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Research paper

Constitution of Pornography in RI Number 44 in 2008 Perspective *Maqashid Al-Syariah*

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Abstract

The main problems in this research, What the law Number 44 in 2008 about pornography by perspective Maqas}id al-Syari>ah. The topics were elaborated on three sub problem. (1) What the Content of The RI law about Pornography is. (2). What the weakness of pornography law is. (3) What pornography law from perspective Maqas}id al-Syari>ah is. This research is to understand substance of Law Number 44 in 2008. It would elaborate the weakness of this law and to elaborate that the content of pornography law is proper to Maqas}id al-Syari>ah. It would be used Syar'i, Juridical, historical, and sociological approach. The result of research showed that the content of Pornography law consist of 8 chapters and 82 verses, they are general certainty, prohibition and limitation, children protection, prevention, investigation, providing guidance, interrogation in the court, annihilation, criminal certainty and closing certainty. The weakness of the law only arranges the pornography in the public by media, and it is not in private area. Specifically the pornography law did not arrange the action which can lead to the adultery prohibited by Islam. This research is hoped that legislative and government can invite Islamic law and do preventive action to the pornography.

***Keywords**: Law**;** Maqas}id al-Syari'ah; Maslahah*

1. Introduction

Globalization, science and technology especially information technology and communication provide to the increase of producing and spreading pornography in that give bad influence to moral and individual of Indonesia nation so it threat the life and social order of Indonesia society. Since the pornography has spread widely among society also cause the increasing of immoral and indecent.

That is why the nation based on sovereignty of God, in which based on the Pancasila law, so the pornography has been regulated in the law of Republic of Indonesia Number 44 in 2008 about Pornography regulated by President and agreed by DPR called equal law either formally or material which is applied in public.

At the first verse, it is explained definition of pornography which is meant by the law, they are: diagram picture, illustration, photo, writing, voice, moving picture, animation, cartoon, conversation, gesture, or other messages through any form of communication media and/or show in public, that consist of pornography or sexual exploitation against the morality norm in society.(1)

On the first chapter verse 3 and 4, the laws aim to provide founding and education to the moral and character in society and serve the law certainty and protection to citizens from pornography, especially for the children and women, prevent improvement of pornography and commercialization of sex in public. But this phenomenon in society get increase and increase about immoral action, indecent, prostitution as can be seen in the television, and newspaper. For an example postgraduate student on Hasanuddin University Makassar was robbed and raped in her place. So, it is necessary the serious attempt to respond these to return ethical and moral society in Indonesia.

Reading result of writer in the law of pornography, this law only regulates the pornography occurs in public through the media and did not include in private area or action which lead to the prohibition of religion in relation between men and women who are not muhrim (degree of consanguinity between a man and woman that renders marriage impossible but gives them the right of association). The law did not specifically regulate about illegal relation between man and woman, a couple living in the same house without legal bonding marriage, or pregnant outside the marriage. If related to the phenomena occur in society so it is interested to be elaborated deeply from the Islamic law perspective using the *maqas}id al-Syari>ah* method.

2. Literature Review

2.1. The Title Definition

2.1.1. . Law

Law means the certainty and rules made by government of a country, arranged by cabinet (cabinet minister, executive, etc) and legal by parlement (DPR, legislative etc) signed by head of country (President, head of government, king).(2) It also means the rules regulated by person or dominant institution.

2.1.2. Pornography and Porn Action

Pornography means that picturing action erotically by painting or writing to increase desire.(2) It is also the action or attitude to

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desire or sexual action. Pornography in law No. 44 in 2008 which meant by picture, illustration, photo, writing, voice, moving picture, animation, cartoon, conversation, gesture, or other message through various form. Meanwhile Porno action means that behavior erotically impacts desire. Communication media and/or shows in public, which meant pornography or sexual exploitation break moral norms in law.(1)

2.1.3. Perspective

Perspective meant point of view. It also meant opinion so perspective meant here is point of view by *Maqas}id al-Syari>ah* or philosophy in the law regulated by Law Number 44 in 2008.

2.1.4. Definition of Maqas} Id Al-Syari>Ah.

In the lughawi way *maqas}id al-Syari>ah* consist of two words they are *maqas}id dan Syari>ah*. *Maqa>s}id* is the plural form of *maqa>s}id* mean deliberateness or purpose. *Syari>ah* in the term, it mean إلى الماء which mean the way to the source of water. It is can be said as the main source of life.(3) *Maqas}id al-Syari>ah* among expert Ushul Fiqh called *asrar al-syari'ah.* It is secret or wisdom that found in the law regulated by syara' which mean business to all mankind either in the world or afterlife. So the purpose of *Syari>ah* (*maqas}id al-Syari>ah*) is to prosperous of mankind.

