

Criminal Policy for Users of Services Prostitution to Achieve Substantial Justice

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Abstract

Prostitution is a form of sexual deviation and disease of society and also against Indonesian morality. Therefore, its existence is a problem for the Indonesian nation. One of the causes is that criminal formulation policies are set within KUHP specifically article 296 jo. article 506 only discussing about criminal responsibility for a pimp. The other parties involved in such prostitution as prostitutes (sex workers) and client of prostitutes are not convicted unless one or both are committed in marriage, so it can be convicted under article 284 which qualifies for a felony in adultery. Based on these issues, this research aims to learn and analyze criminal policy for client of prostitutes in positive laws in Indonesia and criminal policy for client of prostitutes to realize substantial justice. The results of this research show that criminal policy for client of prostitutes in positive laws is not optimal. The arrangement of prostitution in particular article 296 jo. 506 KUHP only discuss about criminal responsibility for a pimp, so there is a legal vacuum in Indonesia's penal formulation policy that regulates prostitution. The government's policy to close brothels in Indonesia still raises problems as it is not followed by reformulation of criminal laws that regulate prostitution crimes. Thus, it has been necessary for criminal policy either by penal or non-penal efforts to realize the laws expected by society and to attain substantial justice (the perfect justice). The author's recommendation would be to include new legal norms governing



prostitution crimes and encourage governments to legitimize RUU KUHP and RUU PKS.

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Praktik prostitusi ini menjadi problematika tersendiri bagi bangsa Indonesia. Salah satu penyebabnya adalah rumusan pidana yang diatur dalam KUHP khususnya Pasal 296 jo. Pasal 506 hanya berkaitan dengan pertanggungjawaban pidana muncikari. Pihak lain seperti pekerja seks komersial dan pengguna jasa prostitusi tidak dimintai pertanggungjawaban, kecuali bila salah satu terikat hubungan perkawinan (Pasal 284 KUHP). Penelitian ini ditujukan untuk mengetahui dan menganalisis mengenai kebijakan kriminal bagi pengguna jasa prostitusi dalam hukum positif di Indonesia dan kebijakan kriminal bagi pengguna jasa prostitusi yang berkeadilan substansial. Hasil penelitian menunjukkan bahwa kriminal bagi pengguna jasa prostitusi dalam hukum positif Indonesia belum optimal. Pengaturan mengenai prostitusi khususnya dalam Pasal 296 jo. Pasal 506 KUHP hanya berkaitan dengan pertanggungjawaban pidana bagi muncikari (hal ini didasarkan karena KUHP/WvS masih dipengaruhi budaya hukum Belanda dan Prancis), sehingga menimbulkan adanya kekosongan hukum dalam kebijakan formulasi hukum pidana di Indonesia yang mengatur terkait praktik prostitusi. Upaya non penal melalui penutupan lokalisasi juga masih menyisakan permasalahan karena tidak diikuti dengan reformulasi hukum pidana yang mengatur terkait kejahatan prostitusi. Oleh karenanya, dibutuhkan kebijakan kriminal baik melalui pendekatan penal maupun non penal yang berkeadilan substansial untuk mewujudkan keadilan yang dicita-citakan masyarakat. Adapun rekomendasi penulis adalah dengan memasukkan norma hukum baru yang mengatur mengenai kejahatan prostitusi dan mendorong pengesahan RUU KUHP dan RUU PKS.

Keywords: prostitution, client of prostitute or sex workers, criminal policy, substantial justice

Introduction

Commercialization of sex or prostitution has developed in Indonesia since the Dutch colonial period. At that time, prostitution had been entered all walks of life. Sex business takes place in big cities and generally has a



special place called “*lokalisasi*”. Commercial sex workers work in an organized manner and are supervised by pimps or pimps. However, not a few commercial sex workers also choose not to join in Localization and practice individually in various places covertly such as hotels, guesthouses, massage parlors, or other places (Erianjoni and Ikhwan 2012).

