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**REGULATIONS OF CRIMINAL SANCTION POLICY IN
PORNOGRAPHY ACT IN INDONESIA**

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Abstract

This research examines the Pornography Act, particularly on the arrangement of criminal sanctions. In reviewing the crime, there are three points of view: strafmaat; strafmodus and strafsoort (duration of punishment, criminal prosecution, and imposition of criminal sanction). This study aims to describe and answer the effectiveness of the law in giving criminal sanctions on the crime of pornography. This study also explains the gradation of punishment in every act of pornography. The issues are examined using three legal approaches. Those are legal juridical approach, policy approach, and value approach. The research used qualitative analysis that describes the research data into components through a series of words and/or images. Assessment of the Act Number 44 Year 2008 started from the research of punishment Theory, gradation of punishment, and formation of law. Then, these theories are used in the analysis to know whether the policy of regulation of criminal sanction on pornography is appropriate. Qualitative analysis emphasizes more on data quality rather than quantity of the data. The conclusion is taken by deductive method, which means specifying the ideas from the general to particular. The research proves that the willingness to protect the legal interests of individuals, publics, or State becomes the reasons of penalizing the acts of pornography. Gradation of criminal sanction on pornography is divided into two, namely the provision of alternative cumulative sanctions of special minimum and general minimum.

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Keywords: Pornography, criminal sanction, gradation, Strafmaat, strafmodus, strafsoor.



1. Introduction

Indonesia, in accordance with the applicable constitution, declares it a state of law, the state of the law implies that Indonesia places the law as commander (Hatta, 2009). Criminal sanction is a required vital tool or the best available method to counter considerable perils of criminal acts and also to guarantee the effectiveness of norms (Bakhri, 2010). Penalty or criminal sanction is the authority of the state to impose penalties to its citizens committing crime. Criminal sanction asserts that an act has a serious impact on the life of the society. It serves to prevent the spread of criminal acts.

Hoefnagels (Arief, 2011) stated that penalty is a process of encouragement and censure intended for making people to obey the norm and laws in a society. Ted Honderich (Marlina, 2011), stated requirements of penalty; 1) penalty should give deprivation or distress, which is commonly used as area of criminal act. 2) penalty produced by legally authorized institution. 3) the government have the right to give penalty for proven subject with criminal act. Penalty is a result of criminal act, criminal act gives suffer for the community. Thus, suffer should be paid with equal suffer (Wiyanto, 2012).

The determination of criminal sanction is a separate issue in the criminal law. In imposing the sanction, the authorities are required to consider particular condition based on three perspectives: strafmodus, strafmaat, and strafsoort (Arief, 2010).

Strafmodus observes the criminal acts from its execution. Strafmaat sees the criminal offenses of the imprisonment imposed, duration of imprisonment indicted, and the amount of the fine charged. Strafsoort is looking at the criminal offenses from criminal type imposed on the offender.

Inequality of penalty sanctions and the consequences resulted from the crime may result in new criminal acts. This is due to the emergence of the sense of injustice in the imposition of punishment. Punishment is a reaction of criminal acts, can be formed as intentional distress given by government for criminal. (Bakhri, 2016)

2. Problem Statement

To put it simply, criminal laws without criminal sanctions is a kind of confirmation that an offender is not necessarily imposed by formal consequences from the action (Luthan, 2007). Criminal sanction or penalty toward pornographic can be categorized as criminalization policy. In values perspective, criminalization is a process of value changes that was not originally a crime to become a disgraceful, immoral act and may be a subject of criminal penalties (Prasetyo, 2010).

Pornography, as an act of decency, is regulated in Laws Number 44 Year 2008. The enactment indicates the serious impact of pornography in the life of the society, nation, and state. The laws categorized pornography as a crime. Thus, the violation of the regulation is subject to the imposition of sanction.

Pornography Act imposes sanction which is different from the one under Indonesian Criminal Code (KUHP). It creates a deviation. Pornography Act recognizes penal sanction using specific minimum, qualitative alternative. The law enforcer, on one side, is given the authority to determine the punishment. On the other hand, he is restricted in imposing the sanction. The gradation occurs in the imposition of sanction/punishment on pornography is necessary to review. The case has raised several questions. First, what is the background of penalization in Pornography Act? Second, how is the

gradation of criminal sanction in Pornography Act? Third, is the imposition of sanction set forth in the Laws Number 44 Year 2008 appropriate from the perspective strafmodus, strafmaat and strafsoort?

