

Criminalization of Pornography: Assessing the Limits of “Intent” in Indonesian Criminal Law

Muwafiq Zaid¹, La Ode Husen², Sutiawati Sutiawati³

Fakultas Hukum, Universitas Muslim Indonesia, Indonesia

Fakultas Hukum, Universitas Muslim Indonesia, Indonesia

Fakultas Hukum, Universitas Muslim Indonesia, Indonesia

Abstract: The criminalization of pornography in Indonesian criminal law raises significant interpretative challenges, particularly in determining the boundaries of intent (*dolus*) and criminal liability in the digital era. This study aims to analyze the legal qualification of the act of intentionally creating pornographic content and to examine the extent of criminal responsibility when such content is disseminated without the direct intent or control of the creator. Employing a normative juridical method with a case approach, this research focuses on Decision Number 51/Pid.B/2021/PN.Mgn as an empirical basis for analysis.

The findings reveal that the application of law in such cases tends to emphasize the fulfillment of *actus reus* while insufficiently examining the element of *mens rea*, particularly the intent to distribute or make the content accessible to the public. The case demonstrates that the defendant’s intent was limited to private recording, whereas the dissemination occurred due to third-party intervention. This condition raises critical issues regarding causality, where the concept of *novus actus interveniens* should be considered as a factor that breaks the chain of criminal liability. The study also identifies a tendency toward overcriminalization, resulting from a formalistic interpretation of legal provisions without adequate consideration of context, proportionality, and individual fault. This research contributes to the existing literature by offering a novel perspective on the reinterpretation of intent in pornography-related offenses, particularly in situations involving loss of digital control. It argues for a more contextual and substantive approach in assessing criminal liability, distinguishing clearly between private acts and public consequences. The study recommends legislative reform to clarify the boundaries between the creation and dissemination of pornographic content, as well as the development of judicial guidelines to ensure consistent and proportionate law enforcement in the digital age.

Keywords: criminal liability; intent; pornography law; digital evidence; overcriminalization; Indonesian criminal law.

A. INTRODUCTION

An act classified as a criminal offense is one that violates the law and is subject to punishment for those who commit it. Legal systems in every country, including Indonesia, evolve flexibly in response to changing times and societal needs. Accordingly, when a legal rule no longer aligns with the needs of society, new regulations emerge to govern collective life, ensuring that the legal system, including that of Indonesia, continues to develop and adapt.[1] In Indonesia, the prohibition of pornography has been firmly established through Law Number 44 of 2008. This regulation serves as the legal basis for regulating and preventing the distribution and production of pornographic content across various media, while also providing guidance for law enforcement authorities in taking action against violations.[2] The law was enacted because the provisions within the Indonesian Criminal Code (KUHP) were considered inadequate to effectively address cases of pornography and pornographic acts, as well as insufficient in providing a deterrent effect for offenders. Pornography-related crimes in Indonesia are not limited to social media or cyberspace, but may also occur in everyday life within the surrounding social environment.[3] Therefore, many members of society, including adolescents and adults, feel concerned due to having experienced violations of norms of decency in their daily lives. Various forms of crime in the real world must not be overlooked, as similar patterns may also occur in cyberspace. In recent times, cases of pornography and sexual offenses have increasingly attracted public attention. Pornography-related crimes encompass various forms and impacts; one such example is exhibitionism, which causes harm and discomfort within society.

As stated in Surah Al-Ahzab verse 33:“And remain in your houses and do not display yourselves as was the display of the former times of ignorance. Establish prayer, give zakah, and obey Allah and His Messenger. Indeed, Allah intends only to remove impurity from you, O people of the household, and to purify you completely.”[4] The verse explains that the wives of Prophet Muhammad (peace be upon him) were instructed to remain in their homes and to leave only when necessary in accordance with religious guidelines. They were prohibited from adorning themselves or behaving like women of the pre-Islamic (Jahiliyyah) era, such as wearing anklets and striking them while walking, or exposing parts of the body that should remain covered. In addition, they were commanded to perform prayers, both obligatory and voluntary, to give zakat, and to obey Allah and His Messenger. These commands were revealed by Allah to purify them from sins, O Ahl al-Bayt, and to cleanse them thoroughly.