Based on data from the Ministry of Social Affairs of the Republic of Indonesia, from 2013 to 2018, 168 *lokalisasi* have been established in 24 provinces and 76 districts or cities, and there are forty thousand commercial sex workers who live in these localizations spread throughout Indonesia. has been closed throughout 2016-2019 in order to make Indonesia free from the Localization of prostitution (Mediani 2018).

The problem of prostitution also affects children. The Indonesian Child Protection Commission (KPAI) released the number of cases of child prostitution reaching 93 cases in 2018. The cases are spread almost evenly in various parts of Indonesia, with the presentation of the number of victims in each case on average above three people. Of the cases described, 80 percent of them are through online recruitment. Entering the digital era, social phenomena such as prostitution have shown their role in adopting technology to facilitate and develop this immoral business (Alaidrus 2019).

In addition, there are also cases that are quite interesting the arrest of a society that is the case of public figures (artist) VA for alleged cases of online prostitution. In this case, VA through pimps is considered to have showing the sensuality of women through photographs. On this case, VA was charged under Article 27 Paragraph (1) of Law No. 11 Year 2008 Jo. Article 45 Paragraph (1) Law Number 19 Years 2016 regarding amendments to Law Number 11 of 2008 about Information and Electronic Transactions Jo. Article 55 Paragraph (1) 1st KUHP (Kurniawan 2019).

Data from the Ministry of Health shows the cumulative number of reported HIV infections until June 2018 as many as 301,959 people and most are found in the 25-49year age group and are reported to continue to increase every year (Rokom 2018). The increase in HIV/AIDS certainly cannot be separated from the many practices of prostitution.



Basically, criminal acts related to prostitution have been contained in Article 296 of the Criminal Code, which threatens with imprisonment for anyone whose work or habit intentionally commits or facilitates obscene acts of others with third persons (Soedjono 1977:60). Then Article 506 of the Criminal Code regulates criminal acts of pimps who take advantage of acts of prostitution (Soedjono 1977:110). Apart from these articles, there are also several other articles in the Criminal Code relating to prostitution, namely Article 297 which regulates the trafficking of women and boys to become sex workers; and Article 295 which regulates provisions similar to Article 296 but differs in the object, which in Article 295 is addressed to minors (Pradana 2015).

The provisions in the Criminal Code regarding moral offenses as in Article 281 to Article 303, in particular Article 296 and Article 506 do not specifically regulate the criminalization of acts of commercial sex workers and service users prostitution, but only ensnares brothel owners, pimps and brokers or brokers of prostitution. Meanwhile, arrangements outside the Criminal Code, namely Law Number 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons (hereinafter referred to as the PTPPO Law) can only criminalize a person who benefits from trafficking in persons (pimps) as stated in Article 2 Paragraph (1) and Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection only criminalizes users of sexual exploitation of children in Article 66 Paragraph (3) jo. Article 66 Paragraph (1) whereas if the person committing the crime is a child, then Article 26 Paragraph (1) of the Juvenile Court Law is threatened (Aditya 2016).

The criminal law policy on prostitution cases is only focused on pimps in accordance with what is contained in the Criminal Code and regulations outside the Criminal Code. Meanwhile, in the world of prostitution, there are other subjects who are also fully involved in the process of committing these immoral acts, one of which is the users of prostitution services. Users of prostitution services can only be penalized if they fulfill the elements contained in Article 284 of the Criminal Code which classifies their actions as adultery, where this article is a complaint offense so that they cannot be prosecuted if the wife or husband who is harmed does not make a complaint.



The existence of inequality that causes injustice and legal uncertainty, then gave rise to the idea of the Draft Law on the Criminal Code (hereinafter referred to as the Criminal Code Bill) and the Draft Law on the Elimination of Sexual Violence (hereinafter referred to as the PKS Bill). In both drafts, there is a progressiveness of the law that regulates the criminalization policy for users of prostitution services. Article 417 Paragraph (1) of the Criminal Code Bill reads:

(1) Any person who has sexual intercourse with a person who is not his husband or wife shall be punished for adultery with a maximum imprisonment of 1 (one) year or a category II fine.

