

Type: Research Article

The Rationale and Limitations of the Retroactive Principle in Terrorism Crimes

Aria Maheswara 

Faculty of Law, University of Tarumanagara, Indonesia

E-mail: aria.205220204@stu.untar.ac.id

Ade Adhari 

Faculty of Law, University of Tarumanagara, Indonesia

E-mail: adea@fh.untar.ac.id

ABSTRACT

The principle of legality is a fundamental norm in criminal law that prohibits the retroactive application of penal provisions. However, in the context of terrorism, several states, including Indonesia, have implemented retroactive measures as a response to extraordinary crimes that were not yet comprehensively regulated. The issuance of Government Regulation instead of Law (*Perppu*) No. 1 of 2002 and *Perppu* No. 2 of 2002 following the 2002 Bali Bombings illustrates the state's urgent need to address terrorism, which is characterized by its massive, organized, and far-reaching impact on public security. This phenomenon highlights a tension between the legality principle and the retroactive application of terrorism legislation. This study aims to analyze the underlying rationale for the application of retroactivity in terrorism cases in Indonesia and to examine the ideal limits for its implementation. The research employs a normative legal method with historical and conceptual approaches, drawing on primary and secondary legal materials. The findings show that the application of retroactivity is grounded in the characterization of terrorism as an extraordinary crime, the absence of comprehensive legal provisions at the time, and the state's need to restore public security. Comparative analysis reveals two general models of limiting retroactive legislation: provisions that clearly define temporal boundaries for retroactivity, and those that apply retroactive measures without explicit limitations. Based on these findings, the most appropriate limitation is the establishment of a clear temporal cut-off date that explicitly determines the period from which a regulation is deemed effective.

KEYWORDS

Retroactive;
Terrorism;
Crimes



Copyright ©2025 by Author(s); This work is licensed under a Creative Commons Attribution-ShareAlike 4.0 International License. All writings published in this journal are the personal views of the authors and do not represent the views of this journal or the authors' affiliated institutions.



INTRODUCTION

In criminal law, several fundamental principles serve as the foundation of normative regulation. One of the most essential principles is the principle of legality. The principle of legality has long been recognized as a cornerstone in the formulation and application of criminal provisions. It asserts that a legal norm cannot be applied retroactively; rather, it operates only with respect to acts committed after the enactment of the relevant law. Accordingly, the principle of legality functions as a safeguard that protects the public from arbitrary criminalization arising from suddenly enacted and retroactively enforced legal rules. The significance of this principle is affirmed in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which stipulates that the right not to be prosecuted under retroactive legislation constitutes a constitutional right of every citizen.

Historically, the principle of legality has roots dating back to classical civilization. The notion that an individual cannot be punished without a pre-existing legal rule can be traced to the period of the Roman Empire.¹ Subsequent developments emerged during the Renaissance, when the concept of legality gained a more systematic foundation within the European legal tradition.² During the Enlightenment era, the principle was regarded as a mechanism for appropriately allocating state authority within the framework of the rule of law. Entering the nineteenth century, the rise of legal positivism further reinforced the principle by emphasizing that criminal law must be formulated and enforced strictly on the basis of written legislation.³ Thus, it is evident that the principle of legality has undergone a long historical evolution that solidifies its position as a fundamental doctrine in criminal law.

In international law, the principle of legality receives clear affirmation through several key instruments. Article 15 of the International Covenant on Civil and Political Rights reinforces this principle by prohibiting the imposition of criminal liability for acts that were not criminalized at the time they were committed, except for acts that were recognized as crimes under international law from the outset. Similarly, Article 11 of the Rome Statute underscores the same principle by rejecting criminal responsibility for conduct occurring before the Statute entered into force, while providing an additional safeguard through the application of the more favorable law to the accused in the event of legal changes. These provisions demonstrate that the principle of legality is regarded as a universal principle within criminal law.

Consistent with these international legal standards, Indonesia also expressly regulates this principle in Article 1 paragraph (1) of the Indonesian Criminal Code (KUHP) and in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia, thereby establishing the principle of legality as a constitutional right of every citizen. Nevertheless, although the principle of legality appears to be a broadly universal doctrine in criminal law, in practice, several criminal statutes allow for retroactive application. This exception is known as the retroactive principle. The

¹ Gillian MacNeil, 'The Prohibition on Retroactive Criminal Law in International Criminal Law' in *Leg Matters* (The Hague: T.M.C. Asser Press, 2021).

² Vittorio Manes, 'Common law-ization of criminal law'? The evolution of *nullum crimen sine lege* and the forthcoming challenges' (2017) 8:3 *New J Eur Crim Law* 334–351.

³ *Ibid.*



retroactive principle refers to the application of a legal provision to acts committed before the enactment of that provision.⁴ This phenomenon can be observed, for instance, in legislation governing terrorism offenses and gross violations of human rights.

