



Pornography and Sexual Crimes towards Children in Indonesia: A Judicial Approach

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Abstract: *Pornography and sexual crimes against children are two forms of crime in Indonesia. Both of these crimes in various cases have a linkage with each other, whether one of which is a crime or pornography becomes a criminogenic factor for the onset of sexual crimes against children. The review in this article attempts to look at the approach used by judges in deciding cases of sexual crimes against children that correlate with pornographic crimes. This research employs normative juridical research using legislation and case approach.*

The results of the review found that, in sum, there are two model of approach used by the Court in deciding criminal cases, especially pornography related to sexual crimes, which include the approach in understanding and assesing cases; and theories of punishment approach. While the rfirst model of approach emphasizes on the understanding the impact of the action, the secodn model look more at the retaliation, prevention, combination and contemporary approach. It is further argued that those two models are not necessarily used separately. The combination of the two models can also be employed, such as in the case of Tanjung Pati District Court's Ruling no. 58/Pid.B/2011/PN.Tjp. In fact, in the case, the judges combine several approaches in deciding cases and punishing defendants. It is submitted that the objective of a judge is crucial since the objectivity resulted in a fairer verdict for the victim, the community or the perpetrator himself.

Keywords: *pornography, sexual crime, decision approach, punishment approach, judicial approach*

I. INTRODUCTION

In mid-March 2017, Indonesia was struck by the uncovering of networks of perpetrators of pornographic and sexual crimes targeting child victims. This network utilizes fanpage groups on the Facebook

social network to create Official Loly Candy's 18+ account. This group account is suspected to be a place for pedophiles and pornographers to interact and disseminate pornographic content with children as the objects. The group is managed by four

perpetrators who are currently detained and named as suspects by investigators. 2 of the four perpetrators were the children of M. Bachrul Ulum (Wawan aka Snorlax), DF (T-Day), Dede and SH.

The name of this group is a term commonly used by pedophiles. Loly is a candy that is identical with children. Thus, the pedophiles interpret children as a loli or candy that could give pleasure, the pleasure in realizes sexual abnormalities. The main requirement of being a member of this group is the obligation to upload pornographic content, especially child pornography.

In its criminal acts, the perpetrator not only shares pornographic images and videos but also sexually assaulting the children. The perpetrators also record the video during their action and then share it to the fanpage members. Investigators from Metrojaya Police reported that there are still other unidentified victims and perpetrators¹. Sexual violence in children may strongly cause a physical or emotional disturbance which affecting in their future growth and development².

The prevalence of sexual assault cases against children increases in every year. According to the Commission of Child Protection in Indonesia, in 2013, the number of sexual assault cases against children was 1445 cases, and not significantly different in

2014 (1423 cases). Surprisingly, in 2015 the number of cases was markedly increase become 1,718 cases³. The victims including 1443 cases in kindergarten and elementary school students, 498 cases in junior high school students, 513 cases in senior high school and 13 cases in school dropped-out children⁴.

The phenomenon of loly candy is a necessity in the cyberspace, where there is a relationship between the criminal act of pornography and sexual crime. Cyberspace is also a sovereign electronic place with individuals, communities, corporations or governments without state restriction⁵. Jessica Lipnack and Jeffrey Stamp described the cyberspace as "smash the boundaries, tear down the hierarchy and dismantle the bureaucracy"⁶. Cyber space is a global communication medium which is enabled to transform the information and communicate between individuals⁷. For the perpetrators of criminal acts of pornography and pedophilia, this also become a medium to interact with others who have the same sexual disorder.

A review of court decisions has often been found in various studies aimed at improving the process of legislative drafting. This is understandable because court decisions are based on the community's actual conditions in responding to state law. Based on the phenomenon and legal cases

¹ <http://www.dw.com/id/loly-candy-di-facebook-terungkap-pedofil-masih-jadi-ancaman/a-37985355> (March 20, 2017)

² Abu Huraerah, *Kekerasan Terhadap Anak* (Nuansa Cendikia, Bandung, 2012) 44.

