

# ANTI-TERRORISM LEGAL FRAMEWORK IN INDONESIA: ITS DEVELOPMENT AND CHALLENGES\*

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## *Abstract*

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*Indonesia is a nation that has been subject to many of high profile terrorist cases. In relation to this, Indonesia's legal framework on anti-terrorism contains provisions that have been generally practiced by other countries. After the 2002 Bali Bombing, the Indonesian government issued Government Regulation in Lieu of Law (Perpu) No. 1/2002 on Anti-terrorism and Perpu No. 2/2002 (which made the Perpu No.1/2002 retroactively applicable to the Bali bombings). The parliament adopted both in early 2003 in the form of Law No. 15/2003 and Law No. 16/2003. The Constitutional Court decided that Law No. 16/2003 was in-constitutional, because it was against principle of non-retroactivity stipulated under Article 28I of the 1945 Constitution.*

**Keywords:** terrorism, legal framework, non-retroactive.

## *Intisari*

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Indonesia adalah korban dari beberapa serangan teroris berskala besar. Terkait terorisme ini, kerangka hukum anti-terorisme telah memuat ketentuan-ketentuan yang secara umum juga diterima oleh berbagai negara. Pasca Bom Bali tahun 2002, lahirlah Peraturan Pengganti Undang-Undang (Perpu) No.1/2002 tentang Pemberantasan Tindak Pidana Terorisme dan Perpu No. 2/2002 yang memberlakukan surut Perpu 1/2002 untuk peristiwa Bom Bali. Dua Perpu itu kemudian diterima menjadi Undang-Undang (UU) oleh Dewan Perwakilan Rakyat (DPR) dalam bentuk UU No. 15/2003 dan UU 15/2003. Mahkamah Konstitusi memutuskan bahwa ketentuan pemberlakuan surut itu bertentangan dengan asas non-retroaktif yang tercantum dalam Undang-Undang Dasar 1945 khususnya Pasal 28I.

**Kata Kunci:** terrorism, kerangka hukum, non-retroaktif.

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## A. Introduction

The issue of terrorism has gained worldwide attention. Indonesia, a nation victim to many terrorist attacks, has also drawn its attention towards this subject matter. This paper discusses the reason behind the existence of anti-terrorism laws in Indonesia, why it was considered as a violation towards the non-retroactive principle, and its prospects for amendments to strengthen anti-terrorism measures in Indonesia.

There are already so many writings on terrorism that discusses the issue from various perspectives, these include, among others, viewpoints from criminal law, criminal procedure law, criminal justice system, criminology and human rights. Here, the author sees four articles that are worth noting in respect to analysis on terrorism from a legal framework viewpoint. One of them was an article titled "Combating Terrorism: Australia's Criminal Code Since 11, 2001" written by Edwina MacDonald and George Williams, from the Faculty of Law, University of New South Wales, Australia.<sup>1</sup> This article focuses on the ways in which new anti-terrorism laws in Part 5.3 of the Australian Federal Criminal Code depart from, or challenge, traditional criminal law principles.<sup>2</sup>

Another work is a book titled *The War on Terror and the Framework of International Law* written by Helen Duffy.<sup>3</sup> Helen Duffy's book tries to clarify some confusions relating to the war on terrorism. It identifies the framework of international law and its capability in addressing the September 11 attack and its subsequent reactions. The author analyzes different aspects of the so called 'war on terror' – from military reactions to a criminal law perspective – and places them under the appropriate law category. The aim of the book is to address concrete problems relating to terrorism and, after seeing the applicability of a legal framework in certain contexts, it analyzes

the application of that legal framework to specific cases.

The third work is a book titled *Terror and Anti-Terrorism: A Normative and Practical Assessment*, written by Christopher L. Blakesley.<sup>4</sup> The author addresses the definitional issue related to terrorism and the ever-recurring questions which surrounds the topic, such as: What is terrorism? What criminal conduct do we qualify as terrorism, and how do we justify this qualification, as compared to other criminal conducts? When contemplating international crimes, Blakesley specifically compares war crimes and crimes against humanity with terrorism.

The fourth work is titled *Anti-terrorist Measures and Human Rights*, edited by Wolfgang Benedek and Alice Yotopoulos-Marangopoulos.<sup>5</sup> The purpose of this book is to analyze the different approaches taken by various states and international organizations regarding the fight against terrorism. The book collects studies by high-level experts from different backgrounds, including academia, diplomats, international organizations and non-governmental organizations. In this book, it asks one main question: How can we efficiently counter terrorism without betraying the principles we believe in? The strong belief shared by the authors is that the need to respect human rights is under no circumstances an obstacle to an efficient fight against terrorism. The authors believe, however, that only a culture that promotes democracy and human rights will create a fertile ground for the fight against terrorism. In fact, they argue that responding to terrorism with further violations of human rights will allow terrorists to gain more support for their cause and will only lead to more terrorism.

What sets aside this paper from the above-works? In summary, the second writing stresses more on international law reviews on terrorism, in

<sup>1</sup> Edwina MacDonald and George Williams, "Combating Terrorism: Australia's Criminal Code Since 11, 2001", *Griffith Law Review*, Vol. 16, No. 1, 2007.

<sup>2</sup> It focuses on five key principles: the use of motivation as an element of an offence; the extension of offences to include preparatory actions; the use of offences to punish a person's status, rather than their actions; the reversal of the burden of proof; and the practice of detaining people without charge, trial or conviction.

<sup>3</sup> Helen Duffy, 2005, *The War on Terror and the Framework of International Law*, Cambridge University Press, Cambridge.

