



**Policy Enforcement Retroactively Criminal Law in  
Transition: A Comparative Study Between Criminal Code  
and Design of New Criminal Cod**

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**Abstract**

Making of the principle of legality in the context of the enactment of criminal law according to time, contain the issue of retroactive principle as an exception from the principle of *lex temporis delicti*. This study aimed to analyze the policy retroactive enforcement of criminal law in the transitional period applicable in Indonesia and perspective of comparative study of an *WvS* with Concept *RKUHP* New. This study included doctrinal-research with *spesifikasinya* descriptive-analytic *ber* approach to legislation which supported the comparative approach. The conclusion of this study shows that the nature of the retroactive application of criminal law in the transitional period in Indonesia is based on benchmarks/criteria, namely (1) there are changes in legislation and (2) there are mitigating rules for defendants. While the study of comparative turned out to show their conceptual development, initially in the Criminal Code criteria are limited to rules that relieve the defendant, pulling in *Konsep* New *RKUHP* is expanding benchmarks / criteria regarding legislative changes that relieve the defendant applies to convict.

**Keywords**

Enforcement of Criminal Law, Retroactive, Comparative Studies, the Criminal Code, *RKUHP*.

## Introduction

As is known, that criminal law is a legal rule that binds to an act that fulfills certain conditions as a result in the form of a crime<sup>1</sup>. In this criminal law, a fundamental principle is known which becomes the spirit or life and underlies its implementation in the context of time, which is then known as the principle of legality. Furthermore, that m embicarakan regarding the principle of legality seen as a problem space into effect of the criminal law in time<sup>2</sup>, it would appear the problem: (a) as as *lex temporis delicti* or a s as n on - retroactivity; and (b) m Problem retroactive.

The legal basis for the application of the principle of legality is seen as a matter of space for the application of criminal law according to time, it is seen in the provisions of the formulation of Article 1 paragraph (1) of the Criminal Code which states that "No act can be punished, except for the strength of the criminal rules in the legislation that existed before the deed is done"<sup>3</sup>. Starting on such provisions is analyzed, that the rule of law should be the one existing before the occurrence of a crime, so in other words it is no exaggeration se would mean that the criminal laws may not be applied retroactively.

Interestingly, the rule regarding the retroactive effect of a criminal regulation as set forth in Article 1 paragraph (1) of the Criminal Code can actually be breached by the legislators<sup>4</sup>. Namely, with the legal basis contained in the formulation of Article 1 paragraph (2) of the Criminal Code which stipulates "If after the act is carried out there is a change in the legislation, the lightest rule is used for the defendant"<sup>5</sup>. So it is not an exaggeration if the author states that the provisions of Article 1 paragraph (2) of the Criminal Code have provided instructions to law enforcers when there is a change in legislation for actions that have not been completely resolved<sup>6</sup>. Therefore, it will be very interesting if the issue of the retroactive effect of a criminal regulation in such a transitional/transitory period is studied<sup>7</sup>, analyzed, and analyzed in the

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<sup>1</sup> Stuart M. Baxley and others, 'Feasibility of Critical Infrastructure Protection Using Network Functions for Programmable and Decoupled ICS Policy Enforcement over WAN', *International Journal of Critical Infrastructure Protection*, 2022, 100573 <<https://doi.org/10.1016/j.ijcip.2022.100573>>.

<sup>2</sup> Federico Cammelli and others, 'Effectiveness-Equity Tradeoffs in Enforcing Exclusionary Supply Chain Policies: Lessons from the Amazonian Cattle Sector', *Journal of Cleaner Production*, 332 (2022), 130031 <<https://doi.org/10.1016/j.jclepro.2021.130031>>.

<sup>3</sup> Ann Ratnayake Macy, 'A Precarious Gap in U.S. Criminal Codes for Cases of Child Torture and Suggested Model Statute', *Children and Youth Services Review*, 96 (2019), 500-508 <<https://doi.org/10.1016/j.childyouth.2018.10.046>>.

