



Revitalizing Justice in Fiqh: Revisiting Non-Retroactive Principles to Address Sexual Violence

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Abstract

Handling sexual violence cases requires a holistic, human rights-based approach, encompassing prevention, protection, law enforcement, recovery, and ensuring victims' access to justice. Islam advocates equality for all, but its implementation is constrained by the improper handling of many sexual violence cases due to the non-retroactive Sexual Violence Law. This paper proposes the urgency of upholding the principle of retroactivity in criminal law and *Fiqh Jinayah* to build an anti-sexual violence construction based on justice and equality. This normative juridical research employs conceptual, statutory, philosophical, and historical approaches. This approach provides an in-depth understanding of the concept of justice in the handling of sexual violence, according to Sharia. This study uses the Islamic legal literature and comparative legal studies to examine the urgency of upholding the retroactive principle in criminal law and *Fiqh Jinayah*. This study confirms that applying the retroactive principle to sexual violence is consistent with the six characteristics of *Maqasid Sharia*: cognitive nature, interconnectedness, wholeness, openness, multidimensionality, and purposefulness. The retroactive principle is necessary in cases of sexual violence as the primary rule in addressing such crimes, in addition to complementing existing laws and regulations. This principle is crucial to ensure fair law enforcement in cases of sexual violence.

Keywords: Child Adoption, Conflicts of Jurisdiction, Family Lineage, Guardianship.

Abstrak

Penanganan kasus kekerasan seksual membutuhkan pendekatan yang holistik dan berbasis pada hak asasi manusia, yang mencakup pencegahan, perlindungan, penegakan hukum, pemulihan, dan memastikan akses terhadap keadilan bagi para korban. Islam menganjurkan kesetaraan bagi semua umat manusia, namun penerapannya terkendala. Contohnya, tingginya kasus kekerasan seksual yang tidak tertangani dengan baik karena UU Kekerasan Seksual tidak bersifat retroaktif. Penelitian ini mengusulkan urgensi penegakan prinsip retroaktif dalam hukum pidana dan Fiqih Jinayah untuk membangun konstruksi anti kekerasan seksual yang didasarkan pada keadilan dan kesetaraan. Penelitian yuridis normatif ini menggunakan pendekatan konseptual, perundang-undangan, filosofis, dan historis. Pendekatan ini memberikan pemahaman mendalam tentang konsep keadilan dalam penanganan kekerasan seksual menurut hukum Islam. Dokumen hukum yang digunakan berupa literatur hukum Islam, dan studi perbandingan hukum untuk mengkaji urgensi penegakan prinsip retroaktif dalam hukum pidana dan Fiqih Jinayah. Dalam kajian ini, ditegaskan bahwa penerapan prinsip retroaktif terhadap kekerasan seksual sesuai dengan enam ciri Maqāshid Syariah, yaitu fitrah, keterkaitan, keutuhan, keterbukaan, multi dimensi, dan tujuan. Prinsip retroaktif diperlukan dalam kasus kekerasan seksual sebagai aturan utama dalam menangani Tindak Pidana Kekerasan Seksual, serta sebagai pelengkap bagi peraturan perundang-undangan yang sudah ada. Prinsip retroaktif penting untuk menciptakan penegakan hukum yang adil dan berkeadilan dalam kasus kekerasan seksual.

Kata Kunci: Keadilan; Prinsip Retroaktif; Kekerasan Seksual Berbasis Gender.



Introduction

Islam views human rights as inherent and beneficial for humanity, as embodied in Sharia law and revealed through divine revelation. Justice is upheld based on the principle of equality or egalitarianism, without discrimination. Equality in Islam is interpreted as an equal way of treating human beings, with regarding matters of the afterlife determined by the individual piety level. The Islamic differences human rights system upholds the basic principles of equality, freedom, and respect for fellow human beings.¹

Islam has the highest respect for women and eliminates their exploitation. However, research in various regions in Indonesia shows that law enforcement regarding sexual violence remains suboptimal, as evidenced by the increasing number of cases of sexual violence reported in previous studies. For instance, cases of sexual violence at Islamic universities in West Java by I Muhsin, S Ma'mun, and W Nuroniyah, the evaluation of the enforcement of legal violence in sexual Islamic institutions and universities by A Riyanto et al., child sexual violence cases in Jinayat Fiqh by N Aprilianda, M Farikhah, L A Krisna, and the rise of sexual violence in cyberspace by S Mardani et al. The results of previous studies show that there are disparities in criminal law for perpetrators of sexual violence in Indonesia by R Rahmawati, and H Hartiwingsih, Indonesia's sexual violence issue persists due to weak criminal law regulations by I Kamalludin et al. M. I. Juliansyahzen and Octoberrinsyah suggest that post-Law Number 12 of 2022, Indonesia's regulations on sexual violence crimes align with Maqāshid Sharia principles. Previous studies have indicated that sexual violence in Indonesia was inadequately addressed prior to the enactment of legislation on sexual violence crimes. Therefore, this study delves into the feasibility of retroactive measures for sexually violent crimes in Indonesia.