³ KompasTV, <https://www.youtube.com/watch?v=PaL21SNpfYE>, 10 Maret 2017, (March 10 2017)

⁴ BeritaSatuTV, <https://www.youtube.com/watch?v=RPTzYvuNI88>, 10 Maret 2017, (March 10 2017)

⁵ Brian Fitzgerald, 'Software as Discourse: The Power of Intellectual Property in Digital Architecture' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 337, 353; Gutnick

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⁶ Jessica Lipnack & Jeffrey Stamps, *The Age of the Network, Organizing Principle for the 21st Century* (New York : John Willey & Sons, Inc, 1994), 3.

⁷ Green Paper, entitled 'A Proposal to Improve Technical Management of Internet Names and Addresses' can be found at <http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm>. Accessed on March 23, 2010.

related to sexual crimes caused by pornography, then the author conducted a study of the judge's decision in settling the case.

This study attempts to examine court decisions on related sexual crime cases and/or is associated with pornography. From the background described above, the authors tried to study about the court's decision in sexual crime cases related to pornography crime and the approach as a priority for judges in deciding cases of sexual crimes related to pornography. This study was based on a normative juridical study by examining *retio decidendi* from the judge's decision.

II. LEGAL MATERIALS AND METHODS

This research adopted a normative juridical method. It relies heavily on existing laws and legal frameworks concerning pornography and sexual crimes against children. The research using statute and case approach in its discussions. The legal frameworks used in this research is criminal law legal framework, especially Indonesian Criminal Code and Indonesian Act Number 44 Year 2008 on Pornography as well as Indonesian Act Number 35 Year 2014 concerning Child Protection and Act Number 48 Year 2009 on Judicial Power. The analyses used the case of Tanjung Pati District Court's Ruling no. 58 /Pid.B/ 2011 /PN.Tjp as specific case on children pornography.

III. RESULTS AND DISCUSSIONS

Pornography Concept and Sexual Assault in Indonesia

Discourse on pornography as a deviant act is strongly influenced by the moral values recognized by a society. The concept of pornography that is formed is also closely related to the sense of decency in society. In

a liberal country that greatly upholds individual freedom, pornographic activity is not a deviant act and not classified as a criminal act. This has become a distinguishing feature in the process of criminalizing pornography in Indonesia compared to other (western) countries. Pornography in Indonesia emphasizes on the relation between morality in society and law. Thus the context of pornography is limited by other rules of social control such as customary law and religion. In Indonesia criminalization of pornography is listed in article 282 of the Criminal Code and article 1 (1) of Act Number 44 Year 2008 on Pornography.

The forms of pornography are described in more detail in article 1 (1) of Act Number 44 Year 2008, as follows:

"Pornography is a drawing, sketch, illustration, photo, writing, sound, sound, motion picture, animation, cartoon, conversation, gesture, or another form of message through various forms of communication media and/or public performances, containing obscenity or Sexual exploitation that violates the norms of decency in society"

The definition of pornography as in the above article is a business that became a social consent to harmonize technological developments with new forms of pornographic activity. While sexual assault in the Criminal Code has several definitions such as criminal acts of decency specifically related to sexual violence. Sexual assault, in this case, is an obscene act committed by an adult or perpetrator against children as stated in Article 287 of the Criminal Code. In addition, the prohibition of sexual intercourse on immature women may cause injury, serious injury, and death as regulated in article 288 of the Criminal Code. In

addition to articles 287, 288 and 289 of the Criminal Code, sexual assault in the Criminal Code is also regulated in articles 290, 291, 292, 293, 294 and 295.

Concept of Judge's Decision

A judge is defined as a public official who has the authority to hear and decide on a legal matter in court⁸. The judge is also etymologically interpreted as an official who discovers, introduces and explains the law⁹.

