

FORMULATION MODEL OF RETROACTIVE IN THE WORLD (COMPARATIVE STUDY WITH INDONESIAN PENAL CODE)

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ABSTRACT

The law became an important instrument of public life in many countries. None of countries in the world can be left out of the formulation of the law to organize the life of society. The big difference in culture and behavior of the state allowed the difference on the formulation of crime from one country to another. In addition, the change of time and civilization also affects the changes and the differences in the perception of people to an act. This is called public relativity view of evil deeds. Relativity of crime is evident in terms of criminalization and decriminalization. In criminalization, an act could be a criminal offense, if it is given a "label" by law and referred to a criminal offense. Criminalization of a new act, generally always associated with retroactive. In the formulation of penal code in many countries, the retroactive is prohibited because it is considered as a violation of human rights which affirm the right not to be prosecuted based on retroactive law. Nevertheless, it will be unjust, if an evil deed is not punished yet because there are no written rules that prohibit it. As a solution, "a more favorable clause" will be the way out and the means of justice for the community in transition law. Through the existence of "a more favorable clause", the value of justice can be upheld. There are several models of the principle of "a more favorable clause" in formulating the model. There are two models of formulation, namely: (1) the implementation of "a more favorable clause" narrowly such as in the Indonesian Penal Code, the England Penal Code and Norway Penal Code, and (2) the implementation of "a more favorable clause" widely such as in the the Korean Penal Code, Thailand Penal Code, the Polish Penal Code, the Portugal Penal Code and Argentina Penal Code

Keywords: Retroactive, penal code.

INTRODUCTION

The tradition of the common law has formulated strictly the principle of legality that an act cannot be imprisoned except by authority of the legislation before the act was committed (George P. Fletcher, 1998: 207-208, Schaffmeister, 1995: 4-5). The formulation like this in criminal law is called the formulation style "Nulla poena sine Lege". It means that in order to ensnare someone with the required criminal law, there are three signs that must be met, namely: (1) there must be a written rule, (2) The written rules must exist before (bad) deeds, and (3) it is not allow to use an analogy.

The formulation of the principle of legality as defined above, it just enforce the law in the future clearly. Thus, by *argumentum a contrario*, the legality principle prohibits the imposition of the law retroactively to the rear. *Retroactive or Retrospective*, according to Black's Law Dictionary is defined as *extending in scope or effect to matters that have occurred in the past* (Bryan A. Garner, 1999: 1318). While, *Retroactive law* means *a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act come into effect.* (Bryan A. Garner, 1999: 1318)

Retroactive implementation of the law is generally attributed to change into lighter legislation. Commonly, retroactive enforcement in different countries has different formulation, too. Many countries impose much unlimited, but some countries also impose only limited to the prior court decision. Unlimited retroactive imposition of new rules ease means that it can be implemented to the convict. Despite the new rules are lighter enacted newly after the perpetrators of criminal acts regularly dropped as criminal acts.

RELATIVITY OF CRIME

Crime is a social construction which means that the determination of an act is depending on the construction of society. The categorization of crime is bounded by time and space. Therefore, the crime itself is relative which means that the crime of criminal law is very different point of view with the criminology/sociology (John. E. Conklin, 1995: 8, GP. Hoefnagels, 1973: 90).

A crime under the criminal law is defined as any acts of human attitude against predetermined force as a law and meets the formulation of criminal law provisions. While criminology provide broader restrictions. It encompasses all human acts deviant attitude (social phenomena) that cause a negative reaction from the public. This definition could happen even had overlapping contradiction between the criminal law and criminology aspect to the crime. Sometimes, a particular act is considered evil by criminal law (statutory law), but according to criminology aspect (the public) is not a crime. For examples, in Indonesia, the riders must turn on the light of their motorcycle in the whole day (day and night) and wear the helmet, insignificant petty theft and so on. The opposite also can happen that a particular act is considered as very bad in the view of criminology (community), but under criminal law (legislation) is not a big case. For examples, in the Indonesian criminal law is a gambling (although without permission) (Moeljatno, 1996: 111), sexual adultery between two people who have no marital relationship with consensual (no coercion) (Moeljatno, 1996: 104-105).

