

PENAL POLICY IN THE PREVENTION OF INCREASING SEXUAL CYBER CRIMES (CYBER SEX/CYBER PORN)

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A. INTRODUCTION

There are some concepts concerning penal policy. In this paper, the concept of penal policy means, criminal law enforcement policy *in abstracto* and *in concreto* (formulation/legislation and application policies) in the prevention of cyber sex and cyberporn.

In the perspective of criminal policy, criminal law is not the only main strategic. The fundamental strategic is to prevent and to eliminate criminogenic factors.² However, many international instruments still recognize the necessary of increasing the effectiveness of penal policy, in the stages of formulation policy and the application policy as well.

²Sixth UN Congress on the Prevention of Crime, 1980: "Crime prevention strategies should be based on the elimination of causes and conditions giving rise to crime"; Seventh UN Congress, 1985: "The basic crime prevention must seek to eliminate the causes and conditions that favour crime".

B. INTEGRATED AND STRATEGIC POLICY ON THE PREVENTION OF CRIME

It should be remind that the ability of criminal law in preventing crime is very limited, especially in combating cybercrime, as the consequences of the rapid progress and complicated of hi-tech crime. In the perspective of "criminal policy" the prevention of crime efforts (including cybercrime) could not be done partially only with criminal law, but it should be applied integrated/systemic approaches. It is not surprisingly that in combating cybercrime as one of 'hi-tech crime' should also use and apply techno-prevention, cultural/educational/morally/religious approaches, administrative regulation approaches and even globally approaches (international cooperation), it is because cybercrime is transnational or transborder crime.

Realizing that prevention of crime should be done through integrated policy, operationally prevention of crime policy should involving integrally many departments .e.g. integrated criminal policy in Czech Republic.

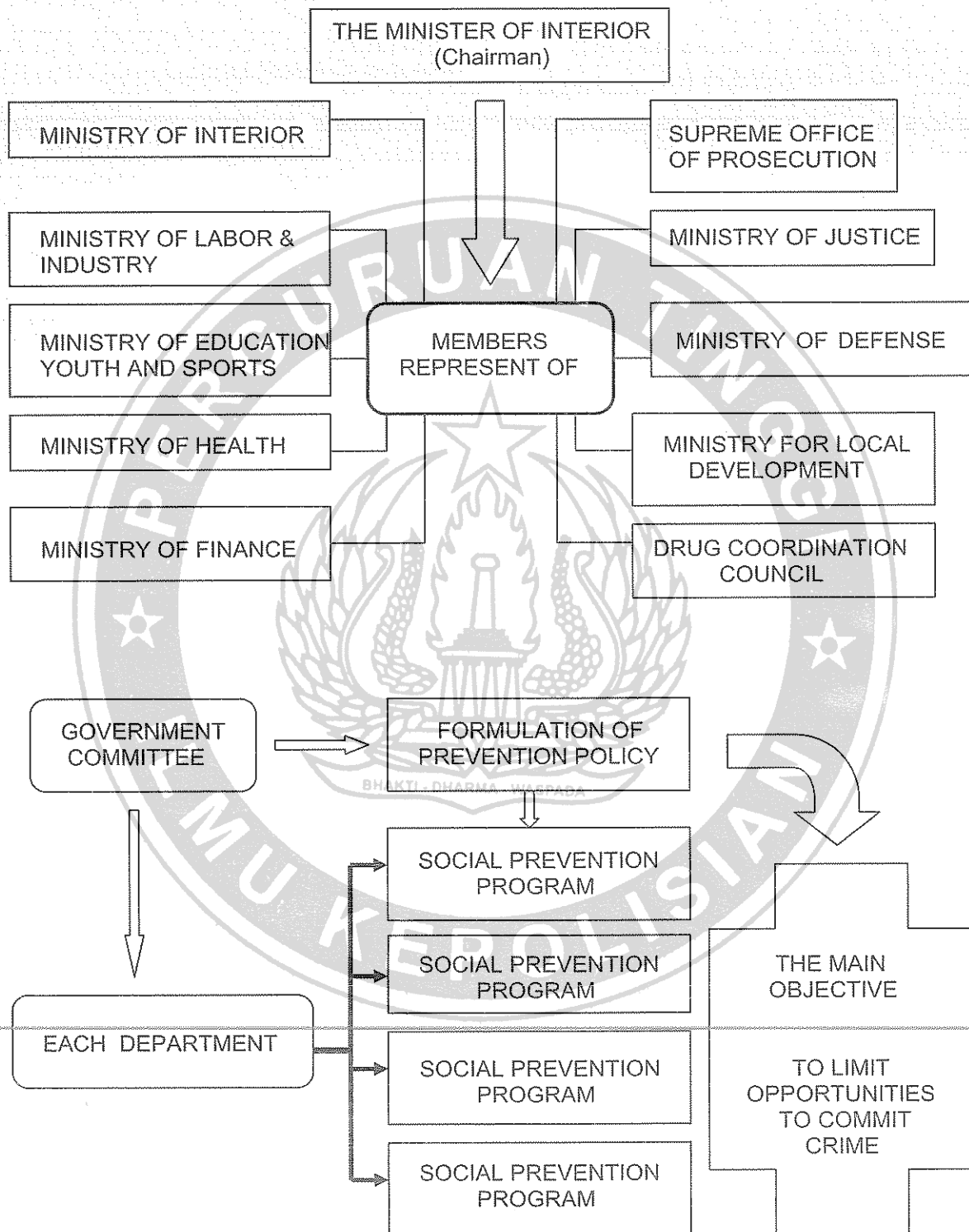
Based on the view, that crimes are social pathologies and the influence factors sometime very complicated, so Czech Republic Government established a Ministry of Interior interagency coordination and the Government Committee for Prevention of Crime (hereinafter only Government Committee). This Commission headed by Minister of Interior with the staff members are representatives of (1) Ministry of Interior; (2) Ministry of Labor and Industry, (3) Ministry of Education, Youth and Sports, (4) Ministry of Justice, (5) Ministry of Defense, (6) Ministry of Health (7) Ministry of Finance, (8) Ministry for Local Development, (9) Supreme Office of Prosecution (10) Government Drug Coordination Council and (11) The Government Council of Roma Issues. This Commission drafts a set planning of Prevention Policy on the interagency level and each of department (local level) breakdown that plan into "social prevention programmes", so that there are a "Prevention of Crime Strategy". The main objectives of the strategy is to limit opportunities to commit crimes.³