Since 2017, the frequency of sexual violence against women has been increasing rather than decreasing, with 2021 marking the highest number of cases in the past five years. Table 1 lists cases of gender-based sexual violence over the last decade from the National Commission on Violence Against Women of the Republic of Indonesia (KOMNAS Perempuan). The data excluded non-gender-based information and statistics from Religious Justice Institutions. Additionally, cases related to divorce due to economic factors, religious conversions, alcohol abuse, and other non-gender-related causes were filtered out.²

Table 1. Gender-based sexual violence in Indonesia

Year	Sexual Violence Against Women	Reports of Sexual Violence Complaints
2017	348203	1301
2018	406178	1234
2019	431471	1419
2020	299911	2389
2021	454772	4322

¹ Kusumasari Ayuningtyas, "Hentikan 'Tradisi' Penghakiman Korban Pelecehan Seksual | SOSBUD: Laporan Seputar Seni, Gaya Hidup Dan Sosial | DW | 29.06.2021," 2021.

² Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana* (Semarang: Universitas Diponegoro Press, 1994), p. 34.

In 2021, The National Commission on Violence Against Women received 1933 complaints, an increase of 81%.³ This surge poses a challenge for KOMNAS Perempuan,⁴ averaging approximately 16 cases per day over 263 working days, with limited resources for handling them. This number has almost doubled from 2020 when the average number of cases that KOMNAS Perempuan needs to respond to is nine cases per day. This finding indicates high public expectations regarding the handling of sexual violence. This requires support from strengthening resources, structures, and special budgets for better policies.⁵

On 12 April 2022, the Bill on Sexual Violence Crime (hereinafter referred to as the Sexual Violence Act) was passed at the DPR RI Plenary Session. The ratification of the Sexual Violence Act is important for strengthening regulations regarding the treatment and responsibility of the state to prevent, and handle cases of sexual violence, and recover victims. Moreover, several factors must be addressed by Government, Law Enforcement, and Society. This is because instances of sexual violence are not confined solely to the physical world, but also occur extensively in cyberspace.⁶

Referring to Article 1, Point 1 of Law Number 12 of 2022 (Sexual Violence Act), Sexual Violence Crimes refer to all acts that fulfil the elements of a criminal act as regulated in this law and other acts of sexual violence as regulated in the law if they are not specified in this law. Previously, in the Academic Text of the Sexual Violence Act, sexual violence was defined as rape, sexual exploitation, or human trafficking. It did not specifically mention sexual purposes. However, this rule was limited compared to the types of sexual violence identified. After the issuance of the Sexual Violence Act, there were nine types of sexual violence crimes: non-physical sexual harassment, physical sexual harassment, forced contraception, forced sterilization, forced marriage, sexual torture, sexual exploitation, sexual slavery, and electronic-based sexual violence.⁷

In addition to these nine types, sexual violent crimes include rape, obscenity, sexual intercourse with minor, indecent acts against a minor, sexual exploitation of children, acts violating the victim's consent, child pornography, pornography featuring violence or sexual exploitation, forced prostitution, human trafficking for sexual exploitation, domestic sexual violence, money laundering with sexual violence as a predicate crime, and other criminal acts explicitly defined as sexual violent crimes in applicable laws and regulations. Law No. 1 of 2023 also regulates sexual violence in a more comprehensive manner. For example, rape is regulated as an act of forcing another person to engage in sexual intercourse with violence or threats.⁸

In the old Criminal Code, rape was included in crimes against decency. It distinguishes between decency, rape, obscenity, child trafficking, and women. The Criminal Act of Rape was regulated in Article 285. Meanwhile, the New Criminal Code regulates the expansion of behavior, which is categorized as a crime of rape. In Article 473, Paragraph (3) of the new penal

³ Kemenpppa, "KEMENTERIAN PEMBERDAYAAN PEREMPUAN DAN PERLINDUNGAN ANAK," 2017.

⁴ "Komnas Perempuan: Kasus Kekerasan Seksual Di Lingkungan Pendidikan, Paling Tinggi Di Universitas," n.d.

⁵ Dessica Diamond, Edi Yunara, and Muhammad Ekaputra, "Perlindungan Hukum Terhadap Lelaki Dewasa Korban Tindak Pidana Perkosaan (Analisis Perbandingan Hukum Pidana Dan RKUHP)" (Universitas Sumatera Utara, 2020), p. 32.

⁶ Dudi Badruzaman, "Keadilan Dan Kesetaraan Gender Untuk Para Perempuan Korban Kekerasan Dalam Rumah Tangga (Kdr)," *Tahkim (Jurnal Peradaban Dan Hukum Islam)* 3, no. 1 (2020): 32, doi:10.29313/tahkim.v3i1.5558.

⁷ S Rofiah, "Harmonisasi Hukum Sebagai Upaya Meningkatkan Perlindungan Hukum Bagi Perempuan Penyandang Disabilitas Korban Kekerasan Seksual," *Qawwam* 11, no. September 2016 (2017): p. 15.

⁸ Edi Setiadi, "Perlindungan Hukum Bagi Wanita Dari Tindakan Kekerasan," *Mimbar*, 2001, p. 11.

code, three behaviors are included in the crime of rape. First, the genitals were inserted into the anus or mouth of the other person. Second, the genitals of other people are inserted into their anus or mouth. Third, body parts that are not genitals or objects in another person's genitals or anus.

Perpetrators of rape may face up to 12 years of imprisonment. Meanwhile, child rape is subject to imprisonment for a minimum of three years and a maximum of 15 years, as well as fines for Categories IV and VII. If rape results in serious injury to the victim, the perpetrator is threatened with a maximum sentence of 15 years. The sentence can be increased by a third of the maximum threat, which is 12 years if the rape results in death, and is carried out on the biological child, stepchild, or guardian. The sentence is increased by a third of 12 years if the rape is committed to other people or when the victim is in a state of danger, emergency, conflict, or war.

