

Sentencing Disparity in Judicial Decisions on the Criminal Act of Disseminating Pornographic Content

Nur Septiana Amanda¹, Yuliana Yuli Wahyuningsih²

*Faculty of Law, Universitas Pembangunan Nasional "Veteran" Jakarta^{1,2}
Jl. Pd. Labu Raya, Pd. Labu, Kec. Cilandak, Kota Jakarta Selatan, 12450
Correspondent Email: nurseptianaamanda@gmail.com*

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Abstract: *This study examines the sentencing disparity in judicial decisions concerning the dissemination of pornographic content, which demonstrates inconsistency in the application of the law. The Decision of the Palu District Court No. 352/Pid.Sus/2024/PN Pal imposed a heavier sentence for an act involving a limited scale of dissemination, whereas the Decision of the Pekanbaru District Court No. 579/Pid.Sus/2025/PN Pbr imposed a lighter sentence despite the case involving a more serious scale. This normative legal research employs statutory, case, and conceptual approaches. The findings indicate that the disparity is influenced by juridical factors, including the legal system, the formulation of legislation, evidentiary processes in court, and the absence of sentencing guidelines, as well as non-juridical factors in the form of judges' characteristics, differences in assessing aggravating and mitigating factors, the offender's motive, and the impact on the victim. The presence of disparity cannot be eliminated outright but can be minimised through the implementation of the sentencing guidelines under Article 54 Paragraph (1) of the New Criminal Code (KUHP), the issuance of a special Supreme Court Regulation (PERMA) on cybercrime with measurable parameters, the strengthening of PERMA Number 3 of 2017 regarding gender perspective and restorative justice, and the enhancement of law enforcement officers' capacity to understand the characteristics of digital crime.*

Keywords: *Disparity; Judge's Decision; Pornography*

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INTRODUCTION

The development of information technology has transformed conventional forms of crime into increasingly complex and widespread cybercrimes. One type of cybercrime that has shown a significant increase is the dissemination of pornographic content across various digital platforms. The

2024 Annual Record of the National Commission on Violence against Women reports a drastic rise in cases of Online Gender-Based Violence, with 1,791 cases recorded, an increase of 40.8% compared with 2023. Of this number, 2,765 forms of violence were identified, with the majority involving sexual elements, amounting to 2,668 cases.

The most frequently reported form of violence is Malicious Distribution or the non-consensual dissemination of intimate content, such as Revenge Porn, with 407 cases. Malicious distribution refers to acts of distributing a person's intimate photos, videos, or information without their consent, with malicious intent to humiliate, intimidate, retaliate, extort, pressure, or damage the victim's reputation. Based on the relationship between perpetrators and victims, the largest number of perpetrators were former partners, accounting for 554 cases in the personal sphere, followed by social media acquaintances with 515 cases in the public sphere¹.

The dissemination of pornographic content has multidimensional impacts. For victims, psychological trauma becomes a severe burden that may trigger depression, excessive anxiety, and Post-Traumatic Stress Disorder. In addition, victims often experience serious social harm, such as loss of reputation, persistent online harassment, and difficulties in rebuilding healthy interpersonal relationships. At the societal level, the circulation of pornographic content in digital spaces also contributes to the normalisation of views that degrade women's dignity and erode public moral values². This condition underscores the importance of consistent and just law enforcement within Indonesia's criminal justice system.

However, in judicial practice,

disparities in judges' decisions are still found. Sentencing disparity is defined as the imposition of unequal or significantly different sentences for same offence or for offences of comparable seriousness without a clear basis for justification³. Spohn categorises sentencing disparity into three forms. First, inter-jurisdictional disparity, namely differences in sentencing for cases with similar characteristics occurring across different court jurisdictions. Second, intra-jurisdictional disparity, referring to differences in sentencing for similar cases that occur within the same court jurisdiction. Third, intra-judge disparity, meaning differences in sentencing imposed by a single judge on cases with similar characteristics, indicating inconsistency in judicial decision-making⁴.

Sentencing disparity may occur because judges possess judicial discretion in determining criminal sanctions for defendants. Such discretion does not mean that judges may impose sentences arbitrarily without regard to the applicable legal provisions; rather, they must remain guided by the existing regulations. The problem lies in the fact that Indonesia's criminal legislation does not yet fully provide clear and detailed guidelines for judges in determining the severity of sentences. This condition creates space for differences in judgments within judicial practice.

This phenomenon is clearly reflected in

¹ Komnas Perempuan, "Catatan Tahunan (CATAHU) 2024: Menata Data, Menajamkan Arah, Refleksi Pendokumentasian Dan Tren Kasus Kekerasan Terhadap Perempuan," 2024, <https://komnasperempuan.go.id/catatan-tahunan-detail/catahu-2024-menata-data-menajamkan-arrah-refleksi-pendokumentasian-dan-tren-kasus-kekerasan-terhadap-perempuan>.

² Rahayu, A., & Sulistyanta, "Perlindungan Hukum Bagi Korban Tindak Pidana Malicious Distribution (Ancaman Penyebaran) Konten Pornografi Di

Indonesia," *Recidive: Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 11, no. 1 (2022), <https://doi.org/https://doi.org/10.20961/recidive.v11i1.67437>.

³ R. D Sukma, R. C., & Agustanti, "Disparitas Putusan Hakim Terhadap Pelaku Tindak Pidana Ujaran Kebencian Yang Dilakukan Oleh Masyarakat Umum," *Jurnal Esensi Hukum* 5, no. 1 (2023): 50–66.

