



Measuring cyber pornography based on Indonesian living law: A study of current law finding method



Hwian Christianto

Faculty of Law University of Surabaya, Surabaya, Indonesia

ARTICLE INFO

Keywords:

Cyber pornography
Living law
Judge
Law-finding

ABSTRACT

Based on the research result of the judge's decision in Indonesia in the case of cyber-pornography during 2008–2016, this article discussed the importance of legal finding in cyber-pornography cases. According to the judge's report, cyber pornography cases were often examined by using grammatical, systematic, and historical interpretation as a result of formal formulation of pornography laws. This article discussed judge's "legal breakthrough" efforts in making legal finding from cyber-pornography criminal cases, first, through judge's understanding on the concept of pornography based on the living law, and second, the mechanism of legal finding performed by the judge. It is suggested that, the judge imposed a moral norm (living law) as a reference in assessing the unlawfulness of pornography actions. The discovery of the law in a criminal case is not impossible because the judge keeps a contextual interpretation of the norms of public morality based on the formulation of the Law.

1. Introduction

Based on the findings about the condition of cyber-porn law enforcement in Indonesia, Krismiyarsi considered that "Indonesian law enforcement institutions has not fully understand about what is cybercrime" (Krismiyarsi, 2015). As a result, law enforcers are bound by 'conventional efforts' to meet the formulation of laws rather than attempt to fulfill the justice in the society. Law enforcement is very rigid and formal, regardless of the values of law which exist in the society, especially for pornography. In terms of understanding 'pornography', the Indonesian Pornographic Act 2008 does not give a firm definition of 'pornography'. Article 1 paragraph (1) stated that 'Pornography' is "the publication of materials which are in violation of decency using various media". This definition does not give 'settled definition of pornography', so it creates "a free space for interpretation" of what is called 'pornography'. Akdeniz does not blame the condition since it was a logical impact of "cultural differences, moral, and legal variations" related to "pornographic content" (Akdeniz, 2001). Similar views related to the unsettled definition of Cyber pornography can be seen in a statement that defines it as "any depict images of a child or adult uses or uploaded in the internet" (Saulawa, 2015). It is no surprise that the condition has brought up opposing views that cyber pornography is just 'an important aspect of freedom of expression' (Frederick, 2011). Indefinite formulation regarding 'pornography'/'cyber pornography', furthermore the understanding of this crime's law enforcement that is not fully whole yet are often considered as the cause of 'legal uncertainty'. It would be improper, however, to jump into conclusion that law enforcers are trapped in 'vulnerable law' as a result of 'unsettled definition' and 'limited understanding' about cyber-pornography. The conclusion is not clear since what is meant by the law enforcer is only the police (Krismiyarsi, 2015) while the law enforcers are actually consist of the police, the prosecutor, and the judge. Moreover, the researches that have been done so far were more likely to discuss about normative juridical studies, whereas the empirical juridical study on the

E-mail address: hw_christianto@staff.ubaya.ac.id.

<https://doi.org/10.1016/j.ijlcrj.2019.100348>

Received 30 October 2017; Received in revised form 22 October 2019; Accepted 23 October 2019

Available online 11 November 2019

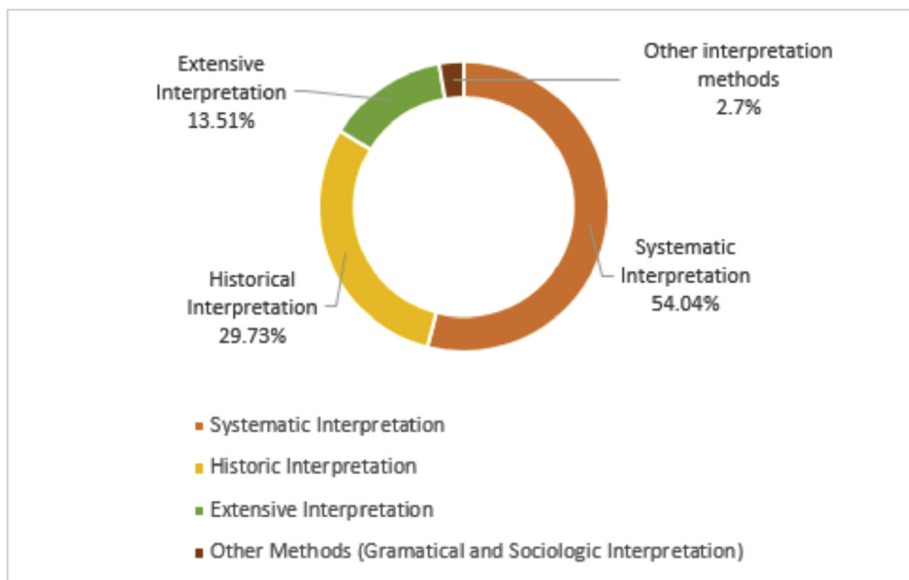
1756-0616/ © 2019 Elsevier Ltd. All rights reserved.

Table 1
 Unlawfulness principle in Statute Making Principle.
 Source: Researcher's Analysis

NO	PRINCIPLE TO BE RULED AND THE SCOPE	CORRELATION WITH MATERIAL UNLAWFULNESS PRINCIPLE
1	Nurturing Principle Rule of Law Content Material must function providing protection in order to create public calm	This principle provides implementation basis for effort to protect legal interest possessed by public including the recognition of non-written law.
2	Nationality Principle Rule of law content material must reflect character and nature of Indonesian nation that is pluralistic (diversity) by keep preserving One Indonesian Republic State	This principle provides basis for implementation of non-written law with the diversity by keeping unity principle.
3	Bhineka Tunggal Ika Principle Rule of Law Content Material must pay attention on diversity of inhabitants, religion, ethic and group, region particular condition and culture particularly related to sensitive issue in society, nation and state life.	This principle provides strong basis for implementation of material unlawfulness principle in non-written legal source bearing in mind the diversity of inhabitant, religion, ethnic, and group of Indonesian is important to be considered in formulating a crime provision.
4	Equal Position before Law and Governance principle Rule of law content material may not be filled with things that discriminate individual based on religion, ethnic, race, group, gender and social status background.	This principle provides basis for implementing material unlawfulness principle from equal opportunity side for implementing non written law and legal interest to be protected by rule of law.

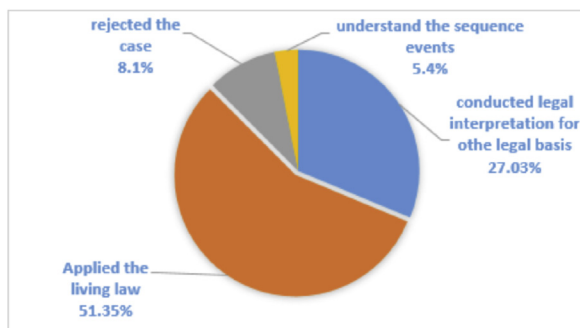
handling of cyber pornography by the judge has not been done. The judge as a law enforcer owns flexible space in comprehending applicable laws. The Judicial Power Act affirms the principle of 'judge's task to find the law' (Art. 10 (1)), so the approach of cyber pornography may not merely have a formal legalistic nature. Rahardjo stated that the disadvantage of formal legalistic approach has led to the increasingly unmet substantive justice that society expects. The paradigm of law also has shifted by saying that "man is made for the law" when it's actually should be "the law is made for man". (see Table 1, Figs. 1-4)

This article will discuss judges' perceptions in handling cyber pornography cases that are not trapped in 'unsettled definition' but on how they made legal findings through the cases. As Bello asserts that the essence of the law lies not in a set of rules of law but also "moral principles as an integral part of the law" (Bello, 2012). On the basis of this 'moral principles' that judges play a very important role in order to enforce cyber-pornography. While the cases in Indonesia are unique in its particular nature, the information from Indonesian judges proves that legal finding has been made in many areas. Notably, the judges' statements prove the high level of 'moral principles' in handling cyber-pornography and its quality as a form of judicial activity. By reading judges' statements about the importance of 'moral principles', firstly based on their own terms and second, comparatively in court decisions and the understanding of criminal law theories, this research seeks to show the judges' efforts in exploring 'moral principles' against opinions that assume law enforcement is incapable of understanding cyber pornography and the legal finding in the case of cyber pornography.