Then, the PKS Bill is explained in Article 13 which reads:

"Sexual exploitation as referred to in Article 11 Paragraph (2) letter b is sexual violence carried out in the form of violence, threats of violence, deceit, a series of lies, name or identity, or dignity. false, or abuse of trust, so that someone has sexual relations with him or another person and/or acts that take advantage of that person's body related to sexual desire, with the intention of benefiting oneself and/or others."

Criminal Policy for Users of Prostitution Services in Positive Law in Indonesia

The government through the Ministry of Social Affairs has carried out eradication efforts in stages by closing as many as 156 of the 168 localizations of prostitution in Indonesia during the period from 2016 to 2019 (Handayani 2016). These political commitments were responded to positively by most people who view the commercialization of sex as a practice that is contrary to religious norms and social norms of society and has resulted in various negative impacts on the resilience of families and communities. However, on the other hand, some community groups responded pessimistically to the plan because it only dealt with superficial problems considering the complexity of prostitution in Indonesia and the government's lack of consistency in preventing and handling sex commercialization in Indonesia. For example, state regulations regarding the prohibition of prostitution have been regulated in Article 296 and Article 506 of the Criminal Code (KUHP), but these two articles can only be used to criminalize parties who organize or provide prostitution services (pimps) (Rusyidi and Nurwati 2019).



This closure is also considered less effective due to several things including: a) closing the Localization does not necessarily make demand from users of sex services also decreased; b) closing localization does not discourage someone from becoming a provider sex services, this is because the closure of the *lokalisasi* does not have a correlation with things that cause a person to want become commercial sex workers such as low levels of education, difficulty finding work, poverty, and so on; c) there is a market place is Another digital channels. This shows that prostitution as a commodity can find other channels or media, namely the digital world, meaning that the localization closure policy can impact on the spread of online prostitution networks that are more difficult to be watched (Rusyidi and Nurwati 2019).

LBH APIK Semarang data shows that at least there are 5 cases related to prostitution that have been handled. However, the partner (victim) prefers the mediation process, because partners feel marginalized in the legal process when violence experienced by partners of users of prostitution services or service providers reported prostitution to the police. Director of LBH APIK Semarang also stated that the main obstacle to dealing with prostitution is the unavailability of regulations governing sanctions or penalties for users of prostitution services (Interview with Raden Raya Ayu Hermawati Sasongko).

Cases regarding prostitution have also attracted the attention of society in recent years. One case is enough phenomenal among the public is the determination of the artist VA as a suspect by the Regional Police (Polda) East Java in the case of online prostitution. VA is subject to Article 27 Paragraph 1 UU ITE with the consideration that he is directly exploiting himself to pimps like sending private photos from the VA that he distributed himself to several suspected pimps who Previously, he was arrested by the East Java Regional Police. In addition, ES and TN also made suspects where the two, according to the Direskrimsus Polda East Java Kombes Akhmad Yusep Gunawan promoted via Instagram, facilitate communication and conduct transactions (in other words plays a pimp). Contrary to this, entrepreneurs who are alleged to be users of prostitution services are kept confidential and their identity protected and cannot be subject to criminal.



A similar case also happened to one of the famous pimps Robby Abbas. He was picked up at a 5-star hotel in the Kuningan area, South Jakarta, on May 8, 2015, and sentenced to 1 year in prison 4 months for being proven to peddle people for personal gain (Abdi 2019). Robby Abbas used to market PSK at a fairly high price which ranges from Rp. 80 million to Rp. 200 million for a duration of three hours o'clock. Because the PSK rates offered are very high, buyers who served by Robby is generally not a member of the community middle-low income in the capital city. Robby is known for serving the sales of more than 200 top sex workers (Linggasari 2015).

