IMPOSITION OF NATURE AGAINST MATERIAL LAW UNDER JUDGE VERDICT OF CYBERPORN CASE IN EAST JAVA

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Abstract

Cyberporn case has become a challenge for the Judge in East Java jurisdiction to fulfill legal provisions and uphold law in the society. The problem appears on the meaning of nature against material law itself under judge's consideration and the measurement used to determine that a judge has imposed nature against material law. In order to decrease the problem, research method of socio-legal is used to analyze the basic law of imposition of nature against material law associated with the use of nature against material law by judge in examining and deciding a case. The result of research shows that judge considers nature against material law in giving verdict for cyberporn case. Judge's consideration on norms of morality is based on religious aspect, culture and the development of people's condition. Judge's verdict also includes socio-juridical which is automatically accepted by the society.

***Keywords**: nature against material law, judge, cyberporn*

Abstrak

Perkara *cyberporn* menjadi tantangan tersendiri bagi Hakim Pengadilan di Wilayah Hukum Jawa Timur untuk tidak sekedar memenuhi rumusan ketentuan hukum tetapi hukum yang hidup di masyarakat. Permasalahan yang timbul terletak pada arti penting dari sifat melawan hukum materiil dalam pertimbangan putusan hakim dan ukuran yang digunakan untuk mengatakan hakim telah memberlakukan sifat melawan hukum materiil. Sebagai upaya untuk mengurai permasalahan tersebut digunakan metode penelitian sosio legal dengan menganalisis dasar hukum dari pemberlakuan sifat melawan hukum materiil dikaitkan dengan penggunaan sifat melawan hukum materiil oleh hakim dalam memeriksa dan memutus perkara. Hasil penelitian menunjukkan hakim telah mempertimbangkan sifat melawan hukum materiil dalam memberikan putusan perkara *cyberporn*. Pertimbangan hakim atas norma kesusilaan didasarkan pada aspek agama, budaya-adat istiadat dan perkembangan kondisi dari masyarakat setempat. Putusan hakim pun memuat pertimbangan sosioyuridis yang secara otomatis diterima oleh masyarakat.

Kata kunci: sifat melawan hukum materiil, hakim, *cyberporn*

Introduction

Cyberporn is criminal act using technology and the internet. Pornography regulated in Article 282 of Criminal Code (KUHP) gets new modus operandi by using sophisticated internet technology. Before Law Number 11 Year 2008 on Electronic Information and Transactions and Law Number 44 Year 2008 on Pornography (Law of Pornography) are applied, there is already prohibition on pornography through internet in Special Criminal Laws such as Law Number 36 Year 1999 on Telecommunication (Article 21), Law Number 40 Year 1999 on Press (Article 5 paragraphs (1) and (13), Law Number 32 Year 2002 on Broadcasting (Articles 36 and 46) and Law Number 8 Year 1992 on Film (Article 40 and Article 41 paragraph (1).[1] Those regulations get a challenge related to *anonymity*[2] from criminal

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1 Alfons Zakaria, "Pelarangan Website Yang Bermuatan Pornografi di Indonesia", *Jurnal Risalah Hukum*, Vol. 7 No. 1, Juni 2011, pp. 88-95.

2 David Eaton dalam Go Lisanawati, "*Cyber Child Sexual Exploitation* dalam Perspektif Perlindungan atas Keja-

act via internet which causes ponography perpetrators difficult to be found. Krismiyarsi [3] asserts that cyberporn as a part of cybercrime has not been understood precisely by law enforcement officers. Moreover, based on DeKeresedy's research,[4] pornography through internet leads to race discrimination and offers various sexual fantasies which are intersting for the users.

Several legal stipulations that can be imposed to cyberporn criminal act are Article 27 paragraph (1) of Law of Electronic Information and Transactions and Article 4 of Law of Pornography. Those two stipulations base pornography assessment on the violation of morality norm. The comprehension on morality norm is important for both sides as assessment parameter and disap-proval of cyberporn criminal act.

Formulation of criminal act asserted in Article 27 paragraph (1) of Law of Electronic Information and Transactions which bases the prohibition criminal act on the condition "violating morality" is not easy to be implemented by law enforcement officers, especially judges. The judges in criminal act are limited by closed system of criminal law so that it is inseparable from law.[5] The understanding on morality norm is considered having wide scope and not objective depending on certain condition of society. Even though judges have responsibility to do investigation and legal finding (Article 10 paragraph (1) of Law of Judicial Authority), the comprehension of morality value becomes a challenge. Judges' behavior which is only based on morality norm will be assessed by not prioritizing legal certainty. On the other hand, judges who base themselves on the stipulation of criminal law are considered violating justice.