2.2. The Content and Substance of Pornography and Porn Action Law

The substance categories consist of the main point about pornography and porn action including this category they are:
CHAPTER I
GENERAL CERTAINTY
The first Part
Definition (Verse 1)
Second Part
Principle and Purpose (Verse 2,3 point a,b)
Full explanation will be connected directly to the implication which is occurred. Meanwhile, the administrative technique category can be seen on the chapters consist the limitation of technique rules, regulation, etc. which can be grouped, they are:
CHAPTER II
PROHIBITITION
The First Chapter
Pornography consist of (Section 4,5,6,7,8,9 or 4,10 verse 1 and 2, 11 verse 1-2, 13,14, 15,16,17 verse 1-5, 18 verse 1-2, 19 verse 1-4, 20,21,22,23,24 verse 1-3)
The Second Part
Porn action consist of (Section 25 verse 1-2, 26,1-2, 27 verse 1-2, 28 verse 1-2, 29 verse 1-3, 30 verse 1-4, 31 verse 1-4, 32 verse 1-4, 33 verse 1-3
CHAPTER III
EXCEPTION AND LICENSING
Exception (Verse 34,35,36)
Licensing (Verse 37,38,39)
CHAPTER IV
INSTITUTION OF NATIONAL ANTI PORNOGRAPHY AND PORN ACTION
Name and Position (verse 40 verses 1-2)
Function and Duty (verse 42, 43)
Structure and membership of organization (Section 44-50)
CHAPTER V
ROLE OF SOCIETY (Section 51 Verse 1-2)
CHAPTER VI
THE ROLE OF GOVERMENT (Section 52,53,54,Verse 1-2)
CHAPTER VII
INTEROGATION, PRESECUTING AND INVESTIGATION (Section 55)
CHAPTER VIII
ANNIHILATION (Section 56)
CHAPTER IX
SANCTION
Administrative Sanction (Section 57 Verse 1-2)
Criminal Sanction (Section 58, 59,60, 62,63, Verse 1-4, 64 Verse 1-2, 65 verse 1-2, 66, 67,68,69, 70,71 verse 1-4, 75,76,77,78, verse 1-3 79 verse 1-2, 80 verse 1-2, 81 verse 1-2, 82 verse 1-2,83 verse 1-3, 84 verse 1-4. 85 verse 1-4, 86 verse 1-4, 87 verse 1-3, 88 verse 1-3, 88 verse 1-3, 89,90)
The last category which is not include the previous category. On another meaning, the chapter and section; only explain the shift and close. The category is:
CHAPTER X
TRANSFER CERTAINTY (section 93)
That is why the plan of anti pornography and porn action law and some sections which are considered controversial, and need to change, in one side can include the values which change society, or it can be contain the ideal relevance.

2.3. The Weakness of RI Law Number 44 in 2008 about Pornography

Generally as laws, Law Number 44 in 2008 is criticized by many sides. Moreover, the beginning of this law a lot of pro and contra happen among the group supporting the arrangement of moral in society by government and group of liberalism and secularism which against government participating in moral or private law.
Based on the discussion of law Number 44 in 2008 can be seen the weakness on the points below:
This law only regulates pornography limit showed in the public through media, and not include in private area or action which can lead to the breaking the law of religion in the relation between men and women who is not mahram. (relation by blood or marriages) Law did not specifically regulate illegal relation between man and women, such as adultery or action which lead to adultery in which this action is prohibited by Islam. Islam give big focus that can be used to give specialization to their right. This protection is clearly can be seen by the serious sanction about adultery.
On the first section it is explained about definition of Pornography which is meant by this law, it is:
All citizens are not allowed to produce, make, increase, duplicate, spread, broadcast, import, export, offer, commerce, rent, or provide pornography which consist of: intercourse, including diverge intercourse; sexual violence, masturbation or onani; naked or appearances seems naked; genitals or children pornography.(1)
But, couples who live in the same house without legal bonding marriage or pregnant outside marriage, or in relation in public area, are not included in this law. what Construction thought of this law must be admitted is based on the criminal law system arranged by KUHAP, that is why the case defined so. In KUHAP, section 284-289, adultery is defined as intercourse between husband and wife who is done by someone has been married not based on mutual love.
On this side, Pornography law is important to be observed closely. Pornography law section 4 verse 1 mention:
In the constitution is explained that is meant by producing is not including for themselves or another own interests.
The explanation section elaborates in torso paragraph that what is not allowed by the law is only producing of pornography for public interest. All kinds of adultery can be done as long as based on mutual love and produced for self interest is not prohibited by the constitution.
Adultery is not punished by constitution section 27 verse 1 which mention: "people by which meant without right to distribute and/or transmit and/or make can be connected to electronic information and or electronic document which has content that against moral norm.(4) Furthermore section 282 KUHP about showing in public area writing, picture or things which content against moral. all of them is only about spreading pornography.