3. Research Questions

There are interesting questions for further examination regarding the policy of regulating criminal sanctions in Pornography Act in Indonesia:

1. What is the background of penalization in Pornography Act?
2. How is the gradation of criminal sanction in Pornography Act?
3. Is the imposition of sanction under the Act Number 44 the Year 2008 appropriate from the perspective of strafmodus, strafmaat and strafsoort?

4. Purpose of the Study

This paper aims to:

- a. To identify the theoretical background of penalization under Pornography Act.
- b. To find out the gradation of criminal sanction under Pornography Act.
- c. To understand the appropriateness of imposing criminal sanction in Pornography Act from the strafmaat, strafmodus and strafsoort point of view.

5. Research Methods

The researches employed three legal approaches: juridical approach, policy approach, and value approach. Juridical approach serves to understand the law from the normative rules. Policy approach is used in taking the decision oriented to the expected goals. Value approach serves to understand the function of particular regulation from the perspective of values underlying the establishment of the regulations.

The data are analysed using qualitative analysis, describing the research data into components through a series of words and/or images. The assessment of the Law Number 44 Year 2008 begins from the research of punishment theory, gradation of the punishment, and the establishment of law. The theory are used to analyse the effectiveness of the policy of regulation of sanction imposition for pornography act. Qualitative analysis emphasizes the data quality instead of the quantity. The results are obtained deductively, means that the conclusion is drawn from the general to the particular ideas.

6. Findings

6.1. Background of penalization in Pornography Act

There are four types of criminal sanctions in accordance with Article 10 of the Indonesian Criminal Code, namely Death Penalty, Imprisonment, Fines, and Confinement. The Pornography Act employs two of the types: imprisonment and fines. Considering the sanction, it applies deterrence theory. The punishment imposes serious sanction, which is by combining two types of punishment. Imprisonment or fines indicate that the lawmaker expects everyone to think twice before committing the act of pornography.

The criminal policy on acts of pornography clearly illustrates that the country protects the existing values, such as moral, ethics, noble character, noble personality, faith, and piety to God Almighty according to the values of Pancasila. It also confirms that obscenity and sexual exploitation, as well as violation of moral norms can undermine the values based on Pancasila.

The sentencing of pornography act is meant to return the dignity of human values. Morality values distinguish human from other creatures. If it disappears, the humanity values as well diminish.

Pornography is an attack on the dignity and values of humanity, damaging the mental of young generation as well as triggering other criminal acts. According to Yusuf Muzamil (members of the House of Representatives), there are four reasons underlying the enactment of pornography act. First, Indonesia recognizes the values of religion supported by the values of Pancasila. The first principle glorifies the religious teaching related to morality. Second, the 1945 Constitution mandates the national education in the purpose of improving the faith, piety, and noble character to educate the nation. Third, it is in the efforts of securing the young generation and children. "The least advantaged by pornography are children and youth." Fourth, to prove that the liberal ideas of the western has failed to protect the society from the danger of pornography (Ministry of Law and Human Rights, 2010)

Punishment on pornography is supposed to protect the legal interest of individuals, public, and the country. Personal legal interest refers to the self and the good name of the related individual, it is in line with the sense of morality. Pornography act has interfered human decency. The legal interest of the people is that the act of pornography harms the life of the society. Indonesian people bases their daily activities on the principles of Pancasila, upholding the values and dignities of human based on the God Almighty. The state legal interest argues that the pornography act has impeded the achievement of the nation's goals, which is to educate the nation. At the worst, pornography destroys the mentality and the characters of the youth.

6.2. Gradation of criminal arrangements in Pornography Law

The following is the gradation of criminal sanction of pornographic crime in mandatory minimum sentencing (Table 1).