Building on prior research and insights into sexual violence in Indonesia, this legal study adopts a qualitative normative juridical approach, specifically examining the retroactive principle and absence of retroactivity in legislation concerning sexual violence crimes. The statutory approach was supported by a descriptive-prescriptive analysis. The data consisted of primary legal sources, such as laws and regulations pertinent to the research, supplemented by secondary legal materials, including books and journals, to enhance comprehension.

Method

This study employed a statutory approach,⁹ focusing on examining legislation relevant to legal issues. It involved delving into the legislative intent behind the law to grasp its philosophical underpinnings and to determine any potential conflicts between the law and legal issues.¹⁰ According to Soetandyo Wignjosubroto,¹¹ this doctrinal legal research is conceptualized and developed on the basis of the doctrines adhered to by the drafter and/or developer. Morris L. Cohen stated that legal research is the process of finding the law that governs activities in human society. Cohen further elaborated that it involves locating both the rules that are enforced by the states and commentaries which explain or analyze these rules.

This study used both primary and secondary data. The primary legal material was authoritative. It consists of laws, regulations, and the decisions of judges. Secondary legal materials encompass all non-official legal publications including books and journals. Court decisions also have the highest authority because they are the concretization of legislation. Secondary data sources included primary and secondary legal materials.¹²

The data analysis commenced with cataloguing all primary legal materials, specifically statutory regulations, followed by categorizing them based on the types required to facilitate data analysis. At the stage of inventorying primary legal materials and grouping data, data reduction was performed to comply with the required data limits.¹³ The selected data were analyzed according to the problems and theories used. Systematic data analysis was conducted in alignment with the theory employed, culminating in a comprehensive conclusion that addresses the research problem.

⁹ Peter Mahmud Marzuki, *Penelitian Hukum*, 16th ed. (Surabaya: Kencana, 2021), p. 32.

¹⁰ Ani Purwati, *METODE PENELITIAN HUKUM TEORI DAN PRAKTEK* (Semarang: Jakad Media Publishing, 2018), p. 26.

¹¹ S Wignjosubroto, *Hukum: Konsep Dan Metode* (Setara Press, 2013), p. 13.

¹² Mukti Fajar and Yulianto Achmad, "Dualisme Penelitian Hukum Normatif Dan Empiris," *Yogyakarta: Pustaka Pelajar*, 2010, p. 47.

¹³ Muhaimin, *Metode Penelitian Hukum*, 1st ed. (Mataram: Mataram University Press, 2020), p. 43.

Criminal legal instruments regarding sexual violence crimes in Indonesia

Sexual violence is a violation of human rights, a crime against human dignity, and a form of discrimination that must be abolished. Earlier versions of the Sexual Violence Act encompassed three types: rape, sexual exploitation, and human trafficking, albeit not explicitly stated for sexual purposes.¹⁴ However, legal coverage of these forms of sexual violence remains limited compared to that of the identified instances. According to KOMNAS Perempuan's report, there were 15 types of sexual violence that occurred: 1) Rape; 2) Sexual Intimidation, including Threats or Attempts of Rape; 3) Sexual Harassment; 4) Sexual Exploitation; 5) Women Trafficking for Sexual Purposes; 6) Forced Prostitution; 7) Sexual Slavery; 8) Forced marriage, including hanging divorce; 9) Forced Pregnancy; 10) Forced Abortion; 11) Forced contraception and sterilisation; 12) Sexual Abuse; 13) Inhuman and sexual punishment; 14) Traditional practices with sexual nuances that harm or discriminate against women; and 15) sexual control, including through discriminatory regulations based on morality and religion. These types of sexual violence were the result of monitoring for 15 years (1998-2013). These 15 forms of sexual violence are not on the final list because there are probably a number of forms of sexual violence that have not been identified.¹⁵

In Moeljatno's translation of the Criminal Code, sexual violence manifests as normalised behaviours such as rape and obscenity (fornication). The Criminal Code defines both crimes against decency. This has become one of the weaknesses of the Criminal Code in terms of adequate legal substance for cases of sexual violence. Another solution is to classify rape as a crime against decency or a violation of societal norms, although in reality, it is a form of violence against an individual's integrity or their bodily and sexual autonomy. The Criminal Code also fails to distinguish between rape and fornication. This can be found in the formulation of Article 299 Number 1 and 3, where the two are combined into one article which defines criminal acts per month. The type of sexual violence in the form of rape regulated in the Criminal Code is considered very narrow, since it only places sexual intercourse as a penetration from the genital (male) to the genital (female). Proving rape becomes harder when victims are in a vulnerable state or when coercion is psychological rather than just physical, complicating the interpretation of coercion.¹⁶ Law enforcement officials often rely on evidence from victims, such as signs of resistance, screams, torn clothes, scratches on the perpetrator, or physical injuries on both parties. If a victim cannot demonstrate resistance, proving that the elements of rape can be challenging results in unjust outcomes for the victim.¹⁷

Law enforcement against sexual violence is based on the Criminal Procedure Code (KUHAP). Exceptions to this matter are based on RI Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which only applies to children.¹⁸ According to KOMNAS

¹⁴ Yulianti Ningsih Cahyani, Alfa Galih Verdiantoro, and Febriyanti Uma, "Perlindungan Hukum Bagi Korban Tindak Kekerasan Seksual Kaum Tunarungu Dalam Prespektif Hukum Pidana," *Mimbar Keadilan* 13, no. 2 (2020): 11, doi:10.30996/mk.v13i2.3941.

