in question is a crime under national and international law, the principle of Nullum Delictum cannot be employed.

It is also appropriate to note that Article 15(2) of the International Covenant on Civil and Political Rights above states that nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations.

Based on this rule it can be concluded that if the act was a crime under the general principles of law recognised by the community of nations, the principle of Nullum Delictum can be overridden ...

... [T]he State has the obligation to protect all of its citizens from any criminal threat, both national, trans-national and international. The state also has the responsibility to protect its sovereignty and maintain

national unity and integrity from all threats, both domestic and foreign. Based on the above considerations the government saw a compelling need (public emergency) to issue Interim Law No 2 of 2002 ...

In addition to the considerations in the above paragraph, the United Nations also issued two ... Conventions within the framework of suppressing international terrorism. These conventions include:

- i. International Convention for the Suppression of Terrorist Bombings (1997); and
- ii. International Convention for the Suppression of the Financing of Terrorism (1999).

Further, previous to this the United Nations issued two Declarations:

- i. Declaration on Measures to Eliminate International Terrorism (1994); and,
- ii. Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (1996).

... It is apparent that the international community had agreed to do away with all forms and manifestations of international terrorism ... [and] that those responsible for terrorist acts had to be brought before the courts.

[The court then discussed art 28I(1) of the Constitution and art 1(1) of the Criminal Code again and repeated its conclusion that Law No 16 did not make criminal an act that was previously legal.]

V. Based on all of the above considerations ... [Law No 16 of 2002, Interim Law No 2 of 2002, and Interim Law No 1 of 2002] do not contravene the 1945 Constitution because they are limited in application and intended to uphold justice in a special situation. There are no compelling reasons to disallow the application of the Law on the Eradication of Crimes of Terrorism to the Bali Bombing of 12 October 2002.

This decision was reached at a Consultative Meeting of Justices on Thursday 22 July 2004 and read aloud today, Friday 23 July 2004, by Chief Justice Prof Dr Jimly Asshiddiqie SH on behalf of the Members of the Tribunal, Prof Dr HM Laica Marzuki, SH; Prof HAS Natabaya, SH, LL.M.; Prof HA Mukthie Fadjar, SH, MS; Dr Harjono, SH, MCL; H Achmad Rustandi, SH; I Dewa Gede Palguna, SH, MH; Maruarar Siahaan, SH; and, Soedarsono, SH, assisted by the Deputy Registrar Widi Astuti, SH, and in the attendance of the Lawyers for the Applicant and the Government.

Notes

* The decision upon which this commentary and translation is based is located on <www.hukumonline.com>. It is also available on the Constitutional Court's website <www.mahkamahkonstitusi.go.id>.

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- 1 However, the decision was discussed and decided by the judges on 22 July 2004.
- 2 Although the Supreme Court was required to exercise the jurisdiction of the Constitutional Court until it was established, in practice cases were registered with the Supreme Court, but the court did not hear or decide any of them. The Supreme Court simply transferred all these cases to the Constitutional Court upon its establishment.
- 3 Constitutional Court judges must have high levels of integrity, be of impeccable character, be fair and just, have a complete understanding of constitutional and administrative law, and not hold government office (art 24C(5) of the Constitution). The court consists of nine judges; the DPR, President and Supreme Court put forward three candidates each (art 24C(3) of the Constitution; art 4(1) of the Constitutional Court Law). The seven member judges can serve a maximum of two five-year terms. These judges elect their own Chief and Deputy Chief Justices (art 24C(4) of the Constitution; art 4(2) of the Constitutional Court Law), who can hold office for three years (art 4(2) of the Constitutional Court Law).
- 4 DPR = Dewan Perwakilan Rakyat.
- 5 Article 13(a) states that any person who intentionally assists or facilitates the perpetrators of terrorism by providing or lending money, property or other assets to the perpetrators faces between three and 15 years' imprisonment.
- 6 The full name of the Law is: Law No 16 on the Stipulation of Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali Bombings on 12 October 2002 as a Statute.
- 7 Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism.
- 8 Law No 15 of 2002 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism as a Statute.
- 9 Interim Law No 2 of 2002 on the Application of Interim Law No 1 of 2002 on the Eradication of the Crime of Terrorism to the Bali Bombings of 12 October 2002.
- 10 For the Law's full citation, see fn 6 above.