Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials

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This article discusses two instances of retrospective prosecution currently under way in Indonesia: the trials of those accused of perpetrating the Bali bombing and the trials of Indonesia’s ad hoc Human Rights Court for East Timor. Both sets of trials have been clouded in uncertainty due to a recent constitutional amendment which prohibits retrospective prosecution. The prosecution of crimes against humanity is a widely acknowledged exception to the principle of non-retrospectivity. Despite this, uncertainty over the validity of the Bali and East Timor trials has not been authoritatively resolved. The issue of retrospectivity will be central to any appeals; and of critical import to the outcome of such cases is the proposed Constitutional Court and the emergence of judicial review in Indonesia. A ruling on the constitutional validity of retrospective prosecution could potentially exonerate those responsible for grave human rights violations in Bali and East Timor; whatever the outcome, these cases will likely prove defining moments for the Indonesian judiciary.

Introduction

On 12 October 2002, terrorists bombed two nightclubs in Bali causing the loss of over 200 lives. A special court in Denpasar is now going through the painstaking task of prosecuting those accused of perpetrating the bombing. Lawyers for Amrozi bin Nurhasyim and Imam Samudra – two of the main defendants – argue that the trials are invalid on the grounds of retrospectivity. Specifically, they argue that the anti-terrorism legislation under which the two have been charged is invalid, as it breaches a recent constitutional amendment prohibiting retrospective prosecution. The judges of the Bali Court rejected this argument and upheld Indonesia’s anti-terrorism legislation.

The retrospectivity of the Bali bombing trials will probably be a key issue on appeal and, given recent constitutional reforms that establish a Constitutional Court, it is unclear how the matter will be resolved. A similar situation has unfolded in the trials conducted by Indonesia’s ad hoc Human Rights Court for East Timor (the East Timor trials). These were convened to try senior military, police and civilian officials in connection with serious human rights violations committed in Timor during
In these cases, the retrospectivity of the prosecuting legislation has also been in issue. Those convicted have already indicated they will appeal on constitutional grounds.

This article has two aims. The first is to analyse Indonesia’s recent constitutional prohibition on retrospective prosecution and determine whether the Bali bombing and East Timor trials are a justifiable exception to the principle of non-retrospectivity. A brief survey of different approaches on the retrospectivity issue suggests that both sets of trials are justifiable, notwithstanding their apparent illegality under Indonesian constitutional law.

The second aim is to discuss Indonesia’s proposed Constitutional Court and examine its potential impact on the projected appeals from the Bali and East Timor trials. The Constitutional Court, if implemented successfully, will represent a major development for Indonesia’s legal system and appeals from either the East Timor or Bali trials on the constitutional validity of retrospective prosecution would represent the first major instance of judicial review since the fall of Soeharto’s New Order regime in 1998. The political importance of both sets of trials for the Megawati Government has attracted much attention (International Crisis Group, 2002; Parkinson, 2002; Reuter, 2003). On the other hand, the legal issues – in particular the constitutional validity of retrospective prosecution – have been largely overlooked. There is, however, no doubt that once one of the East Timor or Bali cases is appealed to either the Supreme Court or the proposed Constitutional Court, the issue of retrospectivity will have to be resolved. This should prove a defining moment for Indonesia’s fledgling post-reformasi legal system.

Background to Constitutional Reform

On 18 August 2000, Indonesia’s Majelis Permusyawaratan Rakyat (MPR) or People’s Consultative Assembly passed the Second Amendment to Indonesia’s 1945 Constitution.2 In a 12-day sitting, the 700-member MPR significantly reformed the Constitution, particularly in the area of human rights. The Second Amendment was the culmination of nine months of preparation by the Ad Hoc Committee (PAH 1) of the MPR’s Working Committee, which included provincial consultation meetings and international study missions (International Crisis Group, 2001: 15). Throughout the drafting process, PAH 1 engaged in intense negotiation with representatives of the MPR’s political blocs3 and the final draft tabled for debate was considered the result of political deals and compromise – a situation common to all of Indonesia’s recent constitutional amendments (National Democratic Institute for International Affairs, 2000: 3).
The Second Amendment included the addition of a Bill of Rights – Chapter XA of the Constitution. It is the first meaningful protection of human rights in Indonesia’s 1945 Constitution and it represents a radical shift in Indonesia’s constitutional philosophy from essentially authoritarian to a more liberal–democratic model. Chapter XA was drawn substantially from the Universal Declaration of Human Rights (UDHR) and it provided a far more extensive constitutional protection of human rights than that offered by many developed states (Lindsey, 2002: 254). Thus, the Second Amendment was made in the spirit of widespread reform, with the MPR focused on using constitutional amendments to stimulate Indonesia’s transition to democracy and to guarantee the protection of human rights.

Included in Chapter XA is art 28I(1) which provides that:

[T]he right not to be prosecuted on the basis of a retroactive law [is a] human right … that cannot be diminished under any circumstances.

This provision is based on art 11(2) of the UDHR which prohibits prosecution on the basis of retrospective legislation (National Democratic Institute for International Affairs, 2000: 13). The inclusion of this provision was extremely controversial. On the one hand, it protected an important human right – the right not to be prosecuted for an act that was legal at the time it was performed – while, on the other, it appears to be a significant impediment to the prosecution of past human rights violations.

**Evaluation of Article 28I(1)**

**An Appropriate Constitutional Provision?**

Protection from prosecution on the basis of retrospective legislation is an important individual right worthy of significant protection – so much so, that it is enshrined in art 11(2) of the UDHR and art 15(1) of the International Covenant on Civil and Political Rights (ICCPR). Further, the Constitutions of countries as diverse as South Africa, France, India, Argentina and the United States either expressly prohibit retrospective prosecution or do so via a more general prohibition on retrospective legislation (Edinger, 1995: 17). Such substantial protection exists due to the severe breach on personal rights that retrospective prosecution entails and the effect retrospectivity has on the provision of a fair trial (Lawyers Committee for Human Rights, 2000: 20).

Given such widespread consensus on the importance of protecting against retrospective prosecution, an innocent observer might have expected little objection to the inclusion of art 28I(1) in Indonesia’s Constitution. Yet, the inclusion of art 28I in the Bill of Rights was met with
severe criticism from international and domestic human rights activists. Amnesty International described the amendment as a potential ‘backdoor’ for those responsible for massive human rights violations (Amnesty International, 2000: 1), while the Indonesian Legal Aid and Human Rights Association called the amendment ‘disturbing’ (Chandrasekaran, 2000: 1). Further, it was generally agreed that the inclusion of the principle of non-retrospectivity in the Constitution was inappropriate. For instance, Professor Muladi, a former Minister of Justice and Human Rights, stated that:

[A]lthough non-retroactivity is a general principle of the law, it would be better not to include it in the Constitution. (Susantri, 2001: 1)

The importance of the right not to be subject to retrospective prosecution did not draw much attention, especially when compared to the international and domestic furore concerning the amendment’s potential impact on human rights trials (Amnesty International, 2000: 1). Similarly, little mention was made of the need to restrain government from arbitrarily prosecuting past acts. However, it was the words, ‘cannot be diminished under any circumstances’, that seemed to explain the controversy. This appeared to make the right against retrospective prosecution absolute. If this interpretation is correct, art 28I(1) poses a significant barrier to the prosecution of past human rights violations.

Implications for Prosecuting Past Human Rights Violations

Until 23 September 1999, when Law 39/1999 on Human Rights was enacted, crimes against humanity were not incorporated into Indonesian domestic law. As countless human rights violations allegedly occurred before this date, many human rights activists believed that art 28I(1) prevented the creation of retrospective legislation to charge perpetrators with such crimes (Amnesty International, 2000: 1). If that were the case, it would be near impossible to hold senior military and police officials accountable for either orchestrating or failing to prevent serious human rights violations against civilians in East Timor before 23 September 1999.

