

Research Article

The Urgency of Criminal Code Bill Ratification in Criminal Law Policy Frame on The Spreading of Pornographic Content Offence

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ABSTRACT

Nowadays, the crime of spreading pornographic content as one form of cybercrimes has developed into a frequent offence. This offence has inflicted a lot of damage psychologically and materially for those who become the victims because, with internet access available in cyber space, the spread of pornographic materials is faster, wider, and easier to be accessed by public. The aim of this study is to review criminal law policy on the handling of pornographic content spreading offence according to the present and the future positive law. This study used normative juridical method, a method which analyzed a problem based on *ius constitutum* and *ius constituendum*. Criminal Code and Special Criminal Act such as Pornographic Act and Electronic Information and Transactions Law (UU ITE) have not clearly regulated pornographic content spreading crime in Indonesia and have not been able to countermeasure this type of crime. This problem occurs in part because regulations are applicable specifically for offence containing pornographic element, but not applicable for the spread. Criminal Code Bill needs to be ratified because the Bill regulates the offence related to pornographic contents which is suitable to the condition and issue arising in Indonesia recently. In comparison to regulations on offence related to pornographic content spreading in various countries, the author found that each country adjusts the law related to pornographic content spreading according to the type of issues they face. Thus, Indonesia also needs to make a legal product that can suppress the spread of pornographic materials.

Keywords: Criminal Law Policy; Cyber Criminal Offence; Criminal Code Bill.

A. INTRODUCTION

The advance of digital era nowadays has brought about the improvement of quality and ease of life for human activities. The development we have in this digital era is driven by the advancement of Technology and Knowledge in life (Chazawi, 2016). This condition occurs as the need of global citizens for knowledge and technology increases today and in the future. The goals of knowledge and technology (IPTEK) are to make people's life better, easier, cheaper, safer,

and faster (Isnaeni, 2014). The dynamics of knowledge and technology in people's life nowadays, apart from giving positive impact, also generates negative impact as a result of the abuse of the use (Sudjito dkk, 2016). The misuse or abuse of knowledge and technology cause the emergence of a crime known as cybercrime (Arief, 2012).

Nowadays, cybercrime which has become people's center of attention is a crime related to decency or morality. Cybercrime related to morality

which always draws public attention is the crime of pornographic content spreading (Goldsmith, & Wall, 2019). Among many other crimes committed in the internet, crime related to pornography is the one that tends to ruin public morality (Silaban, 2020).

The crime of pornographic spreading is an offence that is frequently reported nowadays. Social media has become a means that people mostly use to spread pornography. This crime is very harmful for the people who become the victims of the crime because social media helps spread pornographic content more easily, faster, and more widespread. Because of social media, people can easily access pornographic content spread. In handling this problem, some countries in the world has made a policy related to pornographic content spreading crime called cyber law (Kamal, 2016).

According to Marc Ansel, Criminal law policy is a study to compile or formulate positive laws into a better law than the previous law (Arief, 2014). In respect to this matter, it is necessary to initially examine the applicable provisions or positive laws regulating the crime of pornographic spread in order to formulate a much better law in the future.

Pornographic crime is generally regulated in Article 282 section (1) Criminal Code and, furthermore, the crime is specifically regulated in The Act of Pornography stipulated in Article 29 jo. Article 4 section (1). Moreover, to regulate the spread of pornography in Indonesia, the government formed Electronic Information and Transactions Law known as UU ITE so

that technology can be used properly and with good intention (Silaban, 2020). The presence of those laws is expected to be able to countermeasure the crime of pornographic spreading in Indonesia in order to have law effectiveness.

Law effectiveness, according to Soerjono Soekanto, is determined by five factors, namely; the law itself, the law enforcement officers, the facility and infrastructure supporting the enforcement of the law, the people, and the culture. These five factors are the essence of law enforcement and are benchmark for the effectiveness of law enforcement. Whether a law can function well or not depends on the law, which is related to the five factors (Soekanto, 2008).