<sup>4</sup> Faiza Benmenzer and Rachid Beghdad, 'An Adaptive Formal Parallel Technique with Reputation Integration for the Enforcement of Security Policy in the Cloud Environment', *Computer Communications*, 196 (2022), 207-28 <<https://doi.org/10.1016/j.comcom.2022.09.023>>.

<sup>5</sup> Federico Cerutti and others, 'Looking for Criminal Intentions in JavaScript Obfuscated Code', *Procedia Computer Science*, 207 (2022), 867-76 <<https://doi.org/10.1016/j.procs.2022.09.142>>.

<sup>6</sup> Gunae Choi, 'Determinants of Target Location Selection for Acquirers in the Manufacturing Sector: Pollution Intensity, Policy Enforcement, and Civic Environmentalism', *Journal of Business Research*, 146 (2022), 308-24 <<https://doi.org/10.1016/j.jbusres.2022.03.074>>.

<sup>7</sup> Jamie Rowen, 'War Crimes Tribunals, Crimes against Humanity and Transitional Justice', in *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2015), pp. 382-88 <<https://doi.org/10.1016/B978-0-08-097086-8.86119-X>>.

perspective of a comparative study of criminal law between the Criminal Code/WvS, the 2015 RKUHP Concept and the 2019 RKUHP in order to determine the dynamics of the formulation. and the basic idea (Intellectual Conception) that underlies it, so that it becomes very colorful and rich in scientific analysis. On the basis of the rear Lakang above, the formulation of the issues raised in penelit i 's are: (1) What is the nature of the application of criminal law retroactively in the transition current in Indonesia? and (2) How is the policy of applying criminal law retroactively in the transitional period based on a comparative study between the Criminal Code and the New RKUHP Concept?

### Research Methods

Research is manifold *doctrinal research*, namely p enelitian the form of positive law business inventory and discovery of the basic principles and philosophy (doctrine / dogma) positive law. By Hutchinson & Duncan *doctrinal research* is defined as "A systematic exposition of governing rules a particular legal category, analyzing the relationship between rules, difficulty and, perhaps, predicts future development". Approach that is used is the *statute approach* and supported by and *comparative approach*<sup>8</sup>. The specification of this research is descriptive-analytical. The data used tangible the data of secondary that is obtained through the study of literature on the substance of law primary form; Penal Code RKUHP 2015, and RKUHP 2019. Then law of secondary obtained from *research library or collection of literature through techniques roomates document include a study of archive or literature studies* like book, article papers, journals, and research results. As well as material legal tertiary are sourced from the website. All of the data are then analyzed in qualitative, ie by way of organizing the data and sorted them into units that can be managed, and decided that something can be told to others or describe it.

### Results and Discussion

#### The Essence of Retroactive Enforcement of Criminal Law During the Transition Period Based on the Rules Applicable in Indonesia

As has been dising gung in advance, that the question of the legality principle is seen as a space problem is expired unya criminal law according to time in nature is to contain the problem of retroactive principle in it<sup>9</sup>. Moreover, d natural perspective of the history and practice of the development of the law of criminal in Indonesia, according to Agus Raharjo bahwasannya principle of retroactive still remains to exist even though limited only to the offense of

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8 Theresia Anita Christiani, 'Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object', *Procedia - Social and Behavioral Sciences*, 219 (2016), 201-7 <<https://doi.org/10.1016/j.sbspro.2016.05.006>>.

9 James Garbarino, 'ACEs in the Criminal Justice System', *Academic Pediatrics*, 17.7 (2017), S32-33 <<https://doi.org/10.1016/j.acap.2016.09.003>>.

criminal particular<sup>10</sup>. It became the main focus of this study, because so far the problem of retroactive principle as if *ter ke san* just as complementary to that of the study of the principle of legality seen as the principle source of legislation.

It should be noted together that retroactivity is generally interpreted as "retroactive" (KBBI). However, what needs to be observed is whether the retroactive meaning applies to new rules that create new offenses or is it only limited to new rules which are changes from old rules and do not create new offenses? On the fundamental questions that, Nyoman Putra Jaya States argued that the meaning of retroactivity are only *lah* narrowly, that is confined to the enactment new legislation creates a new offense and also limited to the new offenses that meet the criteria of acts that endanger the survival of the state, nation and society<sup>11</sup>. Thus, the provisions of Article 1 paragraph (2) of the Criminal Code are transitional rules of a general nature.