Source: interview results with the judges

Fig. 1. Judges' interpretation methods used on cyber-pornography cases.



Source: interview results with the judges

Fig. 2. Judges' Efforts When the Legal Provision Related with Cyber-pornography is Uncertain.

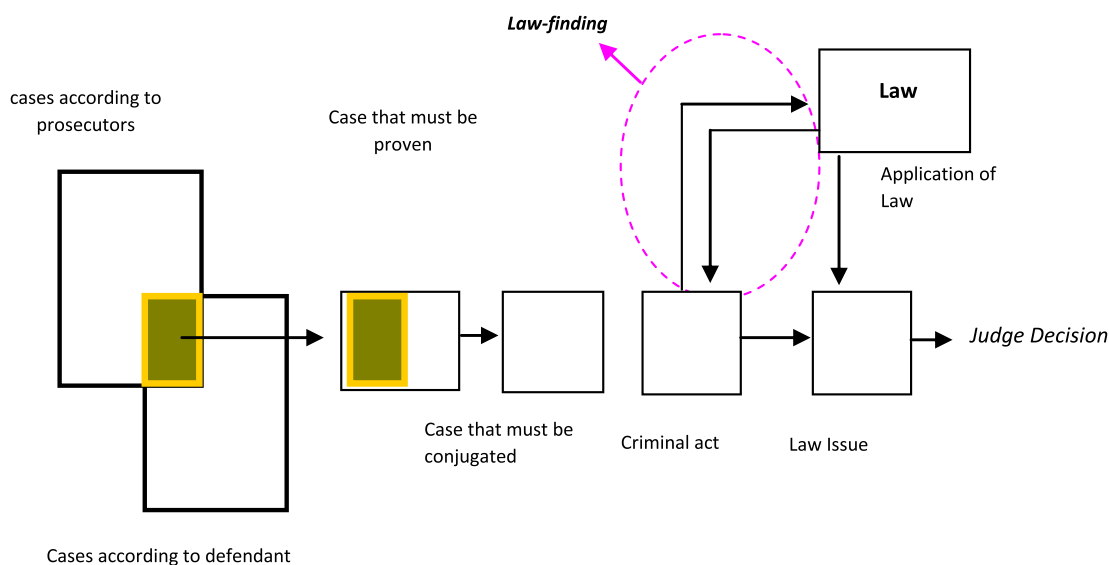


Fig. 3. Law-finding method by mertokusumo.

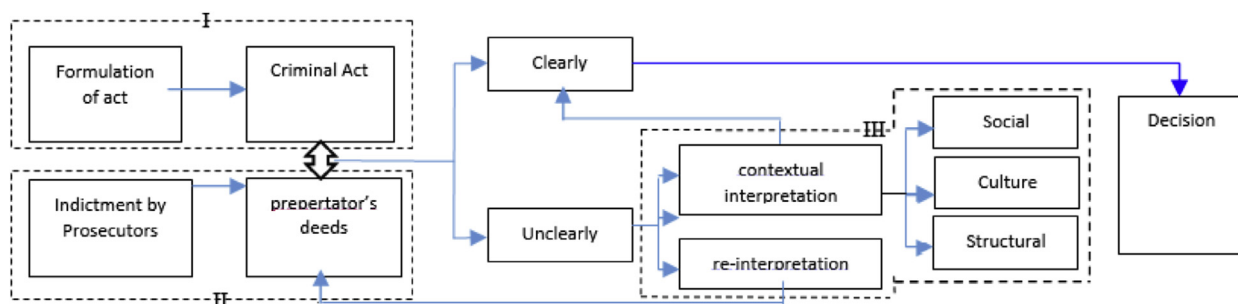


Fig. 4. Stages of finding of law as performed by a cyber-pornography.

2. Term definition

This research provides a study of the concept of Indonesian criminal law and its application, particularly the legal reasoning of judges from Indonesian district court. This research was based on the legal understanding of the legal system applied in Indonesia which is the civil law system. The law enforcement is understood mainly as the enforcement of legal provisions made by the legislature in the form of constitution. The understanding of the legislature consists of the president (can be represented by the ministry) along with the House of Representatives. The establishment of the law can also be proposed by either or both parties, but it is must be approved by both parties. The term “living law” or “unwritten law” is defined as the law which lives, effects and binds (Baude and Sachs, 2017) the Indonesian society based on the civilized humanity principles. The use of the term “law findings” is

understood as the process of law enforcement by involving the understanding of legal provisions and the law that lives in the society in balance. Based on the understanding of the law finding, the writer used the term “textual interpretation” for the activity of understanding the legal provisions and the term “contextual interpretation” as an effort to understand the living law, specifically morality norms. The term “morality norm” is meant to be the values of being noble, being civilized, and treating other people as human, based on the principles of Just and Civilized Humanity (Indonesian views on humanity). The understanding of contextual interpretation as the result of the research was based on three factors i.e., social, cultural, and structural. “Social factor” is defined as the society's views of good and bad in viewing humanity and life, “Cultural factor” is defined as the ordinance of life in the society, and “Structural factor” is the view of the society on the position and role of the community members.

3. Methodology

The judge's interpretation of the cyber pornography cases in Indonesia presented in this article are excerpts of interviews with the judges who has handled internet pornography cases in 6 (six) district courts in East Java, Indonesia. The selection of the 6 (six) districts is based on the socio cultural characteristic considerations in every area which represents the areas in Indonesia, *First*, Surabaya City, which has the urban society characteristics; *Second*, Malang City and District, which have the characteristic of urban and agrarian, *Third*, Mojokerto City and District, which have the characteristics of agrarian society, *Fourth*, Kediri City and District, which have the Javanese culture characteristics, *Fifth*, Banyuwangi City and District, which have Javanese and Madurese culture characteristics, and *Sixth*, Bangkalan City and District, which have the characteristics of Madurese society. The six research locations became the sample of areas in Indonesia based on the characteristics of the society from the urban, agrarian, single culture, and multicultural societies. The selection of East Java Province was also based on the recapitulation of cyber pornography case handling of 19,44%, this is according to the Supreme Court of Republic of Indonesia publication (www.mahkamahagung.go.id/direktoriputusan). During the research, structured data collection were carried through the documentation of recorded interviews conducted in private towards 27 respondents (19 male, 8 female) for about 1 h to one and a half hour. The Interviews focused on interviewees' personal understanding about pornography as a crime and decency norms, experience in judging cyber pornography case, legal interpretation method used, and the legal findings. The researcher also reviewed judge's interpretation through the 36 court decision documents on cyber-pornography happening in Indonesia.

Interviewees were selected based on the experience in judging cyber pornography cases in his/her career as a judge. Over the course of the interviews, judges were asked about their experiences with cyber pornography cases. Generally, this part of the interview was began by asking the judges to describe the action of spreading pornography through the internet which have been examined, the substance of ‘pornographic content’ such as nudity, fornication, rape, or other forms, the display used by the perpetrator, pornography publication media, and the legislation mostly used in examining cases. The interviewees were then asked to mention in detail the chronology of the case especially the indictment of the prosecutor and the defense from the attorney of the action examined. When interviewees reported the formulation of pornography criminal act, they were asked about the effort of understanding the living law in the society and to mention in detail how to include the living law as the consideration of their decision.

The main limitation of the present study was the understanding of judge on a case was basically done by a panel of judges that consist of 3 judges, one presiding judge and two judge members. The research could not obtain the understanding of the three judges completely since the related judge has been transferred to other court based on the judge rotation system applied by the Supreme Court of Republic of Indonesia. The comprehension of the panel of judges was also limited to the court decision document which could not be seen in complete. Acknowledging this limitation, I would refer to other authors' findings on discussion model for panel of judges to complete the judge's interpretation step in the cyber pornography case.