In 2020, approximately 40 percent of sites on the internet contain pornography (Silaban, 2020). Peter David Goldberg stated in his thesis that pornography is one of the most popular contents in cyber space. About 25 percent internet users visit sixty thousand sex sites each month (Hidayat, 2017).

According to the data obtained, cases of pornographic spreading in Indonesia are considered high. There are 3,922 pornographic and cybercrime cases until February 2020 (Harjono, 2020). This indicates that positive laws existing have not yet been effective to countermeasure the crime of pornographic spreading in Indonesia. The crime of pornographic spreading in Indonesia is against the norms and values held by the people so that it is necessary to update and revise the law regarding this matter (Manurung, Warno, & Setiyono, 2016). Therefore, criminal law policy is

essential to support the effort to handle the crime of pornographic spreading in Indonesia.

According to the aforementioned explanation, the problem that is discussed in this paper is the effectiveness of the development of criminal law policy on the number of pornographic content spreading cases in Indonesia. Based on the findings of this study, the researcher relates the main issue with the urgency to ratify Bill of Criminal Code. As a comparison study, the researcher also made a comparison with Provisions of Criminal Law in Bulgaria, Nigeria, and Poland on the Crime of Pornographic Content Spreading in order to strengthen the discussion and analysis of the study so that this study can become more comprehensive.

Some previous studies have also discussed pornographic issue such as the study by Vera Rimbawani Sushanty entitled "Cyber Space Pornographic According to Criminal Code and Electronic Information & Transaction Law (UU ITE)" (Sushanty, 2019). In this study, Sushanty discussed cyber space pornography according to legislations which are applied currently. Another study on pornography in relation to criminal law policy is by Mahsun Ismail. This study is entitled "Criminal Law Policy of Cyber pornography on Victims Protection" (Ismail, 2018). This study discusses criminal law policy and victims standing in pornographic crime. Another study on protection for victims of pornographic crime is written by Mufti Khakim, Supanto, and Widodo Tresno Novianto entitled "Legal Protection For Cyberporn Crime Victims" (Khakim, Supanto, & Novianto, 2019).

This study examines regulations on legal protection for an individual who becomes an object of a pornographic content. Another study on the same issue is written by Syarihman Jayadi entitled "Criminal Law Policy on Cyber Child Pornography in Indonesia" (Jayadi, 2011). This study examines formulation policy on child pornographic crime through criminal approach. Another study still on the similar issue is a study written by Vaillancourt Morel, Sarah Blais Lecours, Chloé Labadie, Sophie Bergeron, Stéphane Sabourin and Natacha Godbout entitled "Profiles of Cyber pornography Use and Sexual Well-Being in Adults" (Morel dkk, 2017). This study discusses adult tendency as the subject of law in pornographic crime.

All of those studies only focus on regulations of pornographic crime only. Those studies do not examine the crime of pornographic content spreading. Therefore, a special policy is necessary to regulate the crime of pornographic content spreading in Indonesia, so that there will be a foundation for legal certainty in the future.

Special formulation of criminal law policy is needed to handle the crime of pornographic content spreading in Indonesia (Putra, 2015). This study examines regulations concerning the pornography spreading issue in respect to Criminal Code Bill as the topic of the study to answer the problem of the research.

B. RESEARCH METHOD

Research method used in this study was juridical normative method with literature study. Through literature study, secondary data in the form of primary and secondary legal materials were examined. This study analyzed Legislation regarding pornographic content spreading crime consisting of Criminal Code, Pornographic Act, and Electronic Information & Transaction Law (UU ITE) including Criminal Code Bill which will become legislation in Indonesia. In addition, this study conducted a comparative study on regulations applied by other countries on pornographic content spreading.

C. RESULT AND DISCUSSION

1. The Effectiveness of Criminal Law Policy Development on The number of Pornographic Content Spreading Cases in Indonesia

a. Criminal Code (KUHP) / WVS

Criminal Code or WvS regulates pornographic spreading offence particularly in Article 282 and Article 283. The following is the explanation of some of the Articles regarding pornographic content spreading:

1) Article 282 Criminal Code

This Article stipulates that those who commit pornographic content spreading are those who broadcast, show, or stick any text, picture, or object against the norm in public. This also applies for the spreading crime which is done in or outside the country. This offence, according to section (1) and section (2) of the Article, is threatened with sentence

punishment maximum one year and six months or is charged with a maximum fine of Rp. 4,500,-.