⁴ Institute for Criminal Justice Reform, "Disparitas Pemidanaan Dalam Tindak Pidana Kekerasan Seksual," IJRS, 2024.

the comparison between the Decision of the Palu District Court Number 352/Pid.Sus/2024/PN Pal and the Decision of the Pekanbaru District Court Number 579/Pid.Sus/2025/PN Pbr, both of which involved offences under Article 45 Paragraph (1) in conjunction with Article 27 Paragraph (1) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 on Electronic Information and Transactions (the ITE Law). The Palu District Court imposed a sentence of 3 years' imprisonment and a fine of Rp1 billion for the dissemination of pornographic content via private messages, whereas the Pekanbaru District Court imposed a sentence of 1 year and 10 months and a fine of Rp500 million even though the defendant disseminated the content publicly, hacked the victim's account, and committed extortion. This sentencing disparity demonstrates inconsistency in the assessment of the degree of culpability and the social impact of the acts committed.

Justice enforced through judicial decisions must reflect the principles of equality before the law and proportionality. The principle of equality before the law requires that the law must not discriminate against anyone, regardless of status or position, during the examination process, with its inherent value being the fair treatment of every offender⁵. Meanwhile, the principle of proportionality emphasises the need for balance between the severity of criminal sanctions and the degree of culpability as well as the impact of the criminal act committed⁶. When similar legal events result in markedly different decisions, or when more serious offences receive lighter sentences, it produces a fundamental problem within the criminal

justice system. Such sentencing disparity obscures the value of justice, weakens the deterrent function of punishment, and ultimately erodes the legitimacy and public trust in judicial institutions.

In analysing these issues, this study explicitly anchors its theoretical framework in the tension between two major philosophies of punishment: Retributivism, which argues that punishment must be proportionate to the offender's culpability and the harm inflicted (a *backward-looking* justification); and Utilitarianism, which views punishment primarily as a means to achieve social benefits such as deterrence, rehabilitation, and crime prevention (a *forward-looking* justification). The conflict between these two approaches often manifests in judicial reasoning and becomes a crucial explanatory factor for the emergence of sentencing disparity.

Based on this theoretical orientation, the author examines disparity in judicial decisions concerning the offence of disseminating pornographic content because it is closely connected to the principles of justice and legal certainty. Judicial decisions in such cases must be capable of satisfying victims' sense of justice, ensuring a deterrent effect for offenders, and maintaining consistency across the judicial system. The objectives of this study are therefore: (1) to analyse the factors that contribute to sentencing disparity in judicial decisions regarding perpetrators of disseminating pornographic content, and (2) to evaluate possible measures to minimise such disparity in order to realise legal certainty and justice within Indonesia's criminal justice system.

METHOD

⁵ Supardi, *Hukum Acara Pidana*, (Jakarta: Kencana, 2023).

⁶ R Noor, *Sistem Peradilan Pidana* (Yogyakarta: K-Media, 2024).

This study employs a normative legal research method, namely research that uses secondary data and primary data or data obtained through library materials⁷. The approaches used in this research include the statute approach, the case approach to examine patterns of sentencing disparity, and the conceptual approach to understand legal doctrines and theories of punishment⁸. The data collection techniques were carried out through library research and interviews, while the data analysis was conducted using a qualitative descriptive method, which is a method of analysing research results that produces descriptive analytical data⁹.

ANALYSIS AND DISCUSSION

Factors Behind Sentencing Disparity in Judicial Decisions on Cases Involving the Dissemination of Pornographic Content

According to Article 1 Paragraph (1) of Law Number 44 of 2008 on Pornography, "Pornography refers to pictures, sketches, illustrations, photographs, writings, sounds, voices, moving images, animations, cartoons, conversations, body movements, or other forms of messages conveyed through various forms of communication media and/or public performances that contain obscenity or sexual exploitation which contravenes societal norms of decency." The dissemination of pornographic content through electronic systems is specifically regulated under Article 27 Paragraph (1) of Law Number 1 of 2024 on the Second Amendment to Law Number 11 of 2008 on Electronic Information and Transactions (the ITE Law), which stipulates that "Any Person who intentionally and without right transmits, distributes,

disseminates, displays, and/or makes accessible Electronic Information and/or Electronic Documents containing content that violates decency", is subject to criminal sanctions as regulated in Article 45 Paragraph (1), namely a maximum imprisonment term of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah).

Although the criminal provisions under the ITE Law set a clear maximum limit, in judicial practice, the imposition of criminal sanctions for offences involving the dissemination of pornographic content shows highly significant variation. The regulation, which only establishes maximum penalties without providing technical guidelines on sentencing parameters, has opened a wide interpretative space for judges, leading to decisions in cases with similar facts that may result in vastly different sentences. Sentencing disparity is a consequence of the weak sentencing framework in Indonesian criminal law, both general and specific. This weakness is evident in the limited availability of standardised sentencing guidelines and the absence of operational standards that judges may consistently rely upon when delivering verdicts.

In determining the severity of a sentence (straftoemeting), the principle of proportionality is recognised as a fundamental principle of sentencing. Hirsch explains that proportionality requires judges to impose sanctions that are proportionate to the seriousness of the offence. To achieve this, judges must be able to identify and objectively measure the degree of harmfulness of the act (harm level) and the degree of culpability (culpability level) of the offender¹⁰. However,

⁷ S Soekanto, S., and Mamudji, *Penelitian Hukum Normatif* (Jakarta: Rajawali Pers, 2021).

⁸ Suteki Taufani, *Metodologi Penelitian Hukum: Filsafat, Teori, Dan Praktik* (Depok: Rajawali Pers, 2020).

