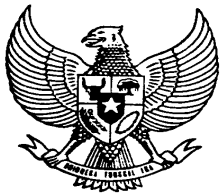

DECISION

Case Number: 013/PUU-I/2003
FOR THE SAKE OF JUSTICE BASED ON BELIEF IN ONE GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Which examines, adjudicates, and decides constitutional cases at first and last instances, has made a decision on the case of request for Validity test of Law of the Republic of Indonesia Number 16 of 2003 against the 1945 Constitution of the Republic of Indonesia, filed by:

MASYKUR ABDUL KADIR, 39 years old, private person, residing at Jl. Pulau Pinang Gg. Rembingin I No. 9, Denpasar – Bali, in these respects empowering H.M. Mahendradata, S.H., M.A.; A. Wirawan Adnan, S.H.; Achmad Michdan, S.H., Achmad Kholid, S.H., Made Rachman Marasabessy, S.H., M. Luthfie Hakim, S.H., Anatomi Muliawan, S.H., his lawyers of the Central-level Muslim Defense Lawyers (TPM), domiciled at Jalan Pinang I No. 9, Pondok Labu – South Jakarta, based on the Special Power of Attorney dated June 6, 2003 (attached hereto), hereafter referred to as the APPELLANT.

Having heard the statements of the Appellant;

Having heard the Statements of the Government and the People's Representative Assembly of the Republic of Indonesia;

Having read the Written Statements of the Government and the People's Representative Assembly of the Republic of Indonesia;

Having examined the evidences;

Having heard the testimonies of the witnesses and expert witnesses;

THE STATE OF THE CASE

Considering that the Appellant in his appeal dated July 1, 2003, received by the Registrar of the Constitutional Court on October 15, 2003, and registered under No. 013/PUU-I/2003 on October 15, 2003, and later revised on November 14, 2003, has appealed as follows:

1. The Legal Basis of the Appeal for a Validity of Law No. 16 of 2003

The nation of Indonesia has made a historic decision in its amendments to the 1945 Constitution. One such amendment was the provision allowing a request for a judicial review of any legislation equal to Law against the 1945 Constitution.

Accordingly, this appeal for a judicial review is based on:

1. Article 24C paragraph (1) of the 1945 Constitution which stipulates: "The Constitutional Court shall have the authority to adjudicate at first and last instances and the decision thereof shall be final in respect of judicial review of any Laws against the Constitution, deciding a dispute on the authority of any state institution whose authority is conferred by the Constitution, deciding the dissolution of any political parties, and deciding on disputes of election results."

2. Article III of the Transitional Regulation of the 1945 Constitution which stipulates: "The Constitutional Court shall be established no later than August 17, 2003, and prior to this establishment, all the authorities thereof shall be exercised by the Supreme Court."

3. Article 1 paragraph (1) of the Regulation of the Supreme Court of R.I. which stipulates:

   "The Supreme Court is the State Institution that shall temporarily exercise the authority of the Constitutional Court as provided in Article 24C paragraph (1) and paragraph (2) jo. Article III of the Transitional Regulation of the 1945 Constitution and the amendments thereto as the Court of First and Last Instances, and the decisions thereof shall be final, and hereafter referred to as the Supreme Court, with the authorities of:

   a. Reviewing a Law against the Constitution;
   b. .... etc.,

4. Article 1 paragraph (7) of the Regulation of the Supreme Court of R.I. which stipulates that "the Appeal is a request filed to the Supreme Court which among other things includes reviewing a Law against the Constitution."
   That based on the above provisions, it is just and true for the Appellant to file an appeal in the Supreme Court which exercises the authority of the Constitutional Court to review the enactment of Law No. 16 of 2003 because it is against the 1945 Constitution.

2. **The rationales of filing a petition for a** judicial review **of Law No. 16 of 2003**

1. Judicial Reasons

A. That to substantiate the reasons for requesting a judicial review of Law No. 16 of 2003, the APPELLANT finds it necessary to put across the following:

   i. Article 1 paragraph (1) of the Criminal Code stipulates "No acts may be penalized unless they are based on the penalty provided in

a law already effective when the acts of crime are such acts are committed."

ii. R. Sugandhi, S.H., stated:

"(1) No acts shall be punishable unless such acts have been so stipulated by the Law. And if a Law is enacted after the act has been committed, the date the Law becomes effective shall not be retroactive."[2]

iii. Article 28i paragraph (1) of the Second Amendment (Amendment II) to the 1945 Constitution (see P-III evidence) stipulates:

"The right to live, the right to be protected from torture, right to be protected from interrogation, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever."

B. That based on the foregoing, the 1945 Constitution as the Constitution of the State of the Republic of Indonesia utterly rejects the Principle of Retroactivity where the refusal of such principle is a Manifestation of the Protection of Human Rights (the Basic Rights of Human Being) that shall not be derogable for any reasons whatsoever or by any persons whomsoever, including by the executive, judicial and legislative bodies of our beloved Republic of Indonesia.

C. That the words ".... under any conditions whatsoever" as contained in Article 28i paragraph (1) of the 1945 Constitution clearly implies the refusal of the 1945 Constitution on the application of the retroactive principle and shall not be construed or interpreted differently.

D. That the Decision of the People's Consultative Assembly of R.I. on the Sources of Law and the Positions of the Legislations (P-V Evidence) stipulates:

i. Article 2

"Positions of the legislations serve as the guideline for drawing up/arranging lower rulings.
"The Positions of the legislations of the Republic of Indonesia shall be as follows:

1. The 1945 Constitution;
2. Decisions of the People's Consultative Assembly of R.I.;
3. Laws;
4. Government Regulations in lieu of Laws;
5. Government Regulations;
6. Presidential Decrees;
7. Regional Bylaws.

ii. Article 4 paragraph (1):

"Based on these positions of legislations, any legislations of lower positions shall not be against those of superior positions."

E. That because the 1945 Constitution is superior to the Laws and the Government Regulations in lieu of Laws (Perpu's), such Laws and Perpu's shall not be against the 1945 Constitution.

F. That because the Perpu No. 2 of 2002 jo. Law No. 16 of 2003 is materially against the 1945 Constitution, the Perpu or Law mentioned above shall become null and void by the operation of law and shall therefore be revoked and be declared invalid.

2. Facts in the Field
That the Appellant also finds it necessary to reveal the facts in the field, as follows:

A. In the case No. PDM-148/Denpa/2003 in the District Court of Bali where the Appellant was a Defendant, the Public Prosecutor in his charges gave the rationales that the Defendant had assisted the perpetrators of a criminal act of terrorism or reported on bombings in three locations, namely, south of the American Consulate, in the Paddy's Club and in front of the Sari Club on October 12, 2002 at 23:00 Central Indonesia Time (WITA) almost at the same time.

B. That Perpu No. 2 of 2002 was declared, enacted and made effective on October 18, 2002, namely, six days after the Bali bombing in which the Appellant and his associates were accused of being the perpetrators. Meanwhile, Law No. 16 of 2003 was passed, enacted and made effective as of April 4, 2003, namely, six months after the Bali bombing in which the Appellant and his associates are accused of being the perpetrators.

C. That it is obvious, clear and undeniable that Perpu No. 2 of 2002 jo Law No. 16 of 2003 was declared, enacted and made effective after the occurrence of the bombing under which the Appellant was charged. That based on the above facts, the declaration, enactment and effectiveness of Perpu No. 2 of 2002 jo. Law No. 16 of 2003 clearly applied the retroactive principle that is against the Second Amendment (Amendment II) to the 1945 Constitution Article 28i paragraph (1) that definitely denies the application of retroactive principle in the form of, at the time and on any events whatsoever that altogether constitutes a violation of human rights.

3. That the declaration and enactment of Perpu No. 2 of 2002 under Law No. 16 of 2003 is a "violation in principle" of the 1945 Constitution and the principles of the Indonesian Criminal Code.

Accordingly, the People's Representative Assembly of R.I. and President of R.I. have made manifest errors by declaring and enacting Perpu No. 2 of 2002 into Law No. 16 of 2003.

This reflects inconsistency and discriminative stance of the People's Representative Assembly of R.I. (DPR R.I.) and the President of R.I. in

handling the cases of human rights violations in Indonesia. An example thereof was the murder of hundreds and even thousands of Muslims in Ambon on the Idul Fitri Day in 1999 and in Tobelo-Halmahera in 2000 including the places of worships of the Muslims. On the occurrence of 2000, we shall present witnesses which had accurate data that in three (3) days, there were at least two thousand (2,000) Muslims comprising old, young people and even children and under-fives killed in a sadistic manner.

For this case, DPR R.I. and the President of R.I. did not declare any regulations similar to Law or Government Regulation in lieu of Law to suppress the mass killings and destruction while it was clear there had been a crime against humanity and extraordinary crime that had caused loss of lives and property that were a lot more than those caused by the Bali bombing. The attempts to make comparisons between the two occurrences in a discriminative view may sow seeds and even produce fruit of disintegration of nation, and therefore the denial of this occurrence should not be made.

4. That the denial in the application of retroactive principle under any situation is actually a recognition of the "The right to live, the right to be protected from torture, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively and human rights that shall be non-derogable under any conditions whatsoever."

Accordingly, a denial or even legalization by the Constitutional Court, regarding the violation in the application of retroactive principle for any reasons including but not limited to "fighting against extraordinary crime" or for other made-up reasons, may also be a potential violation of the above rights. Do not move to other rights in the Second Amendment (Amendment II) to the 1945 Constitution Article 28i paragraph (1) shall not be violated, because if any of the rights provided therein is violated, any other rights may not be violated for any made-up reasons. If any of these rights is violated or is potential for violation, including, for instance, the "Right of Religion", it is likely that such an act will cause disintegration of the nation, that which even the Constitutional Court itself would not be able to restore.

5. That based on the facts, rationales and arguments given above, we the defense attorney of the of the Appellant, appeal in the Supreme Court of R.I. to exercise the provisional authority of the Constitutional Court by deciding as follows:

    1. To accept the appeal for a judicial review of Law No. 16 of 2003 against the 1945 Constitution in its entirety;
    2. To declare that Law No. 16 of 2003 is not legally binding;
    3. To revoke Law No. 16 of 2003 and declare the same null and void.

Considering that to substantiate the rationales of its appeal, the Appellant has presented the evidences as follows:

1. P-1 Evidence : Law No. 16 on the effectiveness of the Declaration of Perpu No. 2 of 2002 on the Application of Perpu No. 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law;
2. P-2 Evidence : Perpu No. 2 of 2002 on the Application of Perpu No. 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002;
3. P-3 Evidence : The 1945 Constitution of the Republic of Indonesia;
4. P-4 Evidence : Regulation of the Supreme Court of R.I. Number 02 of 2002 concerning Procedure of Exercising the Authority of the Constitutional Court by the Supreme Court of R.I.
5. P-5 Evidence : Decision of the People's Consultative Assembly of R.I. No. III/MPR/2000 on the Sources of Law and the Positions of the Legislations;
6. P-6 Evidence : Written Charge, Reg. Perk.No.PDM. 148/Denpa/04.2003 in the name of the Defendant Masykur Abdul Kadir;

Considering that in the preliminary examination conducted on Friday, November 7, 2003, the Appellant was represented by his Defense Attorney, H.M. Mahendradata, S.H., M.A.; A. Wirawan Adnan, S.H.; Achmad Michdan, S.H., Achmad Kholid, S.H., Made Rachman Marasabessy, S.H., M. Luthfie Hakim, S.H., Anatomi Muliawan, S.H.,, his lawyers of the Central-level Muslim Defense Lawyers (TPM), domiciled at Jalan Pinang I No. 9, Pondok Labu – South Jakarta, based on the Special Power of Attorney dated June 6, 2003.

Considering that in the court hearing on December 10, 2003, a statement was made by the Government represented by the Minister of Justice and Human Rights of the Republic of Indonesia, Dr. Yusril Ihza Mahendra, SH, and his written statement dated January 2, 2004, as follows:

I. GENERAL

1. That the verbal explanations of the Government given by the Minister of Justice and Human Rights before the session of the Constitutional Court on December 10, 2003, are inseparable to this Government’s statement.
2. That as on October 18, 2002, the President of the Republic of Indonesia declared two Government Regulations in lieu of Laws (Perpu’s), namely, Perpu Number 1 of 2002 on Suppression of Terrorism and Perpu Number 2 of 2002 on the Application of Perpu No. 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002;

3. That the President issued the two Perpu's based on the constitutional authority as provided in Article 22 of the 1945 Constitution of the Republic of Indonesia. Article 22 paragraph (1) provides that under an emergency of a compelling situation, the President has the right to declare a Government Regulation in Lieu of Law. Further, Article 22 paragraph (2) provides that such government regulation requires an approval of the People's Representative Assembly in the upcoming session. Still further on, Article 22 paragraph (3) provides that unless it is approved, the government regulation shall be revoked.

