

## **Harmonization of Exceptions to The Non-Retroactive Principle Between Positive Criminal Law and Islamic Law From Perspective of Maslahah Mursalah**

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### **Abstract**

*General criminal and Islamic criminal law each adhere to the precept of non-retroactivity. but, one of the interesting matters is that there are still exceptions to this non-retroactive principle in each general criminal regulation and Islamic criminal regulation. So the author is very inquisitive about discussing similarly the exceptions to the non-retroactive precept. aside from that, it is also interesting to review the problem aspect of establishing this exception. This targets to better know and understand the reasons and knowledge of the exception to this precept. The sort of studies that the writer carried out became library studies with a qualitative method. The statistics resources in this have a look at are associated documents, particularly the criminal Code, literature in the form of magazine articles inside the Google scholar database, and others. The information collection approach used is purposive sampling. The information analysis technique utilized by the author is content analysis. The effects of this studies monitor that exceptions to the non-retroactive principle in general criminal regulation and Islamic criminal regulation are very suitable and have fantastic blessings while viewed from the maslahah issue due to the fact they involve the benefit of many people/preferred benefit.*

*Keywords: Non-Retroactivity. Maslahah Mursalah. Islamic Criminal Law*

### **Abstrak**

Aturan pidana umum juga hukum pidana Islam sama-sama menganut asas non rektroaktif. Meskipun demikian, salah satu hal yg menarik ialah ternyata tetap ada dispensasi bagi asas non rektroaktif ini baik pada hukum pidana umum maupun hukum pidana Islam. sebagai akibatnya penulis sangat tertarik untuk membahas lebih lanjut tentang pengecualian terhadap asas non rektroaktif tadi. Selain itu, pula menarik untuk meninjau sisi maslahah dari ditetapkannya pengecualian tadi. Hal tersebut bertujuan untuk lebih mengetahui serta tahu

alasan serta hikmah dispensasi asas tersebut. Jenis penelitian yang penulis lakukan ialah penelitian kepustakaan (library research) menggunakan pendekatan kualitatif. sumber data pada penelitian ini ialah data berupa dokumen terkait yaitu kitab Undang-Undang hukum Pidana, literatur berupa artikel jurnal dalam database Google Scholar, dan lain-lain. Adapun teknik pengumpulan datanya merupakan purposive sampling. Analisis data yang penulis gunakan adalah analisis isi (content analysis). Adapun hasil penelitian ini mengatakan bahwa dispensasi terhadap asas non retroaktif dalam aturan pidana umum dan hukum pidana Islam sangat sinkron serta mempunyai manfaat yg besar Jika dipandang berasal aspek masalahnya sebab menyangkut kemaslahatan banyak orang/ kemaslahatan umum.

Kata Kunci: non-retroaktif, Masalah Mursalah, Hukum Pidana Islam

### A. Introduction

Valid for the future is the premise for all legal rules, which includes criminal rules. <sup>1</sup> which means that the regulation is binding on events that occur after the regulation or law is enacted. <sup>2</sup> Article 1 paragraph (1) of the criminal Code said:<sup>3</sup> All rules, regulations, or laws might not be carried out retroactively;

legislation may not be applied retroactively to criminal law, known as the precept of non-retroactivity. This principle refers to the general ideas of statutory provisions and criminal regulation, as stated in Article 1 paragraph 1 of the criminal Code. This prohibition on retroactive application aims to preserve legal reality for the general public, to be able to determine which moves are taken into consideration criminal. consequently, if a person commits an act this is punishable by using criminal penalties in the future, they cannot be punished underneath the new provisions. If the precept of "non-retroactivity" is established, the identical should observe within the contrary situation. as an instance, if someone commits an act that is difficulty to criminal consequences below statutory provisions, however the criminal provisions are revoked earlier

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<sup>1</sup> Salman luthan, "asas dan kriteria kriminalisasi", *jurnal hukum ius quia iustum*, vol. 16, no. 1 (2009), hlm .3.

<sup>2</sup> Tofik yanuar chandra, *hukum pidana* (jakarta: pt sangir multi usaha, 2022), <http://repo.jayabaya.ac.id/id/eprint/2154>. hlm.6.

