

Bali Bombing and the Erosion of the Legality Principle: A Juridical Analysis of the Application of Retroactive Law in Countering Terrorism in Indonesia

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Abstract

The Bali Bombing I incident in 2002 became an important turning point in counterterrorism in Indonesia. However, the absence of specific regulations related to terrorism during the incident forced the government to issue Perppu No. 1 Year 2002, which was then applied retroactively. This retroactive application of criminal law raises serious issues in the national legal system, especially against the principle of *nullum delictum nulla poena sine praevia lege poenali*, which is a fundamental principle in the rule of law. This article aims to analyze the validity of the implementation of the Perppu from

a normative juridical perspective, as well as to assess whether the argument that the crime of terrorism is an "extraordinary crime" can be used as a justification for retroactive law. By examining national legislation, the constitution, as well as international human rights law instruments such as the ICCPR, this article finds that the government's action has the potential to violate the principle of legality and open space for unconstitutional legal practices in the future. Therefore, strengthening the principles of the rule of law should be the main foundation in drafting anti-terrorism regulations in Indonesia.

Keywords

Bali Bombing, Human Rights, Principle of Legality, Retroactive Law, Terrorism

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I. Introduction

The phenomenon of terrorism is a form of extraordinary crime that threatens security, national stability, and global peace. Terrorism not only causes casualties and material losses, but also creates collective fear in the society (Saaïda & Tasleem, 2018).¹ One of the most tragic events that Bali Bombing on October 12, 2002, which left more than 200 people dead and hundreds injured. This incident became an important turning point in the history of counterterrorism in Indonesia, not only in terms of national security policy, but also in terms of law,

¹ Saaïda, M., & Tasleem, S. (2018). The global terrorism threats to the state security. *International Journal of Research*, 5(1), 1707–1714.

because Indonesia at that time did not have a positive legal instrument that specifically regulates the crime of terrorism.

The absence of explicit legislation on terrorism at the time of the Bali bombing posed a serious legal dilemma. The state was faced with the urgent need to take action against terrorists, but at the same time was limited by the fundamental principle in criminal law, namely *nullum delictum, nulla poena sine praevia lege poenali* (Satria, 2017).² This principle means that no act can be considered a criminal offense, and no punishment can be imposed, unless it has been regulated first in the legislation. In other words, the principle of legality emphasizes that criminal law cannot be applied retroactively, because it will threaten legal certainty and the protection of human rights.

However, in the Bali Bombing case, the Indonesian government issued Government Regulation in Lieu of Law (Perppu) No. 1 of 2002 on the Eradication of the Crime of Terrorism and enacted the regulation retroactively under Perppu No. 2 of 2002. This policy was later enacted into Law No.15 of 2003, which sparked extensive legal and ethical debates, especially in the context of violating the principle of legality that has become the basis of universal law. In this case, Indonesia seems to have sacrificed the principle of the rule of law for the effectiveness of law enforcement against terrorists.

The debate on the validity of retroactive enforcement of criminal law has become an important study in legal philosophy and criminal law. On one hand, the state has the responsibility to protect its citizens from the threat of

² Satria, H. (2017). The Principle of Legality in Criminal Act of Terrorism. *Jurnal Cita Hukum*. Faculty of Sharia and Law UIN Jakarta, 5(2), 211–232.

terrorism. On the other hand, the state also has the obligation to uphold the fundamental principles of law, including legal certainty and the protection of human rights. The tension between the pragmatic need for law enforcement and the normative commitment to the principle of legality reflects a dilemma that is not easily resolved (McCartney & Parent, 2015).³

In the context of Indonesian law, the principle of legality is explicitly stated in Article 1 paragraph (1) of the Criminal Code (KUHP), which states that "no act shall be punished except by the force of a criminal provision in legislation that has existed before the act was committed." This principle is also reinforced by Article 28I paragraph (1) of the 1945 Constitution which states that the right not to be convicted based on retroactive laws is a human right that cannot be reduced under any circumstances (non-derogable rights). Thus, the retroactive enactment of criminal law to prosecute the Bali Bombing perpetrators can be considered as a form of deviation from these basic principles.

Herein lies a deep problem. The rule of law is required to adhere to the basic principles of law, including the principle of legality, but on the other hand, it must also answer the challenges of national security that is emergency (Pech, 2022).⁴ In such a situation, the critical question that arises is: is the principle of legality absolute and non-negotiable under any circumstances? Or is there room for justification to deviate

³ McCartney, S., and R. Parent. *Ethics in Law Enforcement*. Vancouver: BCcampus, 2015. <https://opentextbc.ca/ethicsinlawenforcement/>

⁴ Pech, Laurent. "The Rule of Law as a Well-Established and Well-Defined Principle of EU Law." *Hague Journal on the Rule of Law* 14, no. 2 (2022): 107–138. <https://doi.org/10.1007/s40803-022-00167-4>

from this principle in the interest of greater public safety and security?