4. That in line with the provisions of the 1945 Constitution of the Republic of Indonesia as described above, the two Perpu's had been submitted to the People's Representative Assembly and were subsequently approved as Laws, respectively under Law Number 15 of 2002 on the Declaration of the Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism, as a Law; and Law No. 16 on the effectiveness of the Declaration of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law;

5. That the declaration of the two Perpu's described above that have been approved by the People's Representative Assembly as Laws, were completely based on the objective facts before us requiring our shared responsibilities. A series of bombing occurring in a number of regions in the territory of the Republic of Indonesia in the past few years and the Bali Bombing on October 12, 2002, have produced extensive impacts on the social, economic, political and international relations situation, and may even adversely affect the unity and the integrity of the nation and the state. The acts by the perpetrators of the terrorism have not only caused the deaths of a good number of innocent people, but also tainted the sovereignty and integrity of the state, including adverse effects on the economy and international relationships.

6. That in face of the Bali bombing occurrence, the Security Council of the United Nations Organization (UNO) issued Resolution Number 1438 (2002) that strongly condemned the bombing, and gave its condolence and sympathy to the Government and the People of Indonesia as well as to the victims and their families; and referred to Resolution Number 1373 (2001) that called for all the nations to cooperate and support the Government of Indonesia to uncover all the perpetrators of the bombing and to take them to court;

7. That besides the objective fact before us, the policy of incriminating the acts of terrorism also show the consistency of our nation in joining the efforts to attain and maintain the world peace, as mandated in the Preamble of the 1945 Constitution of the Republic of Indonesia. Terrorism as described in various instruments of the international law, is an alarming threat along with the efforts of all the nations to maintain the world peace and security, and to promote relationship, close neighborhood and cooperation among countries.

8. That we have been aware in the past few decades that terrorism has been a general phenomenon affecting many countries. Various occurrences of terrorism have not only involved citizens of a single country, and the targets have not only been aimed to particular countries but to a number of countries.

9. That terrorism is presently no longer deemed an ordinary crime but an "extraordinary crime, and may also be categorized as a crime against humanity." Terrorism has always used threats or violent acts and caused the loss of many lives without distinguishing who the victims are, destruction and extinguishing properties, living environment, economic sources, causing turmoil in social and political life, and may to certain extent threaten the existence and sustainability of a nation.

10. That the commitment of the international community to prevent and fight terrorism has been translated into a number of international conventions, which confirm that terrorism is a crime that threatens international peace and security. The international conventions include, among other things, the International Convention for the Suppression of Terrorist Bombings, 1997, and the International Convention for the Suppression of Fiturncing of Terrorism, 1999. The regional level also has such conventions as the European Union with the European Convention on the Supression of Terrorism, 1978, Arab Nations with The Arab Convention on the Supression of Terrorism, 1998, and the South Asia Association of Regional Cooperation (SAARC) with their Regional Convention on Suppression of Terrorism 1987.

11. That Indonesia as a member of the world community of nations, Indonesia has the obligations to support and take steps in the fight against terrorism because the Preamble of the 1945 Constitution of the Republic of Indonesia stated that the Government of Indonesia has the duty to protect the people and the fatherland of Indonesia, and to participate in preserving the world order based on independence, eternal peace and social justice.

Based on foregoing, the ideas that make the basis of the Government Regulation in Lieu of Law Number 1 of 2002 concerning Suppression of Terrorism that has been declared a Law under Law Number 15 of 2003 are:

a. In line with the national objective as provided in the Preamble of the 1945 Constitution of the Republic of Indonesia, that is, to protect the people and the fatherland of Indonesia, and to promote public welfare, increase the intellectuals of the nation, and to participate in preserving the world order based on independence, eternal peace and social justice, it is imperative that law enforcement and order be maintained in a consistent and sustainable manner.

b. Terrorism has caused the loss of lives without distinguishing who the victims are and has created extensive fear or deprivation of freedom, loss of properties, and proper steps must therefore be taken for the suppression of terrorism.

c. Terrorism has a vast network that it poses a threat to the national as well as international security.

d. The suppression of terrorism is based on the national and international commitments with references to the international conventions and the laws and regulations concerning terrorism.

e. The presently effective laws and regulations have not comprehensively and adequately covered the need to fight the crime under terrorism.

Main Principles of arranging the materials of a Law:

a. This law is an umbrella of other laws and regulations concerning suppression of terrorism.

b. This Law has special provisions substantiated by criminal penalties and altogether function as a coordinating act and has its function of substantiating the provisions under other laws and regulations in respects of suppression of terrorism.

c. This Law contains special provisions concerning protection of the defendants' rights called safeguarding rules. The provision, introduces, among other things, a new legal institution called the "hearing" and has the function as the institution to do a legal audit of all the documents or intelligence reports made by the investigators in order to determine whether or not an investigation on an alleged act of terrorism.

d. This Law expressly provides that an act of terrorism is exempted from crime acts of politics or crime acts of political motives or crime acts of political aims so that the actions for the suppression thereof under a bilateral and multilateral cooperation could be more effectively taken.

e. This Law contains a provision that enables the President to take actions in formulating policies and operational activities in the enforcement of this Law that must be based on the principles of transparency and public accountability (sunshine principle) and/or the principles of limiting the effective period (sunset principle) that potential abuse of authority could be eliminated.

f. This law contains a provision on the jurisdiction based on territorial principle, extra-territorial principle, and actively national principle, that it is expected to effectively have a coverage of criminal acts of terrorism as provided in this Law that covers beyond the territorial boundaries of the Republic of Indonesia. To strengthen such jurisdiction, this Law also contains provisions on international cooperation.

g. This Law contains a provision on funding of terrorism activities which are determined as criminal acts of terrorism that it also strengthens Law Number 15 of 2002 concerning Crime of Money Laundering.

h. The provisions of this Law do not apply to freedom to express opinions in public, through a demonstration, protest, oractivities for advocacy. If in exercising the freedom to express opinions there are acts that are classified as crime, the Criminal Code and the provisions of the laws and regulations other than the Criminal Code shall apply.

i. This law maintains the possibility of being charged a crime with special minimum to promote the function of teaching the perpetrator of acts of terrorism a lesson.

Further, the ideas that make the basis of the Government Regulation in Lieu of Law Number 2 of 2003 on the Effectivenss of the Law of Suppression of Terrorism on the perpetrators of the Bali bombing on October 12, 2003 as follows:

a. the bombing in Bali on October 12, 2003 has created an extensive terror and caused the loss of lives and properties;

b. the bombing in Bali has created extensive impacts on the social, economic, political life as well as international relationship and threats to the world peace and security, that the Security Council of the United Nations Organization (UNO) issued Resolution Number 1438 (2002) and Resolution Number 1373 (2001);

c. to give it a solid legal basis and to take immediate actions in the inquiry, investigation, and prosecution of the perpetrators of the Bali bombing, the Government issued a Law on Suppression of Terrorism.

II. The Legal Standing of the Appellant

The Appellant, in this regard, HM Mahendradatta, S.H., MA, and associates of the Central-level Muslim Defense Lawyers as the defense council of Masykur Abdul Kadir and registered in case Number: 013/PUU-U2003 who has appealed for the revocation of Law Number 16 of 2002, should be given comments as follows:

a. As provided in Article 51 paragraph (1) of Law Number 24 of 2003 on the Constitutional Court, the Appellant is the party who finds that he has been denied his constitutional obligation by the effectiveness of the Law, namely:

b. an individual citizen of Indonesia;

c. communities of customary law who as long as such communities still exist, and along with the development of the society and the principles of the Unitary State of the Republic of Indonesia as provided by the Laws;

d. public legal entity or private entity, or a state institution.

Hence, an inquiry should be made of the interests of the Appellant (Maskur Abdul Kadir) who has empowered Mahendradatta and associates the defense of his case, whether he is actually in the legal standing of being denied his constitutional right by Law Number 16 of 2003.

If it is said that Law No. 16 of 2003 is against the 1945 Constitution of the Republic of Indonesia (particularly Article 28i paragraph (1), it has been pointed out in the introduction that the exercise of Article 28i paragraph (1) is limited by Article 28j paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Besides, terrorism is internationally classified as crime against humanity and extraordinary crime, because terrorism is a serious act against human rights which has now nationally been adopted under Law No. 16 of 2003.

III. *Fundamentum Petendi* (Government's Statement) of the Appellant's appeal in respect of Article 28i paragraph (1) of 1945 Constitution of the Republic of Indonesia.

a. That according to the Appellant for a Judicial Review of Law No. 16 of 2003 on the Application of Law No. 1 of 2002 on Suppression of Terrorism on the

Bali Bombing of October 12, 2002 is against/in violation of Article 28i paragraph (1) of 1945 Constitution of the Republic of Indonesia which stipulates: The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever, is a mistake.

b. The provision of Article 28i paragraph (1) of the 1945 Constitution of the Republic of Indonesia is limited under the provision of Article 28j paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This is meant to make a balance that a harmony could be created between the rights and obligations of an individual and the harmony between the law and justice. Article 28j stipulates: (1) Every person shall respect the human rights of other people in an orderly society, nation and state. (2) In exercising his or her rights and freedom, each person shall comply with the limitations provided by the laws, merely for assuring recognition and respect of the rights and freedom of other people and to fulfill fair charges with due respects of morality, religious values, security, and public order in a democratic society.

c. It is clear from the above provisions that other laws may limit the rights of other people with certain obligations in the bid to assure a balance. A law may be enacted, but the enactment thereof may be effected after the occurrence of an event that seriously violated the rights of other people by ruling a retroactive application of the provisions thereof, in the efforts to assure recognition and respect of the rights and freedom of other people. Unless such a violation of right is settled in a policy by the enactment of a law, such a violation of human rights shall be deemed a serious violation of the human rights of other people.

d. On October 12, 2002, a series of bombing occurred in Bali, with the most devastating explosion affecting the Sari Café, Jalan Legian Kuta. These bombing series left 184 deaths and hundreds others seriously or slightly injured. Most of the victims were foreign citizens visiting here as tourists, and the rest were Indonesian citizens. The explosions also destroyed a number of buildings and widely created terror and insecurity among the community. Foreign tourists packed and left Bali. Tourists scheduled to visit Bali cancelled their plan. Even some conferences, seminars, and other international events postponed their schedule or decided to move to other locations. This event drew the attention of the international society. The UN Security Council even issued resolution Number 1438 (2002) that strongly condemned the bombing, and gave its condolence and sympathy to the government and the people of Indonesia as well as to the victims and their families; and referred to Resolution Number 1373 (2001) that called for all the nations to cooperate and support the government of Indonesia to uncover all the perpetrators of the bombing and to take them to court.

e. The problem facing then was that to fulfill the above expectations and to charge the perpetrators for the crime they had committed, Indonesia still lacked the laws on such cases, while the terrorist actions had occurred. In face of the

above facts, and to anticipate any further attacks on human, properties and vital installations, the Government considered that the required "under an emergency of a compelling situation" as provided in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia has been fulfilled. The Cabinet Meeting on Monday, October 14, 2002, with a particular agenda of the Bali bombing case, considered the issuance of a government regulation in lieu of law (Perpu). The Perpu is Perpu Number 1 of 2002 on Suppression of Terrorism that was later passed and became Law Number 15 of 2002 and Perpu Number 2 of 2002 on the Application of Perpu No. 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, which was later passed and declared as Law Number 16 of 2002.

f. It should be clear from the above explanations that justice is the main pillar and shall be given priority over law, giving the rationale to form the basis of why the non-retroactive principle was a bit ignored in Law No. 16 of 2002 seeing the fact how the Bali bombing on October 12, 2002, had caused a lot of deaths and created an extensive impact on social, economic, political and international relationship aspects. Besides, the occurrence had been categorized an extraordinary crime and crime against humanity, that for the balance principle of justice, the application on the Bali bombing was made retroactive.

IV. CONCLUSIONS

Based on the foregoing, we hereby request that the Chief/Panel of Judges of the Constitutional Court to kindly accept the Government's Statement in its entirety and to decide as follows:

1. To state that the Appellant does not have the legal standing.
2. To reject the petition of the Appellant;
3. To declare that Law Number 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law, is not against the 1945 Constitution of the Republic of Indonesia, particularly regarding Article 28i paragraph (1);

Considering that in the session of December 10, 2003, a hearing was made of the People's Representative Assembly, represented by A. Teras Narang, SH., and colleagues, and their written statement of February 10, 2004 as follows:

I. On the Requirements of the Petition

1. Constitutional rights and/or authority of the Appellant
   That the Appellant did not clearly describe which of his constitutional rights and authorities were denied according to Article 51 paragraph (2) of Law No. 24 of 2003 concerning Constitutional Court.