<sup>3</sup> Fitri wahyuni, *dasar-dasar hukum pidana di indonesia* (tangerang selatan: pt nusantara persada utama, 2017), [https://www.researchgate.net/publication/348675842\\_dasar-dasar\\_hukum\\_pidana\\_di\\_indonesia](https://www.researchgate.net/publication/348675842_dasar-dasar_hukum_pidana_di_indonesia). hlm. 9.

than the culprit is attempted, the perpetrator need to nonetheless be achieved according to the previous criminal provisions..<sup>4</sup>

This precept of non-retroactivity is also adhered to in Islamic criminal law. Islamic criminal regulation is basically non-retroactive, as said inside the maxim "*la raj'iyah fi at tasyri' al-jina'i*," which means that Islamic criminal regulation is non-retroactive. which means that until there is a textual content prohibiting an act, someone's act isn't always considered a criminal offense till there may be a text that regulates it. The principle of legality in Islamic regulation states that new criminal legal guidelines can simplest be applied after they may be promulgated and acknowledged to the humans. This precept does no longer observe to incidents that occurred earlier than the text became promulgated. A effect of this principle is that criminal provisions do no longer have retroactive impact; as a end result, a criminal act can handiest be punished in keeping with the regulation in force on the time the crime befell. despite the fact that Islamic jurisprudence books do no longer specifically highlight this principle of non-retroactivity, this precept isn't always absent from Islamic regulation, as it's far inherently present within it. folks that observe the verses containing criminal laws and the motives for his or her revelation (*asbab al-nuzūl*) will discover this principle all through..<sup>5</sup>

Primarily based on the description provided above, it may be concluded that each popular criminal law and Islamic criminal law adhere to the principle of non-retroactivity. The purpose of this principle, as defined above, is that statutory regulations, in this case criminal rules, can not be imposed for crimes/criminal acts devoted earlier than the regulation become enacted. however, one exciting component is that there are nevertheless exceptions to this precept of non-retroactivity in each popular criminal regulation and Islamic criminal regulation. therefore, the writer may be very interested by discussing similarly the exceptions to the principle of non-retroactivity. moreover, it is also exciting to examine the advantages of setting up these exceptions. This objectives to better understand and understand the reasons and awareness of these exceptions to the principle of non-retroactivity.

In writing this research, the author found several research findings that also had similarities and differences with the research she conducted. These include: first, a study conducted by Mahlil and Moh. Din, students at the Faculty of Law at Syekh Kuala University in Banda Aceh, entitled "The Principle of

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<sup>4</sup> Lukman hakim, *asas-asas hukum pidana buku ajar bagi mahasiswa* (yogyakarta: deepublish, 2020). hlm. 18.

<sup>5</sup> Syamsuri, abdul basith junaidi, and mufid, *hukum pidana islam* (depok: pt rajawali buana pusaka, 2020). hlm. 26.

Retroactivity in Positive Criminal Law and Islamic Criminal Law."<sup>6</sup> The similarity between the outcomes of this have a look at and the author's personal is that they both describe exceptions to the precept of non-retroactivity. however, this examine differs substantially from my mine. In my own have a look at, the author talk the exceptions to the principle of non-retroactivity in more depth and element, each in wellknown criminal law and in Islamic criminal regulation. furthermore, it's miles important that the Author study the *maslahah* (benefit) factor of the exceptions to the principle of retroactivity.

Second, the study carried out with the aid of Hendra Rawung, a lecturer at the faculty of Social Sciences (FISIP) at UNIMA, entitled "*Deviations from the precept of Non-Retroactivity in instances of Gross Human Rights Violations.*" This look at is virtually very special from this research, which simplest mentioned the principle of non-retroactivity in particular for gross human rights violations. In this study, however, discusses exceptions to the principle of non-retroactivity in both widespread criminal regulation and Islamic criminal regulation, in addition to how *maslahah* (advantage) pertains to this precept. therefore, it is able to be concluded that my research is worth of being performed. this article also offers numerous advantages, together with: it is exceedingly useful as a reference for students and academics, given the paucity of new literature especially addressing this subject matter. moreover, it's miles was hoping that this newsletter will make a contribution to the improvement of trendy crook law and Islamic criminal regulation.

### B. Research Method

The type of studies the author performed became library studies with a qualitative technique. The library studies method is closely associated with the analysis of texts or discourse, which investigates an event, whether within the shape of an action or a written text, to gain correct records.<sup>7</sup> The data analysis technique used by the author is content analysis. consistent with Richard Burd, as quoted through Mahmud, content material analysis is a established method for studying message content, or a device used to study and examine verbal exchange behavior that is visible from the preferred conversation.