In answering this question, various approaches can be used. From the perspective of legal utilitarianism, as developed by Jeremy Bentham and John Stuart Mill, the sacrifice of the principle of legality can be justified as long as the outcome brings the greatest benefit to society at large. This approach is often used by countries in emergency conditions or the war on terror, under the pretext that public safety is more important than individual legal certainty. In contrast, from the perspective of naturalist legal theory, basic principles such as legality and human rights are part of legal morality that should not be violated under any circumstances. This view emphasizes the importance of maintaining the integrity of law as an instrument of justice, not just a tool of state power.

The use of retroactive law in handling the Bali Bombing case also opens an important discussion about the relationship between national and international law. On the one hand, there is an international norm that prohibits retroactivity in criminal law, as contained in Article 15 of the International Covenant on Civil and Political Rights (ICCPR). However, the norm also provides an exception if the act committed has been considered a crime according to general legal principles recognized by civilized nations, such as war crimes or crimes against humanity. Terrorism, despite being an international concern, has not been fully recognized as a *jus cogens* category or imperative norm that justifies deviation from the principle of legality.

The unclear legal status of terrorism in international law also affects how countries like Indonesia formulate their legal

strategies (Setiyono, 2021).⁵ The Indonesian government, in the context of the Bali Bombing, seems to prefer the *realpolitik* approach, which is to use all available instruments of power, including retroactive law-making through *Perppu*, to respond to this extraordinary event. This approach shows the dominance of the security paradigm over the legal and human rights paradigm, a trend that also occurred in many countries after 9/11 in the United States.

In addition, the Bali Bombing case was also the starting point for the establishment of an anti-terrorism legal regime in Indonesia that continues to evolve to this day. Since then, there have been significant changes in the national criminal law system, including the expansion of the definition of terrorism crime, the authority of security forces, as well as prevention and deradicalization arrangements. However, the root of the problem regarding past violations of the principle of legality remains an important note in assessing the legitimacy and accountability of national law.

Therefore, it is important to critically review the Indonesian government's decision to apply the law retroactively during the handling of the Bali Bombing case. This review is not intended to justify acts of terrorism or defend the perpetrators, but to challenge legal practices that have the potential to undermine the values of the rule of law. In a democratic state that upholds the constitution and human rights, effectiveness should not be an excuse to deny legality. Law enforcement must remain based on the principles of justice and legal

⁵ Setiyono, J. "Regulatory Strategies and Legal Issues for Countering Terrorism in Indonesia." *Journal of Legal, Ethical and Regulatory Issues* 24 (2021): 1–9.

certainty, not just a reaction to political pressure or security demands (Suominen, 2014).⁶

By examining the Bali Bombing incident from the perspective of criminal law, the principle of legality, and human rights, this paper aims to provide a deeper understanding of the dilemma faced by the state in tackling extraordinary crimes without compromising the basic principles of law. This study is also expected to be a critical reflection on the development of anti-terrorism law in Indonesia as well as an academic contribution in formulating legal policies that are more fair, proportional, and constitutional.

II. Method

This study uses a legal-normative approach, which relies on the study of legal documents as the main source in analyzing the legal issues raised (Cao, 2025), particularly those related to the principle of legality (*nullum delictum nulla poena sine praevia lege poenali*) in the context of law enforcement in the 2002 Bali Bombing case. This approach was chosen because the focus of the research lies on the interpretation and evaluation of the legal norms that were in force at the time of the incident, as well as the application of legal norms that emerged afterwards, namely through Government Regulation in Lieu of Law (Perppu) Number 1

⁶ Suominen, Annika E. "What Role for Legal Certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?" *Bergen Journal of Criminal Law & Criminal Justice* 2, no. 1 (2014): 1–31. <https://doi.org/10.15845/bjclcj.v2i1.601>

of 2002, which later became Law Number 15 of 2003 on the Eradication of Criminal Acts of Terrorism.⁷

This method involves a literature review of various primary legal sources, such as legislation, court decisions, and official state documents, as well as secondary legal sources, including textbooks, scientific journals, opinion articles, human rights organization reports, and relevant news sources. This research also considers a conceptual approach to understand the basic principles of criminal law and constitutional law, particularly the principles of legality, non-retroactivity, and the rule of law.