⁹ P. M Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2017).

¹⁰ Institute for Criminal Justice Reform, "Disparitas Pemidanaan Dalam Tindak Pidana Kekerasan Seksual."

in the absence of objective and standardised parameters, judicial subjectivity becomes the sole basis for determining sentences. Assessments of factors such as the extent of distribution (public or private), the number of affected victims, economic gain, the complexity of digital method of operation, and the psychological impact on victims are often carried out inconsistently and without measurable or uniform consideration within judicial practice.

According to Zulfa, such disparity arises from the absence of sentencing guidelines that may function as consistent references, resulting in judges' personal values significantly influencing judicial decisions. As stated by Muladi and Arief, differences in judges' social backgrounds, education, religion, experience, and personal characteristics contribute to variations in sentencing for cases with similar characteristics. Nevertheless, the existence of sentencing guidelines does not mean that disparity will be eliminated entirely. In legal systems that apply sentencing guidelines, such guidelines are not absolute. Each panel of judges still holds the authority to deviate from the guidelines, provided that such deviation is accompanied by clear legal grounds and juridical considerations set out in the judgment. In practice, differences in sentencing or disparity may still be justified, particularly for serious offences that possess differing characteristics or circumstances. However, such disparity must be based on rational, transparent, and legally and morally acceptable reasoning.

To illustrate the existence of sentencing disparity in cases involving the dissemination of pornographic content, the author compares two decisions that apply the same legal basis but result in significant differences in the sentences imposed. The first decision is the

Decision of the Palu District Court Number 352/Pid.Sus/2024/PN Pal, which is based on Article 45 Paragraph (1) in conjunction with Article 27 Paragraph (1) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 on Electronic Information and Transactions (the ITE Law). The case chronology in this matter centres on the dissemination of pornographic content driven by revenge following the termination of a romantic relationship. The Defendant, a 35-year-old private employee residing in the City of Palu, had been in a relationship with the Victim Witness from 2022 until around 2024. During the relationship, the Defendant recorded intimate acts using an OPPO mobile phone (which later became damaged) and transferred the data to his Samsung Galaxy A12 mobile phone. According to the Defendant, he made four video recordings as mementos which he claimed were consented to by the victim; however, the Victim Witness denied knowing about or giving permission for the recordings.

Conflict arose when the Victim Witness decided to end the relationship in order to marry another man and blocked all communication with the Defendant. The Defendant felt betrayed because he claimed to have divorced his wife at the request of the Victim Witness, but was subsequently rejected and blocked. Driven by resentment and a desire for revenge, on 23 August 2024 at around 23.00 Central Indonesian Time, the Defendant disseminated the pornographic photos and videos using the WhatsApp number 08524xxxxx from his Samsung Galaxy A12 mobile phone to four individuals, namely Witness 1 (a friend of the Victim Witness), Witness 5 (the victim's aunt in Sinjai), Witness 6 (a cousin) through WhatsApp Video Call, and Witness 4 (another aunt), accompanied by threats that he would

continue to disseminate the content if the Victim Witness married someone else.

Based on the facts revealed during the trial, the panel of judges considered several mitigating factors, including the defendant's admission of his actions, the remorse he demonstrated, the fact that he had never been convicted before, and his cooperative attitude throughout the proceedings. The aggravating factors included the defendant's actions that demeaned the dignity of the victim and her extended family, caused shame and psychological suffering to the victim, and contravened the prevailing moral norms in society. Based on these considerations, the panel of judges imposed a sentence of 3 (three) years' imprisonment and a fine of Rp1,000,000,000.00 (one billion rupiah), in default of which 6 (six) months' imprisonment shall apply.

In contrast to the Palu case, the second judgment is the Decision of the Pekanbaru District Court No. 579/Pid.Sus/2025/PN Pbr, which also bases its charges on Article 45 Paragraph (1) in conjunction with Article 27 Paragraph (1) of Law Number 19 of 2016 concerning the amendment to Law Number 11 of 2008 on Electronic Information and Transactions (the ITE Law). The case position in this matter centres on the distribution of pornographic content driven by revenge and economic motives through extortion. The defendant, Andro Parasian Sitompul, a 21-year-old unemployed man residing in Pekanbaru City, was in a romantic relationship with the Victim Witness, Ristiyani. During the relationship, the defendant recorded their intimate acts using his blue VIVO 1902 mobile phone, producing two pornographic videos with durations of 6 seconds and 1 minute 46 seconds. Although the defendant claimed that the recording was for personal use, the Victim Witness testified

that the recording was conducted without her consent.

The conflict arose when the Victim Witness ended the relationship after discovering that the defendant was still involved with his former partner, and subsequently blocked all communication with him. Feeling hurt and jealous, the defendant repeatedly threatened the Victim Witness that he would disseminate the videos if she did not give him money or phone credit, placing her in a state of persistent fear and psychological pressure. Motivated by hurt, revenge, and economic gain, on Thursday, 13 March 2025 at around 12.00 p.m. Western Indonesian Time (WIB), the defendant hacked the victim's Instagram account, originally named @ristiyani914, changed the password, email (to androowparasiann@gmail.com), and username (to @ristianiiii8), thereby depriving the victim of access. The defendant then disseminated the pornographic videos in three ways: first, by sending them via Instagram Direct Message using the victim's hacked account to the victim's sister, friends, and brother-in-law; second, by uploading an Instagram Story accessible to the public for 24 hours by 506 followers of the account, displaying the 6-second video showing the victim's genitals; and third, by sending the videos via WhatsApp using his number 0877xxxxx to the victim's friends and family, with the intention of humiliating the victim and her family as well as extorting the victim for economic gain.