Problems related to prostitution are problems of high complexity. Such that previously explained that this is influenced by several factors, including high poverty rates, development index low human, lack of education which causes many people to choose and are interested in jobs that related to the commercialization of sex. Not only the number of requests from users of prostitution services is also high because one of them is the absence of a legal umbrella that sufficient to ensnare the perpetrators involved in prostitution. Even though it is clear that prostitution is an act that is contrary to it with the values of divinity and humanity embraced by the nation Indonesia.

A legal system in its actual operation is complex organisms in which structure, substance and culture interact. This is what is known as the Legal System Theory of Lawrence Friedman where the legal system consists of three components which are bound to each other, namely the legal structure, legal substance and legal culture.

The Criminal Code (KUHP) as the parent Criminal law in Indonesia is a legacy of colonial law Dutch. Legal substance contained in the Criminal Code or *WvS* adapted to the legal culture of the Dutch society, which of course has a significant difference with the legal culture in Indonesia. This is felt in the application of articles relating to the crime of prostitution, namely Article 296 and Article 506 of the Criminal Code. Second article it can only be used to ensnare pimps or pimps so that both commercial sex workers and users of prostitution services cannot be punished or in other words cannot convicted. In fact, both of them are fully involved in the



practice of prostitution and participate in the perpetrators of the practice of prostitution.

In addition, prostitution is also caused by the lax formulation of adultery in Article 284 of the Criminal Code. The article is a complaint offense so that it seems as if the police (who supervises) the man is only his wife at home. There were no other cops when he was outside. In fact, a wife may be controlled and threatened. This means that the position of women is weak in the legal structure in Indonesia. The weakness of Article 284 of the Criminal Code is one of the causes of rampant prostitution where the practice of prostitution raises parties involved in prostitution (pimps, commercial sex workers and users of prostitution services) (Interview with Barda Nawawi Arief).

In the Netherlands, buying and selling sex is legal action as long as it involves "sex between mutually agree." (Holigan 2019). Therefore, the norms contained in Article 296 and Article 506 of the Criminal Code are norms that are influenced by prostitution policies that are both regulatory and abolitionist. Both policies consider that prostitution is an act legal and against the actions of pimps. Only difference is that the policy is regulatory, state replace the role of pimps to make supervision easier and training of commercial sex workers. Whereas abolitionist policy, against all forms of role from third parties.

This then creates legal uncertainty considering Indonesia as a country that believes in values divinity and humanity as well as Pancasila which is the philosophical basis in law and in the state becomes contradictory to the actions a state that actually seems to legalize the practice of prostitution through existing criminal law formulation policies and are not in accordance with the Indonesian morality. Closing the Localization that became the program government with the aim of eliminating the practice of prostitution not in line considering the main Indonesian criminal law in particular regulations governing prostitution are still influenced by abolitionist policies that legalize the practice of prostitution and only condemn third parties in prostitution.

As stated by Roscoe Pound, criminal liability is an obligation to pay the retaliation that the perpetrator will receive from someone who has been harmed. This responsibility relates to the mechanism that determines the



criminality of the maker (Atmasasmita 2000:65). The form of criminal liability for pimps as third parties in the cycle of prostitution is regulated in Article 296 and Article 506 of the Criminal Code. Article 296 of the Criminal Code states, "Whoever intentionally connects or facilitates obscene acts by others with other people, and makes it a search or habit, is threatened with a maximum imprisonment of one year and four months or a maximum fine of one thousand rupiahs." Meanwhile, Article 506 of the Criminal Code states, "Whoever takes advantage of the obscene act of a woman and makes it a search, is threatened with a maximum imprisonment of one year." Based on the sound of the two articles, the study of Article 296 and Article 506 of the Criminal Code is based on three main aspects of criminal law, namely criminal acts *strafbaarfeit*, criminal responsibility and crime.