<sup>4</sup> Christopher L. Blakesley, 2006, *Terror and Anti-terrorism: A Normative and Practical Assessment*, Transnational Publishers, New York.

<sup>5</sup> Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (Eds.), 2004, *Anti-terrorist Measures and Human Rights*, Martinus Nijhoff Publishers, Leiden and Boston.

response to how international law deals with the issue of terrorism. The third work answers the basic question on the concept of terrorism and whether terrorism can be categorized as an international crime. The fourth writing discusses different approaches to terrorism and criticizes anti-terrorism efforts that should not violate human rights. It does not deal with the several issues above but it describes more about the development of legal framework on anti-terrorism efforts, in relation to the poor quality of the previous legal framework, in dealing with various terrorism attacks. This paper takes an approach that is almost similar to the first writing titled "Combating Terrorism: Australia's Criminal Code since September 11, 2001" by Edwina MacDonald and George Williams. If MacDonald and Williams wrote about the development of anti-terrorism legal framework in Australia, this paper discusses development of anti-terrorism legal framework in Indonesia. The Australian writers discussed about discrepancies in criminal procedure law and criminal law in anti-terrorism laws in Australia, compared to the standard applicable criminal and general criminal procedure laws in that country. The difference is that, this paper discusses more about discrepancy in the application of non-retroactive principle in Indonesia's anti-terrorism laws and its legal issues.

## **B. Discussion**

### **1. The Bali Bombing and Government Regulation in Lieu of Law (Perpu) on Anti-terrorism**

#### **a. Regulations on Anti-terrorism**

The United Nations General Assembly, through Resolution No. 3034 (XXVII) issued on 18 December 1972, expressed its deep concern "over acts of international terrorism which are occurring with increasing frequency". Thus from this, we can deduce that, today, terrorism is not only considered as a threat to institutions or public order of a single state, but it is also perceived as a threat to the international community as a whole. Many countries in response to this,

has already issued national legal frameworks on anti-terrorism. These newly-established legal frameworks received comments and criticisms from various parties, stating that they have strayed from, or is contradictory with the rules as well as the principles of a country's long-standing general criminal law.

To name a few examples of these legal frameworks are anti-terrorism laws that have been applicable in countries such as United Kingdom, New Zealand, South Africa, Australia and Indonesia. In 1974, United Kingdom has enforced Prevention of Terrorism (temporary Provisions) Act 1974 which was then followed by the 2000 Terrorism Act. New Zealand has a 2002 Terrorism Suppression Act. South Africa has a 2004 Protection of Constitutional Democracy against Terrorist and Related Activities Act. Even Australia's Federal Parliament, following the 9/11 tragedy, has passed 44 Acts in relation to anti-terrorism measures. As for Indonesia, after the Bali Bombing, it passed Perpu No. 1/2002, which later on, was passed as an act called Law No. 15/2003.

#### **b. Indonesia and Terrorism**

The Bali Bombing I incident on 12 October 2002 was the biggest and the most shocking terrorist attack in Indonesia. It hit the Kuta area in Bali, an international tourism destination visited annually by hundreds and thousands of tourists from all over the world. The Bali Bombing I, however, was not the first terrorist attack to occur in Indonesia. Records have shown that there have been many terror attacks that precedes the Bali Bombing case, this includes, among others, a bomb which exploded on the Istiqlal Mosque (the Indonesian national mosque located in Jakarta) on 19 April 1999; a Christmas Eve bombing on 24 December 2000 that hit 23 churches; and the Jakarta Stock Exchange bombing in September 2000. Several years earlier, there was even a plane hijacking, in which the hijackers asked the plane to be

flown all the way to Bangkok, Thailand.

Terrorism is continuously growing. In the beginning, it was indicated by ordinary crimes such as murder and threats in order to achieve a certain purpose. It started from fanaticism in a belief that was later followed by murders, committed by individuals or groups against rulers considered as tyrants. These murders against individuals can be considered as the original type of terrorism, in reference to modern terrorism history.<sup>6</sup>

It can be seen from many terrorist attacks that terrorist motives and objectives include: their aim to gain attention, to seek extensive coverage in mass media (especially from the international media), to make demands or to give messages to certain parties, to create a sense of insecurity, physical and psychological disturbances. Terrors are also intended to give shock therapy, so the perpetrators will gain attention, create anxieties and undermine and bring down the authority of a state's apparatus/government. Another motive is to destroy peace in a community through their chosen ways/actions, to accomplish a certain plan, to cause a widespread instability, and to provoke revenge by counter-terror attacks.<sup>7</sup>

Besides those motives, terrors are also intended to punish or to seek revenge, to create unrest, to make the public frantic or to change the public's view towards certain issues. They may also be intended to destroy a country's political foundation, to prevent a country's commodity from accessing international markets or to block/to prevent materials from entering a country.<sup>8</sup>

If we learn from the information provided in newspapers, television, and internet, the targets of terrorist attacks are chosen without any regard towards state boundaries nor

the people who would become their victims; where the issue of sovereignty and unlawful attack on civilians comes into place. The usual targets are places that would gain the biggest attention, such as tourist spots, hotels, malls, worship houses, restaurants, public transportation, markets, or non-civilian targets that include military bases and arms facilities. As for individual targets, usually they are politicians, industrialists, bankers, diplomats, but occasionally innocent civilians as well. No considerations will be taken over state boundaries, a country's political system, or weak and innocent people.<sup>9</sup>