Section about adultery is actually in KUHP, they are section 284. But its scope is limited. Adultery is identified by overspel,(1) that definition is far more limited than adultery. Overspel is only will occur if one of actor or both actors is bounded by marriage. Overspel can be acted as criminal law if there is complaint from the husband or wife actor. Without complaint, or without complained by wife/husband so criminal of adultery is not prohibited. Positive law which applied in Indonesia did not give sanction to the actor of adultery done by a couple who is not married yet. Certainly it is a serious problem and cannot be underestimated.

But the pornography and porn action problem in Indonesia has effected to character of nation, and unfortunately the solution is not as expected. The difficulty to overcome the pornography and porn action criminal is caused by the definition and interpretation that is different from section KUHP which arrange the problem of pornography, and society responds the pornography and porn action weakly.

Basically the constitution is born from the character of nation moral in that is caused by intercommunication and free sex, especially among teenagers and children. As it can be seen on the television program. It shows that level damage is so serious that social exploitation among young generation. this situation can be seen from the purpose of constitution planning as can be seen on section 3:

Regulation of pornography purpose:

a. Establish and maintain social life order which has ethic, character, honor the values of One God, and respect to dignity of human.

b. Respect, protect, and conserve the art and cultural values, custom and ritual of religion in Indonesia plural society.

c. Provide training and education to the moral and character of society;

d. Provide certainty of law and protection to citizen from pornography, mainly for children and woman; and

e. Prevent the improvement of pornography and sex commercial in society.(1)

The article clearly informs the purpose of this constitution, but full concept cannot be read the preventive action for this criminal action, especially for children.

2.3.1 The Constitution Number 44 Encompass Five Part, They are Art, Letter, Custom, Science and Physical Exercise.

It is confirmed by Constitution Court (MK) to court decision of judicial review for constitution pornography after two expert witness from government, they are Prof. Dr. Tjipta Lesmana and Dr. Sumartono. So all kind of pornography can be divided into five parts which do not have sanction like the other area, for example the sport outfits, such as lady swimwear, even it is included to section 4 (1) Chapter II about proscription and limitation namely it impress naked, but it does not have sanction since it is sport category.

The limitation has to be acted closely since the exception without limit will make liberal party to exploit the criminal for different purpose. They may exploit the human body with art argument or literature and culture. Even in science, pornography can be exploited by sex education argument, as it occurs in U.S. in short, it is so important that the limitation of exception has to be elaborated widely therefore it will not become polemic among people. The limitation is run by issuing the government rule (PP) as explaining to this law, as we can see on the section of 14:

The certainty for condition and procedures of licensing of producing, spreading, and using the pornography product which purpose and education purpose and health service and to the certainty of section 13 would be arranged on section 13 the government rule.(1)

But it is unfortunate that until now the government law about this constitution is not issued by the government, so to run this constitution is not completely running.

The description above has to be understood that Islamic law is not only about the sanction for adultery which is death for marriage person, but Islamic law has to be applied in the hard form which purposes to torture the actor by stoning.

a. Attempt to Solve Porn Action by Islamic Law Perspective

Preventive action to pornography among society especially for children either they are object or as subject, for example by providing education to the society the impact of free sex so it can be avoided, or by controlling the program on media which shows the character of pornography has to give punishment to anyone disobey the pornography content.

It feels so sad that the government most citizens is Muslim. But there is no one constitution accommodated the Muslim interests related to the adultery law, although it is admitted that Constitution number 44 in 2008 is more and less will contribute to minimize the adultery action among society.

Preventive action in Islamic law is important part in prohibiting a criminal, especially adultery. Rasullulah saw said:

From Abu Umamah ra that a man saw Rasulullah saw, and said O Rasululah. Allow me to do adultery. People around there are surprised, but Rasulullah saw. Said: let him (Do not Punc him), while invited him, close to Rasulullah saw. So Rasulullah saw. Do you want your mother to do adultery? Asked Rasulullah saw. The man said "no" so the other person , then Rasulullah said: Do you want your sister to do adultery? "no" similar to the other person" do you like your father sister to do adultery? "no" the same as the other. Do you like your mother sister to do adultery? Then Rasulullah saw. Said: You have to be hate to what you do not like to yourself, and love what you love to yourself". Then the man asked Rasulullah saw: O Rasulullah, pray for me to clean my heart. Rasulullah saw. put his hand to the man while said: " O Allah! Forgive him and clean his heart and maintain his honor"(5)