The difference of view would worsen, if it were associated with a change in outlook and culture of the society against certain acts. Sometimes, an act is considered evil at any given time, but it is not a crime anymore in another times. Conversely, a particular act is not considered as evil deeds, but it is considered a crime on other occasions. At first glance, this is a common thing because nothing is permanent in life except change itself (Larry J. Siegel and Joseph J. Sienna, 2007: 83-84). However, it would be a problem if it were associated with the determination of an act becomes a criminal act (retroactive)¹. The presence of retroactive lately surfaced as a discussion of legal experts (criminologists) because many criminal laws are beginning to implement the retroactive. The implementation of the law is clearly backward against the principle of legality that has solid structures of the criminal law.

Relativity of crimes is also evident in terms of criminalization and decriminalization. In criminalization, an (ordinary) act could be a criminal offense if it is given a “stamped” by law and referred to as a criminal offense. Indonesia became a good example of the criminalization. Almost in every field is always called the criminal law as its enforcement efforts. Many new products that use the penal sanctions as a reinforcement in both the criminal law and criminal laws on administration. The first term used to refer the act intended to regulate and cope with certain crimes. While the second term is intended as an administrative law but criminal sanctions call as reinforcement in law enforcement. It is clear that it is not a crime at the first and becomes a felony then through relativity of crime.

On the other hand, decriminalization also showed its relativity of criminal law. An offense in the past are no longer considered again in the present. Fall into this category in Indonesia is the law No. 26 of 1999 which revoked the law No. 11 / Pnps / 1963 on Eradication/ Subversive Activity. Certain actions initially regarded as subversion and threatened by criminal sanctions were revoked and made a “neutral” act which not convicted.

Regarding the discourse of crime relativism (criminal offense), it is very possible that an evil deed outlook could change by the change of time.

RETROACTIVE IN INDONESIAN PENAL CODE

The Penal Code has provided the basis of the laws applicable to the transitional period at a time when there are changes in legislation (Barda Nawawi Arief, 2010: 10). Indonesian Penal Code hold the principle of subsidiarity when there are changes in legislation as defined in Article 1 line (2) penal code as follows:

“If after the deed is done and there is a change in the law, the lightest rules are used for the defendant”

Thus, according to the rules of Article 1 line (2), the lightest criminal law to be imposed against the defendant. Therefore, if the new rules were more severe when compared to the old one, the principle of legality is purely applied (law is still applied straight forward/use the old rules). However, if the new rules are lighter, they must be applied. Thus, the retroactive proved possible to be implemented. The possibility of retroactive effect according to the Penal Code as transitional rules if:

- a. after a criminal act carried out, there was a change in legislation/ no new legislation.
- b. the new legislation (the change) is more favourable to the accused ((Sudarto, 2009: 43, Utrecht, 1960: 222-228).

Regarding the meaning of “change of law”, the literature of criminal law recognize three doctrines about the changes in legislation (Sudarto, 2009: 44-46):

- a. Formal Doctrine (by Simons)
The changes are made criminal law texts itself. So, the text of the legislation concerned must change the word/ sentence. This is a narrow doctrine.
- b. Limited Material Doctrine (by van Geuns)
The changes are made through the faith of law (the Criminal Law). Unlike the first model, the second doctrine is broader because it is not only limited to text changes, but also the changes in other laws could be used if it is still in the field of criminal law.
- c. Unlimited Material Doctrine
This doctrine postulated that the origin of any changes to benefit the accused which means no change in the law. Thus, the change in the other legal field (not necessarily criminal law) can be used as a basis for saying there had been a change. The third doctrine is known as the most comprehensive doctrine.

Meanwhile, according to the Sudarto (Sudarto, 2009: 47), “the lighter” must be interpreted widely. It means not only the criminal but also the whole system of punishment including the crime ordinary offense or to a complaint.

RETROACTIVE FORMULATION IN THE WORLD

Each country has its own Penal Code with all specific things in formulating the rules. There are several countries that strictly regulates the applicable legal rules in transition time and allow the entry of retroactive enforcement, but some do not set them.

Here is presented formulation Criminal Code of the few countries in regulating the retroactive.