The mitigating circumstances in this case are essentially similar to the previous one, namely the defendant's admission, remorse, absence of prior convictions, cooperative attitude, and promise not to repeat the offence. Nevertheless, the aggravating circumstances indicate a higher degree of seriousness, including actions that demeaned the dignity of

the victim, contravened moral values, damaged social ethics, and caused more severe psychological and social impacts given the wide dissemination of the content. Despite the more systematic method of operation, broader scope of dissemination, and the presence of extortion, the panel of judges in the Pekanbaru District Court imposed a lighter sentence, namely imprisonment for 1 (one) year and 10 (ten) months and a fine of Rp500,000,000.00 (five hundred million rupiah), in default of which 3 (three) months' imprisonment shall apply.

The author's analysis of the Decision of the Palu District Court No. 352/Pid.Sus/2024/PN Pal and the Decision of the Pekanbaru District Court No. 579/Pid.Sus/2025/PN Pbr shows a significant and disproportionate sentencing disparity. In the case before the Palu District Court, the defendant who disseminated pornographic content within a limited scope was sentenced to a heavier penalty, namely 3 (three) years' imprisonment and a fine of Rp1,000,000,000.00 (one billion rupiah). Conversely, in the case before the Pekanbaru District Court, the defendant who committed the offence with a wider dissemination range and a more serious method of operation was sentenced to only 1 (one) year and 10 (ten) months' imprisonment and a fine of Rp500,000,000.00 (five hundred million rupiah).

Factually, the defendant in the Palu District Court case disseminated pornographic content through the WhatsApp application to four individuals within the victim's circle friends and family members carried out as an act of revenge after the romantic relationship ended. The dissemination was limited (private transmission) through private messages and video calls and was not driven by economic motives. In contrast, the defendant Andro

Parasian Sitompul in the Pekanbaru District Court case engaged in conduct that was far more complex and systematic. He not only distributed pornographic videos but also hacked the victim's Instagram account, changed the email, password, and username, and then published the video through the Instagram Story feature, which was accessible to the public for 24 hours. Thus, the dissemination reach was extremely broad (public transmission), as the video was openly published to hundreds of people. In addition, the defendant also issued threats and committed extortion, indicating intention, planning, and a higher degree of mens rea.

This disparity becomes increasingly concerning when viewed from the perspective of the seriousness of the act based on several objective indicators. First, in terms of the scope and scale of dissemination, the case before the Pekanbaru District Court involved the publication of content through a social media platform with 506 followers, meaning that the content could potentially be viewed, downloaded, and re-shared by a much wider audience, in addition to being sent directly via WhatsApp to the victim's friends and family. Conversely, the case before the Palu District Court involved only direct transmission to four individuals within a closed circle. Second, in terms of method of operation, the defendant in the Pekanbaru District Court case carried out unauthorised access (hacking), which constitutes a separate criminal offence, accompanied by manipulation of the victim's account and continuous threats. Third, in terms of the impact on the victim, publication through Instagram Story, which was accessible to the public, created amplified shame and trauma because the victim lost full control over her digital identity, whereas dissemination through WhatsApp within a limited circle still provided the victim with

room to undertake mitigation.

When viewed from the broader dissemination scope, the planned course of conduct, and the resulting psychological and social impacts, the defendant's actions in the Pekanbaru District Court case should have warranted a sentence at least equivalent to or even more severe than that in the Palu case. However, the reality shows that the Pekanbaru District Court imposed a significantly lighter sentence. This situation raises serious questions regarding the consistency of law enforcement and the uniformity of the application of the elements of criminal offences within the Indonesian criminal justice system.

Such inconsistency indicates a fundamental difference in the juridical considerations employed by the panels of judges in the two courts. The panel at the Palu District Court appears to have placed emphasis on aspects of morality, ethical values, and the protection of the victim's dignity, thereby seriously considering the long-term impact of the dissemination of pornographic content on the victim's honour and future. This approach reflects a restorative justice orientation, in which the restoration of the victim's condition becomes an important element, and sentencing is viewed not only as a means of punishment and deterrence but also as a form of state recognition of the victim's suffering.

Conversely, the panel of judges at the Pekanbaru District Court appeared to place greater emphasis on the defendant's subjective aspects, such as remorse, socio-economic background, and potential for rehabilitation. Although consideration of the offender's personal circumstances is part of the principle of individualisation of punishment, assigning excessive weight to mitigating factors without taking into account

the seriousness of the act and the impact it caused may result in an imbalanced judgment. The dominance of these subjective considerations has the potential to create the impression that the judicial system is more inclined to favour the offender than to ensure the protection of the victim's rights, particularly when the psychological and social impacts of the act are permanent.

The sentencing inconsistency between the Palu District Court and the Pekanbaru District Court becomes more apparent when analysed through the theoretical lens of punishment philosophies. The disproportionately lighter sentence imposed in the Pekanbaru case despite the defendant's multilayered criminal conduct involving hacking, account manipulation, wide-scale dissemination, threats, and extortion indicates that the panel of judges placed excessive weight on utilitarian considerations, particularly the defendant's remorse, socio-economic background, and perceived potential for rehabilitation. These forward-looking considerations, although relevant within the individualisation principle, appear to have overshadowed the fundamentally heightened seriousness of the offence.

