



Pornography in Indonesian Criminal Regulation: A Disharmony of Rules

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Abstract. In Indonesian society, pornography is considered incompatible with moral values, ethics, noble character, and the nation's noble personality, faith, and piety to God and Pancasila as the ideology and basis of the state, which forms the basis that some acts involving pornography categorized as a crime. Indonesia regulates pornography through Acts Number 44 of 2008 concerning Pornography. Along with the changing times and the need for regulatory reform in criminal law in Indonesia, a new regulation was drafted, namely Acts Number 1 of 2023 concerning the Criminal Code which also regulates pornography. However, problems arose regarding the regulation of pornography performed in public. The new Criminal Code stipulates in Article 420 paragraph (1) letter a, that the act is punishable by imprisonment for a maximum of one year and six months or a maximum fine of category II. Whereas Article 36 of Acts Number 44 of 2008 concerning Pornography stipulates that the same act is punishable by a maximum imprisonment of 10 years and/or a maximum fine of Rp 5,000,000,000.00 (five billion rupiahs). This disharmony and perplexing application of the article can have implications for the criminal procedural law process that applies to solving pornography problems. The research method in this study is normative juridical. This research will analyze various laws and regulations in Indonesia, which are supported by theories in criminal law. This research might contribute to the application of criminal procedural law in Indonesia, especially the prevention of disharmony in the enforcement of pornography crimes.

Keywords: disharmony, pornography, Indonesian criminal regulation.

1 Background

In the Indonesian legal system, criminal acts of decency do not have a clear definition. It was explained that a decency crime is a crime against norms in everyday life/decency that are related or have something to do with decency. In the criminal act of decency, the criminal act that is formulated is not only related to sexual matters, but also contains the value of social relations in the household, community life, and life in cyberspace. Criminal acts of decency have various terms in their mention. According to Moelyatno's translation, criminal action of decency as a crime is regulated in the Criminal Code book II chapter XIV from articles 281 to 303 bis. under the title: "about crimes against

decency"[1]. While according to Soesilo, under the title: "crimes about decency", then Sianturi's view on the decency problem is to use the term "immoral crime"[2].

Along with the development of the times, related to the criminal act of decency in Indonesian law, of course, it has developed. This can be seen from the increasing number of decency crimes, from year to year.

Table 1: Number of decency crimes in Indonesia in 2016-2020

No	Year	Number of decency crimes
1	2016	5247
2	2017	5513
3	2018	5258
4	2019	5233
5	2020	6872
6	2021	5905

Based on the table above, the high level of decency crimes in Indonesia shows its own problems. Based on research conducted in Makassar, South Sulawesi, it is known that there are several factors for the occurrence of decency crimes, including [3]:

- a. environmental factors actors, both family environment and community environment
- b. the influence of technological progress;
- c. moral degradation; and
- d. unemployment.

Referring to the provisions of laws and regulations in Indonesia, it is known that there are several provisions of laws and regulations that regulate criminal acts of decency, namely the Indonesian Criminal Code, hereinafter referred to as the Criminal Code, in Article 281. Article 281 of the Criminal Code states that:

A maximum imprisonment of two years and eight months or a maximum fine of four thousand five hundred rupiahs shall be punished:

- a. whoever intentionally and openly violates decency;
- b. whoever intentionally and in front of other people who are there against his will, violates decency.

In addition, decency crimes are also regulated outside the Criminal Code. Arrangements regarding criminal acts of decency are also regulated in Act Number 44 of 2008 concerning Pornography, as a form of *lex specialis* from the Criminal Code.

Meanwhile, along with the development of the need for adjustments to laws and regulations in Indonesia, the Indonesian Criminal Code was readjusted through Law Number 1 of 2023 concerning the Indonesian Criminal Code. Law Number 1 of 2023 is a criminal code that is based on national needs and in accordance with the ideals of national law, which are more locality and national in nature and is the work of Indonesia. However, the provisions in Law Number 1 of 2023 will only become effective in 2026, which is 3 years after ratification.

Problems arise, when juxtaposed with regulations regarding criminal acts of decency, between Act Number 44 of 2008 concerning Pornography and Act Number 1 of 2023 concerning the Indonesian Criminal Code. The provisions of Act Number 44 of 2008 are *lex specialis*, while the provisions of Act Number 1 of 2023 are *lex generalis*. Despite that, the two have an ongoing relationship. The criminal act of decency in Act Number 44 of 2008 concerning Pornography is regulated in Article 36, which is regulated as follows:

Any person who exhibits himself or another person in a performance or in public that depicts nudity, sexual exploitation, intercourse, or other pornographic content as referred to in Article 10 shall be subject to imprisonment for a maximum of 10 (ten) years and/or a maximum fine of a maximum of IDR 5,000,000,000.00 (five billion rupiah).

