

The Amrozi Bali Bombing Case: is Indonesia's Anti-terrorism Law Unconstitutional?

Background

On 8 August 2003, Amrozi bin Nurhasyim ('Amrozi') was found guilty of various charges relating to his purchase of the Minivan and bomb-making chemicals used in the Bali bombings of 12 October 2002. These charges were laid under an anti-terrorism regulation that was proclaimed by President Megawati one week *after* the Bali bombings. An initial appeal to the High Court against Amrozi's conviction was heard in September but the conviction was upheld.

An appeal has now been lodged with the Supreme Court. One of the main grounds for appeal is that the anti-terrorism regulation breaches the prohibition against retrospective prosecution in Article 28I(1) of Indonesia's Constitution. This constitutional issue will likely eventually be decided by the newly-formed Constitutional Court.¹

Indonesian Law and its Legal System

The Indonesian Constitution sits at the apex of the hierarchy of Indonesian law. Below this sit laws passed by the Indonesian Parliament, the Dewan Perwakilan Rakyat (DPR), and then lower again still 'Government Regulations in lieu of law' (Peraturan Pemerintah Pengganti Undang-Undang, or 'Perpus').² Article 22 of the Constitution provides that, 'in the event of a compelling emergency', the President may issue a Perpu. Perpus must be approved by the DPR at its next session.

Indonesia has a civil law system. Unlike countries such as Australia

which have a common law heritage, the Indonesian system is not based on the doctrine of precedent (*stare decisis*). As a consequence, Indonesia does not have an established body of caselaw. This makes it more difficult to anticipate how complex matters of law, such as the constitutional issue in the Amrozi case, will be decided by the courts.

The 2002 Anti-terrorism Law

On 18 October, six days after the Bali bombing, President Megawati issued Perpu 1/2002 and 2/2002. Perpu 1/2002 was a revised version of an anti-terrorism Bill previously debated by the DPR. It provided that an act of terrorism, or the planning or assisting of an act of terrorism, could be punished by death. Section 46 allowed for its retrospective application if this was authorised by another Perpu or law. Perpu 2/2002 authorised that retrospective application 'in relation to the [Bali] bombing incident'. Perpus 1/2002 and 2/2002 were subsequently approved with 'minimal changes' by the DPR in March 2003.³ With the DPR approval, Perpu 1/2002 was renamed Law 15/2003.

The Constitutional Ban on Retrospective Prosecution

Significant amendments were made to the Indonesian Constitution in 2000. In particular, a new chapter on human rights was added. In this chapter, Article 28I(1) says in part:

... the right not to be prosecuted under retrospective laws [is a] basic human right that may not be diminished under any circumstances at all.⁴

A number of international human rights conventions and other agreements contain similar provisions to Article 28I(1). However, many also recognise an 'exception' for acts that offend against internationally accepted legal standards. For example, Article 15 of the International Covenant on Civil and Political Rights (ICCPR) states:

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 ...
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.

An act of terrorism that results in the mass killing of civilians not connected with any military conflict is clearly a criminal act within the scope of ICCPR Article 15(2).⁵ Whilst there is no provision in the Indonesian Constitution that directly incorporates Article 15(2), there is Article 28J(1) and (2), which state:

Each person is obliged to respect the basic human rights of others in orderly life as a community, as a people, and as a nation. In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others ...

Shortly after the 2000 Constitutional amendments, it was suggested by the

then Indonesian Minister for Justice and Human Rights that an individual's Article 28I(1) protection against retrospective prosecution was predicated on him or her not violating the basic human rights of others in Article 28J.⁶ This reasoning has some support in the explanatory notes accompanying Law 26/2000.⁷ Law 26/2000 on Human Rights Courts was enacted by the DPR in 2000 to try various persons, including military officers, of human rights violations in some areas of East Timor during the violence after the 1999 independence referendum. Like the anti-terrorism law, Law 26/2000 purports to have retrospective application. Similar arguments against the retrospective aspects of Law 26/2000 were raised in at least some of the East Timor trials and are expected to be raised again in appeal hearings in the future.