The Czech Republic strategic on the prevention of crime mention above could be summarized in this scheme below:

³CRIME PREVENTION STRATEGY FOR THE YEARS 2004 – 2007, www.mvcr.cz/prevence/english/strategie.pdf

SCHEME I

GOVERNMENT COMMITTEE FOR PREVENTION OF CRIME



The type model of Czech Republic should be considered as the input material for the policy making in crime prevention in Indonesia, in generally and in particularly as well in combating cyber-crime (cyber sex/cyberporn).

C. CRIMINAL LAW FORMULATION POLICY IN THE PREVENTION OF SEXUAL CYBER CRIME (CYBER SEX/CYBER PORN)

In the perspective of penal policy, formulation policy is the most strategic phase in crime prevention. The weakness of formulation policy means the wrong step of strategic policy, and it could be constraint factor in the effort of crime prevention and would be influence in the application and execution phase.

The stipulations of positive criminal law which are closely related with this kinds of offence (sexual/decency crime), are (a) the Criminal Code (KUHP); (b) the Act of Telecommunications No.36/1999 (c) the Act of Press No. 40/1999 (d) the Act of Broadcasting No.32/2002 and (e) the Act of Movie No. 8/1992. From the Acts mention above, criminal law stipulation that can be related with decency issues, are :

1. The Criminal Code (KUHP)

- a. Art. 281 concerning with *public indecency act*;
- b. Art. 282-283 concerning of broadcasting, exhibiting, making, offering, etc of decently writing, pictures.
- c. Art. 284-295 concerning of adultery and other things that

related with doing or giving easier opportunity to obscene and sexual intercourse.

- d. Art. 532-533 of demonstrating something pornography or at least to pro- voke sexual desire.

Unfortunately, of those stipulations of Criminal Code in some degree could not be applied effectively constrained by territorial jurisdiction and corporate legal subject.

2. The Act of Telecommunication No. 36 of the year of 1999

The criminal articles that are stipulated in the Act of Telecommunication No. 36/1999 are Art. 47-57 (Chapter VII). What is pity, the formulation of criminal offences in that Act tend only to protect telecommunication network, telecommunication instruments and the use of them, not to the materials transmitted by them, primarily the pornography materials transmitted by the telecommunication instruments.

In the Art. 21 stated that

Telecommunication Operators prohibited to carry on telecommunication activity enterprises that against the public interests, **decently**, security or public order.

The violation against Art. 21 is only threatening by administrative sanction, the revoke of license after getting the writing warning (Art. 45 jo 46). It means that violation is not criminal act, because not included in the stipulation on Art. 47-57. The

absence of criminal act formulation in the Art. 21 is not like in the formulation of this kinds act in the Act of Press, which is threatened by the punishment to the press industry who publish decently advertisement (see below).