¹⁵ Zulkifli Ismail et al., "Kesetaraan Gender Ditinjau Dari Sudut Pandang Normatif Dan Sosiologis" 26, no. 28 (2020): p. 22.

¹⁶ Juhari, "Restorative Justice Dalam Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Spektrum Hukum* 14, no. 2 (2017): 43, doi:http://dx.doi.org/10.35973/sh.v14i1.1104.

¹⁷ I Kamalludin, H Suhendar, and ..., "Legal Politics In Indonesia's Criminal Policy of Sexual Harassment: Problems and Challenges," ... *Gender Dan ...* 01, no. 01 (2022): 21; Yunas Derta Luluardi et al., "Gender Equality-Based Anti-Sexual Violence Islamic Boarding School at Ribatul Muta'alimin Islamic Boarding School, Pekalongan City," *Islamic Studies Journal for Social Transformation*, 2023, 110–23.

¹⁸ Oleh Anastasia and Hana Sitompul, "Kajian Hukum Tentang Tindak Kekerasan Seksual Terhadap Anak Di Indonesia," *Lex Crimen* 4, no. 1 (2015): p. 32.

Perempuan, certain matters are not specifically regulated in the Criminal Procedure Code, such as procedures for examining children as perpetrators and victims in court. The Criminal Procedure Code does not accommodate procedural law that is sensitive to victims and has a gender perspective, which is known as the concept of the Integrated Criminal Justice System for Handling Cases of Sexual Violence Against Women (SPPT-PKKTP).¹⁹ The Criminal Procedure Code does not stipulate the need for medical or psychological assistance to victims, so that they are ready to give their statements in the criminal justice process. The law does not grant victims access to case details, unlike suspects, who receive copies of the dossier under the Criminal Procedure Code. This hampers victims' ability to gather evidence crucial for their case, as important details uncovered during investigations that are vital for bolstering their position in the criminal justice process are often overlooked, causing harm to the victim.

Law No. 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (hereinafter referred to as the Child Protection Act) applies if the victims have not reached the age of 18 years. It should be appreciated that the Child Protection Law provides for high criminal penalties for perpetrators of sexual violence against children. This act also mentions the right to recovery for children who have been sexually exploited, although without further elaboration of the technical implementation of this right.²⁰ Considering that this provision only applies if the victim is a child, while the crime of sexual exploitation can happen to everyone, including women and children who are in a state of unequal power relations with the perpetrators, the Law on Crimes of Sexual Violence builds legal reforms to the Law on Child Protection, particularly related to the punishment of perpetrators of sexual exploitation and protection and recovery for the victims.

Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT) translates sexual violence as coercion of sexual relations, which is carried out against someone whose position is a husband or wife, someone who lives within the scope of the household, or against one person within the scope of his household with other people for commercial purposes and/or certain purposes. This provision can be used in cases of marital rape, incest (sexual relations with people related to heredity), or forced prostitution. Sexual violence is a common complaint in this context. This hindered victim of domestic violence who did not hold a marriage certificate to get justice.²¹

Currently, Indonesia has two laws as legal instruments to protect witnesses and victims: Law of the Republic of Indonesia Number 13 of 2006 which was amended by Law of the Republic of Indonesia Number 31 of 2014 concerning the Protection of Witnesses and Victims. This law contains detailed basic provisions to protect the rights of witnesses and victims.²² The rights referred to are regulated in Article 5 of the law, namely: a) receive protection for personal, family, and assets safety, and free from Threats with regard to the testimony that will be, is or has been given; b) participate in the process of choosing and determining the form

¹⁹ Loura Hardjaloka, "Criminal Justice System of Children: An Overview Restorative Justice Concept in Indonesia and Other Countries," *Journal of Dinamika Hukum* 15, no. 1 (2015): p. 65.

²⁰ Widyastuti, "Peta Kekerasan Dalam Rumah Tangga (Studi Atas Perkara Perceraian Di Pengadilan Agama Batang Tahun 2015)" 8, no. 2 (2016): p. 32.

²¹ Diamond, Yunara, and Ekaputra, "Perlindungan Hukum Terhadap Lelaki Dewasa Korban Tindak Pidana Perkosaan (Analisis Perbandingan Hukum Pidana Dan RKUHP)."

²² Leslie Pickering Francis and John G. Francis, "Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust," *Criminal Law and Philosophy* 6, no. 1 (2012): 87, doi:10.1007/s11572-011-9136-7.

of protection and safety support; c) provide information without any pressure; d) get a translator; e) free from provocative questions; f) receive information regarding case update; g) receive information regarding court order; h) receive information in the case that the convicted is freed; i) his/her identity to be kept confidential; j) receive new identity; k) receive temporary residence; l) receive new residence; m) receive new residence; (n) receive legal advice, (o) receive temporary fund aid until the Protection ends; and/or; and p) receive assistance.²³ The new law also regulates new norms which are added to Article 6. It reads in full that “Victims of serious human rights violation, Victims of criminal act of terrorism, Victims of criminal act of human trafficking, Victims of criminal act of torture, Victims of criminal act of sexual abuse, and Victims of serious torture, other than the rights as referred to in Article 5, also have rights to: a. medical assistance; and b. rehabilitation, psychosocial and psychological assistance.” This change considers that the Law of the Republic of Indonesia Number 13 of 2006 only provides additional rights in Article 6 for victims of gross human rights violations and victims of criminal acts of terrorism. The new law then confirms the obligation of the Witness and Victim Protection Agency (LPSK) to provide medical assistance and psychosocial and psychological rehabilitation to victims of sexual violence, where women and children are vulnerable to becoming victims of criminal acts of sexual violence.