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<sup>6</sup> Mahlil and mohd. din, "asas retroaktif dalam hukum pidana positif dan hukum pidana islam.", *jurnal ilmiah mahasiswa bidang hukum pidana fakultas hukum universitas syekh kuala*, vol. 2, no. 4 (2018), hlm. 9, <https://jim.usk.ac.id/pidana/article/view/14617>.

<sup>7</sup> Amir Hamzah, *Metode Penelitian Kepustakaan (Library Research)* (Malang: Literasi Nusantara Abadi, 2020). hlm. 7.

In conducting content analysis, the author first prepares data in the form of related documents, namely the Criminal Code, literature in the form of journal articles in the Google Scholar database, and others. Next, in the coding stage, the author reads the data thoroughly and then marks important parts that contain meaning according to the focus of the research, then provides labels or codes according to the theme. The next stage, the author categorizes the codes that appear in one theme for further analysis and interpretation of the data. The results of the analysis are compiled into a narrative for further validation and presentation of the data. The primary data sources in this study are the Criminal Code and Islamic jurisprudence, while the secondary sources come from scientific articles in the Google Scholar database.

### C. Discussion And Research Results

#### The Principle of Non-Retroactivity in Criminal Law

Non-retroactive is also called "non-retroactivity." This precept is a widespread precept in regulation and also applies to criminal regulation, as stipulated in Article 1, paragraph 1 of the criminal Code. The cause of this non-retroactive principle is to make sure legal fact for the general public, with a view to know which movements are taken into consideration criminal and which are not.<sup>8</sup> The existence of this non-retroactive principle is also enshrined in Article 28I of the 1945 Constitution of the Republic of Indonesia, which reads as follows:

*"The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as exclusive before the law, and the right not to be prosecuted under retroactive law are human rights that cannot be diminished under any circumstances."*

This non-retroactive principle is also regulated in Article 1 paragraph (1) of the Criminal Code (KUHP). According to Ishaq, the non-retroactive principle means that laws are only binding for the future and do not apply retroactively. Thus, crimes committed by an individual must be investigated and tried based on the rules in effect at the time the crime occurred. This means that a person cannot be punished for an act that was committed previously, while the law stating that the act was a crime was only enforced afterwards.<sup>9</sup> If we examine history, the emergence of the precept of non-retroactivity, as part of the origins of the precept of legality, began in a time when criminal law was unwritten,

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<sup>8</sup> Lukman hakim, *asas-asas hukum pidana buku ajar bagi mahasiswa*. hlm. 8.

<sup>9</sup> Ishaq, *hukum pidana* (depok: raja grafindo persada, 2020). hlm. 6.

marked by the French Revolution. At that time, the people fought for justice against the arbitrariness of the rulers.<sup>10</sup>

Based on the above descriptions, it can be concluded that criminal law can only be applied to acts committed after the law comes into force and is intended for things that occur in the future. This means that no one can be punished except based on criminal provisions that already existed before the act. Thus, criminal provisions cannot be retroactive. This principle of non-retroactivity aims to ensure legal certainty, where criminal provisions regarding an act must first be determined, before violations of these provisions can be subject to criminal sanctions as a consequence of the legal subject's free choice to commit a prohibited act.

### The Concept Of Maslahah In Islamic Law

The word "maslahah," according to Prof. Mukhsin Nyak Umar, is etymologically derived from the word "shalaha," meaning good, and is used to describe people, objects, or circumstances considered good. In the Quran, this word appears in various forms, such as "shalih" and "shalihah." Meanwhile, "mursalah" in the language means to be cut off or separated, so "maslahah mursalah" refers to benefits not explicitly mentioned in the text. This means that these benefits are not directly stated in the text. Maslahah is one method used in establishing Islamic law. This method places greater emphasis on the benefit when making legal decisions.<sup>11</sup> Imam al-Ghazali, according to Asmawi, explained that maslahah in Islamic terminology means safeguarding and implementing the goals of Islamic law, namely, protecting one's religion, life, intellect, lineage, and property. He further stated that anything that safeguards and protects these five things can be considered maslahah.<sup>12</sup>

Based on the description that the author has presented above, it can be concluded that what is meant by *maslahah* is a method in Islamic legal istinbat that is oriented towards the welfare of the people, where the legislation that is made must pay attention to the aspect of welfare for the community/people.