With respect to the retroactive principle, history records a pivotal moment in which retroactivity was applied on a large scale. This moment was marked by the adoption of the Charter of the International Military Tribunal in 1945 in London, commonly known as the London Charter of 1945.⁵ The Charter was agreed upon by the Allied Powers after the Second World War to prosecute various war crimes committed during the conflict by the Axis powers in Europe. Article 6 of the Charter provides that the tribunal established under the Charter possesses jurisdiction over crimes committed during the war before the Charter's enactment. The series of tribunals constituted under this Charter ultimately convicted more than 90,000 individuals for a wide range of offenses committed throughout the war, all of which occurred before the London Charter came into force. Accordingly, the adoption of the London Charter may be regarded as a landmark regulation—one representing a decisive turning point—in the application of the retroactive principle within criminal law.

Following the adoption of the London Charter of 1945, the application of the retroactive principle in criminal law can be found in various national statutes concerning terrorism offenses. For example, Pakistan, through Article 38 of the Anti-Terrorism Act (ATA) 1997, stipulates that conduct committed before the Act entered into force may be prosecuted under the Act insofar as such conduct qualifies as an act of terrorism. In the United States, Section 809 of the USA PATRIOT Act extends the statute of limitations for certain terrorism-related offenses and applies retroactively to offenses committed before the enactment of the Act. Meanwhile, in Turkey, Temporary Article 8 of Act No. 3713 on the Fight Against Terrorism contains retroactive provisions relating to compensation arrangements for the families of state officials who were injured or killed while performing duties in response to acts of terrorism.

In this regard, Indonesia also has legislation that applies the retroactive principle, namely Government Regulation instead of Law (Perppu) No. 1 of 2002 on the Eradication of Terrorism Crimes. The issuance of this regulation cannot be separated from the 2002 Bali Bombing, an incident that shocked Indonesia and drew significant international attention.⁶ At that time, Indonesia did not yet possess a legal framework specifically governing terrorism offenses. Consequently, the state deemed it necessary to adopt a retroactive regulation to ensure that the incident could be addressed through an adequate legal instrument. As a result, Perppu No. 1 of 2002 was enacted as the legal basis for prosecuting the perpetrators of the 2002 Bali Bombing. Several notable court decisions relied on this Perppu as their legal foundation, including Denpasar District Court Decision No.

⁴ Stephen R Munzer, 'Retroactive Law' (1977) 6:2 J Legal Stud 373–379.

⁵ Devin O Pendas, 'Retroactive Law and Proactive Justice: Debating Crimes Against Humanity in Germany, 1945-1950' (2010) 43:3 Cambridge Univ Press 428–463.

⁶ Norbertus Arya Dwiangga Martiar, '20 Tahun Setelah Teror Bom Bali', *Kompas* (13 October 2022), online: <<https://www.kompas.id/baca/polhuk/2022/10/12/20-tahun-bom-bali-medan-perang-narasi>>.



167/Pid.B/2003/PN.Dps; No. 203/Pid.B/2003/PN.DPS; and No. 224/Pid.B/2003/PN.Dps.⁷ These three decisions constitute important precedents in the application of the retroactive principle in Indonesia, as the defendants' conduct occurred before Perppu No. 1 of 2002 came into force, yet they were nonetheless prosecuted under the provisions of that regulation.

Examining the various legal instruments that incorporate the retroactive principle—both within Indonesia's regulatory framework and in the legislation of several other jurisdictions—the application of retroactivity in the context of terrorism offenses reveals a distinctive and recurring pattern. Specifically, the presence of grave and immediate threats to national security often creates an urgent imperative for states to formulate and enact legal measures that are capable of addressing such threats effectively. This urgency, in many instances, becomes the primary rationale for introducing regulations that permit retroactive application, as governments seek to ensure that acts of terrorism—particularly those of an extraordinary magnitude—are not left outside the reach of the criminal justice system merely because adequate legislation was not in place at the time the acts were committed. Thus, the incorporation of the retroactive principle in terrorism-related legislation can be understood as a state's response to exceptional circumstances that demand equally exceptional legal mechanisms.

In addition to the apparent pattern described above, the presence of the retroactive principle within these various legal instruments appears to stand in direct tension with the principle of legality, even though legality itself has long been positioned as a foundational doctrine in criminal law. Moreover, the incorporation of retroactive provisions in these regulations also seems to conflict with a range of international legal norms that similarly articulate and safeguard the principle of legality. However, upon closer examination, it becomes evident that the application of the retroactive principle in criminal law does not arise arbitrarily; rather, it is generally confined to offenses that are classified as extraordinary crimes. Such offenses are understood to produce exceptionally severe consequences for the social order, the political structure, and the overall security of the state.⁸ Thereby necessitates a legal approach that differs substantially from that applied to ordinary criminal acts. This characterization is clearly reflected in the acts of terrorism that occurred in Bali, which at the time resulted in the deaths of hundreds of victims and generated profound national and international shock.