2. Formal Requirements of an Appeal
   a. That the Appellant described the declaration of Law Number 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law

Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing of October 12, 2002, is against Article 28i paragraph (1) of 1945 Constitution of the Republic of Indonesia.

b. That the request of the Appellant did not clearly name the paragraphs, articles, and/or parts of the law that is against the 1945 Constitution as provided in Article 51 paragraph (3) of Law No. 24 of 2003.

Based on the above explanations, the petition of the Appellant failed to fulfill the requirements as provided in Article 51 of Law Number 24 of 2003 on Constitutional Court and therefore the petition of the Appellant must be declared dismissed.

II. Essence of Petition

That the issuance of Law Number 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing of October 12, 2002 on the Suppression of Terrorism is an action taken in the efforts to overcome the legal weakness on the occurrence or the act categorized as an extraordinary crime which could no longer be charged using the instrument of criminal code or the Indonesian Criminal Code ().

That the provision of Article 1 paragraph (1) of KUHP which stipulates that "no charge of crime could be made of an act, unless is based on a provision in a law that had been prevailing before the act was committed," is a general principle of criminal code. This general principle may be ignored for something of a special nature. The special principle or provision is in place because of a special category of an occurrence or an offense.

That Article 28i of the 1945 Constitution stipulates that the right to live, ... and the right to be protected from being charged on the basis of a law that is applied retroactively and human rights that shall not be derogable under any conditions whatsoever" are basic rights of a general nature.

The 1945 Constitution which the Appellant said as denying the application of retroactivity as mentioned above is not right at all. The Appellant did not accurately read the 1945 Constitution, Article 28j paragraph (1) stipulates that "every person shall respect the human rights of other people in an orderly society, nation and state." Further, paragraph (2) stipulates that "In exercising his or her rights and freedom, each person shall comply with the limitations provided by the laws, merely for assuring recognition and respect of the rights and freedom of other people and to fulfill fair charges with due respects of morality, religious values, security, and public order in a democratic society." These provisions make the basis of the limitations of human rights under the Laws. Hence, the retroactive principle is not against the Constitution and may be applied on the consideration of the moral, religious, security and public

order values. Accordingly, Law No. 16 of 2003 is not against or has the legal basis, namely, Article 28j of the 1945 Constitution.

Based on the foregoing, we are of the opinion that the petition of the Appellant to reject the retroactive principle by referring to Article 28i of the 1945 Constitution is completely inaccurate, because the Appellant should have understood Article 28j of the 1945 Constitution, and hence the petition thereof shall be rejected.

Considering that besides the written evidences presented by the Appellant, statements by Witnesses/ Experts have also been heard in the Court session, namely:

1. Witness Prof. Dr. Harun Al Rasyid, essentially testified as follows:

   - That in principle, Perpu No. 2 of 2002 on the application of Perpu No. 1 of 2002 that has become a Law that essentially applies retroactively but is not in the words stating that it shall apply retroactively;
   - That the Appellant said that the right to be protected from being charged on the basis of a law that applies retroactively is Human Rights that shall be non-derogable under any conditions whatsoever;
   - That the case is not a law that is against a law but it is actually a conflict between the law on subversion and Law No. 1 of 2002 being within whose authority;
   - That according to article 24C, the Constitutional Court is only authorized to review any laws against the Constitution;
   - That the purpose of this arrangement is in order to avoid a conflict between one law and another;
   - That Perpu No. 2 of 2002 and Perpu No. 1 of 2002 are against the principles of criminal code system in Indonesia;
   - That the said Perpu is completely unable to fill the vacuum of laws in Indonesia regarding the Bali bombing case, and based on the Indonesian Criminal Code, the perpetrator of the crime is subject to a maximum punishment and is also a death sentence or a life sentence;
   - That regarding Perpu No. 2 of 2002 that is declared as applied retroactively, I firmly state that the Perpu is against article 1 paragraph (1) of the Indonesian Criminal Code, but is not against the 1945 Constitution;
   - That the witness does not support the idea of Law on Terrorism because the existing laws are already sufficient to be used for penalizing who did an act that may qualify as terrorism;

2. Mutamimu Ulla essentially testified as follows:

   - That it is true the witness is member of the People's Representative Assembly;
   - That it is true on November 7, the President of R.I. brought the Bill and the elucidation on Government Regulation in Lieu of Law (Perpu) No. 1 of 2002 and Perpu No. 2 of 2002 to the People's Representative Assembly. Then, on November 12, the People's Representative Assembly informed the members that on November 26, the Assembly formed a

Special Committee on the said Bill on the Perpu's, signed by 50 members of the fraction members including me;

- That on February 7, the said Special Committee was approved and from February 7 through March 4, the Special Committee deliberated on the said Perpu's;
- That on March 6, in a plenary session, the Perpu's were ratified as Laws;
- That at that time the Government proposed 4 bills, namely, Bill on Perpu No. 1 and Bill on Perpu No. 2 of 2002 and the 3rd and 4th bills are on the suppression of terrorism in the Bali bombing of October 12, 2002;
- That regarding the said Bills, the Government requested that the People's Representative Assembly determine its stance.
- That the stance of the Special Committee was commented on by the People's Representative Assembly and the Government and further, at a consultation meeting of March 4, with all fraction chairmen of the People's Representative Assembly present, and the People's Representative Assembly had first to take a stance of rejecting or accepting the Perpu's as laws;
- That on March 6, my colleague of the reform fraction and I were stunned, and our faction was given an opportunity to give a final opinion on the approval of the Perpu's as Laws, and I found a faction disagreeing to it that, as far as I know, it is the Reform fraction which refused the bills to become laws, for reasons of, among other things, regarding the considerations of the Perpu's, and the matter of a compelling situation was not satisfied;
- That the situation of a compelling situation for a state is understood as follows:
    1. Threatening the sovereignty and integrity of the unitary state of the Republic of Indonesia;
    2. Changing the State's Foundation even the state's ideology in an unconstitutional way;
    3. Threatening the authority of the legitimate government in an unconstitutional way that it is ineffective throughout or in a certain part of the territory of the unitary state of the Republic of Indonesia;
    4. Armed threat from outside or inside the state such as a rebellion, organized armed activities affecting extensively and wholly;
- That it is these adverse affects on the nation's economy in a systematic and by resorting to sabotage that make the reason for the disapproval, and another reason is procedural matter.
- That the Reform Fraction observed the process and mechanism in the preparation of the Perpu's are not in accordance with the rules of procedure of the People's Representative Assembly of R.I. No. 131, 120, 122 (rules of procedure in approving a Perpu as a Law);
- That the official opinion of the Fraction regarding the retroactive application was not heard yet because the Special Committee did not discuss the said Perpu but the Bills that were officially presented instead of the Perpu's Nos. 3 and 4;
- That the Bills approved by the Government were the first and the second, while the third and the fourth were after being approved by the People's Representative Assembly regarding the revised Law on Suppression of

Terrorism had not been submitted by the Government to the date of that session;
- That the witness was present five times in the Special Committee meetings;
- That it is true Perpu No. 2 has now become a Law is following an approval thereof by the People's Representative Assembly;
- That it is true the approval of Perpu No. 1 of 2002 as a law, is in a package with Perpu No. 2 of 2002;

3. Mrs. Maria Farida, essentially testified as follows:

- That the principle of legality which provides that all acts are based on the law as stipulated in Article 1 paragraph (1) of the Indonesian Criminal Code;
- That it is true, the said principle enacted in 1915 and is now still effective in Indonesia, and before that we knew the *algemeene bepalingen van wetgeving voor Indonesie* enacted in 1847 with the second article stipulating *de wet verbindt alleen voor het toekomende and en heeft geene terugwerkende kracht*, i.e., a law only provides and binds prospectively;
- That it has been formulated in Article 28i of the 1945 Constitution which stipulates that "The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever;"
- That the principle of retroactivity is essentially denied in laws because laws are effective and binding for any acts prospectively;
- That this Article 28j paragraph (2) substantiates to give a stricter basis that the human rights provided in this Article 28 though limited by laws, are not only limited in respects of assuring justice to the society;
- That it is true the application of Perpu No. 2 of 2002 on the Bali bombing is a regulation with a retroactive effect;
- That the second amendment which does not contain any words of when it becomes effective is only a technical requirement for the drafting of a law, that actually the second amendment dated August 18, 2000 is still ineffective, as no statement has been made of when it is to become effective, but in the fourth amendment to the Constitution, the People's Consultative Assembly (MPR) found a mistake therein that the Preamble of the Constitution stating item "d" was by MPR declared as "b", the addition to the final section of the amendment to the 1945 Constitution under this sentence of Amendment was decided in the Plenary Session of MPR-RI IX, August 18, 2002, meaning that the fourth amendment makes the provision retroactively valid for the second amendment;
- That it is true the Constitution is the highest law in Indonesia, but regarding an act of crime categorized as extraordinary crime, Indonesia follows the International law and it is possible as long as Indonesia has ratified the Rome Statute, but Indonesia has not ratified this International

Law and accordingly I believe that no interventions could be made of the Constitution;

Considering that the Appellant in the session of March 16, 2004, gave a conclusion which essentially:

A. ON THE OBJECT OF THE PETITION

A.1 That the Appellant is an Indonesian citizen who has been denied of his constitutional right, because the Appellant has been adjudicated and sentenced for imprisonment by the District Court of Denpasar and substantiated by the High Court of Bali, based on a law that is retroactively applied, namely, Perpu No. 2 of 2002 that has later been enacted as Law No. 16 of 2003.

A.2 That the Appellant's appeal to the Constitutional Court is to review the enactment of Law No. 16 of 2003 because it is against the 1945 Constitution.

B. ON THE LEGAL ASPECTS

That the Appellant's argument is that the Appellant as a Citizen of the Republic of Indonesia has the constitutional rights to get protection from being charged on the basis of a law that is applied retroactively (hereafter referred to as "retroactive principle") as expressly provided in Article 28i of the Second Amendment to the 1945 Constitution.

C. OPINIONS OF THE GOVERNMENT AND THE PEOPLE'S CONSULTATIVE ASSEMBLY OF R.I.

On December 10, 2003, the Government and the People's Representative Assembly were present at this session and which, on the matter and petition filed by the Appellant, made its explanations and opinions which could essentially be concluded as follows:

C.1. The Government and the People's Representative Assembly expressly admitted they had applied the retroactive principle on the Bali bombing case and on the Appellant in particular.

C.2. That according to the Government and People's Representative Assembly, a retroactive application of a law on the Bali bombing case (including on the Appellant) is valid because the case is an extraordinary crime.

C.3. That the Government and the People's Representative Assembly are of the opinion that Article 28i of the 1945 Constitution is not isolated but is connected to Article 28j that the effectiveness of Article 28i is not absolute but is limited from its being effective by Article 28j.

D. COMMENTS OF THE APPELLANT on THE OPINION OF THE GOVERNMENT AND THE PEOPLE'S REPRESENTATIVE ASSEMBLY

That on the opinion of the Government and the People's Representative Assembly described above, the Appellant in the session of January 20, 2004 made his comments by presenting the rationales which are essentially as follows:

D.1. The application of retroactive principle in Indonesia is a threat to legal certainty. If the Government gives the law enforcement agencies power to prosecute and adjudicate a person on a law that applies retroactively, it is like the Government's justifying the law enforcement agencies to act arbitrarily.

D.2. The acceptance of a retroactive principle in a case on the ground that the crime being charged is an extraordinary crime is not acceptable because it is not at all made on the ground found in a positive law, and it is clearly a potential ground for the law enforcement agencies to act arbitrarily because it is not made clear of who to decide that a crime is an extraordinary or ordinary crime and what their definitions are.

D.3. While Article 28i is not isolate, it has a specific meaning that cannot be related to the other Articles in the 1945 Constitution, to find any weaknesses therein. The words "under any conditions whatsoever" in Article 28i expressly implies there shall not be any exceptions or derogations of that right.

E. EXAMINING

To substantiate his arguments, the Appellant presents a witness and two expert witnesses who have the relevant competence of giving explanations as experts on this case. The expert witnesses and witness (a fact) presented to this session are:

- Prof. DR. Harun Al Rasyid, SH (Professor of Constitutional Law, University of Indonesia);
- Mr. Mutammimul Ulla (Member of Commission II of the People's Representative Assembly of R.I. from the Reform Fraction);
- Ms. DR. Maria Farida, SH (Lecturer of Legislations Subject, Faculty of Law, University of Indonesia).

E.1. The main points of the expert witness' statement of Prof. DR. Harun Al Rasyid, SH, are essentially as follows:

E.1.1 The application of retroactive principle is not acceptable because it is against the principle of "*nullum delictum nulla poena sine praevia lege poenali*" affixed in Article 1 paragraph 1 of the Criminal Code.

E.1.2 Perpu No. 2 of 2002 jo. Law No. 16 of 2003 is a regulation that makes Perpu No. 1 of 2002 jo. Law No. 15/2003 applied retroactively.