- a. England

¹ retroactive is the rule of law which will be implemented to the deeds, but there is no (written) law is set.

Retroactive is not expressly defined in the penal code because the law in England is sourced from case law (law of habit/ custom). Generally, the law of custom does not recognize the principle of legality. In this country, the principle of legality is not formally defined, but it animates verdict (Barda Nawawi Arief, 2006: 25).

b. Korea (Barda Nawawi Arief, 2006: 78-80)

Article 1 (criminality and punishment) penal code of Korea formulated:

- (2) *Where a statute is changed after a crime has been committed with the effect that the conduct no longer constitutes a crime or that the punishment imposed upon it is less than the provided for by the old statute, the new statute shall be applied.*
- (3) *Where a statute is changed after a sentence imposed under it upon a criminal conduct has become final, with the effect that such conduct no longer constitutes a crime, the execution of the punishment shall be remitted.*

Korean Penal Code is set retroactively in case there are changes in legislation. It seems similar to Indonesian Penal Code. Korean Penal Code also adheres to the principle subsidiarity (prioritize relief for offenders). Therefore, it is also possible to apply the retroactive. However, retroactive in Korea will be applied if:

- 1). There is a change in the law after the crime is committed;
- 2). The change caused by (1) the act is no longer a crime, or (2) the criminal threatened to be lighter.

In Indonesian Penal Code, there is no formulation of the meaning and scope of "changes in legislation". Nevertheless, Korea asserts that it includes:

- 1). An act that may be liable (which was originally a criminal act becomes not a criminal offense / decriminalization);
- 2). Punishment threatened (originally weight becomes lighter);

It means that if there is a change in the law after the final court decision, it can still be adjusted then.

According to the Penal Code of Korea, if there is a committed acts (and had been sentenced based on the old law) but it is no longer a criminal offense according the new law, the execution of criminal will be cancelled².

c. Thailand (Barda Nawawi Arief, 2006: 80-82)

Article 2 of the General Regulations Book I Penal Code of Thailand formulated:

- (2) *If according to the law provided afterwards, such act is no more an offence, the person doing such act shall be relieved from being an offender; and if there is a final judgement inflicting the punishment, such person be deemed as not having ever been convicted by the judgement for committing such offence. (3) If, however, he is still undergoing the punishment, the punishment shall forthwith terminate.*

According to the Thai Penal Code, if any decriminalization (changes in legislation which states originally a criminal act becomes not a criminal offense):

- 1). If there is no court decision: the defendant will be freed as an offender;
- 2). If there is a final court decision³:
 - If the criminal execution has not undertaken, the convicted/ accused is considered as never convicted;
 - If it is ongoing criminal execution, the execution would not be continued and be terminated soon.

If the new law only reduce the threat of punishment:

Article 3 stated the more favourable legislation will be applied, unless the matter has obtained permanent legal force based on old legislation.

- 1) If the sentence imposed heavier than the criminal sanctions under the new law, then the court will decide to return (re-determining) criminal offense according to the new law. In determining the return, the court may set a lighter punishment than the minimum according to the new law, or if it is already served enumerated by the offender, the court may release it.
- 2) If the defendant was sentenced to death (according to the old legislation) but according to the new legislation that should be charged not as heavy as the death penalty, the executions would be delayed. Then, it is considered that the death penalty was replaced with the heaviest punishment under the new law.

² In Indonesia, it is only the valid until the binding. One thing that is still unresolved in Korea Penal Code on how the new law only relieve the criminal threat, not the decriminalization?, and what are the forms of mitigation for convicted?

³ One thing that has not been set yet. That is if the convicted have served their entire criminal executions, whether rehabilitation is possible (the return of the good name) or not.

- d. Poland (Barda Nawawi Arief, 2006: 82-84)

Article 2 General Section: *Principles of Penal Liability*

Article 2

- (1) *If at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new shall be apply, however the former law should be applied if it is more lenient to the perpetrator.*
- (2) *If according to the law the act referred to in a sentence is no longer prohibited under threat of penalty, the sentence shall be expunged by operation of law*

If there are changes in legislation, it is used the new law (precedence) and still used the lightest legislation. So, if the old legislation is lighter then the new one, they used the old one. And, if the old law and the new have no differences, they used the principle of “*lex posterior derogat legi priori*”, the new law will be applied. If the new law decriminalizing old legislation, the criminal acts under old legislation will be removed into force of the new legislation.