In addition to the Criminal Code, there are laws outside the Criminal Code that can made *lex specialis* to ensnare pimps, including: The Criminal Act of Trafficking in Persons (TPPO) and Child protection laws. Basically, Article 297 of the Criminal Code has determined the prohibition of trafficking in women and children the male is immature and qualifies the act as a crime. However, the provisions of the Criminal Code do not formulate a definition of trafficking in persons that is strictly legal and has light sanctions so that Law Number 21 was formed 2007 concerning Eradication of the Crime of Trafficking in Persons which regulates specifically and comprehensively regarding criminal acts trafficking in persons (human trafficking). Prostitution as one forms of social deviation can also be subject to articles in the Act Law on the Crime of Trafficking in Persons if the process recruitment using threats of violence, fraud or the like so that it fulfills the formulation of the offense contained in Article 2 Paragraph (1) Law on the Crime of Trafficking in Persons.

Article 284 Paragraph (1) of the Criminal Code is an article that regulates the offense of adultery or what is commonly referred to as *mukah (overspel)* (Pratama 2016). This offense can be imposed on commercial sex workers and users of prostitution services if one of the providers and users of prostitution services or both are bound in a legal marriage. However, this offense is included in the category of absolute complaint offense so that this offense can only be processed if it is reported by a person who feels aggrieved or has become a victim. When referring to the provisions



of the current Criminal Code, there are 4 (four) conditions so that a person can be declared to have committed adultery, namely:

1. Having intercourse with a woman or a man who is not her husband or not his wife (this person does not have to be married);
2. He is not subject to Article 27 of the Civil Code;
3. The partner who has intercourse is subject to Article 27 of the Civil Code;
4. It is known that the partner having intercourse is already married or married, and the provisions of Article 27 of the Civil Code apply to the partner having intercourse;
5. Article 27 BW (*Burgelijk Wetboek*) regulates the principle of monogamy which is regulated in marriage. If we look again, the adultery provisions in the current Criminal Code aim to criminalize the perpetrators of infidelity in which one or both of the perpetrators of sexual intercourse are people who are already bound by previous marriage ties. In addition, Article 284 of the Criminal Code is an absolute complaint offense which does not allow the act to be punished if no one complains from the injured party (husband or wife who has been betrayed by their partner) and, as long as the case has not been examined in court. the complaint can always be withdrawn (Ajie 2020).

In addition to using Article 284 of the Criminal Code, forms of criminal liability for commercial sex workers are also contained in Article 27 Paragraph (1) and Article 45 Paragraph (1) in the Electronic Information and Transactions Law (ITE). This article can be applied if the parties are involved in online prostitution (online). Basically, the ITE Law does not explicitly mention online prostitution, only Article 27 states that the act of distributing and/or transmitting and/or making accessible Electronic Information and/or Electronic Documents containing content that violates decency is prohibited. That is, the article can be used to ensnare anyone involved in the practice of prostitution on the condition that the decency is disseminated through electronic media in accordance with the restrictions contained in Law Number 19 of 2016 concerning Electronic Information and Transactions.

There is no explicit and specific regulation relating to the punishment of users of prostitution services. This means that the 'person' who in this case



is a user of prostitution services cannot be punished because the 'action' he has committed is not a crime (*delik*) (Baehaqi 2014; Nurdin 2017). This certainly raises questions for society and creates legal uncertainty. How is it possible that prostitution which is involved in immoral acts and is seen as bad by the community, based on the principle of legality, can be considered not to be a disgraceful act or a criminal act because it is not regulated by law. The existence of articles relating to the crime of prostitution, especially Article 296 and Article 506 of the Criminal Code, both editorially and substantially shows that there is still a gap for parties involved in prostitution, especially users of prostitution services, to escape punishment or sanctions in the form of punishment for them.