3. The Act of Press No. 40 of the year of 1999

Art. 5 (1) stated that, National Press obligatory to report about event and opinion in appropriate with the respective religious and community morally norms and presumption of innocent principle.

Art. 13, stated that, Press enterprises prohibited to report about advertisement that are (a) has consequences on the degrading religious values and or annoy the togetherness live of religious followers, and against community morally values.

Art. 18 (2) stated that, Press enterprises who break the stipulation of Art. 5 (1) and Art.13 is punishable by fines not more than Rp 500.000.000,- (five million rupiahs)

The weakness: there are no criminal act qualification (as a felony or a misdemeanor) and the provision of corporate criminal responsibility. There is a Press Enterprises criminal act formulation with fines but no provisions:

- when (and how) press enterprises commit crimes; and
- what kinds of sanction if corporates (press enterprises) are not willing to pay the fines (no provision on substitute penalty for the fines).

4. The Act of Broadcasting No. 32 of the year of 2002

a. Art. 57 jo 36 (5) makes punishable to the Broadcasting which demonstrating decently element. The punishment are :

- imprisonment not more than 5 (five) years and/or fine not more than Rp. 1.000.000.000,- (one billion rupiahs) for radio broadcasting, and
- imprisonment not more than 5 (five) years and/or fine not more than Rp. 10.000.000,- (ten million rupiahs) for television broadcasting.

b. Art. 57 jo 36 (6) makes punishable to broadcasting which are ridiculing, degrading, harassing and/or ignoring religiosity values, dignity of human being of Indonesia. The punishment is the same with the point (a) above.

c. Art. 58 jo 46 (3) makes punishable to business advertisement broadcasting which contains, inter alia:

- anything that are against community moral and religiosity values and/or
- children exploitation to the under 18 (eighteen) years child.

The punishment are:

- imprisonment not more than 2 (two) years and/

or fines not more than Rp. 500.000.000,- (five hundred million rupiahs) for radio broadcasting and

- imprisonment not more than 2 (two) years and/or fines not more than Rp 5.000.000.000,- (five billion rupiahs) for television broadcasting.

That provisions above could be implied to cyber crimes (cyber sex /cyber porn), because according to the Acts, the meanings of:

- "Broadcasting" is any activities of broadcasting through transmission media and/or land transmission media, sea or space with using radio spectrum frequency through air, wire, and/or other media that can be received simultaneously and at the same time by society with broadcasting receiver instruments.
- "Broadcast" is message or a set of messages in the form of voices, pictures, or combination of it or in the form of gravies, characters, interactive or non-interactive that can be received through broadcasting receiver instruments.
- "Business advertisement broadcast" is commercial advertisement broadcast which transmitted through radio or television broadcasting with purpose of introducing, socializing, and/or promoting goods or services to public

in trying to provoke consumer using their products offer (Art. 1 point 6)

Although the Act No. 32/2002 can be used to combat cyber porn especially related to the broadcasting, but the jurisdiction constraint as like as Criminal Code also could be faced in this cases. Instead of it, the other weaknesses are: the none stipulation of criminal act qualification (as felony or misdemeanor), and also no provision concerning the corporate criminal responsibility. In fact that kinds of criminal act are close related with corporate activities. Based on the Art. 14 and 16 of this Act, Broadcasting institutions are legal entity.

The other weakness is that the limitation of criminal act only to the broadcasting through radio, television, not included to the broadcasting through digital technology, satellite, internet and other forms of media. Nowadays, there are many broadcasting and business advertisement using sites cyber sex and cyberporn.

5. The Act of Movie No. 8 of the year of 1992

- Art. 40 threatens imprisonment not more than 5 (five) years and/or fine not more than Rp. 50.000.000,- (fifty million rupiahs) for:
 - a. Deliberately circulating, exporting, showing, and/or presenting film advertisement that is rejected by Film Sensor

Institution as stipulated in the Art. 33 ayat (6); or

- b. deliberately circulating, exporting, showing and/or presenting a film pieces and/or voices that is rejected by Film Sensor Institution as stipulated in the Art. 33 (6); or
 - c. deliberately circulating, exporting, showing and/or presenting a unsensored film as stipulated in the Art. 33 (1); or
- Art. 41 threatens imprisonment not more than 1 (one) year and/or fines not more than Rp 40.000.000,- (fourty million rupiahs) to:
- (1a) doing movie industry without license (jo.the Arts. 14 (1), 17, 19, 20, 24, and 27.
 - (1b) circulating, exporting, showing or presenting unsensor film advertisement (jo. The Art. 33 (1))

The concept of film (Art. 1 point 1)

- Film means artistic and cultural works as mass communication media seeing and listening which are made based on cinematography principle which are recorded on celluloid ribbon, video ribbon, video disc and/or other technological finding material in the variety forms, types, and sizes through chemical process, electronic process, or

other process, with or without voices, it could be shown and/or presented with projection mechanic system, electronic, and/or others.