Moving on to the following description of her, the writer needs to emphasize that the benchmarks concerning the application of Article 1 paragraph (2) of the Criminal Code is when "t erdapat per changes in the law" and "there is a rule of thumbs relieve the defendants." Related to the first point about the issue of changes in legislation (*Verandering van wetgeving*), should be expressed understanding by *memorie van toelichting* (MVT) which states that the change in legislation means that all provisions of the substantive law that criminal law" affects *pen i l ian* deeds". Still relevant changes in the law-und fancy, was in the field of science / *Dokt r* in criminal law has been introduced by Remmelink that there are three (3) theory yan g provide an explanation regarding the criteria change. The first is formal theory/teaching, which determines that there is a change if there is a change in the text of the criminal law itself. The second is unlimited material theory/teaching, which stipulates that all laws in a material sense that undergo changes that affect the criminal code are seen as changes to legislation<sup>12</sup>. The third is limited material theory/teaching, which determines that there is a change in legislation if there is a change in legal belief in criminal law.

As for the issue of "mitigating rules for the defendant" in this study, it means when there is a choice of law that must be used to resolve a case that has not been completed completely, in the event of a change in legislation. The meaning of "lightest" must be interpreted as broadly as possible, not only in terms of the criminal act, but also regarding everything from the regulation that

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10 Claire Angelique R.I. Nolasco and Michael S. Vaughn, 'Judicial Scrutiny of Gender-Based Employment Practices in the Criminal Justice System', *Journal of Criminal Justice*, 39.2 (2011), 106-19 <<https://doi.org/10.1016/j.jcrimjus.2010.11.002>>.

11 Junmin Wang, Calin Belta, and Samuel A. Isaacson, 'How Retroactivity Affects the Behavior of Incoherent Feedforward Loops', *IScience*, 23.12 (2020), 101779 <<https://doi.org/10.1016/j.isci.2020.101779>>.

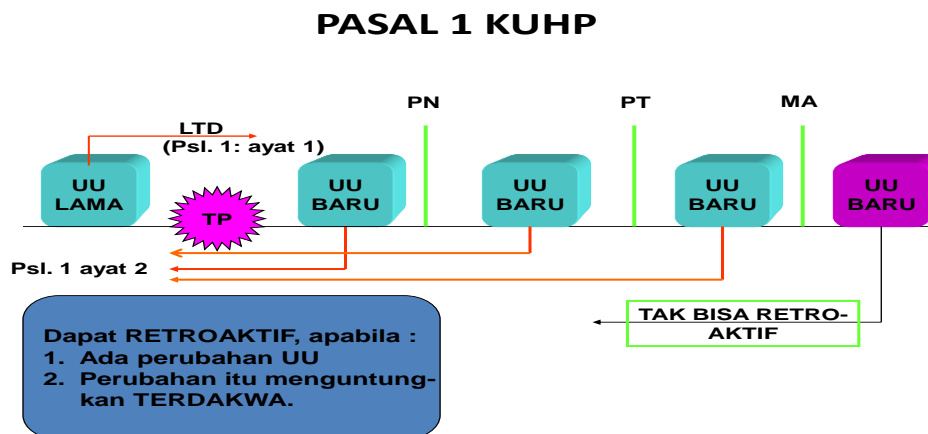
12 Juan Pablo Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', *Anuario Mexicano de Derecho Internacional*, 1.17 (2017), 145 <<https://doi.org/10.22201/ijj.24487872e.2017.17.11034>>.

has an influence on the assessment of a criminal act<sup>13</sup>.