The next stage began by gathering judge's decisions as the primary data. The data collection was followed by interviewing and questionnaires filling by the respondents, ended by screening the respondents' answers. This editing stage was based on the conformity with the theory of nature against the material law, continued with calculating the frequency of answers to the same question. The result data of the interview were compared with the understanding of the criminal law formulation for the material obtained to draw a conclusion of the unlawful nature of material implementation.

4. Defining pornography in Indonesian context

What is pornography? Femisit theory said that “pornography is sexual exploitation of power relationships of dominance and subordination; its purpose to pleasure the powerful.”(Westmarland, N., Rackley F., McGlynn, 2007). There is a difference of understanding about pornography given by Indonesian Law. The new pornography law in Indonesia was entry into force since November 2008. The Pornography Act has given special arrangement (*lex specialist*) from the provision of the criminal law in Indonesian Criminal Code which has been applicable for more than 62 years (since the Independence Day). Pornography as known in Article 282 paragraph (1) of the Criminal Code is considered irrelevant to be applied in the present day (*vide* Pornography Act Preamble). Pornography has evolved along with the use of communication and information media, the internet. Notes on the process of forming the Pornography Act emphasize the three main considerations of legislators, first, the increasingly widespread and diverse acts of pornography; secondly, the threat to the morality of the Indonesian people; and third, the necessity of making pornographic prohibitions. The Draft of Law on Anti-Pornography and Porno-action was proposed by the House of Representatives through Commission VIII based on 3 main bases, which are Philosophical Basis that emphasized the State's responsibility to protect the nation from moral decline, Sociological Basis on aspects of scientific and technological development and social resilience of sexual harassment

also as well as Juridical Basis considering the existing legal provisions have not strictly given pornography limitation. The legislator also formed a special committee (“PanSus”) to in-depthly discuss the urgency of Draft of Law on Anti-Pornography and Porno-action by involving several related parties, religious groups, art groups, Government and Law Enforcers (Police, Prosecutors and Judges). As a result, the definition of ‘pornography’ is defined in Article 1 number 1 as

“Pornography is drawings, sketches, illustrations, photographs, writings, sounds, sounds, moving pictures, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication media and/or public display, containing obscenity or sexual exploitation violating moral norms in the society”

The legislator explained the so-called ‘pornography’ as a display or exposure displayed publicly using various information media with the obscenity or sexual exploitation content that violates the norm of decency. In summary, the definition of pornography is as a publication of obscene information or sexual exploitation that violates the norms of decency. Compared to the previous Law, it appears that the formulation of the Pornography Act provides a detailed definition that pornography should contain “sexual obscenity or exploitation” in addition to violating the norms of decency. The formulation is basically not much of a different from Article 282 paragraph (1) of the Criminal Code which still uses “teleological basis” (Nair and Griffin, 2013) by mentioning the norm of morality as a reference for the assessment of pornography. Various comprehensions and paradigms of moral norms raise a variety of subjective judgments that then considered fails to provide legal certainty. The formulation of ‘pornography’ was filed for a constitutional review by Indonesian Artist as a formulation that actually threatens the constitutional rights of society in terms of freedom of expression. The Indonesian Constitutional Court still considers that the formula remains constitutional based on society itself. Setting the definition of pornography is the ‘core’ of setting cyber-pornography in Indonesia. In addition to the Pornography Act, the prohibition of pornography is also provided through Article 27 paragraph (1) Electronic Information and Transaction Law (EIT). The formulation of Article 27 paragraph (1) is simpler because it emphasizes on the use of internet media to spread information violating decency.

Both pornographic arrangements prescribed by the Indonesian Legislators of the House of Representative (DPR), however, are not always applied easily by the judges. The interviewed judges reported that cases of cyber-pornography have been widely prosecuted under the EIT Act rather than the Pornography Act. One of the judges said the use of the EIT Law is more flexible in terms of facilitating the judges’ interpretation of morality prevailing in the community. A total of 41.67% of judges considered the use of the EIT Act makes it easier to examine cases of cyber pornography than the 33.33% Pornography Act. “Pornography is a violation of public morality”, another judge reported that “morality is the essence of pornographic infringement that exists in the human conscience”, and so it is important to be considered in the judge’s decision. The connection of the importance of this moral norm to the judge is closely related to the duties of the judge, as one of the judges declared that “the judge should not refuse the case brought to him because there is no law against it, so the judge must be able to understand the law that is actually applicable in the society contextually”. The role of the judge is in accordance with Article 5 paragraph (1) of the Judicial Power Act, therefore the judge shall not refuse a case for unclear legal reasons. Uniquely, even if the judge wishes to impose moral norms on the other hand, the judge does not want to escape the criminal law provisions as the basis of the indictment. One of the judges also reported that “the use of moral norms helps to clarify the defendant’s deeds so that they can be said to comply with the law.” Based on this consideration, the judge does not want to get away from the written law as the foundation, the Law that defined in the principle of legality.

Do you always enforce moral norms in examining cyber pornography? Certainly, case examination is done based on the understanding of moral norms. According to the law (the Judicial Power Act), the judge, in examining a case, must explore the values of the living law in the community. However, it was very rare because the judges considered the understanding of the moral value already contained in the formulation of the Act. Then, when did the judge conduct a direct understanding of moral norms? At the time if the defendant’s act was not stated explicitly in the formulation of the law. In the judgment verdict document, the assessment of acts as pornography is usually justified by the fulfilling the elements of the provision’s formulation of the Act. Whereas, based on the perception about the duties of judges, the understanding of the value of decency becomes an important part of the duties of judges in ‘reviving’ the rule of law in effect to be accepted by society.

1. Law in books and law in actions: interpretation methods

“What is written in the Act is a guide for judges to examine criminal cases”, a report from one of the judges. It is closely related to the principle of legality which requires the provision of criminal law to include the formulation of deed in detail (*lex scripta*), clear (*lex stricta*), firm (*lex certa*). A judge states that the “judge of a criminal case” is bound and limited to “its interpretive space based on the formulation of a criminal act is different from a civil case which provides a space of free and broad interpretation.” Judges make interpretation to the applicable law as well as concrete case to further conclude if there is similarity or *ejusdem generis* (general words are limited to the same class as specific words that precede them) (Corbin, 2007). The syllogistic way of thinking is still attached to the judge in handling criminal cases, judges first understands the formulation of criminal acts in the provisions of the law or ‘predictable methodology’ (Helmut Philipp Aust, Alejandro Rodiles, 2014) because an existing legal rule must give way “the instability-of-the-core thesis” (Solum, 2010). They further understand the sequence of events that occur and find the suitability between the formulation of legal provisions and concrete events, and finally conclude the presence of violation.

Judges’ interpretation syllogism model obtains its own challenge related to the formulation of criminal act of pornography. Formulation of criminal act of pornography is formal; an act must fulfill the sequence of actions listed by the legislator as regulated in Article 4 paragraph (1) of Pornography Law. As a result, judges tend to make interpretations derived from legal provisions. As proved and provided in researcher’s dissertation paper, methods of interpretation used to understand rule of law consist with 54.05% by

Systematic interpretation (understand the position of legal provisions enclosed in other legal provisions), 29.73% by Historical interpretation (understand the intent and purpose of making the Act), 13.51% Extensive interpretation (understand the purpose of legal provision based on the present condition), and 2.7% of other interpretations (Christianto, 2019). The data indicates that judges always rely on written legal provisions in understanding pornography.

The role of the living law in adjudicating cyber pornography cases is carried out when there are unclear legal provisions to be applied. "Understanding the legal value of living in society has been exists in the provisions of the law of pornography" a judge stated. This is in line with the judge's opinion related to "what to do in facing unclear legal provisions formulation?" 51.35% of judges declared the understanding of living legal value, 27.03% conducted legal interpretation, 3 judges find other law basis, 8.1% reject cases and 5.4% understand the sequence of events. Thus, judges have assumption that the provisions of the law of pornography are sufficient to be the basis of trying cases of pornography so Indonesian judges will often invoke "the plain meaning rule" (Mouritsen, 2017).

