

# Criticism of The Juridical Positivism Paradigm on The.pdf

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## Criticism of The Juridical Positivism Paradigm on The Meaning of Pornography In The Judge Mindset

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**Abstract.** Pornographical in the way of *lex specialis* was regulated in The Law No. 44/2008 and *lex generalis* loaded on The Criminal Code. The Judge interpreting pornography refer to textual definition of pornography according to the Law No. 44/2008 according the data founded that dominantly on juridical positivist paradigm. Juridical positivist paradigm is not the only one paradigm that used by the judge, moreover related about pornographical, need the change of appropriate paradigm concerning the judge mindset in interpreting pornography recorded to the judge considerations. The aim of this writing is to criticize the judge mindset and social sensitivity in interpreting and handling pornography. This study used qualitative and socio legal research to reveal the judicial considerations textual-contextually. With exposing the textual-contextual meaning of judge's considerations, it can be traced to the legal paradigm used by judges and need to use appropriate legal paradigm related to the use of social theories that support it. The judge needs to have a non-doctrinal legal science perspective on the correct legal paradigm reform in giving judges consideration to pornographic cases. Judges are more likely shackled to the institutional structure and establishment of the juridical positivism paradigm.

### 1 Introduction and Literature Review

The issue of pornography has long been as old as humans inhabit this earth in various forms and ways so that others listen and enjoy and even circulate widely. The etymology of pornography from the word *porne* means bitch and *graphos* or *graphien*, which means pictures or writing and pornography refer to pictures or photos that show the prohibited body parts of women [1]. Often pornography problems are embedded in the elements of eroticism in accordance with the encyclopedia of Britain, pornography is anything that has material in the form of films, newspapers, writings, etc., which causes or arises.

Today's information technology for the forms and ways of pornography is increasingly varied and adept at modifying aims to attract many viewers to be aroused so that it becomes an acute addictive phenomenon. Included in a large scope is called *cbyerporno*. The target extends across age, and the main national borders sell well and spread throughout the area.

The pornography arrangement is classically contained in the Criminal Code, especially regarding the moral offenses of articles 282, 283, 532 and 533. But the development of information technology loaded with globalization with a variety of social media, regulating pornography needs to be made specific regulations in the form of laws on pornography. Law No. 44 year 2008 seeks to accommodate the content of pornography in a variety of movements and time and space, which of course applies uniformly formally according to the principle of unification adopted by the Indonesian state.

Pornography law enforcement using Law No. 44 year 2008 was accompanied by an increase in legal knowledge by judges as the last guardian law enforcement officers in making judges' decisions reflected in the judges' consideration. Judges' consideration is a description of the logic and juristic ethics of the judge on the response to legal cases, especially pornography. The judge's paradigm is still dominated by legal positivism which is easier and more measurable using legal interpretation methods and which surfaces in grammatical interpretation of wording and sentences. Whereas the whole method of interpretation needs to be empowered including referring to the cultural and humanitarian approaches that are critical of the legal positivism paradigm.

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## 1.1 Definition of Pornography

Understanding pornography involves the opening of moral norms and cultural values of the local community. The parameter of the definition of pornography is formulated uniformly and definitively as in Law No. 44 year 2008, pornography is a picture, sketch, illustration, photo, writing, sound, sound, moving picture, animation, cartoon, conversation, gesture, or other message form through various forms of communication media and/or performances in public, which contain obscenity or sexual exploitation that violate moral norms in the community. From the contents of the definition or understanding above forms and pornographic media metamorphosed with the development of information technology in this globalization period. Whereas in substance refers to content concerning sexual exploitation which has the weaknesses of subjectivity in the words: "contains:" moral norms "and" society " [2].

Scoping space can someday shift, change and even disappear according to the demands of community cultural development. Oral culture and written culture in the scope of culture will speak active movements can fade and strengthen according to the style and manner conveyed to the community. Including the word "loading" the ability to accommodate during the period of critical questioning, then the phrase moral norms and speech communities also questioned the understanding and ability of cross-country roaming [2]. Questioning the decency norms on cross-term cruising refers to the word meaning regarding the noble values that are believed and adhered to by local people that are easy to occur between communities and between different regions in defining the meaning and content of moral norms inherent in the local community. Moral norms are one manifestation of a cultural framework within the sphere of cultural systems and social systems initiated by Koentjaraningrat [3].