The concept of movie industry (Art. 1 point 2)

- The movie industry means "all activities that related with making, technical services, export, import, circulation, show and/or film exposure"

In this Act., there is criminal act qualification (in the Art. 43), but there is not any stipulation on corporate criminal responsibility. Instead of that, maximum fines Rp. 50 millions has not any meaning for the movie Industry (comparing with the Act of Press which threatens maximum fines at about Rp. 10 billions)

Based on the mention above, it could be identified some issues or weaknesses from this regulations above, if being faced with the cyber crime (cyber sex/cyber porn) issues as below.

NO	THE ACTS	WEAKNESSES
1.	CRIMINAL CODE	<ul style="list-style-type: none"> - the limitation on jurisdictions - no stipulation of subject and Corporate Responsibility
2.	THE ACT 36/1999	<ul style="list-style-type: none"> - no criminal act formulation against the breaking of the Art 21 - no special stipulation on corporate criminal responsibility
3.	THE ACT 40/1999	<ul style="list-style-type: none"> - no criminal act qualification (as felony or misdemeanor) - no provisions about: <ul style="list-style-type: none"> • when and how corporate commit crimes • corporate (press enterprises) that is not willing pay the fines (no stipulation of substitute penalty of not pay the fines)
4.	THE ACT 32/2002	<ul style="list-style-type: none"> - no criminal act qualification (as felony or misdemeanor) - no stipulation of corporate criminal responsibility; - broadcasting criminal act and business advertisement broadcasting in this Act is limited for radio and television, not included digital technological broadcast satellite, internet and other special forms. In fact there are so many business advertisement through cybersex/ cyberporn sites.
5.	THE ACT 8/1992	<ul style="list-style-type: none"> - no stipulation of corporate criminal responsibility. - maximum fines Rp. 50.000.000,- has not any meaning for movie enterprises (meanwhile in the Act of Broadcasting fines maximum reach upto Rp. 10 billions.

Beside of the weaknesses from the substantive criminal law point of view mention above, there are so many weaknesses in some legislation products in this country especially in combating

or preventing cyber crime. One of it is the aspect of procedural weaknesses especially in the matter of evidence instrument. The juridical recognition for electronic records as legal evidence

instrument only find in the Act of Corruption and the Act of Money Laundering. (the Art. 26A of the Act No. 20/2001, the Art. 38 of the Act No. 15/2002 and the Art. 44 (2) of the Act No. 30/2002). This condition of regulation tends to be for other criminal acts, as like cyber crime.

D. CRIMINAL LAW ENFORCEMENT POLICY ON THE PROBLEM OF CYBER SEX/CYBER PORN

1. The Priority Issue in Criminal Law Enforcement in the field of morality

The criminal law enforcement policy against morally criminal acts tends to be lower priorities attention in comparing with the efforts of preventing other criminal acts, as like corruption, drugs and terrorism.

That condition should be evaluated, it is because of the possibility effects to the increasing and the spreading out cases of morally in the field of cyber, and the raised up of porn sites in Indonesia. Until now approximate for about more than 1.000 local porn sites in Indonesia.⁴

The weaknesses of criminal law enforcement against the porn criminal acts, perhaps close related with the weaknesses of legislation policies In order to

solve this problems effectively, it could be necessary to evaluate and to reform, to reconstruct or to innovate those legislation policies.

2. Efforts Increasing Effectiveness and Orientation Renewing (Reformation/reconstruction) Criminal Law Enforcement in combating Cyber crime (cyber sex/cyber porn)

- However criminal law in general and in particularly some Acts mention above (sub C) exists some weaknesses, the increasing penal law enforcement should be effectively in combating cyber sex/cyberporn. More over among scholar in the internet stated that cyber sex/cyber porn is naturally same with actual sex-crime (fornication or other morally criminal acts)⁵.

In order to effectively positive criminal law, it should be done by some steps as below :

1. Increasing commitment strategic/national priority in prevention of decent criminal act, by positioning in the same level with the prevention of corruption, drugs, terrorism, etc.
2. Increasing socialization/campaign the danger or negative effects of decent

⁴William B Kurniawan, *Media Indonesia Online*, 27/01/06; article "Pornografi Dari Internet Picu Perkembangan Kelainan Seksual Anak", http://www.bkkbn.go.id/article_detail.php?aid=440

⁵Catherine MacKinnon (<http://policynut.usaska.ca/pornnet.htm>) : *Pornography in cyberspace is pornography in society -- just broader, deeper, worse, and more of it*. Dr. Anita Taylor (Together – Integrating Sexology; powerpoint, internet). : *Cybersex is seen as a betrayal equal to actual sex or infidelity*;

criminal act in cyber space (cyber sex, cyber porn, cyber phone, cyber prostitution, cyber/virtual cohabitation etc.) in the perspective of the national development goals, as like campaign anti drug, anti corruption and anti terrorism.