Nevertheless, when the retroactive principle is invoked as a legal response to extraordinary crimes that threaten the stability of the social order, concerns inevitably arise regarding the potential for arbitrariness if such application is not accompanied by clearly defined limits. The principle of legality was, from the outset, formulated precisely to prevent this risk by prohibiting retroactive criminalization. Yet, practice in numerous jurisdictions demonstrates a recurring pattern: retroactivity may still be applied when the state is confronted with offenses of an exceptional nature that produce far-reaching and severe consequences. It is under

⁷ Victor W Nadapdap, 'Penegakan Hukum dan Hak Asasi Manusia Guna Pemberantasan Terorisme Dalam Rangka Ketahanan Nasional' (2011).

⁸ Saufa Ata Taqiyya, 'Apa Itu Extraordinary Crime dan Contohnya', *Huk Online* (1 July 2022), online: <<https://www.hukumonline.com/klinik/a/apa-itu-iextraordinary-crime-i-dan-contohnya-cl3012/>>.



these circumstances that the need to formulate and articulate explicit constraints on the application of the retroactive principle becomes crucial, ensuring that the exception does not expand beyond its intended purpose of addressing extraordinary crimes and safeguarding national security.

The phenomenon of applying the retroactive principle within criminal law presents an important subject for deeper examination. On the one hand, retroactivity provides an opportunity for the state to enforce the law against extraordinary crimes in situations where the existing legal framework did not previously regulate such offenses in a sufficiently specific manner. On the other hand, its existence generates a significant tension with the principle of legality, which serves as a fundamental cornerstone of criminal law and is intended to prevent arbitrary or unforeseeable state action.

Against this backdrop, the present study seeks to explore in detail the various considerations that underlie the adoption and application of the retroactive principle in terrorism-related offenses. Furthermore, this research aims to analyze the contours of permissible limitations on retroactivity by undertaking a comparative assessment of similar regulatory approaches adopted in other jurisdictions that have encountered comparable challenges. Through this analysis, the study aspires to provide a more comprehensive and nuanced understanding of the status, justification, and boundaries of the retroactive principle within Indonesia's criminal law system.

METHOD

The type of research employed in this study is normative legal research. Normative legal research is understood as a methodological approach that examines statutory regulations, both in terms of their hierarchical structure within the legal system and the harmonious relationship among various legislative instruments.⁹ According to Soerjono Soekanto and Sri Mamudji, normative legal research is conducted by thoroughly analyzing library-based legal materials, which include: research on fundamental legal principles; research on the systematic structure of law; research on the coherence and consistency of positive law; comparative legal studies between different jurisdictions; and historical examinations of the development of legal norms.¹⁰

This research employs both a conceptual approach and a historical approach. The conceptual approach is grounded in the examination of scholarly views, legal doctrines, and theoretical constructs that have developed within the discipline of law.¹¹ The historical approach, meanwhile, is carried out by analyzing the background, context, and evolution of the legal issues under study, including the development of the statutory framework and regulatory responses associated with those issues.¹² The categories of research materials used in this study consist of primary legal materials and secondary legal materials. In the context of normative legal research, primary legal materials refer to authoritative sources of law, which

⁹ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).

¹⁰ Mukti Fajar & Yulianto Achmad, *Dualisme Penelitian Normatif dan Empiris* (Yogyakarta: Pustaka Belajar, 2015).

¹¹ Muhaimin, *supra* note 9.

¹² *Ibid.*



include statutory regulations, official legislative records, judicial decisions, and other formal state documents.¹³ According to Cohen and Olson, primary legal materials encompass all written rules enacted by the state, which may be found in court judgments, statutes, executive orders, and regulations, as well as decisions issued by administrative bodies.¹⁴

Secondary legal materials, on the other hand, comprise scholarly writings that provide explanations, commentary, and analysis of the law. These materials include legal textbooks, academic journals, expert opinions, research reports, legal dictionaries, and legal encyclopedias.¹⁵ Diantha further classifies secondary legal materials into two categories: secondary materials in the narrow sense and secondary materials in the broad sense.¹⁶ Secondary materials in the narrow sense consist of legal textbooks containing doctrines, teachings, or treatises; periodical publications such as articles that offer analytical commentary on particular legal issues; and narrative explanations of legal terms, concepts, and phrases as found in legal dictionaries or legal encyclopedias.¹⁷ Secondary materials in the broad sense include all legal scholarship that does not fall within the definition of primary legal materials, including unpublished legal works or legal writings disseminated through newspapers or magazines.¹⁸