Section (3) of the Article stated that if an individual commits the crime of pornographic content spreading as way of earning money or as a habit, the punishment will be maximum sentence of two years and eight months or a fine of maximum Rp 75,000,00.

The categories of a conduct that can be considered pornographic content spreading in Article 282 Criminal Code or WvS are (Chazawi, 2016):

- a) Broadcasting any content which is against the values of morality or norms is considered pornographic content spreading.
- b) The act is done by explicitly spread any contents related to pornography or any contents against the norms.
- c) The offence of pornographic content spreading according to section (1) is any action of broadcasting, showing, and sticking any content contained pornographic contents or contents which are against the norm in public space.

Pornographic spreading is not regulated explicitly in the Article. Current Criminal Code/WvS do not acknowledge the term crime of pornography spreading. Article 282 only regulates the crime of content spreading which is against the norm. Basically, pornography content is against the norms, thus, implicitly this regulation can be used for the crime of pornography spreading."

2) Article 283 Criminal Code:

This article stipulates that an individual may receive a maximum sentence of nine months or maximum fine of Rp. 9,000 if he/she offers, permanently or temporarily gives, hands over, or shows any text, picture, or object which is against the norm, including any tools used to curb pregnancy or do abortion to an individual who is known or suspected to be a minor or has not reached the age of 17 years old yet if the contents of the text, or if the pictures are known to him.

In addition, the same punishment also applies for a person who read any text which is against the norm in public in front of any person who is not yet categorized as an adult as meant in past section, if he already knows the context of the text (Lacombe, 2010).

"Moreover, for a person who offers, permanently or temporarily gives, hands over, or shows any text, picture, or object which is against the norm, including any tools used to curb pregnancy and do abortion to a person who is underage may receive maximum sentence of four months or maximum light imprisonment of three months or a maximum fine of Rp. 9,000,-.

According to this provision, an action that can be categorized as an act of pornography spreading is:

- a) An act of spreading any object related to pornography..
- b) An act of reading obscene text in front of an underage.

c) A negligence of spreading any object containing pornography.

b. Law number 44 Year 2008 on Pornography

The crime of pornography is stipulated in Article 29 jo. Article 4 section (1) Pornography Law. According to this Article, the element of crime from pornography spreading is the act. Those acts consist duplicating, reduplicating, spreading, broadcasting, importing, exporting, offering, commercial using, renting, providing, borrowing, or downloading, listening, displaying, using any object that is categorized as pornography (Saputra, 2017).

c. Law Number 11 Year 2008 Jo. Law Number 19 Year 2016 on Electronic Information and Transaction Law

The formulation of pornography spreading crime on the internet is regulated in Article 27 section (1) Law number 11 Year 2008 on Electronic Information and Transaction. It is stated in this Article that it is a crime for a person to intentionally and without authority distributes and/or transmits and/or causes any Electronic Document containing any object which is against the norm to be accessible.

There are some acts which are prohibited according to the provision in Article 27. Those acts are (Renata, 2017): 1. Distributing; 2. Transmitting; and 3. Providing easy access to electronic information, electronic document, and any contents against the propriety.

Furthermore, Law Number 19 year 2016 on Amendment of law number 11 Year 2008 on Electronic

Information and Transaction Article 45 section (1) stipulates that a person who intentionally and without authority distributes and/or transmits and/or makes any Electronic Information and/or Electronic Document containing any materials which are against the norm accessible as mentioned in Article 27 section (1) receives maximum imprisonment of 6 (six) months and/or maximum fine of Rp. 1.000.000.000,00 (one billion rupiahs).

There is wider scope to the act of pornography crime. In this case, the act of crime includes making easy access to any pornographic contents. This means that every individual who provides access, media, or easy way to pornography may be convicted (Balkin, 2019)."

