

# Retroactive Principle on Crime of Terrorism

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Indonesia has applied non-retroactive principle in its legal system. The non-retroactive principle was actually stipulated long before the 1945 Constitution of the Republic of Indonesia (“**1945 Constitution**”) i.e. in the Indonesian Criminal Code which was derived from the Dutch Penal Code. Article 1.1 of the Indonesian Criminal Code stipulates that:

*‘No act is punishable, unless by the power of prior criminal law provisions.’*

The prohibition of retroactive principle is a basic right that is a non-derogable right. Article 28I of the 1945 Constitution of the Republic of Indonesia (“**1945 Constitution**”) provides the fundamental stipulation on non-retroactive principle that:

*‘The right to life, right not to be subjected torture, right to freedom of thought and conscience, right to religion, right to be recognized as a person before the law and **right of not to be subjected to prosecution based on retroactive law**, are human rights which cannot be derogated in any conditions.’*

Further, Article 18.2 and Article 18.3 of Law Number 39 of 1999 on Human Rights stipulates that:

- ‘2. No one shall be charged or held guilty of a penal offence for any act or omission which did not constitute a penal offence under prevailing law, at the time when it was committed.*
- 3. Should any changes be made to law, the provisions most advantageous to the person held guilty shall apply.’*

Controversy on enforcement of non-retroactive principle arose when the Bali Booming Incident on 12 October 2002 (“**Bali Booming I**”) was occurred. The incident urged the Indonesian government (“**GOI**”) to enact the Government Regulation in Lieu of Law (Perpu) Number 1 of 2002 on the Eradication of the Crime of Terrorism (“**Perpu 1/2002**”).

The GOI promulgated Perpu 1/2002 on 18 October 2002 to combat crimes of terrorism in general. In fact, its main purpose is to deal with Bali Booming I incident, though the GOI may actually harness some articles in the Indonesian Criminal Code to prosecute the perpetrators such as premeditated murder (Article 340), premeditated bodily injury (Article 354 – 356) or possession of firearms and explosive (Emergency Law).

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Some people argued that Perpu 1/2002 applied retroactively and clearly contradict with non-retroactive principle. However, there are basically some exceptions on non-retroactive principle stipulated in Indonesian laws and regulations. Article 1.2 of the Indonesian Criminal Code provides that:

*'In the event of amendment of a law, after an act has been committed, then provisions most favorable for the defendants shall be applied.'*

Besides the foregoing, Article 43.1 of Law Number 26 of 2000 on Human Rights Court ("**Law 26/2000**") provides that an ad hoc human rights court is entitled to investigate and rule any grave violations committed against human right that took place prior to the enactment of Law 26/2000.

In order to perform its duties, an ad hoc human rights court shall refer to elucidation of Article 4 of Law Number 39 of 1999 on Human Rights ("**Human Rights Law**") which basically stipulates:

*'Rights of not to be subjected to prosecution based on retroactive law can be exempted in case of grave violations against human rights that can be categorized in violations against humanity.'*

In connection with the Bali Booming I incident, the GOI clearly apply Perpu 1/2002 retroactively as stated in Article 46 of Perpu 1/2002. However, Article 28J of the 1945 Constitution requires Perpu 1/2002 to be adopted as a law. Therefore, the GOI promulgated Law Number 15 of 2003 on 4 April 2003 to adopt Perpu 1/2002 ("**Law 15/2003**").

On December 2009, some individuals filed a judicial review against Article 25.1, Article 26.1, Article 28, and Article 46 of Law 15/2003 to the Indonesian Constitutional Court. However, such application was revoked by the applicant a month later which has been rectified by the Constitutional Court's verdict Number 150/PUU-VII/2009 dated 08 February 2010.

Based on the above elaboration, the crime of terrorism is considered as grave violations against humanity. The Bali Booming I incident was the massive terrorism attack causing more than hundreds people died and hundreds of other victims got injured. Therefore, Perpu 1/2002 was urgently enacted to settle the Bali Booming I incident and to combat future terrorist acts, including applying sanctions to all committed terrorists in the Bali Booming I incident.

**N**on-retroactive principle should be applied to every single aspect of Indonesian legal system, except for grave violation against human rights i.e. to combating criminal acts of terrorism.