

## **Pornography Criminal Act on Pictures under the Law Number 44 Year 2008 about Pornography and Islamic Law In Indonesia**

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**ABSTRACT:** Pornography on images of all shapes and modes related to drawings, sketches, illustrations, photographs, writings, sounds, voice, moving or non-moving images, animations, cartoons, conversations, gestures or other body shapes through the forms of communication media and public performances, making obscenity or sexual exploitation violating the moral norms of society are formulated in the with a criminal penalty for anyone who commits such acts. Instead of having been passed into a law, the issues of pornography prevention and eradication cannot be overcome by means of the existing regulations or provisions of *KUHP* (Criminal Code) or through moral messages contained in the Qur'an and as a holy book for Muslims, the truth is which is undeniable, or *hadith*. The results of this study indicate that the regulation of pornography regulated in *KUHP* (Criminal Code) substantively shows significant difference with Islamic law, especially the one regarding the definition and the way of the punishment threat and the difference occurs because of views on what is violated. The order substance of the pornography in *KUHP* (Criminal Code) reflects an individualistic, liberalistic view, having influence on the material. It is assumed that the body for everyone is personal; each individual is free to treat his body without the intervention of others, whereas Islamic law holds that there are rules that have been prescribed in Islam that is not to violate the rules of the Qur'an and *Hadith*.

**Key Word:** pornography, image, Islamic law, jarimah and hudud.

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### **I. INTRODUCTION**

The problem of pornography at this time has indeed become a very significant issue in various layers of society, so to respond it the House of Representatives of Indonesia (*DPR-RI*) has passed the Law on Anti-Pornography (*UU-AP*) on November 26, 2008 containing 11 chapters and 93 articles, regulating the problem of pornography in Indonesia, essentially intended as an effort to prevent various forms of pornographic crime within the framework of creating a moral and dignified national life.

In terms of law enforcement and crime prevention of pornography and morals in general, the different rules and legal threats also have various effects. The codification of pornography and morality in *KUHP* (Criminal Code) has resulted in the legal provision having a legal basis for enforcement; while the regulation of pornography in Islamic law is still limited to binding the *ummah* of Islam on the basis of faith and obedience to Go,[1] so it cannot be enforced in formal juridical form, because it will conflict with the principle of legality as contained in Article 1 paragraph (1) of *KUHP* (Criminal Code).[2] In terms of influence, the provisions of the law is enacted by the State so as to have force, in contrast to laws that are not regulated by the State.

Although the law on pornography and morals in *KUHP* (Criminal Code) has been in effect in Indonesia since the independence, pornography and other criminal acts continue to grow even from time to time tending to increase. Indicators of improvement are among others seen from the number of publications either through print or electronic media about pornography, rape and other moral crimes.[3] Islamic law has set restrictions on various criminal morals, but such provisions cannot be enforced because they are contrary to Article 1 paragraph (1) of *KUHP* (Criminal Code) as mentioned above. This also means that efforts to overcome pornography and other criminal morality in terms of the availability of legislation have not been maximally implemented because the provisions of pornography and other criminal morals in *KUHP* (Criminal Code) are not in line with the legal beliefs of the community, on the contrary, the legal provisions believed to be true by most people have not become a positive law.[4]

## II. RESEARCH METHOD

This research can be classified into normative law research specification,[5] therefore the data sources are derived from the primary and secondary data obtained from library materials.

The secondary data derived from library materials used as a source of data in this writing consists of

- a. Primary Law Material
  1. The 1945 Constitution
  2. Legislation
  3. Court Decisions or Jurisprudence
  4. Legal material from the colonial era that is still valid, namely *KUHP* (Criminal Code)
  5. Nash-nash of Al-Qur'an and Hadith.[6]
- b. Secondary legal materials, namely the legal material that provides explanation of the primary legal materials:[7]
  1. Articles or opinions of the. criminal law expert on the principles of the enactment of criminal law.[8]
  2. Articles or opinion of Islamic legal experts about pornography and how to overcome it ..
  3. The fatwas of the Indonesian *Ulama* Council.
- b. Tertiary legal materials,[9] materials that provide guidance as well as explanations of primary, and secondary legal matters:
  1. Big Indonesian dictionary and legal dictionary.
  2. Encyclopedia of Islamic Law
  3. Law magazines that have something to do with the discussion.[10]