The decision refers to some terms including decision, judgment, verdict, finding and ruling¹⁰. Black's Law Dictionary defines judgment as a court's final determination of the right and obligation of the parties in a case. While the verdict is a jury's finding or decision on the factual issues of the case or a judge's resolution of the issues of a case¹¹.

While the definition of a judge in Act Number 48 Year 2009 on Judicial Power is a person who examines cases in court according to law fairly without discriminating people on different tribes, religion, race, position, and wealth. In this context, judges have the authority to uphold justice and law enforcement. As the enforcers of justice, the duty of the judge is to uphold justice (*gerechtigdheid*) not merely a certainty (*rechtzekerheid*). Justice based on the Belief in God Almighty. Even in Indonesian courts, judges in making decisions must be preceded by the words "for justice based on God Almighty".

The meaning of judgment with justice based on God Almighty is that every decision must be based on the laws and beliefs that are felt on a good conscience. A good conscience

is a conscience that reflects the social conditions of society which has a sensitivity to the social conditions of society that leads to a sense of justice in the community.

Meanwhile, as a legal authority, the duty of judges is to enforce regulations in law that have been violated by the perpetrators. In the context of this law enforcement, the constraints of judges are when the law is not in accordance with the social dynamics anymore. John Rawl stated that the trial in court is an imperfect justice procedure. Although the law is implemented according to the procedure, the result could be wrong.

The possibility of mistakes in judicial decisions because laws are less likely to follow social dynamics. Therefore, it provides the basis for judges to either to form law (*rechtvorming*) or discover the law (*rechtvinding*). In this context court judges have the following functions:

- a. Ensuring that one designation is applied appropriately and fairly. Whereas the judge's conscience is convinced that the application of existing laws can lead to injustice, then the judge is obliged to support justice rather than simply making the rules as the ever-true book.
- b. As the interpreter of the designated arrangement by adopting the method of interpretation and consider the sociocultural aspects and also arrange a provision relevant to the condition of society.
- c. Conducting an act of correction of an error or legal void. The judge in this context must find and create the law by enacting the law.

⁸ Garner, Bryan A, *Black's Law Dictionary* (West Publishing co, St. Paul, 2009), 916.

⁹ Abdul Aziz Dahlan et al, *Ensiklopedia Hukum Islam, Ihtiar Baru* (Jakarta, 2001), 503.

¹⁰ Alan M. Stevens dan Schmidgall, *Comprehensive Indonesian-English Dictionary* (Ohio University Press, Ohio, 2004), 792.

¹¹ Garner, Bryan A, *Black's Law Dictionary* (West Publishing co, St. Paul, 2009), 1968.

- d. Performing enhancements to a rigid designation arrangement in order to provide a reasonable justice.

In addition, in relation to *rechtvinding* or legal discovery by judges, a law expert Van Eikema Hommes defines the process of legal development by a judge in a single legal event. This involves applying an abstract rule to a concrete event¹². This is a form of judicial discretion which is the policy of judges in making decisions based on the principles of law and an independent mind in order to give a fair decision¹³.

The judge as the determinant of justice will be seen as a person who knows all laws or jurists (*ius Curia Novit*). Thus, although there are still no rules in some cases, the court (judge) must make a decision. This concept in European continental court tradition is known as the invention of the law (*rechtsvinding*) or creating law (*rechtsschepping*). This concept is a manifestation of the principle that the court should not reject any proposed case.

A judge in Indonesia should refer to three stages in exercising the authority, namely: the stage of fact verification, case eligibility, and case assessment. In the stage of fact verification, a judge must carefully observe, acknowledge or justify the case. While in the stage of eligibility, a judge should judge a case that actually happens and categorizes it to a particular legal section. The judge must find the appropriate law for a confirmed case. While the last stage is the judge must give legal arguments which

involve applying the law to the case by the method of a syllogism with the following steps:

1. Analyzing the legal norms to determine the elements contained in the contents of the norm;
2. Analyzing the case to determine the elements in the case;
3. Comparing the elements in the legal norm with the elements present in the case to construct deductive conclusions.