Based on the background of regulation of pornography through internet that is based on the enforcement of act agains material law, there are several problems: *first*, what are the functions of act agains material law for pornography criminal act through the internet?; and *second*, have the judges applied act against material law in considering the verdict of pornography case through the internet?

Research Method

As an effort to solve those problems, the researcher uses normative juridical research method supported by empirical juridical research method. The comprehension on criminal law stipulation is meant to get deeper understanding related to the functions of act against material law in defamation of cyberporn criminal act supported by the knowledge of act against material law. The result of the comprehension on act against material law is compared with legal document of Verdict on pornography case through the internet in East Java jurisdiction year 2008-2016. Judges' consideration will be analyzed by using the formulation of criminal act and act against material law in order to draw the conclusion.

Discussion

Act Against Material Law as Defamation Parameter of Criminal Act

Act against material law contains defamation parameter of an act whether it includes criminal act or not. The comprehension on "act against law" is very differefent with "against law" (*wederrechtelijkheid*). The understanding on "against law" as the element of opposing law shows that opposing law as part of criminal act formulation unsures in a rule of law.[6] The second understanding is more emphasized on the nature of law that is violated as written law (*objective recht*), someone's rights (*subjective recht*), without power or authority or unwritten

hatan Siber", *Jurnal Pandecta,* Vol. 8 No. 1, January 2015, p. 14.

3 Krismiyarsi, Desember 2015, "Criminal Law Enforcement of Cyberporn/Cybersex in Order to Fghting Crime in Indonesia", *International Journal of Business, Economic and Law,* Vol. 8 Issue 4, December 2015, p. 101.

4 Walter S. DeKeresedy, Desember 1st 2015, "Critical Criminology Understandings of Adult Pornography and Woman Abuse", *International Journal for Crime, Justice and Social Democracy,* Vol. 4 No. 4, 2015, p. 7.

5 Elisabeth Nurhaini Butarbutar, "Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antinomi dan Penerapannya", *Jurnal Mimbar Hukum,* Year 23 No. 1, February 2011, p. 63.

6 Eddy O.S. Hiariej, "Telaah Kritis Putusan Mahkamah Konstitusi dan Dampaknya terhadap Pemberantasan Korupsi", *Jurnal Mimbar Hukum,* Vol. 18 No. 3, October 2006, pp. 295-296.

law.[7] Different with the third understanding, act against law is directed to assesment parameter whether there is violation of an act or not.

Related to the comprehension on the source that will be used in determining defamation, act against law can be divided into 4 meanings. *first,* Act Against General Law which assesses criminal act automatically has act against law; *second,* Act Against Specific Law which gives assessment on act against law that exists when the stipulation of criminal act is written; *third,* Act Against Formal Law that states act against law which exists when act is matched with the stipulation of criminal act; and *fourth*, Act Against Material Law which assesses act against law existing when an act violates or dangers legal interest protected by the legislature.

The important meaning of the enforcement of act against law as defamation parameter of an act cannot be separated from the comprehension on legal source that is used to assess that act. Moeljatno explained that:

> "criminal act absolutely must include formal unsure, which is matching the formulation of law (*tatbestandsmaszigkeit*) and material unsure which is character or act that is contradicted with the goal regarding social interaction or in short, act against law (*rechtwidrgkeit…*"[8]

Moeljatno is a pioneer of the idea of act against material law, remembering that the defamation of the comprehension on criminal act is no longer limited since what is written on the formulation of legal stipulation is not in accordance with law that exists in society. In each definition, Moeljatno clearly asserted that the importance of defamation of an act as criminal act must be based on the stipulation of written criminal law which comes from the goal of social interaction.

Morality Norm as Parameter of Act Against Material Law

The enforcement of morality law as defamation parameter of pornography is regulated in Article 27 paragraph (1) of Law Number 11 Year 2008. The term "violating morality" by Kanter and Sianturi[9] asserts that "morality norm is the stipulations to behave in the rela-tionship among humans based on "conscience". Along with this idea, Ismansyah and Ernawati [10] explained that criminal act is violation toward minimal morality values (*das recht ist das ethische minimum*).