5. Pornography prohibition based on basic unlawfulness principle

Unlawfulness principle (*wederechtelijkheid*) is known in penal law as having close correlation with crimination of an act. The term "unlawfulness principle" (*wederechtelijkheid*) is very different from the term "against law." Hiariej explained that the use of term "against law" has 3 (three) meanings to consider including 1) against law element (elements in penal code provision formulation), 2) against law definition (the law violated including written law, other's right, without authority or power) and 3) unlawfulness principle (crimination of an act) (Eddy O.S. Hiariej, 2014). The criteria of criminated act becomes a serious matter in penal code since it's very related to legal certainty of what act could be considered as a crime. Thought of the importance of crimination measure in a crime act was once stated by Moeljatno that "a crime act absolutely must contain formal element that is matching the statute formulation (*tatbestandsmaszjkite*) and material element that is the contrary nature with vision of society or shortly, unlawfulness principle (*rechtwidrgkite*) ..." (Moeljatno, 1983). Moeljatno's consideration is very important since it contains important understanding about unlawfulness principle, among others that are *First*, the crime act has 2 (two) main elements including formal element in crimination since it matches with law formulation and material element in the crimination since it is against the vision of society. *Secondly*, crime act has complete crimination if it meets formal and material elements. Moeljatno's view in one hand differs both elements in the act to combine both elements to meet crimination on a crime act. Furthermore, thought development on the unlawfulness principles is also exist in Schaffmeister et al.'s (D. Schaffmeister, 2007) view which stated 4 (four) classifications of unlawfulness principle. First, general unlawfulness principle views that all crime acts has unlawfulness principle; Second, specific unlawfulness principle which values against law becomes written element in penal code provisions; Third, formal unlawfulness principle which values an act having the unlawfulness principle because it matches with penal code provision formulation; and Fourth, material unlawfulness Principle which values act of violating or harming legal interest which would be protected by legislators in specific offense formulation. Schaffmeister put more emphasis on unlawfulness principle of the matter to be used as crimination valuation standard. Form of particular unlawfulness principle is called against the law because this term is contained in penal code provision. Form of formal unlawfulness principles exists because the act matches with penal code provision whereas material unlawfulness principle exists because it violates the legal interest to be protected by legislators. If we take a closer look, in general unlawfulness principle can be differed into 2 (two) types including formal unlawfulness principle and material unlawfulness principle. Impetus of formal unlawfulness principle locates in the existing violation on the written legal provision. Conversely, emphasis on the material unlawfulness principle locates in the existing violation on the legal interest to be protected by legislators.

Form of material unlawfulness principle in the development experiences change from what once used to be crimination measure. Barda Nawawi Arief as quoted by Hiariej explained that there are 2 (two) material unlawfulness principle including material principle which is based on legal interest to be protected by legislators and material principle which is based on non-written law, the law which prevails in society, decency principles or justice value (Eddy O.S. Hiariej, 2014). The understanding of the material unlawfulness principle in the last form in turn opens opportunity for implementing law which prevails in a society. The material unlawfulness principle is not only functioning as crimination basis but more as basis of valuing any act as criminated one or vice a versa. The material unlawfulness principle is in positive function when it violates justice or social norms but doesn't violate statute whereas it is in negative function when the act is not in contrary with public justice but violating the statute (Eddy O.S. Hiariej, 2006).

Development of legal practice that implements material unlawfulness material were exist in some crime cases as follow. *Hoge Raad* Provision on January 31st, 1919 relating with *Lindenbaum v. Cohen* case where Cohen committed act that violated society decency hence it was called unlawfulness act and imposed lost on Lindenbaum side (Moeljatno, 2015). The interesting point from the judge's consideration that the unlawfulness principle was defined as society decency was not firmly formulated in the prevailing legal provision. It means that in addition to implement the material unlawfulness principle, the verdict also put emphasis on the use of material unlawfulness principle in positive function. The decency which in the beginning were not set in the legal provision could be used by judge to criminate any act despite the legal provision was not providing an arrangement at all. As we closely observe, the case was existed in civil code scope hence the implementation of unlawfulness principle is not bound on *lex scripta* from Legality Principle.

Provision of Hoge Raad in veterinarian case from Huizen City also deserves an attention bearing in mind that the judge has different understanding about function of material unlawfulness principle. The judge considered that the veterinarian act which placed healthy cow with the mouth and nail diseased cow was matching with veterinary science. Hoge Raad stated that the veterinarian had been in accordance with the veterinary science in effort to anticipate more pain on the cow side due to the mouth and nail disease and milk contamination (Moeljatno, 2015). The veterinarian act was initially proposed to the court since it was considered as

imposing harm to animal act. But the judge's consideration confirmed that the veterinarian act constituted part of act sequence which should be done in order to preserve the cow health by purpose of relieving its pain. The consideration showed that based on penal code provision, the veterinarian act was valued as against the law but in fact he/she didn't. The applicability of the legal provision was reduced by the decency value (veterinary science) stating that the veterinarian act is not aimed to put harm on animal at all. Based on this consideration, the material unlawfulness principle has negative function that is justifying the committed act despite previously it is prohibited by the prevailing legal provision.

Opinions of Indonesian scholars related to the material unlawfulness principle implementation are more accentuated in the negative function. Moeljatno put more emphasis on legality principle in imposition of penal code provision but recognizing the unlawfulness principle in negative function (Moeljatno, 2015). The important meaning of implementing material unlawfulness principle was supported by Sapardhaja by basing her argumentation on Indonesian legal style which still imposes custom law (Sapardhaja, 2002). Thus the unlawfulness principle in negative function can be accepted in penal code by reason that it's not violating legality principle and custom law existence which remains important to accommodate. The implementation of unlawfulness principle in negative function appeared in Case of Alleged Incentive Sugar DO Manipulation in Indonesian Republic Supreme Court Provision No. 42K/Kr/1965 dated January 8th, 1966. The defendant Machroes Effendi was alleged to commit manipulation which imposed harm to state by using surplus fund appropriated from incentive sugar sale to spend for developments in Singkawang area. Judges valued that the defendant act was benefiting society despite it violated the initial purpose of the funding. The judge's consideration indicated that implementation of material unlawfulness principle in negative function had been recognized and implemented in Indonesian penal code.

Based on the understanding of material unlawfulness principle, it is clear that the implementation of such material unlawfulness principle is more positioned as a reason to abolish the crime. Legality principle is seen as main and primary principle that should be obeyed in penal code becomes the main reason to implement the material unlawfulness principle in positive function. Whereas the implementation of material unlawfulness principle in negative function remains acceptable since it abolish formal unlawfulness principle which is in contrary to the prevailing law in a society. Supreme Court as quoted by Soedarto confirmed that unlawfulness principle act as contained in statute could be abolished in addition due to a provision in law rule also based on non-written justice and legal principle and was general in nature (Sudarto, 1986).

Implementation of material unlawfulness principle as crimination basis in legal provision formulation remains to be comprehended in penal code context. The existence of material unlawfulness principle in the legal provision has been implemented in those that bases crimination on any act based on prevailing norm in society as Article 282 of Indonesian Criminal Code (KUHP). The formulation of article 282 KUHP in short set prohibition of spreading pornography act. The measure used by this article is "violating ethics." The use of norm decency in society indicates that legislators recognize crimination of act based on material unlawfulness principle need to be confirmed in penal code provision. Model of crime act formulation based on material unlawfulness principle is different from crime act formulation model in both material and formal offenses. If the material offense formulation puts more emphasis on effect of the prohibition and formal offense formulation on prohibited act sequence/act elements, it doesn't occur to the crime act formulation based on material unlawfulness principle. Law provision arrangement is merely based on violation on living norm in society (pornography context is norm decency).