To date, scholarly studies that specifically examine the limits of the element of intent in the criminal offense of producing pornographic content particularly in cases where dissemination occurs without the direct will of the perpetrator remain relatively limited. Most previous research has tended to focus on the general criminalization of pornography, the protection of morality, and law enforcement efforts against perpetrators

involved in the distribution of pornographic content in digital spaces.[5].

However, there remains a limited number of studies that comprehensively examine the construction of criminal liability in situations where pornographic content is consciously created for private purposes but subsequently disseminated into the public sphere due to factors beyond the creator's control.

In the context of Decision Number 51/Pid.B/2021/PN.Mgn, it was revealed that in June 2020, an incident occurred involving a man and a woman who engaged in intimate relations outside of marriage in a hotel. The activity was recorded using a mobile phone and stored for personal consumption, without any coercion or pressure from any party. However, the video was later disseminated on social media not as a result of the direct intent of the defendant, but due to the use of the device by another party who was still a minor.

Departing from this phenomenon, this study offers novelty by focusing on the analysis of the limits of the mens rea element, particularly intent, in pornography-related offenses especially in situations involving a "shift of control" over digital objects. This research not only examines whether the act of recording can be qualified as intentional conduct within the framework of pornography offenses, but also explores the extent to which criminal liability can be imposed when the resulting consequence (dissemination) occurs beyond the perpetrator's will. Accordingly, this paper seeks to fill a gap in existing scholarship while contributing conceptually to the development of criminal law in Indonesia, particularly in addressing the complexities of technology-based crimes.

This incident attracted public attention and had a significant impact on the reputation of the institution as well as on the image of the defendant as a civil servant within an education office. Furthermore, one of the witnesses, who is also an educator, is recognized as a mentor and guide for the younger generation. The defendant was sentenced under Article 29 in conjunction with Article 4 paragraph (1) of Law Number 44 of 2008 on Pornography in conjunction with Article 56 paragraph (2) of the Indonesian Criminal Code, receiving a prison sentence of six months. However, the verdict has been considered too lenient, given that both defendants were expected to serve as role models for society in upholding norms of decency. [6]

B. METHOD

This study employs a normative legal research method, focusing on literature review and secondary data to analyze legal norms related to the intentional creation of pornographic content, based on Decision Number 51/Pid.B/2021/PN.Mgn. The approaches used include statutory, historical, conceptual, and political approaches, selected according to their relevance to the research issues. The data sources consist of primary legal materials, such as the Criminal Code, Law Number 44 of 2008 on Pornography, and relevant court decisions; secondary legal materials, including statutory explanations, legal literature, prior research findings, expert opinions, and scholarly articles; as well as tertiary legal

materials, such as legal dictionaries and encyclopedias. Data collection is conducted through library research and documentation of various written sources. All legal materials are then analyzed systematically using a normative legal method by interpreting legal theories, statutory regulations, and legal arguments to address the research problems.

C. DISCUSSION

1. The Qualification of the Criminal Offense of Intentionally Producing Pornography in the Perspective of Criminal Law

The qualification of the criminal offense of intentionally producing pornography within Indonesian criminal law cannot be separated from the normative framework established in Law Number 44 of 2008 on Pornography, which serves as a *lex specialis* in regulating acts related to the production and dissemination of pornographic content.[6] This law explicitly criminalizes various forms of activities related to pornography, ranging from creation, production, and reproduction to distribution, as well as an individual's involvement as an object in pornographic content.

Conceptually, the criminal offense of producing pornography requires the element of intent (*dolus*) as part of *mens rea*. Although not all statutory provisions explicitly include the term "intentional," the inherently active and purposive nature of the acts such as "producing," "creating," or "reproducing" implicitly reflects the existence of both will and knowledge on the part of the perpetrator regarding the conduct undertaken.[7] Thus, intent in this context can be understood as the existence of awareness and will to create content containing pornographic material.