3. Increasing socialization fundamental values and spirit which stipulated in the preamble of Indonesia Constitution (UUD 1945) and Vision and Mission which are stipulated in the National Development Planning, that is fundamental values/spirit of abolish colonization in all forms (included morally and cultural colonization) and spirit to build nations life freely based on morally paradigm and national cultural paradigm.

4. Increasing socialization and establishment law enforcement apparatus concerning the main objective and national morally values which are stipulated in some of regulations (inter alia, in the Act of Movie and the Act of Broadcasting).

5. juridical construction reform, these are:

- law enforcement reconstruction (or

legal thinking reform) in the context of national law reform and development policy.

- substantial legal construction to overcome juridical constraints.

- increasing scientific culture/scientific approach in the formulation process and criminal law enforcement.

Efforts on the legal thinking reform/reconstruction (point 5 above) should be done in the broad sense, to all field of criminal law enforcement. Particularly, in trying to combat cyber crime. Cyber crime could not be assumed as same as the ordinary or conventional criminal act. Ordinary or conventional doctrine and principles (those are legality principle, culpability principle, jurisdiction principle, and evidence instrument in overcoming seriously constraints in order to make solution on the kinds of cyber cases.

In related to the issues of juridical thinking reconstruction, it should be concerned the issue of could cyber sex be constructed as adultery and be caught by the Art. 284 Penal Code? If then in court practices, judge will treat

legal construction by state that cyber sex or non physical sexual intercourse as the kind of adultery as stipulated in the Art. 284 Penal Code, in my opinion, the legal construction is mention above reasonable, reminding that:

1. Art. 284 Penal Code itself not giving juridical concept of what is adultery mean? Art. 284 only state, a man/women has already married doing adultery, threaten with imprisonment not more than 9 month. What is adultery and what are the elements of it, not be formulated explicitly, it means that legally still open to interpret comprehensively and contextual (from the point of view on religious, sociologic and academic, etc.)
2. the existence of "sexual intercourse physically" only public opinion and interpretation that developed in theory/ doctrine as well as in law practices.
3. that public opinion/ doctrine/law practices based on the material / physical meaning of behavior. Meanwhile, as long as this cases have developed to the functionally/scientific concept of behavior.
4. interpretation that contrast from functional paradigm and scientific paradigm to many legal concept (as like "behavior", "things", "legal subject" and "man") has been developed and applied in the law-making and law enforcement practices.
5. some theft cases in practice has also conceptualized non-physical, e.g. the case of electronic theft. (Arrest HR May, 23, 1921) and the case of banking piercing BNI 1946 in New York Agency through computer (via transfer electronic payment system which stated by Republic Indonesia Supreme Court⁶ as "theft" (its means "take things non-physical way")
6. in many papers sources in internet is stated that cyber sex and cyberporn naturally are not different with decency or morally offences in general. The difference is only the form, the way, and the broadly consequence. Even, there is strict statement that "cyber sex is "adultery" and kinds of betrayal form of truly and actually sexual behavior.⁷

⁶Supreme Court Decision No. 1852 K./Pid/1988, December, 21, 1988.

⁷Among others, in article "Cyber Sex There are organizations out there to help you" (<http://www.Cyberaa.com>; dan <http://www.salagram.net/cyber.html> <http://www.salagram.net/cyber.html>): "For a married person to engage in this activity consti-

7. from the Islamic point of view, cyber sex identical with adultery, as stated by Dr. Muzammil H Sidiqqi (the former President of the Islamic Society of North America).⁸

8. Based on research findings and some internet sources, the negative consequences broad enough.

The other juridical thinking reform/reconstruction is the issue criminal law enforcement in the context of national law reform and development policy. This issue could be taken into consideration, because of the phenomenon on criminal law enforcement practically tends to use "horse spectacles" (kaca mata kuda), means it focus only to the problem of enforcement criminal law articles which are closely related with main issues, loosing from whole context of system or national policy. It should be reminds that penal policy in the meaning of criminal law enforcement *in abstracto* and *in concreto* as well, naturally is a part of the whole

national legal system/policy and national development policy efforts. It means that criminal law enforcement *in abstracto* (law making/law reform) and criminal law enforcement *in concreto* (law application) should be focused to promote the gaining of goals, vision, and mission of national development and the realization of national law enforcement policy. This condition is reasonable, in the perspective of "penal policy" as an integral part of "social policy".