From a retributivist perspective, punishment must be proportional to the gravity of the wrongful act and the magnitude of harm inflicted. The Pekanbaru case clearly involved a higher degree of culpability (*mens rea*), a more sophisticated and premeditated method of operation, and a far broader and irreversible impact on the victim's psychological well-being and digital identity. The public dissemination to hundreds of Instagram followers magnifies the victim's exposure and trauma, creating a level of harm significantly greater than the limited transmission seen in the Palu case. Under retributivist principles, therefore, the

Pekanbaru defendant should have received a punishment equal to or more severe than the sentence imposed in the Palu decision.

However, the judges in Pekanbaru seemed to prioritise utilitarian goals such as rehabilitation and reintegration over the backward-looking requirement of proportional retribution, resulting in a sentence that fails to reflect the seriousness of the criminal harm. By allowing mitigating personal circumstances to outweigh the objective severity of the offence, the decision risks signalling that even complex and planned violations involving digital intrusion and mass dissemination may be met with lenient punishment. This not only dilutes the deterrent effect of sentencing but also undermines the moral authority of the criminal justice system in acknowledging the victim's suffering.

Therefore, the core issue underlying the sentencing disparity is the imbalance in the application of punishment philosophies: while the Palu District Court incorporated retributive elements to uphold victim protection and the inherent gravity of the offence, the Pekanbaru District Court's utilitarian orientation resulted in an unduly lenient sentence that does not correspond to the scale of harm. The inconsistency demonstrates how divergent judicial interpretations of punishment goals can produce markedly different outcomes in cases with similar legal frameworks but significantly different levels of culpability and societal harm.

1. Findings on the Factors Underlying the Sentencing Disparity in Cases of Pornographic Content Dissemination

Based on the comparison of the two

judgments above, the sentencing disparity is influenced by several juridical and non-juridical factors. The following are the factors causing the disparity in the judgments:

a. Juridical Factors

Juridical considerations are considerations based on the facts revealed during the trial and the elements stipulated by law. The essence of juridical considerations is the proof of the elements of the criminal offence charged by the public prosecutor.

1) Factors Originating from the Legal System

The Indonesian legal system adheres to the Continental European system (civil law system), which emphasises written legislation as the primary source of law. In the civil law system, judges are not bound by previous judgments, thereby possessing broad interpretative freedom¹¹. This freedom allows judges to adjust their rulings to the specific characteristics of each case, but at the same time creates the potential for sentencing disparity.

2) Factors Originating from Legislation

Article 27 Paragraph (1) jo. Article 45 Paragraph (1) of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 on Electronic Information and Transactions (the ITE Law) stipulates a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp1,000,000,000.00 (one billion rupiah) without specifying a minimum. The formulation of sanctions that only provides a maximum limit grants judges an extremely broad margin in determining the severity of the sentence. The absence of clear guidelines regarding criteria or objective parameters

¹¹ Y Pramudya Suhartanto, F., & Febrianty, "Perbandingan Sistem Hukum Civil Law Dan Common

Law," *Konsensus: Jurnal Ilmu Pertahanan, Hukum Dan Ilmu Komunikasi* 1, no. 3 (2024).

to determine the position of sentencing within that range results in judges having very wide judicial discretion in determining the punishment to be imposed¹².

3) Factors Originating from Evidence in Court

The basis of the evidentiary system in Indonesian criminal procedure law is stipulated in Article 183 of the Criminal Procedure Code, which provides that a judge may not impose a sentence on a person unless, based on at least two valid pieces of evidence, the judge acquires the conviction that a criminal act has indeed occurred and that the accused is the perpetrator. This provision indicates that the evidentiary system adopted in Indonesia is negative *wettelijk*, namely a combination of statutory provisions on means of evidence and the judge's conviction in assessing the fulfilment of the elements of the criminal offence¹³. Therefore, differences in how judges assess the strength of evidence, form a conviction regarding the occurrence of a criminal act, and interpret the impact of the act may produce inconsistent rulings even when the legal basis and type of case are the same.

4) Factors Originating from the Absence of Sentencing Guidelines

Judges generally do not possess comprehensive assessment instruments to measure various important aspects in

criminal offences involving the dissemination of pornographic content, such as the scale of dissemination (private or public), the number of parties exposed, the degree of harm suffered by the victim, the existence of extortion elements or motives for obtaining economic gain, the complexity of the method of operation, as well as the long-term psychological and social impact on the victim. The absence of such objective indicators results in the assessment of the seriousness of the act being highly dependent on each judge's interpretation, making judgments vulnerable to being influenced by the judge's personal preferences and perceptions (judicial caprice)¹⁴.

b. Non-Juridical Factors

Non-juridical considerations are based on matters outside the elements of the criminal offence, which function to determine the severity of the sanction (*strafmaat*). Non-juridical factors often exert significant influence on the occurrence of sentencing disparity.

1) Factors Originating from the Judge Themselves

Judges' convictions are influenced by personal characteristics such as religion, education, morality, values, and mentality, as well as by the social environment, including political, economic, and cultural factors, and the level of technological understanding¹⁵. These internal factors are difficult to

¹² R Rizki, M., Harahap, I., & Pardede, "Penerapan Hukum Terhadap Pelaku Penyebaran Konten Pornografi," *Collegium Studiosum Journal* 8, no. 1 (2025): 265–76.

¹³ M Nursapira, N., Oner, B., & Halwan, "Pembuktian Tindak Pidana Pornografi Melalui Undang-Undang Informasi Dan Transaksi Elektronik," *Clavia: Journal of Law* 22, no. 2 (2024), <https://doi.org/https://doi.org/10.56326/clavia.v22i2.4045>.