Table 01. The gradation of criminal sanction of pornographic crime in mandatory minimum sentencing

No	Gradation of Criminal Sanctions	Formulation of the Crime
1	Sentence of imprisonment for a minimum of 6 (six) months and a maximum of 6 (six) years and/or a fine of at least Rp.250.000.000/ US \$19,923 (two hundred and fifty million rupiah) and a maximum of Rp.3.000.000.000/ US \$230,769 (three billion rupiah). Article 30.	Any person providing pornographic services as referred to in Article 4 section (2).
2	Sentence of imprisonment for a minimum of 6 (six) months and a maximum of 6 (six) years and/or a fine of at least Rp.250.000.000/US \$19,230 (two hundred and fifty million rupiah) and a maximum of Rp.3.000.0000.000/US \$230,769 (three billion rupiah). Article 38.	Any person who invites, persuades, exploits, permits, abuses power, or coerces a child in the use of pornographic products or services as referred to in article 12.
3	Sentence of imprisonment for a minimum of 6 (six) months and a maximum of 12 (twelve) years and/or a fine of at least Rp. 250.000.000/US \$19,230 (two hundred and fifty million rupiah) and a maximum of Rp.3.000.000.000/US \$230,769 (three billion rupiah). Article 29.	Any person who produces, manufactures, multiplies, reproduces, distributes, broadcasts, imports, exports, offers, sells, leases or provides pornography as referred to in article 4 section (1).

4	Sentence of imprisonment for a minimum of 1 (one) year and a maximum of 12 (twelve) years and/or a fine of at least Rp.500.000.000/US \$38,461 (five hundred million rupiah) and a maximum of Rp.6.000.000.000/ US \$461,538 (six billion rupiahs). Article 35.	Any person who makes another person as an object or model containing pornographic content as referred to in article 9.
	Sentence of imprisonment for a minimum of 2 (two) years and maximum 15 (fifteen) years and/or fines of at least Rp.1.000.000.000/US \$76,923 (one billion rupiah) and a maximum of Rp.7.500.000.000/US \$576,923 (seven billion five hundred million rupiahs). Article 33.	Any person who funds or facilitates the acts as referred to in article 7.

The table categorized the articles in the pornography act, mentioning the lowest to the highest level of sanction. Specific minimum sanction means that the judge is restricted in giving the minimum sanction. Instead, he should refer to the severity of the action.

Table 2 sets forth the regulation of criminal sanctions in the Pornography Act by using the undetermined minimum sentencing:

Table 02. Regulation of criminal sanctions in the Pornography Act

No	Gradation of Criminal sanctions	Formulation of the Crime
1	A maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 2.000.000.000/US \$153,846 (two billion rupiah). Article 31.	Every person is prohibited from lending or downloading pornography as referred to in (Article 4 section (1)) article 5.
2	A maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 2.000.000.000/US \$153,846 (two billion rupiah). Article 32.	Any person who plays, displays, uses, owns or keeps the pornographic product referred to in article 6.
3	A maximum imprisonment of 10 (ten) years and/or a maximum fine of Rp. 5.000.000.000/US \$384,615 (five billion rupiah). Article 34.	Any person who intentionally or upon his/her consent becomes an object or model containing the content of pornography referred to in article 8.
4	A maximum imprisonment of 10 (ten) years and/or a maximum fine of Rp. 5.000.000.000/ US \$384,615 (five billion rupiah). Article 36.	Any person displaying himself or any other person in a displays or public performance depicting nudity, sexual exploitation, coercion or other pornographic content referred to in article 10.

The gradation of criminal sanction on pornography in the table (3) above shows the seriousness of the danger caused by any criminal act of pornography. Mandatory Minimum Sentencing Pattern Scheme is as below:

Table 03. Mandatory Minimum Sentencing Pattern Scheme

No	Category	Maximum Sentencing	Minimum Sentencing
1	Heavy	4-7 years. 7-10 years.	4-7 years. 7-10 years.
2	Very heavy	12-15 years. Death penalty/ Lifetime Imprisonment/ 20 years.	4-5 years. 6-7 years.

Mandatory minimum sentencing schemes can be used as a measure to determine how severe the sentencing of pornography. The crimes of pornography in mandatory minimum sentencing are as follows Table 4.

