Death row in Bali

an update on the Bali 6

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By Julian McMahon

It is Christmas Eve as I write these words, and I am contemplating the cases of six Australians on death row, from the group known as the 'Bali 9'.

The cases for those young Australians have been moving through the courts for over two years now, and for some there is still a long struggle ahead, the options either being lined up and shot, or prison. Three of them – Sukumaran, Chan and Rush – have just suffered a defeat of sorts in the Constitutional Court of Indonesia, and Australian lawyers should take the time to consider that historic decision, delivered on 30 October 2007. It is one of the most important decisions of its kind in our region for many years. But this article does not cover all the issues or all the problems for those in the case. It is not another argument

for the abolition of the death penalty. It is simply a snapshot in time to give the reader a sense of the current situation. If you are reading this article, it is likely you will be able to play a role in this case at a later time, whether by letters, radio callback, speaking to MPs, etc. The purpose of this article is to better inform those who are likely to have the conviction to act publicly as events unfold.

THE FACTS

One can read a racy, journalistic version of the story of the Bali 9 in *One Way Ticket* by Cindy Wockner and Madonna King. Suffice to say that, in April 2005, nine Australians were arrested, some at the airport in Bali and others at a hotel in Bali, and overnight became – in Australia at least – the phenomenon known as 'the Bali 9'.

It is well-known that the Australian Federal Police (AFP) played a significant role leading up to the arrests. The AFP's actions, the lawfulness of those actions, and the text of the two April 2005 letters they sent to the Indonesian Police about the Bali 9, are discussed in detail by Finn J in the decision *Rush v Commissioner of Police*.[1] The contents of those letters, and the delivery by the AFP of Australians to the Indonesian police on charges that would surely attract the death penalty, are surprising. Regional co-operation 'even unto death' needs considerably more justification than is so far evident in this case. Clearer binding principles are needed for the AFP. Its task is always difficult, but its discretion in this area needs firmer control.

THE INDONESIAN COURTS

The Indonesian court hierarchy is District, High, then Supreme. The Constitutional Court stands outside that hierarchy.

The Bali 9 were tried and found guilty at the Denpasar District Court. Sukumaran and Chan were sentenced to death, and the other seven were sentenced to life imprisonment. On appeal to the High Court, some sentences were upheld and others reduced to 20 years. Renae Lawrence, whose sentence is 20 years, stopped at the High Court.

The other eight went to the Supreme Court. Life imprisonment was upheld for Martin Stephens and Michael Czugaj. The death penalty for Sukumaran and Chan was upheld. Unexpectedly given the arguments on appeal, the Supreme Court increased the sentence of Si Yi Chen, Tach Duc Thanh Nguyen, Matthew Norman and Scott Rush from life imprisonment to death in September 2006. This group on death row is known as 'the Bali 6'.

One of the unusual features of the Indonesian system is that, in a case with many defendants, a Supreme Court hearing for those defendants may be fragmented and heard by different panels of three Supreme Court judges, even if the cases are drawn from the same factual matrix. The Supreme Court has 51 judges – 17 panels of 3 – and different panels heard the cases of various Bali 9 members simultaneously. Each panel sentenced separately. Alleged divergence, or lack of consistency, between the panels is being used by some as a basis for appeal.

WHERE TO GO AFTER BEING SENTENCED TO DEATH BY THE HIGHEST COURT?

Faced with the death penalty in September 2006, the six Australians followed different paths.

Although the Supreme Court is the highest court in Indonesia, a defendant may initiate one further appeal known as a 'Peninjauan Kembali' (or 'PK'). This is a second appeal to the Supreme Court, where a different panel of judges reviews the earlier panel's decision. The right of appeal is limited to where there is new evidence of sufficient kind to alter the verdict, or where there is a sufficient error of law.

Early in 2007, Chen, Nguyen and Norman initiated their second Supreme Court appeal, the PK. That decision, as at Christmas Eve 2007, has not yet been handed down. They are hoping to have their death sentences overturned and jail terms substituted. Following the decision of the Constitutional Court, it is expected that Sukumaran, Chan and Rush will now also move in 2008 to argue a PK.