It is believed that the terrorist attacks have detailed action plans, committed by specific groups, use of violence, there are civil casualties, committed for achieving particular ideology/political beliefs, the perpetrators are well-organized groups with very disciplined members, the attacks have an unexpected and clandestine nature, committed for giving political pressures. Terrorists are focused when carrying out their activities; they have no concern over boundary lines between one country and another or international conventions. Types of terrors used include hijacking, kidnapping with political or financial motives, murder, robbery, time bombs, suicidal bombers, sabotage using chemical or biological materials or other types of sabotage. Terrorists conspire with one another (with other terrorist groups), to hit as many victims as possible. It is difficult to anticipate their moves due to the wide area targeted by their operations.<sup>10</sup>

Explanations about the root causes or factors that provoke terrorism includes modern lifestyle, easy access to technology and information on techniques to commit terrors, violent culture in a nation/a community, lack

<sup>6</sup> Adrianus Meliala, "Teror, Teroris, Terorisme", *Course Material*, Faculty of Social and Political Science Universitas Indonesia, 2010. Muhammad Mustofa, "Memahami Terorisme: Suatu Perspektif Kriminologi", *Jurnal Kriminologi*, Vol. 2, No. 3, Desember 2002. Loudewijk F. Paulus, "Terorisme", <http://ditpolkom.bappenas.go.id/basedir/Politik%20Luar%20Negeri/1%29%20Indonesia%20dan%20isu%20global/3%29%20Terorisme/Terrorisme.pdf>, accessed on 10 October 2009.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

of strong commitment against terrorism, the accumulated intimidation, marginalization and misery, discriminating treatment against certain groups by a government—as its means and methods to establish its power. Other factors are related to demands for political rights, or sense of nationalism from, of a minority group who feels intimidated; demands from groups who feel they have more rights to power or to become part of the ruling authority, demands to separate from a country.<sup>11</sup>

Terrorist acts always gives considerable impacts to public, including loss of lives, properties, sense of security, sense of economic stability and social order. For several years, terrorism plagued Indonesia. It culminated in the Bali Bombing on 12 October 2002. The incident not only shook Bali as well Indonesia, but also the international world, following the 9/11 tragedy in the United States. There were a number of terrorist attacks in Indonesia, some of them were listed in the table below:<sup>12</sup>

Dates	Incidents	Locations
1 August, 2000	A car bomb exploded in front of the Philippines Ambassador's residence in Jakarta. Two victims were killed and 21 others were injured.	Central Jakarta
13 September, 2000	An explosion rocked the parking space of Jakarta Stock Exchange (JSE) building. Ten victims were killed, 90 others were injured while 104 cars heavily damaged and 57 cars suffered minor damages.	South Jakarta
24 December, 2000	Bombs exploded on Christmas Eve in various cities. Sixteen people were killed, 96 were injured and 37 cars were damaged.	Jakarta, Bekasi, Sukabumi, Bandung, Mojokerto, Mataram, Pematang Siantar, Medan, Batam, and Pekanbaru
23 September, 2001	A bomb exploded at Atrium Plaza; six persons were injured.	Central Jakarta
12 October, 2001	A bomb exploded and caused the glasses, the ceiling and lamps at a KFC outlet were broken. There were no victims.	Makassar
12 October, 2002	Three explosions rocked Bali. A total of 202 local and foreign victims were killed while 300 people were injured.	Bali
27 April, 2003	A bomb exploded at Terminal 2F public area. Two victims were seriously injured and 8 others suffered moderate and minor injuries.	Cengkareng, Jakarta
5 August 2003	The first JW Marriott bombing tragedy took place. It destroyed part of the hotel; 11 people were killed and 152 others were hurt.	South Jakarta
9 September, 2004	A major explosion occurred in front of the Australia Embassy. Five were killed and hundreds of people were injured. Several other buildings were also damaged.	South Jakarta
1 October, 2005	Another bomb exploded in Bali (the 2 <sup>nd</sup> Bali Bombing), with 22 people killed and 102 others injured.	Kuta and Jimbaran, Bali
31 December, 2005	A bomb exploded in a market in Palu. Eight were killed and 45 others were injured.	Palu, Central Sulawesi
17 July, 2009	Suicide bombers exploded themselves at two hotels nearby each other and took nine lives with them.	JW Marriott and Ritz Carlton Hotels, Jakarta

<sup>11</sup> *Ibid.*

<sup>12</sup> Budi Gunawan, 2006, *Terorisme: Mitos dan Konspirasi*, Forum Media Utama, Jakarta, pp. 114-116.

### c. **The Bali Bombing Incident**

On Saturday night, 12 October 2002, the street of Legian in Kuta, Bali, was bustling. It was a favorite tourist spot and as the night grew darker, it would usually become even more packed with tourists who crowd the many bars and restaurants there. Nearing midnight, an L-300 minivan stopped right in front of Sari Club that made other cars behind it stood still. Its passenger, who wore a thick vest, left the van and immediately entered Paddy's Café which was located 20 meters from where the van stopped. Exactly at 11.15 pm (Central Indonesia Time), a loud explosion came out from Paddy's Cafe, followed by ear-splitting uproar. Few moments later, the L-300 minivan also exploded with a much more terrifying force. It damaged buildings and vehicles within 200-meter radius. More than 100 people died instantaneously, while hundred of other victims suffered serious injuries. Six months later, record showed that 204 victims of various nationalities were killed. The first Bali Bombing on 12 October 2002<sup>13</sup> triggered responses from all over the world who severely condemned terrorism and later, the international world also assisted the Indonesian government to help the victims and investigate this incident. Those suspected behind this bombing and were then brought to the court and punished include: Imam Samudra, Amrozi, Ali Gufon (Mukhlis), Ali Imron, and several others.