One of the main problems of the Indonesian people is that the main criminal law (codification) has not been replaced in the old Criminal Code, which is used as a barometer instrument for Indonesia's national criminal law. Along with the rapid development of Indonesian society and the strong demands for justice, the formulation of the criminal law contained in the Criminal Code is no longer able to be used as a basis for overcoming the problem of crime and demands for justice. Likewise in dealing with the crime of prostitution. The Criminal Code adheres to the principle of abolitionist policies and legalizes the practice of prostitution because it is influenced by the legal culture of the Netherlands and France, which adheres to the values of individualism and liberalism (because it is included in The Romano-Germanic Family).

Indonesia as a country that makes Pancasila a grundnorm and a *staatsfundamentalnorm* must have a firm attitude in viewing the practice of prostitution in Indonesia. The absence of rules or regulations that regulate criminal liability for users of prostitution services actually shows a vacuum legal and makes Indonesia seem to state that the practice of prostitution is legal and only criminalizes the actions of third parties in prostitution. The government must firmly state that prostitution is an immoral act and is not in accordance with the values adopted by the Indonesian people so that parties who are fully involved in prostitution must be held accountable without exception. So, it takes a policy that can be used to address the problems associated with prostitution.



Criminal Policy for Users of Prostitution Services with Substantial Justice

Based on the previous discussion, we come to the conclusion that there is a legal vacuum in the criminal law policy (penal policy) regarding prostitution in Indonesia, especially with regard to the criminal liability of users of prostitution services. One of the main reasons is that Indonesia still maintains the Criminal Code, which is the legacy of the Dutch colonial as the parent of the national criminal law in Indonesia.

What needs to be taken into account is that the legal system adopted in Indonesia is basically not just a system civil law. There are four legal systems that have a major influence on the sustainability of law in Indonesia, namely Continental European law (*civil law*), Anglo Saxon (law common law), customary law and Islamic law. Therefore, the law must pay attention to the values of morality, religion, and customs that apply in Indonesia, so that they are in accordance with the needs of the community. The regulation of offenses against decency contained in Chapter II of the Criminal Code shows that the law regulated in it still does not meet the aspects of justice, usefulness and legal certainty considering that the formation of the law is not based on the values adopted by (*living law*) the Indonesian people. One example of the problems that arise is the existence of a legal vacuum related to criminal liability for users of prostitution services.

The practice of prostitution is an act that cannot be justified and is philosophically contrary to Pancasila, especially the first and second precepts. Prostitution is an act related to sexual intercourse outside of marriage, which in the view of Islam can be categorized as part of the act of adultery (Muslich 2005:3). Adultery is classified as an unlawful act. This is stated in QS. Al-Isra Verse 32 (Jassin 1977:429, 270). However, Islamic law stipulates that if the law has dies because all conditions are not fulfilled or there is one doubt, but the implementation of a heinous act, report or damage to honor is strong, then this condition requires that be applied *takzir* to the perpetrator (Jauhar 2009:138; Sahroji 2018). That is, if the law *had* to be unenforceable, then the state is required to formulate regulations relating to sanction the perpetrators of adultery (Rokhmadi 2019).



Therefore, we need a policy that can be used to overcome the problems of prostitution law in Indonesia. The policy is a criminal policy that must be adapted to the spirit of Pancasila which upholds divine values and human values. Criminal policy as stated by Sudarto quoted by Barda Nawawi Arief stated that criminal policy is an effort to tackle crime, which is called criminal policy which means a rational effort from the community in tackling crime or criminal acts (Arief 2008:1). Furthermore, Sudarto also defines criminal policy in a broader sense (which he took from Jorgen Jepsen), namely the overall policy carried out through legislation and official bodies aimed at enforcing the central norms of society (Sudarto 2010:113).