On the basis of this analysis, it is not an exaggeration to say that the provisions of Article 1 paragraph (2) of the Criminal Code are transitional rules that apply to all fields of criminal law. Although there has been a growing opinion that Article 1 paragraph (2) of the Criminal Code provides an opportunity for a law to apply retroactively when the new law is applied to actions that occurred before the amendment to the law because the new law is seen as mitigating defendant<sup>14</sup>. Throughout Act newly unfavorable / relieve the defendant, then according to the authors is that the new law should not be applied and the old legislation are applied, as expected in a n so the file and the indictment does not need to be permuted.

Contrary to the system adopted by the Criminal Code (WvS) mentioned above, is the system that applies in Sweden. Adap un d i Sweden have applied the new rules constantly, so the old regulation was abandoned altogether. The ratio is that the new regulation is better<sup>15</sup>.

Focused on the results of the analysis in the above, for ease of understanding "co n s truksi think about the problem of retroactivity in criminal law as provided in Article 1 of the Criminal Code (WvS), briefly described in the following chart below:



Ought to be observed, ter n of paragraph empirically in Indonesia can be found decision declaring that the temporary regulations if they are removed, there is a change in legislation within the meaning of Article 1 (2) of the Criminal Code. Namely the case of Slirodiwismo, convicted for violating the rules issued by the Dutch Military Governor regarding holding a meeting without the permission of the authorities. When tried by the Magelang District Court on

13 Andrei N. Medushevsky, 'Law and Justice in Post-Soviet Russia: Strategies of Constitutional Modernization', *Journal of Eurasian Studies*, 3.2 (2012), 116–25 <<https://doi.org/10.1016/j.euras.2012.03.003>>.

14 Russell Turner, Kristian Daneback, and Anette Skårner, 'Explaining Trajectories of Adolescent Drunkenness, Drug Use, and Criminality: A Latent Transition Analysis with Socio-Ecological Covariates', *Addictive Behaviors*, 102 (2020), 106145 <<https://doi.org/10.1016/j.addbeh.2019.106145>>.

15 Kunyi Jian and others, 'The Establishment of the Absichtsdelikte Model of Criminal Law for Controlling Terrorist Crimes: The Case of China', *International Journal of Law, Crime and Justice*, 60 (2020), 100366 <<https://doi.org/10.1016/j.ijlcrj.2019.100366>>.

January 18, 1950, the military government no longer existed, but the military regulations were indeed temporary, namely when the situation was critical<sup>16</sup>. So in this case Article 1 paragraph (2) of the Criminal Code was not applied and the defendant was sentenced to 3 months in prison, even the decision was upheld by the Surabaya High Court, but the sentence was reduced from 3 months to 1 month with consideration because the defendant was old. (Law Magazine, 1951)

In line with the judicial practice as described above, *Memorie van Toelichting* (memory of explanation) also said that the provisions of Article 1 paragraph (2) of the Criminal Code do not apply to regulations that are temporary in nature, even though they were formed based on power and to implement a law.

### **Retroactive Criminal Law Enforcement Policy in the Transition Period Based on Comparative Study Between the Criminal Code (WvS) and the Draft Draft of the New Criminal Code**

Preparation of the Criminal Code that national new to menggantikan an Penal Code relics governments K olonial Bel a NDA and all amendments is one of the businesses in order pembarua n h u kum crime nationwide. Reform in this context cannot be separated from the values contained in Pancasila. In fact, it actually means, an effort to reorient and reform the criminal law in accordance with the central socio-political, socio-philosophical, and socio-cultural values of the Indonesian people that underlie the policy. social policy, criminal policy, and law enforcement policy in Indonesia.

The authors observe that Article 3 paragraph (1) of the 2015 RKUHP is still in the same breath as Article 1 paragraph (2) of the Criminal Code /WvS. The explanation P origin 3, paragraph (1) RKUHP 2015 contains m akna " more favorable ", is not only on the terms of the threat of punishment, but also pay attention to the principle of subsidiarity (sanctions in the outside threat of punishment). For example, Act which regulate the environment of life, the instrument of criminal just be used if the instrument civil and governance efforts the country is not successful.

