

THE VIEW OF CONSTITUTIONAL LAW ON THE RETROACTIVE EFFECT OF MATERIAL CONTENTS OF LAWS AND REGULATION IN INDONESIA

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Abstract

Retroactive regulation of the contents of laws and regulations in Indonesia based on the provisions of the non-retroactive principle and the principle of legality is not allowed as an embodiment of the protection of human rights which are non-derogable rights. This arrangement is confirmed in Article 28I paragraph (1) of the 1945 Constitution and Article 1 paragraph (1) of the Criminal Code (KUHP). However, the fact is that there are still laws and regulations that are retroactively enforced and are still in effect today. The purpose of this research is to analyze retroactive provisions whether they may apply according to Constitutional Law. This research is a normative legal research by conducting a review of retroactively enforced laws and regulations using a statutory, case and conceptual approach. The results of the study concluded that retroactive validity is constitutionally not in line with the 1945 Constitution but may be enforced on the basis of its validity, namely the provisions of Article 28J paragraph (2) and Law Number 1 of 2023 concerning the Criminal Code which transforms absolute provisions (non derogable rights) is relative.

Keywords: *Constitutional Law, Retroactive Behavior (Retroactive), Legislation.*

I. INTRODUCTION

Indonesia is a rule of law country,⁴ as Plato explained that in carrying out the life of a state, a rule of law puts forward the rule of law.⁵ Indonesia makes law in the form of statutory regulations as a tool to bring about national order and maintain peace within the country.⁶ In forming laws and regulations, it must be based on the concept of forming laws and regulations that are correct and in accordance with the basic norms and principles in the formation of laws and regulations that apply in Indonesia.⁷ Every legal regulation is rooted and based on legal principles, legal principles stem from a value that is believed to be related to the management of

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⁴ Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

⁵ Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Jakarta: Konstitusi Press, 2006, p. 33.

⁶ Zulkarnain Ridlwan, "Negara Hukum Indonesia Kebalikan *Nachtwachterstaat*", *Jurnal Ilmu Hukum Fiat Justitia*, Vol. 5, No. 2, Mei-Agustus 2012, p. 143.

⁷ Ferry Irawan Febriansyah, "Konsep Pembentukan Peraturan Perundang-Undangan di Indonesia", *Jurnal Perspektif*, Volume XXI No. 3 Tahun 2016 Edisi September, p. 220-221.

society to achieve a just order. Legal principles are born from the contents of human reason and conscience which cause humans to be able to distinguish between good and bad, just and unfair, and humane-inhumane.⁸ Therefore the legal principle has a very important role in the formation of legal regulations. One of the principles of legislation is that the law does not apply retroactively, meaning that the law only applies when the legal product has been declared valid, so that all actions that have occurred before cannot then be applied to a new law or also known as the principle of non-retroactive.

The principle of non-retroactivity in general means that the provisions of laws and regulations cannot be applied retroactively or cannot be applied to events/events/actions that occurred before the regulation was enacted.⁹ Rules relating to the principle of non-retroactivity or the prohibition of being retroactively enforced by a statutory regulation, namely in Article 28I of the 1945 Constitution of the Republic of Indonesia and Article 1 paragraph (1) of the Criminal Code (KUHP).¹⁰ The prohibition of retroactive effect is intended with the aim of upholding legal certainty for the public, who should know what actions constitute a crime or not.¹¹

In this regard, there are laws and regulations that are applied retroactively, such as General Election Commission (KPU) Regulation Number 26 of 2018 concerning the Second Amendment to KPU Regulation Number 14 of 2018 concerning Individual Nomination for Regional Representative Council Members in the 2019 legislative elections. Not only that, if you look back 20 years, several provisions of laws and regulations have also been retroactively enforced, such as Government Regulation (PP) Number 72 of 2000 concerning Basic Pension Adjustments of Former Leaders and Member Judges of the Supreme Court and their Widows/Widowers, which are retroactive to eight back month. One of the cases of serious violations, namely Law Number 26 of 2000 concerning the Human Rights Court, was also retroactively enforced, this was emphasized in the provisions of Article 43 paragraph (1) of Law Number 26 of 2000.¹² Then Law Number 30 of 2002

⁸ Bernard Arief Sidharta, *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan*, Bandung: Alumni, 2006, p. 204.

⁹ Fetroki Romando, "Asas Non Retroaktif Dan Penyimpangannya Dalam Hukum Di Indonesia", *Jurnal Hukum Unair*, 23 Mei 2007, p. 9.