### d. **Laws on Anti-terrorism in Indonesia**

From a legal viewpoint, the above-mentioned Bali Bombing I was the important factor for the existing of a special law on anti-terrorism. In 2002, a Government Regulation in Lieu of Law (Perpu) No. 1/2002 on the Eradication of the Crime of Terrorism was issued. Then a year later, the Indonesian government issued Law No. 15/2003 where

the Perpu was adopted as a Law. Hence, from that moment on, Indonesia has a specific legal foundation to combat crimes of terrorism.

On 4 April 2003, President Megawati Soekarno Putri approved Law No. 15/2003 on the Stipulation of Government Regulation in Lieu of Law No. 1/2002 Terrorism Eradication as a Law. In the elucidation of Law No. 15/2003, it was stated that the state shall protect its citizens from every potential crime of national, transnational or international nature.

This law is also intended to create order, a sense of security and provide a strong legal foundation and legal certainty. Law No. 15/2003 has only two articles that basically stipulated Perpu No. 1/2002 as a Law and that this Law took effect since its stipulation date.

The content of Perpu No. 1/2002 on Terrorism Eradication covered the following issues: acts of terrorism, other acts related to acts of terrorism, investigation, prosecution, and examination before court, damages, restitution and rehabilitation, and international cooperation.

Article 1 listed definitions. It explained here, among others, that violence shall mean, "any misuse of physical power with or without the use of any unlawful means, which may endanger a person's body, life or freedom, including causing a person to become unconscious or powerless". A threat of violence shall mean "[...] any deliberate action to give any indication or any warning about a situation that tends to cause fear against a person or the general public". Vital objects shall mean "any place, location, or building that has significant economic, political, social, cultural, and defence and security values, including international facilities." Explosives shall mean, "any material that may explode, any type of gunpowder, bomb,

<sup>13</sup> Less than three years after Bali Bombing I, another terrorist attack hit Bali on 1 October 2005, in Jimbaran and Kuta areas (Bali Bombing II). The impact of this subsequent incident was not as damaging as the first one. About 22 victims were killed and 102 others were injured.

incendiary bomb, mine, hand grenade or any explosive material made from chemicals or other materials used to create explosions”.

**e. Specific Nature of the Indonesian Laws on Anti-terrorism**

Both of the Indonesian Government Regulations in Lieu of Law on anti-terrorism are the umbrella legislation for other laws and regulations relevant to anti terrorism. It is a special legislation supported by criminal sanctions and it is also a coordinating act that works to reinforce provisions in other laws and regulations pertaining to Combating Criminal Acts of Terrorism. This law also has special provisions that protect a suspect's/defendant's fundamental rights and are called the safeguarding rules.

The provisions, among others, introduce a new legal institution in criminal procedure law called hearing and act as an institution that conducts legal audit on all documents or intelligence reports submitted by investigators, in order to establish whether an investigation on suspected terrorism acts should be continued. The Law has a provision that allows the President to take measures to draft policies and operational steps in order to implement this Law, which should be based on transparency and public accountability principles and/or effective time limit principle so any possible abuse of authority can be prevented.

This Law has a provision on jurisdiction that is based on territorial principle, extra-territorial principle, and active national principle. So the Law is expected to be able to effectively reach the crimes of terrorism defined in its content, which are committed beyond the territorial limits of the State of the Republic of Indonesia. To reinforce such jurisdiction, this law also has a provision that rules over international cooperation.

This law contains a provision that rules funding for terrorism acts as a crime of terrorism, so it also supports Law No. 15/2002 on Money Laundering. It maintains the minimum punishments in order to reinforce the deterrent effect on perpetrators of terrorism crimes. Hence, the issue of terrorism financing is also very important to be discussed.<sup>14</sup>

**2. Judicial Review on the Principle of Retro-activity**

**a. The Birth of Perpu No. 1/2002 and Perpu No. 2/2002**

From the criminal law viewpoint, indeed, there was no absence of legal grounds to be used against Bali Bombing I. Because, although at the time of the incident, there was no anti-terrorism law in place, Indonesia already had a Penal Code and some of its articles could be used to prosecute the perpetrators, such as premeditated murder (Article 340), premeditated bodily injury (Article 354-356), or the Emergency Law on the Possession of firearms and explosive. However, the government considered that there was a need for a special law that would be more effective to prevent, obstruct and deal with terrorism, as other countries already had.

In the considerations of Perpu No. 1/2002, which was adopted just after Bali Bombing I, it was stated that the applicable laws and regulations had yet to be comprehensive and sufficient for combating crimes of terrorism. It was also stated that combat against terrorism was carried out based on a national commitment that referred to international conventions and laws and regulations pertaining to terrorism.<sup>15</sup>

The issue was that this regulation was not only applicable prospectively, but it was also applicable for the Bali Bombing on 12 October

<sup>14</sup> This article will not address this particular issue. Please see H.M. Abdi Koro, “Pendanaan Terorisme Diperoleh dari Tindak Pidana Pencucian Uang (Money Laundering)”, *Jurnal Hukum dan Pembangunan*, Vol. 41, No. 4, October 2011.

<sup>15</sup> See the considerations in Perpu No.1/2002, point d and e.