¹⁴ H. M Fauzan, *Peranan PERMA Dan SEMA Sebagai Pengisi Kekosongan Hukum Indonesia Menuju Terwujudnya Peradilan Yang Agung* (Jakarta: Prenadamedia Group, 2013).

¹⁵ I. K Nathaniel, Y. P., & Seregig, "Pertimbangan Hakim Dalam Putusan Pidana Terhadap Pelaku Yang Mendistribusikan Konten Yang Bermuatan Pornografi (Studi Putusan Nomor: 105/Pid.Sus/2023/PN TJK)," *Jurnal LEB* 2, no. 1 (2024), <https://doi.org/https://doi.org/10.57235/jleb.v2i1.1542>.

eliminate, thereby potentially triggering subjective rulings. In cases involving the dissemination of pornographic content, judges who lack an understanding of digital dynamics tend to assess public dissemination as equivalent to private dissemination, even though both have significantly different implications in terms of reach, speed, and impact. Conversely, judges with good technological literacy are able to distinguish the scale of risk and understand that public dissemination on digital platforms is massive, difficult to control, and potentially causes greater harm. Differences in the capacity for such understanding may ultimately lead to variations in assessing the seriousness of the act and the criminal liability of the perpetrator¹⁶.

2) Mitigating and Aggravating Factors Related to the Perpetrator

Judges are obliged to consider the good and bad character of the accused during trial proceedings, as regulated in Article 8 Paragraph (2) of Law Number 48 of 2009 on Judicial Power. Mitigating factors include polite behaviour during the trial, admission and remorse, no prior convictions, and certain personal conditions such as age or economic circumstances. Conversely, aggravating factors include uncooperative behaviour, the existence of intent, status as a recidivist, and the impact of the act causing public anxiety or harm. Although the types of factors used are relatively similar, the weight given may differ between judges. The absence of

measurable guidelines creates a wide space for subjectivity, resulting in judicial considerations in practice often placing greater emphasis on the personal circumstances of the accused rather than on the interests of the victim and the extent of the harm caused by the criminal act.

3) The Factor of Motive and Impact on the Victim

From the aspect of the perpetrator's motive and purpose, the dissemination of pornographic content can be classified into several categories. Revenge motives (revenge porn) are generally driven by negative emotions intended to damage the victim's life. This motive demonstrates a high degree of intent and malicious purpose (*mens rea*), and is therefore typically regarded as a serious criminal offence¹⁷. Meanwhile, actions that are unplanned or carried out spontaneously without a specific intention may be considered as mitigating factors. In terms of impact, psychological consequences such as trauma, emotional distress, and decreased self-confidence are important factors that deserve significant weight in sentencing. The dissemination of pornographic content also causes social unrest and constitutes a violation of moral norms, thereby strengthening the justification for imposing harsher penalties. In addition, judges may take into account any recovery efforts, such as the provision of compensation, expressions of apology, or

¹⁶ R. Kamil, "Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia," *Justisi* 11, no. 2 (2025), <https://doi.org/https://doi.org/10.33506/js.v11i2.4049>.

¹⁷ A. E. Puspitosari, H., & Kusumaningrum, "Victim Impact Statement Sebagai Upaya Perlindungan Hukum Terhadap Perempuan Korban Revenge Porn," *Jurnal USM Law Review* 4, no. 1 (2021): 67–81, <https://doi.org/https://doi.org/10.26623/julr.v4i1.3307>.

the achievement of reconciliation between the perpetrator and the victim¹⁸.

According to Vabiannes Stuart Wattimena, S.H., Judge of the Batam District Court, the disparity in decisions in cases involving the dissemination of pornographic content is generally caused by various factors inherent in the characteristics of each case. First, the scale and reach of the content dissemination constitute the primary factors in determining the severity of the sentence. If the perpetrator disseminates content within a limited scope, such as through private messages or by showing it to specific friends, the impact is assessed as relatively minor. However, if the content is uploaded on large-scale digital platforms such as social media, the level of violation and resulting harm increases significantly. The judge emphasises that when pornographic content is widely published, the victim's suffering multiplies. The victim not only loses their privacy but also experiences deep psychological trauma and social stigma that may have permanent effects on their life. Therefore, the broader the scope of dissemination, the greater the level of the perpetrator's criminal liability.

Second, the perpetrator's motive and background also influence the judgment. Perpetrators may act out of revenge or resentment, but there are also those who disseminate content for economic gain or as part of an organised pornography distribution network. Perpetrators with economic motives or those who act systematically for commercial purposes deserve heavier penalties because such conduct contains elements of intent and planning.

Third, the condition and attitude of the defendant during the trial also become

considerations for the judge. The judge assesses cooperative behaviour, admission of wrongdoing, expressed remorse, and willingness to change. Defendants who demonstrate good faith have the opportunity to obtain mitigating considerations, whereas uncooperative behaviour, evasiveness, or the potential to repeat the act will aggravate the assessment. This is in line with the principle of individualisation of punishment, in which sentencing is not solely aimed at punishing but also at fostering and correcting the behaviour of the offender.

Furthermore, the judge emphasises the importance of considering the social, psychological, and moral impact on the victim. The dissemination of pornographic content through social media on a wide scale creates highly alarming consequences for the victim, including severe psychological burdens, profound shame, and social pressure from the public, which make the victim's suffering far more significant compared with dissemination that is limited or personal in nature. Therefore, in assessing cases of disseminating pornographic content, the judge must measure the extent of the suffering caused. This consideration aligns with the principle of proportionality, namely that the greater the impact inflicted on the victim, the heavier the sentence that is appropriate to impose.