Article 4 paragraph (1) of the Pornography Law prohibits any person from producing or creating pornography, with relatively severe sanctions, namely imprisonment for a minimum of six years and a maximum of twelve years, along with substantial fines. In addition, Article 8 stipulates the prohibition for any person to knowingly become an object or model containing pornographic content, except under certain conditions such as coercion, threats, or deception. These provisions demonstrate that criminal law does not only target active perpetrators in the production process, but also individuals who consciously contribute to the creation of such content.

On the other hand, Law Number 11 of 2008 on Electronic Information and Transactions, as amended (most recently by Law Number 1 of 2024), complements this regulatory framework, particularly in the context of the dissemination of pornographic content through electronic media. The ITE Law prohibits the distribution, transmission, or making accessible of electronic information containing content that violates decency norms. In this regard, there is a fundamental distinction between the act of "creating" and that of "disseminating." The creation of pornography emphasizes the process of producing the content itself, whereas the ITE Law focuses on the consequence, namely the spread of such content within the digital sphere. Accordingly, the qualification of

the criminal offense of intentionally producing pornography must be carefully analyzed, particularly in distinguishing between acts carried out for private purposes and those that have implications within the public sphere.[8] In practice, not every act of creating content containing pornographic elements automatically fulfills the elements of a criminal offense, particularly when there is no intention to disseminate or make such content accessible to the public. This distinction is crucial in assessing the limits of intent whether the intent is confined solely to the act of creation, or whether it also extends to the potential consequences that may arise in the future.

Therefore, from the perspective of modern criminal law, the determination of the qualification of this offense should not rely solely on normative provisions, but must also take into account the element of *mens rea*, the context of the act, and the causal relationship between the perpetrator's conduct and the resulting consequences. This approach is crucial, particularly in addressing the dynamics of digital technological developments that enable the dissemination of content beyond the direct control of its creator.[1]

In Decision Number 51/Pid.B/2021/PN.Mgn, the panel of judges was confronted with a crucial issue concerning the qualification of the criminal offense of producing pornography, particularly in assessing the limits of the element of intent (*dolus*) within the context of digital technological developments. The legal facts revealed that the defendant, together with a woman, consciously engaged in intimate relations and recorded the activity using a mobile phone for private purposes. There was no evidence of coercion, threats, or any intention to disseminate the content to the public. However, the video was later circulated on social media due to the use of the device by another party who was still a minor, without the defendant's knowledge.

The legal issue that arises is whether the act of recording such intimate activity can automatically be qualified as "producing pornography" within the meaning of a criminal offense as stipulated in the Pornography Law, and to what extent criminal liability can be imposed on the defendant for the consequence of dissemination that occurred beyond his control.

Normatively, the element of "producing" in the Pornography Law can indeed be interpreted as any act that results in the creation of content containing pornographic material.[9] In this case, the defendant's conduct factually fulfills the element of *actus reus*, as it resulted in the creation of a visual recording containing pornographic material. However, the assessment cannot be limited to the physical act alone; it must be extended to an analysis of the element of *mens rea*, particularly concerning the intention or purpose underlying the act.

From the perspective of criminal law doctrine, intent (*dolus*) encompasses not only the will to perform an act but also the awareness of its prohibited consequences. Accordingly, there is an important distinction between the intent to create content within a private sphere and the intent to distribute or make such content accessible to

the public. In this case, no evidence of *animus distribuendi* (intent to disseminate) was found; therefore, the defendant's intent is more appropriately qualified as being limited to the creation of content for private purposes.

Furthermore, the dissemination of the video resulting from the actions of a third party raises issues concerning causality (*causal verband*) and criminal liability. In the theory of causation, a consequence can only be attributed to a perpetrator if there exists a relevant cause-and-effect relationship that can be legally accounted for.[10]

In this case, the causal chain is interrupted by the intervention of a third party, namely the defendant's nephew, who used the device and inadvertently disseminated the content. This intervention may be qualified as a *novus actus interveniens*, which breaks the direct line of criminal liability between the defendant's act and the resulting consequence.

From the perspective of modern criminal law, this condition reflects a "shift of control" over digital objects, whereby the perpetrator loses control over content that was previously confined to a private sphere. This phenomenon has become increasingly relevant in the digital era, where a single device may be accessed by multiple parties and the risk of data leakage is significantly heightened.[11] Therefore, an overly formalistic approach that focuses solely on the fulfillment of the *actus reus*, without taking into account the context and intent, has the potential to result in injustice.