E.1.3 Perpu No. 1 of 2002 jo. Law No. 15/2003 should apply to any acts of terrorism committed after the date the law became effective, namely, October 18, 2002. Making this regulation applying retroactively is against the basis in the Indonesian criminal code, as provided in Article 1 paragraph (1) of the Criminal Code. This is also substantiated by the provision of Article 28i of the 1945 Constitution.

E.1.4 The prohibition of applying the retroactive principle for a law is also prohibited in the United States Constitution.

E.1.5 The words “under any conditions whatsoever” contained in Article 28i means that there shall be no exceptions, that it shall men no reduction of the rights of the Defendant.

E.2 The witness’ statement of Mr. Mutamminul Ula, SH., is essentially as follows:

E.2.1 The deliberation process of Perpu No. 2 of 2002 to become Law No. 16 of 2003 did not follow the procedure of deliberation as provided in the rules of procedure of the sessions of the People’s Representative Assembly/People’s Consultative Assembly which requires 2 stages of deliberation. In this process, the People’s Representative Assembly overrode the procedure and directly gave its approval without any deliberation on the material of the Perpu, and there were, therefore, no deliberations of Article by Article as required under the procedure.

E.2.2 Through this process of approval in the People’s Representative Assembly, there were no discussions, discourses, or mentions of the provision of Article 28i of the 1945 Constitution that forbid the application of retroactive principle.

E.3 The witness’ statement of DR. Maria Farida, SH, is essentially as follows:

E.3.1 The retroactive application of a Law is prohibited because it is against the legality principle, and is against the Constitution of the Republic of Indonesia, particularly as provided in Article 28i of the 1945 Constitution.

E.3.2 The 1945 Constitution of the Republic of Indonesia completely denies the retroactive principle of a law. Our Constitution observes the nonretroactive principle.

E.3.3 The right of a person for protection against being charged by a law applied retroactively is a right provided in the 1945 Constitution, particularly Article 28i. This right is non-derogable at all. The Article that follows, Article 28j, of the 1945 Constitution is not an Article that limits the application of Article 28i but, rather, it substantiates the application thereof.

E.3.4 The International law, written or otherwise, may not be applied in Indonesia if it is against the 1945 Constitution as the highest law in the Republic of Indonesia.

E.3.5 On the effectiveness of the Second Amendment to the 1945 Constitution, which does not provide what date it shall become effective, should mean that the Second Amendment has never been effective, but this has been a mistake that has actually been corrected in the Fourth Amendment, regarding the item “b”. This means, according to the expert, that the Second Amendment has been effective since August 18, 2000.

F. EXPERTS’ OPINIONS OUTSIDE THE SESSION

F.1 Professor Dr. Indriyanto Seno Adji, in his speech of February 19, 2004, in his confirmation as an associate professor of the Faculty of Law of the University of Krisnadwipayana, entitled *Prospects of Criminal Code in the Society under Changes* gave his opinion, among other things, as follows:

F.1.1 The legality principle is highly required to assure prevention of arbitrary acts by the authorities.

F.1.2 The opinion of the International Commission of Jurists is a rejection of the application of the retroactive principle because it seriously denies the right of the justice seekers.

F.1.3 The Indonesian Criminal Code has never applied the retroactive principle except by the government of the Dutch East Indies in the efforts to take revenge on its political opponents.

F.1.4 Under the Old Order and the New Order regimes, the application of retroactive principle in all forms and for any reasons was also rejected because it was regarded producing a legal bias, giving no legal certainty, and allowing arbitrary acts by the law enforcement agencies and political powers to take the so-called "political revenge".

F.1.5 Exploring the historical approach, the (criminal) law system of Indonesia does not make retroactive principle exist, and it is therefore awkward if there is the Retroactive Principle in this era of reformation where there is more appreciation to human rights.

F.1.6 The spirit to make the retroactive principle exist is actually a setback and creates destruction to the existing (criminal) law, and even gives room to a talionic (revenge) principle as a source of primarity.

F.1.7 Hence, no forms of emergencies will justify the retroactive application of a legal product.

F.2. **H. Achmad Roestandi, SH**, a Judge of the Constitutional Court, in his dissenting opinion as quoted by Mr. Refly Harun in his paper entitled *Saat Dewi Keadilan Menolak Tunduk* (*When the Goddess of Justice Refuses to Give Up*), Kompas, February 26, 2004, page 4, said, "clearly, the rights that shall be non-derogable in the 1945 Constitution are those provided in Article 28i namely, The (1) right to live, (2) right to be protected from torture, (3) right to believe and to be conscientious, (4) right of religion, (5) right to be protected from enslavement, (6) right to be recognized as an individual person before the law, and (7) right to be protected from being charged on the basis of a law that is applied retroactively. The rights other than these seven may be reduced not only on a nonpermanent basis.

F.3 **DR. James Popple, barrister and solicitor, Assistant to the Australian Attorney General**
gives his opinion, among other things, as follows (as published in the *Criminal Law Journal*, vol. 13, no. 4, August 1989, vol. 2, pages 5-18 and Australasian Law Student's Association Journal, 1989, vol. 2. pages 5-18):

F.3.1 The essentiality of a right to protection from retroactive criminal law has generally been accepted without argument. Literature on the justification for the principle is scarce. Yet, it has become well accepted that individuals have such a right. The principle has been enunciated in various declarations of human rights from 1789 to the present.

F.3.2 The principle that people should be free from retroactive law has its roots in another principle: that there is no crime or punishment except in accordance with law.

F.3.3 No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law. This principle was stated in 1789 in Article l, section 9(3) of the American Constitution which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it:

F.3.4 Article 15 of the International Covenant on Civil and Political Rights states, inter alia: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

G. CONCLUSIONS

That from the stages of the Court sessions with those present including the Appellant, the Government (represented by the Minister of Justice & Human Rights), People's Representative Assembly of R.I. and the expert witnesses, the Appellant gave his conclusions of the Court sessions as follows:

G.1 The Appellant is an Indonesian citizen having competency to file a petition for a judicial review of a Law against the 1945 Constitution of the Republic of Indonesia because the Appellant is an Indonesian citizen whose constitutional right has been denied with the enactment of Law No. 16/2003.

G.2 As the Appellant has filed a petition for a judicial review of a law against the 1945 Constitution of the Republic of Indonesia, then, based on Article 24C paragraph (1) of the 1945 Constitution jo. Article 10 paragraph (1) of Law No. 24 of 2003, it is right and accurate that this petition for a judicial review be made to (filed in) the Constitutional Court of R.I.

G.3 That the Government and representatives of the People's Representative Assembly of R.I. failed to defend their rationales to support Perpu No. 2 of 2002 which was later enacted as Law No. 16 of 2003 which observes the retroactive principle, because:

G.3.1 The application of retroactive principle is against the provision of Article 28i of the 1945 Constitution of the Republic of Indonesia. This was substantiated in the statements of Prof. DR. Harun al Rasyid, SH., and DR. Maria Farida, SH, and other experts outside the Court session.

G.3.2 The rationales of the Government and the People's Representative Assembly of R.I., which essentially stated that Article 28j gave limitations to Article 28i paragraph (1), was incorrect. Instead, Article 28j substantiated the application of Article 28i paragraph (1), as the expert witness, DR. Maria Farida, SH, stated.

G.3.3 The application of retroactive principle is against Article 1 paragraph (1) of the Criminal Code which observes the legality principle, namely, "*nullum delictum nulla poena sine previa lege poenali.*" This was substantiated in the opinions of expert witnesses, namely, those of Prof. DR. Harun al Rasyid, SH., and DR. Maria Farida, SH, and experts outside the Court session.

G.3 That the international conventions, including the UN Resolution, International laws, whether written or otherwise, ratified or pending ratification, are below the 1945 Constitution, so that if the existence of those laws are against the 1945 Constitution, they shall not apply.

G.4 For any reasons whatsoever, any terms belonging to the extraordinary crime that applies the retroactive principle shall not be effective in Indonesia as it is against the legal norms and principles in Indonesia as provided in Article 28i of the 1945 Constitution.

G.5 The process of passing Perpu No. 2 of 2002 into Law No. 16 of 2003 that has violated the rules of procedure adopted by the People's Representative Assembly, implies that the Government was strongly forcing its will that the People's Representative Assembly could not do anything but give its approval.

G.6 There were no discussions on the existence of Article 28i of the 1945 Constitution in the process of passing Perpu No. 2 of 2002 into Law No. 16 of 2003. The lack of discussions regarding the nonretroactive principle acknowledged in the 1945 Constitution, made the discussion proceeded without any controversies that there was a sign that People's Representative Assembly actually intended to pass this Perpu in a smooth way, or the People's Representative Assembly unintentionally failed to discuss this as an important issue because they were not aware or did so intentionally so that the fact that our Constitution observes the Nonretroactive principle that does not allow the provision stipulated in this Perpu, is overridden. In my opinion, if this controversy arose in the deliberation of the People's Representative Assembly, it is very likely that this Perpu will not pass legislation.

G.7 One of the Constitutional Judge (H. Achmad Roestandi, SH) himself finds that the right to be protected from being charged on the basis of a law that is applied retroactively is a constitutional right of an Indonesian citizen that are non-derogable for any reasons whatsoever.

G.8 The Non-Retroactive principle is also acknowledged in the United States Constitution. Non-Retroactivity is also a principle acknowledged in the International Law.

G.9 Perpu No. 2 of 2002 that later became Law No. 16 of 2003 is against the 1945 Constitution, Article 28i.

That based on the rationales, arguments and evidences as described above, the Appellant requests that the honorable Constitutional Court would kindly decide:

1. To accept the petition for a judicial review of Law No. 16 of 2003 against 1945 Constitution, in its entirety;
2. To declare that Law No. 16 of 2003 is against the 1945 Constitution;
3. To declare that Law No. 16 of 2003 does not have the legality that is binding as from its enactment.

Considering that to make the explanations in this decision brief, all that proceeded in the Court sessions are referred to in the minutes of the Court sessions, that make an inseparable part of this decision:

LEGAL CONSIDERATIONS

Considering that the aims of the Appellant's petition a quo are as described above.

Considering that before getting into the essence of the case, the Court should first consider the following:

1. Whether the Court has the jurisdiction to examine, adjudicate and decide on the judicial review of Law No. 16 on the Declaration of Government Regulation in Lieu of Law Number 2 of 2003 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law (hereafter referred to as Law No. 16 of 2003).
2. Whether the Appellant a quo has the legal standing to file a petition for a judicial review of Law No. 16 of 2003 against the 1945 Constitution.

Considering that on the two matters described above, the Court is of the opinion as follows:

1. Jurisdiction

That based on Article 24C paragraph (1) of the 1945 Constitution jo. Article 10 paragraph (1) of Law No. 24 of 2003 on Constitutional Court, one of the authorities of the Court is to review a law against the 1945 Constitution. Further, based on the provision of Article 50 of the said Law No. 24 of 2003 and the Elucidation thereof, the laws that may be requested for a judicial review are those enacted after the first amendment to the 1945 Constitution dated August 19, 1999, while Law No. 16 of 2003, was enacted on April 4 of 2003 under State Gazette of the Republic of Indonesia of 2003 Number 46, State Gazette Supplement Number 4285.

Based on the foregoing, the Court has the jurisdiction to examine, adjudicate and decide on the petition a quo.

2. Legal Standing of the Appellant

That based on the provision of Article 51 paragraph (1) of Law No. 24 of 2003 on Constitutional Court, the subjects eligible to file a petition for a judicial review of a law against the 1945 Constitution are those who believe that they have been denied of their constitutional rights, namely individual Indonesian citizens, or traditional communities as long as such communities still exist, and along with the development of the society and the principles of the Unitary State of the Republic of Indonesia as provided by the Laws, and public legal entities or private entities, or a state institutions.

That the Appellant, Masykur Abdul Kadir, is an Indonesian citizen who was one of the defendants of the Bali bombing case of October 12, 2002, who believes that he has been denied of his constitutional right by Law No. 16 of 2003, that is, the right provided in Article 28i paragraph (1) of 1945 Constitution which stipulates that, “the right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever,” while Appellant has been charged under Law No. 16 of 2003 because Perpu No, 1 of 2002 was enacted on October 18,

2002 (State Gazette of the Republic of Indonesia No. 106) had been applied to the case that occurred on October 12, 2002 (the Bali bombing).
Accordingly, the Appellant a quo has the legal standing to file a petition for a judicial review of Law No. 16 of 2003 against the 1945 Constitution.

Considering that because the Court has the jurisdiction to examine, adjudicate and decide on the petition a quo made by the Appellant that has the legal standing, the Court finds it necessary to further consider the essence of the case being presented as the rationales by the Appellant.

The Essence of the Case

Considering that the essence of the case of the petition a quo on Law No. 16 of 2003 which was originally Perpu No. 2 of 2002 which retroactively applied Law No. 15 of 2003 which was originally Law No. 1 of 2002, which in the rationale expressed by the Appellant a quo was against Article 28i paragraph (1) of 1945 Constitution of the Republic of Indonesia and is therefore requested to be declared null and void.