In the National Development Planning/Policy (GBHN) 1999, stated that, Vision of national development is, "the realization of peace, democratic, justice, competitive abilities, progress and welfare of Indonesia Society in the unity Republic of Indonesia which is promoted by Indonesia men which is have of healthy, independent, faithful, obey to the Lord, good manner, love his country land, legal and environmental awareness, understanding scientific and technology, having highly working ethos and discipline" The mission are 12 point, part of it which are closely related with cultural values and national morality are (1) realizing Pancasila in community lives (2) increasing quality of faith and obey the Lord; (3) socio-cultural living with national identity.

tutes a form of adultery; From a legal viewpoint, a moral one and a religious one, it is clearly cheating. Legally speaking, it is a gray area, but only because the courts haven't caught up with the times. Some courts might define it as adultery. Others might define it as abandonment"; Catherine MacKinnon (<http://policynut.usaska.ca/pornet.htm>) : Pornography in cyberspace is pornography in society -- just broader, deeper, worse, and more of it. Dr. Anita Taylor (Together – Integrating Sexology; powerpoint, internet). : Cybersex is seen as a betrayal equal to actual sex or infidelity; Nathan Tabor, Adultery Is Killing the American Family, Sep 22, 2005 : "76 percent of women feel that phone sex or cyber-sex is the equivalent of committing adultery" (Internet source).

⁸FatwaCyber Sex & Zina, (Islamonline.net), (<http://pakistan-link.com/religion/2001/0413.html>).

In the Long Term Development Planning (RPJP) 2005–2025, the Vision and the Mission are:

The vision National Development 2005-2025 is:

“The Progress and Self-standing, justice and democratic Indonesia, with peace and united in the Unity of Indonesia Republic”

This vision tends to focus on gaining efforts to the development goals as stipulated in the Preamble of Indonesia Constitution of 1945.

The mission are:

1. Realizing Indonesia into progress and self standing country
2. Realizing Indonesia into just and democratic state
3. Realizing Indonesia into savety and unity state.

In a detail, the second mission, RPJP stated:

- Legal development is focused to the realization of national legal system based on the Pancasila and the 1945 Constitution which is included developing legal substance, legal structure, legal apparatus, software and hardware of law and encouraging highly legal feelings and legal culture of society in the context of

constitutional state, in creating just and democratic society.

- Legal substance development is focused to continuing legal product reform (to replace colonial legal system), which reflect socio-cultural and social interest of Indonesia society, and able to motivate the growth of creativities and involvement of society which are very important to realizing government administration and national development based on the Pancasila and the 1945 Constitution, which is consist of legal planning, legal formulation, legal research and legal development.

- Religious development is focused to establish the function and the role of religious as moral basis in national development and social ethics in the good and clean government administration.

In detail statement of the third mission, RPJP stated:

- Realizing nations character building into strong, competitive and highly moral which is characterized on individual and society's behavior with obedience and faith in God, good manner, tolerance, communalistic, patriotic, dynamic and scientific and technology oriented.
- The more established nation culture which indicated by

increasing civilization, dignity Indonesia human being and strongly national character and personality.

- Development and establishment national character is focused to the effort of realizing nation character and rooted social system which are unique, modern, superior ability. Those characters and personalities are combinations of nations glory values, religious, togetherness, and unity and modern universal values.

Even though the Indonesia positive criminal law right now based on the Netherlands Criminal Code (WvS), but the implementation of it, in the aspect of law enforcement, should be difference with the law enforcement in the context of colonial era, because the national legal framework is different. It means that vision and mission National Development should be placed as the guidance principles in criminal law enforcement *in concreto*, particularly in the decently and morally cases. Instead of that, the implementation of positive criminal law nowadays (the Netherlands Criminal Code) should also consider the general guidance of justice process (enforcement of law and justice) in the national legal system. In other word, the positive criminal law enforcement should be in the context of Indonesia values (in the context of national legal system).

As a part of justice process, sentencing process it should not only based on positive criminal law, but should also consider the guidance of justice process (enforcement of law and justice). Those general guidance justice process are already provided in the 1945 Constitution and the Act of Justice Authority No. 4 of the year of 2004, those are:

1. Art. 18 (2) the 1945 Constitution (the second amendment) stated:

Government recognizes and respects to the adat law unities with their traditional rights as long as their existence and appropriate with society development and the principle of Unity Republic of Indonesia which is stipulated in laws.