Table 04. The crimes of pornography in mandatory minimum sentencing

No	Article	Maximum Sentencing	Mandatory Minimum Sentencing	Minimum Fine
1	Article 30	6 years	6 months	Rp.250 million/US \$19,230
	Article 38	6 years	6 months	Rp.250 million/US \$19,230
	Article 29	12 years	6 months	Rp.250 million/US \$19,230
2	Article 35	12 years	1 years	Rp.500 million/US \$38,461
3	Article 33	15 years	2 years	Rp.1 billion/US \$76,923

6.3. Criminal Sanction Regulation

Theoretically, regulation of criminal sanctions in the Pornography Act concerns with three matters. First, type of criminal (strafsoort), which regulates what criminal sanctions are imposed on the perpetrators of pornography. Second, the duration of criminal sanctions (strafmaat), which is related to the duration of criminal sanctions imposed to the offender. Third, the execution criminal sanction (strafmodus), which regulates the execution of criminal sanction.

6.3.1. Criminal Type (Strafsoort)

The determination of types of criminal offences is, inter alia, intended to provide a set of provisions for law enforcement in tackling the crimes. In addition, it also intends to restrict law enforcement in executing criminal sanction (Arief, 2010). Simons says that the criminal system is the most important part of a Criminal Code as well as the age of the legislation involving criminal law in it (Arief, 2010).

In the discussion of the Bill of Pornography on July 16, 2008 inviting the Government Drafting Team, with regards to the strafsoort, government explains that legislators generally recognize four types of the main criminal sanctions: death penalty, imprisonment, confinement, and fine. In addition to the main punishment, there are also additional criminal sanction, such as the revocation of certain rights, i.e. rights to be chosen in the General Election. The heaviest sanction under the Indonesian Criminal Code is death penalty, lifetime imprisonment and 20 years imprisonment. The sanction is imposed alternatively.

In the Act No. 44 the Year 2008 on Pornography Chapter VII in accordance with the sanction in Article 29 to Article 40, all types of sanctions are alternative-cumulative. None of the criminal sanction (strafsoort) is imposed in one type only, such as imprisonment only or fine only. The conjunction of "and / or" means that the judge may choose one of the main sanction or the judge may also impose both imprisonment and fine (Minutes of Meeting dated July 16, 2008).

The Pornography Act enumerates the judge to impose criminal sanctions alternatively which means that there is a choice of judge whether to impose alternatively among a fine or imprisonment, or to impose both accumulatively. The accumulation of the criminal sanction type is a deviation against Indonesian Criminal Code. The Criminal Code recognize only two systems of penalization (Arief, 2010). First, imperative formulation system, which means imprisonment is determined as the only type of criminal sanction for the offense concerned. Second, alternative formulation system in which imprisonment is determined alternatively along with other types of sanction based on its order from the heaviest sanction to the lightest sanction. Considering its policy in regulation of criminal sanction under Pornography Act, the legislator does not draft it in the imperative formulation system.

Imposing a type of criminal sanction on pornography law with an alternative-cumulative system shows that imprisonment is not enough for a pornographic offender; it also shows the seriousness of policy makers to tackle pornography.

6.3.2. The duration of Criminal Sanctions (strafmaat)

The government explained in the Bill of Pornography on July 16, 2008 (the Minutes of Meeting held on 16 July 2008 with the agenda of inviting the Drafting Team from the Government) that the Government explained further that this Bill does not recognized death penalty, lifetime imprisonment or 20 years imprisonment. The maximum imprisonment is 15 years. The Pornography Act also implies a mandatory minimum sentencing which develop recently but unrecognized in the Indonesian Criminal Code. The Criminal Code recognized only the maximum sentencing which is between 1 to 15 years even recognized the gradation of 1 day, 1 year, 2, 3 to 15 years.

Pornography Act divided the duration of sanctions (strafmaat) into two categories: by means of mandatory minimum sentencing and by means of undetermined minimum sentencing. Based on its mandatory minimum sentencing, this Act recognizes the minimum sentencing is of 6 months and the maximum is of 2 years.

6.3.3. Sentencing Implementation (strafmodus)

Pornography Act as one of the legislation imposing criminal sanction to the offender is included in an extraordinary crime category beyond the regulation under Criminal Code. However, this law does not regulate in detail on how to impose the sanctions so that the implementation of criminal law sticks to the criminal procedure in general.

The Pornography Act, particularly in its Chapter V concerning the Investigation, Prosecution, and Examination, Article 23, asserts the application of criminal procedural law. It states that, "Investigation, prosecution, and examination of the crime of pornography shall be carried out in accordance with the law of criminal procedure, unless stipulated otherwise in this law."