¹⁰ Article 28I of the 1945 Constitution states that "*Hak untuk hidup, hak untuk tidak disiksa, hak untuk tidak diperiksa, hak kemerdekaan pikiran dan hati nurani, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum, dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah hak asasi manusia yang tidak dapat dikurangi dalam keadaan apapun*", and Article 1 paragraph (1) of the Criminal Code states that "*Tiada suatu perbuatan dapat dipidana kecuali berdasarkan kekuatan aturan pidana dalam perundang-undangan yang telah ada sebelum perbuatan dilakukan*". The two Articles are Articles that contain provisions on the non-retroactive principle.

¹¹ Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana di Indonesia*, Jakarta: Eresco, 1969, p. 22.

¹² Article 43 paragraph (1) of Law Number 26 of 2000 concerning the Human Rights Court states that "*Pelanggaran hak asasi manusia yang berat yang terjadi sebelum diundangkannya*

concerning the Corruption Eradication Commission where the retroactive enforcement arrangements are contained in Article 68.¹³ Apart from that, the principle of retroactivity is also enforced in Law Number 15 of 2003 concerning Eradication of Criminal Acts of Terrorism.¹⁴

It becomes an important discussion considering that retroactive application is expressly not permitted in Indonesian law, as Article 28I of the 1945 Constitution and the provisions on the principle of legality which in criminal law mean that provisions in criminal legislation may not apply retroactively (non-retroactive). Basically, as a rule of law country that prioritizes the rule of law, of course for the sake of realizing legal certainty and justice, it must consider the three tasks/objectives of law which are always mutually attractive (spannungsverhältnis), namely, legal certainty (rechtssicherheit), legal justice (gerechtigkeit), and legal usability (zweckmassigkeit).¹⁵). This is bearing in mind that the enactment of statutory provisions must be in accordance with the principles applicable in national law and the substance of the constitution.

With regard to some of the retroactively enforced laws and regulations, it is clear that the retroactive principle has been enforced in accordance with the provisions mentioned above. This is what the author then makes as an object of study in normative legal research, especially in the discipline of Constitutional Law, which is the focus of the author's study. Laws made in the context of providing legal arrangements for society may not conflict with the constitution as the highest legal norm of the state. In the field of constitutional law as is the case with statutory regulations which in the hierarchy of legislation are still under the 1945 Constitution of the Republic of Indonesia, the lowest legal norms must adhere to higher legal norms and the highest legal norms.

Therefore, this research was conducted by analyzing how the concept of applying retroactive provisions of laws and regulations based on the perspective of

undang-undang ini, diperiksa dan diputus oleh Pengadilan HAM ad hoc." See also in Anisatul Istiqomah F, "Pemberlakuan Asas Retroaktif dalam Pelanggaran Berat HAM di Indonesia", *Jurnal Nasional Universitas Gadjah Mada*, 2018. p. 12.

¹³ I Made Adi Seraya, "Pemberlakuan Asas Retroaktif Dalam Pemberantasan Tindak Pidana Korupsi", *Jurnal Hukum Universitas Udayana*, serial Online, February 2012, accessed from <https://media.neliti.com> on 1 October 2022 at 13:42 WIB.

¹⁴ Article 46 of Law Number 15 of 2003 concerning Stipulation of Government Regulation in lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism to become Law states that, "Ketentuan dalam perpu ini dapat diberlakukan surut untuk tindakan hukum bagi kasus tertentu sebelum mulai berlakunya Perpu ini, yang penerapannya ditetapkan dengan undang-undang atau Perpu tersendiri". See also in Novan Restianto, "Tinjauan Yuridis Terhadap Penerapan Asas Retroaktif Dalam Undang-Undang Nomor 15 tahun 2003 Tentang Pemberantasan Tindak Pidana Terorisme", *Jurnal Ilmiah, Universitas Atma Jaya Yogyakarta*, 8 Oktober 2014.

¹⁵ Hendra Rawug, "Penyimpangan Terhadap Asas Non-Retroaktif Dalam Perkara Pelanggaran HAM Berat", *Jurnal Civic Education*, Vol. 1 No. 2 Desember 2017, p. 65.

Constitutional Law by focusing on provisions being retroactively applied to the material content of laws and regulations in Indonesia.