Law of Pornography serves to filter any crime potentially containing pornography in order to set boundaries on the conducts which are prohibited in relation to pornography (Febriansyah, 2017).

d. The Effectiveness of Electronic Information and Transaction Law (UU ITE) on The Case of Pornographic Content Spreading in Indonesia

According to statistical data of Patroli Siber POLRI (Indonesian Police Cyber Patrol), in 2020, there were 2259 reports on cybercrimes, and there are 208 reports related to pornographic offence. Reports regarding pornography crimes are on the top three crimes in terms of the number of cases. The highest number of case is the spread of provocative contents, as many as 1048 reports, the second highest number of case is online scam case with 649 reports, and the

third highest number of case is pornography case with 208 reports.

In respect to this matter, it is indicated that the Laws currently practiced in Indonesia have not been effective, either Law of Pornography or UU ITE, in handling the crime of pornography spreading. This happens because those laws are outdated. Those laws are supposed to be updated or improved. Therefore, it is necessary to update the law regarding pornography spreading offence in Indonesia.

e. The Urgency of Criminal Code Bill in handling Cases of Pornographic Content Spreading Crime in Indonesia

Regulation on pornography spreading in Criminal Code Bill on September 2019 is written in Chapter XV on Crime on Decency particularly Second part concerning Pornography in Article 413. Article 413 stipulates that:

- (1) "Every individual who produces, manufactures, duplicating, reduplicating, spreading, broadcasting, importing, exporting, offering, selling and buying, renting or providing pornographic contents serves maximum 10 (ten) years imprisonment or maximum fine Category IV".
- (2) "The conduct meant in section (1) is not considered a crime if it is the work of art, culture, sport, health, and/or knowledge".

Activities that can be classified as crime of pornographic content spreading are: 1) Making other people or oneself an object of pornography; 2) Forcing underage to become an object of pornography; and 3) Spreading work of art containing pornography.

In respect to the provision, there are two subjects that can be charged with spreading

pornography offence. First is the person who makes him/herself the object of pornography which is then spread, and second is the person who spreads the pornography content.

There is extension concerning crime of pornography spreading in regulations of Criminal Code Bill. This extension stipulates that either the person who becomes the object of pornography or the person who spread pornography can be convicted.

Nowadays, in Indonesia, cases of pornographic content spreading or porn videos involving couples having sexual relation are on the rise. Law enforcement for this type of cases most of the time only targets the actors in the content or porn video. The person who spread the content or porn video is rarely targeted and convicted. In such case, the person who spreads the content or porn video is the one who is convicted and become the main perpetrator (Citron, 2019). This is also related to the protection of personal data. The government must also take a role in formulating regulations concerning protection of personal data both in the form of preventive way and repressive way (Kuner et.al, 2012).

2. Criminal Law Policy as An Effort to Handle The Pornography Spreading in The Future

a. Bulgaria's Criminal Code

Regulations concerning pornography spreading in Criminal Code in Bulgaria are stipulated in Article 159. It is stated in this Article that:

(1) "A person who produces, distributes, exhibits, shows or sells compositions, printed publications, pictures, films or other objects of pornographic

content, shall be punished by deprivation of liberty for up to one year and a fine of one million to three million Bulgarian levs".

(2) "The object of the crime shall be confiscated pursuant to Article 53, sub-paragraph b".

This regulation states that anyone who produces, distributes, exhibits, or sells compositions, printed publications, pictures, films, or other objects of pornographic content may face maximum jail punishment for one year and pay a fine of 1 million to three billion levs Bulgaria (Chang dkk, 2016).

According to this Article, the categories of crime related to pornography are (Haryadi, 2007): a) The act of producing, distributing, showing, exhibiting, selling, printing pictures, film, or other pornographic contents; and b) those pornographic contents will be confiscated.

According to these criteria, they explicitly do not regulate the spreading of pornographic contents. However, if seen from the form of the activities which are done in cyber space and the pornographic content can be identified with pictures or film, This can be the reference of an act of pornographic content (Williams et.al., 2008).

b. Nigeria's Criminal Code

Nigeria's Criminal Code regulates the crime of pornography spreading in Article 372. This Article stipulates that:

(1) "Whoever sells or distributes, imports or prints or makes for sale or hire or willfully exhibits to public view any obscene book pamphlet paper gramophone record or similar article, drawing, painting, representation, or figure or attempts to or offers so to do or has in possession any such obscene book or other thing for the purpose of sale, distribution or public exhibition, shall be punished

with imprisonment for a term which may extend to one year or with fine or with caning which may extend to twenty lashes”.