The comprehension on morality norm related to conscience is in accordance with the value of Humanity that is full of justice and civilization. Pancasila which becomes philo-sophy of life and ideology at once that is able to accomodate all interests[11] should prioritize the understanding on humanity, remembering its existence as the soul of all Indonesians.[12] That understanding becomes the basic of refusal for the comprehension of pornography positively as

> "an expression of fantasies that provide pleasure" (Christensen) dan "a positive displacement activity for sexual aggression" (D'Amato) as quoted by Diamond.[13]

Pornography still has negative impacts because it degrades humanity as sexual object.

The regulation of moral norms originating from Pancasila brings Pancasila culture through law because of "conceptualizing law as nation behavior".[14] The law will follow the develop-

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7 *Ibid*.

8 Moeljatno, 1983, "*Perbuatan Pidana dan Pertanggungjawaban Pidana dalam Hukum Pidana",* Ceremony of the 6th Anniversary of Universitas Gadjah Mada, Sitihinggil Yogyakarta 19 December 1955, Jakarta: Bina Aksara, pp. 24-25.

9 E.Y. Kanter dan S.R. Sianturi, 2012, *Asas-asas Hukum Pidana di Indonesia dan Penerapannya,* Jakarta: Storia Grafika, Jakarta, pp. 26-27.

10 Ismansyah dan Ermawati B., "Permasalahan Delik Zina yang terdapat dalam Kitab Undang-Undang Hukum Pidana (KUHP", *Jurnal Delicti,* Vol. IX No. 1, January-June 2012, p. 27.

11 Gabrielia Febrianty, "Philosophy, Pancasila and Modern Technology", *Jurnal Yuridika,* Vol. 29 No. 2, May-August 2014, p. 8

12 Fransiska Novita Eleonora, "Pancasila sebagai Ideologi Pandangan Hidup Bangsa Indonesia", *Jurnal Hukum ADIL,* Vol. 3 No. 1, July 2012, p. 143.

13 Milton Diamond, 16 Februari 2016, "Pornography, Public Acceptance and Sex Related Crime: A Review", *International Journal od Law and Psychiatry,* Vol. 32, 2009, p. 304.

14 Sudjito, "Hukum sebagai Sarana Pembudayaan Pancasila", *Prosiding Kongres Pancasila V 2013: Strategi Pembudayaan Nilai-Nilai Pancasila dalam Menguatkan Semangat Ke-Indonesiaan,* 31 May-1 June 2013, p. 117.

ment of society so that it can be accepted well by the community. This understanding provides a new approach to the law not to orient the formulation of the law but the value of living in society, namely the value of Pancasila. With regard to the duties of judges, the imposition of moral norms based on Pancasila gives the opportunity to carry out judicial duties to analyze the human experience and contextual human experience.[15]

The trial minutes of the drafting of the Information and Electronic Transaction Information Enactment from the outset show the legislators considering the importance of its nature against law. These efforts are aimed at understanding the legal needs of the community and accommodating the legal needs that society expects.[16] In line with this, Law Number 11 Year 2008 in terms of arrangements provides more general arrangements related to electronic transactions and accommodates business interests.[17] Law is expected to answer the problems of decency arising as a result of the use of information technology with its "all-knowing culture"[18] so that cyberporn can be overcome.

Similar but not the same, Law Number 44 Year 2008 in Article 1 number 1 emphasizes the act of pornography is prohibited because it is against the moral norms. Dewi Bunga [19] asserts that the prohibition of pornography is essentially a manifestation of moral values and character as originated in the principle of a just and civilized humanity. Law No. 44 of 2008 on the one hand protects children and women from the dangers of pornography but on the other hand has the potential to criminalize women, interfere with the privacy[20] of even the dehumanization of women.[21] Not to mention the setting of pornography does not provide a clear boundary between pornography, erotica, and obscenity.[22]

The concern is quite reasonable if viewed the regulation of prohibition of pornography in Law Number 44 Year 2008 more limited to Article 4 of Law Number 44 Year 2008 which explains the scope of pornography consists of 2 (two) kinds of explicit pornography with 6 (six) forms display and sexual services consisting of 4 (four) forms of activities. This state of affairs indicates that the formation of laws tends to ignore sociological considerations based on norms, values, ethics and religious norms.[23] The enforcement of the nature against law becomes disregarded to be applicable.