The legal material collection technique employed in this research is the library study (bibliographic study). A library study constitutes an examination of written legal information derived from various widely published sources, which is essential for conducting normative legal research.¹⁹ The processing of the collected legal materials is carried out through several stages, namely inventory, identification, and classification. This systematization is intended to prevent inconsistencies or contradictions between one legal material and another.²⁰ Once the legal materials have been gathered and organized, the analytical process is conducted using both the conceptual approach and the historical approach to obtain a coherent understanding or an informed answer to the issues that constitute the focus of this research.²¹

RESULT & DISCUSSION

I. The Rationale for Applying Retroactive Principles in Terrorism Crimes in Indonesia

The principle of legality, which prohibits the retroactive application of criminal provisions, has been deeply rooted within the Indonesian legal system. This principle was implemented in the *Wetboek van Strafrecht voor Nederlandsch-Indië*

¹³ *Ibid.*

¹⁴ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2017).

¹⁵ Muhaimin, *supra* note 9.

¹⁶ Diantha, *supra* note 14.

¹⁷ Muslan Abdurrahman, *Sosiologi dan Metode Penelitian Hukum* (Malang: UMM Press, 2009).

¹⁸ Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2019).

¹⁹ Suyanto, *Metode Penelitian Hukum Pengantar Penelitian Normatif, Empiris Dan Gabungan* (Gresik: Unigres Press, 2023).

²⁰ Ali, *supra* note 18.

²¹ Johnny Ibrahim dan Junaedi Efendi, *Metode Penelitian Hukum* (Depok: Prenada Media, 2018).



in 1918, which was later adapted and reaffirmed as the Indonesian Criminal Code through Law Number 1 of 1946 concerning Criminal Law Regulations. The continuous application of the principle of legality from the colonial period through the post-independence era demonstrates that this principle has been regarded as a fundamental cornerstone of criminal law. Furthermore, Article 28I paragraph (1) of the 1945 Constitution explicitly stipulates that the right not to be prosecuted based on retroactively applicable laws constitutes a constitutional right of every citizen. Accordingly, the principle of legality is also embedded within the Constitution itself.

According to Satjipto Rahardjo, a legal principle is the “heart” of a regulation.²² Accordingly, it can be understood that the principle of legality represents the core element underpinning the validity and operation of any legal norm. The principle of legality holds a position of exceptional importance because it ensures that no individual may be subjected to criminal punishment without a pre-existing legal basis. This principle is explicitly reinforced through Article 1 paragraph (1) of the Indonesian Criminal Code, which states that “An act cannot be punished except based on a criminal law provision that has already been established.” Therefore, the retroactive application of criminal provisions is expressly prohibited.

Nevertheless, Government Regulation, instead of Law Number 1 of 2002 on the Eradication of Terrorism Crimes, gives rise to a significant issue. Article 46 of Government Regulation, instead of Law No. 1 of 2002, provides: “The provisions stipulated in this Government Regulation, instead of Law, may be applied retroactively for legal actions concerning certain cases occurring before the enactment of this Government Regulation instead of Law, the implementation of which shall be determined by a separate Law or Government Regulation instead of Law.”

This provision appears to stand in contrast with Article 1, paragraph (1) of the Criminal Code. On the one hand, the principle of legality prohibits the retroactive application of criminal regulations; on the other hand, the state deemed it necessary to take extraordinary measures that deviate from that very principle. This tension becomes a critical focal point in analyzing the underlying rationale for the adoption of retroactive provisions within the regulatory framework governing terrorism offenses. The historical background of the enactment of Government Regulation instead of Law Number 1 of 2002 was the Bali Bombing incident on 12 October 2002, which constituted the largest terrorist attack in Indonesia’s history and drew intense international attention. In that tragedy, 202 individuals lost their lives, consisting of 164 foreign nationals and 38 Indonesian citizens. In addition to the fatalities, hundreds of others sustained injuries.²³ The 2002 Bali Bombing was not merely an ordinary crime resulting in mass casualties; it also carried geopolitical dimensions because it involved international terrorist networks affiliated with global extremist groups. For that reason, the incident was regarded as a concrete example of an exceptionally serious crime.

After the Bali Bombing incident, the regulatory framework governing terrorism offences in Indonesia was developed through a series of increasingly

²² Ade Adhari et al, ‘The Ultimum Remedium Principal Formulation Policy is Partial In Nature in Corporate Criminality in Indonesia’ (2024) 14:1 *Indones Law Rev*, online: <<https://scholarhub.ui.ac.id/ilrev/vol14/iss1/1/>>.