Considering that it must first be distinguished of the meaning between a retroactively applied law with justification of a retroactive application of a law. A retroactively applying law is the law declared to be effective as from some time before, that is means implicating an act committed by a person before the law is enacted. Based on this definition, Law No. 16 of 2003 which declares that Law No. 15 of 2003, enacted on October 18, 2002 apply to the Bali bombing of October 12, 2002, is a law that is applied retroactively (*an ex post facto law*).

Considering that as described before, there have now been the pros and cons on the justification or denial of the application of the retroactive principle of a law. Both those who are against the application of the retroactive principle of a law and those who believe in the application of a retroactive principle of a law, in principle agree that the application of retroactive principle of a law is a violation of the human rights and the standards of humanity as stated by the World Organization Against Torture, USA.

Considering that there be a group of people who believe that under a particular situation, the nonretroactive principle could be overridden (the nonretroactive principles of the World Organization Against Torture) by giving six (6) arguments as follows:

1. Argument of Gustav Radbruch which states that an act is liable for punishment even when the act is committed it has not been declared as a crime because the principle of superiority of justice may override the nonretroactive principle. However, Radbruch still believes that the nonretroactive principle is so important that overriding it may only be made in a most extreme situation, such as that which was once applied to the Nazi regime that had committed a genocide.
2. The argument saying that the knowledge of the perpetrator that his or her act is a punishable subject in the future, thought the act is legal when he or she commits it. The argument concludes that under any conditions the nonretroactive principle is not applicable to protect a person who is aware that his act is wrong.

3. The argument saying that the general principle of justice may override the existence of positive law. An act that may not be a crime when it is committed according to the positive law, may be applied with a retroactive law if the act is against the generally accepted justice.

4. The argument saying that the international law principles may override domestic law. Hence, though an act is according to domestic law is not against the law the nonretroactive principle may be overridden because the act is against the international positive law.

5. The argument saying that the nonretroactive may be overridden through a reinterpretation of the law that was effective before. By doing a reinterpretation of the law existing when the act was committed, an act that was before one that was not punishable may become a punishable act.

6. The argument saying that the act according to the prevailing law when it is committed is actually an obvious violation of the law prevailing at that time.

Considering that despite the views described above, it is apparent that the larger part of the legal scholars in the world — in observance of the development of the said viewpoints — still believe that somehow the nonretroactive principle cannot be overridden only for a cause as described in the above views. Accordingly, aside from the dissenting opinions among the judges of the Constitutional Court, the Court is of the opinion as follows:

1. That, essentially, law applies prospectively. It is not fair to punish a person for an act committed at the time when it was not a wrongful one. It is equally unfair if a person is charged under a heavier law to an act that when committed was punishable under a less severe law, whether it relates to procedural law or substance.

2. That the nonretroactive principle refers more to the philosophy of criminalization on retributive basis, while this principle is no longer the main reference of the criminalization system in our country that favors the preventive and educative principles.

3. That it has been a public knowledge that overriding the nonretroactive principle allows a particular regime to use the law as a tool for a revenge against its former political opponents. Such a revenge may not happen, and therefore, there should not be the slightest likelihood for such an opportunity.

4. That, currently, efforts are being made to ensure the rule of law including a fair trial. The minimum guarantee for a fair trial is: the principles of presumption of innocence, equal opportunities for the parties to the case, pronouncing a decision open to the public, the principle of *ne bis in idem*, the application of less severe law for a pending process, and the prohibition of the application of retroactive principle. By referring to these minimum conditions, Law No. 16 of 2003 moves in opposite direction as a fair trial.

Considering for a comparison, the countries that have long and sound history of law enforcement, such as the United States of America, have their constitutions that prohibit the application of retroactive principle as provided in Article 1 Section 9 which stipulates: “No bill of attainder or ex post pacto law shall be passed.” It is true

that the judges, in their decisions, often override this prohibition, but this is only applied generally to civil cases. Meanwhile, the legislative institutions strongly maintain this principle and has never amended it to date.

To prove how the application of a retroactive principle is strongly rejected, the following passage may serve as a reference:

> *An ex post facto violation can occur in several ways. No legislative body may pass a law that makes criminal any conduct occurring prior to the passage of the law. Neither may a law redefine a statute to make previous conduct a more serious or aggravated violation. The ex post facto prohibition also precludes retroactively increasing the severity of punishment for criminal conduct. No law may alter evidentiary rules in a way that makes successful prosecution more likely or diminishes any legal prosecutions a person may exercise. In sum, the ex post facto provision prohibits any legislative action that retroactively disadvantages a person in a criminal context. (Ralph C. Chandler et. al "The Dictionary of Constitutional Law page 615").*

Considering that it is true this principle was once overridden when prosecuting the war criminals in the Nuremberg Tribunal. However, as described above, this was done as an exception and an emotionally strong notion to punish the unfeeling Nazi, and after this trial has been completed, the international community has always been emphasizing that the nonretroactive principle shall not be overridden.
This is reflected in the formulation on the human rights instruments drawn up after that which are as follows:

1. United Nations Universal Declaration of Human Rights

Article 11. (2)

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

2. European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Eight Protocols

Article 7

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

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

3. United Nations International Covenant on Civil and Political Rights (1966)

Article 4

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be under this provision.

Article 15

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequently to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

4. American Convention on Human Rights

Article 9 : Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

5. Rome Statute of the International Criminal Court (1998)

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22. *Nullum crimen sine lege*

(1) A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

(2) The definition of a crime shall be strictly construed and shall not extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

(3) This article shall not affect the characterization of any conduct as criminal under the international law independently of this Statute.

Article 23. *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24. *Non-retroactivity ratione personae*

(1) No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

(2) In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Considering that the application of retroactive principle is rejected in the Indonesian law, as has long been observed.

1. Article 6: *Algemene Bepalingen van Wetgeving voor Nederlands Indie (AB) State Gazette of 1847 Number 23* which stipulates *:* "*De wet verbind alleen voor het toekomende en heeft geene terug werkende kracht*".

2. Article 1 paragraph (1) *Wetboek van Straftrecht* which stipulates : "*geen feit is straafbaar dan uit kracht van eene daar aan voor afgegane wettelijk straafbepaling* (No acts shall be punishable unless it is based on the provision of criminal law that has been existing before).

3. Law Number 39 on Human Rights,

   - Article 4 stipulates: The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever.

   - Article 18 paragraph (2) stipulates: "No one may be prosecuted or punished unless it is based on a law that has been existing when the crime is been committed."

4. The 1945 Constitution, Article 28i paragraph (1) stipulates: "The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever."

By referring to the spirit in Article 1 paragraph (1) of the *Wetboek van Strafrecht* that is a universal principle, Prof. DR. Harun al Rasyid, S.H., as an expert, gave in the Court session his opinion that there are no other interpretations than the nonretroactive principle being absolute.

Considering that Article 28i of the 1945 Constitution endorses the previous laws and regulations and places the a quo principle as the supreme laws and regulations in the constitutional law arrangements. *Constitutie is de hoogste wet*! The State is unable to negate the Constitution as such a thing would mean the Constitution is slicing its own flesh. Referring also to the opinion of Dr. Maria Farida Indrati, S.H., M.H., the provision of Article 28j paragraph (2) of the 1945 Constitution, which gives limitations to human rights, does not apply to Article 28i paragraph (1) because there is the phrase "under any conditions whatsoever".

Considering that, accordingly, the Court is of the opinion that all rights may be limited except they are otherwise provided in the Constitution. It is in accordance with the conclusion of Bryan A. Garner in the Black Law's Dictionary, page 1318, which states: "*A retroactive law is non unconstitutional unless .... is constitutionally forbidden.*"

Considering that terrorism is undeniably a crime that is seriously threatening, creating terror or insecurity among the public, though there has not been to date a universal definition and understanding of what is called terrorism. The trend is more emphasizing on one dimensional conception on terrorism, on the proposed construction that terrorism is dominantly and formally defined in a single-direction framework, implying that the perpetrator is single, that is, a merely non-state actor, that accordingly an act of terrorism is always seen as an activity, that is, terrorism from below, as Johan Galtung (*Exiting From the Terrorism-State Terrorism Vicious Circle: Some Psychological Conditions*, 2001) put it, as shown in the definition of terrorism by the *League of Nations Convention*, 1937 and also United Nations Resolution No. 50/186, of December 22, 1995. While, actually, terrorism may also be perpetrated by a state (state terrorism) in the form of various structural violence actions (Michael Tilger, *Terrorism and Human Rights*, 2001).

Considering that aside from whether or not the above definitions on terrorism are still confusing, the Court believes that all types of terrorism must be eradicated, even down to the roots of the problems and the initial causes thereof, as are the growing expectations among the international society. There must therefore be a law that assures the deterrence, suppression and eradication of terrorism. The law must provide, in addition to heavier penalty, smooth arrangements for the process of probing, repression and apprehension.

Considering that Law Number 15 of 2003 on the Declaration of Government Regulation in lieu of Law Number 1 of 2002 on Suppression of Terrorism, as a Law, has fairly satisfied the expectations of the justiciables. However, Law Number 15 of 2003 must not be applied retroactively, because the elements and types of crime contained in terrorism according to this law are the types of crime that are subject to severe punishment.

Considering that the application of retroactive principle in criminal code is an exception that may only be permissible and applied to a case of gross violation on human rights, as a serious crime, that will protect the non-derogable rights. Meanwhile, the Roma Statute of 1998 categorizes gross violation of human rights include genocide, crime on humanity, war crime, and aggression crime; while Article 7 of Law No. 39 of 1999 on Human Rights categories of gross violation of human rights as only genocide and crime against humanity. Hence, a reference to the Rome Statute of 1998 as well as Law, Bali bombing does not still belong to an extraordinary crime that may be subjected to a retroactive principle of law, but an ordinary crime that is very cruel, but can still be prosecuted under the existing criminal code. Perpu No. 1 of 2002 and Perpu No. 2 of 2002 received many challenges, because, in formally legal view, the retroactive principle is actually inapplicable, because terrorism does not belong to the category of crime that will be subject to a retroactively applied law (Paper Position of Human Rights Foundation, No. 1, December 2002). If terrorism is viewed as an act against human rights, the legal provisions and actions for the suppression thereof shall not override human rights because, because in the United States itself, there is a view that Terrorism Law is a major setback for civil liberties.

Considering that besides the foregoing considerations, the Court finds it necessary to also consider the relationship and harmony between the normative substance contained in Law No. 16 of 2003 and the form of the law which contains it. By referring to the theory that is generally observed in law science, namely, the *Stuffen Theorie de Recht* of Hans Kelsen, a law as a legislative product contains legal norms that regulate the abstract and general norms. Law does not contain individual and concrete norms as the norms contained in the legal decisions prepared by the state administrative officials which form administrative decisions or court's legal products in the form of verdicts. Hence, we can say that it is essentially not the authority of the statutory body that will apply a legal norm that should be general and abstract into a concrete event, as this should have been the jurisdiction of the judge through the court process or the jurisdiction of the state administrative official through decision making according to the legal provisions of the state administration.

Considering that Law No. 16 of 2003 that is originally Perpu No. 2 of 2002 dated October 18, 2002, contains a legal norm that is the declaration of the effectiveness of Law No. 15 of 2003 that is originally Perpu No. 1 of 2002 dated October 18, 2002. A declaration of the effectiveness of a legal norm on a concrete legal case, is not accurate, and shall not therefore be translated into a legislative process in the form of a law, but should actually be a material sphere of the court in applying a general and abstract law norm. Hence, the declaration of effectiveness of Law No. 16 of 2003 to valuate a concrete event, that is, the Bali bombing on October 12, 2002, that occurred before the said law was enacted, is against the norm of division of power provided in the 1945 Constitution of the Republic of Indonesia. In this respect, it may be concluded that the statutory body has done a thing that is the authority of the judge as provided in Article 24 paragraph (1) as an independent, separated power from the body of state government branch, as provided in Chapter III or the lawmaking power branch provided in Chapter VII and Chapter VIIA of the 1945 Constitution of the Republic of Indonesia.

Considering that besides that, if the application of the legal norms by the statutory body on a concrete event that occurred before, as the application of Law No. 16 of 2003 described above is accepted, or is by the Court regarded constitutional, such an example may in the future become a bad precedent, which may be made a reference that a statutory body may apply a legal norm explicitly in a law or in an *expressis verbis* on one or two concrete events that occurred before, only on political judgment by the People's Representative Assembly together with the Government, making a legal event happening before constitutes a serious crime against humanity. Actually, it is a fact that to overcome and to take actions on such a crime, there is already legal framework that is sufficient or there has not at least been a proof that the said legal framework has been maximally used in the efforts to suppress such a crime.