CONSTITUTIONAL COURT

In September 2006, Lex Lasry QC (now Justice Lasry of the Supreme Court of Victoria) and I became actively involved in running the cases of Sukumaran and Chan. We engaged one of Indonesia's pre-eminent lawyers, Todung Mulya Lubis, to consider the question of running a case in the Constitutional Court of Indonesia on the question of the constitutionality of the death penalty. Mulya Lubis formally commenced >>

The application seeking a ruling that the death penalty is unconstitutional had never before been made in Indonesia.

proceedings in January 2007 to argue the point.

Scott Rush, who is also represented by Indonesian lawyers and, in Australia, by Colin McDonald QC and John North, commenced his own application early in 2007 on similar substantive issues, and the court joined the applications for the purposes of argument.

Standing

One initial hurdle was the question of standing, because Sukumaran and Chan were not Indonesian citizens. In order to eliminate this problem, our Indonesian lawyers began acting for two women who were Indonesian citizens on death row, Edith Siyanturi and Rani Andriani.

The logic behind this was that, if the application of Sukumaran and Chan was struck out on the question of standing, the court could nevertheless proceed to hear argument and make a decision on the basis that the two women, who are citizens, remained as applicants. In the event, this is precisely what happened. No applicants were successful.

THE HISTORY OF THE CONSTITUTIONAL COURT

Following the end of the Soeharto era in 1998, Indonesia began a period of ongoing reform. Two relevant reforms were the creation of the Constitutional Court and the insertion into the Constitution of both the permanent recognition and protection of a range of human rights. That new part is Part XA, and reflects key provisions from the International Covenant of Civil and Political Rights (ICCPR), which Indonesia subsequently signed in 2006.

THE RUNNING OF THE CASE

The Constitutional Court has a full bench of nine, and is highly regarded. Its function is to safeguard the organs of government and administration on behalf of the country. It is inquisitorial. In our case, it heard evidence from many experts. The Court's rule of thumb was '*If you can help us to understand more deeply local law, the death penalty, international law and treaties, the drug problem, we are happy to hear from you.*' The result was that the Court heard perhaps two dozen experts drawn from law, criminology, government ministers and agencies over a six-month period.

Apart from local experts, we also used three world experts to focus on international jurisprudence, particularly the international law of the death penalty, and deterrence, which was a particular concern of the Court. Our non-local experts were Professor Philip Alston, the UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions; Professor William Schabas, author of *The Abolition of the Death Penalty in International Law*,and current head of the Irish Centre for Human Rights; and Professor Jeffrey Fagan, an expert from Columbia University on the criminology of the death penalty and (its failure to work as) deterrence.

The application was to seek a ruling that the death penalty is unconstitutional. Such an application had never been made before in Indonesia. The core of the dispute was the possible conflict between the new Part XA, which entrenched a *'right to life, which may never be derogated from'*, and a different constitutional provision that subjected all the newly stated rights to the law. Needless to say, there were already laws in place providing for execution.

THE DECISION

The judgments were delivered on 30 October 2007, and totalled just under 500 pages. The Chief Justice – as a matter of stated procedure and practice – apparently always sides with the majority. The Court was divided 5 – 3, with the Chief Justice making the final division 6 – 3.

The majority decision emphasised the scourge of drugs. The Court ultimately weakened the force of the words in the Constitution providing absolute rights, ruling that the so-called 'non-derogable' rights were indeed subject to some limitations. What follows are the key points the Chief Justice made concerning reform, and some extracts from the powerful minority decisons.

THE CHIEF JUSTICE'S WORDS

The drama of the decision was unforgettable, given the issues. Part of the real issue was of course whether Indonesia would take the lead in Asia on reforming death penalty law. Although the Court decided against us, the Chief Justice made a striking contribution. After the majority had read their judgments, a process taking some hours, the Chief Justice spoke for the first time. His own reasons were very short and focused on reform. The context was that one of the witnesses at the hearing had spoken on behalf of a parliamentary reform committee working on a new criminal code. Part of that reform was to consider the merits of changing death penalty law so that anyone on death row was given a chance to reform. His words will have a real impact on the country.