²³ Martiar, *supra* note 6.



refined regulations. Two days after the occurrence of the bombing, the United Nations issued Resolution 1438 on 14 October 2002, which essentially condemned the act of terrorism that had taken place in Indonesia. The first domestic regulation emerged in Government Regulation instead of Law Number 1 of 2002 concerning the Eradication of Terrorism Crimes, which was issued on 18 October 2002 as a rapid governmental response to the Bali Bombing I that had occurred six days before its promulgation. In parallel with Government Regulation instead of Law Number 1 of 2002, the state subsequently enacted Government Regulation instead of Law Number 2 of 2002 on 18 October 2002, which provided the legal basis for applying Government Regulation instead of Law Number 1 of 2002 retroactively, specifically to the Bali Bombing case. Government Regulation, instead of Law Number 1 of 2002, was later enacted into statute through Law Number 15 of 2003 on 4 April 2003, and was applied to the Bali Bombing I incident through Law Number 16 of 2003. Subsequently, Law Number 15 of 2003 underwent amendments through the promulgation of Law Number 5 of 2018.

The retroactive provision contained in Law Number 16 of 2003 was subsequently submitted for judicial review before the Constitutional Court. In its Decision Number 013/PUU-I/2003, the Court ruled that Law Number 16 of 2003 was inconsistent with the Constitution and therefore lacked binding legal force. The petition was filed by Masykur Abdul Kadir, an individual involved alongside Imam Samudra in the planning of the Bali Bombing I attack.²⁴ Nevertheless, although the Constitutional Court declared Law Number 16 of 2003 unconstitutional and without binding legal effect, Masykur Abdul Kadir could not rely on that ruling as a basis to file a judicial review (*Peninjauan Kembali*) before the Supreme Court. This is because Constitutional Court decisions do not apply retroactively to criminal convictions that have already obtained permanent legal force before the issuance of the Constitutional Court's decision.²⁵

When examining the *Considerations* section of Government Regulation instead of Law Number 1 of 2002, it becomes apparent that the government's decision to enact a regulation containing retroactive elements was grounded in several significant considerations. In Letter (e), it is stated that the existing legislation at that time was neither sufficiently comprehensive nor adequate to eradicate acts of terrorism. Meanwhile, Letter (b) emphasizes that terrorism had taken human lives indiscriminately and caused widespread public fear. Furthermore, Letter (c) explains that terrorism possesses an extensive network and therefore constitutes a threat to national and international peace and security. Observing the various points in the *Considerations* of Perppu No. 1 of 2002, it is evident that the government viewed terrorism as an extraordinary crime requiring a special legal approach, even if such an approach deviates from the principle of legality, which ordinarily may not be disregarded.

According to Hiariej, the retroactive application of criminal law may be justified when the interest being protected is significantly greater than the violation

²⁴ Irsyad Dhahri S Suhaeb, 'Retrospectivity and Human Rights in Indonesia: How Can Irregularities be Resolved' (2013) 10:2 *Indones J Int Law* 339–360.

²⁵ *Ibid.*



of the principle of legality itself.²⁶ Hiariej further notes that the Bali bombing incident constituted an act of violence, ferocity, and brutality against humanity, such that the retroactive application of criminal law could be deemed acceptable. Without such an application, the balance of the existing societal order could be disrupted and lead to fatal consequences.²⁷ Therefore, that disrupted balance must be restored. The Bali Bombing I attack represented an act of such extreme and brutal violence that it can be categorized as a direct threat to humanity. This demonstrates that retroactivity is not merely an unjustifiable deviation, but can function as a legitimate solution in circumstances that are genuinely extraordinary.

In Constitutional Court Decision No. 013/PUU-I/2003, the Minister of Justice and Human Rights of the Republic of Indonesia, representing the Government during the hearings, provided explanations regarding the principal considerations underlying the enactment of Government Regulation instead of Law No. 1 of 2002. These considerations included, among others, that terrorism had taken human lives indiscriminately and generated widespread fear; that terrorism possessed an extensive network constituting a threat to both national and international security; and that the legislation in force at the time was neither comprehensive nor adequate to eradicate acts of terrorism. In essence, the government regarded terrorism as an extraordinary crime, and at the time of the Bali Bombing incident, there was no comprehensive regulatory framework capable of prosecuting the perpetrators. Consequently, a regulation containing retroactive provisions was implemented.

From a broader perspective, the application of the retroactive principle in criminal law is not a phenomenon unique to Indonesia. After World War II, the international community was confronted with war crimes and crimes against humanity on an unprecedented scale. To prosecute perpetrators of war crimes from the Axis Powers, the Allied nations established tribunals through the 1945 London Charter for Europe and the 1946 Tokyo Charter for Asia. Both instruments were applied retroactively because, at that time, there were no international rules that clearly regulated crimes against peace, war crimes, or crimes against humanity. Nevertheless, the establishment of these tribunals was regarded as a crucial precedent in international law, marking the first instance in which a legal framework was successfully applied to actions that had occurred during wartime. This experience demonstrates that within the context of extraordinary crimes, legal rules may be applied retroactively to prevent the recurrence of acts that threaten humanity.