The panel of judges in this case should have proportionally considered the balance between the protection of public morality and the fundamental principles of criminal law, particularly the principle of *geen straf zonder schuld* (no punishment without fault). The application of this principle requires the existence of culpability that can be personally attributed, rather than merely relying on the resulting consequence. Accordingly, if the dissemination occurred without the defendant's intent, knowledge, or significant negligence, then imposing criminal liability for such consequences becomes legally problematic.[12] The analysis of this decision indicates the need for a reinterpretation of the element of intent in pornography-related offenses, particularly in distinguishing between the private and public spheres, as well as in assessing the role of third parties in the occurrence of legal consequences. This also underscores that future approaches in criminal law must be more adaptive to technological developments, while consistently upholding the principle of substantive justice.

2. Critical Analysis of Judicial Considerations in Sentencing for the Intentional Production of Pornography in Decision Number 51/Pid.B/2021/PN. Mgn

Decision Number 51/Pid.B/2021/PN.Mgn raises normative debates regarding the accuracy of legal application, particularly in assessing the element of intent (*dolus*) and the limits of criminal liability in pornography-related offenses. Critically, there are two approaches that may be employed to evaluate whether the decision is appropriate, namely the formalistic-normative approach and the substantive-progressive approach.

From a formalistic perspective, if the panel of judges maintained the defendant's guilt for the act of "producing pornography," the decision may be considered to have a juridical basis, given that the element of *actus reus* has been fulfilled through the act of recording sexual activity that substantively contains pornographic material. This approach tends to interpret legal norms textually, whereby any act resulting in the creation of pornographic content is regarded as a prohibited act, without significantly distinguishing between the private and public spheres.[13] The implication of this approach is the establishment of a rigid standard of law enforcement that is oriented solely toward legal certainty, even though it may potentially overlook the dimension of individual justice.

However, this approach becomes problematic when viewed in light of the fundamental principles of modern criminal law, particularly the principle of *geen straf zonder schuld*. In this case, the defendant had no intention to disseminate the content, and in fact, the dissemination occurred as a result of the actions of a third party.[14] Accordingly, if the judge continues to impose criminal liability for the consequence of the content's dissemination, such an approach risks violating the principle of culpability (*schuld*) as the foundation of punishment. In this context, the imposed sentence no longer reflects a balanced relationship between the act, the fault, and the resulting consequence, but instead tends to be objective in nature, without adequately considering the subjective dimension of the perpetrator.

From a substantive perspective, a decision that declares the defendant guilty without deeply considering the context of intent and the loss of control over the digital object may be viewed as failing to reflect substantive justice. In criminal law, intent should not be understood merely as the will to perform an act, but also as encompassing awareness of the consequences prohibited by law. In this case, the defendant's intent was limited to the act of recording for private purposes, not to distribution or publication.[15] Therefore, a clear differentiation must be made between *dolus directus* (direct intent) and the possibility of *dolus eventualis*, which in this case appears not to be fulfilled, as there is no indication that the defendant was aware of or accepted the possibility of the content being disseminated.

Furthermore, when viewed through the lens of causation theory, the dissemination by a third party may be qualified as a *novus actus interveniens* that breaks the chain of criminal liability. This means that the consequence namely the spread of the video can no longer be fully attributed to the defendant. Ignoring this aspect risks leading to overcriminalization, where an individual is punished for consequences that lie beyond their control and intent. Within this framework, it is essential to emphasize that criminal law must not function as an unlimited punitive instrument, but rather must adhere to the principles of proportionality and individual accountability. On the other hand, if the judge considers that the defendant still bears negligence (*culpa*) in safeguarding personal data, such an approach remains open to

debate. However, the establishment of such negligence must be grounded in a clear and proportionate standard of due care.[16]

In the context of the general public, the shared use of mobile phones within a family environment cannot automatically be considered as negligence that fulfills the elements of a criminal offense, unless there is evidence of a serious disregard for the risk of dissemination. Without clear parameters, an expansive interpretation of negligence risks leading to uncontrolled overcriminalization.