## III. RESEARCH RESULT

### 1. Meaning of Pornography

According to Wirjono Prodjodikoro "The word porn is formed from pomes which means violating decency (obscenity) and graphics means writing and now includes images and sculptures or articles in general that contain or describe things that offend decency from those who read and see them. [11]

In Big Indonesian Dictionary, the word "porn" means "obscene", while the word "pornography" means "depiction of erotic behavior with paintings to awaken lust." [12] Being striptease is a dance performed by women with movements such as taking off their clothes one by one in front of audience, or can also mean stripping dance.[13]

### 2. Pornography Criminal Act

Pornography is an offense set forth in the second book of the Criminal Code (*KUHP*), in articles 282 and 283, while as a "violation" Pornography is set forth in the third book of the Criminal Code (*KUHP*) article 533. However, the three articles do not mention the term Pornography explicitly as one element of the formulation of the offense.

Articles 282 and 283 use the term "Crime Against Modesty", or Moeljatno states "Crime Against morality"[14] as a translation of *aanstotelijk voor de eerbaarheid*, while article 533 uses the term "immorality violation." Thus, the formulation of Pornography under article 282 is : "writings, drawings or objects that violate decency" 'being according to Article 533 Pornography formulation can mean: "writings with titles, cover or made readable, as well as images or objects, capable of arousing the lust of teenagers." [15]

The term of decency is closely related to the term of modesty, and these two terms are often coupled with sexual crimes. Sexual crimes is an act committed between man and woman or between the same sexes unlawfully.

Currently pornography in Indonesia has entered the global strata. The United States Police Federation has asked the Police to investigate the operation of the largest pornographic websites of children (paedophilia) suspected of being run from Indonesia. [16]According to Public Relations of Police Headquarters this is one of the investigations against the largest international network ever. The Associated Press news agency in the United States also pointed to the Glodok area in Jakarta as the largest center of pornography market in Southeast Asia.[17]

In addition to the big turnover and worldwide, the consequences are also quite severe. Some examples are the results of the Consumer Care Foundation (Kakak Foundation) done between May 1999 and May 2001. The results showed that pornographic VCDs are closely related to one of the factors of prostituted children in the world of prostitution[18] and in line with the researches done in *Pancawarga* Jakarta hospital in 1981[19] Atmajaya University Research Jakarta in 1994,[20] and Research Center for Business and Humanities of Yogyakarta in 1999-2002; [21]all show that pornography becomes the cause of teenagers having sex outside of marriage. Sexual intercourse outside marriage is the cause of widespread prostitution, abortion, the spread of venereal disease, and lastly increasing the number of people with HIV / AIDS (Human Immunodeficiency Virus

/ Acquired Immune Deficiency Syndrome).

With these severe consequences, the threat of punishment provided by *KUHP* (Criminal Code) is unbalanced. Article 282 paragraph (1) of *KUHP* (Criminal Code) provides a maximum threat of 1 year and 4 months in prison or maximum fine of Rp.45.000,00 (forty five thousand rupiah) and paragraph (3) maximum of 2 years 8 months imprisonment or fine of Rp. 75.000,00 (seventy five thousand rupiah). Article 283 paragraph (1) maximum 9 months imprisonment or a maximum fine of Rp. 9,000 (nine thousand rupiah) and paragraph (3) maximum 9 months imprisonment or a maximum fine of Rp. 9,000 (nine thousand rupiah). The lightest threat is in Article 533, which is a maximum of 2 months imprisonment or a maximum fine of Rp.3.000,00 (three thousand rupiah).

In practice, the punishment imposed is always a probation penalty. This can be seen in cases of the *Maya* magazine 1971, the cinema posters of City Jakarta in 1976, pornographic VCDs in East Jakarta in 1980, Happy New Year Sexino porn calendar in 1984, or the case of the new *Varia* magazine in 1991.[22]

From the above description it is clear that the punishment threat for Pornography and porn crimes in *KUHP* (Criminal Code) is not sufficient at all.