The "unless stipulated otherwise" is manifested in Article 24 regarding the evidences which states, "In addition to evidence as provided in the law on criminal procedure, including evidence in criminal cases but not limited to: a. goods containing writings or images in the form of printed or non-printed, either in electronic, optical, or other forms of data storage; and b. data stored in internet networks and other communication channels".

Other distinctive matter determined in the Pornography Act compared to the Indonesian Criminal Procedure Code is in article 25. It states that:

“(1) ... for the interest of investigation, the investigator authorizes to open access, examine, and make copies of electronic data stored in computer files, internet networks, optical media, as well as other forms of electronic data storage; (2) for the interest of investigation, the data owner, data keeper or electronic service provider is obliged to submit and/or open the electronic data as requested by investigator; (3) The owner of the data, data keeper or electronic service provider following after submitting and/or opening electronic data as referred to in paragraph (2) shall be entitled to receive receipt of the submission or official unveiling of electronic data report from the investigator.

Article 26 regulates the forming or report as it states, “The Investigator shall make an official report on the action referred to in article 25 and deliver the copy to the data owner, data keeper, or communications service provider where the data is obtained.” Furthermore, Article 27 states,

“(1) Electronic data correlates to the case concerned shall be enclosed in a case file; (2) Electronic data correlates to the case shall be foreseeable to be destroyed or removed. (3) The investigator, the public prosecutor and the officials at all levels of examination in the judicial process shall conceal verily on the ground of their oath regarding with the electronic content or data information subject to the annihilation or deletion.”

7. Conclusion

The research of the Act Number 44 the Year regarding Pornography in the perspective of strafmodus, strafsoort and strafmaat concludes that: the sentencing of pornography act is encouraged by the intention to protect the legal interests of individuals, societies, and the State. The legal interests of the individual is related to the self-dignity, the interest in the sense of decency. The act of pornography is to attack the sense of human decency. The legal interest of the society is that the act of pornography is a condemnation of the living law, as the people of Indonesia upholds the dignity of humanity under the Supreme God as set forth in Pancasila. The legal interest of the State is that the act of pornography impedes the achievement of Indonesia nation to educate the nation. Pornography damages the mental and character of the young generation. Imposing criminal sanctions shall be an effort to protect the interests of the society.

Gradation of criminal sanction on pornography is divided into two, namely the sentencing of alternative-cumulative sanctions using mandatory minimum sentencing and undetermined minimum sentencing. Mandatory minimum sentencing is imprisonment of minimum 2 (two) years and maximum of 15 (fifteen) years and/or a fine of at least Rp.1.000.000.000 (one billion rupiah) and most Rp.7.500.000.000 (Seven billion five hundred million rupiah) for the act of funding or facilitating pornography. The mandatory minimum sentencing is imprisonment of minimum 6 months and or a fine of at least Rp. 250,000,000/ US \$19,230. The undetermined minimum sentencing is imprisonment of 4 years and or a fine of Rp. 3,000,000,000/US \$230,769. While the heaviest criminal sentencing is 10 years and or a fine of Rp. 5,000,000,000/US \$384,615.

The imposition of criminal sanctions in the perspective of strafsoort, strafmaat and strafmodus are as follow:

1. In the perspective of *strafsoot* (criminal type), there are two kinds of sanction towards pornography: imprisonment and fine. Both are subject to a cumulative alternative sanction. These applies to all pornography crimes thus none of the crime is being charged to single sanctions.

In the perspective of *strafmaat* (the duration of criminal sanction), the duration of criminal sanctions in the crime of pornography is divided into two categories: mandatory minimum sentencing rules and undetermined minimum sentencing rules. Mandatory minimum Specific minimums charged pornography for a minimum period of 6 months and at maximum of 2 years. This sentencing is a deviation to the criminal law as pornography is considered as extraordinary (*thenerik*) crime.

In the perspective of *strafmodus* (criminal Implementation), the Act Number 44 the Year 2008 on pornography does not regulate in detail the application of sentencing so that the implementation subject to the Indonesian Criminal Procedure Code (Criminal Procedure Code). Chapter V concerning Investigation, Prosecution, and Examination in the Act Number 44 the Year 2008 article 23 reads, "Investigation, prosecution and examination of pornography shall be carried out under the law on criminal procedure Law, unless otherwise provided in this law." Other provisions of this law are set forth in articles 23 to 27.

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