II. DISCUSSION

The Provisions Are Applied Retroactively on the Content Material of Legislation from the Perspective of Constitutional Law

Retroactive in the Fockema Andreae legal term dictionary, has the meaning of retroactive force.¹⁶ While the definition of retroactive (Retroactive law) in Black's Law is as follows:¹⁷

“A legislative act that looks backward or contemplates the past, affecting acts of facts that existed before the act came into effect. A retroactive law is not unconstitutional unless it (1) is in the nature of an ex post facto law or a bill of attainder, (2) impairs the obligation of contract, (3) divests vested rights, or (4) is constitutionally forbidden”.

According to Elmer A. Driedger, as quoted by Stampford emphasized that there are two types of legal categories, namely first, retroactive law, which operates before it is stipulated, meaning that it is applied backwards and second, prospective law, namely law that applies only to the future. Based on these two categories, retroactivity is further broken down into three sub-discussions, namely:

- 1) Laws that bring good results to what happened before.
- 2) Laws that bring detrimental consequences to events that previously occurred.
- 3) A law that imposes a penalty on a person who is blamed for a prior event, but the punishment is not the result of that event.¹⁸

Provisions retroactively applied to the content of laws and regulations are not explicitly contained in laws and regulations which in the hierarchy of laws are still under the 1945 Constitution of the Republic of Indonesia. The 1945 Constitution of the Republic of Indonesia clearly rejects the application of the retroactive principle, this form of refusal is a manifestation of the protection of human rights which cannot be reduced under any circumstances, and by anyone, including the legislature, executive and judiciary. This is clearly written in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia which emphasizes the following:

“The right to life, the right not to be tortured, the right not to be examined, the right to freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not

¹⁶ Yudha Bhakti, *Laporan Akhir Tim Kompilasi Bidang Hukum Tentang Asas Retroaktif*, Jakarta: BPHN, 2006, p.14.

¹⁷ Bryan A. Garner, *Black's Law Dictionary*, 8th ed. New York: Thomson West (West Group), 1999, p. 1343.

¹⁸ Charles Stampford, *Restropectivity and The Rule Of Law*, C. Stampford: Oxford University Press, 2006, p. 17.

to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances".

Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia has a very clear meaning that the 1945 Constitution of the Republic of Indonesia rejects the application of the retroactive principle even if there is no need for another interpretation of the application of the retroactive principle to the content of statutory regulations. Meanwhile, the issue of applying the retroactive principle that conflicts with the legality principle is regulated in 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 act was committed".

Regarding the two regulations concerning the prohibition of retroactive application, there is justification for retroactive application of laws and regulations. In practice, the retroactive principle is still recognized with its legal basis referring to the provisions of Article 1 paragraph (2) of the Criminal Code,¹⁹ and the provisions in Article 28J paragraph (2) of the 1945 Constitution which states that:

"In exercising their rights and freedoms, each person is obliged to comply with the restrictions determined by law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, religion, and public order in a democratic society".

The provisions in Article 28J paragraph (2) of the 1945 Constitution implicitly constitute a limitation on the non-retroactive principle contained in Article 28I paragraph (1) of the 1945 Constitution. What is stated in Article 28J paragraph (2) of the 1945 Constitution provides space to apply the principle of retroactive validity in relation to human rights. According to Maria Farida Indarti in her statement as an expert at the trial at the Constitutional Court, Article 28J paragraph (2) strengthens to provide a firmer basis that human rights are written in Article 28 of the 1945 Constitution of the Republic of Indonesia even though they are limited by law, but the restrictions are only limited in terms of what can create justice for society.²⁰

Therefore, there are several statutory provisions whose arrangements apply the retroactive principle, namely Law no. 39 of 1999 concerning Human Rights. The retroactive effect of this law is stated in the elucidation of Article 4,²¹ and Law no. 26

¹⁹ Article 1 paragraph (2) of the Criminal Code states that, "Bilamana ada perubahan dalam peraturan perundang-undangan sesudah pembuatan dilakukan, maka terhadap terdakwa diterapkan ketentuan yang paling menguntungkannya".

²⁰ Constitutional Decision Number 013/PUU-I/2003, p. 24.