2. Art. 24 (1) the 1945 Constitution (the third amendment) stated:

The authority of justice is the independent authority to administered justice in the context of law enforcement and justice.

3. Art. 28D the 1945 Constitution (the second amendment) stated:

Every person has the rights for recognition, guarantee, protection, and just legal certainty and same treatment in law.

4. Art. 3 (2) the Act of Justice Authority No. 4 of the year of 2004

The State Justice agency implement and enforce law and justice based on Pancasila

5. Art. 4 (1) the Act of Justice Authority No. 4 of the year of 2004

The justice being done in the name of Justice based on the One Mighty God

6. Art. 5 (1) the Act of Justice Authority No. 4 of the year of 2004

The courts doing justice based on law with no discrimination

7. Art. 25 (1) the Act of Justice Authority No. 4 of the year of 2004

All of court decisions instead of consists of reasons and basis of its decisions, should also consists of each certain article and the related regulations or based on unwritten law resources.

8. Art. 28 (1) the Act of Justice Authority No. 4 of the year of 2004

Judge should find out, follow in and understanding legal values and justice feelings that are exist and living in society.

Based on the guiding principles above, criminal law enforcement should be not only based on formal legality principle as stipulated in

the Art 1 Criminal Code, which is only considered Acts as the source of law and source of legal certainty. What is a pity, if the Constitutional Court (Mahkamah Konstitusi) in its considerations on the decision No. 003/PUU-IV/2006, of July, 25, 2006, stated that "legal certainty according to the 1945 Constitution (the Art. 28D (1)) in the criminal law be translated as legality principle that stipulated in The Art. 1 (1) Criminal Code which consist of "lex scripta", "lex stricta" and "lex certa"..

I amnot really agreed with their legal construction mention above, based on some reasons as below:

- a. Legal certainty principle in the 1945 Constitution could not be identified as same as stipulation of the Art. 1 (1) Criminal Code. The Legal Certainty Principle in the Constitution is not identical with the soul of certainty of law, written law certainty, formal/ legal certainty.

- b. Examining the Acts should be based on the principle (including legal certainty principle) which exist in the 1945 Constitution, not based on the Criminal Code.

- c. Art. 28 D the 1945 Constitution state that:

"Every person has the rights of recognition, guarantee, protection and a just legal certainty and same treatment

before the law". It means what principles stipulated in the Constitution means not only the term of legal certainty, but "just legal certainty" and never making statement that legal certainty identical with certainty of law (formal certainty) or legality principle on the Criminal Code.

- d. The use term of "just legal certainty" in the 1945 Constitution perhaps identical with the Art. 3 (2) the Act of Justice Authority No. 4 of the year of 2004 which stated that: "State justice implement and enforce law and justice based on Pancasila" It means that in that statement stipulating of "equilibrium principles", "the substantive certainty" than formally legal certainty.
- e. The equilibrium principle could be really shown in the national legal system guiding principle. (see on the 1945 Constitution and the Act No 4 / 2004)
- f. Ignoring unwritten law on the matter of legal certainty as stipulated on the Art. 1 Criminal Code, is not really relevant with the soul of the 1945 Constitution. The unwritten law prohibited in the time of the born of legal certainty (in the French Revolution era) is "the law of the King" (commonly unwritten law). That is not the same meaning on the unwritten law in the context of Indonesia

- "people laws" or "the living law in society".

- g. Concept of legality principle as "lex scripta", "lex certa" and "lex stricta" has faced many critics. Dr. Marjanne Termorshuizen states that "the view that a *lex scripta can be certa, that is to say certain, in the sense of unambiguous, cannot be maintained. There is no such things as a legal provision which is clear and unambiguous in all circumstances*".⁹
- h. Prof. Douglas N. Husak and Craig A Callender in their publication "Wil- ful Ignorance, Knowledge, And the "Equal Culpability" thesis: A Study of the Deeper Significance of the Principles of Legality" states that, "Fidelity to law cannot be construed merely as fidelity to statutory law, but must be understood as fidelity to the principle of justice that underlie statutory law".¹⁰

That means that legality principle could not only be understood merely as formal certainty but substantive certainty.

The things that are going to be noted from the many statements above is that the criminal law enforcement on the case of cyber crime should also not only based on the criminal act formulation in the

⁹Marjanne Termorshuizen, *The principle of legality*, National Refreshing Course on Criminal Law, Semarang, Indonesia, 2006.

¹⁰Thomas Morawetz (Ed.), *Criminal Law*, Ashgate Publishing Company, Burlington, USA, 2000, p. 203 and 207.

