



Appeal may not help drug runners

*Can the Bali Nine
beat the death penalty,
asks Tim Lindsey*

ALI Nine members Scott Rush, Andrew Chan and Myuran Sukumaran, convicted in Indonesia of an attempt in April 2005 to smuggle more than 8kg of heroin into Australia, await execution by firing squad or lethal injection. They are now running cases in that country's Constitutional Court, claiming that the death penalty is unconstitutional.

The bitter irony is that even if they win, it may not be enough to save them. The reasons for this relate to major differences about how courts in different jurisdictions enforce their constitutions. In most British tradition common law countries, the power to hear appeals and the power to review statutes against the constitution are effectively fused in one court, as in our High Court or the US Supreme Court. But in European tradition civil law systems — the vast majority of legal systems in the world today — this has not always been the case.

In some European-tradition systems, the authority of constitutional courts has often been tightly restricted to constitutional review, sometimes preventing them from hearing appeals from other courts or reversing their decisions. Indonesia's judicial system was inherited on independence in 1945 from the former colonial rulers, the Dutch, who in turn developed their legal system from the Napoleonic model, so Indonesia's Constitutional Court fits squarely into this category.

This means the current cases are not, in fact, appeals, as claimed in some reports, but "in principle" challenges to the constitutionality of statutes — in this case, the drugs legislation under which the Bali Nine were convicted.

This is why the Constitutional Court has been questioning the Australians' lawyers as to whether they should even be heard at all. Should the right to interpret Indonesia's constitution be restricted to citizens? This problem doesn't arise for Chan and Sukumaran, because their lawyers joined two Indonesian death row inmates to their action, neatly short-circuiting the "standing" issue. But it has been an issue for Rush. The consequences of the absence of an appeal jurisdiction in Indonesia's Constitutional Court go well beyond problems of legal standing.

If the "Bali Three" do win, the court will probably declare the death penalty to be contrary to Article 28I of the constitution, which provides that the right to life "cannot be diminished under any circumstances whatsoever".

But this may not help them, because the Constitutional Court says that its judgments cannot be applied to earlier decisions of other courts.

Although from the moment of decision the death penalty would become unconstitutional, existing sentences would not be altered. This approach is intended to give certainty to court decisions and prevent constitutional reviews from becoming de facto appeals.

This was made clear in a 2003 case, involving Masykur Abdul Kadir, a conspirator on the fringes of the first Bali bombing in 2002. The Constitutional Court accepted his claim that it was unconstitutional to apply Indonesia's tough new anti-terror laws to the Bali bombing, because they were retrospective, something also banned by Article 28I of the constitution. Judges, prosecutors and police complied from then on, but Kadir, although convicted under those same anti-terror laws, stayed in jail. His (now unconstitutional) conviction remained intact because it was made before the Constitutional Court decision. The Bali Three are now in the same position as Kadir,

only facing a far more severe penalty.

So will there be any benefit for the six Australians facing death if the Bali Three win? Maybe. A Constitutional Court declaration would probably be used in final Supreme Court appeals, although Chief Justice Bagir Manan has already said it would not be proper grounds for appeal to his court.

But, although a finding that the death penalty is unconstitutional would technically not void any existing sentences, there might be an argument that the Government can no longer carry out the executions. And it would be difficult politically for the Government to do so: an international outcry would be inevitable. The decision might form strong grounds for a clemency application to Indonesia's President Susilo Bambang Yudhoyono to substitute imprisonment for execution. It could even be enough to persuade him to break his longstanding promise not to use his powers to help convicted drug offenders. There is another catch. Bali bombers Amrozi, Mukhlis and Imam Samudra have been dodging execution since 2003. If the Bali Nine escape death, they might rely on the same grounds to also avoid the death penalty. There can be no doubt that Jakarta is well aware of this and that creates another twist in the already complex array of factors that will ultimately determine the fate of the Bali Nine. The Indonesian Government has waited years for the Bali bombers and has only executed a few drug offenders in recent years.

Fifty-nine more languish on death row. Jakarta is likely to let every possible legal avenue be exhausted, including litigation and clemency.

The Constitutional Court is neither a quick fix, nor the end of the road.

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