On that hadis, Rasulullah saw. gave education to the man to leave adultery by describing to his close family so the man realized that this action would hurt someone heart. Whereas, his feeling was similar to them, the man left adultery.

b. Constitution of Pornography and Porn Action perspective *Maqas} Id al-Syari>Ah*

Constitution of Pornography No. 44 in 2008 can be seen from some theory *maqa>s}id al-Syari>'ah.* if it is seen by its urgent, The constitution No. 44 in 2008 can be acquired justification from the theory of *maqa>s}id al-Syari>'ah.* Conventional especially related to obligate to maintain fundamental thing (*al-d}aru>riya>t al-hamsah*). The urgency at least may be seen such as below:

1. *Hifz al-'Aql.*

Intelligence is one instrument in human life as slave of Allah swt. Intelligence can be as measurement to someone who deserve to get *takli>f.* by that reason, it is not surprised that expert of Islam agreed to maintain intelligence to existence and the function of intelligence so one purpose (*maqas}id*) is *d}aru>ri.(6)*

According to Ibn Taimiyah, Attempt to maintain intelligence in Islam not only forbidden material thing (*h}issiyah*), such as alcohol and various things which can effect to intoxicate, but also forbidden to non material which can break a purity.(7) the other need to remember, that to maintain intelligence as we can see to *maqas}id al-Syari>'ah* can be done from two sides; the side of *jalb al-mas}a>lih}* and the side *daf'u al-mafa>sid.* so *jalb al-mas}a>lih* to intelligence give and realize all benefit to maintain intelligence as instrument of worship to Allah swt. while *daf'u al-mafa>sid* to intelligence can be done by doing all thing that can block mafsadat to touch intelligence. We can see the word of Allah swt. in al-Nisa>/4:43

"O the believer, do not pray, while you are in drunk, until you understand what you said…

"Drunk" is a condition where someone feel pleasure to the things which later block the intelligence to run properly.(7) Because of it,

Ibn Taimiyah then explained that the action of drunk should be divided into two:

a. *Jusma>mi,* is caused by food and drink consumed, and this is the main reason most of things people who is drunk consume. When intelligence do not run properly, he or she will forget all his problem and sadness.
b. *Ma'nawi,* is drunk caused by something that is not consumed by body, Ibn Taimiyah cited as example with the chaos on the picture of woman to man and opposite.(8)

2. *Hifz al-A'ra>d*

Maintain dignity in Islam has a lot of implication. Maintaining dignity specifically start from maintain genitals (*al-Farj* or *al-Bid'u*) which then maintain generation (*al-Nasl*), then finally by all of them will realize that dignity is still safe. Allah swt. said in QS. Al-Nur/24:30.

3. Translation:

Said to the man who is believer that "They should block his sight, and maintain his genitals; it is more pure for them. Allah is the Most knowing what they did" (9)

The verse clearly mentioned between commands to block sight from forbidden thing to be seen by maintaining "genital. (10) Both of them is relevant. Something is touched by sight will impress strong effect to the soul/heart, which then give motivation to all part of body to, including genitals. That is why one forms to maintain genitals by blocking sight consistently. It means that one way to achieve the purpose of *hifz al-a'ra>d* is to prepare the devices of law to keep and prevent the sight of society to do bad things, and constitution of law will be more or less have fulfilled this needs. Moreover *hifz al-a'ra>d* is related to important maintaining to the religion (*hifz al-di>n*) and soul (*hifz al-nafs*). Allah said in Q.S. al- Furqa>n/25:68.

And the people who do not worship another god with Allah and not kill the other soul forbidden by Allah (to kill) except by (reasoning) the right, and not do adultery…(9)

This verse showed that how to maintain three main purposes sharia: they are maintain religion (by forbidding to connect Allah), maintaining soul (not killing a soul without right reason) and maintain dignity (by forbidding adultery). (8) It is clear that adultery case cannot be underestimated, especially this verse mentioned with two actions that is criticized hard in Islam: Shirk and killing soul who is innocent.

What another theory of *maqas}id* important is the theory of *h{udu>d* and *ta'zir*, as the most important part from the laws, including constitution is how the pattern and how to run it. Since whatever the law without any sanction and punishment will have no effect to the actor. Meanwhile one purpose of the law is to give forswear.