The Issue of Retrospectivity at the Amrozi Trial

Amrozi's lawyers challenged the constitutionality of the retrospective aspect of Law 15/2003 at the start of the Amrozi trial in May 2003.⁸

No English language transcript of the trial or appellate judges rejection of the constitutional argument is available. However, one commentator has observed that:

It remains unclear ... whether the [trial] judges of the Denpasar court based their decision on a broad reading of the Constitution or on customary international law. Given the experience of the East Timor Trials, the former is more likely, yet the Bali Court further illustrates the desire of Indonesian judges to overlook Article 28I(1).⁹

The reference to East Timor trials may relate to the decision of Judge Cicut Sutiarto in the trial of Col. Herman Sedyono charged under Law 26/2000 in relation to a massacre at St. Ave Maria Church in September 1999. According to a report in the *Jakarta Post* the judge considered that:

Article 28I should be read in conjunction with the subsequent clause J. Thus we may conclude that the rights tribunal law [ie Law 26/2000] is based on Article 28J ... The value of justice is higher than legal certainty ... where the non-retroactive principle can be set aside. Should there be any dispute over legal certainty, then we should opt for justice.¹⁰

Thus Indonesian courts, for the time being at least, appear to be validating the retrospective operation of Laws 26/2000 and 15/2003 by reading the protection contained in Article 28I as being subject to the respect of human rights of others in Article 28J.

What Happens if Amrozi's Appeal is Successful on Constitutional Grounds?

Amrozi was not charged with any offences under the ordinary Indonesian criminal code. Like Australia, Indonesian law incorporates the double jeopardy principle.¹¹ In general, the Australian interpretation of double jeopardy ordinarily prohibits a person from being charged twice in relation to the same conduct. However, if there are significantly different elements that make up the separate offences, a person could potentially be charged a second time if the initial charges fail. This said, an Australian court would still have the option of staying proceedings in the case of the second round of charges on the grounds of abuse of process.¹²

The exact nature of the double jeopardy principle in Indonesian law is unclear, so any forecasting must be speculative. Nonetheless, whilst subsequent charges against Amrozi under the Criminal Code could well be possible, there may be a risk that an Indonesian court would consider that such charges infringe on the double jeopardy principle and the case would not proceed. In this situation, Amrozi might potentially escape prosecution altogether. However, given judicial interpretation to date of Articles 28I

and 28J, this is more of a theoretical possibility than a likely one.

1. The Constitutional Court has the authority to make 'final decisions in the review of legislation against the constitution': Article 24C(1) of the Constitution.
2. There are other forms of legislation in the hierarchy but none of them are relevant here.
3. Ross Clarke, 'Retrospectivity and the Constitutional validity of the Bali bombing and East Timor trials', *Australian Journal of Asian Law*, 2003 5(2), 2–32.
4. Note this is not an official translation of the Constitution.
5. See the 1994 UN Declaration on Measures to Eliminate International Terrorism.
6. International Crisis Group *ICG Asian Report no. 12*, February 2001, p. 16. http://www.intl-crisis-group.org/projects/asia/indonesia/reports/A400227_02022001.pdf
The debate surrounding in inclusion of articles 28I and 28J are well covered in Clarke, op. cit., pp. 2–8.
7. International Crisis Group, op. cit., p.16.
8. They also claimed that the charges did not provide sufficient detail to demonstrate that Amrozi was materially involved in the planning of the bombing.
9. Clarke, op. cit., p. 20.
10. Tertani Simanjuntak 'Judges insist trial must go on', 10 April 2002.
11. Tim Lindsey 'Appeals could prolong Amrozi case', *Lateline* 8 August 2003.
12. *Pearce v the Queen* 194 CLR 610 at 620–621. See also *R v Carroll* 194 ALR 1 at 10–13.

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ISSN 1328-8016