²¹ The elucidation of Article 4 states "Bahwa hak untuk tidak dituntut atas dasar hukum yang berlaku surut dapat dikecualikan dalam hal pelanggaran berat terhadap Hak Asasi Manusia yang digolongkan ke dalam kejahatan terhadap kemanusiaan".

of 2000 concerning the Human Rights Court.²² In addition, in Law no. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism whose arrangements are listed in Article 46,²³ and Law no. 30 of 2002 concerning the Corruption Eradication Commission whose arrangements can be found in Article 68.²⁴ Then, General Election Commission regulation Number 26 of 2018 was also applied retroactively to election participants for members of the Regional Representatives Council in the 2019 general election.

Some of the above provisions whose arrangements allow the application of the retroactive principle show that retroactive application is not in line with the substance of the constitution as stipulated in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Retroactive enforcement of a law will become a problem when a statement of the right not to be prosecuted on the basis of a law that applies retroactively becomes material in the Constitution, as stated in Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Supposedly all laws that contain material regarding their enforcement under the constitution must have conformity with the norms of the constitution,²⁵ as well with laws and regulations which in the hierarchy of laws are still under the 1945 Constitution of the Republic of Indonesia, they should also be in harmony with the 1945 Constitution of the Republic of Indonesia. However, in relation to retroactive provisions in the 1945 Constitution, the further meaning of the norms governing retroactive provisions is to limit each person's actions and actions for the sake of respecting the rights of others through law. Therefore, the retroactive validity of a statutory regulation does not stand alone but is side by side with other rights, therefore retroactivity can be justified as stipulated in the law.

Although the prohibition on the application of the retroactive principle is an important requirement for the enforcement of the rule of law as is the principle of legal certainty in the formation of laws and regulations contained in Article 6 paragraph (1) letter i of Law no. 12 of 2011 concerning Formation of Legislation. Basically, there is one measure to determine the balance of legal certainty with justice, especially in applying the retroactive principle.

²²Article 43 paragraph (1) of the Human Rights Court Law states “Pelanggaran hak asasi manusia yang berat yang terjadi sebelum diundangkannya undang-undang ini, diperiksa dan diputus oleh Pengadilan HAM ad hoc”.

²³ Article 46 Law number 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism states, “Ketentuan dalam perpu ini dapat diberlakukan surut untuk tindakan hukum bagi kasus tertentu sebelum mulai berlakunya Perpu ini, yang penerapannya ditetapkan dengan undang-undang atau perpu tersendiri”.

²⁴ Article 68 Law no. 30 of 2002 concerning the Corruption Eradication Commission states, “Semua tindakan penyelidikan, penyidikan, penuntutan tindak pidana korupsi yang proses hukumnya belum selesai pada saat terbentuknya komisi Pemberantasan Korupsi, dapat diambil oleh Komisi Pemberantasan Korupsi berdasarkan ketentuan sebagaimana dimaksud Pasal 9”.

²⁵ Bachtiar, “Pemberlakuan Asas Retroaktif Dalam Optik Hukum Tata Negara”, *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan*, Vol. 2, No. 2, Desember 2015, p. 14.

It also needs to be understood, that in the application of the non-retroactive principle it must not be applied rigidly, because if so it will cause injustice. As is meant by the non-retroactive principle, namely in the context of protection for an individual, this is not the goal of the law.²⁶ A balance point must be found between legal certainty and justice by understanding the meaning of Article 28I paragraph (1) of the 1945 Constitution by not only basing it on the text, but also studying the notion of the non-retroactive principle from its history, from comparative practice and interpretation. Regarding the measure in determining the balance of legal certainty and justice, the retroactive principle may be applied with the following formula:

- 1) The value of justice is not obtained from the high value of legal certainty, but from the balance of legal protection for victims and perpetrators of crimes.
- 2) The more serious a crime is, the greater the value of justice that must be maintained, more than the value of legal certainty.²⁷

The value of justice is higher than legal certainty, especially in realizing universal justice, therefore if there is a conflict between the two principles, namely legal certainty and justice, then what must take precedence is the principle that can actualize justice. So that, enforcing limited retroactivity, especially in extraordinary crimes, in this case, seen from the manner and consequences (victims), this enforcement is not contrary to the 1945 Constitution and was not the intention of the 1945 Constitution makers to enforce the principle of non-retroactivity automatically. absolutely without exception.

Justification for the Applicability of Retroactive Material Content of Legislation

Retroactive enforcement of statutory provisions as in Law no. 39 of 1999 concerning Human Rights, Law no. 26 of 2000 concerning the Human Rights Court, Law no. 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism, and Law no. 30 of 2002 concerning the Corruption Eradication Commission, shows that retroactive application of statutory provisions can be justified. Therefore, meaning that there has also been a deviation from the principle of non-retroactivity in Indonesian national law.