Rommelink explained that existence of law provisions which based on norm decency as sign of legislator inability to detail any act which violates ethic (Rommelink, 1994). Pornography act shows development from act type and the modus operandi of pornography act. The existence of internet media enables perpetrators not only to spread information with pornography content but also consciously creating pornography industry via specific website. The online prostitution sexual service offering is also incredibly rampant indicating the growing and developing pornography act. Modus operandi of pornography spreading is no longer limited to two dimensional media but now it uses tools of telecommunication, broadcasting and internet which is sophisticated, hence it spread widely and rapidly and so difficult to be eradicated in short time. Roeslan Saleh confirmed that the use of norm decency formulation becomes an important thing despite it seems to be "vague norm" since it provides flexibility of penal code implementation in pornography act which is always actual (Saleh, 1984). Judges in investigating and managing alleged pornography crime act also can try to figure out, dig up and implement norm decency as prevailed in society at that time. It brings positive effects for law supremacy which prioritizes society needs especially about justice.

Crime act formulation form that set pornography prohibition based on norm decency is contained in Article 282 KUHP, Article 1 Telecommunication Law and Broadcasting Law, and Article 27 verse (1) of EIT Law. Norm decency is used as basis for prohibiting information act which content violates norm decency as prevailed in public. It deserves to be understood more related to the scope of ethic which remain unclear, related with sexual matter or more than it. Ethic is defined as "ethic matter, good custom; decency; politeness; civilized" which if it relates to humanity would turn to be civilized humanity. Understanding of ethic in Indonesian society context always correlates with Just and Civilized Humanity pillar as the value source. Soekarno confirmed the humanity understanding as follow "Humanity is the human nature itself, de mensheid. Humanity nature is the soul having sense that among humans relationship exists, the soul that will heighten human soul than animal." (TIFA, 2008) Humanity is understood as not limited to the self-understanding or *dignitas hominis* (McCrudden, 2008) nor *Ius Commune* (Carozza, 2008) but to understand on human soul possessing high dignity and honor. Related to human relationship in searching of self genuine meaning, Notonagoro confirmed that: "The human essence is performing physical and psychological acts based on his/her will, based on reasons, in harmony with sense to fulfill the unity desire, bodily and psychologically, individually, socially with autonomous personality, as God's creature." (Notonagoro, 1983) There is no reason for Indonesian to legitimate his/her self-concept limited to the fulfillment of self-desire. Indonesian human relationship is a multidimensional relation including a complete relationship between themselves, themselves with fellow human beings, themselves with other living beings, and themselves with God, The Creator which called *monopluralis human* (Notonagoro,

1983).

Human as individual takes responsibility to advance human dignity since by this way he heightens his own humanity. Therefore every act which decreases human honor and dignity should be prohibited. Prohibition on pornography obtains its basis when norm decency is understood. Norm decency which is based on just and civilized humanity value provides guidance of what act should be done and should not be done by human. Kanter and Sianturi explained that “norm decency is provisions of behavior in relationship among humans which in many cases are based on “heart.” Definitely, norm decency is provisions about good and evil behaviors.” In agreement with this perception, Rahayuningsih found the shifting paradigm of ethic which is not only concerning with human sexual elements but religion, custom and politeness aspects (Rahayuningsih, 2014). Scope of norm decency is very wide but also deep since it derives from human heart. Thing needs to be explained in this case is related with the source of the norm decency in society. Indonesian society in reality is communalistic-religious whose shared life depends on religion, custom, and culture values as embodiment of their thought, attitude and behavior (Sudjito, 2016). The existence of these three things are known as *tripakara* (Notonagoro, 1983) becoming basis in understanding norm decency as prevails in society, particularly to comprehend pornography prohibition.

Prohibition on pornography based on material unlawfulness principle can be dated back since the law making process. Understanding on importance of material unlawfulness principle can be seen in 2 (two) things: First, implementation of material unlawfulness principle in Formulation of Chapter EIT Statute Plan Considerate and Second, implementation of material unlawfulness principle in formulation of pornography crime act. The first understanding is related to the importance of implementing material unlawfulness principle in arranging rule of law as confirmed in Article 6 of Act No. 10 of 2004 which was then changed by Article 6 of Act No. 12 of 2011 about Formulation of Law Rule. The legal provision a quo stated that the law rule arrangement in its content must fulfill 10 (ten) principles including nurturing, family value, Nusantara/archipelago unity value, *bhinneka tunggal ika* (diversity in unity), justice, equal position before law and government, order and legal certainty and/or balance, harmony and proportionality plus prevailing legal principle within related law. The goal of 10 principles reflect importance of material unlawfulness principle in formulation legal provision as follow:

The four principles become the anchor to set the rule of law in order to implement living law in society. The implementation of living law is directed toward placing law as a part of Indonesian society life, hence it can be accepted and implemented in effective manner. The establishment of EIT as viewed from EIT Law Framework Discussion Meeting Letter shows an impetus on importance of implementing living law in society. Consideration of the legislators on Preamble letter d of EIT Law framework through the Academic Script is based on “that activity of using information technology needs to be developed further without setting aside national unity and integrity and legal supremacy in just manner, hence violations related to the use of information technology can be prevented through uniformity of principle and law of rules implementation.” The outlook of academic script raises question related to the stressing point on national integrity or law violating act (House of Representative of Republic of Indonesia, 2011).

The question later was responded by Ministry of Communication and Informatics (*Kominfo*) as the proposer of EIT Law Framework Academic Script that the part puts emphasis on “the existing negative legal act” (House of Representative of Republic of Indonesia, 2011). The actual meaning of “the negative legal act” is understood as the act that violates law and one that abides the law (House of Representative of Republic of Indonesia, 2011). The consideration is taken by the formulator with the deliberation on importance of anticipation through law ruling on the acts which in the future might occur in use of information technology both in negative nature in sense of against the law and in positive nature which the act is abiding the law. The use of term “law violating act” if based on the definition of unlawfulness principle has the same meaning. The term “law violating act” both within civil code context as known with *onrechtmatige daad* and penal code as known with *wederrechtelijk* have the same understanding as an act that is not matching with the law provision or fulfilling the prohibited law provision (Sapardjaja, 2002).

The use of “violating law” term also opens opportunity for the implementation of non-written law in providing assessment on the prohibited act. Therefore, the consideration of the Preamble letter d formulation of EIT law framework through the Academic Script considers material unlawfulness principle both from legal interest as set and non-written legal source to be used as assessment standard. The implementation of material unlawfulness principle also appears in discussion which put emphasis on the importance of the protected interest, value, principle and the prevailing law rules. Protection on the interests that need to be protected in EIT Law's Academic Script discussion appears when the formulators discussed the Preamble letter b and letter c of EIT law framework. Preamble letter b formulation of EIT Law's Academic Script states “that information globalization has placed Indonesia as part of global information society hence requiring the arrangement of information management and electronic transaction in national level as response to development occurred in regional and national level.”

The formulation if analyzed according to material unlawfulness principle is not strictly regulates which acts being violated, The Preamble Formulation of letter b EIT legal framework through the Academic Script is very important in understanding the background of regulations regarding pornography crime act prohibitions which would be implemented in further EIT law framework. Legal interest that needs to be protected by legislators is on protection upon legal interest in information field due to the new legal act. Therefore Preamble letter b of EIT Law's Academic Script has emphasized on the importance of protection on legal interest from the regulation to be made. In agreement with the thought, Preamble letter c of EIT Law's Academic Script also provides impetus on the importance of protection on information technology development which affects human life change. “That the rapid development of information technology has caused human life change in many aspects which is directly influencing the rising new legal act forms”.

Preamble Formulation of letter c of EIT Law Framework Academic Script stresses the importance of protection on legal interest in information field. The dynamic human life due to information technology development provides great effect on the rising new legal acts, hence a regulation for them is required. The important signification which bases the regulation of EIT Law's Academic Script is vary, not only concerning with value existing in society but also the change of value as recognized in cyberspace. Consideration of the

value importance is stated in discussion of Case Inventory List (DIM) No 8 (House of Representative of Republic of Indonesia, 2011) which discusses following formulation "Government needs to support information technology development through legal infrastructure and its regulation hence the information technology use can be done safely to prevent the misuse by paying attention on religion and culture and social values of Indonesian people." The formulation confirms that law regulation on information technology use including the misuse of it should not be separated from Indonesian people life context. The three basic values including religion, social and culture should be regarded as the guidance in assessing law regulation of information technology use including the effort to formulate what crime act to be implemented.