Criminal policy is essentially also an integral part of social policy that is carried out both by using criminal law policies and non-penal, but must pay attention to and lead to the achievement of the objectives of the social policy by supporting the goals of efforts to achieve public welfare. Social welfare and community protection efforts (Arief 2001:74). Barda Nawawi Arief stated that the most rational and strategic effort in tackling the crime of prostitution is an effort through non-penal means as a preventive effort against the crime itself where the main target is to deal with the conducive factors that cause the practice of prostitution. The conducive factors, among others, are centered on problems of social conditions that directly or indirectly develop the practice of prostitution. This is a logical form where tackling crime with prevention efforts through the causes of the crime. Like a tree, this non-penal effort is an effort to overcome crime through its roots before the crime itself occurs. Non penal efforts have basically been done by the government through the Indonesian program clean the brothel in 2019.

Criminal Policy for users of prostitutes can be realized in the form of criminal law policy which is good and just. There needs to be a reformulation of regulation legislation as a form of criminal law reform. There are three important things to be aware of criminal law that is a crime, criminal liability as well as criminal and conviction that each is a sub-system and also the pillars of the entire criminal system building, namely, crime, Criminal Responsibility Criminal responsibility, and Criminal and Criminal Law.



Definition of the criminal act itself is the basic understanding in criminal law where the definition of a crime then gives rise to two streams, namely monistic and dualistic. The basic difference between the two schools lies in the separation or unification between criminal act and criminal responsibility. However, almost all of them agree that criminal acts cannot be separated from the existence of elements of unlawful acts and mistakes. In this case, the author focuses on the definition put forward by Vreij that an act in the form of a criminal act (Arief 2001:61), namely that there is an element of being against the law and wrongdoing creates a sub-social situation where there are at least four environments that are affected by an offense:

1. The maker himself has damage to him;
2. The victim; there is a feeling of discontent;
3. Nearby environment; there is a will to imitate doing evil; d. The general public: feelings of anxiety. Based on the Vreij theory, the actions of users of prostitution services can be categorized as criminal acts (which can be punished). This is because there are elements of against the law and mistakes, as well as the existence of sub-social elements which Vreij considers to be a kind of "damage to law and order." Users of prostitution services also take part in carrying out and launching a whole series of activities in prostitution.

Criminal Responsibility Criminal responsibility is a very important substance along with the problem of regulating criminal acts. Criminal responsibility is the implementation of the idea of a balance between the principle of no punishment without fault (the principal culpability or *straf Zonder geen principe Schuld*) which is a principle of humanity as a partner of the legality principle, which is a principle of society. Given this principle, a person can only be convicted if he is found guilty of committing criminal offenses both active and passive process outlined in the legislation. Therefore, the concept of criminal responsibility relates to the mechanism that determines the convict of the maker.

In essence, criminal liability is a mechanism built by criminal law to react to violations of the 'agreement to refuse' a certain act. The community's rejection of an act is manifested in the form of a prohibition (and a threat of punishment) for the act. This is a reflection that the people through the



state have denounced the act (Huda 2015:66, 71). So, based on the reality in society, prostitution is a despicable act and cannot be justified and also has a negative impact in terms of morality, health, and others. If Roscoe Pound defines criminal liability as an obligation to pay the retaliation that the perpetrator will receive from someone who has been harmed (Atmasasmita 2000:65). So, it is proper for users of prostitution services to be held accountable for the damage they have done. This is because the accountability carried out is not only related to legal issues but also concerns the issue of moral values or decency that exist in a society.

Criminal liability can also mean imposing reproach on the maker because of his actions that violate the prohibition or cause prohibited conditions. Although legally speaking, the act committed by users of prostitution services is not a crime, but rather from an analysis related to accountability. So that if criminal responsibility involves the process of transferring the reproach that exists in the crime to the maker. Accountability for someone in criminal law is to continue objectively reproach on criminal acts subjectively to the maker.³⁶ So, it is appropriate that the reproach for the actions committed by the users of prostitution services is regulated in the law to be passed on to the users of prostitution services.