In the introduction of pornography law No. 44 of 2008, the background describes that the making, dissemination, and use of pornography are growing widely in the community so that it can threaten the lives and social order of Indonesian society. As we all know that the problem of pornography is increasingly complex so that it cannot be denied that pornography can eliminate the Indonesian culture upholding the moral values. What is meant by :

1. Pornography is a picture, sketch, illustration, photo, writing, sound, voice, moving picture, animation, cartoon, conversation, gesture, or other form of message through various forms of communication media and / or public performances, sexual exploitation violates the norms of morality in society.
2. Porn services are any kind of pornographic services provided by individuals or corporations through live performances, cable and terrestrial televisions, , radio, 18 [www.aruspelangi.or.id/statement/report](http://www.aruspelangi.or.id/statement/report), Friday 31December telephone, internet, communications, electronics as well as newspapers, magazines, and other printed materials.
3. Everyone is an individual or corporation, either lawful or not.
4. A child is a person who is not 18 (eighteen) years of age yet. From the above understanding it can be concluded that pornography law is a definition of pornography that is general which cannot be separated from the purpose of the formation of the constitution (*UUD*). It upholds moral values, noble personality, faith and piety, respect for diversity, nation and state and also in accordance with the purpose to protect the dignity of every citizen, whether women, children, or adolescents from the negative effects of the dangers of pornography. The law on pornography is based on the One Supreme God, respect for human dignity, diversity, legal certainty, non-discrimination and protection of citizens. The law aims:
  1. to realize and nurture the life order of ethical people, noble personality, uphold the value of Belief in God Almighty, and honor the dignity of humanity;
  2. to respect, protect, and preserve the arts and cultural diversity, customs, and religious rituals of plural Indonesian society; provide guidance and education to morals of society;
  3. to provide legal certainty and protection for citizens against pornography, especially for children and women; and
  4. to prevent the development of pornography and sex commercialization in the community.

A law is in form to have a goal that can later be used as a reference. Judging from the purpose of this law, it can be said that this law does not only want to realize and maintain the life of society only, but also for the arts and cultural values in Indonesia remaining sustainable while providing moral lessons increasingly lost with the times. This law also provides legal certainty so that there is no confusion in the implementation later and preventive action against the problem of pornography can go well.

Investigation, prosecution and examination in court for violation of pornography shall be conducted in accordance with the law on Criminal Procedure Law, unless otherwise provided in the law no. 44 of 2008 on pornography.

In the investigation, prosecution, and investigation of the procedure of investigation (which the meaning of "investigator" is the investigator of the Police officer of the Republic of Indonesia in accordance with Law Number 8 Year 1981 regarding Criminal Procedure Law and Law Number 2 Year 2002 regarding Police of the Republic of Indonesia), the prosecution and examination of these courts are quite clear because they are all carried out under the Law on Criminal Procedure, unless the law says otherwise.

Article 29 states that any person who produces, reproduces, offers, sells, imports, exports, offers, sells, leases or provides pornography as referred to in Article 4 paragraph (1) shall be sentenced to imprisonment of a maximum of 6 (six) months and a maximum of 12 (twelve) years and / or a fine of at least Rp250,000,000.00 (two hundred and fifty million rupiah) and a maximum of Rp6,000,000,000.00 (six billion rupiah).

Article 30 states that any person providing pornographic services as referred to in Article 4 paragraph (2) shall be subject to imprisonment of a minimum 6 (six) months and a maximum of 6 (six) years and / or a fine of at least Rp250,000,000.00 (two hundred and fifty million rupiahs and a maximum of Rp3,000,000,000 (three billion rupiah).

Article 31 states that anyone who lends or downloads pornography as referred to in Article 5 shall be liable to a maximum imprisonment of 5 (four) years and / or a maximum fine of Rp2,000,000,000.00 (two billion rupiah).

Article 32 states that anyone who listens to, displays, utilizes, possesses or stores the product of pornography as referred to in article 6 shall be liable to a maximum imprisonment of 4 (four) years and / or a maximum penalty of Rp2,000,000,000.00 (two billion rupiah).

Article 34 states that any person who intentionally or upon his / her consent becomes an object or model containing pornographic content as referred to in Article 8 shall be liable to a maximum of 10 (ten) years and / or a maximum fine of Rp 5,000,000,000.00 ( five billion rupiah).

Article 35 states that any person who makes another person as an object or model containing pornographic content as referred to in article 9 shall be subject to imprisonment of a minimum of 1 (one) year and a maximum of 12 (twelve) years and / or a minimum of fines Rp500.000.000,00 (five hundred million rupiah) and at most Rp6,000,000,000.00 (six billion rupiah).