2. 'judge's task to find the law' concept

According to Posner, there are "three points of an equilateral triangle": formalism, politics and pragmatism (Posner, 2006). The judge will consider these three principles by understanding the text of the law (formalism), the public interest that needs to be protected (politics) and giving answers to the case submitted. In the Indonesian Law, Posner's Theory is understood as one of judge's activity which is the law finding. The study on law findings in general as conducted by Rifai has two concepts of law finding: Heteronomous law findings and Autonomous law findings (Rifai, 2010). The first concept places the judge in a passive function, he only acts as the implementer of the Law (*la bouche de la loi*). In contrast, the second concept gives judges the freedom to understand and explore the value of the living laws of society. The judges' duty of discovering the law is explicitly stated in Article 5 paragraph (1) of the Judicial Power Law "judges and constitution judges must explore, follow and understand the legal values and sense of justice living in the community". Based on these legal provisions, the Judge prioritizes the legal values and sense of justice that lives in the community in carrying out their duties, including the criminal case of cyber-pornography. The purpose of these legal provisions is not to violate the principle of legality, on the contrary, it is to fulfill the principle of legality. The provision of written criminal law is basically a legal product of the agreement of legislators taken from the legal values living in the community. Changes in the value of legal living within the development of society is the consideration of the legislators that the applicable law is 'not in accordance with the development'. "What does living law (moral norm of decency) means?" A judge explained that "the moral norm is a social code derived from the conscience that results in behavior or morals" so that the living law is not made in a short time but is consciously applied by community members. Uniquely, the judge stated that the moral norm is important to understand when dealing with cyber-pornography cases. Then how do judges make legal findings? The judge responded "the legal finding in a criminal case is committed when the legal provisions are not clearly applicable to the case being handled".

First, the judge will make a legal interpretation of the text of the Act; *Secondly*, he will examine the actions of the defendant filed by the prosecutor, *Third*, he draws a conclusion. When there is a lack of clarity on the text of the Act against the alleged action, the judge makes an effort of legal finding. Stages of legal finding will be explained gradually. Initially, the judge will focus on interpreting the criminal law provisions filed by the general prosecutor. In the case of cyber-pornography, there are two relevant legal provisions, Article 27 paragraph (1) in conjunction with Article 45 of the Information and Electronic Transaction Law or Article 4 paragraph (1) in conjunction with Article 29 of the Pornography Law. The judge interprets the intent of each term from the formulation of a criminal offense of both provisions of the law. However, these two legal provisions have differences in terms of formulating prohibited acts. The Pornography Law defines pornography in detail from the form and type of action, explicit pornographic acts containing genitals, nudity/impression of nudity, masturbation, sexual intercourse including deviant sexual intercourse, and child pornography. The formulation of such acts of pornography limits the understanding of pornography to only 6 forms whereas there are still various forms of pornography. In contrast with Article 27 paragraph (1) of the Information and Electronic Transaction Law which formulates pornography as part of the act which is prohibited for violating decency. The use of 'violating decency' requires further understanding of what is meant by decency and the understanding of an act as an offense or not.

Figuring out the action committed by the defendant is performed by the judge when he is questioning the case submitted to him. Based on the indictment filed by the Prosecutor, the Judge reviews every evidence presented in the trial. The Judge sees and considers the evidence staged in the trial as the basis for himself to assess an act is committed by the defendant or not. As a result, if he sees no sufficient evidence and the judge's conviction indicates the non-fulfillment of the indictment the judge will decide the defendant to be free from lawsuits ("*vrijspraak van ale rechtvervolging*"). On the other hand, if the judge obtains a suitability of the evidence and the judge's conviction leads to the involvement of the defendant as the perpetrator, then he will refer to the understanding of the law. The judge's understanding of the law at the first stage is combined with a comprehension of the proven actions in the trial. The judge will consider a simple syllogism of the suitability of the defendant's conduct with the text of the Act. When the Judge considers that the formulation of the related provision needs to be clarified by interpretation, the judge will make various efforts.

The results showed that 51.35% of judges stated that they comprehended the value of living law, 27.03% had legal interpretation, 3 sought other legal basis, 8.1% rejected the case, and 5.4% comprehended the series of events, as proved and provided in researcher's dissertation paper (Christianto, 2019). From the various efforts of judges, an effort of understanding of the value of living law and the interpretation of the law leads to the effort of legal finding. When the judge comprehends of the value of the living law, he is convinced that there is a law which is already in effect and has a correlation with the actions committed by the defendant. The search for a living law is so interesting because judges conduct a contextual legal understanding of the society. An interesting example regarding this case is the judges' consideration in the Tuban District Court Decision No. 67/Pid.Sus/2014/PN.TBN declares the defendant's act of taking photos of herself naked, (i.e both breasts are visible) then she sent it via *Multimedia Messaging Service* ("MMS") to others. The defendant's act of documenting and spreading her photos was declared as an action of cyber-pornography. "It is a disgraceful act of destroying the order and moral values of the people of Tuban, especially the religious community of Tuban

Regency” (Tuban, 2014). It can be seen in the consideration of the Judge's decision, the social, cultural and structural factors of the Tuban community are the source of a living legal understanding in assessing the actions of cyber-pornography.

6. Law finding models: social value, culture value, and structural factor

The legal provisions of Article 5 paragraph (1) of the Judicial Power Act state that judges must explore the legal values applied in the society in judging criminal cases. The provisions become the legality for judges to make law findings. The law finding concept experiences a development along with the task division and role of the judges. Initially, law finding was viewed as an effort in applying the law to the actions charged by the general prosecutors (Mertokusumo, 1997). In practice, the application of the law is understood strictly on the application of the legal provisions written in the law. A judge is considered applying the law when he successfully interprets the formulation of the laws to be applied to the crime charged by the general prosecutor. This applied law is considered as a law finding.

Chart 1 shows that judges seem to prioritize the understanding of the law textually. The method of interpretation used was certainly oriented on the understanding of the laws such as grammatical, systematical, and historical interpretation (Grammatical interpretation focuses on the understanding of the formulation of laws based on the series of words. Systematical interpretation focuses on the understanding of the law from restriction of the activities in the types of the crime. Meanwhile, Historical interpretation focuses on the situational understanding and condition and the purpose of the formation of the law). The interpretation of the law by the judge would result in a whole comprehension of the legal event being studied. The Judge moved on to the examination of cases by checking the evidence presented in the court in order to explain about what actually happened. When the evidence managed to explained what had happened, the judge would call it as a concrete event. After the judge got the legal event, he would then compare it with a concrete event. When a legal event matched the concrete event, the judge successfully made law findings and vice versa.

The application of law in the first concept seemed to focus on the understanding of law, but it ignored the law that applies in the society, as a country that adheres to civil law, it's acceptable. However, Article 5 paragraph (1) of Judicial Power Act states clearly the tasks and obligations of judges are not limited only to applying the legal provision, but also applying the law that lives and grows in the society. Therefore, the apprehension of the concept was not accurate. The importance of applying the law that applies in the society in the case of cyber-pornography is affirmed in the Article 27 paragraph (1) ITE Law and Article 1 number 1 Pornography Law. Restriction of the acts of spreading obscenity content is not based on the Law, but it is based on morality norms. The judge is then challenged to perform understanding, digging, and applying the law that applies in the society, the morality law, besides of the written law. Research respondents considered the understanding of morality norms is important since pornography is closely related to the morality norms.