Efforts to Minimise Sentencing Disparities in Cases of Disseminating Pornographic Content

Article 5 Paragraph (2) of Law Number 48 of 2009 on Judicial Power emphasises that "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live within

¹⁸ M Aini Muthiah, D. N., & Zuhdy, "Pertimbangan Hakim Dalam Memutus Perkara Tindak Pidana Pornografi," *Indonesian Journal of Criminal Law and*

Criminology (IJCLC) 2, no. 1 (2021), <https://doi.org/https://doi.org/10.18196/ijclc.v2i1.11561>.

society”. This provision grants judges the freedom to interpret the law in accordance with the circumstances encountered during the trial. However, this freedom also results in differences in sentencing, both within the same judicial environment and across different courts, indicating that uniformity in sentencing remains difficult to achieve.

Sentencing disparities cannot be entirely eliminated, as judges, who exercise judicial authority, are human beings with diverse backgrounds, experiences, and psychological conditions. Juridically, judges throughout Indonesia are governed by the same legal system and norms; however, sociologically, each judge possesses distinct characteristics and approaches in interpreting the elements of a criminal offence and considering aggravating or mitigating factors.

According to Vabiannes Stuart Wattimena, S.H., Judge of the Batam District Court, disparities in sentencing are a natural occurrence as long as judges are granted the freedom to assess legal facts in court. He asserts that each judge has differing perspectives and assessments regarding the elements of a criminal offence, the degree of the defendant’s culpability, and the impact of the act on society. Nevertheless, he emphasises that disparities must remain within reasonable limits so as not to create legal uncertainty. Sentencing disparities are difficult to avoid, yet they can still be minimised through various strategic efforts.

The primary effort to minimise sentencing disparities in cases of disseminating pornographic content is the implementation of clear and measurable sentencing guidelines. With the presence of sentencing guidelines, it is expected that judges, when deciding a case and imposing a

sentence, can apply the principles of transparency and consistency. The New Criminal Code (KUHP), enacted through Law Number 1 of 2023, represents an important breakthrough in improving the sentencing system, particularly through Article 54 Paragraph (1), which obliges judges to consider: (a) the nature of the perpetrator’s fault; (b) the motive and purpose of committing the criminal act; (c) the perpetrator’s state of mind; (d) whether the criminal act was committed with premeditation or without premeditation; (e) the manner in which the criminal act was committed; (f) the perpetrator’s attitude and actions after committing the criminal act; (g) the perpetrator’s background, social circumstances, and economic conditions; (h) the effect of the sentence on the perpetrator’s future; (i) the impact of the criminal act on the victim or the victim’s family; (j) forgiveness from the victim and/or the victim’s family; and/or (k) the legal values and sense of justice that live within society. Furthermore, Article 53 Paragraph (2) of the New Criminal Code emphasises that when a conflict arises between legal certainty and justice, judges must give precedence to the principle of justice, thereby making sentencing more directed and not merely formal¹⁹. These sentencing guidelines greatly assist judges in considering the appropriate degree or severity of punishment to be imposed, so that the sentence delivered is expected to be proportionate and understandable to both the public and the convicted person. Although the details in this provision are not exhaustive and judges may add further considerations, the word “obliged” in this article provides a strong imperative dimension to the sentencing guidelines.

¹⁹ M Arifia, M. U., Gultom, B. M., & Markoni, “Upaya Meminimalisir Disparitas Putusan Hakim,” *Jurnal*

Syntax Transformation 4, no. 1 (2023), <https://doi.org/https://doi.org/10.46799/jst.v4i1.677>.

From a philosophical perspective, the Criminal Code contains values derived from the classical school of thought, which emphasises the act or criminal conduct. In other words, the regulation of sentencing guidelines is expected to maintain a balance between objective factors (the act) and subjective factors (the perpetrator's state of mind). In cases of disseminating pornographic content, the severity of the sentence must take into account the consequences of the perpetrator's actions. If the consequences of the act cause severe trauma or even lifelong trauma to the victim, thereby damaging the victim's future and psychological condition, then the sentence imposed on the perpetrator should indeed be increased.

The Supreme Court has an important role in minimising sentencing disparities through the issuance of Supreme Court Regulations (PERMA), which specifically regulate sentencing guidelines for criminal acts involving the dissemination of pornographic content in cyberspace. PERMA has advantages compared to Supreme Court Circulars (SEMA) because it carries binding legal force for all judges in Indonesia, can fill legal gaps (*rechtsvacuum*)²⁰, and provides certainty in the application of criminal sanctions. PERMA is necessary because the Law on Electronic Information and Transactions only regulates the maximum penalty without providing clear parameters on how to assess the seriousness of an act. A PERMA specifically for cybercrimes should ideally contain technical guidelines for verifying electronic evidence, standards of proof in the digital domain, and proportional sentencing parameters based on the characteristics of cybercrimes such as the scale of dissemination, platform, motive, and

victim impact. If these guidelines are formulated systematically, for example in the form of a matrix or binding guideline, judges across all jurisdictions would have a uniform benchmark.