Article 36 states that anyone displaying themselves or others in a public performance or display depicting nudity, sexual exploitation, coercion or other pornographic charges referred to in article 10 shall be liable to a maximum imprisonment of 10 (ten) years and / or a fine of at most Rp5,000,000,000.00 (five billion rupiahs).

Article 37 states that any person involving a child in the activities and / or objects as referred to in article 11 shall be subject to the same criminal sanction as referred to in Article 29, Article 30, Article 31, Article 32, Article 34, Article 35 and Article 36, plus 1/3 (one third) of the maximum criminal threat.

Article 38 states that anyone who invites, persuades, exploits, lets, abuses power, or coerces a child in the use of pornographic products or services as referred to in Article 12 is liable to a criminal offense of a minimum 6 (six) months and a maximum of 6 (six) years and / or a fine of at least Rp250,000,000.00 (two hundred and fifty million rupiahs) and a maximum of Rp3,000,000,000.00 (three billion rupiahs).

Article 39 declares a crime as referred to in Article 29, Article 30, Article 31, Article 32, Article 33, Article 34, Article 35, Article 36, Article 37, and Article 38 are crimes.

Article 40

1. In the case of a crime, pornography is committed by or on behalf of a corporation, criminal prosecution and improper can be made against the corporation and / or its management.

2. The crime of pornography is committed by the corporation if the offense is committed by persons, whether based on employment or other relationships, acting in the corporate relationship either alone or jointly.

3. In the case of a criminal charge against a corporation, the corporation is represented by the board.

4. The board representing the corporation as referred to in paragraph (3) may be represented by others.

5. A judge may order a corporate administrator so that the corporate administrator faces his / her own in court and may also order a corporate administrator to have the board brought to court.

6. In the case of criminal prosecution committed against the corporation, the call to face and the submission of the summons shall be communicated to the management in the residence of the management or at the place of the office administrator.

7. In the case of a criminal act, corporate pornography, in addition to imprisonment and penalties against its management, shall also impose a penalty on corporations with a maximum penalty of 3 (three) of the penalties specified in each chapter in this chapter.

Article 41 states that in addition to the principal punishment as referred to in Article 40 paragraph (7), corporations may be subject to additional crimes in the form of:

- a. Cancellalton of business license;
- b. Revocation of business license;
- c. Deprivation of the proceeds of a crime; and
- d. Revocation of legal entity status.

To improve the effectiveness of the implementation of this law, a task force has been set up among departments, ministries, and related institutions whose provisions are governed by presidential regulations. The role of the law becomes highly relevant when the context of the substance meticulous and precise to the goal of enforcement. Such relevance is also the need of society as a legal subject. Next is the continuing efforts to improve the principles of the law itself, as a form of direct feedback from the community. And in this case, the state is responsible for ensuring the sustainability of the systematic legal construction process. When the legal system works well within the legal community, the reform and objectives of a law can be successfully achieved. It is this achievement which then becomes an effort which is also relevant in the process of social control

through the law. The debate surrounding the law is an indicator of the stimulation of a law enforcement process to create a better social order. Functionally, the pornography law is then expected to really regulate what is the limitations of these aspects so that the objectives of the order themselves can be realized. Law enforcement and development in a systematic perspective must then be realized to be awakened by a solid legal construction. In this case, the public response is capable of being evaluated against the establishment of law and its application. Such support can only then be created if the substance of a law is clearly accepted in the eyes of the public.

The law number 44 of 2008 on pornography entraps everyone who owns or keeps pornographic products (except for personal gain). The provisions on the prohibition of ownership of pornographic products are stated in article 6 which reads "that everyone is prohibited from playing, displaying, utilizing, owning or storing pornographic products unless authorized by law". Referred to as "authorized by law" such as film censorship agencies, broadcasting monitoring institutions, law enforcement agencies, health care institutions and educational institutions.

Subsequently, Article 43 instructs any person who holds or owns a pornographic product to destroy itself or submit to the authorities to be destroyed within a period of 1 month from the date the pornography law applies. Destruction is like deleting all pornographic files stored on CD, Hard disk, Flash disk, or other storage media. Persons who still keep pornographic products will be subject to imprisonment sanctions for a maximum of 4 (four) years at a maximum of 2 billion rupiah.