Considering also that through the Court's decision, all the Indonesian law enforcers shall wherever they are be convinced that the legal actions on all types of crime shall be taken under just and definite law enforcement, instead of making new law norms through the enactment of a Perpu or a new Law. It is especially true if such legislation policy is based on a political judgment. If all crimes occurring before our very eyes are suppressed by enacting a new law, we may not be upholding any laws because we will always feel that what we have is insufficient. Hence, the Court is of

the opinion that despite the overall revision of the Indonesian laws at present that is deemed critical in the efforts to promote orderly and fair legal system, actual legal actions shall not be delayed merely because of the consideration of the imperfect laws available. Justice delayed is justice denied. The precedence of a mistake as described above will, unless proper actions are taken, adversely affect the pillars of the rule of law (*rechstaat*), because of leaving political judgment as the most influential thing in deciding the application of a legal norm on a concrete event and preserving a wrongful habit of overcoming a concrete type of crime by drafting a new law. This precedence will cause waning progress in the efforts to uphold the principles of the rule of law as mandated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which firmly stipulates that Indonesia is the Rule of Law." Actually, the existence of the Constitutional Court is in fact an effort to institutionalize the activities to protect the constitution and to uphold the principle of law supremacy in the statecraft system of Indonesia after the reformation era, which is essentially the efforts to solidify the attainment of the ideals of the Rule of Law.

Considering that besides the weakness as viewed from the aspects of its form, as well as the aspect of the authority of the statutory body in applying an abstract law norm on a concrete event, and is therefore against the authority of the judge we observe under 1945 Constitution of the Republic of Indonesia, the substance in Law No. 16 of 2003 is found as an ex pacto law or a retroactive legislation as provided in Article 28i paragraph (1) of the 1945 Constitution.

Considering that based on the arguments given above, the Court is of the opinion that the petition a quo must be accepted, because Law Number 16 of 2003 is against the provision and the spirit of Article 1 paragraph (3) and Article 28i paragraph (1) of 1945 Constitution and the Court must therefore declare that the Law a quo is not legally effective and binding.

In view of Article 56 paragraphs (2) and (3) of Law of the Republic of Indonesia No. 24 of 2003 on Constitutional Court.

TO DECIDE

To accept the petition of the Appellant for a judicial review of Law No. 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law against the 1945 Constitution of the Republic of Indonesia;

To declare that Law No. 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism on the Bali Bombing of October 12, 2002, as a Law (State Gazette of the Republic of Indonesia of 2003 No. 46, State Gazette Supplement Number 4285) against the 1945 Constitution of the Republic of Indonesia;

To declare that Law No. 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on the Suppression of Terrorism on the

Bali Bombing of October 12, 2002, as a Law (State Gazette of the Republic of Indonesia of 2003 No. 46, State Gazette Supplement Number 4285) not legally binding.

DISSENTING OPINIONS

On the above decision of the Constitutional Court, four (4) judges of the Constitutional Court, namely, **Maruarar Siahaan, S.H.; I Dewa Gede Palguna, S.H., M.H.; Prof. H.A.S. Natabaya, S.H., LL.M.; and Dr. Harjono, S.H., MCL**, gave their opinions that were difference on the substance of the case, as follows:

I. The cases in which retroactive principle of criminal code was applied were those of serious crimes against humanity, genocide, war crime. That application of the retroactive principle has been required for the sake of justice, as the case was considered seriously against the morality of human being. If the human rights of the criminal were protected because of the application of the retroactive principle is ruled out, it will mean leaving the possibility of a more serious and more extensive violation of human rights. Hence, justice is a rational reason for waiving the nonretroactive principle under a certain situation and in a limited manner.

How should we view the provision of Article 28i of the 1945 Constitution of the Republic of Indonesia which provides the basis of the application of nonretroactive principle, that are the human rights that are non-derogable under any conditions whatsoever? Though a literary definition of the provision shows as if the retroactive principle is absolute, a systematic look at it shows that the human rights here are not anything absolute as a person shall in exercising his or her human rights observes the human rights and freedom of other people to fulfill fair charges with due respects of morality, religious values, security, and public order in a democratic society (Article 28j paragraph (2)).

By reading Article 28j paragraph (2) together with Article 28i paragraph (1), a conclusion could be made that the nonretroactive principle is not anything absolute and may therefore be subject to exception in the bid to “fulfill fair charges with due respects of morality, religious values, security, and public order.

Before coming to the conditions of possible exemption, it is important to first look at the aim of applying the nonretroactive principle, that is, in order that the people in power will not arbitrarily make a law to punish their citizens. From the philosophical view, this principle must not of course be used for protecting the people who have committed a violation against the human rights, if such an act effects a situation where the people who have committed gross violation of human rights will enjoy impunity. The nonretroactive principle should not be rigidly applied. Essentially, the nonretroactive principle contains the legality principle, which is provided in criminal code in Article 1 paragraph 1 of Criminal Code, which has since long ago been accepted as a part of the basic principles of legislation, though it is not expressly provided in the Constitution, so that when this principle was explicitly stipulated in the 1945 Constitution, the interpretation thereof should be viewed along with the historic viewpoint, comparative interpretation with international human rights instruments and the practices accepted in Indonesia.

The interpretation of Article 28i paragraph (1) of 1945 Constitution after the amendment thereto, should be with the awareness of the fact that the Constitution of a state is only a part of the legal basis of the concerned country. The Constitution is a written Basic principles of legislation, while besides the Constitution there are also unwritten basic principles of legislation, that are, the basic rules arising from and are preserved in the practice of the administering the state, despite their being unwritten. To explore the basic law (*droit constitutionnel*) of a state will not be enough by only exploring the Articles in the Constitution (*loi constitutionelle*), but exploration must also be made of how the practices are and how the inner spirit of it (*Geistlichten Hintergrund*) of the Constitution is. No Constitutions could be understood by just reading their texts. To completely understand the what the Constitution of a State aims, we should explore what made the text appear, its information, and it must also be found out of the situation when the text was written (Elucidation of the 1945 Constitution of the Republic of Indonesia, before amendment). It is then the task of the Judge of the Constitutional Court to make an interpretation of the provision in the Constitution if there are anything that remained unclear because of a contradiction between one Article and another.

Article 1 paragraph (1) of Criminal Code stipulates:

"No acts may be penalized unless they are based on the penalty provided in a law already effective when the offense is committed."

The stipulation of this article contains important principles in Criminal Law as expressed in the maxims *"Nullum Crimen Sine Lege"* (No Crime without a Law), *Nulla Poena Sine Crimine* (No Criminal Code without a Crime) *Nullum Crimen Sine Lege Praevia* (No crime without a law effective before). In other words, it is not allowed to apply the Ex Post Facto Criminal Law. It is intended to ensure legal certainty and to prevent abuse of power and to solidify Rule of Law.

Hence, in the application of the non-retroactive principle, it must also be considered whether by applying the principle rigidly it will on the contrary create injustice, adverse effects on the religious norms, public security and order, that if these situations develop, the intention of protecting an individual will not be as desired of the Law. A point of balance should be found between Legal certainty and Justice, by trying to understand what meaning is implied in Article 28i paragraph (1) of the 1945 Constitution instead of just reading the text. An exploration should also be made of what the principle means from its history, practice and interpretation in a comparative manner.

The equilibrium between legal certainty and justice, particularly in upholding the retroactive principle, may be assessed using the following formula:

a. The value of justice is not obtained from the value of legal certainty, but from the balance between the legal protection of the victims and the criminal;
b. The more serious a crime, the higehr value of justice that needs to be maintained, more than the value of legal certainty (Academic Paper of Study on Human Rights, Supreme Court, 2003).

The value of justice is higher than legal certainty, particularly in establishing universal justice. Hence, if there is a conflict between the two principles, priority must be given to the principle that will clearly ensure justice, and hence, applying the Law retroactively in a limited manner, particularly on extraordinary crimes as viewed from the methods and the effects (victims) of the crime, will not be against the 1945 Constitution and it is not the intention of the drafters of the 1945 Constitution to apply the nonretroactive principle absolutely without any exceptions.

An application of a law retroactively will not automatically make a Law being against the Constitution, and such application of the law will not always automatically mean a violation of the Human Rights, as could be valued from the 3 factors or requirements to be satisifed in the application of retroactive principle:

1. The extent of the public interests the Law needs to protect;
2. The degree of the rights being violated due to the application of the Law is lower than the public interests being violated.
3. The nature of the rights affected by the retroactive law (Robin C. Trueworthy, 1997).

Though it is admittedly difficult to rationalize the application of retroactive principle on a Criminal Law, it should be understood that the essence of nonretroactive principle is the denial of incriminating an act that was not a crime when it was committed or to make a punishment more severe on a prohibited act. In the case of the Bali bombing, the delict provided is essentially a prohibited act and was subject to being incriminated under the former Criminal Code and under a maximum criminal conviction, similar to that provided in the Law which had then been existed, and the legal awareness established before the said law became effective had also seen it as a crime (*Maria Propria*) and, hence, substantively, the *Nulla Poena, Nullum Delictum Sine Lege Praevia* prohibition is not violated though there are other aspects in Laws No. 15 and 16 of 2002 which concern procedure, are also declared applying retroactively.

From the three elements of valuating the validity of limited application of the retroactive principle of a law as described above, with due observance of the huge number of victims, targeted to a particular race or group, and in a vast and organized network, even with preparation done across national borders, with devastating impacts on the territory of the Republic of Indonesia in social, economic and political terms, the public interests to be protected are a lot more than the effect of individual Human Rights of the appellant. A limited application of the retroactive principle on Law No. 15/2003 on Suppression of Terrorism by the enactment of Law No. 16/2003 on the Bali bombing, is acceptable enough as an exception of the general principle of nonretroactivity, with due observance of the practice and interpretation of the comparative study interpretation as will be described below.

II. That before coming to the conclusion on whether the retroactive application of a law is against the 1945 Constitution, it is very important to understand the basic idea underlying the nonretroactive principle on the one hand, including overriding it, and the history of how Article 28i paragraph (1) of the 1945 Constitution was created, on the other hand;

That the nonretroactive principle which originally was a Latin maxim "*nullum delictum nulla poena sine praevia lege punali*", was not actually an isolated legal principle. There are a number of legal principles prior to the *nullum delictum* principle. Those legal principles are the *nullum crimen sien poena* (no crime without a punishment), *"Nullum Crimen Sine Lege"* (No Crime except it is provided by the Law). Hence, it is clear that the ideas behind or preceding the nonretroactive principle comprise a number of legal principles that eventually, as James Popple put it, come to a single understanding that, "there is no crime or punishment except in accordance with law".

That, from its history, the nonretroactive principle is intended to limit the acts of the state or the authority to arbitrarily punish a person who has done an act by just stating that the particular act is a crime while, when the act was committed, the law did not provide that such an act was a crime. This principle was subsequently accepted widely in Europe by the end of the 19th Century, with France being the first when this principle was included in the provision of Article 8 of French Declaration of the Rights of Man of 1789, which was later included in the French criminal code and the French Constitution in 1791. In the United States Constitution, the same provision was not included until 1789, termed ex post facto laws, and was later included in Article 1 paragraph 9(3).

That along with the development in the human rights movements, the nonretroactive principle or the ex post facto laws were later materialized into various international law instruments. Article 11 (2) of the Universal Declaration of Human Rights declared, "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence on account, under international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed". This provision clearly states that what is prohibited is:

a. To declare a person guilty for doing a crime that when the act was committed did not constitute a punishable act;
b. deciding a heavier penalty than the penalty under the criminal code effective when the act was committed.

It is this provision that many experts use as a basis for denying the retroactive application of a legal provision or a law.

Meanwhile, Article 7 of the European Convention on Human Rights stipulates that no persons may be retroactively convicted of a crime. However, that provision is accompanied by an important clause which states that the provision "shall not prejudice trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general priciples of law recognized by civilized nations. Identical provision is also found in the International Covenant on Civil and Political Rights, Article 15, which is also accompanied by a similar clause. A slight difference is the term "civilized nations" in the European Convention on Human Rights, was changed to "community of nations" in the International Covenants on Civil and Political Rights.

That the above descriptions should make it clear that the nonretroactive principle is not actually absolute in its entire substance. What is absolutely denied is the creation of a legal provision that states that a past act is a crime while the particular act is not actually a crime. On the contrary, it is not deniable to try and punish a person who does an act based on a law that, though it is later enacted, the act itself has been a crime when it is committed in the past.