From some court decisions, there are several approaches used by judges to make decisions. The first approach relates to the assessment and the description of the case and the second approach refers more to criminal prosecution. An approach which is related to the full assessment of a case including:

1. Understanding Approach

This approach is very close to the interpretation of the law through hermeneutics. According to Max Weber, this understanding approach is an analysis of the symbol system. This approach allows people to appreciate the other's beliefs without prejudice. *Verstehen* tried to make an understanding of a case by re-experiencing or reviewing experiences¹⁴. This concept assesses the desired motive of person's actions (in-order to motive). Therefore, to understand the actions of a person, it is crucial to examine and analyze the person's motive¹⁵.

¹² Sudikno Mertokusumo, *Bab-Bab tentang Penemuan Hukum* (Aditya Bakti, Bandung, 1993), 4

¹³ Frans Hendrawinata, *Mencegah Judicial Corruption melalui Eksaminasi Publik, Mungkinkah?*, in Susanti Adi Nugroho dkk, *Eksaminasi Publik: Partisipasi Masyarakat Mengawasi Peradilan* (ICW Jakarta, 2003), 14.

¹⁴ Wilhelm Dilthey, *Selected Works: Hermeneutics and the study of history*, Selected Work Volume 4 (Princeton University Press, 1985), 159-161

¹⁵ Muhammad Basrowi, *Teori sosiologi dalam tiga paradigma* (Yayasan Kampusina, Surabaya, 2004), 60

The understanding approach in making this decision is in line with the opinion of Judge Oliver Wendell Holmes Jr. who states that in making judgments in court is not merely a process of mathematical and mechanical syllogism. However, it has a broad meaning. The life of the law has not been logic; it has been an experience. The felt necessities of the time, the prevalent moral and political theories, the institution or public policy avowed or unconscious, even the prejudice share with their fellow.

2. The Action Impact Approach

This approach is used by the court by assessing the indirect impact of acts perpetrated by the perpetrator. This approach can easily be known from the judge's argument that the perpetrator's actions have damaged the morale of the community, especially the younger generation. In Courts cases, this approach is commonly used on perpetrators who trade in pornographic items such as VCD or DVD. For example, the Ruling of District Court Bandung No 1096 / Pid.B / 2010 / PN Bdg with the defendant Jhon Deardo Sipayung¹⁶ who was arrested by the police for selling pornographic items which are VCD and DVD. A similar case was the decision of District Court Ngawi No 310 / Pidsus / 2011 / PN. NGW in the case of Wahyudi bin Isbani who was sentenced to 8 months for selling pornographic items to his cellular store customers.

The court verdict with an action impact approach illustrates that the court will refer to the moral values in society in making the decision. This case is in line with Tamanaha who reported about mirror thesis which

means that every judge's decision becomes a reflection of the will of the people in using the law¹⁷. Judge Holmes also declared the judge's decision bring the character of cultural relativism. Every judge's decision is a reflection of judges' experience related to behavior, morality, and wisdom. Holmes further stated that the law embodies the story of nation's development through many centuries, and it contains only the axioms and collections of a book mathematics¹⁸

In addition to the approach that emphasizes in understanding and assessing the cases, the next approach is more to the theories of punishment purposes, namely approaches of retaliation, deterrence or prevention.

3. Retaliation Approach

Approach to retaliation of criminal acts appears in the classical era of criminal law. The theory that uses punishment to retaliate the perpetrators is known as an absolute theory. According to absolute theory, retaliation is a justification for punishment. In this context, the state is entitled to impose appropriate penalties because the perpetrator has violated the state's law. A Dutch legal expert Vos stated that in seeking the basis of criminal prosecution, the criminal act itself is seen as the basis of the punishment of the perpetrators of criminal acts. The use of this approach is rarely used except in certain cases that attract public attention. The case of pornography with the defendant Ariel on the decision of the District Court and the High Court implies an attempt to satisfy the grudge of society.