Moral norms that are easy to experience a shift that used to be said to be immoral or pornographic acts in the future are neither assusila or vice versa [4]. Therefore, the definition or definition of pornography is extended to the subject, location, situation when the content of the decency norm is used by the local community within the scope of the meaning of pornography. This happens because Indonesian society is a plural society [5], where they have different morality, customs, norms and religions and even different types of law. To be understood the meaning of pornography needs to be seen in the text and context.

Concrete examples of Suku temple relief works in the Karanganyar Regency of Central Java and Borobudur temple have carved human body carvings and carvings between the opposite sex which are displayed in real terms, as an observation of the stages of human life that still prioritize the lust of biological pleasure. The discovery of lingga and yoni artifacts at the shrine that is interpreted is not merely concrete but a symbol of balance and calm from the encounter of Lord Shiwa and Dewi Parvati. Furthermore, the literary works of the book Kamasutra in India take the form of narratives and pictures of the art of making love, in the homeland of the novel Ronggeng Dukuh Panarukan about the life of Ronggeng dancers in the 1960s the condition of being a ronggeng dancer according to the local tradition tradition of giving up her virginity to a man who is not a legitimate husband. The meaning of pornography is relative, because in the scope of meaning includes an understanding of the cultural values adopted by the community and local area. Likewise, the meaning of cross-community pornography and across regions cannot be equated in a region or nation.

The meaning of pornography contains the text and context, not just fixed on the definition or understanding of pornography. A position that views the meaning of pornography cannot be uniformed in every law case, among others, cultural artist, feminist and critical legal observer. The feminism movement is oriented towards the liberation of women's position in order to eliminate and find the formula for equal rights of women and men in all fields according to the potential they possess [6]. Related to the meaning of pornography for the feminist movement is the result of superior male ideology and politics dominated and designed by male logic. Like the sexual politics of both women and men, Plato prioritizes the content of the head rather than the groin section but actually there is a relationship between being ruled and mastering having an intimate erotic encounter in a secret room in the sense of physical and non-physical geographical.

Plato tried to sort out erotic encounters in the body of men and women not from mimicry in a beautiful body but authentic ideas in the form of beauty that resides in the body as well as in other bodies. Here Plato already implies that the body experiences fragmentation into spaces that we can enter in various ways. And the right way for the Plato regime is to enter the space of beauty - not the beauty that arises from intimacy, but from the thoughts or ideas of the beautiful. A beautiful body is just a step. If the idea of beauty is what makes the body beautiful, there is nothing more erotic than loving an idea that is eternal and beyond all forms, namely the beauty itself, therefore Plato agrees to promiscuity behavior [7].

## 1.2 Criticism of the Law Positivism Paradigm

Positivism published this issue from Comte comes from a positive word to be positivism which means knowledge should not exceed the facts [6]. Therefore adherents of legal positivism see the rule of law as only valid because the law gets its positive form from an authorized agency [8]. The law of positivism paradigm views the types and

forms of law which are the most superior in the form of state law (state-law) in writing derived from the human ratio. This type of natural law is not a major study especially concerning the legal purpose of justice which is considered to have existed by itself. Whereas aspects of social, cultural, political, economic and ideological sensitivity for the operation of state law are not the main and urgent matters because they can damage the working system of state law. Because the social sensitivity of the legal apparatus is easily dull even though the state law is dealing with fellow human beings, humanizing human beings in law needs to be considered in the enforcement of pornography law.

## 2 Objective of Study

The purpose of this study is to map and analyze the mindset of judges through the consideration of judges who strongly adhere to the paradigm of positivism and criticize it in handling legal cases of pornography.

## 3 Research Method

Research methods used are qualitative. This approach refers to normative and empirical law to obtain a comprehensive description of the object under study. Primary data sources in the form of humans in actions, events and documents and related archives and others. Data sources that have been obtained are then processed using interactive and non interactive models then analyzed using interactive analysis models.

## 4 Discussion

Judges are the determinants of justice for legal cases handled because the public court is the last bastion of justice for litigants who use litigation. All legal remedies are taken for parties who have litigated in winning legal cases, including pornography cases. Pornography contains an injury to the norms of public decency and experiences a shift in meaning and reality at all times, therefore legal apparatuses, especially judges, are required to have excessive mastery in carrying out legal interpretation. This legal interpretation experiences a shift due to changing situations and demands of the times.