Regarding sexual violence, the Law on the Eradication of Criminal Acts of Trafficking in Persons (PTPPO) only regulates the crime of trafficking in persons for the purpose of exploitation. Exploitation is defined as “Exploitation shall mean an act committed with or without the consent of the victim which includes but is not limited to prostitution, forced labor or service, slavery or practices similar to slavery, repression, extortion, physical abuse, sexual abuse, abuse of the reproductive organs, or the illegal transfer or transplantation of body organs or the use of another persons’ labor or ability for one’s own material or immaterial profile” (Article 1 number 7 of the PTPPO Law). Currently, the Sexual Violence Act has specifically regulated criminal threats against the criminal act of trafficking in persons for sexual purposes. In the context of sexual violence, this law also regulates norms regarding acts that violate decency in Any Person who intentionally and illegally distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain content that violates decency.” Criminal offences include actions such as distributing, transmitting, and making information with immoral content accessible. In today's digital age, numerous immoral acts have unfolded via social media, such as the 2020 case of sexual violence involving a former student at a State University in Surabaya. In this case, police investigators chose to use the ITE Law rather than the Criminal Code because they considered that the actions committed did not meet the elements of offences Articles 292, 296, and 297 of the Criminal Code. These three articles regulate sexual violence against children, involvement in supporting perpetrators of sexual violence, and child trafficking. There are ten articles on criminal law material for the Pornography Law, from Articles 28 to 38. The formulations in these articles are deemed flexible and contingent upon values, perceptions, and context, making it challenging to establish firm definitions, particularly for legal translation. This ambiguity can lead to confusion and allow law enforcement agencies to implement them freely.

The Republic of Indonesia Law Number 11 of 2008 concerning Electronic Information and Transactions is the first cyber law in Indonesia to provide security and legal certainty in

²³ Sri Kurnianingsih, “Pelecehan Seksual Terhadap Perempuan Di Tempat Kerja,” *Understanding Housing Defects XI*, no. 2 (2003): 67, doi:10.4324/9780080936826-18.

the use of technology. Due to its unique characteristics, regulation and law enforcement in cyberspace cannot rely solely on traditional legal principles (Setiawan, 2013). This law has two major parts. The first part regulates e-commerce or digital trade. The second part regulates information technology crimes, such as illegal content (for example SARA information, hate speech, false information/hoaxes, fraud), illegal access (such as hacking), illegal interception (such as wiretapping), and data interference (such as tampering with or illegally destroying a system).²⁴

This law governs the prevention of all types of sexual violence, the handling, protection, and restoration of victims' rights, coordination between the Central and Regional Governments, and international cooperation to ensure effective prevention and handling of sexual violence victims. Additionally, it also mandates community involvement in both preventing and aiding the recovery of victims, aiming to foster an environment free from sexual violence. There are four breakthrough points in the TPKS Law, including (1) apart from qualifying for the TPKS type, there are also other criminal acts that are expressly stated as TPKS as regulated in other statutory provisions; (2) there are comprehensive procedural regulations starting from the stages of the investigation, prosecution, and examination at court hearings while still paying attention to and upholding human rights, honor and without intimidation; (3) Victims' rights to treatment, protection and recovery since the occurrence of TPKS have become the obligation of the state and are carried out according to the conditions and needs of victims; (4) TPKS cases cannot be resolved outside the court process, except for child perpetrators.

The TPKS Law integrates both penal and non-penal measures, utilizing penal means to address the nine types of TPKS and several related criminal acts, thereby criminalizing them. Criminalization is an action or determination of the authorities regarding certain actions which are considered by the community or groups of people as an act that can be punished as a criminal act, or make an act into a criminal act and therefore can be punished by the government by how to work on his behalf. In addition, this also covers various policies that are oriented towards three main issues in criminal law: (1) criminal acts (acts that are against the law), (2) criminal responsibility (mistakes/perpetrators), and (3) criminal/sentencing (various alternative sanctions, both criminal and action). This includes adding (increasing) sanctions to existing criminal acts.

The principle of retroactivity in Islamic criminal law (*jinayah fiqh*)

The retroactive principle applies to Islamic criminal law. As stated by 'Abd al-Qadir 'Audah, there are at least three types of legal action that use the retroactive principle: *hirabat*, *qadzaf* or *li'an*, and *zihar*. The retroactive principle can be used in the following two categories: (1) new punishments are more favourable to perpetrators, and (2) crimes that endanger public and state security. In Islamic law, if a new provision appears to be a more beneficial punishment for perpetrators of a crime, the perpetrator must be given a more beneficial punishment, even though he committed the crime when the old sanctions were in effect. However, if the perpetrator of the crime has been sanctioned based on the old rules, he may not be given sanctions based on the new rules, because sanctions are intended to prevent crimes from recurring, and the benefit of the community is guaranteed. Therefore, the punishment must be adjusted to the level of benefit that will be achieved, even though,

²⁴ Iqbal Kamalludin et al., "Sexual Violence and the Politics of Criminal Law in Indonesia: A Gender Equality Approach and Maqāsid Al-Sharī'a," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 57, no. 1 (2023): 51–81.

according to the new rules, the punishment is lighter. Additionally, protecting society's welfare does not rely solely on harsher punishments, and it is deemed equitable if perpetrators are not subjected to penalties surpassing the benefit of society.²⁵

The most obvious example of this problem is the death penalty. Before Islam, among Arab customs, punishment for murderers, whether intentional or accidental, depended on social status.²⁶ If the killer was of a higher status than the victim, the penalty was lighter, while if ordinary individuals killed someone of higher status, compensation was often required. Such practices disrupted societal order and could even spark conflicts, including wars. When Islam came, some ignorant people demanded that murderers be punished according to the laws that were in effect during the time of ignorance, as described in *al-Ma'idah* (5): 5. Finally, Allah determines the sanction of murder as contained in *al-Baqarah* (2): 178.