It has been argued, however, that retrospective legislation is unnecessary, as the existing Criminal Code could be the basis of successful trials. Thus, Yakop Tobing, the head of the MPR sub-committee that drafted the amendment, has stated that ‘this regulation is not an obstacle to prosecuting past cases’ (International Crisis Group, 2001: 11). Yet, the Criminal Code – legislation inherited from the Dutch colonial period with minimal amendment – does not include crimes against humanity and it would therefore be far less effective at prosecuting large-scale human
rights violations (Amnesty International, 2000: 1). In particular, the Criminal Code contains no provisions regarding command responsibility for the acts of subordinates and therefore it is unlikely the ‘architects’ of the crimes would be held accountable if tried under standard criminal law.

The criticism of art 28I(1) has been countered by pointing to art 28J(2) of the Constitution, which provides:

In exercising their rights and freedoms, each person is obliged to observe limitations established by laws with the intention of guaranteeing recognition and respect for the rights of others ...

The Minister for Justice and Human Rights at the time of the Second Amendment, Yusril Ihza Mahendra, argued that art 28J(2) requires the general observance of human rights (International Crisis Group, 2001: 16). Thus, if art 28I is read in conjunction with art 28J, the non-retrospectivity provision could be circumvented to protect human rights. And, by implication, the retrospective prosecution of serious human rights violations could thereby be justified to protect the human rights of the victims of such violations. However, the general protection of human rights must still be balanced against the individual right to freedom from retrospective prosecution. If the broader social need to protect human rights prevails, Mahendra would argue that retrospective legislation created to prosecute past human rights violations is constitutionally valid.

Mahendra’s argument holds little weight because it appears to stretch art 28J(2) beyond its meaning. A more reasonable interpretation of this paragraph is that respect for the limitations imposed by law is essential for the preservation of individual human rights (International Crisis Group, 2001: 16). Implying into this provision a general constitutional requirement to protect human rights – and thereby an exception to the principle of non-retrospective prosecution – appears to be imputing a meaning that was not intended.

Further, the plain wording of art 28I(1) states that retrospective prosecution cannot be allowed ‘under any circumstances’. Even if the Constitution is read as a whole, it seems implausible that the vague wording of art 28J(2) can impute a general requirement to prosecute past human rights violations that overrides the phrase ‘under any circumstances’. Nevertheless, the policy behind this interpretation is clear: it justifies the existence of a constitutional amendment that was subsequently considered inappropriate by many human rights activists.

Oversight
It has been suggested that art 28I(1) was approved by the MPR due to an oversight or error. The Chairman of the MPR, Amien Rais, admitted he
was not really aware of the legal issues involved with art 28I(2) and that ‘the amendment was an oversight that went unnoticed by many legislators’ (Jakarta Post, 2000a). Further, those assigned to discuss the amendment were not knowledgeable in human rights or legal issues and therefore failed to highlight to the MPR the implications of the clause. This contention is bolstered by the rushed atmosphere of the MPR sitting, in which only twelve days were set aside to debate 16 revised, and five new, chapters (International Crisis Group, 2001: 16).

In addition, the MPR session occurred in the context of a political crisis. It is possible that the MPR was so preoccupied with the impeachment of President Wahid, that it failed to appreciate fully the impact of a constitutional prohibition against retrospective prosecution (National Democratic Institute for International Affairs, 2000: 1). However, there is evidence to the contrary. The Minister of Foreign Affairs, Alwi Shihab, has publicly stated he was aware of the implications of art 28I(1) and was concerned about the international response (International Crisis Group, 2001: 16). Further, the proposed constitutional amendments were in the public domain since mid-June 2000 making complete ignorance unlikely (National Democratic Institute for International Affairs, 2000: 13). It is, nevertheless, clear that there was insufficient debate on the retrospectivity issue and, accordingly, a substantial number of MPR members must have been unaware of the amendment’s implications.

Military Influence

Another theory put forward to explain the inclusion of art 28I(1) is the influence of the military. The fact that the prohibition against retrospective prosecution makes it more difficult to hold senior military commanders accountable for past human rights violations undoubtedly bolsters this claim (Lindsey, 2002: 254). Political commentator, Dede Oetomo, suggested the provision was ‘sneaked through’ by the military and the MPR was somehow duped into providing impunity for human rights violations. Associated Press journalist, Slobodan Lekic, even reported that some MPR members had privately stated they were coerced into their vote by hard-line generals who threatened to provoke violence in Aceh, Maluku or West Papua unless the amendment was passed (Lekic, 2000: 1).

Regardless of the accuracy of this account, in August 2000 the military still had a substantial presence in the MPR, either directly through the 38 guaranteed military and police seats, or through the military-influenced party, Golkar, formerly Soeharto’s political vehicle (Jakarta Post, 2000a). Thus, despite the official decline in the military’s political role since the fall of Soeharto, at the very least, art 28I(1) could be
seen to demonstrate that the military lobby still holds considerable influence (Jakarta Post, 2000a). On the other hand, it is quite possible that the military were not instrumental in securing the passage of the amendment. The Attorney General at the time of the Second Amendment, Marzuki Darusman, guaranteed that investigations into human rights violations in East Timor would be exempt from art 28I(1) and, as will be discussed below, military commanders did, in fact, face prosecution (AFP, 2000a). Therefore, claims that art 28I(1) was part of well-planned military conspiracy to avoid prosecution appear ill founded.

Conclusion

Perhaps the most concerning aspect of the retrospectivity issue is what it tells us about Indonesia’s procedure for constitutional reform. Many fundamental constitutional issues were dealt with in the Second Amendment after only 12 days of debate. This is simply not enough time for legislators to consider amendments that have a significant impact on Indonesia’s governance and political stability. Further, it is deeply disturbing that a constitutional provision such as art 28I(1) could make its way into the Constitution through ‘oversight’ or ‘deception’. In any country, every constitutional amendment should be heavily scrutinised and the Constitution itself should be treated with the utmost respect; yet the retrospectivity amendments clearly demonstrate that, in Indonesia, constitutional reform is in need of a major overhaul.4

Which category best describes the passing of art 28I(1) – deception or oversight? The answer is probably beyond reach. It is however, extremely unlikely that none of the MPR’s 700 members understood the impact that art 28I(1) would have on the prosecution of past human rights violations (International Crisis Group, 2001: 16). Rather, it is probable that some members realised and intended the consequences of the constitutional amendment, while others were too pre-occupied to notice or were not appropriately informed. The attempts from many corners of Indonesian politics to explain away art 28I(1), or at the least minimise its impact, suggest, however, that the disastrous consequences many foretold were not intended. And since military and police officers have actually been prosecuted for crimes against humanity in the ad hoc court, it is apparent that the initial outcry over the retrospectivity amendment’s effect on the existence of trials for past human rights violations was largely overreaction.

Despite having made two further amendments to the Constitution since the inclusion of art 28I(1), the MPR has not revisited the retrospectivity issue, despite public calls for clarification. For example, Professor Suwoto Muljosudarmo, a constitutional law expert, has stated
that ‘to avoid further problems, the article should be revoked in the next amendment’ (Jakarta Post, 2000c). The MPR’s failure to resolve the uncertainty over retrospective prosecution is disappointing, for either amending art 28I(1) or revoking it altogether would undoubtedly have strengthened the Constitution and given the Indonesian Government certainty as to the validity of the East Timor and Bali trials.

The controversy surrounding Indonesia’s constitutional prohibition against retrospective prosecution must be seen within the broader political context of the Indonesian Bill of Rights and the Second Amendment to the Constitution. These constitutional amendments were clearly made with the intention of instigating meaningful reform, and were not intended to ingrain constitutionally the kind of military impunity which existed under Soeharto’s New Order regime (National Democratic Institute for International Affairs, 2000: 13).

Nevertheless, it remains unclear on the face of the Constitution whether retrospective prosecution is valid in Indonesia. It is therefore crucial to evaluate the meaning of art 28I(1) in relation to the actual retrospective legislation itself, that is, the laws creating the offences under which the defendants in the Bali bombing and East Timor trials are being prosecuted. Before doing so, however, a brief overview of different approaches to the retrospectivity issue in international human rights law, and then in select domestic jurisdictions, will assist in providing a framework by which to evaluate the Indonesian legislation.