2002. In other words, it applied retroactively. On the other hand, in Indonesia (and also in other countries) a non-retroactive principle was a fundamental principle in criminal law, as stated in various provisions. In Indonesia, this prohibition was stated in the 1945 Constitution, in the chapter on Human Rights. Article 28I of the Constitution mentioned it as a non-derogable right. At the legislation level, this principle has also been regulated in the Penal Code (Article 1),<sup>16</sup> and Article 18 of Law No. 39/1999 on Human Rights. Article 28I of the Constitution stated that: “The right to life, right not to be subjected to 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.” Likewise, Article 18 of Law No. 39/1999 stated that: (2) No one shall be prosecuted or punished, unless by virtue of prior statutory penal provision. (3) In case of changes in the law (after the commission of a crime), the most favourable provision for the accused shall be applied.

The only exception from the retroactive restriction was in the case of the gross violation of human rights, as consented by Law No. 26/2000 concerning the Human Rights Court. So the issue was, can we disregard the non-retroactive principle when it deals with terrorism? As is the case of gross violations of human rights (genocide, crimes against humanity and war crimes)? The issues of principle of legality, no crime without law (*nullum crimen sine lege*) and no punishment without law (*nulla poena sine lege*) on crimes of genocide, crimes against humanity and war crimes were heavily discussed in relation to international crimes, which are under the

jurisdiction of the International Criminal Court (ICC).<sup>17</sup>

This principle is not only provided in Indonesian legal framework, but also guaranteed in the international level. Article 15 of the International Covenant on Civil and Political Rights/ICCPR (this human rights instrument was ratified by Indonesia with Law No. 12/2005) and Article 22-24 of the Rome Statute of the International Criminal Court has also explicitly mentioned this principle. Article 15 of the International Covenant on Civil and Political Rights/ICCPR stated that: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” Meanwhile, Article 24(1) of the Rome Statute similarly provided that, “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

#### **b. The Retroactive Principle in the Indonesian Laws on Anti-terrorism**

Article 46 of Perpu No. 1/2002 stated, “Provisions in this Government Regulation in Lieu of Law are applicable retroactively in order to support legal actions taken against specific cases that have taken place prior to the enforcement of this Government Regulation in Lieu of Law, the application of which shall be stipulated by a law or a Government Regulation in Lieu of Law.”

The above Article 46 generally states that this Perpu might be applied retroactively

<sup>16</sup> Article 1 paragraph 2 of the Penal Code actually also allows criminal law to be applicable retroactively in the event of a transitional circumstances, that is when there is a new law (including amendments of existing laws) passed after an act has been committed. However, the new law may only be applied retroactively against a past act only if it would be more in favour of the defendant. When it would put a defendant at a disadvantage, then the law may not be allowed to be applied retroactively.

<sup>17</sup> They were explored in-depth by Shahram Dana in his article “Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Law Sentencing”, *Journal of Criminal Law & Criminology*, Vol. 99, No. 4, Fall 2009.

in legal actions taken against specific cases that had occurred in the past, so it did not particularly assert the retroactive principle only for the Bali Bombing incident taken place on 12 October 2002.<sup>18</sup> This means it may also be applied against other terrorist attacks as long as it is established by a law or a Perpu. The imposition of Perpu No. 1/2002 on the Bali Bombing incident that took place on 12 October 2002 was stipulated by Perpu No. 2/2002. This Perpu only has two articles. Article 1 states: “Provisions in Government Regulation in Lieu of Law No. 1/2002 on Combating Criminal Acts of Terrorism are declared to be applicable against the bomb explosion in Bali on 12 October 2002.”<sup>19</sup>

Why was this Perpu on Combating Criminal Acts of Terrorism stated to be applicable retroactively? Why did those who drafted the Perpu (the government) not realize that the prohibition against retroactive principle was a very fundamental principle in criminal law that had been established in the 1945 Constitution? Despite the fact of how fast the Perpu was drafted (only six days after Bali Bombing I), the government had already considered this restriction. Moreover, later, the Parliament and the government adopted Perpu No. 1/2002 and Perpu No. 2/2002 laws—Law No. 15/2003 and Law No. 16/2003 respectively—on 4 April 2003.<sup>20</sup>

One of the reasons might be because the Government (and later, also the Parliament) categorized terrorism as grave crimes against humanity. This is evident in the General Elucidation of Perpu No. 1/2002 and the General Elucidation of Perpu No. 2/2002 that

stated: “Terrorism is crime against humanity and civilization”.<sup>21</sup> As mentioned above, in Indonesia, there is an exception over the restriction against retroactive principle, especially on grave crimes against humanity, as regulated in Law No. 26/2000 on the Court of Human Rights, which is still applicable until today.

We can see this restriction against retroactive principle in various provisions, both at international and national levels. Article 11 (2) of the United Nations Universal Declaration of Human Rights stated that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 15 (1) of International Covenant on Civil and Political Rights (ICCPR) also stated that criminal law shall not be applied on retroactive basis. However, ICCPR also recognized exceptions, as regulated by article 15 (2). It stated that exceptions were recognized, for crimes that were in accordance with international customary laws. This was also found in Article 22, 23 and 24 of the Rome Statute.

In Indonesia, restriction against retroactive provision is clearly stated in the Constitution. It is regulated in the Chapter on Human Rights, especially in Article 28I, which stated that, “The right not to be charged against retroactive legal grounds is a human right that cannot be removed in any

<sup>18</sup> This Perpu was signed on 18 October 2002, or six days after Bali Bombing I.

<sup>19</sup> Article 2 of Perpu No. 2/2002 stated that this Perpu took effect on the date it was passed as a law.

