

PUNISHMENT FOR PERPETRATORS OF THE CRIME OF SPREADING PORNOGRAPHIC CONTENT USING SOCIAL MEDIA BASED ON LAW NUMBER 11 OF 2008 CONCERNING ELECTRONIC INFORMATION AND TRANSACTIONS

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Abstract

The presence of law as "*a tool of social control*" is very much needed, namely the function of law as a means of social control. Technological advances characterized by the emergence of new inventions such as the internet, is one of the causes of social change, other causes such as increasing or decreasing population, *conflict* in society, rebellion or revolution within the society itself. Some people consider technological advances such as the internet to provide many benefits, both in terms of safety and convenience. However, negative impacts also occur due to the influence of the use of internet media. Through the internet media, several types of criminal acts are easier to commit. The following are the qualifications of the criminal act of spreading pornographic content as revenge based on the Law: Subjective element: The element of intent, i.e. the perpetrator knows that the content being disseminated is pornographic content and disseminates it with the aim of taking revenge on the victim. The motive element, i.e. the perpetrator disseminates pornographic content with the aim of humiliating or hurting the victim. Objective element: The act element, i.e. the perpetrator disseminates the pornographic content to another person, either directly or indirectly. The object element: The pornographic content disseminated is content that violates decency. In both cases, the perpetrator can be charged with the criminal offense of defamation or dissemination of immoral content.

Keywords: Criminal Offense, Dissemination of Pornographic Content, Social Media

A. BACKGROUND

Advances in science and technology have encouraged the development of society towards a more modern life, because the use of technology always affects people's mindset and lifestyle. A technology is basically created to improve the quality of life and facilitate human activities to be more effective and efficient. But it cannot be denied that besides having a positive side, technology also has a negative side. In fact, in various research studies, technological advances show a positive correlation with increasing

crime rates, for example in the use of computers. An attitude of dependence, negligence, misunderstanding or deliberate use of computers will have a negative impact, if not balanced with a positive mental attitude and attitude of action.¹

Crime is now in the spotlight of developments in society, especially in the field of technology and information, in connection with technological advances in the field of information. The development of information technology in the 21st century has become a new progress that is no less important than the discovery of molecules for nuclear manufacturing in Einstein's time. Many important things in the 21st century related to the use of information technology can be used as a benchmark for human progress. However, the success and positive side of the use of information technology for the advancement of human civilization, on the other hand, also causes its misuse which aims to gain material benefits illegally and against the law so that it can harm the interests of individuals, groups, and the state which is identified as a criminal act.²

One of the most worrying things related to the above is the development of the *modus operandi* of criminal acts.³ The development of the *modus operandi* of a criminal offense is the negative side of advances in information technology which has a very broad negative impact on all fields in today's modern era. Crimes previously carried out in the habitual ways of society have become an opportunity for unscrupulous criminals in this modern era, namely by utilizing advances in information technology. Various crimes can be committed such as the process of prostitution, gambling in cyberspace (internet), breaking into *Automated Teller Machine* (ATM), pornography in cyberspace, theft of company data via the internet and fraud through electronic media.⁴

Therefore, the presence of law as "*a tool of social control*" is very necessary, namely the function of law as a means of social control".⁵ Where according to Ronny Hantijo Soemitro:⁶ "Social control is a normative aspect of social life or can be referred to as a provider of definitions of deviant behavior and its consequences such as prohibitions, prosecutions, punishment and compensation."

In connection with the above problems, ultimately the policy or politics of criminal law has an important application. According to Sudarto:⁷ "The politics of criminal law" means conducting elections to achieve good criminal legislation results in the sense of fulfilling the requirements of justice and effectiveness. Where, in implementing the "politics of criminal law" means an effort to realize criminal legislation that is in accordance with the circumstances and situations at a time and for the future."

Technological advances characterized by the emergence of new inventions such as the internet, is one of the causes of social change, other causes such as increasing or decreasing population, *conflict* in society, rebellion or revolution within the society itself.⁸ Some people consider technological advances such as the internet to provide many benefits, both in terms of safety and convenience. However, negative impacts also occur due to the influence of the use of internet media. Through the internet media, several types of criminal acts are easier to commit.