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<sup>10</sup> Nurul Zashkia, "pengecualian prinsip non rektroaktif dalam hukum formil: pelanggaran atau perlindungan hak asasi manusia?," *alauddin development journal*, vol.5 No.3 2023: 533., vol. 5, no. 3 (2023), hlm. 53, <https://api.semanticscholar.org/CorpusID:265153588>.

<sup>11</sup> Risdianto risdianto, "masalah mursalah al-ghazali sebagai dasar hukum fatwa mui no. 14 tahun 2020 tentang penyelenggaraan ibadah dalam situasi terjadi wabah covid 19", *misyykat al-anwar jurnal kajian islam dan masyarakat*, vol. 4, no. 1 (2021), hlm. 51.

<sup>12</sup> Asmawi asmawi, "konseptualisasi teori maslahah", *salam: jurnal sosial dan budaya syar-i*, vol. 1, no. 2 (2014). hlm. 18.

If *maslahah* is grouped according to the level of human need, scholars of ushul (Islamic jurisprudence) divide *maslahah* into three categories:

1. Necessary *Maslahah* refers to matters that are essential and urgently needed in human life.<sup>13</sup>
2. *Maslahah Hajjiah* refers to various actions and deeds that are not directly related to the basic necessities of life, but are still needed by society.<sup>14</sup>
3. *Tahsiniyat* are benefits related to self-respect (*muruah*). This includes virtues derived from noble habits and morals. If *tahsiniyat* are lost, the rules of life will not disappear as with necessities, nor will they cause hardship for humans as with *hajiya*. Al-Sinqithi, in his book, distinguishes benefits based on their connection to Sharia into three categories.
  - a) The benefit of *Muktabarah*, according to al-Sinqithi, is the benefit determined by the Shari'a.
  - b) *Maslahah Mulghah* is a condition where the Shari'a cancels a benefit and does not consider it a *maslahah*.
  - c) *Maslahah Mursalah* is defined by ushul scholars from various points of view. According to Abdul Wahab Khalaf, *maslahah mursalah* is a benefit that is not determined by Allah, which means there are no legal provisions that regulate it and there are no *sharak* arguments that support its existence or neglect of it.<sup>15</sup>

The majority of Ushul Fiqh scholars in principle agree that *maslahah mursalah* cannot be used as a proof in matters of worship, because the field of worship must be practiced as inherited by the Prophet, and therefore the field of worship must no longer be changed.<sup>16</sup> in the field of *mu'amalah* (transactions), scholars hold varying views regarding *maslahah* as a source of Islamic law. However, most scholars acknowledge that *maslahah* can be used as a source of

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<sup>13</sup> hendri hermawan adinugraha and mashudi mashudi, "al-maslahah al-mursalah dalam penentuan hukum islam", *jurnal ilmiah ekonomi islam*, vol. 4, no. 01 (2018), hlm. 63.

<sup>14</sup> syarif hidayatullah, "maslahah mursalah menurut al-ghazali", *al-mizan*, vol. 4, no. 1 (2018), hlm. 36.

<sup>15</sup> agus miswanto, *ushul fiqh: metode ijtihad hukum islam* (yogyakarta: magnum pustaka utama, 2018), [https://www.researchgate.net/publication/342185625\\_ushul\\_fiqh\\_metode\\_ijtihad\\_hukum\\_islam#full-text](https://www.researchgate.net/publication/342185625_ushul_fiqh_metode_ijtihad_hukum_islam#full-text). hlm. 173.

<sup>16</sup> Ahmad qorib et al., "penerapan *maslahah mursalah* dalam ekonomi islam", *analytica islamica*, vol. 5 (2016), hlm. 55. <https://jurnal.uinsu.ac.id/index.php/analytica/article/view/480/381>.

law in this context. However, some scholars reject this view. Therefore, this discussion will briefly outline the differing views of scholars and their reasons for considering *maslahah* as a source of Islamic law.<sup>17</sup>

Imam Malik is one of the scholars who supports the use of *maslahah mursalah* as a legal basis.<sup>18</sup> Ushul scholars who support the use of *maslahah murrasa* as a method of legal *istinbat* set several conditions for its use.<sup>19</sup> This means that *maslahah mursalah* cannot be applied haphazardly. The *ulama* are very careful to ensure that the *maslahah mursalah* is not influenced by at will or tendencies towards insubstantial and sectarian benefits<sup>20</sup>

al-Ghazali and al-Syathibi emphasize the importance of the validity of *maslahah*, which must be considered in terms of its certainty, its generally accepted nature, and whether it is rational. Furthermore, they emphasize that *maslahah* must be in line with sharia principles.

