

Features

Hope is faint for the Bali six

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The Indonesian legal system has missed a chance for reform, argue **Tim Lindsey** and Simon Butt

ON Tuesday, Indonesia's Constitutional Court handed down a landmark judgment that retains the death penalty and leaves six members of the Bali nine facing the firing squad.

To reach its decision, the court diluted fundamental guarantees of rights in Indonesia's new, amended democratic constitution. The decision is hard to understand legally or morally and it does not bode well for Indonesia's slow transition to rule of law.

The new Constitutional Court is not an appeal court. Its jurisdiction is to review legislation against the constitution but it is the first court in Indonesia with this power in almost 40 years.

It was therefore welcomed with much optimism by the reformers who toppled Suharto in 1998 and have pushed ever since for democracy, separation of powers, strengthened human rights and a more accountable government. But this time they have been disappointed.

The specific question before the court was a simple one. Did the death penalty under the narcotics law infringe the fundamental right to life in articles 28A and 28I(1) of the bill of rights in chapter XA of the constitution? This provision was copied from the Universal Declaration of Human Rights, but in Indonesia it was strengthened by the rider that the right to life "cannot be limited in any way".

Nevertheless, by a majority of six to three, the court read down article 28I, finding that the right to life could be limited and did not prevent the court from executing narcotics offenders, including the applicants, Myuran Sukumaran, Andrew Chan, Scott Rush and two Indonesian women, Edith Yunita Sianturi and Rani Andriani, as well as dozens of other drug offenders, foreign and local, on death row.

To justify this finding, the court relied on the testimony of constitutional drafters and referred to previous Indonesian constitutions and statutes and various international conventions that do not cast the right to life as absolute. But surely resorting to material outside the constitution is justifiable only if its words are unclear? In this case, minority judges pointed out, the constitution is unambiguous: the right to life is absolute. Otherwise what is the point of inserting the words "cannot be limited in any way" in the first place?

This is not the first time the court has marginalised the guarantee in article 28I(1). The same article also grants a right to be free of retrospective prosecution that likewise cannot be limited in any way. In the case of one of the Bali bombers, Masykur Abdul Kadir, the court upheld the prohibition. But in the case of Abilio Soares (former governor of East Timor, facing conviction for crimes against humanity) it read down the no limits provision and allowed him to be prosecuted.

The Bali nine decision, read with the Soares case, makes it clear the Constitutional Court's position is that the rights in article 28I(1), including the right to be free from the operation of retrospective laws and the right to life, can, in fact, be limited for offenders who have committed particularly grave crimes, including drug offences.

The majority emphasised that international conventions allowed the death penalty for the "most serious crimes" and that the UN Convention Against Illicit Traffic in Narcotic Drugs Psychotropic Substances 1988 classified drug offences as "particularly serious". They then found no significant difference between "particularly serious" drug offences and internationally recognised "most serious crimes" such as genocide and crimes against humanity.

This is disturbing, but what is especially troubling is that the court seems to regard terrorism as being less serious than drug smuggling.

In the Kadir Bali bombing case, the court specifically decided that the bombing, which killed more than 200 people, was not sufficiently grave to set aside the guarantee against retrospective prosecution.

The result is that Indonesia's Constitutional Court has effectively trashed strict constitutional guarantees of fundamental rights, preserved the death penalty and formally classified terrorism as not among the most serious of crimes. These deeply conservative findings suggest the court simply does not appreciate the new start Indonesia's recent reforms offer for human rights, or the clear international trend towards abolition, or international repugnance for terrorism. For all these reasons the Bali nine decision is a substantial setback for human rights and rule of law in Indonesia.

And it leaves the Bali six just one, faint chance. The court, without explanation, recommended that existing death sentences be carried out but that the death penalty should be commuted in future cases to a life sentence, subject to a 10-year probation period. The injustice that this option, quite arbitrarily, will not be available to the Bali six may become grounds for a last-ditch appeal to President Susilo Bambang Yudhoyono for clemency. So much for a guaranteed right to life.

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