Balancing Competing Interests: Non-retrospectivity v Prosecution of Human Rights Violators

Background

Debate about retrospectivity can be found throughout Western legal scholarship. In fact, the presumption against the retrospective operation of laws can be traced back to ancient Greece and Rome, and it is now a well-established principle in all western legal systems (Edinger, 1995: 12). In Leviathan, Hobbes (1651: Chapter 27) wrote ‘no law, made after a fact done, can make it a crime’. Blackstone (1830: 46), in his Commentaries, highlighted the unjust nature of retrospective legislation: ‘all laws should be therefore made to commence in futuro, and be notified before their commencement’. In most cases, discussion focuses on how retrospective legislation breaches fundamental notions of justice and fairness, and is contrary to the rule of law (Edinger, 1995: 12). Retrospective legislation is thus seen as an abuse of legislative power and, consequently, all legislation is presumed to be prospective in its operation.
Central to the principle of non-retrospectivity is the lack of notice that is a consequence of retrospective legislation. Citizens cannot be expected to adhere to the law if it is subject to arbitrary, retrospective change and if its content cannot reasonably be obtained before conduct is undertaken. Due to this lack of notice, individuals cannot choose to avoid conduct which is considered illegal and retrospective legislation is therefore a breach of personal liberty. In this light, it seems entirely unjust for an act which was considered legal at the time it was committed to be made illegal at some future stage. Given this, retrospective laws are claimed to undermine public confidence in the legal system (Trueworthy, 1997: 1710). However, Maher (1983: 191) argues that this is not always the case: ‘retrospective laws indeed diminish respect for law; but in grave crises they increase confidence in the law’. The prosecution of gross human rights abuses would be one such example of a ‘grave crisis’. Maher emphasises the ethical basis of law and argues that if retrospective legislation serves the ‘common good’ then it is consistent with the rule of law and is therefore justified (Maher, 1983: 188).

Modern scholars still grapple with retrospectivity and a common theme throughout the debate is determining the circumstances in which retrospective legislation is justified (Edinger, 1995; Maher, 1983; Triggs, 1990). There are two general principles which underlie this debate. First, retrospective legislation is prima facie unjust and constitutes a breach of individual rights. Second, there are some extraordinary circumstances which create an exception to this general rule. Determining the scope of the exception to the principle of non-retrospectivity is at the heart of the retrospectivity debate and defining its parameters is by no means a simple task. Trueworthy (1997: 1710) makes the point well: ‘retroactively applied laws, however disliked, may not be an inherent violation of people’s rights. Yet the determination is neither easily nor automatically made’.

It is generally agreed that there are some extraordinary circumstances that justify the enactment of retrospective legislation (Edinger, 1995: 17, Maher, 1983: 189). A common test used to determine the scope of the exception balances the law’s effect on the individuals to which it applies against the public policy it supports (Edinger, 1995: 17). The effect on the individual may be increased if the person in question has been specifically targeted or is subject to criminal sanctions, while the public policy consideration may include the proposed outcomes of the law in a broad social sense and the potential loss of public confidence in the judicial system if the retrospective law is not enacted (Edinger, 1995: 17). Another approach is a reasonableness test, such as that developed by the US Supreme Court when interpreting the prohibition against ex post facto laws in Article I of the US Constitution (Edinger, 1995: 19). This was
employed in the case of *Miller v Florida* 482 US 423 (1987) where sentencing guidelines which increased the severity of a crime’s punishment could not be applied retrospectively (Trueworthy, 1997: 1711). Regardless of the approach used, determining whether retrospective legislation is justified is primarily a policy consideration. Each determination will be highly dependent upon the facts.

**Retrospective Criminal Prosecution**

Retrospective criminal prosecution is considered the most unjust form of retrospective legislation (Edinger, 1995: 17) with the result that many constitutions and human rights instruments expressly prohibit *ex post facto* criminal legislation. See, for example, art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art 9 of the American Convention on Human Rights; art 7(2) of the African Charter on Human and People’s Rights; and art 22 of the Statute of the International Criminal Court (the Rome Statute). To impose criminal sanctions on an individual for an act which, at the time it was committed, was not considered a crime is seen as a severe breach of personal rights that may have profound consequences, such as imprisonment and the death penalty (Trueworthy, 1997: 1709).

The prohibition on retroactive criminal laws is encapsulated by the long-recognised criminal law principle *nullum crimen sine lege* (no crime except in accordance with the law) (Joseph et al, 2000: 340). This principle is considered fundamental to a fair trial as any criminal prosecution should be based on offences that are clearly defined and that were actually considered criminal at the time they were committed (Lawyers Committee for Human Rights, 2000: 20). So important is the principle of non-retrospective prosecution for the protection of individual rights and the provision of a fair trial that art 15(1) of the ICCPR (the non-retrospectivity provision) is one of the few non-derogable rights identified in art 4(2) (Lawyers Committee for Human Rights, 2000: 20).

Aside from its effect on the individual, retrospective prosecution also involves broader risks. If retrospective prosecution is tolerated then it is always open to abuse. In extreme situations, a new government could enact retrospective legislation to prosecute its opponents for past political acts. Retrospective prosecution also undermines a central objective of the criminal justice system: specific deterrence. Making an act criminal retrospectively does not successfully deter others from committing the same act (Popple, 1989: 255). Rather, it undermines the importance of punishment as a means of specific deterrence as people can only be deterred from committing the same act from the time the punishment is retrospectively prescribed (Popple, 1989: 255).
Despite the unjust nature and negative impact of retrospective prosecution, prohibitions against retrospective criminal legislation are rarely absolute. Rather, most jurisdictions temper such a prohibition with exceptions and generally allow retrospective prosecution if there is a significant public policy justification (Edinger, 1995: 22). The most established exception to the principle of non-retrospectivity is crimes against humanity.

**Nuremberg**

Since the 13 separate trials of war criminals at the International Military Tribunal in Nuremberg (1945–46) it is a well-accepted principle of customary international law that gross human rights abuses can be prosecuted retrospectively (International Crisis Group, 2001: 17). Defendants in the trials of major war criminals from the Axis powers relied on the *nullum crimen sine lege* principle, arguing that the Nuremberg Charter was retrospective in operation as the war crimes which were the subject of their prosecution were not considered criminal at the time they were committed. Counsel for the defendants therefore argued that the trials should not proceed as ‘ex post facto punishment is abhorrent to the law of civilized nations’ (International Military Tribunal, Nuremberg, 1946: 172).

The judges at Nuremberg recognised that non-retrospectivity was an important aspect of justice, although they held that the Nuremberg Charter was declaratory rather than retrospective. The Kellogg-Briand Pact of 1928 and the Hague Convention of 1907 were cited as examples of treaty-based sources of war crimes and it was further held that ‘the law of war is to be found not only in treaties, but in the customs and practices of states’ (International Military Tribunal, Nuremberg, 1946: 172). It was therefore held that, rather than impose criminal liability retrospectively, Nuremberg prosecuted defendants under legislation which codified pre-existing crimes as established under customary international law. Simpson (1997: 13), however, criticises the judges’ rejection of the retrospectivity arguments stating ‘these defences were rejected only after a rather unconvincing trawl through pre-War international law for evidence of an incipient criminal law system’. Despite this attack on the judges’ reasoning, Simpson (1997: 13) does not dispute the conclusion that was reached.