### Exceptions to the Principle of Non-Retroactivity in General Criminal Law

Exceptions to the principle of non-retroactivity in Indonesia were initially formulated in Article 43 paragraph (1) of the Law on Human Rights Courts, which reads as follows: "Gross human rights violations that occurred before the enactment of this law shall be examined and decided by an ad hoc Human Rights Court."

The above provision relates to Article 4 of Law No. 39 of 1999 concerning Human Rights, which prohibits the retroactive application of laws. Exceptions to the principle of non-retroactivity are explained in the explanation to Article 4. The formal procedure for applying the law retroactively is regulated in Article 43 of the Law on Human Rights Courts, which is proposed by the House of Representatives and then ratified by presidential decree. This process is necessary so that the retroactive application of the law is not solely the authority of the executive branch but also involves the legislative branch. The House of Representatives, as representatives of the Indonesian people, has the authority to determine which cases can be applied retroactively.<sup>21</sup>

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<sup>17</sup> Zaenuddin Mansyur and Asyiq Abdullah, *ushul fiqh dasar* (mataram, 2020). hlm.18

<sup>18</sup> Amir syarifuddin, *ushul fiqh 2* (Jakarta: kencana, 2011).hlm. 31.

<sup>19</sup> Mukhsin nyak umar, *al-mashlahah al-mursalah kajian atas relevansinya dengan pembaharuan hukum islam* (banda aceh: turats, 2017). hlm. 149.

<sup>20</sup> Adinugraha and mashudi, "al-maslahah al-mursalah dalam penentuan hukum islam". *jurnal ilmiah ekonomi islam* 4, no. 01 (2018): hlm. 63. <https://doi.org/10.29040/jiei.v4i1.140>.

<sup>21</sup> Pasal 4 UU no 39 Tahun 1999 yang menyatakan bahwa:

"hak untuk tidak dituntut atas dasar hukum yang berlaku surut dapat dikecualikan dalam hal pelanggaran berat terhadap hak asasi manusia yang digolongkan ke dalam kejahatan



The retroactive application of criminal law, one in all that is seen within the legal guidelines on human rights and terrorism related to the Bali bombing case, is a model of the retroactive application of material criminal regulation. It's far similarly explained that formal criminal regulation can be implemented with the existence of material rules. One of the capabilities of criminal procedural guidelines is to put in force the rules that exist in material criminal regulation, or extra especially, criminal regulations assign the challenge to law enforcers to be searching for material reality. Historically, the application of retroactive criminal law simplest applies to material criminal regulation and is not found in criminal procedural law, because the precept of legality regulated in Article 1 paragraph (1) of the Criminal Code is alleged to be the result of an authoritarian regime. Consequently, the principle of legality goals to restrict the abuse of authority, and till now this aim has remained unchanged.<sup>22</sup>

### **Exceptions to the Principle of Non-Retroactivity in Islamic Criminal Law**

The principle of legality in Islamic law stipulates that criminal law rules do not have the power to apply retroactively, except in the following two conditions: First, criminal law rules can be applied retroactively to crimes that are very dangerous and disrupt public security and order. Therefore, to maintain security and public order in these conditions, the law may apply; Second, Islamic criminal law rules may also apply retroactively when they benefit the suspect (if the purpose is for the benefit of the perpetrator of the crime). Or it is usually said to be mandatory, in the sense that Allah and His Messenger as the lawmakers will not prevent something unless it is for the benefit of the general public.<sup>23</sup> The author will then explain these two things one by one:<sup>24</sup>

#### **1. Extremely Dangerous Crimes**

The first exception to the principle of non-retroactivity in law is extremely dangerous crimes that threaten the security and public order of society. Examples of these extremely dangerous crimes include qazaf (accusing another person of adultery without witnesses), ḥirābah (disturbing security),

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kemanusiaan". lihat Made darma weda, "pengecualian asas legalitas dalam hukum pidana", *jurnal hukum dan peradilan*, vol. 2, no. 2 (2013), hlm. 212.

<sup>22</sup> Pande I putu cahya widyantara, "pande i putu pemberlakuan asas retroaktif dalam hukum pidana indonesia.", *kertha wicara: journal ilmu hukum, s.l.* (2015), hlm. 19. <https://ojs.unud.ac.id/index.php/kerthanegara/article/view/10715>.