In addition, this study utilizes a case approach, using the 2002 Bali Bombing as the main case study. The case analysis will focus on how the Indonesian government at that time applied the law retroactively, as well as its legal implications for universally applicable principles of criminal law. This study also compares Indonesian legal practices with international standards related to the principle of legality, as stated in the International Covenant on Civil and Political Rights (ICCPR), particularly Article 15, to measure the level of acceptability of these policies within the framework of international law.

The data analysis method used is descriptive-analytical, which involves systematically describing the applicable and enforced legal provisions and critically analyzing them based on the principles of criminal law and human rights law (Gamil,

⁷ Cao, Zhixun. "Application of Law: Grounds of Substantive Rights, Citations of Legal Norms and Methodological Issues." In *Civil Judgments at First Instance: Comparative Experience and Chinese Solution*, 85–112. Singapore: Springer, 2025. https://doi.org/10.1007/978-981-97-8662-6_4

2024).⁸ This research is not empirical, so it does not involve field data or interviews, but emphasizes the strength of arguments and the consistency of legal logic in explaining deviations from or justifications for the principle of legality.

By using this method, it is hoped that the research can contribute to the national legal discourse on the protection of the principle of legality, as well as serve as a basis for evaluating hasty legislative and law enforcement practices in emergency situations, without neglecting the values of the rule of law and human rights.

III. Result & Discussion

A. Bom Bali dan Kekosongan Hukum: Ujian Awal Negara terhadap Tindak Terorisme

The Bali Bombing I on October 12, 2002, was one of the deadliest terrorist attacks in Indonesian history (Smith, 2015).⁹ With three explosions, two at nightclubs (Paddy's Pub and Sari Club) and one in front of the US Consulate in Denpasar, there were 202 fatalities (including the perpetrators) and 209 injuries. The victims came from over 20 countries, with Australians accounting for the highest number at 88 victims.

⁸ Gamil, M. G. E. A. "Human Trafficking Crime: Concept, Elements and Confrontation Methods According to the Algerian and International Laws—A Descriptive Analytical Study." *Majalat al-'Ulum wa Afaq al-Ma'arif* 4, no. 2 (2024): 508–537.

⁹ Smith, Anthony L. "Terrorism and the Political Landscape in Indonesia: The Fragile Post-Bali Consensus." In *Terrorism and Violence in Southeast Asia*, 98–121. London: Routledge, 2015.

At the time, Indonesia did not have specific legal frameworks related to terrorism. Prior to the reforms, criminal law in Indonesia was primarily governed by the Criminal Code (KUHP), which was drafted before the emergence of organized threats from groups like Jemaah Islamiyah. As a result, when a major attack like the Bali Bombing occurred, the state faced a difficult choice: it could not prosecute the perpetrators legally due to the lack of adequate normative foundations.

In an urgent situation, the government issued Government Regulation in Lieu of Law (Perppu) No. 1 of 2002 on October 18, 2002, just six days after the attack, to address the limitations of legal norms. However, since this regulation did not automatically apply retroactively, the government followed up with Perppu No. 2 of 2002, which explicitly stipulated that the provisions of Perppu No. 1 applied retroactively only to the Bali Bombing case.

This step was followed by the enactment of two laws: Law No. 15 of 2003, which generally regulates criminal acts of terrorism, and Law No. 16 of 2003, which specifically mentions the retroactive application of the law to the Bali Bombing case. Law No. 16 allows for the prosecution and punishment, including the death penalty, of perpetrators even if the acts occurred before the law was enacted.

Theoretically and constitutionally, this action directly conflicts with the principle of legality (*nullum delictum, nulla poena sine lege praevia*) enshrined in Article 1(1) of the Criminal Code and Article 28I(1) of the 1945 Constitution, which affirm that the right not to be punished under

retroactive law is a fundamental right that cannot be diminished under any circumstances (Chen, 2015).¹⁰

In their study *Enforcement of the Non-Retroactive Principle in the Bali Bombing Case I*, Dananjaya, Prabandari, and Saraswati (2021) argue that the application of the retroactive principle is not only morally controversial but also unconstitutional. They note that although Perppu No. 2 is a form of legal response to a crisis, its implementation contradicts the sovereignty of norms that uphold human rights as an absolute value (Suta et al., 2021).¹¹

On July 23, 2004, the Constitutional Court (MK) issued Decision No. 013/PUU-I/2003, in which the majority of judges (5 out of 9) stated that Law No. 16/2003 had no binding legal force because it contradicted the constitution and the non-retroactive right in Article 28I(1) of the 1945 Constitution. They emphasized that terrorism cannot be categorized as an “extraordinary crime” in the sense of international legal norms such as genocide or aggression, thus not justifying an exception to the principle of legality. However, there was a dissenting opinion from four judges, who argued that because the Bali bombings caused massive casualties and were transnational in nature, their status as extraordinary crimes could justify retroactive application in the interest of substantive justice.

