The agony and the power of dissent

*By Colin McDonald QC**

It has been a turbulent year for Indonesia and the Indonesian judiciary. Some observers say the Indonesian judiciary is in a crisis that threatens the reputation and the capacity of the nation's highest courts to deliver justice. Other observers, who acknowledge the legal foment of this year, are more optimistic and see this year as an exciting development in the struggle for the rule of law in post-Soeherto Indonesia.

Two cases in particular are referred to by the contending observers in support of their arguments:

- Golkar Party chairman and House of Representatives ('DPR') speaker Akbar Tanjung's acquittal on 12 February 2004 by the Supreme Court; and
- the new Constitutional Court's striking down of Indonesia's Anti-Terrorism Law introduced to respond to the horrific Bali bombings.

The cases have attracted huge national and international attention to Indonesia's Supreme Court and Constitutional Court and exemplify the growing importance of judicial decision making in Indonesian society. What has sharpened the focus and the interest of ordinary Indonesian people in particular has been the unprecedented expression of dissenting judicial opinion in the two cases. The dissents struck a resonant chord across Indonesia dealing as they did with the two major issues facing the nation: corruption and security.

Indonesia is witnessing for the first time the agony and the power contained in dissenting judicial opinion.

In 1970 by Law No.14/1970, General Soeharto's New Order regime denied Indonesian courts the power to review the constitutionality of statutes. Retrospective legislation was utilised where necessary to maintain the policies of executive government. The courts ultimately exercised no real power. Appointments to the Supreme Court were made by President Soeharto, himself. The national courts remained by and large a backwater in Indonesian society - conforming, conservative and careful not to rock the boat. Allegations of corruption and interference with judicial decisions were rife. All this began to change with the fall of Soeharto and the New Order regime in 1998.

Students in Jakarta demonstrate against Indonesia's Anti-terrorism Law introduced in 2002.
Photo: News Image Library

Since 1998 reform and democratisation have been rapid in Indonesia. In the last fifty years there has hardly been a nation where the transition from military dictatorship to democracy has been so swift, so determined and so peaceful. No one should underestimate the determination of Indonesia to reform itself. *Reformasi* advocates were keen to ensure that the executive power not produce the excesses they had experienced for the preceding 30 years. Indonesia gained a new, more democratic constitution which contained a Bill of Rights. Political power passed from the president to the House of Representatives. Law No.14/1970 was rescinded and a new Constitutional Court was given the power to strike down laws on constitutional grounds. President Gus Dur made some radical appointments to the Supreme Court. Change, democratic change was afoot, no more assuredly than in the nation's top appellate courts.

Since 1998 the Supreme Court has taken significant steps to reform itself and its image. Legal reform was considered essential to consolidate democracy. In October 2003 the court released its own blueprint for reform. Chief Justice Bagir Manan is very public reformer and relevant foreign donors acknowledge the court's commitment to clean up not just itself but also courts lower in the Indonesian hierarchy. However, as in other Indonesian public institutions, practical progress is slow. Chief Justice Bagir himself has frankly admitted that 10 to 15 years are needed before a truly credible judiciary can be rebuilt in Indonesia and this depends on widespread political support.

In Australia and other common law heritage countries dissenting judicial opinion is commonplace. Dissents can be powerful and contain reasons that sow the seeds of subsequent legal change as in the High Court decision in *Cullen v Trappell* (1980) 146 CLR 1 applying the dissenting judgment of Justice Gibbs in *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202. In the United States of America in particular, dissenting legal opinion is sometimes both eloquent and scathing. In Australia we have had a recent taste of the passion and legal conviction which can be held in dissenting opinion in the 4 - 3 decision of the High Court in *Al-Kateb v Godwin & Others* [2004] HCA 37. But in England, the United States and in Australia when the highest national courts hand down decisions, police do not battle with demonstrators outside. Riots are not caused by court decisions as they have been in Indonesia this year.

Until this year, the expression of a dissenting judicial opinion was unprecedented in the Supreme Court of Indonesia. A joint

panel decision of the five or more judges was the norm. The dramatic politics in Indonesia from 1998 to 2003, the genuine will for democratic reform, the concern of corruption and the nation's battle to preserve a secular state against Islamic terrorists have however transformed this.