Accordingly, the application of the retroactive principle in Government Regulation instead of Law No. 1 of 2002 can be understood as a legal response grounded in factual circumstances, urgent necessity, and considerations related to public protection. Retroactivity in this context is not merely a deviation from the principle of legality, but rather an extraordinary measure aimed at addressing extraordinary crimes that previously lacked a comprehensive regulatory framework. The gravity of the threat posed by terrorism, the need to restore public security, and the presence of international precedents collectively provide a strong

²⁶ Eddy Omar Sharif Hiariej, *Bunga Rampai Hukum Pidana Khusus* (Jakarta: Pena Pundi Aksara, 2006).

²⁷ *Ibid.*



conceptual foundation for the application of the retroactive principle within Indonesia's criminal law on terrorism.

II. Restrictions on the Application of Retroactive Principles in the Regulation of Terrorism Offenses

The application of the retroactive principle inherently creates a tension with the principle of legality. However, as elaborated in the preceding discussion, there exist extraordinary circumstances in which retroactive application is considered necessary, particularly when a certain type of crime significantly threatens public interests and the existing statutory framework is inadequate to address it. This is what ultimately forms the basis for understanding how retroactivity may be applied in a limited manner within the context of terrorism-related offenses.

Although the application of the retroactive principle may be taken into account in exceptional situations, its implementation must not be conducted arbitrarily. Clear limitations are required to ensure that such a measure remains within a defensible framework of legal protection. These limitations represent a manifestation of the principle of legality itself, particularly in preventing the state from using retroactivity as a repressive instrument. After all, the principle of legality exists precisely to prevent the occurrence of arbitrariness arising from laws that are not clearly formulated.²⁸ Therefore, formulating an ideal set of limitations for retroactive regulations—especially those concerning terrorism-related offenses—becomes essential to ensure the protection of individual rights.

In determining the most appropriate model of limitation, a comparative analysis is required of various anti-terrorism regulations from other countries that have likewise implemented retroactive elements. This approach enables a more objective assessment of how a state applies the retroactive principle without disregarding the fundamental principles of criminal law. Through this research, six countries were identified as having regulatory frameworks on terrorism offenses that incorporate retroactive provisions, namely South Africa, Bangladesh, Spain, Pakistan, Turkey, and the United States. The examination of these six jurisdictions subsequently becomes the basis for determining the most suitable form of limitation on retroactivity.

South Africa is one of the countries that applied the retroactive principle in its Terrorism Act 1967, which was enacted on 12 June 1967. Under Section 9(1), the statute is declared to have come into force as of 27 June 1962, despite being formally enacted only on 12 June 1967. This means that the provisions of the Act were applied retroactively for a period of five years. In addition, the statute provides that its application overrides any other legislation that conflicts with it. This broad retroactive application reflects the political context of South Africa during the apartheid era, a policy regulating relations between the minority white population and the majority non-white population in twentieth-century South Africa, which permitted racial segregation and institutional discrimination in political and economic life against non-white citizens.²⁹ During the 1960s, the African National Congress engaged in separatist and resistance movements, including a series of

²⁸ Topo Santoso, *Hukum Pidana: Suatu Pengantar* (Depok: Rajawali Press, 2022).

²⁹ Britannica Editors, 'Apartheid' in *Encycl Br* (2025).



guerrilla warfare campaigns against the South African government as part of its struggle against the apartheid regime.³⁰

Bangladesh exhibits a similar pattern through the Anti-Terrorism Act of 2009, which was enacted on 24 February 2009. Article 1, paragraph (3) of the Anti-Terrorism Act 2009 states: "This provision is deemed to have come into effect on 11 June 2008." This provision was formulated in the context of a rise in terrorist acts, particularly bombings carried out by religious extremist groups. Since the 1990s, religiously motivated extremist terrorist activities have been increasing in Bangladesh.³¹ One of the terrorist networks that carried out a series of terrorist acts in Bangladesh was *Jama'at Mujahideen Bangladesh* (JMB), which conducted multiple bombings in 2005.³² Similar to the situation in South Africa, the legislation imposed retroactive application without specifying a clear cutoff date.

Spain demonstrates a different form of retroactive application through Law No. 29/2011, enacted on 22 September 2011. Law No. 29/2011 regulates the recognition of and compensation for victims of terrorism. Article 7 of this law states: "The provisions of this law apply to acts committed since 1 January 1960." Unlike the countries previously discussed, the retroactivity applied in Spain aims to cover victims of terrorist incidents that occurred decades earlier. Since the 1960s, Spain has had a long history with the separatist group *Euskadi Ta Askatasuna* (ETA), which employed terrorism in its campaign to establish an independent Basque state.³³ The ETA movement was active from 1959 until its disbandment in 2018, during which it carried out approximately 3,300 attacks, resulting in between 800 and 952 fatalities and more than 2,000 injuries.³⁴ With the retroactive application of Law No. 29/2011, recognition and compensation for the victims affected by this series of attacks could be provided under the provisions of the law.