Implementation of Norms of Morality in Judge's Verdict Consideration of Pornographic Cases through the Internet

The sign of the enforcement of the nature of the material law can be seen in the judges' judgment in shaping the law in order to "deepen the conscience of the people".[24] Normatively, the prohibition of cyberporn acts has been regulated in Law Number 11 Year 2008 and Law Number 44 Year 2008, the judges are challenged to integrate the normative aspects with the applicable morality norms (social justice) in order to provide justice that is expected by the society (moral justice) in every case examined

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15 Ahmad Zaenal Fanani, "Hermeneutika Hukum Sebagai Metode Penemuan Hukum dalam Putusan Hakim", *Varia Peradilan,* Numberf 297, Year XXV, August 2010, p. 58.

16 Abdul Gani Abdullah, "Pergumulan Penegakan Hukum dengan Politik Hukum dalam Ranah Teori Hukum", *Jurnal Legislasi,* Vol. 7 No. 3, October 2010, pp. 450-451.

17 Ahmad Ramli, "Dinamika Konvergensi Hukum Telematika dalam Sistem Hukum Nasional", *Jurnal Legislasi,* Vol. 5 No. 4, December 2008, p. 5.

18 Kamarudin Hasan, "Pancasila dan Arsitektur Negara Hukum Indonesia", *Jurnal Digest Epistema,* Vol. 4, September-February 2013, p. 28.

19 Dewi Bunga, "Penanggulangan Pornografi dalam Mewujudkan Manusia Pancasila", *Jurnal Konstitusi,* Vol. 8 No. 4, 2011, p. 471.

20 Heru Susetyo, "Perempuan dalam Hukum di Indonesia", *Jurnal Legislasi,* Vol. 7 No. 2, 2010, p. 223

21 Debora H. Yatim, "Mengurai Fenomena (Perempuan dan) Pornografi, *Jurnal Perempuan,* No. 38. November 2004, p. 8-9.

22 Gayatri Dyah Suprobowati, "Penerapan Hukum Pidana terhadap Foto Bugil Artis Anjasmara yang Fenomenal dalam Rangka Memberantas Pornografi dan Pornoakse di Indonesia", *Jurnal Yustisia,* Year XIX 73th Edition, January -April 2008, p. 9.

23 M. Sofyan Pulungan, "In Defense of The Freedom of The Press: The Indonesian Playboy Magazine Case Study", *Jurnal Indonesia Law Review,* Vol. 4 No. 3, January-April 2014, p. 34.

24 M. Syamsudin, "Keadilan Prosedural dan Substantif dalam Putusan Sengketa Tanah Magersari: Kajian Putusan Nomor 74/PDT.G/2009/PN.YK", *Jurnal Yudisial,* Vol. 7 No. 1, April 2014, p. 22.

(legal fact).[25] These three aspects are essential to unity in the judge's verdict.

Legal procedures are often "stashed" the judge on very strict legislation so that it is not understood by the society[26] that leads to legal dislocation due to legalistic-positivistic thought.[27] Judge's consideration of cyberporn should be possible through legal approaches and technological approaches, moral approaches and global approaches.[28] Bagir Manan[29] emphasized that the freedom of judges is still recognized as long as the judge holds to the general principle of law and the general principle of natural justice. The freedom of the judges in the interpretation of moral norms is intended to: *first*, understand the meaning of the principle of law; *second*, linking legal facts with the rule of law; *third*, guaranteeing the application or enforcement of the law appropriately, justly and correctly; and *fourth*, with social change so as to suit the changes of society.[30] That is, judges in understanding the norm of decency are asked to involve all aspects that exist continuously in accordance with the development of society to gain a contextual understanding.[31]

A case of cyberporn occurred in the city of Malang with the case of the US position has 16 nude photos showing the breasts, parts of the breast and genitals of the victim because he felt hurt he spread the photos through social media Facebook with Kusuma Furry account via Fitria Saida and Whatsapp (group? Social A 2013?) through Iphone mobile phone 4. Decision of Malang District Court Number 645/Pid.Sus/2015/PN.Mlg show the judge's consideration as follows: "that the defendant's conduct fulfills the act of disseminating pornography in order to make the nude photo public." Judge's consideration prioritizes the fulfillment of the elements of Article 4 paragraph (1) in conjunction with Article 29 of the Pornography Law so that the nature against law imposed is the nature against material law.

The same consideration in the case of defendant ES by sitting the case of the defendant and the victim is a marriage partner of siri. The defendant often photographed the naked body of the victim as well as himself with the HP of the defendant and the victim. The defendant then uploaded the photo to the Defendant's FB account "EDI WOJOD". Panel of judges in Decision Number 425/Pid.Sus/2015/PNMjk considers the elements of dissemination of pornography understood from the act of the defendant uploading the photo so that it is proven.