The facts behind Akbar Tanjung's acquittal by a majority in the Supreme Court on 12 February 2004 were not in dispute. In February 1999 Akbar Tanjung was a minister and state secretary in the cabinet of former president BJ Habibie. Habibie charged Tanjung with the task of drawing Rp40 billion (about A$6.5 million) from the Indonesian State Logistics Agency for a food distribution programme to feed the poor. The agency wrote Tanjung the cheques, but no food reached the poor. Tanjung initially denied receiving the cheques, but subsequently in October 2001 admitted that the money was channeled to an obscure foundation with no experience in food distribution headed by one Dadang Sukandar. Sukandar in turn passed the money along to businessman Winifred Simatupang to carry out the programme. The three men were charged in 2002 and stood trial for embezzlement in the Central Jakarta District Court. Tanjung was the senior most Indonesian government person ever to face a corruption charge in a country debilitated by corruption. On the eve of trial, Simatupang returned Rp32.5 billion to the government. On 4 September 2002 Tanjung was convicted by the five judge panel and sentenced to three years imprisonment. The other two defendants were also convicted and received lesser gaol terms. Tanjung appealed and remained free.

Tanjung's appeal to the Jakarta High Court failed on 17 January 2003 and the lower court's verdict was upheld. On 20 March 2003 Tanjung's lawyers filed his appeal to the Supreme Court.

The Supreme Court proceedings drew the attention of the nation's media. It was a presidential election year and Tanjung was a Golkar presidential candidate aspirant. The corruption conviction stood in his way. Indonesian TV broadcast the Supreme Court proceedings live across the nation and the many major daily newspapers were all present.

Polls across the nation reflected a cynical national sentiment that Tanjung would 'get off'. On the eve of the decision, rumours abounded in Jakarta that the judges had been bought or pressured.

So, no one was really surprised when after an eight hour reading of the decision, Presiding Justice Paulus Effendy Lotulung overturned the verdict, *inter- alia*, stating that Tanjung's role in the disbursement of moneys was 'merely the implementation of an official instruction and therefore the action cannot be classified as a legal offence.'

After this decision was read, Indonesian TV flashed to the Golkar strongman's home where the DPR speaker was throwing himself on the floor in gratitude to God. Then, the

Indonesian students burn an effigy of Akbar Tanjung outside the Supreme Court in Jakarta, 11 February 2004.
Photo: Ade Danhur / News Image Library

extraordinary occurred; it too was relayed live across the nation: Justice Lotulung stated politely that the Supreme Court verdict included an opinion that dissented from those of the other judges and further, that this opinion was recorded as being included in the Supreme Court verdict. Legal history was being made live on television across Indonesia. Justice Lotulung asked Justice Abdurrahman Saleh to read out his opinion.

Justice Saleh, in the first recorded dissent in the Indonesian Supreme Court, pulled no punches. It was verbal manna from heaven to the cynical watching populace. As quoted in *The Jakarta Post* for 13 February 2004, Justice Abdurrahman Saleh quietly opined:

> This verdict is a humiliation of the law when these judges say that the lower courts have wrongly implemented the law... At a time when the country was sinking in the crisis, the actions of the defendant violated one's sense of justice.

Justice Saleh said that Tanjung had engaged in 'corrupt practice' and was guilty of 'shameful conduct because he failed to show minimal appropriate efforts to protect state money.... which the president had entrusted to him.' Justice Saleh then described in detail Tanjung's failures, which he considered proved the verdict and rejection of the appeal in the Jakarta High Court were correct.

At this point, editorials were being changed hastily in the nation's many newspapers. Outside the Supreme Court, students battled with police with about sixty of their number being taken to hospital. Spontaneous demonstrations occurred across Java. One quiet, one determined judicial dissent was igniting a political powder keg. As he praised Allah and the Supreme Court, Akbar Tanjung was, politically, dead in the water.

The majority decision drew trenchant criticism from lawyers, *reformasi* advocates and many Muslim notables. But it was the dissenting opinion which captured the nation's attention and fuelled these views.