In the case of Riga Antoni Putra¹⁹, the perpetrator was charged with disseminating

¹⁶ District Court Verdict Bandung No 1096/Pid.B/2010/PN Bdg

¹⁷ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, Oxford, 2006), 1-3.

¹⁸ Oliver Wendell Holmes, *The Common Law* (Little Brown, Boston, 1963) see also Julius J. Marke, *The Holmes reader* (Oceana's Docket Books, 1955), 65-70.

¹⁹ District Court Verdict Tanjung Pati No. 58 /Pid.B/ 2011 /PN.Tjp.

his sex video clip with Lidya who was still 14 years old. The court sentenced the perpetrator to 7 years imprisonment and a fine of 250 million rupiahs. The perpetrator started to get acquainted with the victim, Lidya by phone. After 2 months of a relationship, the perpetrator invites Lidya to had sexual intercourse at perpetrator's house in Payakumbuh. The perpetrator recorded their sexual intercourse by using a cellular phone. The recording was then used by the perpetrator to threaten the victim to have sex with him again. The perpetrator and the victim then had sex for 14 times and recorded it. The perpetrator began to spread the video to his friends through his phone, and to the Lidya's teacher so that the victim was expelled from school.

This case showed the relation between pornography and sexual crime to the children make the judge impose severe punishment to the perpetrator. The approach of retaliation is also more visible when there are two crimes that occur. On the other hand, Angga Ryan Saputra²⁰ was accused of recording and spreading sexual intercourse in children on the Internet and only sentenced to 9 months in prison.

4. Prevention Approach

This approach emerges from relative theory. In this theory, the basis of punishment is the enforcement of the order in society. The purpose of the punishment in this theory is to prevent crime in society. The relative theory may also be called relationship theory or objective theory. This is because the relationship between injustice and punishment is related to the desired purpose of punishment which is to provide legal protection and prevent injustice.

This approach can be found in the decision of District Court of Rengat No 178 / Pid.B / 2013 / PN. RGT with defendant Ardiansyah bin Suryadi. In this case, the perpetrator was charged with article 45 (1) of Law No. 11 of 2008 on ITE to article 65 (1) of the Criminal Code. This section states that the perpetrator committed a crime intentionally and without the right to make access to information that violates decency.

At first, the perpetrator got acquainted with the victims, Maria and Ine Alivia via Facebook. Without the consent of the victim, the perpetrator downloaded the victims' picture from their facebook. The picture was edited by taking the victims' face and pasting it on another naked picture. The perpetrator then informed the victims that in the blog entitled "Cewek Bispak Rengat Part II" there were their pornographic images. Then the perpetrator said that the pictures can be removed if the victims pay to the perpetrator of 100.000 IDR. Because the victim did not want to pay, the perpetrator in March 2012, uploaded 4 more pornographic images of Maria and 4 porn images of Ine Avilia to his Blog. The perpetrator also extorted the victims to immediately pay of 900.000 IDR. The victims than reported him to the police.

In its verdict, the Panel of Judges stated that the behavior of perpetrators who manipulated person's images to pornographic images and extorted the victims are criminal acts which have no excuses of forgiveness and justification. Thus, the court ruled that the perpetrator was sentenced to 1 year and 4 months in prison. This severe punishment was imposed by the court to prevent perpetrators from repeating

²⁰ District Court Verdict Kandangan
114/Pid.B/2012/PN.Kgn

their actions and preventing people from committing the same crimes as criminals.