Turkey also implements a similar model through Law No. 3713 of Turkey on the Fight Against Terrorism, which was enacted on 12 April 1991. Temporary Article 8 of this law states: "The provisions of Article 21 of this law shall be applied starting from the first day of the month following the entry into force of this law, for all persons covered under this law since 1 January 1968." Article 21 of the law regulates compensation for the families of state officials who are injured or killed while performing their duties in responding to acts of terrorism. In Turkey, there is the *Partiya Karkerên Kurdistanê* (PKK or Kurdistan Workers' Party), which has carried out various acts of armed violence, including the killing of Turkish military personnel and the abduction of Turkish politicians.³⁵ The PKK is regarded as a separatist terrorist movement, particularly since declaring the establishment of an

³⁰ Britannica Editors, 'African National Congress' in *Encycl Br* (2025).

³¹ National Defence College Bangladesh, *Proceedings Seminar on Terrorism and Counter Terrorism: Bangladesh Perspective* (Bangladesh: National Defence College Bangladesh, 2016).

³² Abdul Mannan, 'Militant Islamism in Bangladesh – Global Jihadist Connection?' (2006) 11:2 *Perceptions* 27–48.

³³ Britannica Editors, 'ETA' in *Encycl Br* (2025).

³⁴ Kathryn Loosemore & Matthew Johnson, 'The challenge of establishing the impact of terrorist organisations: development of a database on ETA's activities' (2023) 16:2 *Crit Stud Terror* 396–406.

³⁵ Josef Braml & Friedrich-Ebert-Stiftung, *Anti-terrorism laws and powers: an inventory of the G20 States 20 years after 9/11* (Berlin: Friedrich-Ebert-Stiftung, Global and European Policy, 2021).



independent Kurdistan state in 1984.³⁶ Similar to the case in Spain, the retroactive provision in Law No. 3713 primarily focuses on providing compensation for the families of state officials who became victims during the handling of terrorist acts.

Pakistan also applies retroactive principles through the Anti-Terrorism Act of 1997, which was enacted on 20 August 1997. Article 38 of this regulation states: "If a person has committed an offense before the enactment of this Act, and if the offense, had it been committed after the date of this Act, would be considered an act of terrorism under this Act, that person shall be prosecuted under this Act, but will be subjected to the punishment in accordance with the law that was in force at the time the offense was committed." Accordingly, Pakistan implements retroactivity in determining the criminal nature of an act as well as the related legal procedures under the Terrorism Act of 1997, while still maintaining the non-retroactive principle in the imposition of criminal sanctions. The enactment of this legislation was strongly supported by the context of various violent incidents in Pakistan in 1997, which were fueled by inter-religious group conflicts. These conflicts, particularly between Sunni and Shia communities, resulted in hundreds of casualties.

The United States differs from the other countries because it had previously established a relatively comprehensive legal framework regarding terrorist offenses under Title 18 of the United States Code. However, following the events of September 11, 2001, the USA Patriot Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001) was enacted on 26 October 2001 with the objectives of expanding law enforcement authority, enhancing coordination among agencies, and imposing stricter penalties for acts of terrorism. Within the Patriot Act, there is a provision applied retroactively, namely Section 809. Section 809(c) states: "The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the effective date of this section." Section 809 modifies the statute of limitations for certain terrorism-related offenses that were previously regulated under Title 18 of the United States Code. Section 809(a) extends the statute of limitations for some of these offenses to eight years, whereas Section 809(b) eliminates the statute of limitations. Section 809 of the Patriot Act does not impose a specific temporal limitation, unlike the retroactive provisions in the other countries previously discussed. Section 809(c) explicitly stipulates that the provision applies to the prosecution of any offense committed before the enactment of the provision.

From these various regulations, it can be observed that each country applies the principle of retroactivity using different models, some with specific temporal limitations and others without any limits at all. In general, there are two major patterns: regulations that provide clear restrictions on retroactive application, and regulations that apply retroactive principles without limitation. Based on this comparative analysis, it can be concluded that the most ideal form of retroactive limitation is the implementation of retroactivity accompanied by a clearly defined time boundary, that is, a specific date that determines the extent to which the regulation applies retroactively.

³⁶ *Ibid.*



This is based on the principle of *lex certa* as an element of the legal principle of legality. According to Jan Remmelink, *lex certa* signifies the obligation of lawmakers to formulate criminal provisions as precisely and meticulously as possible.³⁷ Although the retroactive application of regulations inherently contradicts the principle of legality, the enforcement of a clearly defined temporal limit still allows for legal certainty, as it provides at least an effort to specify clearly how a retroactive provision is applied.

CONCLUSION

The rationale for applying the principle of retroactivity in terrorism-related criminal offenses in Indonesia essentially stems from the Bali I bombing, where the state assessed that the legal framework in force at that time was insufficient to address acts of terrorism with massive impacts, large-scale casualties, and international networks. This consideration became the basis for the introduction of retroactive application, taking into account the characterization of terrorism as an extraordinary crime and the urgent need to restore public security.