<sup>23</sup> Syamsuri, Abdul Basith Junaidi, and Mufid, *hukum pidana islam*. hlm. 80.

<sup>24</sup> Fitri Wahyuni, *hukum pidana islam: aktualisasi nilai-nilai hukum pidana islam dalam pembaharuan hukum pidana indonesia* (Tangerang Selatan: PT Nusantara Persada Utama, 2018), [https://www.researchgate.net/publication/348675848\\_hukum\\_pidana\\_islam](https://www.researchgate.net/publication/348675848_hukum_pidana_islam). hlm. 20.

and *zihār* (equating one's wife with one's mother). These crimes are punishable for events that occurred before the revelation of the verse prohibiting them.

### 2. *Qadzaf*

*Qadzaf* linguistically means throwing stones or other things. Terminologically, *qadzaf* is defined as an accusation against someone of adultery or homosexuality. Islamic jurisprudence scholars explain that *qadzaf* means linking a child of Adam to another man due to adultery, or severing family ties between fellow Muslims. Furthermore, other sources state that *qadzaf*, which is subject to the *hudud* punishment, occurs when someone accuses a good person of adultery or denies the family ties of a child.<sup>25</sup> However, in the context of Islamic criminal law, the term *qadzaf* is emphasized more on accusations of adultery, either through clear statements or by stating that a person's child is not a descendant of their father or mother.<sup>26</sup>

### 3. *Hirabah* crime

The word *hirabah* comes from the word *harb*, which means to attack and seize property. In the encyclopedia of Islamic law, *hirabah* is defined as the actions of a group of people in an Islamic country who create chaos, commit murder, confiscate property, rape, who openly disturb and oppose applicable regulations, humanity and religion. *Syafi'iyah* scholars define *hirabah* as the act of taking someone's property, killing, or scaring them using the force of a sword, carried out away from the help of others. In this context, perpetrators of *jarimah hirabah* can be subject to very heavy penalties, because it is a form of *hudud* or *ta'zîr* crime, with a legal basis that can be found in the text.<sup>27</sup>

The verse regarding *hirabah* was revealed by bringing in new laws and establishing sanctions for perpetrators who disturb security. If a history stating that the verse was intended to punish the *'Urainah* tribe is valid, then the verse contains the law for actions that occurred before the revelation of the verse, so it has retroactive force. Meanwhile, most scholars are of the opinion that this verse

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<sup>25</sup> Nurul afifah, "qadzaf dalam perspektif hukum islam dan khi", *istinbath : jurnal hukum*, vol. 2, no. 1 (2015), hlm. 153, <https://ejournal.ejournal.metrouniv.ac.id/istinbath/article/view/580>.

<sup>26</sup> Khairul hamim, *fikih jinayah* (mataram: sanabil, 2020). hlm. 98.

<sup>27</sup> Endang jumali, "hirâbah dan hubungannya dengan hukuman ta'zîr bagi pelaku korupsi dalam hukum pidana islam (kajian tafsir ahkam terhadap qs. al-mâidah ayat 33)," *Asy Syari'ah* 18, no. 1 (2016), <https://doi.org/https://doi.org/10.15575/as.v18i1.657>. hlm. 50.

was revealed to punish the *'Urainah* tribe. Therefore, a stronger view (*rājih*) stipulates that the verse has the power to apply retroactively.<sup>28</sup>

For the Wider Public Interest

If there are criminal provisions that are more favorable to the suspect, then those provisions must be applied, even if at the time the crime was committed, the applicable provisions contained more severe sanctions. These new provisions only apply if the sentence imposed on the suspect based on the old provisions has not yet become legally binding. Once the decision becomes legally binding, the suspect can no longer be tried under the new provisions. The selection of provisions that are more favorable to the suspect is based on the legal objective of addressing criminal activity and protecting the public. If the public interest requires a reduced sentence, then the suspect who has not yet been sentenced is entitled to benefit from the new, lighter provisions. Upholding the public interest does not involve imposing harsh sentences, but rather by imposing proportionate sanctions to protect the public.