The new things that appear in the RKUHP concept and are not in the KUHP (WvS), are the provisions of Article 3 paragraph (2) of the 2015 RKUHP and Article 3 paragraph (3) of the 2015 RKUHP. Further explanation in Article 3 paragraph (2) of the 2015 RKUHP din y Atakan, that y ang referred to " the implementation of the verdict of punishment abolished " are prisoners were concerned exempted from undergoing a criminal who has been handed down to him. With Thus, when the prisoners were undergoing criminal, then the implementation of the rest of the criminal eliminated, and if the criminal is not

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16 Aldo Zammit Borda, 'International Criminal Courts and Tribunals', in Encyclopedia of Violence, Peace, & Conflict (Elsevier, 2022), pp. 627-33 <<https://doi.org/10.1016/B978-0-12-820195-4.00155-2>>.

undertaken, then the implementation fall. Regarding the decision of the court already gained force of law remains, then the agency or official that is authorized to set the exemption is official executive<sup>17</sup>. Conditions me 6 initiations, exemptions are valid also for suspects or defendants who are in custody. Liberation of the set by authorities are authorized in accordance with the level of examination. Liberation of the criminal that does not give rise to the right to convict demanded compensation losses.

The explanation of Article 3 paragraph (3) RKUHP 2015 determines that the m engingat decision of the court already gained force of law remains, then the agency or official that is authorized to set the adjustment of criminal is the official executive. The granting of criminal leniency does not give the convict the right to demand compensation<sup>18</sup>. Novelties terkait t "legislative changes are favorable to the accused and the convicted person" as set forth in RKUHP 2015 that, apparently cents AFAS with the provisions of the Criminal Code South Korea and the Criminal Code of Thailand. So the author needs to present a comparative analysis with the two foreign countries. Moreover, the study of comparative according to Ade Adhari so useful to examine the " conception of intellectual " of the system of law of criminal foreigners, which in the end can be used as material complementary to memperb a rui design of intelligent a nation about the law that will be enforced.

The provisions of Article 1 paragraph (3) of the South Korean Criminal Code states, *"When a law is changed after the sentence for a crime committed under the previous law has become final and such an act thus no longer constitutes a crime, the execution of the punishment shall be remitted "*. Meanwhile, in the Thai Criminal Code it is stated in Article 3 that: *"if the law in force at the time of committing the offense is different from that in force after the time of committing the offense, the law which is, in any way, more Favorable to the offender, shall be applied, unless the case is final.*

If the offender has not yet undergone the punishment, or is undergoing the punishment, and the punishment is determined by the judgment is heavier than that provided by the law afterwards, when it appears to the Court from the file of the case, or when the offender, the legal representative or guardian of such person, or the Public Prosecutor makes a request, the Court shall re-determine the punishment according to the law as provided afterwards<sup>19</sup>. In re-determining the punishment by the Court, if it appears that the offender has undergone a part of the punishment, the Court, when having regard to the punishment as provided by the law afterwards, may, if it thinks fit, determine

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17 Kweilin T. Lucas and others, 'Military Veteran Involvement with the Criminal Justice System: A Systematic Review', *Aggression and Violent Behavior*, 66 (2022), 101721 <<https://doi.org/10.1016/j.avb.2022.101721>>.

18 Etienne Blais and others, 'Diverting People Who Use Drugs from the Criminal Justice System: A Systematic Review of Police-Based Diversion Measures', *International Journal of Drug Policy*, 105 (2022), 103697 <<https://doi.org/10.1016/j.drugpo.2022.103697>>.

19 Adrian D. van Breda, 'Patterns of Criminal Activity among Residential Care-Leavers in South Africa', *Children and Youth Services Review*, 109 (2020), 104706 <<https://doi.org/10.1016/j.childyouth.2019.104706>>.

less punishment than the minimum punishment as provided by the law afterwards, if any, or if it is of opinion that the punishment already undergone by the offender is sufficient, the Court may release the offender.

if the Court has passed the judgment of death upon the offender, but, according to the law as provided afterwards, the punishment to be inflicted upon the offender is not as high as death, the execution of the offender shall be suspended, and it shall be deemed that the punishment of death according to the judgment has been changed to be the highest punishment to be inflicted according to the law as provided afterwards<sup>20</sup>.