In the perspective of criminology, technology can be said to be a criminogenic factor, which is a factor that causes people to want to do evil or facilitate the occurrence of crime.⁹ Crimes that are born as a negative impact of the development of internet applications are often called *cyber crimes*.¹⁰

The Criminal Code (KUHP) has regulated legal relationships and crimes related to the internet (*cyber crime*). However, the provisions in the Criminal Code and Criminal Procedure Code are still *universal*. Therefore, a law was made that specifically regulates *cyber crime*, Law Number 11 of 2008 concerning Electronic Information and Transactions was born and later amended into Law Number 19 of 2016 concerning Amendments to Law 11 of 2008 concerning Electronic Information and Transactions. This is done in order for the government to address the needs of the community for legal protection as if there is a legal vacuum, due to the rapid changes in society regarding crimes on the internet or *cyber crime*.¹¹

In *cyber* space, offenders who use information technology instruments are often difficult to ensnare and solve, in addition to the unlawful acts committed by the subject using sophisticated technological means and difficult to trace their whereabouts.¹² Article 45 Paragraph (1) of Law Number 19 Year 2016 has regulated sanctions with a maximum imprisonment of 6 (six) years and / or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah) for perpetrators of acts of decency which reads: Every person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that have content that violates decency as referred to in Article 27 Paragraph (1) shall be punished with a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Based on these laws, it is still not enough to ensnare the perpetrators of the crime of spreading pornography on the internet. Considering that crimes in the field of *cyber crime* are not only carried out with sophisticated tools, but these crimes are really difficult to determine quickly and simply who is the perpetrator of the crime when the legal instruments and criminal law enforcers still have many limitations.¹³

Nowadays people can use fake email identities on social media called Fake Accounts or Anonymous Accounts. Fake Accounts in Article 35 of Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions reads: That every person intentionally and without rights or against the law manipulates, creates, changes, removes, destroys Electronic Information and/or Electronic Documents with the aim that the Electronic Information and/or Electronic Documents are considered as authentic data.

Social media accounts on the internet are an integral part of a collection of electronic data containing writings, sounds, images, and photographs. Thus, social media accounts are a form of Electronic Information. Data from Kominfo, in 2020 pornographic content amounted to 1,062,558, then data as of February 2021 a total of 1,073,886 reports related to pornographic content on social media.¹⁴

Pornography is images, sketches, illustrations, photographs, writings, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and/or public performances, which contain obscenity or sexual exploitation that violates the norms of decency in society.¹⁵ Therefore, the crime of pornography is included in the prohibited things because it violates the rules of decency.

Pornography is not only about offenses committed by the perpetrators of immoral criminal acts. But in this case there are victims of pornographic criminal acts that must be of concern to everyone, especially law enforcement officials. The case of victims of pornography that should be of concern is *revenge porn*. *Revenge porn* is a term used to refer to *cyber* crimes committed by disseminating someone's sexual content without their consent.

With the motive of revenge, hatred towards the victim and other motives. In some cases, indecent photos on social media on the internet are photos of the victim that are spread by the victim's former lover. The goal of the perpetrator is not only to spread the pornographic photos but also to avenge the hurt he has experienced. Research on internet pornography cases shows that *revenge porn* is a new modus operandi of pornography crime.¹⁶

One of the cases that also became a case study in the author's research was the crime of distributing pornographic content by WJ, who was the boyfriend of the victim when they were still lovers. During their relationship, WJ and the victim had intercourse, and after the intercourse, WJ secretly took nude photos of the victim. Every time WJ and the victim argued, WJ always threatened and sent nude photos of the victim to the victim, not long after that the victim broke off the dating relationship with WJ. As a result of the breakup of the dating relationship, WJ felt hurt and chose to resolve his hurt by spreading nude photos of the victim via Instagram and TikTok. WJ's purpose in distributing the victim's nude photos was so that the photos could be seen by the victim's friends and the victim would be embarrassed.