Limitations on the application of retroactivity in the regulation of terrorism-related offenses can be identified through a comparative analysis with several countries that also implement retroactive measures in their anti-terrorism regulations. The patterns that emerge show two major models: retroactivity without a temporal limit and retroactivity with a defined time limit. Based on the principle of *lex certa* as a crucial element of the principle of legality, the most ideal model is retroactivity limited explicitly through the specification of a retroactive effective date. Such a limitation provides the state with the flexibility to address extraordinary crimes while simultaneously maintaining legal certainty and preventing the arbitrary use of regulations containing retroactive provisions.

DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None.

ACKNOWLEDGMENT

None.

REFERENCES

BOOK

- Abdurrahman, Muslan, *Sosiologi dan Metode Penelitian Hukum* (Malang: UMM Press, 2009).
- Ali, Zainuddin, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2019).
- Braml, Josef & Friedrich-Ebert-Stiftung, *Anti-terrorism laws and powers: an inventory of the G20 States 20 years after 9/11* (Berlin: Friedrich-Ebert-Stiftung, Global and European Policy, 2021).

³⁷ Santoso, *supra* note 28.



- Diantha, I Made Pasek, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2017).
- Efendi, Johnny Ibrahim dan Junaedi, *Metode Penelitian Hukum* (Depok: Prenada Media, 2018).
- Fajar, Mukti & Yulianto Achmad, *Dualisme Penelitian Normatif dan Empiris* (Yogyakarta: Pustaka Belajar, 2015).
- Hiariej, Eddy Omar Sharif, *Bunga Rampai Hukum Pidana Khusus* (Jakarta: Pena Pundi Aksara, 2006).
- Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).
- National Defence College Bangladesh, *Proceedings Seminar on Terrorism and Counter Terrorism: Bangladesh Perspective* (Bangladesh: National Defence College Bangladesh, 2016).
- Santoso, Topo, *Hukum Pidana: Suatu Pengantar* (Depok: Rajawali Press, 2022).
- Suyanto, *Metode Penelitian Hukum Pengantar Penelitian Normatif, Empiris Dan Gabungan* (Gresik: Unigres Press, 2023).

JOURNAL

- Adhari, Ade et al, 'The Ultimum Remedium Principal Formulation Policy is Partial In Nature in Corporate Criminality in Indonesia' (2024) 14:1 Indones Law Rev, online: <<https://scholarhub.ui.ac.id/ilrev/vol14/iss1/1/>>.
- Loosemore, Kathryn & Matthew Johnson, 'The challenge of establishing the impact of terrorist organisations: development of a database on ETA's activities' (2023) 16:2 Crit Stud Terror 396–406.
- MacNeil, Gillian, 'The Prohibition on Retroactive Criminal Law in International Criminal Law' in *Leg Matters* (The Hague: T.M.C. Asser Press, 2021).
- Manes, Vittorio, 'Common law-ization of criminal law? The evolution of nullum crimen sine lege and the forthcoming challenges' (2017) 8:3 New J Eur Crim Law 334–351.
- Mannan, Abdul, 'Militant Islamism in Bangladesh – Global Jihadist Connection?' (2006) 11:2 Perceptions 27–48.
- Martiar, Norbertus Arya Dwiangga, '20 Tahun Setelah Teror Bom Bali', *Kompas* (13 October 2022), online: <<https://www.kompas.id/baca/polhuk/2022/10/12/20-tahun-bom-bali-medan-perang-narasi>>.
- Munzer, Stephen R, 'Retroactive Law' (1977) 6:2 J Legal Stud 373–379.
- Nadapdap, Victor W, 'Penegakan Hukum dan Hak Asasi Manusia Guna Pemberantasan Terorisme Dalam Rangka Ketahanan Nasional' (2011).
- Pendas, Devin O, 'Retroactive Law and Proactive Justice: Debating Crimes Against Humanity in Germany, 1945-1950' (2010) 43:3 Cambridge Univ Press 428–463.
- Suhaeb, Irsyad Dhahri S, 'Retrospectivity and Human Rights in Indonesia: How Can Irregularities be Resolved' (2013) 10:2 Indones J Int Law 339–360.

WEBSITE

- Taqiyya, Saufa Ata, 'Apa Itu Extraordinary Crime dan Contohnya', *Huk Online* (1 July 2022), online: <<https://www.hukumonline.com/klinik/a/apa-itu-iextraordinary-crime-i-dan-contohnya-cl3012/>>.



ENCYCLOPEDIA

Britannica Editors, 'African National Congress' in *Encycl Br* (2025).

———, 'Apartheid' in *Encycl Br* (2025).

———, 'ETA' in *Encycl Br* (2025).