- e. Norway (Barda Nawawi Arief, 2006: 84-85)

Article 3 *General Provisions* stated:

If the penal law has been amended in the interval between the commission of an act and the trial, the penal provisions in force at the time of commission are applicable, unless otherwise provided.

The penal provisions in force at the time of decision in a particular case apply when they are more favourable to the accused than the penal provisions in force at the time of the commission of the act. Provisions which come into force after adjudication, however, shall not apply in case the decision is appealed or rehearing requested.

Principally, the more favorable law is applied in this country. Compared with the Indonesian Penal Code, Norwegian is limited. According to Jurisprudence of Indonesia, the implementation of the new law could also be applied to the process of appeal and/ or cassation. While in Norway does not apply the legislation in terms of their ease reexamination (appeal or cassation).

Norway prefers old legislation. The new law only can be applied if:

- 1) The new law will be applied before the judgment;
- 2) The new law is more favorable than the old legislation.

- f. Russia (Andi Hamzah, 2008: 21-22)

Although Russia does not regulate strictly the principle of legality, but its Penal Code also regulates the lighter principles. Article 10 of the Russian Penal Code formulated “If there is a change in the law that applied, the most favourable will be applied to the accused”. The advantages for the defendant could be a reduction the time of punishment if the new law reduces the punishment for that action.

The principle of legality is not formulated with the model as it is generally done by the Penal Code of other countries which require the provision of criminal law before the deed is done. The principle of legality according to Russia was formulated uniquely in Article 3 as follows:

- (1) *The criminality of a deed, and also its punishment and other consequences shall be determined by the present code alone.*

- g. Portugal (Andi Hamzah, 2008: 45-46)

Article 2 of the 2nd Portugal Penal Code formulated:

A punishable act in according with the law in force at the moment of its completion ceases being punishable if a new law eliminates it from the number of infraction, in this case if there has been condemnation, even if it became a definitive sentence, the execution ceases and all its penal effects.

It means that even after their sentencing verdict remains, the laws that benefit the convicted person can still be applied. Thus, the Portuguese Penal Code imposes “subsidiarity principle” for the benefit of the wider accused/ convict.

The Penal Code of Portugal stressed how the attitude towards laws that apply temporarily. Article 2 of the 3rd Penal Code of Portugal formulated:

If the law is valid for a determined period of time, act committed during this period continues to be punished.

- h. Argentina (Andi Hamzah, 2008: 98)

Argentina has formulated its legislative changes and continued to recognize the principle of subsidiarity. Thus, it is possible to implement the retroactive. Article 2 of the Penal Code of Argentina formulated its changes in legislation, and even expanded to include convicts who are ongoing criminal. So, if the law is changed, and new criminal punishment is much lighter or removed, it will reduce the punishment of the convicted person.

Based on the description of retroactive formulation from the various countries, it can be seen the differences in the style of the formulation. At least, there are two models of the formulation, namely: (1) the

implementation of a more favorable clause narrowly such as the Indonesian Penal Code, the England Penal Code and Norway Penal Code. (2) the implementation of a more favorable clause widely such as the Korean Penal Code, Thailand Penal Code, the Polish Penal Code, the Portugal Penal Code and Argentina Penal Code. However, there is one country that did not explicitly formulate its retroactive. It is Russia.

The retroactive formulation rule in positive law in Indonesia recently (*ius constitutum*), primarily in the Penal Code remains lack of perfection because it only works when a criminal offender still existed as a suspected person. It will alleviate the consequences of the new law (effect of the change). The new law has no effect although the offender has been convicted by final legal force (*inkracht van gewijsde*). These weaknesses attempted to be addressed and closed through the concept of the Penal Code (*ius constituendum*) by applying the lightest punishment more broadly, even for those who are ongoing the criminal punishment. However, one thing that still need to be considered in the formulation concept. It is the balance of the meaning of the Penal Code in terms of "ease". This term should alleviate not only measured by the offender, but also measured of the victim both individuals and society.

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