Moreover, this decision may also be criticized from the perspective of the protection of the right to privacy, which in the development of modern law is increasingly recognized as part of fundamental human rights. The recording of private activities conducted consensually within a private sphere essentially falls within the domain of individual autonomy. When the state, through criminal law instruments, intrudes too far into the private sphere without considering proportional limits, it risks creating a conflict between the protection of public morality and individual freedom. Therefore, law enforcement in pornography-related cases should also take into account the dimension of privacy rights as part of a more balanced approach.

Furthermore, in the context of digital technological development, this decision reveals a gap between static legal norms and dynamic social realities. Digitalization has created conditions in which control over data becomes relative and vulnerable to access by third parties. Consequently, the application of criminal law that fails to adapt to this reality risks producing decisions that are not contextually grounded. Judges should not merely act as the mouthpiece of the law, but also as active interpreters capable of integrating the values of justice, utility, and legal certainty in a balanced manner.

Accordingly, it can be critically concluded that a decision which continues to declare the defendant guilty tends to reflect a legalistic-formal approach rather than one grounded in substantive justice. Ideally, judges should develop a more contextual interpretation by considering the evolution of digital technology, the concept of control over personal data, and the distinction between private intent and public impact. Therefore, this decision demonstrates an urgent need for the reformulation or at least reinterpretation of criminal law norms related to pornography, in order to prevent overcriminalization while remaining aligned with the principles of individual rights protection and proportional justice. In addition, clearer judicial guidelines are necessary in assessing elements of intent and negligence within the context of digital-based crimes, so that law enforcement is not solely oriented toward punishment, but also toward balanced justice that is adaptive to contemporary developments.

D. CONCLUSION

The qualification of the criminal offense of producing pornography within Indonesian criminal law, particularly one that requires the element of intent (*dolus*), in practice still presents significant interpretative challenges, especially in the context of digital technological developments. Decision Number 51/Pid.B/2021/PN.Mgn reflects a tendency in law enforcement to emphasize the formal fulfillment of the *actus reus*, without being adequately balanced by a thorough analysis of the element of fault (*mens rea*) and the factual context underlying the act. Substantively, intent in pornography-related offenses cannot be narrowly understood as merely the will to perform an act, but must also encompass awareness of the prohibited consequences, particularly with regard to distribution or public accessibility. In the case analyzed, the defendant's intent was limited to the creation of content within a private sphere, without any intention or awareness of its dissemination. Therefore, attributing criminal liability for the consequence of the content being distributed by a third party reflects an expansion of the meaning of intent that is inconsistent with fundamental principles of criminal law, especially the principle of *geen straf zonder schuld*. Furthermore, the intervention of a third party in disseminating the content should be understood as a *novus actus interveniens* that breaks the chain of causation between the defendant's act and the resulting consequence. Accordingly, the imposition of punishment on the defendant in such circumstances risks leading to overcriminalization and blurring the boundary between criminal liability and the social risks inherent in the use of digital technology. This underscores that Indonesian criminal law continues to face challenges in adapting classical legal concepts to the complexities of the digital era. Overall, this decision reflects a tension between a legalistic-formal approach and the need for substantive justice. Therefore, reforms are necessary both at the normative level and within judicial practice to ensure that the application of criminal law remains grounded in the principles of culpability, proportionality, and the protection of individual rights within the private sphere.

E. REFERENSI

- [1] D. Yuridiksi, D. I. Ruang, S. Tantangan, A. C. Cindrapole, and A. A. Mangarengi, "STRATEGI PENEGAKAN KEAMANAN LINTAS NEGARA," vol. 3, no. 1, 2025.
- [2] Nuzul Fajrin and M. Fauzi Ramadhan, "Tinjauan Yuridis Tindak Pidana Pembunuhan Atas Dasar Membela Diri," *Qawanin J. Ilmu Huk.*, vol. 4, no. 1, pp. 48–59, 2024, doi: 10.56087/qawaninjih.v4i1.390.
- [3] M. Muslimin and U. M. Malang, "Perkembangan teknologi dalam industri media".
- [4] M. Muhammad, "Dinamika Terjemah Al-Qur'an (Studi Perbandingan Terjemah Al-Qur'an Kemenerian Agama RI dan Muhammad Thalib)," *J. Stud. Ilmu-ilmu Al-*

