

Chapter 20

The Bali Bombing, East Timor trials and the Aceh Human Rights Court – retrospectivity, impunity and constitutionalism

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When the Second Amendment to Indonesia's 1945 Constitution was passed in 2000, it appeared the fledgling democracy was taking a significant step away from the repression and violence of the New Order and embracing a new era of human rights protection. While the gains were significant, particularly as they appeared on paper, one provision was to have a profound impact on steps to hold accountable perpetrators of crimes against humanity. The prohibition of retrospective¹ prosecution stipulated in Art 28i(1) (and especially the fact that the provision 'cannot be limited under any circumstances') became a thorn in the side of attempts to bring to justice both senior TNI (Tentara Nasional Indonesia, Indonesian National Army) officers, and some of the perpetrators of the Bali Bombing. Because legislation drafted to prosecute the perpetrators in both cases was enacted after the alleged crimes occurred, it appeared that Art 28i(1) could render trials based on retrospective prosecution invalid. Similar arguments were made by lawyers for military and militia defendants charged with human rights offences in trials in the Ad Hoc Human Rights Court for East Timor.

At the trial level, judges dismissed these arguments and convicted defendants under retrospective legislation. Cases then made their way up the appeal chain and one case came before Indonesia's newly-established Constitutional Court. On appeal, Bali bomber Masykur Abdul Kadir argued that his conviction breached the Constitution as the legislation he was prosecuted under operated retrospectively. The court agreed by the smallest of margins (5:4).

Not only did the Kadir case indicate that Indonesia's prohibition on retrospective prosecution is absolute, but it also represented one of the most important exercises of judicial review conducted in Indonesia since the fall of Soeharto. The

¹ The terms 'retrospective' and 'retroactive' are often used interchangeably. Although it is acknowledged there is a difference in their legal meaning, with retroactive statutes operating from a time prior to 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).

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option is amending Art 28I(1) to clearly allow certain exceptions to the principle of non-retrospectivity. In this case, an important question would be whether such a constitutional amendment could operate retrospectively? It most likely could, particularly if explicitly expressed to do so.

A Human Rights Court for Aceh?

The envisaged Human Rights Court for Aceh further illustrates that retrospective prosecution (or lack thereof) will continue to be controversial (Forum Asia, 2006: 1). The Law on the Governance of Aceh, passed by the DPR on 11 July 2006, envisages a Human Rights Court, however, as mentioned earlier, the court was rendered largely impotent, as under Art 228 of the Law it can only try human rights cases that occur after the enactment of the Law. This limitation of the court's jurisdiction to prospective cases makes the court by and large meaningless, as most such violations were committed well before the Law was passed.

Given the significant number of human rights abuses on both sides of the conflict, the prospective jurisdiction of the court was attractive to both the Free Aceh Movement (Gerakan Aceh Merdeka or GAM) and Indonesian government and military negotiators. Yet despite the political reality of Aceh's peace negotiations, the irony of establishing a specific Human Rights Court for Aceh but preventing it from trying large numbers of existing human rights cases is difficult to avoid.

To effectively address widespread state-sponsored human rights violations in Aceh, the prosecution of perpetrators needs to occur. Ensuring justice and accountability through effective trials (possibly in conjunction with other transitional justice mechanisms) is necessary to uphold Indonesia's obligations under international law; is crucial to breaking the culture of impunity that remains a barrier to military reform; and is a basic right of the conflict's many victims.

In light of the controversy surrounding the retrospectivity of the East Timor and Bali Bombing trials, as well as the Kadir decision, both GAM and Jakarta have the strongest authority on which to justify the court's prospective jurisdiction. On any interpretation, the absence of retrospective prosecution – notwithstanding the constitutional issues – will be a significant barrier to effectively addressing crimes committed during the Aceh conflict. Its absence may indicate that the Indonesian government sees human rights trials as a prospective project only, with past abuses consigned to the domain of truth and reconciliation commissions. If so, this has serious implications for the future of judicial accountability for past human rights violations committed not only in Aceh but across Indonesia. The resolution of the retrospectivity issue is therefore crucial in securing justice for the victims of Indonesia's history of human rights violations.

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