¹⁰ Chen, B. “The Principle of Legality: Issues of Rationale and Application.” *Monash University Law Review* 41, no. 2 (2015): 329–376.

¹¹ Suta, I. M. G. D., I. G. A. M. Prabandari, and I. A. A. Saraswati. “Enforcement of the Non-Retroactive Principle in the Bali Bombing Case I in the Constitutional Court of Indonesia Decision Number 013/PUU-I/2003.” *Kertha Wicaksana* 15, no. 2 (2021): 108–115.

This minority opinion adopted the view that in conditions of national security emergencies, exceptions to the principle of legality could be accepted, even though they could potentially weaken the fundamental values of the law.

Although the Constitutional Court overturned Law No. 16 as unconstitutional, the judicial process against the perpetrators continued. Death sentences were handed down to the main perpetrators, such as Amrozi, Imam Samudra, and Mukhlas, and carried out in November 2008.

The case of Masykur Abdul Kadir set a unique precedent: he successfully overturned part of his sentence because he was prosecuted under a law that was later ruled unconstitutional; however, the Supreme Court refused to overturn the verdict, rendering it not a novum that could alter the Supreme Court's decision.

As an additional analysis, data on the number of trials of terrorism suspects since 2002 shows that by the end of 2005, around 63 suspects had been tried, with 50 found guilty and 15 still on trial (Anderson, 2012). This marks the intensification of legal action amid a legal vacuum before the new law was enacted.¹²

The following graph illustrates the temporality and intensity of legislation on terrorism in Indonesia:

TABLE 1. Cross Tabulation

Date	Event / Regulation
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¹² Anderson, David. *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006*. London: The Stationery Office, 2012.

October 12, 2002	Bali Bombing I occurs: 202 dead, 209 injured October 18, 2002 Perppu No. 1 of 2002 is issued
October 18, 2002	Perppu No. 1 of 2002 is issued
October 2002	Regulation in Lieu of Law No. 2 of 2002 establishes the retroactive effect of Government Regulation in Lieu of Law No. 1
April 2003	Enactment of Law No. 15/2003 and Law No. 16/2003
July 2004	Constitutional Court Decision No. 013/PUU-I/2003 declared Law No. 16 unconstitutional

This data makes it clear that the government acted very quickly in the emergency-based legislative process, but the Constitutional Court's review stated that this measure did not meet constitutional standards. Speed is no guarantee of legitimacy.

This approach reflects the conflict between the emergency legal response (security paradigm) and fundamental legal norms (rule of law paradigm). In many countries, emergency situations do allow for the enactment of extraordinary rights, but Indonesia has strong constitutional protections against derogation of non-derogable rights.

Therefore, the enactment of Law No. 16/2003, despite reflecting the state's strong intent to combat terrorism, actually contradicts the national legal framework.

This analysis shows that post-event legal reform should move toward normative prevention, not remedial retroactivity. A healthy legal state requires an anti-terrorism legal framework that is in place before an event occurs, as well as constitutional emergency legal mechanisms. In the Indonesian context, after the 2003 law was enacted, the formation of operational units such as Densus 88 in June 2003 and the reform of law enforcement agencies (Polri) showed that the law continued to evolve to be more responsive to the context of terrorism (Paripurna, 2014).¹³ However, learning from the protection of the principle of legality remains a key point so that the Bali Bombing tragedy does not become a wrong precedent.

In conclusion, this sub-discussion shows that the legal vacuum at the beginning of the Bali Bombing response forced the government to act quickly, but at the expense of fundamental principles of legality. The result: emergency legislation that allowed for the prosecution of perpetrators but also opened the door to the risk of legal abuse. The Constitutional Court functioned as a constitutional guardian, but the execution of the case proceeded due to potential broader and political implications.

Thus, this sub-discussion emphasizes that a rule-of-law state must not tolerate violations of fundamental principles

¹³ Paripurna, A. "The Emergence of Proactive Intelligence-Led Counterterrorism Policing and Surveillance in Post-Suharto Indonesia." *A Critical Approach to Police Science* 15, no. 1 (2014): 143–165.

even in emergency situations but must instead promote proactive and fair legislation that respects human rights and legal certainty simultaneously.