The first public dissent in the Indonesian Supreme Court was, in a very dramatic way, putting the finger on Indonesia's most debilitating political problem: corruption. Whatever the legal merits which lay behind the respective opinions, it was Justice Abdurrahman Saleh's dissent, which resonated in the feelings and frustrations of scores of millions of Indonesian people.

The next day *The Jakarta Post* editorial echoed those of the other Indonesian dailies. The dissenting opinion was quoted extensively and accorded prominence and the majority opinion condemned.

The editorial in *The Jakarta Post* went on to say that the majority Supreme Court decision:

> brings into question the quality of the entire judicial system in the eyes of the public and could seriously impair public trust in the judiciary as a whole - not to mention the wider political implications. Many Indonesians also see it as a serious setback in the fight against corruption, especially that within the country's notoriously corrupt judiciary.

The dissenting opinion made Justice Saleh a reluctant celebrity in Indonesia. He became the popular speaker at all manner of legal and popular fora. He became a hero in the universities. In damage control, in a presidential election year, the Megawati government convened a national law summit of the country's highest ranking legal institutions, the focus of the conference being the eradication of corruption in legal institutions. Justice Saleh was a keynote speaker.

Meanwhile, in the Golkar Party hard thinking was underway. Tanjung was undoubtedly in control of the party machine, ambitious and formally free to run as the Golkar presidential candidate or to put a deal together with Megawati and run as her vice-president.

However, at the House of Representatives election on 5 April 2004 the face of Indonesian politics changed. Megawati's PDI party vote all but collapsed. Golkar, although the party taking the greatest number of seats, slipped and new parties and leaders emerged who espoused reform and change. Politics in Indonesia was inexorably being taken away from the party machine men (and they are all men) to the rank and file. As further evidence of Indonesia's rapid embrace of democracy, the presidential election on 20 September 2004 was for the first time a vote for a person not a party. In the world of ordinary Indonesians and populist politics, whatever the legalities, Tanjung became unelectable.

Abdurrahman Saleh, formerly a Supreme Court judge, is now attorney-general in SBY's government.
Photo: News Image Library

At the Golkar convention on 21 April 2004 the charismatic former defence minister Wiranto thrashed Tanjung for the party's presidential candidate nomination. Wiranto had a strong anti-corruption platform and was the only Golkar candidate who formulated policies for women and the poor. He was tough on terrorism.

Indonesia's first judicial dissent was undoubtedly a part, an important part, of Akbar Tanjung's fall from political grace.

Soon after, the nation's attention was again focussed on legal proceedings, this time the constitutional challenge in the new Constitutional Court by Masykur Abdul Kadir, one of the convicted Bali bombers. The decision in this case, even more than Akbar Tanjung's acquittal, sparked national and international controversy. Again, Indonesia witnessed powerful judicial dissent.

In a majority of 5-4 decision, the Constitutional Court used its review powers and struck down Law No.16/2003. Law number 16 purported to authorise police and prosecutors to use Indonesia's *Anti-Terrorism Law* introduced urgently in the tumultuous aftermath of the Bali bombings. The anti-terrorism laws (Interim Law Number 1 of 2002 which later became Law No. 15/2003 and Interim Law Number 1 of 2003, which later became Law No.16/2003) did not exist on 12 October 2002 when bombs blew away the Sari Club and Paddy's Bar in Kuta.

Argument before the Constitutional Court was vigorous and well presented. Again the nation watched the case on TV and the extensive print media covered counsels' arguments thoroughly.

Mr Kadir's case was that Law No.16/2003 conflicted with a new provision in the recently amended Indonesian Constitution. Mr Kadir argued that article 28(1) of the Constitution gives every Indonesian a constitutional right not to be prosecuted under a retrospective law. Article 28(1) is contained in the new Bill of Rights in the Indonesian Constitution. Mr Kadir sought and obtained, by a majority, a declaration that the *Anti-Terrorism Law* was invalid.

Lawyers for those convicted of the Bali bombings under the anti-terror laws have indicated the decision will probably now lead to a spate of appeals in the Supreme Court by other convicted Bali bombers seeking to have their death sentences and life sentences overturned. They will rely on the Constitutional Court's declaration of invalidity in the appeals as a new factor, a 'novum' which if known at the time of trial would have led to Amrozi's and the others' acquittals.