To prevent and eradicate the spread of pornography through the system and the internet, Indonesia already has a legislation that contains a prohibition on the spread of pornography in the form of electronic information that is Law no. 11 of 2008 on Information and Electronic Transactions (*UU ITE*). Article 27 paragraph 1 states: "Every person intentionally and without right to distribute and / or transmit and / or make access to electronic information and / or electronic documents possessing content that violates morals".

Criminal sanctions shall be imposed for any person committing acts as provided in article 27, paragraph 1, namely a maximum imprisonment of 6 (six) years and / or a maximum fine of Rp1,000,000,000.00 (one billion rupiah). With the enactment of pornography legislation, Information and Electronic Transactions (*UU ITE*) and the legislation that contains a ban. Pornography remains in force as long as it is not contrary to Law no. 44 Year 2008 About Pornography. Everyone also needs to be careful of every giving or deposit computer / laptop from other people especially data storage like flash disk, hard disk, CD, or other storage. When given a compact disk (CD) by someone containing an application program, it is necessary to have a thorough examination because there may be pornographic files tucked between other files that can be troublesome if found by law enforcement officers, if pornographic files are encountered, immediately remove them .

Activities such as copying pornographic files to CDs (compact disks) or other storage media, then renting or selling them are actions that violate Article 4 paragraph (1) of Law no. 44 of 2008 on pornography, the offender shall be imprisoned for at least 6 (six) months and no later than 12 (twelve) years and / or a fine of at least Rp250,000,000.00 (two hundred and fifty million rupiah) and at the most Rp6,000,000,000.00 (six billion rupiahs).

A person's activity to facilitate the creation, duplication, dissemination, sale, rental, use of pornographic products is prohibited in Article 7 of the pornography law, for offenders violating Article 7 shall be imprisoned for a minimum of 2 (two) years and no later than 15 ) years and / or a fine of at least Rp1,000,000,000.00 (one billion rupiah) and a maximum of Rp7,500,000,000.00 (seven billion five hundred million rupiah). Comparing with Information and Electronic Transactions (*UU ITE*), anyone intentionally and unlawfully commits or provides the computer hardware or software used to facilitate the act of dissemination of pornography is an act prohibited in article 34 paragraph 1 of the Information and Electronic Transactions (*UU ITE*) Law.

The offender shall be imprisoned for a maximum of 10 (ten) years and / or a fine of at least Rp10,000,000,000.00 (ten billion rupiah). The act includes the involvement of a person providing facilities in the form of computer hardware to duplicate or reproduce pornographic files on CDs or other storage media for dissemination. Everyone who owns a pornographic product gets it by purchasing, obtaining for free, or downloading from the internet (downloading is the activity of transferring or retrieving files from information and communication technology systems). Downloading activities are often done on the internet, such as downloading scientific articles, news stories, humor stories, and other information. But, downloading pornography is an act that is prohibited in article 5 of Law no. 44 Year 2008 About Pornography: anyone downloading pornography shall be imprisoned for a maximum of 4 (four) years or a fine of up to 2 billion rupiah.

The government has attempted to block the access of porn sites so that they cannot be downloaded by providing anti-pornography software. Nevertheless, the porn system on the internet increases in number every time, so the use of anti pornography software needs to be coupled with other efforts, such as empowering the role of parents to supervise and give explanations to children not to download pornography via the internet or

other media.

The arrangement of pornography is based on Belief in the Almighty, respect for human dignity, diversity, legal certainty, non-discrimination and protection of citizens. This means that the provisions provided for in this Law are:

1. Upholding the moral values derived from the teachings of religion;
2. Providing clear provisions on restrictions and restrictions that every citizen must obey and determine the types of sanctions for those who violate them; and
3. Protecting every citizen especially women, children, and the younger generation from the influence of bad and victims of pornography. The pornographic arrangements in the Act include:
  - a. prohibition and restriction on the manufacture, dissemination, and use of pornography;
  - b. protection of children from the influence of pornography; and
  - c. prevention of the making, dissemination and use of pornography, including public participation in prevention.

To provide protection against victims of pornography, this Law requires all parties, in this case legal institutions, educational institutions, religious institutions, families and / or communities to provide coaching, recovery assistance, physical and mental health for every child who becomes a victim or perpetrators of pornography. Based on the idea, the pornography law is regulated comprehensively in order to realize and maintain the ethical Indonesian society life, noble personality, and uphold the values of Belief in the One and honor the dignity of every citizen.