Whereas the provisions in Article 406 of Act Number 1 of 2023 state that immoral crimes in public are categorized as different from pornography and regulated with imprisonment for one year or fines for category II (10 million rupiah). The following is a snippet of article 406:

"Sentenced with imprisonment for a maximum of 1 (one) year or a maximum fine of category II, Everyone who:

- a. violating decency in Public;
- b. violates decency in front of other people who are present without the will of the person present."

These differences in legal arrangements have resulted in disharmony in the regulation of decency crimes. Disharmony in the regulation of moral crimes in Act number 44 of 2008 concerning pornography and Act number 1 of 2023 concerning the criminal law code will have implications for law enforcement. In general, this study will discuss related to the concept of regulating pornography crimes between Act Number 44 of 2008 and Act Number 1 of 2023 and the problems that arise because of disharmony between the two regulations. The purpose of this research is to analyze pornography crimes between Act Number 44 of 2008 and Act Number 1 of 2023 and to describe the consequences of the disharmony of provisions related to pornography in the two laws and regulations.

2 Method

The type of research used in this study is normative legal research commonly known as doctrinal legal research. Doctrinal legal research is research conducted by examining literature or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. In this study, the data source used is secondary data. This study examines the principles and systematics of criminal law. The approach used in this research is the statute approach. The legislation used is Indonesian Act number 44 / 2008 concerning Pornography and Indonesian Act number 1 / 2023 concerning the Indonesian Criminal Code.

Secondary legal materials are in the form of literature books, papers, journals, previous studies, and other scientific works that have relevance to the object of research.

As for tertiary legal material, it can be interpreted as a source that provides an explanation of primary legal material and secondary legal material, such as legal dictionaries.

3 Literature Review

3.1 General overview of pornography

Pornography is defined as the portrayal of sexual subject matter for sexual arousal. It is usually presented in various forms using magazines, videos, books, and video games. In the current scenario, it has become widespread and easily accessible to almost all age groups due to the easy availability of Internet usage. Studies have noted that early intentional exposure to pornography use in children and adolescents can lead to delinquent behavior, high-risk sexual behavior, and substance use [4]. According to Indonesian regulation, concerning Act No. 44/2008 about Pornography, the definition of pornography is pictures, sketches, illustrations, photos, writing, sound, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and/or performances in public, which contains obscenity or sexual exploitation that violates the norms of decency in the society [5].

3.2 General Overview of Indonesian Integrated Criminal Justice System

In the Black Law Dictionary, Criminal Justice System is defined as "the network of courts and tribunals which deal with criminal law and its enforcement". This definition places more emphasis on an understanding of both the network within the judiciary and the function of the network for enforcing criminal law. So, the emphasis is not solely on law enforcement by the criminal court, but even further in carrying out the function of law enforcement by building a network.

Meanwhile, Prof. Mardjono Reksodiputro said that the criminal justice system is a system in society to deal with crime problems [6]. Overcoming means here the effort to control crime so that it is within the limits of social tolerance. This system is considered successful if most of the reports and complaints of people who are victims of crime can be "resolved", by bringing the perpetrators of crimes to court and being sentenced and receiving punishment.

3.3 General Overview of Disharmony Rules

Disharmony of laws and regulations can be found in various areas of legal regulation in the Indonesian legal system [7]. Analysis of statutory regulations is only possible if the order of the statutory regulations is well understood. The hierarchy of laws and regulations is regulated in Indonesian Act Number 12 / 2011 concerning the Formation of Legislation and its amendments. The highest hierarchy is the 1945 Constitution of

the Republic of Indonesia, while the lowest is Regency/City Regional Regulations. Referring to research conducted by Kusnu Goeniadhi, disharmony can occur due to several factors, such as [7]:

1. There are so many types of laws and regulations.
2. There is a difference between the governing law and the implementation of regulations of the relevant law.
3. The occurrence of inconsistency, namely the closing provisions in the law that are not stated explicitly, which regulations are no longer valid.