<sup>20</sup> In Indonesian legal system, a Government Regulation in Lieu of Law (Perpu) is a type of regulation equal to a legislation. This regulation, in substance, is a law, but due to circumstances of emergency nature and the fact that it is not possible to pass a law immediately, then it is made as a Government Regulation. Hence, it is called as Government Regulation in Lieu of Law. Therefore, it is also regulated that within a year, this Government Regulation in Lieu of Law shall be discussed in the House of Representatives in order to be passed as a law.

<sup>21</sup> The matter over the difference between terrorism and common domestic crimes and international crimes (especially war crimes dan crimes against humanity) was reviewed in-depth especially in chapter 7 of a book written by Christopher L. Blakesley, *Terror and Anti-Terrorism: A Normative and Practical Assessment*, 2006, Transnational Publishers, New York. Antonio Cassese also discussed the issue of terrorism as an international crime. He said international terrorism was involved in armed conflicts: a sub category of war crimes dan crimes against humanity. See Antonio Cassese, 2008, *International Criminal Law*, 2<sup>nd</sup> edition, Oxford University Press, New York.

circumstances.” Long before a restriction was put against the use of retroactive provision in the 1945 Constitution, Indonesia Penal Code—derived from Dutch Penal Code—had put in place a prohibition against the use of retroactive provision in article 1 paragraph (1). It stated: “No act is punishable, unless by the power of prior criminal law provisions.”

In addition to being stated in a Chapter on Human Rights in the Constitution, a Law on Human Rights (Law No. 39/1999) also included this prohibition against retroactive principle in Article 18 paragraph (2), which stated: “No one shall be prosecuted in order to be punished or to be sentenced, except on the grounds of legal provisions existed prior to the criminal acts.” As regulated in Article 1 paragraph (2) of the Penal Code on transitional period, Article 18 (3) of Law No. 39/1999 also stated a similar provision: “In the event of amendments on laws and regulations, provisions that would be most in favour of the suspects shall be applied.”

As mentioned above, there has been one acceptable exception, that is for serious crimes against humanity. As stated in Article 43 (1) of Law No. 26/2000 (Law on Court of Human Rights): “Grave violations committed against human rights that took place prior to the passage of this law, shall be investigated and ruled by an ad hoc human rights court.” The procedures were established in paragraph (2) of the same article. It stated: “The ad hoc Human Rights Court as referred to in paragraph (1) shall be established on the recommendations of the Indonesia Parliament, based on specific cases, by a presidential decree.”

In the Elucidation of Article 43 (2) of Law No. 26/2000, it was stated:

“In the event that the Indonesia House of Representatives recommends an ad hoc Human Rights Court to be set up, it shall base its recommendation on allegations that grave violations against human rights

have been committed, limited by specific locus and tempus delicti taken place before the adoption of this law.”

### **c. Judicial Review by the Constitutional Court**

Following Perpu No. 1/2002, the government issued Perpu No. 2/2002 on the Imposition of Perpu No. 1/2002 for the Bomb Explosion in Bali taken place on 12 October 2002. Perpu No. 1/2002 was later adopted as Law No. 15/2003 and Perpu No. 2/2002 was later adopted as Law No. 16/2003. When the legal proceedings of Bali Bombing case was underway, using Law No. 15/2003 in conjunction with Perpu No. 1/2002, a judicial review on Perpu No. 2/2002 in conjunction with Law No. 16/2003 was submitted. In essence, the review stated that the imposition of Perpu No. 1/2002 in conjunction with Law No. 15/2003 in retroactive manner on the Bali Bombing incident conflicted with the non-retroactive principle as established in the 1945 Constitution.

A ruling of the Constitutional Court dated 22 July 2004 stated that Law No. 16/2003 on the Stipulation of Perpu No. 2/2002 concerning the Imposition of Perpu No. 1/2002 on the 12 October 2002’s Bali Bombing as a Law was contradicted to the constitution and therefore does not have any legal power. This was in accordance with the provision in Article 28 I (1) that stated some rights cannot be removed in any circumstances and they include, “the right to not be prosecuted based on retroactive legal grounds”. Likewise, it was also confirmed in Article 4 of Law No. 39/1999 on Human Rights. Although the Constitutional Court said Law No. 16/2003 did not have any binding power, it did not prevent the ongoing proceedings since the ruling applied prospectively. Meanwhile, the investigation and prosecution process that used Law No. 15/2003 in conjunction with Perpu No. 1/2002 for the Bali Bombing case, still continued as before.

Is this discrepancy, found in Indonesia's anti-terrorism law justifiable? As described above, both the government and parliament agreed that this Perpu concerning Combating Criminal Acts of Terrorism could be applied on a retroactive basis. But not according to the Constitutional Court who considered the judicial review case submitted by Masykur Abdul Kadir—a defendant in the case of Bali Bombing of 12 October 2002. Kadir submitted a judicial review on Law No. 16/ 2003 to the Constitutional Court. According to him, this law conflicted with the 1945 Constitution, particularly the provision that applied retroactive principle on Law of Combating Criminal Acts of Terrorism in dealing with the Bali Bombing incident, which had taken place before the law was passed.

According to the Constitutional Court, the ground for revoking this law was the application of retroactive principle in Law No. 16/ 2003. As discussed above, Indonesian laws has specifically established in the 1945 Constitution that criminal law shall not be applied on retroactive basis. The government itself considered the Bali Bombing case as an extraordinary crime and it was a crime against humanity and civilization. So it had to be dealt with in an extraordinary manner as well, by imposing the anti-terrorism laws on retroactive basis.