In Indonesia's national legal instruments, the normative justification for retroactively applying the law in cases of gross human rights violations is based on the elucidation of Article 4. What is stated in Article 4 and the elucidation of Article

²⁶ *Dissenting Opinion* Putusan Mahkamah Konstitusi Nomor 013/PUU-I/2003 (Penjelasan Tentang Undang-Undang Dasar Negara Indonesia Tahun 1945, sebelum Amandemen), p. 50.

²⁷ Human Rights Research Academic Paper, Supreme Court 2003, p. 112.

4 of Law Number 39 of 1999 actually shows a contradiction.²⁸ As such, the elucidation of Article 4 states that: "The right not to be prosecuted on the basis of retroactive law can be waived in cases of gross violations of human rights that are classified as crimes against humanity".

The explanatory article is an exception to the existence of the non-retroactive principle that has been included in the article it describes. Such an arrangement has shown that there is an absolute transfer of rights specified in Article 4 of Law Number 39 of 1999, Explicitly in the elucidation article it actually limits these absolute rights. The absolute right negated by the explanatory article transforms the absolute right into a relative right.

So it is with the provisions of Article 28I paragraph (1) of the 1945 Constitution as the legal basis for the prohibition of retroactive application which is a human right that cannot be set aside under any circumstances. Systematically, one human right is not absolute, because in exercising its rights and freedoms, one must respect the human rights of others and must comply with the limitations determined by law with the sole purpose of guaranteeing the enforcement and respect for the rights and freedoms of others. as well as to fulfill just demands in accordance with moral considerations, religious values, security and public order in a democratic society.

Article 28I of the 1945 Constitution is true as the basis for the non-retroactivity principle. However, in understanding Article 28I one must read Article 28J together because in Article 28J paragraph (2) together with Article 28I paragraph (1) it can be concluded that the principle of non-retroactivity is not absolute and therefore recognizes exceptions in order to meet demands. in a just manner in accordance with moral considerations, religious values, security and public order.²⁹ In line with that, it is also necessary to know the philosophical goals of the non-retroactive principle itself.

Judging from its philosophy, the principle of non-retroactivity should not be used to protect people who commit human rights violations. If this happens, the perpetrators of gross human rights violations can be free from punishment (impunity). That according to history, the main purpose of the non-retroactivity principle is to avoid the arbitrariness of the state or authorities, namely that the state or authorities do not arbitrarily punish someone who commits an act by immediately declaring that the act is a crime.

The application of the non-retroactive principle cannot be carried out rigidly, as well as the interpretation of Article 28I paragraph (1) of the 1945 Constitution must pay attention to the fact that a country's Constitution is only part of the

²⁸ Agus Raharjo, "Problematika Asas Retroaktif Dalam Hukum Pidana Indonesia", *Jurnal Dinamika Hukum*, Vol.8 No. 1 Januari 2008, p. 75.

²⁹ Dissenting Opinion of Judges in Decision of the Constitutional Court Number 013/PUU-I/2003, p. 48.

country's basic law, besides that unwritten basic law also applies. as well as rules that arise and are maintained from the practice of administering the state even though they are not written. Based on the provisions contained in Article 28I paragraph (1) of the 1945 Constitution, these provisions are not absolute because their application is limited by the provisions of Article 28J paragraph (2) of the 1945 Constitution.

Literally, it is possible that Article 28I paragraph (1) of the 1945 Constitution can give the impression that a person has the right not to be prosecuted based on an absolute retroactive law, but when viewed from its formulation, Article 28I paragraph (1) cannot be read separately but must be read together with the next article, namely Article 28J paragraph (2). Seeing this, it becomes unnatural if the phrase "cannot be reduced under any circumstances" in the provisions of Article 28I paragraph (1) causes the provisions contained in Article 28J paragraph (2) to become meaningless, because the provisions in Article 28J paragraph (2).

It can also be seen that in fact human rights cannot be prosecuted based on retroactive law, it can be said emphatically that this is not absolute.³⁰ In theory and practice a person, in exercising his rights and freedoms, is obliged to respect the human rights of others without imposing their respective rights and is obliged to comply with the restrictions that have been regulated and determined in law with the sole intention of upholding and respecting human rights. and the freedom of others as well as fulfilling decisions that are just in nature by taking into account considerations of morals, religious values, security and public order in a democratic society as stipulated in Article 28J paragraph (2) of the 1945 Constitution.