The purpose of this study is to determine the qualifications of the criminal act of spreading pornographic content as revenge based on Law No. 19 of 2016 concerning amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions and to determine the application of material criminal law to the perpetrators of the criminal act of spreading pornographic content as revenge in Decision Number 206/Pid.Sus/2022/PN Cjr.

Criminal or punishment or straf in Dutch or poenali in Latin is "a feeling of discomfort (misery) imposed by a judge with a verdict on a person who has violated the criminal law"¹⁷ On the other hand, punishment is essentially a loss in the form of suffering deliberately given by the state to individuals who violate the law.¹⁸ Generally, punishment is the most severe sanction given by the state through an authorized judicial institution that aims to cause pain, suffering and provide a deterrent effect to perpetrators who are legally proven guilty of committing a criminal offense.

Meanwhile, according to Professor Van Hamel, the meaning of punishment or straf according to positive law today is: "A suffering of a special nature, which has been imposed by the authority authorized to impose punishment on behalf of the state as the person responsible for public legal order for an offender, namely solely because the person has violated a legal regulation that must be enforced by the state."¹⁹

Tirtaamidjaja also explains material criminal law and formal criminal law as follows: "Material criminal law is a collection of legal rules that determine criminal offenses; establish conditions for criminal offenses to be punishable; indicate persons who can be punished and determine penalties for criminal offenses. Formal criminal law is a collection of legal rules that regulate how to maintain material criminal law against violations committed by certain people, or in other words, regulate how material criminal law is realized so that a judge's decision is obtained and regulate how to implement the judge's decision."²⁰

The famous criminologists N. Morris and G. Hawkins from the United States said that punishment is the part of criminal law that is so arbitrary or has no principles. ("*no branch of criminal law is more unprincipled or more anarchical*"). Based on his research on criminal law and punishment, it turns out that there are no clear guidelines and principles, so that criminal judges will find it difficult to carry out their duties properly, which results in punishment practices in court that seem arbitrary.²¹

According to Moeljatno, "Criminal acts are acts prohibited by a rule of law. Which prohibition is accompanied by threats (sanctions) in the form of certain punishment, for anyone who violates the prohibition. Or it can also be said that a criminal act is an act that is prohibited by the rule of law and threatened with punishment, provided that in that case it is remembered that the prohibition is addressed to the act, namely a situation or event caused by the behavior of the person, while the criminal threat is addressed to the person who caused the incident."²² According to the Legal Dictionary, the definition of decency is defined as behavior, conversation that anything related to the norms of decency that must be/protected by law for the realization of order and morality in social life.²³

In Indonesia *Cyberpornography* is a criminal offense that is included in the crime of pornography that occurs in online networks or cyberspace, cyberspace activities that can be said to be *cyberpornography* criminal offense is the activity of loading, accessing, misusing and disseminating pornographic content. A criminal offense is a process of action that is prohibited because it violates the provisions of the law and carries the threat of sanctions to the violator. The elements of a criminal offense according to Simons are human actions, threatened with punishment, against the law, committed with fault, and committed by a person who is capable of responsibility.²⁴

Regarding the rules of law relating to the crime of *cyberpornography* involving minors specifically have not been regulated because there is a vacuum of legal norms on this crime. Thus, law enforcement officials combine several articles listed in the "Criminal Code (KUHP), the Pornography Law, and the Electronic Information and Transactions Law (ITE Law)" as the basis for resolving *cyberpornography* criminal cases.

B. RESEARCH METHODS

The research specifications in this writing are carried out with a normative juridical approach, namely by analyzing the problem through the approach of legal principles and referring to the legal norms contained in the legislation. The purpose is mainly to reinforce hypotheses, so that they can help in strengthening old theories, or in the framework of compiling new theories. In relation to this research, it aims to describe the criminal offense of spreading pornographic content.

This research method uses a normative juridical approach. The normative juridical method is legal research conducted by examining data or library materials which are secondary data in the form of laws and regulations, various kinds of literature, and the internet which are supported by field research which is primary data that examines laws and regulations, rules and aspects of criminal law.