5. The Combined Approach

The combined approach is a combination of both approaches of retaliation and the prevention approach. The purpose of this approach is to combine retaliation and make an order in society. This is in line with the maxim *puniendis nemo est ultrameritum, intra meriti vero modum magis aut minus peccate piniuntur pro utilitate* which means that sorrow is a natural thing to be borne by the perpetrators of criminal acts, but the severity of punishment to the perpetrator is limited to social benefits. This is in line with the maxim who stated that *natura ipsa dictat, ut qui malum fecit, malum ferat* which means that nature gives the teaching that anyone who commits a crime, they will be exposed to sorrow. It's not a sorrow as revenge but also maintaining public order²¹.

This combined theory is able to give a balance in punishment to the perpetrator by giving an appropriate retribution to provide a protection to the law. This approach can be referred to Tjandra Adi Gunawan²² case in District Court Surabaya. This case was started from the perpetrator who created a fake Facebook account with the name Evi Urwatul Wusqo. The perpetrator admitted in Facebook that he was a woman and worked as an obstetrician at Mitra Keluarga Hospital Cibubur. Through the account, the perpetrator in early November 2013 sent a friend request to victims of Fedorika Yaphilia, Stephanie Caroline, Ivana Wardana, Devina Dea and Merry Merlina Renata. They were still 12 years old and

enrolled as a 5th grader at Petra 9 Christian Primary School Surabaya.

The perpetrator then communicated with the victims and requested a naked picture of the victims to check the health information such as the stage of reproduction, menstruation, and prevention of breast cancer from their naked images. Then, the victims were interested and send the naked pictures to the perpetrator. After that, the perpetrator made several new Facebook account named Iveyaphilia and Hen Wei. Through this Facebook account, the perpetrator uploaded naked pictures of the victims. The perpetrators also uploaded the pornographic images in the victims' school Facebook account. This made the school report the perpetrator to police.

In its verdict, the panel of judges stated that the sentence imposed to perpetrator has given a sense of justice by giving an indication that the court has given appropriate retaliation to the perpetrator's actions. The punishment also psychologically prevent perpetrators from repeating criminal acts and preventing people from committing criminal acts, especially in the pornographic crime of children.

6. Contemporary Approach

This approach tries to restore the future of the perpetrator by improving the behavior of the perpetrator. The purpose of this approach is the perpetrators can be accepted in the society after serving the punishment. This approach is a form of separation from punishment as punishment (*poenae ut poenae*) and punishment as a medicine that can recover or heal (*poenae ut medicine*).

²¹ Jan R Emmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting dalam KUHP Belanda dan Padanannya dalam KUHP Indonesia* (Gramedia Pustaka Utama, Jakarta, 2003), 611

²² District Court Verdict Surabaya No 2191/Pid.B/2014/PN.Sby

This approach is used in the Supreme Court's verdict No. 1607K / Pid. Sus / 2008. In this case the victim and the perpetrator are children. This case began when the perpetrator X saved and showed the pornographic images of the victim on the perpetrator's computer to 5 witnesses which are all brothers. In addition, the perpetrator showed the picture to witnesses 6, 7 and 8 which were a friend of a perpetrator's school and the victim. All the witnesses shown were still children. The perpetrator was charged with article 283 of the Criminal Code which has and publicly displayed images or objects that violate morality to children²³.

In this case, the approach was very considerate of the circumstances perpetrator who was still a children. Even the Supreme Court only sentenced the perpetrator for 6 months with a trial period of 9 months. This means that the perpetrator did not need to serve in a prison for 6 months if during the trial period of 9 months the perpetrator did not repeat the crime. Whereas in cases involving children and perpetrators are adults, the courts always sentenced a heavy punishment to perpetrators.

IV. CONCLUSIONS AND SUGGESTIONS

This research concludes that there are two models of approach used by the Court in deciding criminal cases, especially pornography related to sexual crimes. The first model relates to the effort to understand and assess cases and the second model relates to the theories of punishment. Approach with first model is approach of understanding and impact of action. Furthermore, approach related to the theory of punishment is the approach of retaliation, prevention, combination and contemporary approach.

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²³ Supreme's Court Verdict MA No 1607K/ Pid. Sus/ 2008

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Internet Resources

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