In addition to a PERMA specific to cybercrimes, the implementation of Supreme Court Regulation Number 3 of 2017 on Guidelines for Adjudicating Women in Conflict with the Law needs to be strengthened, particularly in cases involving the dissemination of pornographic content, in which most victims are women. This regulation encourages judges to apply a gender perspective, consider the psychological and social impacts on the victim, and prevent victims from experiencing repeated suffering through inappropriate judicial decisions. Restitution and compensation in various forms, such as compensation for losses, psychological counselling services, medical services, and legal assistance, need to be considered as forms of restorative justice for victims. However, in practice, the determination of the severity of the sentence imposed by the panel of judges is often based solely on juridical factors, non-juridical factors, and considerations of aggravating and mitigating circumstances of the defendant. The implementation of Supreme Court Regulation Number 3 of 2017 has not yet been fully optimised. This is due to judges' limited understanding of the meaning of women in conflict with the law, resulting in judicial approaches that are often based solely on statutory provisions and tend to neglect the

²⁰ H. M Fauzan, *Peranan PERMA Dan SEMA Sebagai Terwujudnya Peradilan Yang Agung* (Jakarta: Pengisi Kekosongan Hukum Indonesia Menuju Prenadamedia Group, 2013).

aspect of protecting women as victims of pornographic criminal acts²¹.

Vabiannes Stuart Wattimena, S.H. emphasises the importance of consistently implementing Supreme Court Regulation Number 3 of 2017 in every decision involving women as victims. Judges must be more sensitive to the condition of the victim and the impact experienced, and not focus solely on technical juridical aspects. He suggests that in every judicial training programme, gender perspectives and an understanding of Supreme Court Regulation Number 3 of 2017 should be mandatory components, so that judges have a shared understanding of the importance of protecting victims, particularly women who experience online gender-based violence. Thus, the decisions handed down will not only fulfil the aspect of legal certainty but also reflect substantive justice that prioritises the interests and recovery of the victim.

Effective implementation of PERMA cannot function without adequate capability among law enforcement officials. Therefore, capacity-building becomes an essential part of efforts to minimise sentencing disparities. Such capacity-building can be realised through training that covers several key aspects. First, a sound understanding of digital technology and the dynamics of social media platforms as mediums of crime. Second, digital forensic techniques to analyse electronic evidence comprehensively and accountably. Third, an understanding of the characteristics and methods of cybercrimes that continue to evolve. Fourth, gender perspectives and the rights of victims of online gender-based violence, which are often overlooked in judicial processes. Fifth, the

principles of restorative justice that place victim recovery as the primary consideration in sentencing.

This approach is aligned with Lawrence M. Friedman's legal system theory, which emphasises that the effectiveness of the law depends heavily on three main components: legal substance, legal structure, and legal culture. In the context of minimising sentencing disparities, these three components must operate simultaneously. Legal substance in the form of clear sentencing guidelines, legal structure in the form of competent and well-trained judicial institutions, and legal culture that prioritises victim protection and genuine justice constitute the combination required to create a fair and consistent criminal justice system²².

CONCLUSION

Sentencing disparity in cases involving the dissemination of pornographic content remains a serious issue within the Indonesian criminal justice system. A comparison between Palu District Court Decision Number 352/Pid.Sus/2024/PN Pal and Pekanbaru District Court Decision Number 579/Pid.Sus/2025/PN Pbr demonstrates significant inconsistency in sentencing, whereby a case involving a simpler method of operation received a heavier punishment than a case employing a far more complex and harmful one. This imbalance reflects the suboptimal application of the principles of proportionality, equality before the law, and victim protection.

The sentencing disparity arises from both juridical and non-juridical factors. From a juridical perspective, the disparity is influenced by the civil law system, which

²¹ I. G. N. N. K Aditama, K. P. S., & Yudiantara, "Disparitas Dalam Penjatuhan Hukum Pidana Terhadap Terdakwa Di Indonesia," *Kertha Negara: Journal Ilmu Hukum* 11, no. 12 (2024): 1369–83.

²² Rizki, M., Harahap, I., & Pardede, "Penerapan Hukum Terhadap Pelaku Penyebaran Konten Pornografi."

affords judges broad interpretative discretion; the sanction formulation in the Electronic Information and Transactions Act (the ITE Law), which provides only maximum penalties without minimum thresholds; the absence of specific and binding sentencing guidelines; and differing levels of judicial competence in evaluating electronic evidence. Meanwhile, non-juridical factors include variations in educational background, professional experience, moral values, levels of digital literacy, and differences in how judges weigh mitigating and aggravating factors, offender motives, victim harm, and the purposes of punishment.

To minimise sentencing disparity, it is essential to implement the sentencing guidelines contained in the New Criminal Code (KUHP), particularly Article 54 Paragraph (1), which obliges judges to consider various aspects such as the nature of the offender's culpability, the motives and objectives of the offence, the manner and degree of planning involved, the impact on victims, and the broader purposes of punishment. The effective operationalisation of this article especially when combined with the issuance of a Supreme Court Regulation (PERMA) specifically governing sentencing standards for cyber-based offences involving the dissemination of pornographic content would transform the current model of *free judicial discretion* into *structured judicial discretion*. This shift represents a significant step forward in establishing proportionate, predictable, and transparent sentencing practices, thereby enhancing legal certainty.

Furthermore, the Supreme Court's adoption of measurable and objective parameters, such as the scale and reach of dissemination, the nature of the digital platform used, the complexity of the method of operation, and the psychological, social,

and economic impacts on victims would provide a uniform framework for judicial decision-making. Strengthening the implementation of Supreme Court Regulation Number 3 of 2017 on Guidelines for Adjudicating Cases Involving Women in Conflict with the Law, which integrates gender perspectives and restorative justice principles, alongside capacity-building for law enforcement officials through regular training in information technology and digital forensics, are strategic measures necessary to realise a consistent and equitable sentencing system. With clear and structured guidelines, Indonesia's judicial practice can systematically reduce sentencing disparities and better ensure legal certainty, substantive justice, and optimal victim protection in the era of digital crime.

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