The Constitutional Court stated that Law No. 16/ 2003, which enacted the Perpu on Terrorism for the bomb explosion in Bali, did not have any binding power. In its ruling, the Constitutional Court's panel of judges stated that they accepted the judicial review petition on Law No. 16/ 2003. However, the Constitutional Court did not reach its ruling in complete accord. Five judges granted the petition while the other four judges denied it and gave dissenting opinions. The five judges that granted the judicial review petition on Law No. 16/2003 considered that the

enforcement of the law conflicted with the 1945 Constitution. This referred to article 28I of 1945 Constitution, which stated that, "The right not to be charged against a retroactive legal grounds is a human right that cannot be removed in any circumstances.

The decision stated that today, there are still pros and cons on justification of applying a law on retroactive basis. However, applying retroactive principle on a law remained a violation against human rights and humanity standards as stated by World Organization against Torture.

In their considerations, the panel of judges also reinforced that in essence, law shall be applicable in prospective manner. Furthermore they added in their considerations, "that it is general knowledge that removal of non-retroactive principle would give opportunities to a ruling party to use law as means for revenge against its previous political opponents. Such revenge should not take place, therefore, no opportunity—however small—should be given to serve such purpose."

In their dissenting opinions, the four judges who disapproved of the judicial review petition on Law No. 16/ 2003 stated, actually Article 28 I of the 1945 Constitution concerning retroactive principle was not absolute and exceptions were possible. This, they said, was in order to see that a fair trial was carried out, in accordance with moral considerations of religious values, security and public order. The four judges asserted that interpretation of Article 28I of the 1945 Constitution should consider the facts that the Constitution was simply a part that made up the State's fundamental law. Therefore, it was the task of the Constitutional Court judges to interpret provisions in the National Constitution in the event of ambiguities due to contradictions between one article and another.

In their opinions, they also revealed that application of non-retroactive principle

should also consider beforehand, whether such rigid application would lead to injustice, undermine religious values, public security and order. “There should be a balance between legal certainty and justice, by trying to understand the meaning of Article 28I of the 1945 Constitution, not only based on its texts, but also by studying the concept behind the principle through considering its history, practices and comparable interpretations,” described the four Constitutional Court judges in their dissenting opinions.

Romli Atmasasmita, a leading criminal law expert and a member of the team that drafted the Government Regulation in Lieu of Law on Terrorism, stated its disappointment in the Constitutional Court (MK). He said that MK not only consider Article 28I paragraph (1) of the 1945 Constitution, but they also needed to take into account its preamble and Article 28J. In his opinion, Article 28J allowed the state to limit a person’s fundamental rights if ordered by a law and for the sake of the wider public interest. He stated, “Considering the articles one by one is not a role expected from the Constitutional Court. They should have reviewed the Constitution as a whole in a broader context. We should not only consider article 28I, but we should take into account the 1945 Constitution preamble as well. The preamble was intended to promote welfare, to participate in maintaining world peace and security. Overall, the Constitution has to protect the 200 million (Indonesian people) who may become bombing targets anytime”.<sup>22</sup>

The Constitutional Court ruling that revoked Law No. 16/2003 because it conflicted with the 1945 Constitution and stated that the Law did not have any binding power raised a question: then, what about the Bali Bombing case? Because from the beginning, the case had been dealt with Perpu No. 1/2002 (which

later was passed as the Law No. 15/2003).

According to the prevailing understanding of criminal law literatures, especially in relation to Article 1 paragraph (2) of the Indonesian Penal Code, in the event of amendment of a law, after an act has been committed, then provisions most favourable for the defendants shall be applied. The question: to what extent do we have to take into account the amendments? Is it as long as a judge has not issued his verdict?

To date, the understanding is that when a judge has not issued his ruling for a case, then any amendment to the relevant laws must be taken into account. In fact, some also considered that when a ruling has been issued for a case, but the case is still submitted for an appeal to the higher court and supreme courts, then amendments of the law must still be taken into account or the transitional provision in Article 1(2) of the Penal Code is still used. The question is: how about the Bali Bombing I case? Its legal proceedings were based on Perpu No. 2/2002 (which later was passed as Law No. 16/2003) but later, the imposition of this law in this case was revoked by the Constitutional Court. Must its legal proceedings be declared as legally null and void? And then be reinvestigated and prosecuted based on the regulations that had prevailed prior to the Bali Bombing on 12 October 2002 (for example, based on Penal Code and Criminal Procedure Code)?

It turned out that the ruling did not make the ongoing legal proceedings suspended. In other words, the law enforcement still used Law No. 16/2003 to deal with Bali Bombing I case. On several occasions, the Constitutional Court Chairman stated that the institution’s ruling was not applicable retroactively and it only revoked Law No. 16/2003, so the ongoing proceedings could continue. The Director General of Law and Human Rights of the Ministry of Justice and Human Rights

<sup>22</sup> Hukum Online, “MK Nyatakan UU Terorisme Tidak Mempunyai Kekuatan Mengikat”, <http://www.hukumonline.com/detail.asp?id=10800&cl=Berita>, accessed on 10 April 2012.

also said that the Constitutional Court's ruling was final and binding. However, he confirmed that it was only applicable on prospective basis and not retroactively.

This certainly was opposed by the defendants of Bali Bombing case and their lawyers. Nevertheless, the investigation, prosecution and inquisition process continued to be carried out against the defendants.