Punishment in Islamic law perspective at least is known into two terms: *hudu>d* and *ta'zir. Hudu>d* is punishment that has been regulated its character by nash shariah, such as *qis}a>s* in killing case and cutting hand to the thief case. While *ta'zi>r* is.

تَأْدِيْبٌ عَلَى ذَنْبٍ لاَحَدَّ فِيْهِ, وَلاَ كَفَّار ة غَالِبًا وَهُوَ لِلّٰهِ وَلِآدَمِي(11)

The punishment for one sin which is not explained (explanation) the *had* and also not its kaffarah, and it is related to the right of Allah and man.

Shortly it is said that pornography criminal from Islamic law perspective will be analogy with general pattern, if there is adultery and can be proved, the punishment should be done. While proved guilty but the action is not identified through *h}udu>d,* so the door *ta'zi>r* is the way to give effect to the crime. Sharia Islam delegate to judge to determine any proper punishment to the crime.

Constitution of pornography can be said that theory will accommodate through Chapter VII about criminal certainty. But technology and pornography industry improve fast, the criminal formation certainly will follow this progress. This condition, Islamic law actuall will have role through the concept of Program KUHO 1991/1992 Section 1 verse (1) still maintain legal. On the verse (3) mentioned, Certainty on the verse (1) does not run the law to determine based on the custom where someone need to be punished whether the action is not regulated to the law.

So it can be seen on the criminal that can be punished and which is not, it is necessary to do the courage of judge to interpret the constitution. The certainty will justify to interpret to the laws, even there is threat, if rejecting to be punished. To fill this emptiness, judge for while can do interpretation. A Muslim judge should take advantage to this opportunity digging from *Maqas}id al-Syari>'ah* from such these cases.

3. The future Application of Pornography and Porn action constitution in Indonesia.

The existence of Pornography and porn action constitution is proper to give a hope to eliminate crime. Although the existence of the constitution cannot be said perfectly, it is relevant with the principles which are determined by the expert of Islam.

مَالاَ يُدْرَكُ كُلُّهُ لاَيُتْرَكُ كُلُّهُ(12)

Something that can be achieved perfectly, it is not supposed to leave fully.

4. Conclusion

Of the research, the writer can conclude that:

1. The content and substance of Pornography constitution are 8 chapter and 82 section, they are general certainty, prohibition and limitation, children protection, preventive, investigation, Persecuting and Investigation on the court, eliminating, Criminal certainty and closing certainty. Pornography is picture, diagram, illustration, photo, writing, voice, moving picture, animation, cartoon, conversation, gesture, or other patter of message which various media communication or performance in the public, which contain salaciousness or sexual exploitation against the moral norm in society, the definition includes porn action.
2. The constitution Number 44 in 2008 about pornography has weakness so there are some poin need to observed, they are this constitution is not regulated about adultery for a couple who live in the same house without marriage or pregnant, it also does give the preventive steps to do pornography action and the laws is not completed by the rule of government as explain some section and area which is excepted, such as art, sport, cultural observer, so the application cannot run perfectly. The existence of constitution should give a hope to eliminate crime in this country.
3. The constitution of pornography perspective *Maqas}id al-Syari>ah* can be seen as a base argument to see the important constitution as the base to provide sanction to the crime actor of pornography. *Maqas}id al-Syari>ah* theory, constitution number 44 in 2008 can be acquired justification from the theory *Maqas}id al-Syari>ah,* conventional especially relevant to the obligation to maintain the fundamental principle (*al-d}aru>riya>t al-hamsah*). These urgent things at least can be shown from the protection side to the existence and intelligence function is one purpose (*maqas}id)* in which Islamic law has *d}aru>ri* character. Besides *Hifz al-A'ra>d* (Safe dignity) safe dignity specifically started *al-Farj* or al-Bid'u (cover genitals) in which continue to the maintain *al-Nasl* (generation), finally by all of them will realize the protection to the honor which has important relevance with religion protection. Although the constitution of existence is not perfect yet, but it is proper to the principle that something cannot be achieved perfectly, it should not leave fully.

5. Implications and Recommendations

1. Implication and recommendation from this paper is hoped that legislative side (DPR RI) can invite the law taken from Islamic law and revise section 284-289 KUHP which define adultery based on imperialism law. Asked to the executor to more

focus on the nation moral to do preventive action against pornography especially for the young generation.

2. The government should publish the rule of government for the constitution number 44/2008 so that it can run well. The implementation of these laws insists the role of society which become important factor to run these. At least it soon prevents spreading pornography crime in Indonesia for the purpose that can reach the highest of moral nation.

3. For Muslim in Indonesia hope that Islamic law as one national system of law since pornography and porn action is the part to sharia paradigm directly related to the case of adultery.

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