Every law is crafted with a specific objective in mind, with a positive law aimed at maintaining societal peace; however, long-term and high-value objectives are not its primary focus. The purpose of positive law is to uphold public order in a certain way. This goal is held by every positive lawmaker, although it sometimes leaves out noble and religious moral rules, such as permissible drinking and gambling. Meanwhile, Islamic law's purpose is higher and eternal. The goal is not limited to temporary material because individual, societal, and human factors in general are always taken into account which are linked to one another. These objectives appear in the fields of *mu`âmalat*, *jinâyat*, and *siyâsat*. Among the main principles are rejecting the risk of being faced with the establishment of goodness (*daf' al-mafâsid muqaddam `ala jalb al-mashâlih*) and the rule of public interests should supersede personal interests (*al-mashlahat al-`âmat muqaddamat `ala al-mashlahat al-khâshat*).²⁷

The benefit is a universal principle in Islam, where *maslahah* serves as a legal consideration for ensuring legal certainty beyond matters explicitly addressed in the Qur'an and Sunnah, while Islam's concerns extend beyond legal certainty. From the benefit side, the principle of legality is intended for benefit, as well as the principle of retroactivity. However, in Islamic teachings, the benefit is relative (*idhâfî*), not *haqîqî*. Benefit must remain in line with the teachings of Islam itself which were formulated by the scholars in *maqâshid al-syarî'at*. *Maslahah* that is developed in Islamic law must meet the following criteria: (1) *maslahah* is still within the scope of sharia objectives, namely protecting religion, soul, mind, lineage, and property, (2) *maslahah* does not conflict with the Qur'an, (3) *maslahat* does not conflict with Sunnah, (4) *maslahah* does not conflict with *qiyas*, and (5) the use of *maslahah* does not destroy other more important benefits.²⁸

In life, many situations involve balancing multiple benefits that must be upheld. In cases of human rights violations, utilizing the retroactive principle is more advantageous than strictly adhering to legality. This aligns with the *istihsân* method, which involves leaving propositional demands by means of exceptions and relief (*al-rukshat*).²⁹ In addition, the rule

²⁵ Miskari Miskari, "Politik Hukum Islam Dan Maqasid Al-Syariah," *Al Ijarah: Jurnal Pemerintahan Dan Politik Islam* 4, no. 1 (2019): 47, doi:10.29300/imr.v4i1.2168.

²⁶ Iqbal Kamalludin and B. N. Arief, "Kebijakan Reformasi Maqâshid Al-Syarîah Dan Kontribusinya Dalam Formulasi Alternatif Keringanan Pidana Penjara," *Al-Adalah* 15, no. 1 (2019): 54, doi:http://dx.doi.org/10.24042/adalah.v%vi%i.2931.

²⁷ Dwiyan Achmad Hartanto, "KONTRIBUSI HUKUM ISLAM DALAM PEMBAHARUAN HUKUM PIDANA DI INDONESIA (Studi Pidana Cambuk Di Nanggroe Aceh Darussalam)," *Al-Ahkam: Jurnal Ilmu Syari'ah Dan Hukum* 2, no. 2 (2017): 65, doi:10.22515/al-ahkam.v2i2.147.

²⁸ Sudirman, *Fiqh Kontemporer: (Contemporary Studies of Fiqh)*, 1st ed. (Sleman: Deepublish, 2018), p. 76.

²⁹ Zaid Alfauza Marpaung, "Kebijakan Hukuman Mati Bagi Pelaku Tindak Pidana Korupsi Dalam Perspektif Hukum," *Jurnal Ilmiah Advokasi*, 1, 7, no. Hukum (2019): p. 69.

of the law applies according to its benefit (*al-hukm yadûr ma`a mashlahat*). However, laws can also differ according to conditions (*al-hukm yadûr ma`a `ilatîf wujûdan wa`adaman*); eliminating harm is more important than getting benefit (*dhaf` al-madhâr muqaddam `ala jalb almashâlih*). Both are considered in accordance with the rules of gaining benefit rejecting harm (*jalb al-mashlahat wa daf` al-mafsadat*).

When applying the retroactive principle to cases of severe human rights violations, it is essential to be selective, considering either time constraints or the substantial quality of these violations. However, implementing these measures for severe human rights violations is not straightforward, as such cases in Indonesia are not confined to specific timeframes or events. Crucially, the application of the retroactive principle can ensure the preservation of justice, full protection of victims' interests, and provision of minimum guarantees for suspects' rights as protected by law. The minimum guarantee for the protection of the suspect's rights includes the right to obtain prompt and detailed information regarding the nature, causes, and contents of the accusation, and to communicate freely with trusted legal counsel to prepare his defense, to be tried without delay, without any time limit, to be present at trial and accompanied by his legal advisers, examining witnesses against him or requesting the presence of witnesses in his favour with the same facilities, obtaining a fee waiver to pay for an interpreter for the purposes of his defense; may not be forced to admit guilt and forced to remain silent, has the right to make statements in his defense without an oath, and reverse evidence is not allowed.