### 3. Moving Forward: Criticisms against the Draft Amendment on Terrorism Eradication Law

Applicable since 2003, Law No. 15/2003 in conjunction with Perpu No. 1/2002 in fact was still considered to have some loopholes. This was not surprising, considering that it was drafted in a very short period. Therefore, there was a plan to make amendments on this law in order to make it even more effective in preventing and dealing with the looming threat of terrorism. However, the plan was met with criticisms by many; among them was Setara Institute.<sup>23</sup>

Setara Institute said that the revision seemed to be oriented towards fully supporting preventive works on combating terrorism. However, vague and biased definition of actions would likely violate citizens' civil rights. In particular, the Institute highlighted crimes that might spread hatred or enmity which could provoke or influence people, or incite terrorism. This definition did give significant support for works to combat terrorism by dealing with its root causes, but it would jeopardize assurance for freedom of expression, freedom of association, and freedom to express one's opinions. Setara Institute has considered terrorism as the culmination of intolerance; and intolerance was the starting point of terrorism. But it did not mean that various actions of intolerance could be qualified as parts of terrorism. One thing for certain, spreading hatred could be categorized as a crime.<sup>24</sup>

Then there was also a clause that says, "to be a member of an organization or a group that clearly intends to commit crimes of terrorism". This definition is likely to be a controversial one. If the organizations, which have been seen as terrorist base or places where seeds of terrorism were nurtured, are considered to satisfy the above article's definition, then it would be easy for the police to make arrests. But then, how about the assurance for freedom of association? These are some of the controversies that need to be dealt with and reviewed seriously.

Amendment of Law on Combating Criminal Acts of Terrorism also asserted that intelligence reports were able to be submitted as evidence (Articles 26 and 27). Previously, in Law No. 15/2003, intelligence reports could only become preliminary evidence for making an arrest; but by this amendment, other than maintaining its position as preliminary evidence for making an arrest, the draft amendment stated that intelligence reports obtained during investigation and prosecution stages could be submitted as evidence. This definition was one type of expansion on types of evidence, from the previous law. The problem was that the source of this information came from intelligence reports, not from objective facts of an event. Though the court still has the authority to rule whether the preliminary evidence is valid, but since the reports do not come from facts, it will still be difficult to conduct a test to examine its objectivity.

The draft amendment of Law on Combating Criminal Acts of Terrorism added one chapter that upheld the presence of the National Counterterrorism Agency (BNPT) as a new agency that was assigned to prevent, protect, enforce, combat, deradicalize, carry out international cooperation, and prepare the nation to be alert on crimes of terrorism. As an organization, BNPT was established based on Presidential Decree No. 46/2010 on the Establishment of BNPT and the agency has operated since last January 2011.

<sup>23</sup> SETARA Institute for Democracy and Peace, "Ringkasan Analisa Terhadap RUU Intelijen dan RUU tentang Perubahan UU No. 15/2003 tentang Terorisme", <http://www.setara-institute.org/id/content/ringkasan-analisa-atas-ruu-intelijen-dan-revisi-ruu-terorisme>, accessed on 8 October 2012.

<sup>24</sup> *Ibid.*

### C. Conclusion

Terrorist acts always give out considerable impacts to the public, including, amongst others, loss of lives, properties, sense of security, sense of economic stability and social order. The discussion above has mentioned the background reasoning behind the existing of anti-terrorism laws in Indonesia, why it was considered as a violation towards the non-retroactive principle and its the prospect for amendments to strengthening anti-terrorism measures in Indonesia. Discussions on the development of anti-terrorism legal framework in Indonesia was also discussed, especially on the issue of discrepancy in the application of non-retroactive principle in Indonesia's anti-terrorism laws and its legal issues. Many countries already issued legal frameworks on anti-terrorism. In 2002, a Government Regulation in Lieu of Law No. 1/2002 on Combating Criminal Acts of Terrorism was issued. Based on Law No. 15/2003, the Perpu was adopted as a Law. From that moment, Indonesia has a specific legal foundation to combat crimes of terrorism. The content of Perpu No. 1/2002 on Terrorism Eradication covered the definition of terrorism acts, other acts related to terrorism, investigation, prosecution, and examination before court, damages, restitution and rehabilitation, and international cooperation. The problematic issue is that this regulation is not only applicable prospectively, but it was also applicable for the Bali Bombing on 12 October 2002. In other words, it applied retroactively. On the other hand, the non-retroactive principle is a fundamental principle in Indonesian criminal law,

as stated in various provisions. In Indonesia, this prohibition was stated in the 1945 Indonesian Constitution, in the chapter on Human Rights. Article 28I of the 1945 Constitution, specifically, mentioned it as a non-derogable right. A ruling of the Constitutional Court dated 22 July 2004 stated that Law No. 16/2003 on the Stipulation of Perpu No. 2/2002 concerning the Imposition of Perpu No. 1/2002 on the 12 October 2002's Bali Bombing as a Law was contradictory to the constitution and therefore does not have any legal power. This was in accordance with the provision in article 28I (1) that stated some rights cannot be removed in any circumstances and they include, "the right to not be prosecuted based on retroactive legal grounds". It turned out that the ruling did not make the ongoing legal proceedings suspended. In other words, the law enforcement still used Law No. 16/2003 to deal with Bali Bombing I case. The Constitutional Court stated that the institution's ruling was not applicable retroactively and it only revoked Law No. 16/2003, so the ongoing proceedings could continue. Amendment on the anti-terrorism laws is a reasonable step, when a serious review has been conducted on the implementation of the applicable anti-terrorism law and its loopholes, instead of the concerning law enforcement agencies. It is also recommended to carry out a comparative study between Law No. 15/2003 in conjunction Perpu No. 1/2002 and various anti-terrorism laws in other countries, in order to find out the similarities and the differences among these laws and to get positive and advanced knowledge from them, as input for the planned amendment.

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