The interpretation that dominates the judge in the mindset or paradigm of positivism in the form of grammatical words and sentences is described according to the origin of the word and language. The mastery of grammatical interpretation is no longer sufficient in pornographic cases because the judges consider the content to be biased in meaning and bias of the perpetrator. Judges need to master hermeneutics to uncover first; text, second; text maker, and reader or interpreter of the text. Text interpreters are tasked with exploring what is explicit and implicit behind the hidden meaning of a series of words in the form of text sentences. Hermeneutical work reveals thoughts through words as a medium of delivery.

Decisions of the Constitutional Court of the Republic of Indonesia 10-17-23 / PUU-VII / 2009 have made decisions in a judicial review, among others, the Constitutional Court recognizes the exceptions of pornography according to expert testimony submitted by the government by Tjipta Lesmana (hukumonline.com, colored dissent, MK states Act Constitutional Pornography, accessed August 12, 2018):

- a. Art needs
- b. Literary needs
- c. Custom / custom requirements
- d. The need for knowledge
- e. Sports needs

For artists and cultural observers understand the meaning of pornography, as stated in the table below:

Meaning Giver	Meaning of Pornography	Description
Painting Artist	The meaning of pornography is reinforced and not biased meaning because, the painting of naturalist flow that accentuates the beauty of the human body and natural forms are popular and are enjoyed by local and foreign consumers	The results of naturalist painting are limited by the rules of decency and the rules of decency precisely the aesthetic value disappears and is not sold in the market
Sculpture Artist	Agree the existence of Law Number 44 of 2008 provided that the legal apparatus including judges have extensive legal knowledge, especially interpreting art because the art of serving art is not a	Interpretation of judges or the mindset of judges need to be expanded because related sculpture works accentuate the body of mania as a sign of gratitude as a perfect being.



	pornographic product. Sculpture requires high creativity so that a legal culture and high legal authority are needed.	
Fiction Artist	Fiction artists really appreciate the multicultural society that can be promoted into fiction according to the culture that lives in their respective regions. Example of Noe1 Ronggeng Dukuh Penarukan by Ahmad Tohari.	Legal certainty that is pursued by the legal apparatus is not the main thing precisely in justice and expediency because the expression of artists written on fictional art is related to the uniqueness of local culture. Like the intercourse scene is packed and framed the beauty of art through songs, dances and other symbols
Drama Artist	Pornography only takes care of human sex which has been taken over by the State so that it kills the creativity of artists and cultural observers in expressing their artistic ideas.	Naked bathing scenes on the river in the art of drama are natural because morality rules allow.

The part judge of the justice apparatus determines justice, so it is necessary to look at Lawrence Friedman's legal system theory, structure, substance, and culture [9, 10]. the three elements above are first attached to the judge, the two judiciary institutions as a forum for the operation of state law designed with a system of certain judicial mechanisms and thirdly attached to the soul of the community affected by lawsuits.

The perspective of the judge in carrying out his legal knowledge in the judiciary cannot be separated from the quality aspect of the judge himself in the form of a mindset or legal paradigm which the judge believes and adheres to when dealing with pornography lawsuits. Based on the cases of pornography criminal acts investigated, namely: No. 751/Pid.B/2017/PN. JKT. BRT, No. 210/Pid.B/2018/PN Mlg, No, 512/Pid.B /2017/PN Mjk (Mojokerto, East Java), and No. 123 PK / Pid.Sus / 2015 (Judicial Review), clearly the judge did not give pornography meaning to Law No. 44 of 2008 only on grammatical interpretation only. Judges do not dare to think and argue differently from what is contained in the law. This is the form of the positivism paradigm in the judiciary which is still held firmly by the judge. There needs to be a change of mind in their mindset so that the judge's decision - not only in a pornography case - is able to give meaning to every case he handles.

## 5 Conclusion

The judge is dominated by the mastery of the legal positivism paradigm as a result of Indonesian legal higher education in giving the consideration to pornographic cases in accordance with Law No. 44 year 2008. Pornography is not a simple matter because it generally involves many parties such as the distribution of pornographic vcd and judges are easier to use legal positivism paradigm more likely to reject the criticism paradigm on the critical approach of legal hermeneutics.

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PAGE 1

PAGE 2

PAGE 3

PAGE 4