### **Review of The *Maslahah* to the Exceptions**

Based on the above description, the author concludes that the exceptions to the principle of non-retroactivity in general criminal law and Islamic criminal law are highly appropriate and have significant benefits when viewed from a *maslahah* perspective. The author will explain the results of this analysis in more detail and clearly as follows:

#### **1. Exceptions to the Principle of Non-Retroactivity in General Criminal Law**

As previously explained, the exceptions to the principle of non-retroactivity in positive criminal law in Indonesia apply to serious violations of human rights, which are classified as crimes against humanity. When viewed from the *maslahah mursalah* aspect, as previously outlined, it can be concluded that these exceptions to the principle of non-retroactivity are of immense benefit, not only categorizing *maslahah mursalah* but also *maslahah daruriyyah*.

As previously explained, *maslahah dharuriyyah* is something that is essential and urgent for human life. Terminologically, *dharuriyyah* refers to matters that are vital and essential, on which human life depends and relies. If these matters are neglected, life will cease to exist, corruption will spread, and slander will flourish. These matters relate to preserving the five fundamental

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<sup>28</sup> Syamsuri, Abdul Basith Junaidi, Nur Lailatul Musyafa'ah, Moh. Mufid. *hukum pidana islam*. Depok: PT Rajawali Buana Pusaka, 2020. hlm. 84.

human rights: intellect, life, property, lineage, and religion. When viewed from a *maslahah* (beneficial) perspective, a retroactive exception to the law is certainly appropriate. This is because such crimes are extremely dangerous and even threaten the lives of others.

### 2. Exceptions to the Principle of Non-Retroactivity in Islamic Criminal Law

As previously explained, exceptions to the principle of non-retroactivity in Islamic criminal law are divided into two categories: dangerous crimes such as *qadzaf* (fornication), *hirabah* (fornication), and matters concerning the public interest. Regarding *qadzaf*, as previously explained, the revelation of the verse prohibiting accusing a chaste woman of adultery is related to a previous incident, namely the accusation against Aisha, the wife of the Prophet Muhammad (peace be upon him). The retroactive application of this verse is likely due to its significant and significant negative impact. In this case, people accused the Prophet Muhammad's wife, Aisyah r.a, of adultery, which not only damaged her reputation but also hurt him and the Prophet Muhammad (peace be upon him). This false news caused chaos and uproar among Muslims, even nearly triggering war among the Companions due to this slander. From a *maslahah* (public interest) perspective, this is very significant because *qadzaf* is a crime that can destroy the social order.

Furthermore, in the case of *hirabah*, as explained previously, the public interest requires firm action to prevent the brutal actions of the people of *Urainah*. Without firm action, insults against Muslims and the new Islamic-based social system will spread, resulting in more serious unrest and security disturbances. Therefore, strict punishment requires the application of retroactive measures, similar to those applied to the crime of *qadzaf*. In conclusion, the primary purpose of applying criminal measures with retroactive force is to maintain the security, public interest, and social order.<sup>29</sup>

### Harmonization of Exceptions to the Principle of Non-Retroactivity

These two legal systems, although derived from different foundations and paradigms, apparently share a common ground in viewing the importance of exceptions to the principle of non-retroactivity in cases of serious crimes. In Islamic criminal law, sharia principles such as *jalbul mashalih wa dar'ul mafasid* (taking advantage and repelling harm) serve as the justification for retroactive enforcement. Similarly, in Indonesian positive law, the principle of legality is not

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<sup>29</sup> Syamsuri, Abdul Basith Junaidi, and Mufid, *hukum pidana islam*. hlm. 85.

rigidly applied when dealing with crimes against humanity that require the enforcement of substantive justice.

In conclusion, the harmonization of exceptions to the principle of non-retroactivity in general criminal law and Islamic criminal law demonstrates that the law is not solely based on formalistic procedures, but also on the values of justice and the common good. Retroactive application in certain contexts is a concrete manifestation of the protection of collective community rights. Thus, the principle of justice in criminal law can be maintained without neglecting society's pressing need for protection and social order.

### D. Conclusion

As the author has previously described, several conclusions can be drawn as follows: Exceptions to the principle of non-retroactivity in positive criminal law in Indonesia apply to serious violations of human rights that are included in the category of crimes against humanity. Exceptions to the principle of non-retroactivity in Islamic criminal law are divided into 2 things, namely dangerous crimes namely *qadzaf*, *hirabah* and also in matters concerning the benefit of many people/which are more beneficial to the suspect. Exceptions to the principle of non-retroactivity in general criminal law and Islamic criminal law are very appropriate and have great benefits when viewed from the aspect of *maslahah* because they concern the benefit of many people/public benefit as the author has described in the writing above.

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