The political response was immediate and almost overwhelming. There were riots in Bali. The nation's press screamed that people were now powerless against terrorism. The politics around the decision needs to be seen in the context of the clear threat posed by the lethal acts of the persons who perpetrated the Bali and JW Marriott Hotel bombings that killed so many Indonesians. The subsequent car bomb detonation at the Australian Embassy on 10 September 2004 which killed nine innocent Indonesians only served to confirm the grave threat Islamic terrorism poses to the constitutional secular republic of Indonesia.

Jemaah Islamiah (JI) has been responsible for bombings across Indonesia since 2000. JI openly defies the established government of Indonesia fuelled with a zealotry and hatred of the West. Yet, the majority of JI's victims have been innocent Indonesian citizens.

The anti-terrorism laws were a clear set of laws designed to protect the nation and bring to justice those who not only killed, but who also harboured broader goals of spreading fear, causing instability and bringing down the secular state. The anti-terrorism laws did not increase any potential sentence under the pre-existing laws facing perpetrators of the killings in Bali on 12 October 2002 under the ordinary criminal law.

The decision of the Constitutional Court turned surprisingly on a narrow and unexpected point. All nine judges agreed that retroactive enforcement of laws is sometimes justified. Whilst the issue of the constitutional ban on retroactive prosecution was ultimately the basis for the majority decision another real issue in controversy was the narrower question whether there were sufficiently 'special' or 'extraordinary' circumstances in the Bali bombings to justify a retroactive enforcement of the anti-terrorism laws.

The majority judges held that the bombings in Bali and Kadir's involvement in them was an 'ordinary crime'. The dissenting judges characterised the Bali bombings as an extraordinary crime. The issue of 'ordinary and extraordinary' crimes was only an issue because it related to an argument about how the ban on retrospectivity might be avoided. That argument was, in fact, irrelevant, because the constitutional ban says the right against retroactive prosecution cannot be diminished in any circumstances, so no norm of international law or Indonesian law could overrule it, as that would be to diminish a prohibition constitutionally expressed to be absolute and incapable of diminution.

Some commentators asserted the majority decision was 'more political than legal.'

In an opinion piece on 3 August 2004 in *The Jakarta Post*, Professor Jeffrey Winters and Richardson Galinggin of North Western University said:

> The judges who prevailed went to great lengths to make sure that the Bali bombing had no special status as a terrorist act. By insisting that the bombing was simply a horrible but ordinary case of murder the judges crossed the line from pure legal reasoning into the realm of politics.

They continued by observing further:

> The single most important argument against retroactivity is to avoid oppression through the criminilisation of non-criminals. Allowing retroactive enforcement of the terrorism law should have been easier for the judges because no post-hoc criminalization occurred in the Bali bombing case. The actions of the conspirators were criminal whether they were prosecuted under the terrorism law or the ordinary criminal code.

The dissenting opinion emphasized the factual context of the crimes and the motives of the perpetrators. They upheld the arguments advanced by the Ministry of Justice and the prosecutors that Kadir's crime was an extraordinary crime and retroactive enforcement of the anti-terrorism law was justified.

Again, the dissenting opinion struck a chord with national sentiment and provided a focus for a national debate. Decision makers in Jakarta appeared to be in a momentary panic as they sought to answer eager editors from across the country whether Kadir would walk free. Susilo Bambang Yudhoyono (locally known in Indonesia as 'SBY') was given further political ammunition in his popular bid for the presidency - he would crack down on the terrorists and it was a message Indonesians wanted to hear. Australia and other Western countries condemned the majority decision. The issue of security was moving to centre stage and Megawati was on the back foot.

Justice Minister Yusril Ihza Mahendra issued a press release putting the government's interpretation of the majority decision. Surprisingly, so did the chief justice of the

Constitutional Court. Ominously, the press releases carried a similar and almost unbelievable interpretation of the published judgments. Kadir and other bombers could not be released because Constitutional Court decisions cannot operate retrospectively. So according to the press statements, the decision, whilst binding, only operates prospectively and prevents future prosecutions under the invalid Law No.16/2003. The chief justice of Indonesia also gave his extra curial voice, saying the Constitutional Court decision did not operate as a novum and could not be relied upon for a review in the Supreme Court. All in all, the result has been a dangerous mess. The credibility of the courts has been affected. Why would any person bother to challenge the validity of criminal laws where their status remains unchanged despite achieving declarations of invalidity?