- Qur'an dan Hadis*, vol. 17, no. 1, p. 1, 2018, doi: 10.14421/qh.2016.1701-01.
- [5] E. Raharjo, D. R. Monica, and E. D. Maiyanti, "Analisis Faktor-Faktor Penyebab Meningkatnya Kasus Pornografi Balas Dendam (Revenge Porn) Di Indonesia," *Lex LATA*, vol. 5, no. 3, 2023, doi: 10.28946/lexl.v5i3.2560.
- [6] Ni Komang Ayu Triana Dewi, A. A. S. L. Dewi, and I. M. M. Widyantara, "Kajian Viktimologi terhadap Perlindungan Korban Balas Dendam Pornografi (Revenge Porn)," *J. Konstr. Huk.*, vol. 3, no. 1, pp. 217–221, 2022, doi: 10.22225/jkh.3.1.4465.217-221.
- [7] J. Pustaka *et al.*, "PIDANA PENYEBARAN VIDEO BERMUATAN PORNOGRAFI DI MEDIA SOSIAL WHATSAPP SEBAGAI TINDAKAN BALAS DENDAM (REVENGE PORN)," vol. 02, pp. 145–160, 2024.
- [8] A. C. Cindrapole and S. Rosmini, "the Legal and Ethical Implications of Surveillance in Criminal Law : a Literatur Review," vol. 4, no. 1, pp. 448–455, 2024.
- [9] Achmad, Naswar, M. Assidiq, Hasbi, A. Safira, and S. N. Lubis, *Korelasi Kejahatan Siber dan Kejahatan Agresi Dalam Perkembangan Hukum Internasional*. 2020.
- [10] M. Chaerul Risal, "Perlindungan Hukum Terhadap Korban Kekerasan Seksual Pasca Pengesahan Undang-Undang Tindak Pidana Kekerasan Seksual : Penerapan dan Efektivitas," *Al Daulah J. Huk. Pidana dan Ketatanegaraan*, vol. 11, no. 1, pp. 75–93, 2022, doi: 10.24252/ad.v1i2.34207.
- [11] A. C. C. Nurhaedah, "Analisis Yuridis Penegakan Hukum terhadap Pelaku Tindak Pidana Perdagangan Orang Lintas Negara," *J. Ilm. Metadata*, vol. 4, no. 3, pp. 1–23, 2022.
- [12] A. I. Assaad and A. C. Cinrapole, "Compendium of judge made lawjournal," vol. 1, no. 2, 2025.
- [13] M. I. Asrum, H. Thalib, and M. Jannah, "Criminological Review of the Phenomenon of Cyberbullying," *Horiz. Public Leg. Stud.*, vol. 1, no. 1, pp. 32–49, 2024, doi: 10.56087/hegels.v1i1.490.
- [14] D. D. Saputra, S. M. R. Noval, and A. Jamaludin, "Mengeksplorasi Krisis Kebijakan dan Perlindungan Bagi Anak-Anak Terhadap Sexual Grooming Di Ruang Maya," *J. Legis. Indones.*, vol. 20, no. 2, p. 117, 2023, doi: 10.54629/jli.v20i2.1058.
- [15] Z. S. Hakanadila and A. Salam, "Lex Patrimonium Tinjauan Yuridis Terhadap Penerapan Pasal 1365 dan Pasal 1372 Kuhperdata Secara Kumulatif Terhadap Gugatan Ganti Rugi Dalam Kasus Pencemaran Nama Baik," vol. 4, no. 3, 2025.
- [16] F. P. Alviolita and Universitas, "KAJIAN YURIDIS MEDIASI PENAL SEBAGAI UPAYA PENYELESAIAN TINDAK PIDANA PENCEMARAN NAMA BAIK MENURUT HUKUM PROGRESIF," *AT-TAWASSUTH J. Ekon. Islam*, vol. VIII, no. I, pp. 1–19, 2023.

COMPENDIUM OF JUDGE MADE LAW JOURNAL

Volume 1 Issue 2 Year 2025