Professor Hans Kelsen (1947), in a commentary on the Nuremberg trials, provides an improvement to the unconvincing reasoning at Nuremberg. He draws a distinction between retrospective criminal legislation and legislation that merely imposes punishment retrospectively for acts which were illegal but not criminal. He places the Nuremberg Charter in this latter category and states that such laws are an exception to non-
retrospectivity (Kelsen, 1947: 164). However, despite such justifications for the infringement of non-retrospectivity at Nuremberg, the issue still attracts criticism. Popple (1989: 257) even claims that at Nuremberg, ‘the principle of non-retrospectivity was largely ignored’. Debate over the International Criminal Court (ICC), however, has brought the issue back into light. Under art 22 of the Rome Statute the ICC will not exercise retrospective jurisdiction (McCormack, 2001: 2). This has led Human Rights Watch (2001: 2) to emphasise the importance of domestic tribunals in the prosecution of the most grave human rights abuses.

The consideration of retrospectivity at Nuremberg illustrates the tension between individual notions of justice for the defendants and the broader need to punish acts considered immoral by the international community. Although balancing these competing interests is not easily achieved, it is widely acknowledged since Nuremberg that crimes against humanity are an exception to the principle of non-retrospectivity (International Crisis Group, 2001; Steiner and Alston, 1998; Joseph et al, 2000).

**ICCPR**

The exception to the non-retrospectivity principle for crimes against humanity has been enshrined in art 15(2) of the ICCPR:

> 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 recognized by the community of nations.

Although Indonesia is not currently a signatory to the ICCPR, a discussion of art 15 provides insight into the prohibition on retrospective prosecution and crimes against humanity as an exception.

Article 15(2) is clearly intended to facilitate the retrospective prosecution of acts considered criminal under international humanitarian law (Joseph et al, 2000: 347). It has been noted, however, that the wording of art 15(1) – ‘no one shall be held guilty of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed’ (emphasis added) – creates a broader exception to the principle of non-retrospectivity than art 15(2) as it could refer to international law more generally, not just customary international law as in art 15(2) (Joseph et al, 2000: 347). This distinction has not been tested in practice. However, it illustrates that the drafters of the ICCPR were so intent upon entrenching the prosecution of crimes under international law as an exception to the principle of non-retrospectivity, that two safeguards were included in the final draft (Joseph et al, 2000: 347). Article 15 of the ICPR can therefore be seen as an expression of the international
community’s desire to protect against capricious retrospective prosecution by states, while also ensuring that those who breach international law are brought to justice.

There has been little jurisprudence on art 15. The most prominent case concerning retrospective prosecution, however, is *Weinberger Weisz v Uruguay* (28/78), in which persons were convicted for membership of political parties that were considered ‘subversive’ and retrospectively banned (Joseph et al, 2000: 341). In this case, the Human Rights Committee (HRC) held that the prohibition on retrospective prosecution had clearly been breached and the Uruguayan Government’s actions could not be justified. Although HRC decisions are generally considered more persuasive than representative of the actual position under international law (Steiner and Alston, 1998: 708), the decisions do provide valuable insight into the HRC’s views on particular provisions of the ICCPR.

Aside from the Uruguayan case mentioned above, the only other prominent cases in relation to art 15 involve retroactively imposed penalties in Canada (Joseph et al, 2000: 341). These cases are quite narrow in scope and hold little relevance for interpreting art 15 in regard to prosecution. Nevertheless, the limited jurisprudence on art 15, in particular the Uruguayan case, does illustrate that the HRC is prepared to uphold the principle of non-retrospectivity in certain circumstances. As yet, the HRC has not had to resolve a situation such as that in Indonesia where individuals have been retrospectively prosecuted for what appear to be crimes under international law. Such a decision would no doubt shed further light on the interaction of the principle of non-retrospectivity with the prosecution of serious human rights violations.

**National Jurisdictions**

Although there is a substantial amount of general jurisprudence on retrospectivity in civil law jurisdictions, there is little analysis of retrospectivity in relation to the prosecution of crimes against humanity. Two relevant cases from Australia and Canada, however, deal with this issue directly. In the High Court of Australia case of *Polyukhovich v Commonwealth* (1991) 172 CLR 501, retrospective legislation intended to prosecute alleged Nazi war criminals was upheld by a majority of 4:3. The majority judgments primarily relied on constitutional arguments; however, the court impliedly found Australia’s *War Crimes Amendment Act 1988* (Cth) to be a justifiable breach of the principle of non-retrospectivity. In regard to international law, Brennan J (dissenting) recognised that crimes against humanity can rarely be retrospective due to their derivation from customary international law (at 574). Brennan J referred to the Nuremberg trials and further emphasised crimes against humanity as an important exception to the principle of non-retrospectivity.
Asian Law (at 575). Toohey J referred to a similar Canadian case, *R v Finta* (1989) 61 DLR (4th) 85, in which the Ontario High Court of Justice held that legislation providing for the prosecution of crimes against humanity was not retroactive as these crimes had previously existed under international law (172 CLR 501 at 672).

In relation to Indonesia, there is of course no such jurisprudence on the retrospective prosecution of crimes against humanity. Indonesia does have a recently enacted constitutional prohibition on retrospective prosecution; however, there is as yet, no authoritative determination on whether this provision should be strictly applied. Under both customary international law and human rights treaties such as the ICCPR, crimes against humanity are considered an exception to the principle of non-retrospectivity. So an argument could be run, as per *Nuremberg*; Toohey J in *Polyukhovich*; and *R v Finta*, that legislation which facilitates the retrospective prosecution of crimes against humanity is actually not retrospective but declaratory of acts considered criminal under customary international law. It remains to be seen whether such arguments would be persuasive in Indonesia if they were raised on appeal from the decisions of the Bali bombings or ad hoc East Timor trials.

Determining whether retrospective prosecution is justified (regardless of its legality under Indonesian law) requires the balancing of the infringement of individual rights against the public interest served by the prosecution. In the case of gross human rights violations, the latter will almost always prevail (Edinger, 1995: 22). Bearing this in mind, the two recent instances of retrospective prosecution in Indonesia – the Bali bombing and the ad hoc East Timor trials – will now be analysed, with particular emphasis placed on determining whether they are justifiable exceptions to the principle of non-retrospectivity.

**Article 28I(1) in Practice**

**The Ad Hoc Human Rights Court for East Timor**

**Background**

In November 2000, Indonesia’s legislature – the *Dewan Perwakilan Rakyat* (DPR) or People’s Representative Assembly – enacted Law 26/2000 on Human Rights Courts. This law established the procedure to create ad hoc courts to try human rights violations. The Law was to have general application and was not intended solely for use in relation to human rights violations that occurred during the final days of the Indonesian occupation of East Timor in 1999 (International Crisis Group, 2001: 13). Article 43 of this Law included a provision permitting the retrospective

The precursor to the Law on Human Rights Courts was Government Regulation in Lieu of Law (Perpu) 1/1999. This Perpu was President Habibie’s response to the international condemnation of alleged gross human rights violations in East Timor and it was not retrospective in operation (International Crisis Group, 2001: 13). Rather than be tried retrospectively, human rights violations that occurred before the issuing of Perpu 1/1999 would be subject to the existing Criminal Code (International Crisis Group, 2001: 13). Under art 22 of the Constitution, however, Perpu can only be issued in emergency situations and must be approved by the DPR at its next session, failing which they cease to have force (Lindsey, 2003: 1). At the DPR’s next sitting, Perpu 1/1999 was, in fact, not ratified.

According to Yuzril Ihza Mahendra, the Minister for Law and Legislation, the Perpu was rejected due to the DPR’s concern that a non-retrospective law would receive widespread criticism from the international community (International Crisis Group, 2001: 13). In this light, retrospectivity was the subject of much controversy from the outset of Indonesia’s response to human rights violations committed in East Timor.

**Retrospectivity in Law 26/2000**

The drafting of Law 26/2000 to replace the rejected Perpu 1/1999 was dominated by debate over whether the law would operate retrospectively (Amnesty International, 2001b: 10). As discussed previously, the Criminal Code is not suitable for the prosecution of gross human rights violations due to the difficulty in proving command responsibility. Therefore, giving Law 26/2000 retrospective operation was considered crucial to the successful prosecution of senior military officials.

Golkar and military representatives firmly criticised any attempt to make the law retrospective and the retrospective provision was accordingly excluded from the final draft that went before the DPR (Indonesian Observer, 2000).