As a complement to the comparative study in this paper, the authors present the provisions of the 2019 RKUHP which in fact further expands the benchmarks regarding the criteria for the application of criminal law in the transition period, namely as formulated in the following provisions of Article 3 of the 2019 RKUHP.

The author observes that Article 3 paragraph (1) of the 2019 RKUHP is still in the same breath as Article 1 paragraph (2) of the Criminal Code and in the Elucidation of Article 3 paragraph (1) of the 2019 RKUHP it is stated firmly that "this provision is an exception to the principle of legality". The provisions of Article 3 paragraph (2) of the 2019 RKUHP and Article 3 paragraph (3) of the 2019 RKUHP are "new things" that have not been accommodated by the 2015 RKUHP concept. Meanwhile, the provisions of the formulation of Article 3 paragraph (4) of the 2019 RKUHP are copy - pasted from the provisions of the formulation of Article 3 paragraph (2) of the 2015 RKUHP. Interestingly, the provisions of the formulation of Article 3 paragraph (5) of the 2019 RKUHP and Article 3 paragraph (6) of the 2019 RKUHP are the sounds of the Elucidation of Article 3 paragraph (2) of the 2015 RKUHP and Article 2 paragraph (3) RKUHP 2015.

One more interesting thing that the author found, that in the provisions of Article 3 paragraph (7) of the 2019 RKUHP there is a new principle called the " principle of criminal adjustment ". The general criteria can be found in the Elucidation of the paragraph that what is meant by " adjusted to the criminal limit" is only for sentencing decisions that are heavier than the maximum criminal threat from the new legislation<sup>21</sup>, including adjustments to the types of criminal threats (strafsoort, pen). different<sup>22</sup>.

Based on the analysis of these comparisons in the above, it can be the author of kerucutkan construction thinking, among others: (1) the basic concepts regarding the enforcement of criminal law retroactively in the Criminal

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20 Patrick Michaud, Eric Beauregard, and Jean Proulx, 'Criminal Nomadism: A Neglected Dimension of Spatial Mobility in Sex Offending', *Journal of Criminal Justice*, 81 (2022), 101928 <<https://doi.org/10.1016/j.jcrimjus.2022.101928>>.

21 Chang Wang and Nathan H. Madson, 'Criminal Laws and Criminal Cases', in *Inside China's Legal System* (Elsevier, 2013), pp. 175-210 <<https://doi.org/10.1533/9780857094612.3.175>>.

22 Gisselle Vila Benites, 'Natures of Concern: The Criminalization of Artisanal and Small-Scale Mining in Colombia and Peru', *The Extractive Industries and Society*, 2022, 101105 <<https://doi.org/10.1016/j.exis.2022.101105>>.



Code (WVS) and the concept of RKUHP New is essentially equally as exceptions or a balancing of the principle of legality which contains the principle of non-retroactivity ; (2) the basic concept regarding the application of criminal law in the transitional/transitional period in the perspective of the Criminal Code (WVS) is solely limited to "can be convicted" ( strafbaarheid) only and does not include if you have (are) serving a sentence. Unlike the case with the construction of thinking about the application of criminal law in the transitional / transitory period in the perspective of the New RKUHP Concept, which expands the provisions of benchmarks / criteria regarding changes to legislation in favor of the defendant, it also applies to convicts so that in essence it contains a new principle which will be known referred to as the principle of criminal adjustment.

### **Conclusion**

Based on the results of research and analysis, as has been described above, dipe r by the following conclusions: (1) The nature of the application of criminal law retroactively in the interim period based on the rules that apply in Indonesia application is based on the benchmark, as formulated in Article 1 paragraph (2) The Criminal Code which includes the existence of a change in the legislation and there are mitigating rules for the defendant ; (2) The policy of retroactive application of criminal law in the transitional period based on comparative studies turned out to show a conceptual development, initially in the Criminal Code the criteria were limited to mitigating rules for defendants, but interestingly in the New RKUHP Concept is to expand the benchmarks/criteria regarding changes to legislation. The law that relieves the defendant also applies to the convict.

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