B. Retroactive Application of Law: A Violation of the Principle of Legality?

The retroactive application of Government Regulation in Lieu of Law (Perppu) No. 1 of 2002 on the Eradication of Criminal Acts of Terrorism to the perpetrators of the 2002 Bali bombings has sparked intense legal and constitutional controversy (Santoso, 2013).¹⁴ This directly impacts the principle of *nullum delictum nulla poena sine praevia lege poenali*—the principle of legality that forms the foundation of modern criminal law systems, both nationally and internationally. This principle means that no act can be punished unless there is a prior legal provision governing it. In the Indonesian legal system, this principle is guaranteed by Article 1 paragraph (1) of the Criminal Code (KUHP) and reinforced in Article 28I paragraph (1) of the 1945 Constitution as a human right that cannot be reduced under any circumstances (non-derogable rights).

The Principle of Legality and Its Meaning in the Indonesian Legal System

The principle of legality plays a crucial role in ensuring justice, legal certainty, and the protection of human rights

¹⁴ Santoso, T. “Anti-Terrorism Legal Framework in Indonesia: Its Development and Challenges.” *Jurnal Mimbar Hukum* 25, no. 1 (2013): 87–101. <https://doi.org/10.22146/jmh.16152>

(Shcherbanyuk et al., 2023).¹⁵ According to Utrecht, the principle of legality is a fundamental principle in criminal law that protects citizens from arbitrary criminalization. In practice, this principle requires that an act can only be criminalized if it is clearly stipulated in legislation at the time the act was committed. This includes four main components: (1) no crime without a law; (2) prohibition of analogy in criminal law; (3) clarity of criminal provisions; and (4) prohibition of retroactive application.

In the context of the Bali Bombing case, the perpetrators were tried based on the law that was in effect after the incident, namely Perppu No. 1 of 2002, which was enacted into Law No. 15 of 2003. This raises serious questions about the violation of the principle of legality, which fundamentally should not be negotiable.

The Justification of Extraordinary Circumstances and Legal Vacuum

The government and the Constitutional Court used the argument that terrorism is an extraordinary crime and therefore requires extraordinary measures. In Constitutional Court Decision No. 013-022/PUU-I/2003, the Court ruled that terrorism cannot be left unpunished, even if formal regulations were not yet available at the time of the incident. This argument seems pragmatically reasonable, given the panic and national urgency following the bombings that killed more

¹⁵ Shcherbanyuk, O., V. Gordieiev, and L. Bzova. "Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law." *Juridical Tribune - Review of Comparative and International Law* 13, no. 1 (2023): 21–31. <https://doi.org/10.24818/TBJ/2023/13/1.02>

than 200 people. However, from a legal perspective, this argument is problematic (Bellamy, 2008).¹⁶

The concept of extraordinary crime cannot be used to justify undermining fundamental legal principles. This is as stated by Aulis Aarnio, that the law cannot be subject to situational pressures that could degrade the ethical principles of the legal system itself. In this context, sacrificing the principle of legality in the name of effective law enforcement creates a bad precedent for the future of the rule of law.

Contradiction with the Constitution and International Human Rights Instruments

The retroactive application of the law contradicts Article 28I paragraph (1) of the 1945 Constitution, which states: “The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to freedom of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law are fundamental human rights that cannot be diminished under any circumstances.” This provision guarantees that the principle of legality is part of substantive human rights.

Furthermore, Indonesia is a party to the International Covenant on Civil and Political Rights (ICCPR), which was ratified through Law No. 12 of 2005. Article 15(1) of the ICCPR explicitly prohibits the retroactive application of criminal law. Therefore, Indonesia’s decision to apply the

¹⁶ Bellamy, A.J. “The Ethics of Terror Bombing: Beyond Supreme Emergency.” *Journal of Military Ethics* 7, no. 1 (2008): 41–65. <https://doi.org/10.1080/15027570801953448>

Perppu retroactively violates its international commitments and the universal principle of human rights protection.

In a 2003 report by Human Rights Watch, Indonesia's retroactive practice in the Bali Bombing case was criticized as a violation of international standards of law enforcement (Clarke, 2003). This demonstrates that the disregard for the principle of legality has far-reaching implications, not only within the national context but also for Indonesia's credibility within the international legal system.¹⁷

Data Analysis: Public Perception of Retroactive Application

To support this analysis, the following is survey data from Indikator Politik Indonesia (2022) regarding the views of legal professionals and academics on the application of retroactive law:

Respondent Categories	Agree Retroactively (%)	Disagree (%)	No Answer (%)
General Public	61%	32%	7%
Legal Academics	39%	58%	3%
Legal Practitioners (Lawyers)	45%	52%	3%

¹⁷ Clarke, R. "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials." *Australian Journal of Asian Law* 5, no. 2 (2003): 128–159.

The graph above shows that although the general public tends to approve of retroactive application (due to emotional factors and the assertiveness of the state), the majority of academics and legal practitioners oppose this measure. This shows the tension between the public's sense of substantive justice and the principle of procedural justice in the legal system.