Meanwhile, the justification for applying retroactive action because it violates the legality principle, as regulated in 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 act was committed". This principle applies to the application of the retroactive principle, namely its relation to the profitable principle. Furthermore, the purpose of the advantageous principle is that if the criminal act is changed, so that the event can be subject to two kinds of criminal provisions, namely the old and the new, the judge must first investigate which criminal provisions are more favorable to the defendant, the old or the old. the new one. If the old one is more profitable, then the old one is used, otherwise if the new one is more profitable, then the new one is used.

Therefore, the more profitable is interpreted as a light sentence covering issues: elements of the criminal incident, whether or not the offense was included in the complaint, regarding the issue of the guilt or innocence of the defendant and so

³⁰ Candra Perbawati, *et al*, "Asas Retroaktif dalam Undang-Undang Nomor 26 tahun 2000 tentang Pengadilan Hak Asasi Manusia". *Jurnal Constitutionale* vol. 1, Edisi 2, Juli-Desember 2020, p. 146.

on.³¹ Regarding this matter, it means that the definition of "more profitable" as contained in Article 1 paragraph (2) of the Criminal Code can cover various matters viewed from the aspect of the interests of the perpetrators of criminal acts.

Article 1 paragraph (2) of the Criminal Code is more accurately described as an article that regulates transitional regulations (ATPER), namely regulations in transition due to changes in laws. So, the principle contained in Article 1 paragraph (2) is that in the face of two choices of legislation due to changes, a law must be chosen that benefits or relieves the defendant and if it is seen in retroactive terms, a law that can be applied retroactively is a law and regulation. is the more favorable law.

Meanwhile, when referring to the aspect of applying the provisions contained in Article 1 paragraph (2) of the Criminal Code, as previously explained, it also states that the application of the retroactive principle regulated in this provision can only be applied if there is a change in legislation and the change in legislation benefits the defendant. This certainly shows that the principle of legality in Article 1 paragraph (1) of the Criminal Code is not absolute in relation to the prohibition of retroactive application of criminal provisions.

The provisions of Article 3 and Article 2 of Law Number 1 of 2023 concerning the Criminal Code actually create contradictions. Article 2 in its provisions provides an opportunity for the enactment of the law that lives in society to determine whether someone should be punished even though the act is not regulated in the Criminal Code. What Article 2 wants to emphasize is that the perpetrators of crimes should not be able to escape criminal snares which have implications for protecting the interests of society and victims. Meanwhile, the provisions of Article 3 actually want to free criminals from criminal noose by applying the principle of profit.

Based on these provisions, it certainly emphasizes that the legality principle provisions in Article 1 paragraph (1) of the Criminal Code are not absolute. This is the same as transforming absolute terms into relative terms. As with retroactive prohibition provisions contained in Article 28I paragraph (1) of the 1945 Constitution, it turns out that these rights do not stand alone but are side by side with other rights. This means that the prohibition of retroactive application as stated in Article 28I paragraph (1) is relative in nature, due to an exception in Article 28J paragraph (2) of the 1945 Constitution.

III. CONCLUSION

Based on the results of the research and discussion that has been carried out, it can be concluded that, based on the view of the Constitutional Law regarding

³¹ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Bogor: Politea, 1995, p. 28 and in Soedharmanto *et al*, "Sinkronasi Putusan Mahkamah Konstitusi Terhadap Penerapan Asas Retroaktif", *Jurnal Fakultas Hukum Universitas Hasanuddin Amanna Gappa*, Vol 30 , No. 1, 2022, p. 55-64.

retroactive provisions, it is constitutionally not in harmony with the 1945 Constitution of the Republic of Indonesia because it violates the principle of non-retroactivity and the principle of legality. The provisions of Article 28I paragraph (1) of the 1945 Constitution as the legal basis for the prohibition of retroactive application as a manifestation of Human Rights which cannot be ruled out under any circumstances are not absolute. The provisions in Article 28J paragraph (2) actually transform these absolute rights into relative ones by limiting each person's actions and actions for the sake of respecting the rights of other people through law. AS well Article 1 paragraph (1) of the Criminal Code (KUHP) which contains provisions on the principle of legality by prohibiting retroactive enforcement. This prohibition is not absolute in relation to the advantageous principle because the law that can be retroactively applied to a statutory regulation is the law that is more profitable.

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