### **3. Pornography According to Islamic Law**

The punishment of the perpetrators of Pornography is closely related to the division of punishment for the offender or *jariimah*, which is divided into: *jariimah huduud*, *jariimah qishaash-diat* dan *jariimah ta'ziir*. [23] Each of these is summarized as follows:

#### **a. Jariimah Huduud**

*Huduud* is plural of *had*. *Had* in essence means, something that separates between two things, or what separates things from others. For example: *hudud ad-dar*, meaning space separator, *hudud al-ard* means boundary of land. Etymologically, *huduud* means prohibition or prevention. The penalties for crime are called *huduud*, because they usually prevent the perpetrator from repeating his crime. *Huduud* is used to refer to God's forbidden acts, as in Surat al-Baqarah verse 187: which means: That is the prohibition of Allah, so do not approach it.[24]

In term, *Jariimah huduud* means is: *Jariimah* is threatened with *had*, [25]while the *had* is the punishments of a certain size, the right of Allah Ta'ala. The notion of God's right is that the punishment cannot be abolished either by individuals (that is victims) or by the people represented by the state. *Jariimah huduud* contains seven, namely adultery, *qadzaf* (accused of adultery), drinking liquor, stealing, *hiraabah* ( robbery / security disturbances), apostasy and *al-baghyu* (rebellion).

#### **b. Jariimah Qishaash-diat**

*Jariimah qishaash-diat* is :

*Jariimah* is threatened with the punishment of *qishaash* or *diat*, and each *qishaash* and *diat* is a punishment that is of a certain size and is the right of the individual.

Individual rights mean that the victim or his family can forgive the offender, and if forgiven then the punishment may change from *qishaash* (balanced penalty) to a penalty of fine and if forgiven can again turn into *ta'ziir*.

*Jariimah qishaash-diat* ada lima macam, yakni pembunuhan sengaja (*al-qatlu al-'amdu*), pembunuhan seperti sengaja (*al-qatlu syibhu al-'amdi*), pembunuhan tidak sengaja (*al-qatlu al-khata'*), penganiayaan sengaja (*al-jarhu al-'amdu*) dan penganiayaan tidak sengaja (*al-jarhu alkhata'*).

#### **c. Jariimah Tazir**

*Jariimah ta'ziir* is:

*Jariimah* is threatened with one or more *ta'ziir* penalties.

*Ta'ziir* can also mean *ta'diib*, that is teaching, *ta'ziir* punishment can mean punishment in the form of a teaching of sin (error) which is not available punishment or *kifarat* thereon.

*Jariimah te'zfir* is not determined in a limited manner by the *syara'*, both of the actions and of the punishment. *Syara'* only determines as *jariimah ta'ziir*, deeds that are forever seen as finger or crime, such as usury, embezzled entrails, cursing people, accepting bribes and so on.

The scholars have argued that the Islamic *Shari'a* does not specify in detail and firmly the punishment to be imposed on any violation of the *jariimah ta'ziir*. Islamic *Shari'a* only states a number of laws that can be applied

in accordance with the desired benefits. Therefore, the determination of punishment in accordance with the criminal act committed entirely to the policy of the authorities / judges. However, the authorities / judges are not allowed to misuse the authority in determining the *ta'ziir* punishment. In establishing a punishment against the *jariimah ta'ziir*, the authorities / judges should always be based on the circumstances of the convict, the environment surrounding the convicted, the welfare of the people who want, and oriented to the desired goal of *syara* punishment, namely the prevention of crime / *munkar* and the cessation of someone doing criminal acts, as well as a deterrent effect to avoid repetition of mistakes setups, both for those who do *Wakari* criminal and for the surrounding community.

The types of punishment in *jariimah ta'ziir*, according to the *fiqh* scholars, may be the mildest form of punishment, such as rebuking a convict, censuring, or embarrassing a convict, and possibly the toughest punishment, such as the death penalty. Such punishments are physical, such as beatings or whipping, some of which are spiritual, such as warnings, threats, and rebukes, some of which are both temporal and spiritual, such as temporary imprisonment and imprisonment, and others that are material, such as a fine penalty. Among the *ta'ziir* punishments are those mentioned in the passages (verses or *hadiths*) and some are not mentioned at all.