There were 51.35% respondents stated that the understanding of the law that applies in the society was the key to success in judging cyber-pornography cases. Moreover, one of the respondents mentioned that morality norms was “the humanity value that has to be respected by Indonesian people.” The concept of law finding then changed. Judges should not only understand the written legal provisions (textual interpretation) but also the value of law that applies in the society which is related to the actions being charged by the general prosecutor. Chart 2 shows the stage of new law finding concept conducted by the judge in the cyber-pornography case. The new law finding concept consists of three stages: first, textual interpretation by understanding the purpose of the legal text, second, understanding the event proposed by the general prosecutors based on the evidence submitted in court, and finally, contextual interpretation was conducted when the understanding of the scope of the action committed by the defendant was unclear. The judge would make another understanding on the concept of the intention and the purpose of the legal provision being charged, defendant actions which were proven in court, and comprehension of morality norms applied in the society related to the defendant actions.

The interesting part of the study findings show that the understanding of the new law finding concept is that respondents use morality norms to carry out 4 main activities, including 42% about the fulfillment of the law, 25% about the living laws, 23% about how bad the defendant's actions are, and 10% about how much the victim suffered. The importance of morality norms in adjudicating cyber-pornography cases is also stated by respondents by digging on the main aspects that affect the morality norms. Respondents stated that the efforts to understand the morality norms on cyber-pornography cases were based on three main factors, first, social factors (66%) consisting of religious views (40%), community development (13%), habits (11%) and other factors (2%), second, cultural factors in the way of life of the community (19%), and third, structural factors, namely the community's perspective on the position and role of community members (15%). The application of the three contextual interpretation factors is seen in the consideration of the judge's decision in 6 research areas. Judges in the Surabaya District Court understand the norms of decency based on social factors that are influenced by religious values rather than other factors, while the cultural and structural factors of society are still considered. A judge of Surabaya District Court stated that “the understanding of morality norms must be adjusted to the conditions of the community where the crime was committed.” One of the Surabaya District Court Decrees PT-No.277/PID/2013/PT.SBY on May 30th, 2013 showed the consideration of the judge who denounced the act of recording a sexual intercourse with a child through a mobile phone as an act of violating morality norms by sentencing imprisonment to 3 years, 6 months plus a fine of 60 million rupiah. The consideration of the judge of the Surabaya District Court reinforced the role of religion as a measure of the morality norms from the actions of the defendant in using children as objects of pornography. There's also another consideration of the judge of the Malang District Court which represents urban and agrarian characteristics, it was seen in the judge's consideration of the case of sexual abuse of women by the defendant. The defendant sent a text through social media in the form of pictures of male genitals at the request of sexual relations. The text that said “If you are lonely, my dick is also lonely?” was considered by the judge as

an act of violating the morality norms by stating “violations of morality norms as a norm born of conscience, emerged since people were born. This norm is found in the soul of every human being without knowing the boundaries of territory, nation and society.”.

An understanding of the morality norms was also seen in the consideration of the judges of the Mojokerto District Court with the characteristics of an agrarian society. The defendant, Dwi Seta, took nude pictures of his lover on mutual agreement as Sirri marriage partners. Sirri Marriage is a recognized form of religious marriage in Islam. Dwi Seta took a photo of his partner in 26 poses including sleeping on her back, sloping, sitting, squatting and standing without any cloth covering her body. Other poses showed she was naked in a red transparent shawl, wearing a blue bra without any underwear and half-naked photos. The photo files were transferred into a CD and transferred to Tdw's laptop. Tdw allowed his friends to see the file. The file was circulated and spreaded widely through the internet. The Mojokerto District Court considered the defendant's actions as a violator of morality norms by making it easier for others to see pornography even though the victim agreed to take the photos. The judge considered the morality from the social factors of the people of Mojokerto who were anxious due to the spread of immoral photos on the internet.

The application of the morality norms in the three main factors was clearly seen in Siswandi's case. The defendant stored pornographic data in the computer server of his internet rental service provider and offered the data to the customers. Kediri District Court Judge No. 137/PID.SUS/2015/PN.KDR June 29, 2015 considered the defendant's actions as pornographic because he spread data that violated morality norms and were prohibited by religious values. The consideration of the community with cultural characteristics could be seen in the Banyuwangi District Court Decision on Noviandi's case who took nude photos of a couple, Zainas and Rinayah, from Zainas's cellphone without consent and uploaded the photo via kaskus.com, a social media website. The judge's consideration in Decision 827/Pid.B/2006/PN.Bwi Nov. 30, 2007 stated that the morality norm was violated by the defendant in knowing that the distribution of the photo was against the norms of any religion. An understanding of the importance of morality norms as a basis for judging the public with cultural characteristics was increasingly apparent in the consideration of the judge's decision on the Saifuloh case in recording scenes of rape with child victims through mobile phones and shared them through the internet. Judge in consideration of PN-No Decision. 220/Pid.B/2012/PN Bkl. March 27, 2013 stated that the defendant violated the morality norms from a series of acts that abused a child to commit immoral acts.

Based on this understanding, the judge seemed to maintain a balance between textual interpretation and contextual interpretation. The judge still understood the purpose and area of implementing the prohibition on legal provisions, but also understood the morality norms as a living law in evaluating the actions of the defendant. The concept of law finding became a balanced mix between understanding the provisions of written law on one hand (textual interpretation) and understanding the norms of decency on the other (contextual interpretation). This makes it easier for the judge to provide a clear understanding of the prohibition of pornography not only in terms of the needs of law but the needs of the community for justice.

The legal finding stage is shown in the Area III. When the understanding of the element of criminal acts and the perpetrator's action is not found due to uncertainty, the judge performed contextual interpretation or reinterpretation of the criminal act in the text and the actions of the perpetrator. Contextual interpretation as reported by judges is based on 3 values, social values, cultural values and structural values. Social value is the basic value of the common life that is believed and obeyed by members of society based on religious norms. The study of social values is affirmed by Notonagoro that ‘Indonesian people are mono-pluralistic creatures’ (Notonagoro, 1983) because they have a complete relationship between themselves, themselves with fellow human beings, themselves with other living beings, and themselves with God. The evidence of the application of social value derived from the value of God is seen in the Decision of the District Court of Tuban no. 67/Pid.Sus/2014/PN.TBN which highlighted the understanding of the religious value of Tuban people in assessing the actions of cyber-pornography. The value of culture is the value of the living order of the Indonesian nation in living a life together. The differences are the social value is derived from the value of divinity, while cultural values are derived from the value of humanity that has civilization. Soekarno stated that Indonesian culture can be seen from the value of humanity that is ‘humanizing human’ as a part of oneself. The judge may be determined to have applied the Indonesian cultural values when he/she provides an understanding that the act of spreading pornography is an act of degrading human dignity as a sexual object. The structural factors of Indonesian society are also taken into consideration in view of the assessment of a forbidden act and gaining enforcement in close relation to the power structure in society. When the judge has gained a contextual understanding, he will conclude the defendant's act as a violation or not. At this stage, the judge gets the basis of appropriate judgment and in accordance with the circumstances and conditions of society so that he can be considered as making legal finding.

7. Discussion

This research showed that the application of living law (morality norms) emphasized more in contextual interpretation by giving more focus in religious values as part of social factors. Enforcement of religious values in understanding the social factors of Indonesian society is strongly influenced by *Pancasila*, the nation's ideology, which based on the belief in One Supreme God as a source of understanding human values. Things that should be discussed in further research are related to the influence of the three factors in the judge's judgment to decide on cyber-pornography cases. As it is known that the condition of the internet user community is very diverse in social, cultural and structural factors that apply. Judges in carrying out contextual interpretations are still limited to the social understanding of the real community yet involve the understanding of the situation and conditions of internet users.