The Chief Justice, speaking on behalf of the whole Court, echoed that recommendation of the reform committee and spelled out a program for reform. Given the role and importance of the Court, such a move has great significance for all on death row in Indonesia. I set out the two key paragraphs, translated, and then interpret:

Spoken by Chief Justice Jimly Asshidique on behalf of the majority

'[3.26]

Considering also that in taking into account the irrevocable nature

of the death penalty, separate from the Court's opinion that the death penalty does not conflict with the Indonesian Constitution for particular crimes within the Narcotics Law, the deliberation of which was requested by this appeal, the Court is of the opinion that in the future, in the context of revision of the national criminal law and the harmonisation of the laws containing the death penalty, as well as the formulation, application and implementation of the death penalty within the criminal justice system in Indonesia, serious attention ought to be paid to the following points:

a) the death penalty is no longer a fundamental form of punishment, but rather a punishment of a special and alternative nature;

b) the death penalty can be handed down with a trial period of ten years, where if the prisoner demonstrates commendable character his or her sentence can be changed to life imprisonment or 20 years;

c) the death penalty cannot be handed down for non-adults;

d) that death penalty executions of pregnant women and the mentally ill be postponed until the pregnant woman has given birth and the mentally ill person has recovered;

[3.27]

Considering that separate from the concept of legal reform outlined above, for certainty of a just law, the Court suggests that all death penalty sentences, which have the ultimate force of law, be immediately carried out in the appropriate manner.'

Paragraph 3.26 is of critical importance. The Court has recommended reform of the law to the effect that the death penalty be handed down only rarely, for special crimes; and secondly, when imposed, anyone facing execution be given a reprieve of 10 years to prove contrition or reform. The adoption by parliament of such a recommendation would create an opportunity for those on death row to reform and avoid execution. Where necessary (from the State's point of view), imprisonment for life could still be imposed. Further, the Court has limited the categories of those who may be executed – an important step on the path to minimising the application of the death penalty. Most importantly, the Court is adding weight to the parliamentary committee working on the new Criminal Code, and there are now two organs of the state calling in the same terms for the same important reform.

Paragraph 3.27 states that once all legal avenues have been exhausted, then execution, if it is still the sentence in place, should proceed immediately. So it is that we see in the Indonesian media of late December 2007 that the Bali bombers have been told to lodge and file a petition seeking clemency within 30 days. If they do not – and to date they have indicated they will not – they are likely to be executed forthwith.

It is hard to escape the conclusion that paragraph 3.27 was written with an eye to the Bali bombers. Until now, Indonesia has had policy that enabled execution to be delayed – by not seeking presidential clemency (the only option left after all legal avenues are exhausted), defendants have delayed executions. And it must be remembered that Indonesia is relatively slow to formally execute people, perhaps a handful in any recent year.

Paragraph 3.27 may ultimately apply to some of the Bali 9. However, at this stage it is not pressing on them, as they all have legal steps remaining which will take some time.

The important minority judgments

There were three minority judgments. Since most readers will not get a chance to read the judgments in full, I set out below a number of extracts translated, to give a flavour of the power and importance of one of the judgments.

Spoken by Maruarar Siahaan as a minority judge ***[5.4, p448]***

'...the right to life is not just limited to citizens, but also to foreigners who are not citizens. This is not just because Indonesia has ratified the ICCPR, which creates international obligations, but also because of Indonesian's commitment in protecting the world order, through the protection of human rights that are recognised to have a universal nature. Indonesia's participation in International Human Rights Conventions, in a reciprocal manner, also gives Indonesia the juridical and moral right to request compliance with international obligations from other countries, whether or not they are parties to a Covenant, to protect and guarantee the human rights of Indonesian citizens in other countries, with a minimum standard of national treatment, of which there are a number of cases. >>

In order not to be accused of double standards, hypocrisy or racism, Australia must be consistent in its opposition to the death penalty.