That the proposition given above is not just a theoretical conclusion, but has been an acceptable practice as indicated in, among other things, the failure of the Australian Bill on Human Rights of 1985 to pass legislation. Article 28 of the Bill contains the following provision, "No person shall be convicted of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it occurred" without an accompanying clause (proviso) as provided in Article 7 of the European Convention on Human Rights or as provided in Article 15 of the International Covenant on Civl and Political Rights. Another practice showing that to some extent the retroactive principle is acceptable, and that has become a classical example, is the Nuremberg Tribunal established on the basis of the London Charter, intended for the criminals in World War II. It should be important for a comprehensive understanding of the boundaries of the application of nonretroactive principle if we quote here the statement of the Judge Jackson when examining the case, which, as we know, was not only a trial the Defendants on a charge of committing war crime, but also "crime against humanity" which Article 6 of the London Charter provides as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. **Judge Jackson** in his opening statement stated, among other things:

"Less than 8 months ago ... the law (applied by the Tribunal) had not been codified, no procedure thereof had been prepared, no Tribunal, no building of the Tribunal was found here...

This Charter (the London Charter) under which this Tribunal was formed, adopted a number of legal concepts that are inseparable from their jurisdictions that have to regulate the decisions...

We may say that this is a new legal provision, which was not declared as having a binding power when the prisoners being tried here did the malignant act under this law, and a statement that this is a law that has made them stunned ...

I cannot of course deny if they are stunned that this is the law; they should be completely be stunned such a law does exist. However, these defendants did not at all base their acts on any laws. Their program ignored and overrode all laws ... The international laws, natural laws, German laws, shortly, all laws are to them not more than just a propaganda tool that was appplied if it would help them but would be ignored if it condemned what they intended to do. These people may have been protected by the laws prevailing when they did their acts as the reason where we may find the laws applied retrospectively unjust. However, these people may not be able to justify their use of the reasons, which a number of court systems denied ***ex post facto***

***laws**). They were unable to show that they had based their acts on international laws or respected even just a bit of these laws...*

The fourth indictment was crime against humanity. The main part of it included the remorseless murders of countless number of people. Are these persons stunned that murder is a crime? In a civilized society, it is for certain that a person attacking another person empty-handed is a crime. How would it be possible for an act of million times more than that, and with the use of firearms, be an act that was legally not wrong? ...

*The failure of the Nazis to respect, or understand the power and meaning of the theoretic evolution of laws in this world, cannot be made a reason to justify or mitigate... but even if this Charter, with the statements accepted as binding us all, are deemed containing new legal provisions, I stil will not give in from the request for the application thereof through this Court. The world's **rule of law** which has been ignored through the violations commited by these defendants, must be again be enforced in the name of millions of victims in my nation, not to mention the victims of other nations. I cannot accept a heretic reason saying that the society will develop and strongly uphold the rule of law over the sacrifices of people who are morally innocent, but that development in the field of law has never been made at the cost of the lives of people who are morally guilty..."*

That further, a number of arguments brought to this Nuremberg Tribunal as inquired why the nonretroactive principle was not absolute in its entitrety that, to some extent, were felt necessary for application. Those arguments included as follows:

(1) The argument termed the "'**Strong**' **Radbruch argument of the superior and compelling needs of justice**". This argument means to say that "even if the action was legal at that time when it was committed, the action was so reprehensive that justice allows (or requires us) to penalize that action now. Therefore, present penalization is retroactive, but this is an instance in which retroactive penalization is justified because superior principles of justice outweigh the principle of non-retroactivity";

(2) The argument "**Knowledge of Guilt and/or Knowledge that the Action Could be Subject to Later Punishment"**. It means to say that "*even if the action was legal at the time when it was committed, the actor knew [a] that in some important senses the action was wrong, and/or [b] that the action could well be subject to later punishment. Because of this knowledge, present penalization may be retroactive, but the underlying principle seeks to enhance security by preserving reasonable expectations of non-penalization, but here there was no reasonable expectation that the action would not be penalized eventually. In any case, the principle should not protect a person who knew his actions were wrong*."

(3) The argument, "**General Principles of Justice Override Existing Domestic Law**". This principles says, "e*ven if the action was formally legal under the law of the prior regime, the action was so reprehensible that it was not truly*

legal even then, because it violated principles of justice which overrode positive law at the time. Therefore, present penalization is not retroactive, because superior principles of justice overrode the formal law even then".

(4) The argument, "**Non-retroactivity through Re-interpretation of the Prior Law**", implies that "t*he action was so reprehensible that it was not even formally legal under the law of the prior regime: the domestic law of the prior regime, if properly interpretated, penalized the action at the time when it was committed – even though, under the legal practice of the prior regime, the law was interpreted in a manner that did not penalize the action"*.

(5) The argument, "**Clear Violation of Prior Law**". It implies that "*the action was so reprehensible that it was not even formally legal under the law of the prior regime; the law, under any plausible interpretation, penalized the action at the time when it was committed. Therefore, present penalization is not retroactive because the law of the prior regime, in any plausible interpretation, penalized the action even then"*.

That, based on the foregoing, it is clear that not all the nonretroactive principles apply absolutely. From the above descriptions, particularly the three international law instruments made as references, it is also clear that as long as it concerns criminal code, the essence of the problem of the nonretroactive principle is protection of a person from the action to penalize an act that was not considered a crime when the act was committed. This is what is actually prohibited. What is also prohibited is the creation of a new law that contains a heavier punishment than the punishment or as provided in the prior legal regime when the act was committed. Hence, in *a contrario*, overriding the application of the nonretroactive principle is plausible as long as it does not violate the two prohibitions noted before that at the same time serve as the limitations of the actions to override those nonretroactive principle which we have found in practice in the Nuremberg Tribunal.

How about the Bali bombing case? It is true that legally the bombing in Kuta-Bali was not a war crime, or fulfilling the judicial definition of crime against humanity. However, the absence of legal definitions does not automatically mean disregarding the event and the legal consequences it produced, or even to liberate the perpetrators as it will harm the very basic principle in the common criminal code, that has even been recognized as a "basic norm" (*jus cogens*, peremptory norm), namely, no crime may be left unpunished" (*aut punere aut de dere, nullum crimen sine poena*).

The bombing left 202 people killed, 188 of them foreigners, 519 people injured or permanently disabled – all are innocent men, women and children. The material effect included desctruction of at least 450 buildings, a drastic decline in tourists owing to cancellation of visits by 440 people, not to mention domestic visitors, increase in the unemployment rate to 450,000 – 500,000 people – loss of employment of thousands of children, women and unskilled workers. There are also non-material losses affecting hundreds of people – some are even now still taking therapy from prolonged trauma and fear. Without mentioning the figures and statistical data, by only watching the televised news showing the cruelty of the act, it is safe to say the bombing in Kuta-Bali was a crime that fulfills the five arguments overriding the

nonretroactive principle, as described above, if we speak of legal ideal that must submit to upholding justice.

That based on the above considerations, the application of Perpu Number 1 of 2002 through Perpu Number 2 of 2002 which were later enacted as a law, namely, Law Number 16 of 2003, there were not enough reasons to say that the retroactive application of Perpu Number 1 of 2002 on Suppression of Terrorism by Perpu Number 2 of 2002 (which was later enacted as Law Number 16 of 2003) have deviated from normative limitations known in various international law instruments as well as from the practical arguments in respects of overriding the nonretroactive principle because:

a. The act stipulated in Perpu Number 1 of 2002 as an act of terrorism based on positive law which had been existing before already constituted as a crime;
b. Perpu Number 1 of 2002 also did not make the punishment of the act which Perpu Number 1 of 2002 stipulated as an act of terrorism heavier.

Even from the viewpoint of the perpetrators, without considering whether the act by the Bali bombers fulfilled the legal definition of crime on humanity, the retroactive application of Perpu Number 1 of 2002 also fulfilled the five arguments on overriding the nonretroactive principle as is noted in the process of the Nuremberg Tribunal.

If in theory and practices that have been already accepted internationally it is acknowledged that the nonretroactive principle does not apply absolutely, in its entire substance, is the nonretroactive principle overridden by Perpu Number 1 of 2002 against 1945 Constitution, particularly Article 28i paragraph (1)? To answer this question, it is necessary to first find out what the provision of Article 28i paragraph (1) means as could be noted in the history of the creation of that Article.

Article 28i paragraph (1) of the 1945 Constitution stipulates, “The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever.”

That the history of the entry of this Article in the 1945 Constitution, which was adapted from Article 15 of the International Covenant on Civil and Political Rights (ICCPR), proceeded in long debates in the deliberation in the Ad Hoc Committee I of the Working Body of the People’s Consultative Assembly (MPR), namely, the committee that prepared the draft amendment to the 1945 Constitution, as well as in the Commission A sessions through the sessions of the Annual Session of MPR of 2000, particularly regarding the phrase “non-derogable for any reasons whatsoever,” The question then was that the phrase implies that the provision under Article 28i is absolute. The source of the debate is the phrase “non-derogable rights” in Article 15 of ICCPR which was translated into Indonesian as “shall be non-derogable for any reasons whatsoever” that some interpreted it as an absolute provision, while the larger part actually see the adverse, because if it is so interpreted, there will be conflicting views in the implementation thereof. It is because a person exercising his or her human rights will be facing the same human rights other people deserve to. However,

dissenting opinions persisted until the last minutes when the Commission A Plenary Session of the Annual Session of MPR of 2000 and it was only resolved with the addition of a new Article consisting of two paragraphs — Article 28j that stipulates:

(1) Every person shall respect the human rights of other people in an orderly society, nation and state.

(2) In exercising his or her rights and freedom, each person shall comply with the limitations provided by the laws, merely for assuring recognition and respect of the rights and freedom of other people and to fulfill fair charges with due respects of morality, religious values, security, and public order in a democratic society.

That, accordingly, seeing the purpose of its creation, the provisions of Article 28i paragraph (1) in the 1945 Constitution was not actually meant to be absolute and free from limitations as long as such limitations are provided in a law.

III. Article 28i paragraph (1) stipulates that The right to live, the right to be protected from torture, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that shall be non-derogable under any conditions whatsoever."

Article 28j paragraph (2) stipulates that: "In the exercise of his or her rights and freedoms, everyone shall be subject only to such limitations provided by the laws, solely for securing due recognition and respect for the rights and freedoms of other people and of fulfilling fair prosecution with due respects of morality, religious values, security, and public order in a democratic society."

However, interpreting the constitution will not be sufficient by getting the understanding literarily, let alone interpreting an article in isolation of the other articles of the Constitution. The Constitution's provision on a judicial review of a Law is to find out whether the law is against the Constitution, which means the Constitution as a whole instead of article by article. A comprehensive and systematic interpretation is required in order that the Constitutional Court be able to exercise the functions mandated by the Constitution. A literary and partial interpretation will produce inconsistent results.

With the wording of Article 28i as quoted above, is it necessary that for satisfying the request for justice, the wording of the article must be literarily exercised? In the case of hypothesis if only this Article must be exercised literarily, it will *not be allowed to prosecute using a new retroactively applied law*, even though that new law actually mitigates the punishment of the defendant compared with if the prior law is applied. If being protected from prosecution using a retroactive law is a right, while the new law actually mitigates the punishment, will the provision of protection from prosecution using a retroactive law still be a right? In the case where the new law is more mitigating, the right conferred by the law on the defendant should be to be treated in accordance with the new law. Article 1 paragraph (2) of Criminal Code (KUHP) stipulates that "If there is an amendment to the laws and regulations regarding the act already committed, the provision to be applied to the defendant shall be the most

favorable one. *The above article means that if a new law or regulation is mitigating to the defendant, it is the right of the defendant to be treated with the new law or regulation*." It means that a retroactive law is applied to the particular defendant. It is clear from this case that in accordance with the principle of law and justice that makes the basis of Article 1 paragraph (2) of KUHP, the application of prohibition on retroactivity with its positive norm contained in Article 1 paragraph (1) of KUHP is not absolute, but is actually valued by justice. It is this value of justice that will later determine the change in the right to be protected from the application of a retroactive provision in a particular situation that will later become the right to be treated with the provision that must be applied retroactively in another situation. The change in the right proceeds contradictively.

On the basis of rationality as described above, the application of a prior provision on an act that under the new law will come to a mitigating conviction will be seriously against the feeling of justice. The value of justice is a legal principle applying universally, and is inherently contained in laws. As an agent exercising the judicial power, the Constitutional Court abides by Article 24 of the Constitution, which stipulates that the judicial power shall be an independent power to conduct trials to uphold the law and justice.

The value of justice appears to be directly related to a concrete case and cannot be generally applied, as each case has its characteristics. It will be felt much unjust if applying a new provision while the particular provision is more incriminating than the prior provision on a defendant being charged using the prior provision but because the act has not been undergone trial. Hence, the absolute nature of the refusal of retroactivity may create the feeling of injustice.