- (2) “Whoever deals in materials contrary to public morality or manages an exhibition or theatre or entertainment club or show house or - any other similar place and presents or displays therein materials 258 which are obscene, or contrary to public policy shall be punished with imprisonment for a term not exceeding one year or with caning which may extend to twenty lashes”.

According to this Article, a crime related to pornography spreading can be identified as follows (Haryadi, 2007): a) There is an activity of selling, distributing, importing, printing, or renting with intention to show it to public in the form of books, pamphlets, newspapers, obscene recording, or similar articles in the form of pictures, paintings, drawing of a body image ,or offering or owning obscene books to be sold, distributed, or exhibited publicly; b) There is a transaction of content which is against the norms applied within the society.

These criteria do not specifically regulate pornography spreading, yet if seen from the form of the crime, It can be classified as a crime of pornographic content spreading (McKay, & Lee, 2019).

c. Poland’s Criminal Code

Poland’s Criminal Code, or what is called The Penal Code issued on 6th of June 1997 and which has been amended few times, regulates the issue of pornography in Article 202 stipulating that:

- (1) “Whoever publicly presents pornographic material in such a manner that it is imposed upon a person who may not wish so shall be subject to a fine, the

penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year”.

- (2) “Whoever presents pornographic material to a minor under 15 years of age or makes available to him/her items of this nature, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years”.
- (3) “Whoever produces, for the purpose of dissemination or imports or propagates pornographic material in which minors under the age of 15 participate, or pornographic material associated with the use of violence or the use of an animal shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years”.

Regulation on pornography in Poland focuses more on the fact that pornography must not be done or seen by minors aged under 15 years old. Violation to sexual freedom and courtesy is clearly regulated in Poland’s Penal Code in Article 202 (2). This Article stipulates that anyone who presents pornographic materials to a minor under 15 years old will be fined, and receive punishment of imprisonment up to 2 years. Article 202 (3) also states that anyone who produces with an intention to spread or import pornographic content involving minors under 15 years old participating in the content will receive jail punishment for maximum 5 years.

This does not mean that the spread of pornography in Poland occurs freely or widespread because Article 202 (1) regulates pornography in public domain, and the punishment is imprisonment up to one year if not paying a fine (Silaban, 2016).

D. CONCLUSION

Criminal law policy in an effort to countermeasure the crime of pornographic content spreading according to current positive laws, either Criminal Code, Pornography Law, or Electronic Information and Transaction Law, still has not been effective in handling the spread of pornography in Indonesia. This happens because cases of pornographic content spread in Indonesia are still considered high. These cases are even the most cyber cases reported in 2020. Thus, it is necessary to update and improve regulations in Criminal Code and Law on Special Crime such as Pornography Law and Electronic Information and Transaction Law so that those laws can specifically regulate the crime of pornographic content spreading in Indonesia based on what is happening in the society now. The update or renewal of those laws can be done by renewing the root of criminal law, Criminal Code, as *lex generalis* to become a reference to formulate *lex specialis* concerning pornographic content spreading offence. Thus, in this case, Criminal Code Bill must immediately be ratified considering that the current positive laws regarding crime related to pornography has not been effective anymore to be used to handle current crime cases such as pornographic content spreading.

In the future, criminal law policy as an effort to handle the crime of pornographic content spreading will be implemented through comparative study with other countries such as Bulgaria, Nigeria, and Poland. . From all the provisions, the regulations of pornographic

content spreading crime has become clearer because they regulate the conduct which is spreading with specific object which is pornography so that legal regulations can be enforced by the law enforcers. In those countries, their government, in an effort to handle a crime, refers to the reality in the society so that the law is sensitive to any issue occurring amid the society. One of the cases is the case of pornographic content spreading.

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