Kirchengast calls the act done by "ES" as "revenge porn", it is "the sharing of initimatte images without consent of the person".[32] Porn revenge action is very harmful people, especially the victim can experience prolonged mental stress, community relation damage and being ostracized from the community.[33] In this case the judge only considers the fulfillment of elements of the criminal act listed in Article 4 paragraph (1) jo. Article 29 of the Pornography Law. The judge only focuses on the presence or absence of the defendant's acts against Article 4 jo. Article 29 of Law Number 44 Year 2008. The condition is indeed highlight the legal certainty as measured by the proven or not element of criminal act that was charged. It's just that the understanding of cyberporn cases is more static fixed on the fulfillment of elements of criminal acts without considering the interests of the community, especially the unwritten law.

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25 A Salman Maggalatung, "Hubungan Antara Fakta, Norma, Moral dan Doktrin Hukum dalam Pertimbangan Putusan Hakim", *Jurnal Cita Hukum,* Vol. 1 No. 2, December 2014, p. 188.

26 Subibharta, "Moralitas Hukum dalam Hukum Praksis sebagai Suatu Keutamaan", *Jurnal Hukum dan Keadilan,* Vol. 4 No. 3, November 2015, p. 392.

27 A.M. Mujahidin, "Hukum Progresif: Jalan Keluar dari Keterpurukan Hukum di Indonesia", *Varia Peradilan,* No. 257 Year XXII, April 2007, p. 52 .

28 Don Raisa Monica dan Diah Gustiniati Maulani, "*Cybersex* dan *Cyberporn* Sebagai Delik Kesusilaan", *Jurnal Fiat Justitia,* Vol. 7 No. 3, September-December 2013, p. 339

29 Bagir Manan dalam A Salman Maggalatung, *Loc.cit*.

30 Bagir Manan, "Beberapa Catatan tentang Penafsiran", *Varia Peradilan,* Year XXIV No. 285, August 2009, p. 5.

31 B. Arief Sidharta, "Struktur Ilmu Hukum Indonesia", *Jurnal Refleksi Hukum,* Tahun ke tanpa nomor, October 2008, p. 119-120.

32 Tyrone Kirchengast, 2016, "The Limits of Criminal Law and Justice: 'Revenge Porn', Criminalisation, Hybrid Responses, and The Ideal Victim", *University of South Australia Student Law Review*, Vol. 2 No. 42, p. 96

33 Mudasir Kamal, MD and William J. Newman, MD, 1 September 2016, "Revenge Pornography: Mental Health Implications and Related Legislation", Vol. 4 No. 3 2016, *The Journal of the American of Psychiatry and the Law,* p. 362-363

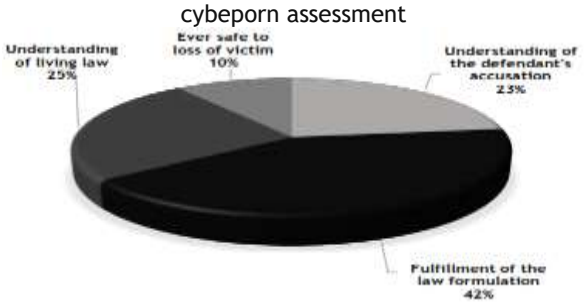
Some judges' considerations in cyberporn cases based on Article 27 paragraph (1) junction Article 45 of Law Number 11 Year 2008 shows a unique case. The case of the defendant "PD" sent a chat to the victim containing the question "mbaknya udah nikah ??" (Have you married?) then he sent male genital picture from Google.com followed by a message "kalo mbak lagi kesepian kontol aku juga lagi kesepian?" (my dick is lonely, are you lonely too?). Then She captured the chat and reported to police. Judge's consideration in Malang District Court Decision Number 702/Pid.B/2015/PN.MLG related to the element of "content infringement" namely:

> "Considering the definition of morality norm, it is a social regulatio from society conscience that produces behavior or morals; therefore, people can distinguish whichi is good and bad."

The formulation of Article 27 Paragraph (1) of ITE Law provides gives a space for judges to investigate the presence or absence of violations of moral values. It's just a question of legal certainty and ease of judges. Legal certainty becomes an issue when a criminal case is handed over to a judge for determining whether there is a violation of decency or not. The judge must understand the interests and the value of morality which defendant violates.