8. Conclusion

The existence of a judge's duty to explore and apply the living law in judging cases submitted to him is highly dependent on the

legal provisions proposed by the general prosecutor. The use of legal provisions as the basis of the charges for cyber-pornography acts affect the application of law by judges. Legal provisions that do not include the phrase “violating morality” are applied by judges according to the formulation of legal provisions only. The judge ignores the law that lives in the society against the actions committed by the defendant as pornography or not. Unlike the case when judges examine cyber-pornography cases based on legal provisions that include the “violating morality” phrase. Judges actually make law findings in three stages, which begin with the stage of textual interpretation by understanding the intent of the text of the law. Secondly, judges understand the events submitted by the general prosecutor based on the evidence presented in court. Finally, contextual interpretation is carried out when the understanding of the actions done by the defendant is not clearly included in the scope of the application of legal provisions. Furthermore, contextual interpretation has been carried out by judges when judging cyber-pornography cases by involving social, cultural and structural factors of society. As a result, judges have made law findings in a new concept, namely a balanced understanding between textual interpretation and contextual interpretation.

Appendix A. Supplementary data

Supplementary data related to this article can be found at <https://doi.org/10.1016/j.ijlcrj.2019.100348>.

References

- Akdeniz, Y., 2001. Governing Pornography & Child Pornography on the Internet : the UK Approach Governing Pornography & Child Pornography on the Internet . Retrieved from. http://www.cyber-rights.org/documents/us_article.pdf.
- Baude, W., Sachs, S.E., 2017. The law of interpretation. *Harvard Law Rev.* 130 (4), 1079–1147. Retrieved from. http://harvardlawreview.org/wp-content/uploads/2017/02/1079-1147_Online.pdf.
- Bello, P.C.K., 2012. The Controversy About The Essence of Law: A Dispute Between Hart and Dworkin. *Indonesia Law Review* 1, 45–58. <https://doi.org/10.15742/ilrev.v2n1.11>.
- Carozza, P.G., 2008. Rights : a reply. *Eur. J. Int. Law* 19 (5), 931–944. <https://doi.org/10.1093/ejil/chn059>.
- Christianto, H., 2019. Perumusan Perbuatan Pidana Pornografi Melalui Internet Berdasarkan Sifat Melawan Hukum Materiil. Dissertation. Doctoral Programme in Law. Gadjah Mada University, Yogyakarta.
- Corbin, L., 2007. The role of statutory interpretation in law-making through the courts. *Legaldate* 19 (2), 1–9. Retrieved from. https://research-repository.griffith.edu.au/bitstream/handle/10072/18919/44654_1.pdf%3Bsequence=1.
- Frederick, D., 2011. Pornography and freedom. *Kritike* 5 (10), 84–95. Retrieved from. http://www.kritike.org/journal/issue_10/frederick_december2011.pdf.
- Helmut Philipp, Aust, Alejandro Rodiles, P.S., 2014. Unity or Uniformity ? Domestic courts and treaty interpretation unity or Uniformity ? *Leiden J. Int. Law* 75–112. <https://doi.org/10.1017/S0922156513000654>.
- Hiariej, Eddy O.S., 2006. Telaah kritis putusan mahkamah konstitusi dan dampaknya terhadap pemberantasan korupsi. *Mimbar Hukum* 18 (3), 293–304.
- Hiariej, Eddy O.S., 2014. Prinsip-Prinsip Hukum Pidana, second ed. Cahaya Pustaka Atma, Yogyakarta.
- House of Representative of Republic of Indonesia, 2011. Proses Pembahasan Rancangan Undang- Undang Tentang Informasi Dan Transaksi Elektronik, Buku 1. RUU tentang Informasi dan Transaksi Elektronik, Jakarta.
- Krismiarsi, 2015. Criminal law enforcement of cyberporn/cybersex in order to fighting crime in Indonesia. *Int. J. Bus., Econ. Law* 8 (4), 96–103. Retrieved from. <http://ijbel.com/previous-issues/december-2015/vol-8-december-2015-issue-4-law/>.
- McCrudden, C., 2008. Human dignity and judicial interpretation of human rights. *Eur. J. Int. Law* 19 (4), 655–724. <https://doi.org/10.1093/ejil/chn043>.
- Mertokusumo, S., 1997. Penemuan Hukum: Sebuah Pengantar, 5th. Liberty, Yogyakarta.
- Moeljatno, 1983. Perbuatan Pidana Dan Pertanggungjawaban Pidana. Bina Aksara, Yogyakarta.
- Moeljatno, 2015. Asas-Asas Hukum Pidana. Rineka Cipta, Jakarta.
- Mouritsen, S.C., 2017. Corpus linguistics in legal interpretation: an evolving interpretative framework. *Int. J. Lang. Law* 6, 67–89. <https://doi.org/10.14762/jll.2017.067>.
- Nair, N., Griffin, J., 2013. The regulation of online extreme pornography: purposive teleology (in)action. *Int. J. Law Info Technol.* 21 (4), 329–353. <https://doi.org/10.1093/ijlit/eat007>.
- Notonagoro, 1983. *Pancasila Secara Ilmiah Populer* (Fifth). Bina Aksara, Jakarta.
- Posner, R.A., 2006. The Role of the Judge in the Twenty-First Century, vol. 76. *Boston University Law Review*, pp. 1049–1068. 1929. <http://www.californiasupremecourtreview.com/wp-content/uploads/sites/718/2016/05/posnerv.2.pdf> Retrieved from.
- Rahayuningsih, T., 2014. Kejahatan Kesusaan dan Upaya Penanganannya: Studi pada Tingkat Penyidikan, Penuntutan dan Pemeriksaan di Pengadilan Negeri Surabaya. (Surabaya).
- Remmelink, J., 1994. *Inleiding tot de studie van het Nederlandsche Strafrecht*. Arnhem: Gouda Quint bv.
- Rifai, A., 2010. Penemuan Hukum Oleh Hakim dalam Perspektif Hukum Progresif, 1st. Sinar Grafika, Jakarta.
- Saleh, R., 1984. Segi Lain Hukum Pidana. (Jakarta).
- Sapardjaja, K.E., 2002. Ajaran Sifat Melawan Hukum Materiil Dalam Hukum Pidana Indonesia : Studi Kasus Tentang Penerapan Dan Perkembangannya Dalam Yurisprudensi. (Bandung: Alumni).
- Saulawa, M.A., 2015. Cyber pornography: AN analysis OF the legal framework faculty of law, umaru musa yar’adua university, P.m.B. 2218. Katsina state, Nigeria. In: *Global Journal of Politics and Law Research Faculty of Law*, vol. 3. Umaru Musa Yar’adua University, P.M.B. 2218, Katsina State, Nigeria, pp. 45–56. 2. <http://www.eajournals.org/wp-content/uploads/Cyber-Pornography-An-Analysis-of-the-Legal-Framework.pdf> Retrieved from.
- Schaffmeister, D., a, E., 2007. In: Sahetapy, A.P.J.E. (Ed.), *Hukum Pidana*, second ed. Citra Aditya Bhakti, Bandung.
- Solum, L.B., 2010. The unity of interpretation. *Boston Univ. Law Rev.* 90 (551), 551–578. Retrieved from. <http://www.bu.edu/law/journals-archive/bulr/documents/solum.pdf>.
- Sudarto, 1986. *Hukum Dan Hukum Pidana*, fourth ed. Alumni, Bandung.
- Sudjito, 2016. Ideologi Pancasila Sebagai Dasar Membangun Sistem Hukum Nasional. (Yogyakarta).
- TIFA, P.U.Y., 2008. Pancasila sebagai dasar negara: kursus presiden soekarno tentang Pancasila. In: Jakarta: Aditya Media & Pusat Studi Pancasila (PSP) UGM Dan Yayasan TIFA, first ed. .
- Tuban, P.P.N., 2014. Putusan Pengadilan Negeri Tuban Nomor 67/Pid.Sus/2014/PN.TBN Tentang Penyebaran Foto Telanjang Melalui Multimedia Messaging Service (MMS), 3 Maret 2014. Tuban.
- Westmarland, N., Rackley, F., McGlynn, C., 2007. In: In: Clare McGlynn, N.W., Rackley, Erika (Eds.), *Positions on the Politics of Porn: Debate on Government Plans to Criminalise the Possession of Extreme Pornography*, vol. 44 Durham University.