Abdul Qadir Audah[33] have mentioned some of the *ta'ziir*' punishments in *Nash*:

- 1) Warning, threats, rebuke / lashing, whips, lashes, and punches. Types of punishment like this can be seen in the word of Allah SWT Surat an-Nisa '(4) verse 34. In the *hadith* of the Prophet Muhammad was once told that Abu Zarr al-Giffari (32 H), once rebuked by Rasulullah SAW for criticizing one's mother (HR al-Bukhari, Muslim and Ahmad bin Hanbal).
- 2) Prison sentences, both temporary (temporary incarceration), such as the Prophet (Peace be Upon Him) temporarily arrested a person accused of stealing another's camel (HR) Abu Daud, Ahmad ibn Hanbal, an-Nisa'i, and at-Tirmizi from *bahzbin hukaim*), as well as imprisonment as a permanent punishment, as applied to a person who repeatedly commits a crime.
- 3) The crucifixion (*Hirabah*). Rasulullah SAW once used the punishment of the cross to someone who was nicknamed Abu Nab (HR, Abu Daud and Ahmad ibn Hanbal).
- 4) Death penalty. It is found in the words of the Prophet (s): "Whoever undermines your unity under a leader and attempts to divide you, then kill him (HR al-Jamaah [the majority of Hadith experts].) Therefore, *fiqh* scholars agree to allow judges applying the death penalty for slanderers, spies, people who have repeatedly committed criminal acts, homosexuals, lesbians, if the judge sees a benefit to impose the punishment of this murder. Tuning punishment in this *ta'zir* category in Islamic *fiqh* is called *al -gatl as-siyasi*.
- 5) The punishment of exile, as done by Umar bin al-Khatib against Nasr bin Hajjaj.
- 6) The penalty for disseminating the criminal offense concerned, such as those committed against persons who proclaimed false testimony, committed fraud in scales, measures and other measuring instruments.
- 7) A punishment of dismissal from office, if an official commits a criminal offense against the mandate of his position, as proposed by Ibn Taimiyah and Ibn Qayyim al Jauziah.
- 8) The punishment of a person's inadequacy for a right, such as unworthy as a witness, because of frequent fraud and unworthy to occupy a position because often do not hold a mandate.
- 9) The penalty of seizure of property, which is imposed on the apostates. The seizure of these items in Islamic jurisprudence is called the *musadarah mal al-murtad* (seizure of apostate goods).
- 10) Penalty of fine. This penalty is stipulated by the judge, because according to his judgment, if subjected to another corporeal or spiritual punishment, there will be no such purpose of punishment.

As explained above, that *Jariimah ta'ziir* is not determined in a limited manner by *syara* , both about actions and punishment. Therefore any offenses not included in *jariimah huduud* and *jariimah qishaash-diat* are included in *jariimah tazfir*, such as dabbing the deposit, cursing people, accepting bribes, seclusion, including pornography and so on.

The punishment for the offender or *jariimah tazfir*, including pornography is entirely upheld to the policy of the authorities / judges, from the earliest punishment, such as rebuking a convict, censuring, or embarrassing a convict, punishment such as flogging or whipping, temporary imprisonment, or fines. or even the toughest punishment, such as the death penalty.

#### IV. CLOSING

The spread of pornography in Indonesia is now at a very alarming level. The underlying factor is that the regulations or rules contained in the Criminal Code (*KUHP*) are extremely disadvantageous, coupled with the threat of punishment and weak law enforcement, and the result of moral shifts and decline in the practice of spiritual and religious values in society.

Regulations or provisions concerning pornography with images set forth in the Criminal Code (*KUHP*) substantively contain a very significant difference with Islamic law especially regarding its understanding and the threat of the punishment. This difference occurs because of different views of rights that are violated. The

substance of the arrangement of pornography with images in the Criminal Code (*KUH*) reflects an individualistic-liberalistic view, so that it is very influential to the material; they hold that the body for everyone is the absolute right of each person, each individual treats his body without the intervention of others. Meanwhile, according to Islamic Law, the Body is a mandate of God that must be maintained by every human being. Islam explicitly guides, guides and directs human beings in treating and exploiting the body in order to maintain harmony, degrees and dignity, both in the family, society and nation, to achieve the happiness of life, both in the world and in the hereafter.