An indication of the intense political pressure over the issue is the fact that the retrospective provision was not endorsed during the formal session of the DPR, but was included later due to intense lobbying among factional leaders after the session (Susantri, 2001: 5). The compromise that was reached involved allowing the Law on Human Rights Courts to operate retrospectively but making it subject to a special procedure. So under clause 26 of Law 26/2000, the President can only establish an ad hoc court on the explicit recommendation of the DPR (International Crisis Group, 2001: 15). Thus, any court established under the legislation could only have retrospective jurisdiction with the legislature’s express consent.
Breach of Article 28I(1)
By facilitating the retrospective prosecution of gross human rights violations, art 43 of Law 26/2000 clearly breaches the plain wording of art 28I(1) of the Constitution. To clarify the hierarchy of laws in Indonesia, the MPR passed decree III/2000 on The Sources of Law and the Hierarchy of Laws and Regulations. This decree was passed at the same sitting which brought about the Second Amendment (National Democratic Institute for International Affairs, 2000: 28). Article 2 of this decree states that ‘the 1945 Constitution is the primary source of law in the hierarchy’ and art 4(1) stipulates that ‘an inferior legal instrument must not conflict with a superior legal instrument’. There can be no doubt, therefore, that on a plain interpretation, the Law on Human Rights Courts infringes art 28I(1) of the Constitution and may be constitutionally invalid to the extent of its retrospective effect.

Interestingly, during the time that Law 26/2000 was before the DPR, the Second Amendment was being considered in the MPR. Given that all members of the DPR are members of the MPR as well, forming three quarters of its membership, it seems staggering that the implications of passing a constitutional amendment in August and then creating a law that breaches that amendment less than three months later were not fully realised (Susantri, 2001: 2). However, the Law on Human Rights Courts’ apparent breach of the Constitution was justified in the Law’s formal Elucidation. This stated the point discussed above, namely that art 28I(1), when read in conjunction with art 28J(2), implies that the prosecution of crimes against humanity are an exception to the principle of non-retrospectivity (International Crisis Group, 2001: 16).

International Pressure
A likely explanation for the retrospective effect of Law 26/2000 is the international condemnation Indonesia would have received if it were otherwise. As mentioned, the inclusion of the non-retrospectivity principle in the Constitution had caused widespread criticism from international and domestic human rights observers who suggested that by enacting this provision, Indonesia had effectively granted impunity to perpetrators of well-documented human rights abuses (Amnesty International, 2000: 1; International Crisis Group, 2001: 16). Such critics have therefore called for the establishment of an international criminal tribunal to conduct the prosecutions, along the lines of the international criminal tribunals established to try offences committed in Rwanda between 1 January and 31 December 1994 and in The Former Yugoslavia after 1991 (Magro, 2001: 16).

Human rights campaigners have suggested the Law on Human Rights Courts was only made retrospective due to the Indonesian
Government’s desire to avoid an international criminal tribunal which would usurp national jurisdiction (Amnesty International, 2001a: 8). Similar sentiment has also come from within Indonesia with Agung Yudhawiranata (2002: 2) of the Institute for Policy, Research and Advocacy (ELSAM) in Jakarta acknowledging the possibility of an international tribunal, and highlighting the Indonesian Government’s concern to avoid international intervention.

Trials
As was to be expected, the issue of retrospectivity was raised in the trials of the ad hoc court for East Timor. In the trial of five middle-ranking military and police officers – including Lt Colonel Herman Sudyono who was on trial for murder as a crime against humanity – the defence argued that Law 26/2000 was unconstitutional and therefore the court had no right to hear the case (Simanjuntak, 2002: 1). Judge Cicut Sutiarso dismissed these arguments relying on the Elucidation to Law 26/2000. He affirmed that ‘Article 28I should be read in conjunction with the subsequent clause J. Thus we may conclude that the rights tribunal law is based on Article 28J’ (Simanjuntak, 2002: 1). Further, the importance of justice was paramount in Judge Cicut’s determination:

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. (Simanjuntak, 2002: 1)

In this case, Erman Umar, one of the defence lawyers, filed an appeal against the court’s decision with respect to the constitutionality of the trials. He insisted that the trial should be suspended pending the appeal court’s decision; however, he was unsuccessful and the trial proceeded (Simanjuntak, 2002: 1). As the defendants were acquitted, the issue was not pursued to the appeal level.

On 6 August 2003, the East Timor trials came to a close. The final case was that of Major-General Adam Damiri, who was convicted of crimes against humanity and sentenced to three years imprisonment. Like the other defendants convicted, he has indicated he will appeal the verdict. In total, six out of a possible 18 defendants have been convicted: namely, former Governor Abilio Soares, Lieutenant-Colonel Soedjarwo, militia leader Eurico Guterres, Brigadier-General M Noer Muis, former Dili police chief Hulman Gultom and former regional military commander Major-General Adam Damiri. At the time of writing, all bar Major-General Damiri remain free pending their appeals. As yet, dates for the appeals have not been finalised. When the appeals are heard, the constitutional validity of Law 26/2000 will undoubtedly be in issue. The impact of judicial review will be discussed below. However, it is important
to note that the convictions could be quashed on appeal. Such a situation may be unlikely due to the international outcry that would ensue, especially as Indonesia has pandered to the international community throughout the investigation and prosecution of the East Timor trials (Magro, 2000: 16). Nevertheless, a determination on the constitutional validity of retrospective prosecution will inevitably occur at some point in the not too distant future.

**Evaluation**

It is difficult to deny that Law 26/2000 on Human Rights Courts is a legitimate use of retrospective legislation, regardless of its constitutional validity. As discussed previously, policy considerations are often the overwhelming factor when determining whether retrospective legislation is justified (Edinger, 1995: 22). The need to hold military officials accountable for human rights violations in East Timor is not only critical to deliver justice to the Timorese victims, but is also a significant step in breaking the culture of military impunity that has endured since the Soeharto era (Amnesty International, 2000: 1). Further, the legitimacy of Law 26/2000 is significantly increased due to crimes against humanity being a well-established exception to the principle of non-retrospectivity under customary international law. When these factors are balanced against the effect on the individuals being prosecuted, it is not difficult to conclude that prosecution under Law 26/2000 is both ethically and legally justified.

In this light, it would be a brave court that strikes down Law 26/2000 on appeal. Nevertheless, the uncertainty over retrospectivity has given defendants a smoke screen by which to deflect attention from the real issue – military accountability for events in East Timor. This has made the trials appear more susceptible to political manipulation and, to those uneducated in legal issues, has made the Constitution appear to support military impunity for human rights violations. The Law on Human Rights Courts is important, well-meaning and delicately negotiated legislation that has been labelled unconstitutional, perhaps unjustifiably so (*Jakarta Post*, 2000b). Accordingly, the trials have been clouded in political and legal controversy (Amnesty International, 2000: 1). It is inevitable that this confusion will eventually have an adverse effect on public confidence in Indonesia's legal system, if it has not already done so.

**Bali Bombing Trials**

**Background**

In October 2002, the Indonesian Government responded to the Bali bombings of the same month by issuing two Perpus: Perpu 1/2002 on the

In March 2003, the DPR voted overwhelmingly in favour of approving the Perpus and gave them the status of Law (Undang-Undang) with minimal changes. However, the issue of retrospectivity was once again controversial, with the Nation’s Sovereignty (Kedaulatan Bangsa) faction – a coalition of small Islamic parties – voting against the Bill, claiming it was unconstitutional (Sebastion, 2002: 2). Also of concern were the far-reaching powers granted to security forces and the diverting of attention from issues such as judicial reform (Tapol, 2002: 1). Despite this, the speed with which the anti-terrorism legislation was passed, and the mere fact that consensus was reached on quite controversial legislation, illustrates the extent of the bombing’s impact on Indonesia’s legislators (Sebastion, 2002: 3).