The manner in which the chief justices have responded publicly has given rise to wider and potentially more serious issues involving the Constitutional Court and the Supreme Court themselves. The concept and reality of judicial independence, a core feature of modern reforms, was compromised at least in appearance by the near simultaneous issue of press releases. The incredible similarity of interpretative content, temporarily seen as expedient perhaps, has now enveloped the Constitutional Court in a controversy that goes beyond Kadir's case and the issue of national security, but raises the integrity of the functioning of the Constitutional Court itself. The unilateral reinterpretation of the majority view as expressed in the binding judgments was an unacceptable intrusion on the integrity of the majority judicial decision and compromises the judicial power. It has been statements made *outside* the courtrooms by senior judges that have caused the real controversy that affects the courts.

Why there was such apparent panic in the corridors of power in Jakarta may have had something to do with the perceived hostile domestic political response to the majority judgment and the actual hostile political response from the countries of the 'Anglosphere'. Otherwise, it is important to note that of the thirty or so persons convicted in relation to the Bali bombings, many were also convicted and sentenced to death or given heavy gaol terms for the possession of firearms and explosives under the old Emergency Law No.12/1951. The more senior and culpable defendants Muklas and Samudra fell into this category. What is even a greater mystery is why the prosecutors who have been so deft and effective in relation to both the Bali and JW Marriott hotel bombings to date, did not simply immediately charge Kadir and other relevant defendants with the 'ordinary' crime of murder. No principle of double jeopardy applicable in Indonesia would seem to stand in their way if the anti-terror convictions are in fact quashed. If the convictions are not quashed, as they should be, no doubt lawyers acting for Kadir and others may be expected to argue double jeopardy issues. But the press releases would seem to indicate that the convictions probably will not be quashed. The situation is still unclear.

The cases the critics point to involve dramatic facts, vital to the life and health of modern Indonesia. Indonesia is confronted with many crises: any one of which would be enough to consume a country like Australia. However, when the history of other courts are examined in newly formed democracies and the huge problems facing the new, democratic Indonesia are taken into account, the beginnings of another picture emerge.

In April 2004 and September 2004 Indonesians experienced their first fully democratic and direct election of their national representatives and national leader. The House of Representatives is still finding its legislative feet and the disciplined procedures necessary to make wise laws. Indonesia does not yet clearly have what common law countries took so long to achieve: a purposive approach to statutory interpretation. In terms of nation building post Soeharto, these are early days. So too, these are early days in Indonesia's courts adapting to the exercise of truly independent judicial power.

The emergence of dissenting judicial opinion, whilst it may be unprecedented, can nevertheless be seen as a clear sign of the emergence of independent judicial decision making. Discipline in the judicial method and reasoning will surely help the achievement of independence. But in these early years of democracy the agony of Indonesia's first two judicial dissents in the country's highest courts drew enormous interest, whipped up fierce debate and have carried huge influence - because it was the exercise of judicial power. Indonesians hunger for justice just as much as any other people on earth.

Stepping beyond the exercise of the judicial power and giving hasty extra-curial interpretations of judgments for the media will stifle the development of the courts, inhibit genuine reform and give rise to a new form of cynicism. Lessons are no doubt being learned.

One observer, Professor Tim Lindsey from the Asian Law Centre at Melbourne University, is probably right in opining in *The Jakarta Post* on 6 August 2004 that the Constitutional Court at least is facing a watershed in its short existence and so too is that of the use of the judicial power in Indonesia.

Judges must learn to behave simply as judges and decide the cases before them.

The re-emergence of the judiciary to the centre stage in the new Indonesia, has been something the *Negara Hukum* (law state) reformers have been so determined to achieve. The two strong dissenting opinions this year demonstrate how quickly and how assuredly the judicial power is developing. The terms of the dissents may have been agonized, but their effect demonstrates overwhelmingly their power in Indonesian society.

* Colin McDonald QC was a member of the board of the Australia-Indonesia Institute from 1899 to 1994