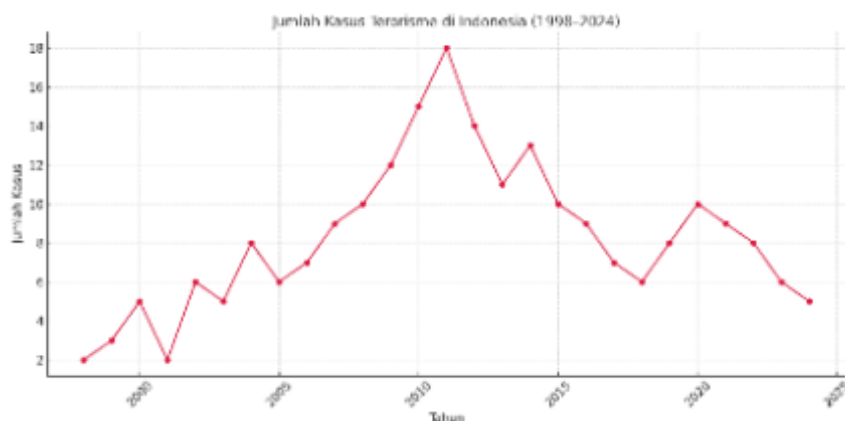
Risk of Abuse of Power and Delegitimization of Law

Allowing retroactive practices for situational reasons opens up enormous scope for abuse of power. The government can unilaterally create new rules and apply them to past events simply because it is dissatisfied with the limitations of existing laws. In the long term, this weakens the principles of due process of law and the rule of law, which are the backbone of a democratic state based on the rule of law.

The Bali Bombing case serves as an important study that even in emergencies, the law must still be guided by principles and not by panic (Rucktäschel & Schuck, 2020). The state should develop adaptive but constitutional criminal law mechanisms, rather than justifying human rights violations through ad hoc arguments.¹⁸

Graph showing the number of terrorism cases in Indonesia from 1998 to 2024.

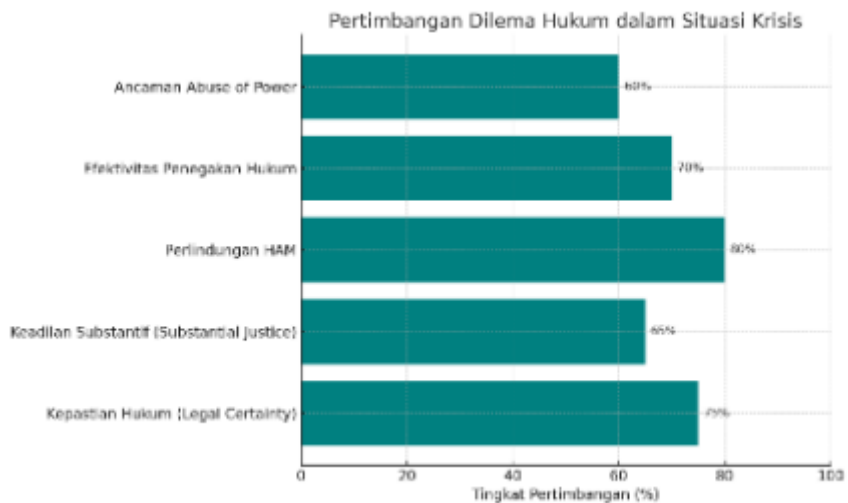
¹⁸ Rucktäschel, K., and C. Schuck. "An Analysis of Counterterrorism Measures Taken by Indonesia Since the 2002 Bali Bombings." *The Pacific Review* 33, no. 6 (2020): 1022–1051. <https://doi.org/10.1080/09512748.2020.1746981>



C. Weighing the Importance of Justice versus Legal Certainty in Crisis Situations

The Bali Bombing I case in 2002 placed Indonesia in a state of emergency unprecedented in the reform era (Fenton, 2016). The attack killed more than 200 people and injured hundreds more, most of whom were foreign nationals.¹⁹ The explosion not only shook national security stability but also shook the structure of Indonesia's legal system. The country, which was in the process of building a post-New Order democracy, was suddenly forced to face the classic dilemma between upholding legal certainty or providing substantial justice for the victims and the wider community.

¹⁹ Fenton, A. J. *Combating Terror: Indonesia's Legislative and Law Enforcement Response to Terrorism*. Darwin: Charles Darwin University, 2016.



The following graph shows the level of consideration given to five important elements in legal dilemmas in crisis situations such as the Bali Bombings case. This graph illustrates how state decisions are often faced with considerations between legal certainty, substantive justice, protection of human rights, effectiveness of law enforcement, and the risk of abuse of power.