**Perpu 2/2002 and Retrospectivity**

There can be little doubt that the provision for retrospective prosecution found in Perpu 2/2002 breaches the plain meaning of art 28I(1). However, using the same justification as the Law on Human Rights Courts, the Bali incident was considered ‘extraordinary’ and therefore retrospective prosecution was deemed justified to apply the general human rights provisions of the Constitution (Wockner, 2003). It has been argued that the Bali bombing is a crime against humanity and is therefore an exception to the principle of non-retrospectivity. This issue will be considered in more depth below.

Like the Law on Human Rights Courts, the retrospectivity of the anti-terrorism legislation was controversial. This was in part due to uncertainty over whether the retrospectivity of the law could extend to terrorist acts other than the Bali bombing (Sebastion, 2002: 1). Singapore’s Institute of Defence and Strategic Studies at Nanyang Technological University has raised arguments that the new laws could possibly authorise prosecution for the many unresolved (and often state-sponsored) acts of terrorism that occurred during New Order Indonesia (Sebastion, 2002: 2). Such widespread retrospective prosecution would be difficult to justify and would be severely criticised by civil libertarians.

Despite the extent of its retrospective operation, the anti-terrorism legislation illustrates that legislators have failed to learn from previous mistakes and have thereby allowed significant legal uncertainty in regard to the new law’s retrospectivity.
The Trials
A special court was established in Denpasar in 2003 to try the alleged perpetrators of the Bali bombing. The first trial to commence is of Amrozi bin Nurhasyim who faces four charges under the anti-terrorism legislation for planning and helping to execute the attack (Munro, 2003). Rachman Marasabessy, one of Amrozi’s lawyers, has challenged the anti-terrorism laws arguing they are ‘illegal’ due to their retrospectivity (Miller, 2003). He has claimed that ‘the indictment has no legal basis … it’s a threat to justice and legal certainty’ (Munro, 2003). On 22 May 2003, the Bali court’s panel of five judges rejected this argument: ‘the application of retrospectivity can be justified so there’s no legal dispute’ (Munro, 2003). Wirawan Adnan, the head of Amrozi’s defence team, has already indicated that this recent decision will be appealed to the ‘higher court’ (AFP, 2003a).

Similarly, lawyers for Imam Samudra argued that his trial should not proceed as the anti-terrorism legislation was contrary to Indonesia’s constitutional prohibition on retrospective prosecution (Miller, 2003). Prosecutor Nyoman Supartha disputed this claim arguing the Bali bombing is an ‘extraordinary crime and a crime against humanity’ and therefore retrospective prosecution is possible (Wockner, 2003). As per Amrozi’s case, the judges rejected the arguments based on retrospectivity and the trial was ordered to proceed (Miller, 2003). It remains unclear, however, whether the 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 art 28I(1). At the time of writing, prosecutors have charged 15 suspects, and six trials are in progress (AP, 2003). It can be expected that any convictions will be appealed with retrospectivity once again in issue.

Evaluation
In determining whether the anti-terrorist legislation is a justified breach of the principle of non-retrospectivity, it is necessary to assess whether the Bali terrorist attacks can be considered a crime against humanity. If they can, the anti-terrorism legislation will fall into one of the internationally accepted exceptions and this will give considerable weight to its legitimacy.

Crimes against humanity are generally considered to include a number of large-scale inhumane acts, or acts which are part of a widespread or systematic attack, against a civilian population (Skillen, 1999: 213). Importantly, Skillen notes that there does not have to be a nexus with armed conflict for an act to constitute a crime against humanity (Skillen, 1999: 213). Given the death of over 200 civilians in an intricately
planned attack, it is clear the Bali bombing would fall under this definition. And like the Law on Human Rights Courts, the anti-terrorism legislation can be ethically justified on the basis of international customary law as outlined above. The legal validity of the anti-terrorism legislation under Indonesian law will depend on whether a literal or holistic interpretation of the Constitution is preferred. This, however, will only be authoritatively settled on appeal.

Also worthy of consideration is whether the Indonesian Criminal Code would have been a more sensible foundation for the prosecution indictments. Although the Criminal Code was not intended for use in the prosecution of terrorist acts, it may have been wise, both practically and politically, to include some charges under the Criminal Code. This could have avoided the controversy of an acquittal if the anti-terrorism laws are struck down on appeal and would ensure that those responsible for the attack are punished. Certainly, the Criminal Code would not be as effective as the anti-terrorism legislation, primarily because terrorism is substantially different from ordinary crimes – for example, notwithstanding the nebulous nature of the term ‘terrorism’, terrorist acts are generally considered to involve deliberately planned and systematically executed attacks by trained individuals acting with a political motive (Higgins, 1997: 15). Further, the injury caused by terrorism generally extends beyond the specific victim to impacting on political stability and economic growth. Nevertheless, the ‘covering all bases’ approach of adding ‘ordinary’ criminal charges such as murder, arson or causing injury was not adopted and it appears that, like Amrozi, all the other defendants will be tried solely on the basis of the anti-terrorism legislation (Munro, 2003). This is a high-risk strategy for the prosecution and is disappointing, especially given the controversy that surrounded the retrospectivity of the East Timor trials.

Considering the severity of the Bali bombings and the widespread loss of life, the retrospective prosecution of suspects is justified. Further, due to international pressure, the Megawati Government feels itself under a political imperative to be seen as taking firm steps to counter terrorism (Munro, 2003). The anti-terrorism laws achieved this goal, but it is unfortunate that, in doing so, the constitutional debate over retrospectivity had to be revived. No concrete progress on handling the issue appeared to have been made since the enactment of the Law on Human Rights Courts some two years earlier.

Predicting the outcome of any appeal is mere speculation, although there can be little doubt that retrospectivity represents a real possibility for defendants to have any convictions overturned. Given the approach taken by judges at trial level, it appears likely that the anti-terrorism
legislation will be upheld, although the uncertainties of the Indonesian judicial system mean this is far from certain. Further insight into how the cases may be treated on appeal lies in recent constitutional reform that envisages a Constitutional Court with authority to exercise judicial review of legislation. This court could authoritatively determine whether retrospective prosecution, such as that in the East Timor and Bali bombing trials, is constitutionally valid.

**Constitutional Court**

**Authority**

A Constitutional Court was envisaged by the Third Amendment to the Constitution. Inserted in 2001, arts 24(2) and 24C of the Constitution authorise the creation of a Constitutional Court to provide judicial review of legislation (Lindsey, 2002: 293). At this stage, the scope and commencement date of the new court remains somewhat unclear, but art III of the Constitution’s Interim Provisions provides that the Supreme Court has the authority to exercise the Constitutional Court’s jurisdiction until the court is established (National Democratic Institute for International Affairs, 2002: 6). The actual structure and authority of the new court were left undefined. To gain an idea of what role the Constitutional Court will play, one must look to vaguely worded constitutional provisions. Article 24C(1) states:

The Constitutional Court has the authority to hear matters at the lowest and highest levels and to make final decisions in the review of legislation against the Constitution …

This provision seems to suggest that the court does not have an exclusive right to exercise judicial review. However, when it is called upon to do so, its decisions are final. In practice, any court could therefore, if it wishes, refer a constitutional matter to the new court, although this is not required under the Constitution.

According to art 24C(6) of the Constitution, the specific powers of the court will be ‘regulated by law’. It is therefore the DPR's responsibility to define the authority of the new court and determine its standing within the Indonesian legal hierarchy (Lindsey, 2002: 261). Of particular concern is whether the court's decisions will be subject to appeal to the much-maligned Supreme Court. If this occurs, it is unlikely that any Constitutional Court determination, assuming that it was independently made, could withstand the Supreme Court’s well-documented corruption and lack of integrity (Lev, 1999). However, the words ‘make final decisions’ in art 24C(1) seem to discount the possibility of the Supreme
Court sitting above the Constitutional Court. This leaves open the question of the route a case must take to reach the Constitution Court.