The writing of this thesis uses a data collection method, namely *library research*, namely research conducted using data from various reading sources such as laws and regulations, books, magazines, and the internet which are considered relevant to the problems that the author will discuss in this research.

In this research, the normative analysis method will be used, namely as a way to draw from the research results that have been collected. Normative, considering that this research material is based on existing regulations as positive legal norms, while qualitative is intended on data analysis based on efforts to find principles and legal information revealed in this study, by not using table numbers or statistical formulas.

C. RESEARCH RESULTS

The qualification of the criminal act of spreading pornographic content as revenge based on Indonesian law can be seen from two laws, namely: Law No. 11/2008 on Electronic Information and Transactions (ITE Law), Law No. 44/2008 on Pornography (Pornography Law).

Based on the ITE Law, spreading pornographic content as revenge can be categorized as a criminal act of defamation. This is regulated in Article 27 paragraph (3) of the ITE Law which reads: "Every person intentionally and without the right to distribute and/or transmit and/or make accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation."

In the context of disseminating pornographic content as revenge, the pornographic content disseminated can be considered electronic information and/or electronic documents that contain insults and/or defamation. This is because the pornographic content can cause harm to the victim, both morally and materially.

Based on the Pornography Law, spreading pornographic content as revenge can be categorized as a criminal act of spreading pornography. This is regulated in Article 29 paragraph (1) of the Pornography Law which reads: "Every person who intentionally and

without right distributes, transmits, makes accessible electronic information and/or electronic documents containing pornographic material shall be punished with a maximum imprisonment of 12 (twelve) years and/or a maximum fine of Rp6,000,000,000.00 (six billion rupiah)."

In the context of disseminating pornographic content as revenge, the pornographic content disseminated can be considered electronic information and/or electronic documents containing pornographic material. This is because the pornographic content features explicit sexual activity. Based on the two laws, perpetrators of spreading pornographic content as revenge may be subject to a maximum imprisonment of 12 (twelve) years and/or a maximum fine of Rp. 6,000,000,000.00 (six billion rupiah).

Based on Law No. 19/2016 on Electronic Information and Transactions (ITE Law), spreading pornographic content as revenge can be categorized as a criminal offense of defamation. Article 27 paragraph (1) of the ITE Law states that every person intentionally and without right distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that have content that violates decency.

The criminal punishment for defamation under Article 27 paragraph (1) of the ITE Law is imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp1 billion. In addition, the dissemination of pornographic content as revenge can also be categorized as the crime of dissemination of immoral content.

Article 4 paragraph (1) of Law Number 44 Year 2008 on Pornography (Pornography Law) states that what is meant by indecent content is content that contains content that is contrary to decency. The criminal punishment for the crime of disseminating indecent content based on Article 4 paragraph (2) of the Pornography Law is imprisonment for a maximum of 12 (twelve) years and/or a maximum fine of Rp6 billion.

The following are the qualifications of the criminal act of spreading pornographic content as revenge under the Law: Subjective element: The element of intent, i.e. the perpetrator knows that the content being disseminated is pornographic content and disseminates it with the aim of taking revenge on the victim. The motive element, i.e. the perpetrator disseminates the pornographic content with the aim of humiliating or hurting the victim. Objective element: The act element, i.e. the perpetrator disseminates the pornographic content to another person, either directly or indirectly. The object element: The pornographic content that is distributed is content that violates decency. The perpetrator can be charged with the criminal offense of defamation or dissemination of immoral content.

The application of material criminal law against perpetrators of the crime of spreading pornographic content as revenge can be done in two ways, namely: Using Law Number 44/2008 on Pornography (Pornography Law). Basically, the distribution of pornographic content is an act that violates decency and can be punished based on Article 27 paragraph (1) of Law Number 11/2008 on Electronic Information and Transactions (ITE Law). However, in the case of *revenge porn*, the element of decency is not only seen from the

pornographic content itself, but also from the motive of the perpetrator who spread the content.