The Tension Between Legal Certainty and Justice

The principle of legality is a fundamental principle in criminal law, as stated in Article 1 paragraph (1) of the Criminal Code, which states, “No act can be punished unless it is based on criminal law provisions that existed before the act was committed.” This principle aligns with the universal principle of *nullum crimen, nulla poena sine lege praevia*, which ensures that a person can only be punished if their act has been previously regulated by applicable law.

However, terrorist attacks like the Bali Bombings exerted extraordinary public pressure on the state to take swift and decisive legal action (Pradana & Pamesti, 2024).²⁰ Unfortunately, at that time, there were no specific legal frameworks comprehensively regulating terrorist crimes. The government then issued Government Regulation in Lieu of Law (Perppu) No. 1 of 2002, which was subsequently enacted as Law No. 15 of 2003 on the Eradication of Criminal Acts of Terrorism. More controversially, Article 43 of the Law was applied retroactively to the perpetrators of the Bali Bombing.

This is where tension arises between two important interests in law: legal certainty, which demands a prohibition on retroactivity, and substantive justice, which encourages the punishment of perpetrators. The government's choice to apply the law retroactively is considered contrary to the principles of modern criminal law and potentially violates the constitution and human rights.

The Perspective of Progressive Legal Theory

In addressing this dilemma, Satjipto Rahardjo's thinking on progressive law becomes highly relevant. Progressive law rejects the concept of law as a static and legalistic normative device. Instead, law is seen as a tool for human liberation and must side with substantive justice (Esquirol, 2021).²¹ In this

²⁰ Pradana, I. G. P. B., and R. C. I. Pamesti. "Terrorist Attacks in Indonesia: Does Terrorism Work?" *Jurnal Ilmu Kepolisian* 18, no. 2 (2024): 206–220.

²¹ Esquirol, Jorge L. "Making the Critical Moves: A Top Ten in Progressive Legal Scholarship." *University of Colorado Law Review* 92 (2021): 1079–1120.

view, legal texts should not shackle human morality and conscience.

Satjipto asserts that “law must explore the human values that exist within society.” In the context of the Bali Bombings, this approach justifies the state’s actions to prosecute perpetrators of extraordinary crimes even if the legal framework is not yet fully in place. In this paradigm, justice is considered more important than formalistic certainty.

However, a progressive legal approach also poses significant risks if not accompanied by strict institutional controls. Once the state is permitted to violate the principle of legality in the name of justice, the potential for abuse of power becomes wide open. Unchecked power can use the pretext of “justice” to justify violations of the law, and this can lead to a new form of authoritarianism cloaked in legality.

Comparison with International Practices

The phenomenon of violating the principle of legality in emergency situations is not unique to Indonesia. In the United States, following the 9/11 attacks, the government also enacted the Patriot Act, which grants broad authority to law enforcement agencies to conduct arrests and surveillance without judicial process. Many academics criticized this action as an abuse of emergency power that erodes democratic principles.

Similarly, in France after the Charlie Hebdo attacks, the government imposed a state of emergency that allowed repressive actions against civilians without due process. This

situation shows that in many countries, threats to procedural justice tend to increase in times of crisis, even under the pretext of maintaining security and justice (Dembinski, 2017).²²

However, some countries maintain the principle of the rule of law even in extraordinary circumstances. Germany, for example, stipulates that emergency measures must be subject to constitutional principles and only be temporary. The German Constitutional Court has consistently rejected legislation that imposes laws retroactively, except in very limited extraordinary cases.

The Urgent Need for National Legal Reform

Learning from the Bali Bombings and various international practices, Indonesia needs a legal framework that is more adaptive and anticipatory towards extraordinary crimes such as terrorism, without sacrificing the basic principles of criminal law (Heath-Kelly, 2015).²³ In this regard, Indonesia should:

1. Drafting Emergency Laws that are Consistent with the Constitution

Emergency provisions such as Perppu must be strictly regulated with clear and temporary conditions, so that they do

²² Dembinski, M. "Procedural Justice and Global Order: Explaining African Reaction to the Application of Global Protection Norms." *European Journal of International Relations* 23, no. 4 (2017): 809–832. <https://doi.org/10.1177/1354066116652369>

²³ Heath-Kelly, Charlotte. "Securing through the Failure to Secure? The Ambiguity of Resilience at the Bombsite." *Security Dialogue* 46, no. 1 (2015): 69–85. <https://doi.org/10.1177/0967010614552549>

not become loopholes for abuse of power. There needs to be strict supervision from the DPR and the Constitutional Court in the enactment and implementation of emergency regulations.