4 Discussion

4.1 The regulatory framework of Pornography Crime between Indonesian Act Number 44/2008 and Indonesian Act Number 1/2023

The act of displaying immoral material in public means that someone already knows that the content of the material to be displayed is immoral or violates public decency with the aim that other people know the material. There are two things that need to be emphasized in this provision, namely that the perpetrator must know that the content of the material violates decency or at least he should suspect or estimate that there will be a reaction from the public towards the material displayed. It is necessary to clearly know the considerations of the perpetrators, considering that the act of displaying immoral material is the main requirement for it to be said that a crime has occurred [8]. In addition, the action must be intended so that other people or the public know the content. It is not necessary to know clearly how many people saw the immoral material at the time it was displayed by the perpetrators, nor it is not necessary to evaluate whether the material violated decency or not.

Based on article 281 KUHP. Arrangements regarding criminal acts of decency are regulated in Article 281 number 1 of the Criminal Code. As for having the following elements:

Subjective element. This subjective element of "intentionally" is reviewed from its placement in the formulation of a crime regulated in article 281 number 1 of the Criminal Code, including elements, damaging decency, and in public. For the perpetrator to be declared proven to have fulfilled the element of "intentionally" in court, a judge and public prosecutor must be able to prove [9]:

- a. That the perpetrator did have the will or intention to commit an act damaging to decency.
- b. That the perpetrator knew and was sure that he was doing the act in public.

To be able to declare the perpetrator proven to have fulfilled the element "intentionally" contained in the formulation of a crime regulated in article 281 number 1 of the

Criminal Code, here a judge does not need to depend on the confession of the perpetrator, but a judge can draw conclusions from the facts which were revealed in court proceedings [10].

Objective element

a. Whoever

The objective element of "deliberately destroying decency in public" as regulated in Article 281 point 1 of the Criminal Code, is the element of "whosoever". What is meant by "whosoever" is a person who is proven to have fulfilled the elements of a crime regulated in article 281 number 1 of the Criminal Code, then these people can be called the perpetrators of a crime of decency. Article 281 of the Criminal Code is usually carried out by many people, either in the form of "participating in", in the form of "uitokking" "moving other people to commit a crime" or in the form of "assisting".

To have a 'uitokking' or an act of encouraging another person to commit a crime as referred to in Article 281 point 1 of the Criminal Code, the person who commits the act must use one of the efforts mentioned in a limited manner in the formulation of the criminal provisions stipulated in Article 55 paragraph (1) 1) point 2 of the Criminal Code, namely by giving, promising, abusing power, violence, threats, lying, giving opportunities, means or information.

People who mobilize other people to commit crimes regulated in Article 281 point 1 of the Criminal Code can be blamed for fabricating the prohibition regulated in Article 163 of the Criminal Code, which carries a maximum imprisonment of six years or a maximum fine of four thousand. five hundred rupiahs. The criminal acts regulated in Article 281 number 1 of the Criminal Code can also be committed by several people in the form of "medeplichtigheid". Medeplichtigheid is regulated in Article 56 of the Criminal Code, which consists of the following actions:

- 1) Deliberately assisting when another person commits a crime,
- 2) Deliberately providing opportunities for means or information so that other people can commit crimes.

Damaging decency. Regarding what is meant by damaging decency itself, the law does not explain. But according to Professor Simon, gave the opinion that it must be included in the sense of violating decency, that is, every act that is included in the meaning of sexual relations between a man and a woman, which is done to arouse his lust, is because it has been done in public and has been seen by the public as a crime. acts that are outrageous and make others who see them feel ashamed or have feelings of displeasure.

In public. There is nothing in the law that explains what is meant by the word "in public". The Hoge Raad in one of his arrests has decided on an act that violates decency, where an act that violates decency in public is a good deed done in a public place in the sense of a place that can be visited by everyone, as well as an act, even though it is not done somewhere public, but can be seen from public places. According to Professor

Simon, to be said to have been committed in public, an act does not need to be committed in a public place, but it is enough if the act can be seen by the public from a public place, while the opinion of a professor van Bemmelen argues that an offender who is said to have decency in public, if the perpetrator is a "voorwaardelijk opzet" is the perpetrator's awareness that what he is doing may be seen by the public.