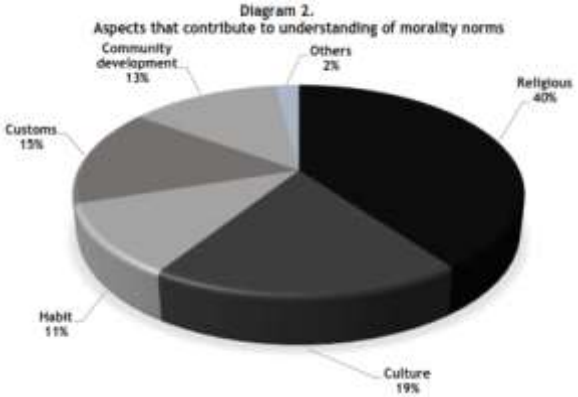
The important role of morality norm is different for judges when they examine cyberporn cases in internet. Most of the respondents stated that the understanding of moral norms was intended to fulfill the formulation of law which are the understanding of the living law and the defamation of the defendant's actions, as the following diagram:

Diagram 1.
Some ways to understand morality norm as a basic cybeporn assessment



Judge wants a formula which gives them a freedom to understand the living law. This view is much in line with the nature against material awful law that affirms the existence of unwritten law; however, the enforcement must be formulated in the legal provisions.

Diagram 2.
Aspects that contribute to understanding of morality norms

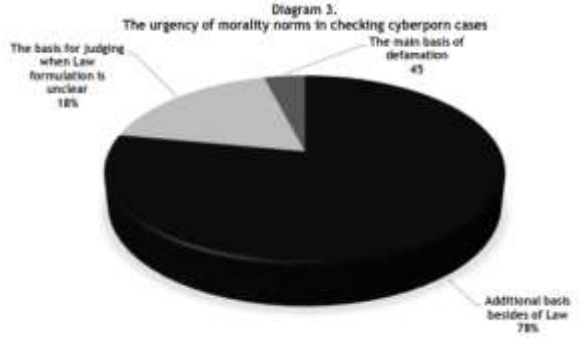


Religious factor plays an important role in understanding morality norms and it is the most often used as a guide in assessing cyberporn criminal acts. The consideration of Pornography draft law also places the value of God Almighty as the main value in shaping the dignity of humanity of Indonesia. The placement of morality norms in relation to value of the God Almighty appears in judges' consideration in the Malang District Court Decision Number 702/Pid.B/2015/PN.MLG which says "Morality norm is the oldest norm since it was born together with the birth of man or human existence, since the first man (Adam)."

Similarly, the judges' consideration in the Tuban District Court Decision Number 67/Pid. Sus/2014/PN.TBN declares defendant's actions in taking himself naked picture that It is immoral act which can destroy moral order and values in Tuban society, especially the religious community. Judge prioritizes defamation of deeds not only from the fulfillment of the formulation of the law but the moral order of the people of Tuban who uphold the religious norms. Siti Musdah[34] emphasizes the relation of religious norms as an act of avoiding immoral behavior (*fahisyah*). Respondents stated that the importance of morality norms is an addi-

[34] Siti Musdah Mulia, "Manajeman Syahwat Terapi Islam Menyikapi Pornografi", *Jurnal Perempuan: Pornografi*, No. 38, November, 2004, p. 67.

tional basis in addition to the law to convince judges of the presence or absence of morality norms that are violated from the actions of the perpetrators.



Morality norm is proven to be the basis of cyberporn criminal acts assessment when the formulation of law is unclear. As a basis for assessing when the formulation of the law is unclear, morality norms play an important role. It becomes as the basis of assessment if the formulation of the law is not clear.

Conclussion

Nature against material law in juridical normative has been applied in the formulation of criminal law provisions, both in Article 282 of the Criminal Code, Article 27 paragraph (1) of the ITE Law and Article 1 number 1 of the Pornography Law. The function of the unlawful nature of the material lies as a measure of criminal defamation based on the value of decency. Decency is understood to be not limited to obscene things but has a wider scope and concerns the human conscience that leads to the One Godhead. The inclusion of morality norms in the formulation of criminal law provisions is very important for the application of decency. In practice, the Judge applied the morality norm as a source of defamation of pornographic acts through the internet at the time when the formulation of legal provisions was not clear.

Recomendation

An understanding of morality norms by judges should not be used when legal provisions are unclear only. Enforcement of the nature against material law should be a priority for judges earlier in understanding all cyberporn deeds. This will reinforce the basis of contextual cyberporn defamation. The judge's verdict will put forward more justice on every case of cyberporn.

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