The appointment and removal of constitutional judges could render any attempt at making the new court independent, meaningless, regardless of its position in the hierarchy. If judges are selected from the same pool as those for the Supreme Court, or may be dismissed by that court, the Constitutional Court would be higher in the legal hierarchy in theory only (Lindsey, 2002: 261).

Under art I of the Constitution’s Interim Provisions, the Constitutional Court must be formed by 17 August 2003. It appears this deadline cannot be met but it has been suggested that the new institution will come into effect in 2004 (National Democratic Institute for International Affairs, 2002: 6). Given the volume of new legislation required to create the new court and the heavy workload already burdening the DPR, the 2003 deadline was simply unrealistic, but it is also possible that the formation of the Constitutional Court has been stalled due to the general election in 2004. In any case, as mentioned previously, the Supreme Court can exercise the Constitutional Court’s powers until the latter is established. At present, the Supreme Court has not been required to do so (Lindsey, 2002: 261), but as the appeals from the Bali and East Timor trials will most likely be on constitutional grounds, this situation may very well change. If so, the Supreme Court’s integrity will once again be in issue.

**Constitutional Courts in Mongolia and South Korea**

The concept of an institution solely charged with interpreting a country’s Constitution is by no means a novel one. Countries as diverse as Russia, South Africa and Germany all have some variation of a Constitutional Court. In particular, Mongolia and South Korea hold significant relevance to Indonesia, as they have recently established constitutional courts as part of liberal–democratic reforms. Mongolia’s Constitutional Tsets (literally ‘Constitutional Council’) was established in 1992 and is an independent state organ that supervises the implementation of the Constitution and provides judicial review of constitutional disputes (Fenwick, 2001: 217). Fenwick (2001) finds that the Tsets has contributed to the development of the rule of law in Mongolia, but uncertainty over the relationship of the Tsets to the legislature caused a significant constitutional crisis in 2000. As it was unclear whether the Tsets or the legislature had final authority over the review of constitutional amendments, Mongolia became entrenched in a ‘lawful constitutional deadlock’ (Fenwick, 2001: 228). It appears that specific definition of the Tsets’ jurisdiction could have averted this crisis.
The Korean Constitutional Court, formed in 1988, exercises a similar jurisdiction to that of its Mongolian counterpart and although, according to Lim (2002), it is in need of significant development, the Constitutional Court has played an integral role in clarifying the Constitution and protecting the constitutional rights of the Korean people. The website of the Constitutional Court of Korea (<http://www.ccourt.go.kr/english/statistics.htm>) states that the court has received 8920 cases and settled 8383 since its inception on 1 September 1988. Lim (2002: 359) argues this substantial caseload has made a significant impact in ‘changing citizens’ perception of the Constitution and government’.

Of particular relevance for Indonesia is the political manipulation of the Korean Constitutional Court and its relationship to the Korean Supreme Court. Despite best efforts to ensure its independence, the Constitutional Court is subject to intense political pressure. According to Lim, other branches of government even threaten the institution’s existence because of their influence over the judiciary (Lim, 2002: 352). Further, the power struggle between the Supreme and Constitutional Courts, brought about by the uncertain nature of each institutions’ relationship to the other, has undermined the position of the Constitutional Court and created discord among the Korean judicature (Lim, 2002: 355). Lim reports that Korean bureaucrats, along with many judges and prosecutors, believe that the Supreme Court is more significant in practice despite the Constitutional Court’s broader jurisdiction and superiority. This is primarily due to the longstanding position of the Supreme Court as Korea’s highest judicial authority and its corresponding allies within the judiciary and within the powerful branches of the executive (Lim, 2002: 356). In spite of these negative aspects, Lim (2002) concludes that the Constitutional Court is performing a crucial function and that its decisions have played a central role in the development of Korean public law.

The experience of both Mongolia and South Korea illustrates two important points for the implementation of a similar institution in Indonesia. First, clear definition of the court’s powers is vital to its success. In Mongolia, a constitutional deadlock could possibly have been averted if the Constitutional Court’s relationship with parliament had been more clearly defined (Fenwick, 2001: 218). Such a situation can be avoided in Indonesia if the jurisdiction and procedure of the court is meticulously defined by the DPR. Secondly, South Korea shows that imposing a new court at the top of the legal hierarchy cannot easily change years of judicial tradition.

Thus, for Indonesia, creating an effective, independent Constitutional Court will likely be a lengthy and frustrating process. A power struggle between the Supreme and Constitutional Courts could very well ensue
and, given Indonesia’s poor track record on judicial independence, it would indeed be an achievement if the court were not subject to political manipulation (Lev, 1999). Yet both Mongolia and South Korea also show that, despite the inherent difficulties, creating an Constitutional Court that operates separately from the wider judiciary can be a means of breaking away from past judicial practice. Moreover, in both instances, the Constitutional Courts have provided important constitutional clarification and improved the separation of powers. If implemented effectively, the Indonesian Constitutional Court could yield similar benefits.

Judicial Review: The East Timor and Bali Bombing Trials

The trial judges of both the Bali and ad hoc Human Rights Courts have rejected defence arguments that legislation facilitating retrospective prosecution is constitutionally invalid. This is despite it being unclear whether they have the authority to do so. Thus, in both cases, the prosecuting legislation has been upheld and the trials have proceeded, even though it is uncertain under Indonesia law whether trial courts can validly exercise this form of judicial review.

As discussed above, the Constitution does not grant the Constitutional Court exclusive rights over judicial review, rather art 24C(1) merely states this power ‘may’ be exercised. This seems to leave room for lower courts to exercise some degree of judicial review. Further, according to Deputy Cabinet Secretary Erman Rajagukguk ‘the Supreme Court is obliged by regulation to review or try any case which is submitted to it on the grounds that a particular law is unclear’ (Rajagukguk, 2002: 59). This power extends to filling any *kekosongan hukum* or ‘legal vacuum’ where legislation does not ‘reflect society’s legal needs’ (Rajagukguk, 2002: 59). It is submitted that the constitutional uncertainty over retrospectivity is a situation analogous to a ‘legal vacuum’ and it may therefore be arguable that a trial court has authority to make constitutional determinations, at least in a preliminary function. Yet, as the *kekosongan hukum* principle appears limited to the Supreme Court, it is unlikely such an argument would hold much weight.

Nevertheless, a trial court failing to strike down a retrospective law, as occurred in the Bali and East Timor trials, cannot be seen as encroaching on the new Constitutional Court’s jurisdiction as established in art 24C(1) of the Constitution. As mentioned, the vague wording of this provision does not grant exclusive jurisdiction for judicial review, but rather envisages lower courts determining constitutional questions, with the Constitutional Court having the ‘final’ say. And although Indonesia’s civil law-based system does not officially recognise the doctrine of *stare decisis*, an interpretation of the Constitution’s non-retrospectivity pro-
vision by either the Constitutional Court or the Supreme Court exercising judicial review would effectively be binding (Rajagukguk, 2002: 57).

Also worthy of consideration is the Supreme Court’s limited power of judicial review as established under MPR Decree III/2000 on The Sources of Law and the Hierarchy of Laws and Regulations. Article 5 gives the Supreme Court authority to review regulations inferior to Laws (Undang-Undang) in Indonesia’s legal hierarchy. This is quite a limited power and would not impact on the Constitutional Court’s broader jurisdiction of judicial review of legislation as established under the Third Amendment. However, this MPR decree sheds light on how the DPR might define the procedure for the proposed Constitutional Court. Article 5(3) of the decree states that the Supreme Court’s limited power of judicial review ‘shall be at the institute of the Court and shall not depend upon an appeal process’. If such a provision is representative of Indonesia’s general approach to judicial review, then it is foreseeable that the Constitutional Court would have a similar power to determine the constitutional validity of legislation without the precondition of an appeal case.