Acts, but also takes consideration of the substance values that exist in the background of that Act formulation in one side and general national guiding principle in the other side. In handling cyber crime should also considerate "general guidings and morally values and national culture" which are stipulated in the Act of Broadcasting, the Act of Press and the Act of Movie, which are :

1. The Act of Movie No. 8/1992:

• The Art 3:

Movie industry should be focused to:

- a. p r e s e r v a t i o n , development of nations cultural values.
- b. developing manner and nations personality and increasing dignity of men.
- c., etc.
- g. continuing public order and morally feelings
- h. presentation healthy entertainment appropriately with social living norms, in have a nation and country.

• the Art. 4

Movie industry in Indonesia administer in the context of maintaining, developing nations culture.

2. The Act of Broadcasting No. 32/2002 :

"Consider" sub-e: that broadcasting which is transmitted and received simultaneously and free has great effects to the opinion formulation, attitudes, and mass behavior, the administration of broadcasting should has responsible in maintaining morally values, ethics, culture, personality and unity of nations based on the One Mighty God values and the Just and Civilization Humanity values.

The Art. 3 :

Broadcasting being administered with purpose to strengthening national integrity, building of manner and personality of faithful and obey the Lord nations, ... etc.

The Art. 5

Broadcasting is focused for:

- highly promoting the realization of Pancasila and the 1945 Constitution.
- Keeping and increasing morality and religiosity values and nation personality.
- Increasing human resources qualities and
- Developing national culture.

3. The Art of Press No. 40/1999

The Art. 5 (1) National Press obliges to give information on event and

opinion that should always respect to religious norms and morally senses of society with presumption of innocent principle.

Reminding to those national general morality, the purpose of criminal law reconstruction being realized in facing cybercrime (cyber sex/cyber porn).

Other side of it, it should be paid attention also in criminal law enforcement reconstruction to the issues of morality in cybercrime factually. In fact nowadays, economic interests have ride along in business entertainment which sharp smelt sexual and pornography. Even sex and pornography issues have been packed so clever not only in the course of entertainment and art merely, but to be business commodities and develop to be cyber sex/cyberporn industry.

Based on some data and information in internet, this kind of industry has so surprisingly increase and to be business (e-commerce) that promises to gain big profit and success.¹¹ According Jerry Ropelato (Pornography statistics 2007) the worldwide pornography revenues in the year of 2006 almost \$ 97 billions, and this revenues more than the accumulation revenues of all monopoly rights in football, baseball, basket ball professional and more than accumulation revenues of top technology enterprises in the worldwide (Microsoft, Google, Amazon, eBay, Yahoo, Apple, Netflix and EarthLink). In USA, revenues on the pornography industry in the year of 2006 reached \$ 13.22 billions and 2005 at about \$ 12,62 billions. This American revenues is far more than the accumulation revenues of ABC, CBS and NBC (only \$ 6,2 billions).¹²

¹¹Donna Rice Hughes (*Internet Dangers and Solution*, 1 September 2001, powerpoint internet). *Online pornography is the first consistently successful e-commerce product* (C-net, 4/28,1999); Jeremy Ropelato (*Pornography Statistics 2007*, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>) : *Porn revenue is larger than all combined revenues of all professional football, baseball and basketball franchises.; US porn revenue exceeds the combined revenues of ABC, CBS, and NBC (6.2 billion); Child pornography generates \$3 billion annually.*

¹²Jeremy Ropelato, *Pornography Statistics 2007: The pornography industry is larger than the revenues of the top technology companies combined: Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink; US porn revenue exceeds the combined revenues of ABC, CBS, and NBC.* Donna Rice Hughes, *Internet Safety*, <http://www.protectkids.com/donna-ricerhughes/powerpoints/CrestedButteSchoolFeb2006>.

Instead of the rapidly increasing cyber sex/cyber porn industry, other facts should also be considered, some research findings and academic analysis on the negative effects of cyber sex/cyberporn which has already done by some developing countries. More seriously than that is the world worried to these problems of cybercrime, cyber sex and cyberporn (especially child sexual exploitation and child pornography) that has already discussed in some international submits.¹³



¹³Among others, in the UN Congress on "The Prevention of Crime and the Treatment of Offenders" (the 8th Congress, 1990; the 10th Congress, 2000; and the 11th Congress, 2005); in *The first World Congress Against Commercial Sexual Exploitation of Children*, Stockholm, 27 - 31 August 1996; *International Conference on "Combatting Child Pornography on the Internet"*, Vienna, Hofburg, 29 September - 1 October 1999; *Cybercrime Convention 2001* in Budapest; and *the Cyber Secrets Conference on Pornography*, Brigham Young University, 18 February 2003.