2. Establishing a Rapid Response Mechanism to Terrorism Threats

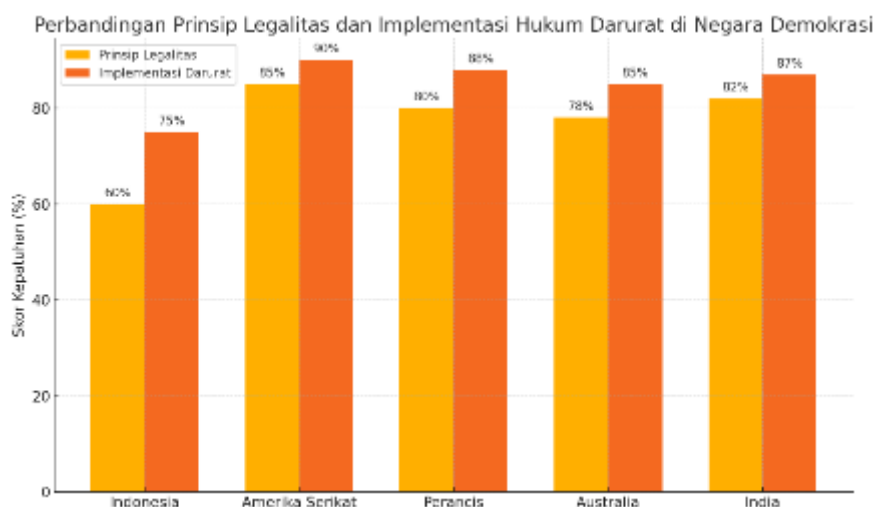
Law enforcement and intelligence systems need to be strengthened so that the government has the capacity to respond quickly to extraordinary crimes without violating fundamental principles of criminal law.

3. Integrating Human Rights and Humanitarian Law Principles into National Legislation

Any efforts to combat terrorism must continue to respect internationally recognized human rights standards, including the principles of non-retroactivity, the right to a fair trial, and proportionality.

Graphic Analysis Comparing the Principles of Legality and Emergency Implementation in Democratic Countries

The following is a graphic comparison of how several countries handle emergency situations related to terrorism:



The following is a graph comparing the principle of legality and the implementation of emergency laws in democratic countries. This graph illustrates the degree of compliance with the principle of legality compared to the level of flexibility or implementation of emergency laws in five major democratic countries: Indonesia, the United States, France, Australia, and India.

Ethical and Strategic Reflections

The dilemma between justice and legal certainty in the Bali Bombing case reflects the reality of modern law, which can no longer be resolved solely through a positivist approach (Holqi & Widiyanto, 2024). Law must serve as a means to achieve justice, but not at the expense of certainty and constitutional principles. As Gustav Radbruch stated, in extreme conditions, justice may supersede unjust positive law. However, this principle should not become a general basis in democratic state life.

Indonesia needs to ensure that emergency choices made in times of crisis remain under the control of a transparent,

accountable, and human rights-oriented legal system. In this way, the state will not only be able to respond to threats, but also maintain the dignity of law and democracy.

IV. Conclusion

The phenomenon of law enforcement in the Bali Bombing case provides a complex picture of the fundamental dilemma faced by modern states in responding to extraordinary crimes such as terrorism. On the one hand, states are bound by the principle of legality (*nullum crimen, nulla poena sine lege*), which is a pillar of the rule of law. On the other hand, there is strong pressure from society for substantive justice—that is, that perpetrators of heinous crimes must be punished even if legal loopholes or normative gaps hinder the process.

Through an analysis based on a progressive legal approach, as developed by Satjipto Rahardjo, it can be understood that the law should not merely stop at the text. The law must be able to adapt to social dynamics and respond to the need for justice in a contextual manner, including in crisis situations such as the aftermath of the Bali bombings. However, the use of extra-constitutional approaches that disregard the principle of legality must be strictly limited and accompanied by accountability mechanisms to prevent abuse of power.

From a global comparison, it is evident that democratic countries tend to establish temporary, accountable, and strictly monitored emergency legal frameworks without disregarding human rights principles and the rule of law.

Indonesia still faces significant challenges in building a legal system responsive to global threats like terrorism while remaining aligned with the constitution and democratic principles.

Therefore, regulatory reform is needed through a constitutional approach in the formulation of emergency laws that explicitly regulate extraordinary circumstances, allowing for flexibility without normalizing violations of the principle of legality. It is also necessary to establish strong legislative and judicial oversight mechanisms, as well as guarantees for redress against potential human rights violations that may arise in their implementation.

Only in this way can Indonesia uphold justice without losing its footing on the principle of the rule of law, and prevent the occurrence of precedents of legal abuse in the future in the name of “temporary justice.”

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