In *revenge porn* cases, the perpetrator spreads pornographic content with the intention of taking revenge on the victim. This revenge motive can be categorized as an act that violates decency because it can cause hurt, shame, and suffering for the victim. Based on the Pornography Law, the distribution of pornographic content carried out with the motive of revenge can be categorized as a criminal act of pornography as referred to in Article 11 paragraph (1) letter c, namely: Any person who intentionally distributes, transmits, makes accessible, reproduces, and/or makes available electronic information and/or electronic documents containing pornographic content relating to decency and/or sexual exploitation of children shall be punished with a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp1,000,000,000 (one billion rupiah).

Using Law Number 1 of 1946 concerning the Criminal Code (KUHP). In addition to using the Pornography Law, the dissemination of pornographic content as revenge can also be punished under the Criminal Code. Article 310 of the Criminal Code regulates unpleasant acts, one of which is spreading obscene images or writings or defaming. In *revenge porn* cases, the perpetrator spreads pornographic content that is obscene or defames the victim. Therefore, the perpetrator can be convicted under Article 310 of the Criminal Code with a maximum imprisonment of 4 (four) months or a maximum fine of Rp. 9,000.00.

In practice, the application of material criminal law against perpetrators of the crime of spreading pornographic content as revenge is still not optimal. This is caused by several factors, among others: Lack of public understanding about *revenge porn*. People still do not understand that *revenge porn* is a form of criminal offense that can be punished. Therefore, many victims do not report *revenge porn* cases to the authorities.

Lack of supporting evidence. In *revenge porn* cases, perpetrators usually spread pornographic content through social media or other *online platforms*. This makes it difficult to collect supporting evidence, such as digital data. There are several *revenge porn* cases that were decided with sentences that were not commensurate with the actions of the perpetrators. This is due to the inconsistent consideration of judges. To improve the application of material criminal law against perpetrators of the crime of spreading pornographic content as revenge, the following efforts are needed:

The government and related institutions need to socialize and educate the public about *revenge porn*. This aims to increase public understanding of *revenge porn* as a form of criminal offense that can be punished. Increased law enforcement, The authorities need to increase law enforcement against *revenge porn* cases. This can be done by increasing public awareness to report *revenge porn* cases to the authorities.

Increasing the role of related institutions Related institutions, such as Komnas Perempuan and LBH, need to play an active role in handling *revenge porn* cases. These institutions can provide legal and psychological assistance to victims of *revenge porn*. With these efforts, it is hoped that the application of material criminal law against

perpetrators of the crime of spreading pornographic content as revenge can be more optimal and provide better protection for victims.

D. CONCLUSION

Based on the research described previously, it can be concluded that the qualifications of the criminal act of spreading pornographic content as revenge based on Law No. 19 of 2016 contained in Article 27 Paragraph (1) jo. Article 45 Paragraph (1). The judge in sentencing the perpetrator of the crime of distribution of pornographic content with consideration of witness testimony, expert testimony, evidence and the judge proves the elements of the crime of obscenity itself, finally the judge sentenced the defendant to imprisonment for 3 (three) years and a fine of Rp. 5,000,000.00 (five million rupiah) with the provision that if the fine is not paid it will be replaced by imprisonment for 1 (one) year. imprisonment for 1 (one) month; or 6 (six) months imprisonment with due observance of Article 45 Paragraph (1) Jo. Article 27 Paragraph (1) of Law Number 19 of 2016 Concerning the Amendment to Law Number 11 of 2008 Concerning Electronic Information and Transactions.

With the research and data that have been presented, researchers can at least provide recommendations related to the criminal act of spreading pornographic content as revenge, namely: It is expected for law enforcement officials in Indonesia to increase highly qualified human resources in handling cases related to computer crime. Given the rules related to *cybercrime* using computer systems will increase its progress and of course the prevalence of its occurrence will also grow. It is recommended that future researchers should research with the basics that have been described to develop knowledge about punishment for perpetrators of spreading pornographic content using computer systems.

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