In the case of the petition filed by the Appellant, it is necessary to review it based on justice, whether the new provision, namely, the Law requested for a judicial review (terrorism) absolutely produces a new offense, that is, making an act that was before not an offense become an act of crime. The act of terrorism is not a new act of crime at all because, despite the absence of a Law on Terrorism, an act subject to punishment under the Law on Terrorism, may still be charged under criminal code effective before, because the act causes death of other people is a common offense. Similarly, causing injuries of other people, destruction of other people's properties, and many more such acts, may be charged on the perpetrators of terrorism as common crime. A person who had committed an act of terrorism before the enactment of the Law on Terrorism may still be charged under the provisions of the criminal code existing before. The perpetrators are completely aware of these, that was why they sought hideouts from the law enforcement agencies after committing their acts. The reason of making their acts subject to punishment under criminal law, though without using the terrorism law because their acts were seriously against justice universally. The presence of law on suppression of terrorism actually does not bring about changes in the sense of justice. However, the Bali bombing actually struck the sense of justice after seeing the huge number of victims, and the impacts brought about by the Bali bombing. Terrorism does not aim at certain targets as their victims, and this causes insecurity of the society. The more the victims – without distinguishing who the victims are – the more successful is the action to create terror among the society. The psychological conditions of the society is shocked, and every person finds himself or

herself in continuous insecurity without knowing why. It is true, the material effects of terrorism, in terms of deaths and injuries of people, may still charge the perpetrators under the existing law. However, the law also considers the motives or the impetus of the terrorists' actions. An ordinary act of murder has a different "mensrea" from that in terrorism, as terrorism is designed to create terror or fear among the society.

The nonretroactive principle and the legality principle are originally intended to protect the members of the society from arbitrary actions by the authorities who through the statutory body may create laws that serve their purpose of being highly repressive, and the use of laws as a tool for their mere interests. Terrorist intends to create terror among the society so that the targets are the general public. Terrorism will always find crowded but inadequately secured locations as their targets. Hence, terrorism is a crime with the society as their victim, and not particularly aiming their actions to the law enforcement agencies or the victims that are engaged in a case with the perpetrator. If nonretroactive principle cannot absolutely be applied to terrorism which has the mode of operation of creating terror and the victims being the members of the society who are not engaged in any cases with the terrorist, then the sense of justice will be seriously struck. Terrorism is a crime without any clear targets of human individuals, but it is the society that makes its target, and it is this attribute that distinguishes an act of terrorism from an ordinary offense. Hence, the Law on the Suppression of Terrorism aims to directly protect the society from any acts that will create terror. This function of the State in protecting its people in this respect is clear, that is, to act as mandated in the Preamble of the 1945 Constitution, that is: to protect the whole Indonesian people and their entire homeland of Indonesia, and in order to advance their general welfare, to promote the intellectual life of the nation, and to contribute to implementing order in a world founded upon independence, eternal peace and social justice."

This basis is different from the nonretroactive principle that is based on the efforts to protect the citizens from arbitrary acts by the statutory body.

The retroactive application of the law on suppression of terrorism only on the case of the Bali bombing, is highly acceptable as the elements of the motive of the case and the target of the action were clear, that were, creating terror or fear among the society, while in other cases, the motives were different. The conflict in Maluku or other conflicts will admittedly create terror and can bring about huge number of victims, but the causes of such victims were clear – a physical conflict between groups and communities. Other victims other than the conflicting parties were indirect victims because of the expanding physical conflict. The statutory body has taken the right step by not applying the Law on the Suppression of Terrorism on the conflicts in Maluku and other conflicts in Eastern Indonesia because these conflicts developed from a different cause. The parties or groups in the conflict are in disagreement of issues that trigger conflicts among them, that efforts to end the conflict will best be settled through mediation. A large number of victims in an event is not the only factor in determining whether the act qualifies as an act of terrorism. In the case of the Bali bombing, there is no basis for initiating an amicable settlement between the perpetrators and the victims, because there are no issues that may create misunderstanding between the two. Hence, the application of the Law on the Suppression of Terrorism only on the Bali bombing case and not on the Ambon and

Poso conflicts, is not a discriminating policy but is based on essential and correct cause, namely, difference in the background of the acts that brought about losses of lives.

In the investigation of the Bali bombing case, the investigators are given more authorities compared with those in common procedure. However, this does not mean that the defendants will lose their rights of being treated under the principle of presumption of innocence, being tried by an independent court, and the guarantee of fair and due process of law in their trials. The defendants still deserve the right to a compensation or rehabilitation on being taken an act without legal grounds.

IV. That according to the international law, human rights, civil and political rights are not absolute. The right of a person may be in conflict with the right of others, or the right of an individual may be against the values of the society and public interests. Both the general statement of the United Nations Organization (UNO) on Human Rights and the International Covenant on Civil and Political Rights acknowledge that the state may limit the rights if it is required for the protection of certain public interests. The UN general statement, Article 29 (2) stipulates: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in democratic society".

It could be concluded from the stipulation of Article 29 (2) of the UN Universal Declaration given above that limitations of the human rights are permissible if such fulfill the criteria of just, morality, public order and general welfare in a democratic society. The Covenant on Civil and Political Rights allows derogation of the covenant's provisions, in time of emergency.

Article 4 of the Covenant stipulates: in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

As stipulated in Article 4 of the International Covenant on Civil and Political Rights, it could be concluded that the State parties may derogate from their obligations only to the extent required in an emergency. However, the States shall keep on their other obligations as provided by the Covenant, without discrimination of race, colour, sex, language, religion and social origin."

The Constitutional Court shall before examining the case brought to it find out whether there is cultural relativism of the human rights that is deemed universal.

On this issue, the World Conference on Human Rights in Vienna in 1993 came out with the following statement: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights

globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities an various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

Indonesia acknowledges that Human Rights are universal. However, it should also be noted that the international society, as stated in the Vienna Declaration of 1993, has also acknowledged and agreed that the application thereof shall be within the authority and responsibility of the national governments with due respects of the varied values, histories, cultures, political systems, social and economic growth rates and other factors of the respective nations.

The nonretroactive principle in criminal code, known as the principle of "*Nullum Delictum, Nullapoena; sene previa lege poenali*" has, in practice, has been facing pros and cons in its application.

Those supporting the nonretroactive principle bases their views on the legality principles in the criminal law in order to ensure legal certainty, that the provision on the nonretroactive principle is found in Article 1 (1) of KUHP and in the UN Universal Declaration on Human Rights, Article 11(2), and the International Covenant on Civil and Political Rights, Article 15(1). However, those supporting the retroactive principle as an exception to the nonretroactive principle believe that in practice, the International Court as well as the National Courts find there is the legal need in the application of the nonretroactive principle. The reasons brought to by those in favor of the retroactive principle are:

i. That an offense already committed has become an act of crime according to the international law, so that the Law enacted in the future may be applied retroactively to the particular act of crime;

ii. Though an act when done was formally one that was in accordance with the laws, the act was reprehensible that was against the general principles of justice, the general principles of justice may override the positive law (prevailing law);

iii. Though an act is legal according to the domestic law, the act is against the international law that the international law may override the domestic law;

iv. Though an act was legal when committed, the act was so reprehensible that according to the superior and compelling need of justice, shall be punished;

v. Though an act was legal when it was done, the subject who did it was aware that the act was punishable under future laws. Because of his knowledge, the perpetrator must be punished retroactively.

Besides the above considerations, the Court shall also discuss the concept of the principle of *Nullum Delictum, Nulla poena, sene previa lege poenali* provided in the UN Universal Declaration on Human Rights, International Covenant on Civil and Political Rights.

Article 11 (2) Universal Declaration of Human Rights provides: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence on account, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.
While Article 15 of the International Covenant on Civil and Political Rights provides:

(1) ”No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The two articles above – of the Universal Declaration and the International Covenant on Civil and Political Rights – show that the *Nullum Delictum* principle is only applied when the offense does not constitute an act of crime according to the national law or the international law. Hence, if the particular act of crime has constituted one according to the national law or the international law, then the *Nullum Delictum* principle shall not apply.

It should be noted that the provision of Article 15 (2) of the International Covenant on Civil and Political Rights given above, which provides that nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
It could then be concluded that if the act or omission is according to the general principles of law recognized by the community of nations is a crime, then the Nullum *Delictum* principle may be overridden.

Law Number 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing, was enacted when the world was shocked by terrorist acts that drew the important attention of the world community as a whole. The action used violence that threatened lives without distinguishing who the victims were, irrespective of the nationalities, and had caused loss of lives, as well as serious destruction of properties, living environment, economic sources, and had caused political economic sources, turmoil in social and political life, and even a threat to the existence and sustainability of a nation.

As mandated in the Preamble of the 1945 Constitution of the Republic of Indonesia, the State shall protect the whole Indonesian people and their entire homeland of Indonesia. Accordingly, the State has the obligation to protect all its citizens from any potential threats of national, trans-national, much less international

extents. The State is also obliged to defend its sovereignty and to maintain the national unity and integrity from any forms of threats from internal as well as external sources. Based on the above considerations, the Government sees the public emergency to enact Perpu Number 2 of 2002 on the Application of Perpu Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing of October 12, 2002.

Besides the consideration given in the above paragraph, the United Nations has issued two (2) international instruments in the forms of Conventions on suppression of international terrorism. The Conventions are:

i. International Convention for the Suppression of Terrorist Bombings (1997) and
ii. International Convention for the Suppression of the Financing of Terrorism (1999).

Besides the above, the United Nations has also issued two (2) Declarations, namely:
i. Declaration on Measures to Eliminate International Terrorism (1994) and
ii. Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (1996).

It is clear from the above descriptions that the world community has agreed to jointly suppress international terrorism in all its forms and manifestations and have determined that all perpetrators of terrorism be taken to court.

To determine whether Law Number 16 of 2003 on the Effectiveness of Government Regulation in Lieu of Law Number 2 of 2002 on the Application of Government Regulation in Lieu of Law Number 1 of 2002 on Suppression of Terrorism on the Bali Bombing of October 12 is against the 1945 Constitution of the Republic of Indonesia Article 28i (1), particularly the phrase "the right to be protected from being charged on the basis of a law that is applied retroactively and human rights that shall be non-derogable under any conditions whatsoever," it must first be defined of what is meant by "protected from being charged on the basis of a law that is applied retroactively and human rights that shall be non-derogable under any conditions whatsoever".

In criminal law, the wording "protected from being charged on the basis of a law that is applied retroactively" means the criminal law shall not be applied retroactively. This principle is known as the *Nullum Delictum, Nulla poena sene previa lege poenali* principle. This principle is contained in Article 1 paragraph 1 of the Criminal Code which stipulates "No acts may be penalized unless they are based on the penalty provided in a prior law." It means there must have been an criminal offense before and the law must have been existing before. Now, it is necessary to see whether Law Number 16 mentioned above has made a new delict. An accurate observation of it shows that Law Number 16 has not made a new act of crime, as all the crime offenses punishable under Law Number 16 are offenses punishable under the Criminal Code, as well as the International Convention that has been effective. These are identifiable in the offenses provided in Articles 6 through 19. Besides, the perpetrators of the Bali bombing case were aware and realized that their offenses are punishable by laws. The perpetrators also realized their offenses had caused a huge

number of victims, particularly people of other nations (the Whites), which is an indication of hatred to foreigners and this means an act of immorality. An act based on hatred to other nationals and an act of immorality, are those classified as against the general principles of law recognized by civilized nations, and altogether against the natural law.

V. Based on the foregoing descriptions, Law No. 16 of 2002 jo. Government Regulation in Lieu of Law No. 2 of 2002 on the Effectiveness of Law No. 15 of 2002 jo. Government Regulation in Lieu of Law No. 1 of 2002 on Suppression of Terrorism retroactively to the Bali Bombing on October 12, 2002, is not against the 1945 Constitution because it is done in a limited manner, is done for the sake of justice in a particular situation, and there are no compelling reasons to deny the application of the said Law on Suppression of Terrorism on the Bali Bombing Case of October 12, 2002.

In witness whereof, this decision was made in a Plenary Session of the Constitutional Judges on Thursday, July 22, 2004, with five (5) judges supporting and four (4) judges presenting a dissenting opinion, and was pronounced this Friday, July 23, 2004, by us, Prof. Dr. Jimly Asshiddiqie, S.H., as Chief concurrently Member, accompanied by Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LLM., Prof. H.A. Mukthie Fadjar, S.H., M.S., Dr. Harjono, S.H., M.CL., H. Achmad Rustandi, S.H., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H. as Members, with the assistance of Widi Astuti, S.H., as Substitute Registrar, in the presence of the Attorney of the Appellant and the Government.

CHAIRMAN,

sgd.
Prof. Dr. Jimly Asshiddiqie, S.H.

MEMBERS,

sgd. Prof. Dr. H.M. Laica Marzuki, S.H.	sgd. Prof. H.A.S. Natabaya, S.H., LLM.
sgd. Prof. H.A. Mukthie Fadjar, S.H., M.S.	sgd. Dr. Harjono, S.H., M.CL.
sgd. H. Achmad Rustandi, S.H.	sgd. I Dewa Gede Palguna, S.H., M.H.
sgd. Maruarar Siahaan, S.H.	sgd. Soedarsono, S.H.

SUBSTITUTE REGISTRAR

sgd.
Widi Astuti, S.H.