Retroactive principle in Indonesian criminal law

Article 1 paragraph (1) of the Criminal Code Article 1 paragraph (1) of the Criminal Code reads "no act can be punished other than based on the strength of the provisions of the criminal law that preceded it". The retroactive application of criminal law, as seen in the Law on Human Rights and terrorism in the Bali bombing case, involves the retroactive application of substantive criminal law. Furthermore, criminal procedural law will only work if material criminal law exists. The function of criminal procedural law is to enforce the principles of material criminal law, or more specifically, criminal law assigns law enforcers the task of seeking material truth. Material truth resides solely in the facts outlined in substantive criminal law; thus, criminal procedural law principles are solely directed at law enforcers, particularly judges, who are ultimately tasked with uncovering material truth.³⁰

Whereas in the New Criminal Code, there are additional provisions regarding material mistakes, namely in Article 2 paragraph (1), "The provisions referred to in Article 1 Paragraph (1) do not reduce the application of the law that lives in the community which determines that a person should be sentenced even if the act is not." The history of retroactive criminal law is only for material criminal law, not for criminal procedural law, because the principle of legality contained in Article 1 Paragraph (1) of the Criminal Code was born as a result of an authoritarian regime. The principle of legality is intended to limit authority, and thus far there has been no change.³¹

³⁰ Muhammad Idris, "UPAYA PERLINDUNGAN HUKUM TERHADAP KAUM PENYANDANG DISABILITAS DARI KEJAHATAN PELECEHAN SEKSUAL (Studi Kasus Unit Pelaksana Teknis Daerah Perlindungan Perempuan Dan Anak (UPTD PPA) Kota Jambi)," *UIN Sutha Jambi* (Universitas Islam Negeri Sultan Thaha Saifuddin Jambi, 2020), p. 34.

³¹ Vivi Ariyanti, "Pembaharuan Hukum Pidana Di Indonesia Yang Berkeadilan Gender Dalam Ranah Kebijakan Formulasi, Aplikasi, Dan Eksekusi," *Halu Oleo Law Review* 3, no. 2 (2019): 45, doi:10.33561/holrev.v3i2.8654.

Determination of offenses relates to the realm of material criminal law, which is determined by the legislature. Retroactive application as referred to in Article 1 Paragraph (1) of the Criminal Code clearly refers to material criminal law, but the principle of non-retroactivity can be waived under Article 103 of the Criminal Code. The principle of non-retroactivity remains a fundamental tenet in criminal law and cannot be disregarded simply because it's been codified in legislation.³² Deviations obtained according to Article 103 of the Criminal Code do not apply to the non-retroactive principle. The application of the retroactive principle is only related to material criminal law. The sentence "*nullum delictum*" which means "no offense" and "*nulla poena*" which means "no crime" shows that this is the realm of material criminal law.³³ Determination of delict and punishment, determined in material criminal law. A provision contains retroactive enforcement if it states that a person is guilty of an act which at the time the act was not a punishable act and imposes a sentence or punishment that is heavier than the sentence or punishment in effect at the time the act was committed.

Sexual violence crimes in Indonesia are widespread and demand strong enforcement, yet the limitations of categorizing them as ordinary crimes also warrant examination. Sukardi mentions that extraordinary crime has a large and multi-dimensional impact on social, cultural, ecological, economic, and political aspects which can be seen from the consequences of an action or deed found and studied by various governmental and non-governmental institutions. national and international. According to Winarno, extraordinary crime does not only have a bad impact on economic problems but also has an impact on the ecology, society, and culture of a country. Mar A. Drumbl emphasized that sexual violence is an egregious crime, qualitatively distinct from general crimes, being severe, pervasive, and a scourge on humanity. The categorization of extraordinary crimes is bound to spark debates or varying viewpoints among legal experts, mainly because there is a lack of standardization in formulating universally accepted concepts and classifications for such crimes. Despite variations in interpretations regarding the classification of extraordinary crimes, experts generally agree that offenses with broad and systematic impacts causing substantial losses can be deemed as extraordinary crimes.

Victimologically, the impact of crimes of sexual violence goes beyond the boundaries of crimes categorized as conventional crimes. First, the psychological impact of victims of sexual violence and harassment will experience deep trauma, and the stress experienced by victims can disrupt brain function and development. Second, the physical repercussions were significant. Violence and sexual abuse in children are major contributors to the transmission of sexually transmitted diseases (STDs). Furthermore, victims may also suffer from internal injuries and bleeding, with severe cases possibly resulting in damage to the internal organs that may cause death. Third, victims of violence and sexual harassment often face social ostracization, undermining their recovery process, as they require both motivation and moral support to rebuild their lives. In 2022, the Ministry of Women's Empowerment and Child Protection (PPPA) received 11,355 cases from January to 30 December 2022. Many victims experience severe trauma, and some even attempt suicide.³⁴

³² Rofiah, "Harmonisasi Hukum Sebagai Upaya Meningkatkan Perlindungan Hukum Bagi Perempuan Penyandang Disabilitas Korban Kekerasan Seksual."

³³ Sri Widowati; Sunarto Herieningsih Sunarto; Faiqoh, Lia, "Pelecehan Seksual: Maskulinisasi Identitas Pada Mahasiswa Jurusan Teknik Elektro Undip," *Interaksi Online* 1, no. 3 (2013): p. 32.