Based on Act Number 1 / 2023 concerning the Indonesian Criminal Code. As for Act Number 1 / 2023 concerning the Criminal Code, it is known that the action group displaying immoral material in public can be divided into three types of action, namely:

1. The act of openly violating decency in Article 406 of the Criminal Code
2. The act of disseminating immoral material Article 407 of the Criminal Code; and
3. The act of facilitating access to immoral material Article 408 of the Criminal Code

However, this article will focus on Article 406 of the Criminal Code. The immoral crimes in this first group have a very broad scope covering all immoral acts committed in public. Such acts as being naked in public or engaging in sexual intercourse in public. At first glance, it seems that there are no problems in this formulation, only if you look closely, there is not yet clear regarding the size of the act of violating decency. The two actions in Article 406 of the Criminal Code seem to have different dimensions, the first action (letter a) is in general decency while the second act (letter b) violates the decency of a person. This confusion of thinking can indeed occur if the interpreter does not fully understand the provisions of Article 406 of the Criminal Code.

The continuation of incomplete thoughts will lead to errors in law enforcement, which in turn will result in legal uncertainty or injustice. Indeed, article 406 of the Criminal Code defines two kinds of actions, firstly committing immoral acts in public and secondly, committing immoral acts in front of other people that the person does not want but has the same basis of judgment. Immoral acts in public in the development of the Dutch Criminal Code have been expanded to "in other places that can be entered by children under the age of 16"[11] so that it is very broad not only in public places but all places where people can see by children under the age of sixteen. The norms of decency that form the basis for assessing the two actions are the norms of decency that apply and are recognized by the people of Indonesia. It is said that the Indonesian people because the norms of decency apply to every group of Indonesian society. Considering that Indonesian society consists of various kinds of people with various cultural backgrounds, differences in the assessment of decency norms can occur. Andi Hamzah suggested understanding the norms of decency to be carried out using a sociological interpretation [11], considering the differences in assessing immoral acts from one region to another. Indirectly this interpretation opens differences in assessing the act as immoral in a case. This is based on the understanding of every Indonesian society towards civilized human values that provide guidelines for a good life.

Based on Act Number 44/2008 concerning pornography. Arrangements regarding immoral acts in public are also regulated in Article 36 of Law Number 44 of 2008 concerning Pornography. Element-based understanding is divided as follows:

1. Deeds: showing off. Just like Article 406 of the Criminal Code, which has an element of intent in its formulation, Article 36 of Law Number 44 of 2008

concerning Pornography also has an element of intent, this is interpreted as having an intention to show oneself or others. Therefore, the perpetrator is consciously and willing to show nudity, sexual exploitation, obscenity, violating the norms of decency in society, or other pornographic content.

2. The object: self or other person that depicts nudity, sexual exploitation, intercourse, or other pornographic content. The form of pornography according to Law number 44 of 2008 concerning Pornography has been expanded in such a way that it includes pictures, sketches, illustrations, photographs, writing, sound, sounds, moving images, animations, cartoons, conversations, and gestures. Or other forms of messages through various forms of communication media.
3. In a show or in public.

4.2 Problems that arise because of disharmony of rules of Pornography Crime between Indonesian Act Number 44/2008 and Indonesian Act Number 1/2023

In Indonesia, conflict of norms or disharmony of laws and regulations is a legal problem that often occurs. This is motivated by several laws and regulations which from a material point of view overlap with one another. Talking about disharmony of laws and regulations is essentially inseparable from the institutions that have the authority to form laws and regulations. Because imperfections in the formation of laws and regulations result in the existence of rights by an institution or individual which become disputes with laws and regulations [12].

The negative implications that arise as a result of disharmony of laws and regulations, in their existence will have a negative impact that is felt directly both to the community, the government as the organizer of the state, and to laws and regulations that are used as instruments in regulating, and cause statutory disharmony, including can lead to differences in interpretation among state administrators in carrying out the mandate contained in a rule or regulation, laws and regulations are not implemented effectively and efficiently, creating legal uncertainty and causing legal dysfunction (the law cannot function to provide guidelines in an orderly and orderly manner [13].

5 Conclusion

Whereas if viewed from the perspective of elaborating elements and setting sanctions, there is disharmony of arrangements in Act 1 of 2023 and the pornography act which can have implications for disparities in law enforcement related to immoral crimes. In general, the problems that will arise because of the Disharmony Rules in Pornography Regulation, among others:

1. Overlapping offense arrangements, and inconsistency of offense arrangements for similar acts;
2. The mistake of law enforcers over the duplication of offenses against similar acts;

3. There are differences in treatment in the criminal procedure law process (for example; detention)

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