Predicting the outcome of an appeal from the East Timor or Bali trials based on constitutional grounds is therefore a difficult task, given the uncertainty that attends the form and authority of the body that will hear constitutional appeals. It is further compounded by the solid arguments both for and against the constitutional validity of retrospective prosecution. The plain wording of art 28I(1) creates an easily justifiable avenue to strike down the legislation for the Bali and East Timor trials. Notions of individual justice and the infringement on personal liberty can also be raised to bolster this claim. To uphold retrospective prosecution, and circumvent art 28I(1), judges can interpret art 28J(2) as requiring an overriding constitutional requirement to protect the human rights of victims of crimes against humanity. The UDHR and international law more generally give weight to this contention. Article 28J(2) could, however, also be construed narrowly as a merely formalistic acknowledgment that the preservation of individual human rights requires respect for the law.

Given that there are arguments that would support a decision to either uphold or strike down retrospective prosecution, a determination on the matter will depend largely on the individual judges who will constitute the court. Accordingly, a resolution to the retrospectivity issue may end up as a political, rather than legal, decision. It is beyond the scope of this article to discuss the political factors which may influence judges either individually or collectively. However, it is important to note that legal reasoning may only play a minor role in resolving the uncertainty over retrospectivity.
In this light, it is worth considering whether the proposed Constitutional Court does, in fact, represent a meaningful improvement for Indonesia’s legal system. Indonesia has a well-documented history of judicial corruption and incompetence (Lev, 1999) and the new court may merely create a new institution for this corruption to manifest itself. If important issues of constitutional clarification, such as the validity of retrospective prosecution, are subject to overwhelming political manipulation, the integrity and clarity of the Constitution could be undermined rather than improved.

It is impossible to pass judgment on an institution that is yet to be created. Yet it is apparent that ensuring the independence of the new court is vital to its success. For if judicial review and constitutional interpretation are influenced more by politics than principle, the Constitutional Court may, in part, weaken Indonesia’s constitutional values and legal system. An independent and competent court would, however, be of significant benefit to Indonesia. An authoritative determination on the constitutional validity of retrospective prosecution made by an independent court would provide much needed certainty to the East Timor and Bali trials and would remove much of the controversy that has plagued these cases.

Under Soeharto’s New Order regime, the Indonesian judiciary was inextricably linked with state interests and judicial review was prohibited (Lindsey, 2002: 261). Thus, a determination on the constitutional validity of the Bali and East Timor trials, either by the Constitutional or Supreme Courts, would, most likely, be the first major instance of judicial review in Indonesia since the fall of Soeharto and arguably the first since the Law on Judicial Powers (No 14/1970), which specifically prohibited the exercise of this power by the judiciary. This would represent a radical change in the relationship between Indonesia’s legislature (previously under the control of the executive) and judiciary and would be an important development in the evolution of Indonesia’s fledgling legal system (Lindsey, 2002: 261). An effectively implemented Constitutional Court has the potential to place the Constitution firmly at the apex of the legal hierarchy, and enhance the separation of powers and thereby strengthen the rule of law (National Democratic Institute for International Affairs, 2001: 6).

The Constitutional Court also has the potential to provide much needed clarity for Indonesia’s Constitution. Thus, the appeals of the Bali and East Timor trials could signal the dawn of a new era of constitutional certainty, where doubt as to the constitutional validity of legislation can be resolved by established – and predictable – principles or by appeal to an authoritative court. However, this will only be achieved if the court is
made strictly independent from the wider judiciary and legislation effectively defines the authority and powers of the new court. And even if the court is successfully implemented, it will still take substantial time to develop doctrines by which to interpret the Constitution. Such a dramatic power shift in Indonesia’s judiciary will undoubtedly be met with resistance by some members of the Supreme Court and it may therefore take decades before this radical change becomes normal practice. Notwithstanding these difficulties, the importance of commencing this process cannot be underestimated: it is highly likely, given Indonesia’s piecemeal approach to constitutional reform, that important cases of constitutional interpretation will arise with increasing frequency in the near future.

Conclusion
As appeals from the six convictions of the East Timor trials and any convictions from the Bali court work their way up the appeal chain, the issue of retrospectivity will have to be revisited. The Constitutional Court, or the Supreme Court exercising the interim power of judicial review, will have to determine the constitutional validity of retrospective prosecution. It is possible that a strict reading of the Constitution will be favoured, and therefore the application of art 28I(1) will render any convictions invalid. Whether the Constitutional Court is in operation by the time of the appeals is likely to have a significant bearing on the outcome of any appeals. Yet, as the authority and procedure of the new court is not yet defined, it remains to be seen how the Constitutional Court (or the Supreme Court, exercising its powers) would deal with such an issue.

At a general level, the retrospectivity issue primarily demonstrates that Indonesia’s legal institutions and processes need development. The inclusion of a non-retrospectivity clause in the Constitution is not of itself detrimental. Rather it provides important protection against capricious retrospective prosecution. It is the drafting and atmosphere in which art 28I(1) was passed which is troubling. Both the Bali and East Timor trials are valid exceptions to the prohibition on retrospective prosecution, but the lack of established principles of constitutional interpretation and the underdeveloped state of judicial review in Indonesia have allowed the defendants to use the uncertainty over retrospectivity to cast doubt upon the validity of their trials. This has created undue controversy and has detracted from Indonesia’s remarkable constitutional development since the fall of Soeharto. Until an effective Constitutional Court is established and Indonesia has an avenue to resolve issues such as retrospective prosecution, perhaps Indonesia’s ‘muddling’ through in its development to fully fledged democracy will remain a slow process (Lindsey, 2002: 276).
Notes

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1 The terms retrospectivity and retroactivity are often used interchangeably. Although it is acknowledged there is a difference in their legal meaning, with retroactive statutes operating from a time before its enactment and retrospective statutes operating for the future only but imposing new results in respect of past events, it is a fine distinction. For simplicity, no distinction will be made between the two terms. Further, the phrase ‘ex post facto’ is often used in place of retrospective and no distinction will be made with this term either: Driedger, 1978.

2 The MPR has the exclusive authority to reform the Constitution. The Dewan Perwakilan Rakyat (DPR), or People’s Representative Assembly, is Indonesia’s parliament and is responsible for passing legislation: Lindsey, 1999.

3 The main blocs within Indonesian politics consist of the Indonesian Democratic Party – Struggle (PDI-P), led by Megawati Soekarnoputri; the former ruling party, Golkar; the National Awakening Party (PKB); the United Development Party (PPP); and the National Mandate Party (PAN).

4 The Constitutional Commission proposed in debate on the Fourth Amendment to the Constitution is a positive step. Although it will lack independence as all proposals will require MPR approval, the Commission will provide greater public consultation and a higher degree of transparency. Given this improved procedure for constitutional reform, it is hoped that constitutional amendments such as art 28I(1) would receive greater scrutiny before they are passed: see Lindsey, 2002: 272; National Democratic Institute for International Affairs, 2001: 1.

5 It has been suggested that Indonesia may become a signatory to the ICCPR in the near future; see Indonesian Mission to New York, 2002: 1.

6 The most relevant examples are European Court of Human Rights decisions on art 7 (the non-retrospectivity provision) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See, for example, K-HW v Germany (2001) Eur Court HR, Reports of Judgments and Decisions 2001-II and Stereletz, Kessler, and Krenz v Germany (2001) Eur Court HR, Reports of Judgments and Decisions 2001-II.

7 The Elucidation is in the explanatory memorandum that accompanies most Indonesian regulatory instruments. It is usually considered part of the statute and is routinely relied on as a guide to interpretation: Lindsey, 2002: 247.


9 The Judicial System Monitoring Program confirmed in May 2003 that dates for the hearing of appeals have not yet been made.

10 As it was reported that there are no substantial differences between the Perpu 1/2002 and the new legislation, the Perpu will be considered to constitute Indonesia’s anti-terrorism legislation. See AFP, ‘Indonesia’s Parliament Passes Law on Anti-Terrorism Decrees’ AFP (Jakarta), 6 March 2003, <http://www.etan.org>, 1.

References


International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976). As at 1 January 1995, there were 131 states parties. Indonesia is not currently a signatory to the ICCPR.


Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948).