³⁴ Farida Nusrat Citraarga, "Perlindungan Hukum Terhadap Anak Disabilitas Sebagai Korban Kekerasan Seksual Di Kabupaten Boyolali," *Universitas Muhammadiyah Surakarta* 53, no. 9 (2013): p. 45.

One of the main reasons for the increasing number of cases of sexual violence is easier access to pornography in cyberspace, with sites that are deliberately offered and presented to anyone and anywhere. Unfortunately, this impact has broad implications because sexual violence in Indonesia is also high; therefore, the threat of its massive impact on the nation is also quite high. Additionally, sexual violence often occurs in religious institutions, dormitories, and orphanages.³⁵ For example, Herry Wirawan molested 21 Santri (female students) from 2016 to 2021. Several cases of sexual violence also exhibit systematic characteristics, such as the Herry Wirawan case, allegations of sexual violence by caretakers of an Islamic boarding school in Batang Regency, and allegations of sexual violence involving educational staff at an Islamic religious university in South Sulawesi.³⁶ The impact of sexual violence crime requires action in extraordinary ways because terrorism is an act that creates the greatest danger to human rights; the target of terrorism is random which tends to victimize innocent people, using power relations to trick the victim; in certain crimes of sexual violence, such as sexual exploitation and sexual slavery, there is an organized relationship on an international scale that can endanger national and international security and stability.

Recognizing the negative impact of sexual violence crime, Indonesia has attempted to prevent and counter these crimes by issuing Law Number 12 of 2022 concerning Crimes of Sexual Violence which will take effect after 12 April 2022 and Law Number 1 of 2023 which will come into force after 2026. This is because sexual violence crimes cannot utilize the retroactive principle despite their widespread occurrence. New laws and regulations put forward the concept of better sentencing objectives. The purpose of punishment is not retaliation for perpetrators, where sanctions are emphasized on the goal, namely to prevent people from committing crimes. This goal is also in accordance with the utilitarian view as classified by Herbet L. Paker, namely, to resolve conflicts caused by criminal acts, restore balance, and bring about a sense of peace in society. The sentencing guidelines in the Sexual Violence Act should be implemented because they contain several advantages, starting from a more comprehensive definition of the crime of sexual violence, rules regarding the subject of the crime, aggravating sentences, and special protection for victims of children, women, and disabilities, as well as rehabilitation. The TPKS Law serves as the primary rule in addressing sexual violence and complementing existing regulations and provides specific guidelines for combating acts of sexual violence.

Various studies have indicated that a high prevalence of sexual violence can result in significant long-term negative impacts on victims, both physically, psychologically, and socially. An in-depth analysis of the data shows that victims of sexual violence often experience deep trauma, mental health disorders, difficulties in social interaction, and even a high risk of depression, addiction, and self-destructive behavior. Psychological approaches such as trauma theory or cognitive-behavioral theory can help to understand how the experience of sexual violence can alter victims' perceptions and behaviors in the long term. Additionally, critical feminist and Islamic law theories can be used to examine aspects of justice, gender equality, and human rights protection for victims of sexual violence within the framework of Islamic law.

³⁵ Binahayati Rusyidi, Antik Bintari, and Hery Wibowo, "Pengalaman Dan Pengetahuan Tentang Pelecehan Seksual: Studi Awal Di Kalangan Mahasiswa Perguruan Tinggi (Experience and Knowledge on Sexual Harassment: A Preliminary Study Among Indonesian University Students)," *Share: Social Work Journal* 9, no. 1 (2019): 32, doi:10.24198/share.v9i1.21685.

³⁶ Yonna Beatrix Salamor and Anna Maria Salamor, "Kekerasan Seksual Terhadap Perempuan (Kajian Perbandingan Indonesia-India)," *Balobe Law Journal* 2, no. 1 (2022): 11, doi:10.47268/balobe.v2i1.791.

This study aims to investigate the importance of implementing retroactive principles in criminal law and Fiqh Jinayah as a vital measure in combating sexual violence. This article summarizes that the application of retroactive principles can provide a stronger legal foundation for addressing cases of sexual violence and ensuring better protection for victims. This article ensures a comprehensive analysis by integrating theories with data, subsequently addressing research objectives, and emphasizing their significance in contributing to scholarly discourse on Islamic law. Thus, this article makes an important scholarly contribution to enriching the discussion on the enforcement of the Sharia law to protect victims of sexual violence.

Conclusion

The Sexual Violence Act is oriented towards three main issues in criminal law: criminal acts (acts that are against the law), criminal responsibility (mistakes/perpetrators), and crimes/punishment (various alternative sanctions, both criminal and action). This includes adding (increasing) criminal sanctions to existing criminal acts. This rule of law is in accordance with the rules of laws can also differ according to conditions (*al-hukm yadûr ma`a `ilatîf wujûdan wa`adaman*); eliminating harm takes precedence over acquiring benefit (*dhaf` al-madhâr muqaddam `ala jalb almashâlih*). Both are aligned with the rules of gaining benefit rejecting harm (*jalb al-mashlahat wa daf` al-mafsadat*). The application of the retroactive principle to sexual violence is in line with six features of the system: cognitive nature, interconnectedness, wholeness, openness, multi-dimensionality, and purposefulness. The significance of employing the retroactive principle in sexual violence cases lies in its role as a primary and foundational rule, complementing previous laws to ensure law enforcement.

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