[5.4, p456]

'...as a nation based on the rule of law and based on the constitution, which protects the human rights of all of its citizens, Indonesia also has the reciprocal, constitutional responsibility to respect the human rights of other people, and with this all of the juridical consequences that arise out of the desire for legal justice for all Indonesian citizens.

[5.4, p458]

'There is no doubt that the death penalty will be able to guarantee that convicted criminals will not be able to repeat their crimes, and that it will influence in some way other, potential offenders. However it cannot be denied also that this is not the only way. Other types of punishment will achieve the same objective without sacrificing our humanity. Because the effectiveness of any action is based on integrated policy, by taking advantage of the combined strength of all our legal and police apparatus and all elements of our society, and by taking advantage of relevant disciplines and expertise, this is the rational choice. The expert testimony, based on experiences in the United States, stated that it is not the severity of the punishment that reduces or prevents drug crimes, rather the best way to decrease the problem of hard drugs is through the treatment and rehabilitation of users, which will reduce the size of the market and the demand for narcotics and in turn will destroy the business of the drug trade.

[5.4, p463]

'By holding on firmly to our Constitution ... and the values that are contained within it, which form the morality of our nation's constitution, we will be able to understand that the right to life, which is regarded as one of those non-derogable rights, which cannot be diminished for any reason whatsoever, gives rise to the conclusion that the Constitution does not give the right to a nation to end the life of a person – even somebody who has severely broken the law – with the threat of the death penalty within laws created by the State.

[5.4, p469]

'...There is no justification from the perspective of the deterrent effect that the death penalty purports to provide, which is rational, proportional and logical and which can form the basis for a deviation from the moral philosophy contained in our Constitution...

[5.4, p470]

'We have made a commitment to building a future that recognises the dignity and value of humanity as a part of or the essence of the right to life, because the doctrine of respect for life and human values is a beacon that can guide our country to make more humane the people within Indonesian society. The death penalty, which does not fall within this measurement of a culture that is fair and civilised, must be abolished. Maybe in a past era such a punishment was considered not to violate humanitarianism, however in this day and age, it must also be viewed with a sensitivity that has grown out of the journey of our civilisation within a wider, global civilisation, which ought to be based on morality and the living perspective of our nation within the Preamble to our Constitution ... it is the unified consciousness of our nation, which must form our prevailing values, as reflected in both the Preamble and the body of our Constitution.'

WHERE TO FROM HERE?

During the recent late 2007 Bali Climate Change Conference, Prime Minister Rudd spoke at length to President Yudhoyono. It was widely reported that one of the issues discussed was Mr Rudd's determination to appeal for clemency from the President for any of the Bali 6, if they should remain sentenced to death once all legal avenues have been exhausted. So the next step is to try to win some reprieve through the courts. If that fails, only then is it appropriate to ask the Prime Minister to formally seek clemency from the President. Thankfully for the Bali 6, Prime Minister Rudd has made clear his intentions in this regard.

There is a very clear consensus in Australia that it is essential for the Australian government to present a coherent and rational policy position on the wrongfulness of the death penalty. In order not to be accused of double standards, hypocrisy or racism, it is important for Australia to be consistent in its opposition to the death penalty.

Others are likely to be executed in Indonesia long before that becomes an imminent possibility for any of the Bali 6. When we are not consistent – for example, the previous Prime Minister calling for Van Tuong Nguyen to be spared in Singapore in 2005, while welcoming the execution of, say, the Bali bombers – the Asian media throws this double standard back in our faces. It is possible that, by the time you read this article, the Bali bombers will have been executed. How we, as citizens, politicians, writers, teachers or lawyers anticipate and respond to those impending executions as a matter of policy and principle will be watched carefully in Indonesia. It is important that our leaders publicly make it very clear they do not welcome or support any execution, whatever the nationality of the prisoner or any victims. ■

Note: **1** [2006] FCA 12.

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