In the prevention of pornographic crime with the picture policy must be taken in the forms:

a. In the criminal law:

- 1) Improvement of pornography offense formula should be performed.
- 2) There must be good law enforcement.
- 3) The moral problems, social problems and religious communities should be noted.

b. Islamic legal policy:

- 1) *Amar ma'ruf nahi mungkar*, calling people to do good and to prevent wrongdoing.
- 2) *Saddu Adz-dzaraai'* that is closing the means of disobedience.

c. There should be a movement of moral coaching and an increase in the practice of religious values.

#### Endnote

- [1] Soerjono Soekanto, *Perspektif Teoritis Studi Hukum Dalam Masyarakat*, CV. Rajawali, Jakarta 1985, page 19
- [2] Ediwarman, *Perlindungan Hukum Bagi Kasus-Kasus Pertanahan (Legal Protection For The Victim of Land Cases)* Pustaka Bunga Press, Medan 2003, page 64).
- [3] Soerjono Soekanto, *Loc.cit.*
- [4] According to Soerjono Soekanto, examples of tertiary legal materials are: dictionary, encyclopaedia, cumulative index and others. Read -. *Ibid.* According to Ediwarman tertiary legal materials including *Majaiah*. Read: Ediwarman, *loc.cit.* See also Abdul Kadir Muhammad, *Law and Legal Research*, Citra Aditya Bhakti, Bandung, 2004, page 67, See also Ronny Hanitijo Soemitro, *Research Methodology and Arimetry*, Cet. V, Ghalia Indonesia, Jakarta, 1996, p. 11-12.
- [5] Wirjono Prodjodikoro, *Tindak-Tindakan Pidana Tertentu di Indonesia*, P.T. Ekes Co., Jakarta, 1980, 118.
- [6] Departemen Pendidikan Dan Kebudayaan RI, *Kamus Besar Bahasa Indonesia*, Cetakan Kesepuluh, Balai Pustaka, Jakarta, 1999, page 698.
- [7] *Ibid.*, halaman 860.
- [8] R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-komentarnya Lengkap Pasal Demi Pasal*, Politeia, Bogor, 1983, page 176.
- [9] Moeljatno, *KUHP, Kitab Undang-undang Hukum Pidana*, PT. Bina Aksara, Jakarta, 1990, page 122.
- [10] *Republika*, 9 Agustus 2001
- [11] *Ummi*, Edisi Special September 2001.
- [12] Yayasan Kakak, *Anak-Anak Yang Dilahirkan, Masa Depan Yang Terkoyak*, Pustaka Pelajar, Yogyakarta, 2002, page 80.
- [13] Andi Hamzah, *Pornografi Dalam Hukum Pidana, Suatu Studi Perbandingan*, Bina Mulia, Jakarta, 1987, page 25.
- [14] *Republika*, 17 December 1994
- [15] *Fakta*, No. 451, 15 september 2002
- [16] Tjipta Lesmana, *Pornografi Dalam Media Masa*, Puspa Swara, Jakarta, 1995, page 77.
- [17] Ahmad Hanafi, *Asas-asas Hukum Pidana Islam*, Bulan Bintang, Jakarta, 1986, page 6.
- [18] As-Sayyid Saabiq, *Fiqhu As-sunnah*, Jilid.II, Daar Al-Kitab Al-'Araabiyyi, Beirut, 1985, page 305.
- [19] Abdul Qadir Audah, *At-Tasyri'u Al-Jinaaiyyi Al-Islaamiyyi Muqaaranan Bi Al-Qanauni Al-Wadh'I*, Juz I, Daar Al-'Urnabah, Kairo, 1963, page 78.
- [20] Ahmad Hanafi, *Op.cit.*, halaman 7. Oleh Wahbah Az-Zuhaili mentioned : *إنما حق الله أن يقرر ما ليس له* that is that the right of Allah, meaning that for every crime, humans have no right to let down the law. Read : Wahbah Az-Zuhaili, *Op.cit.*, page 44.
- [21] Ahmad Hanafi, *Op.cit.*, page 8.
- [22] Abdul Qadir Audah, *Op.cit.* page 80.
- [23] Ahmad Hanafi, *Op.cit.*, page 8
- [24] Abdul Qadir Audah, *Loc.cit.*
- [25] *Ibid*
- [26] Ahmad Hanafi, *Loc.cit.*
- [27] Abdul Qadir Audah *Op.cit.*, page 364.

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