Criminal and Criminal Law, basically, the terms of sentencing are based on two very fundamental principles in criminal law, namely the principle of legality and the principle of culpability. In other words, the main idea regarding sentencing cannot be separated from the two pillars, namely regarding criminal acts and criminal responsibility as previously stated. Sentencing is the most important part in criminal law because it is the culmination of the entire process of holding accountable someone who has been guilty of a crime. Criminal law without punishment means to declare a person guilty without any definite consequences for his guilt. Thus, the conception of guilt has a significant influence on the imposition of punishment and the process of its implementation. If the error is understood as 'reproachable', then punishment is 'the embodiment of the reproach' (Huda 2015:129).

If we return to the legal umbrella of prostitution in Indonesia, then punishment can only be carried out against prostitution service providers



(pimps) because it has been regulated in Article 296 and Article 506 of the Criminal Code. The punishment is in the form of imprisonment or a fine which is one of the main types of crime regulated in the Criminal Code. In addition to these two articles, users of prostitution services and workers commercial sex can be subject to Article 284 of the Criminal Code, which is included in the category of adultery. This article also has a weakness where one or both of them must be bound in a legal marriage, and this crime is included in the category of complaint offense.

Therefore, based on the aspects of the criminal act and criminal responsibility of users of prostitution services that have been described previously, it is necessary to have a punishment as an embodiment of the reproach for the actions of users of prostitution services as well as a juridical form of the reproach. The importance of building a new legal concept through criminal policies for users of prostitution services as an effort to tackle crime and realize substantial justice aspired by the community.

Establishing an act that was originally not a criminal act to become a criminal act, it is necessary to change or reform the law, especially to the rules regarding moral offenses (crimes of prostitution) in positive law in Indonesia. The urgency of this policy is based on the interest to reduce the number of prostitution crimes to be higher and is a form of crime prevention efforts. Basically, the issue of punishment for users of prostitution services has been going on for quite a long time. This has also received a response with the emergence of the Draft Criminal Code (hereinafter referred to as the Criminal Code Bill) which regulates the expansion of adultery and the Draft Law on the Elimination of Sexual Violence (hereinafter referred to as the Bill on the Elimination of Sexual Violence).

The state of criminal law has aroused the awareness of the Indonesian people about the importance of comprehensive criminal law reform. Efforts to realize this desire have been started since 1963 with the drafting of the Criminal Code Bill. The policy for the formation of the Indonesian National Criminal Code can be the basis for building the Indonesian national criminal law system as a manifestation of the desire to realize the mission of decolonizing the colonial legacy of the Criminal Code,



consolidation of criminal law, and adaptation and harmonization of legal developments that occur both as a result of developments in the field of science and technology. knowledge of criminal law as well as the development of values, standards, and norms who live and develop in the life of the Indonesian legal community and the international community, as well as a reflection of responsible national sovereignty (privilege, control and responsibility).

In the Draft Criminal Code, criminal law norms are reformulated and adapted to the moral values of the Indonesian legal community (related to the concept of adultery and decency). Therefore, it is also important to include the role of religious elements in it. This is in line with the opinion of Oemar Senoadji which states that in filling and directing moral offenses, religious elements should play a role. In this regard, the prohibition of prostitution is regulated in Chapter XV concerning the Crime of Morality Part Four (adultery) Article 417 Paragraphs (1) and (2) of the Draft Criminal Code which reads:

“(2) Anyone who has intercourse with a person who is not a husband or his wife is sentenced for adultery with a maximum imprisonment of 1 (one) year or a category II fine. The criminal act as referred to in paragraph (1) shall not be prosecuted except on the complaint of the husband, wife, parents, or children.”

Elucidation of Article 417:

“(1) What is meant by "not husband or wife" are: a) a man who is in a marriage bond has intercourse with a woman who is not his wife; b) a woman who is in a marriage bond has intercourse with a man who is not her husband; c) a man who is not in a marriage bond has intercourse with a woman, even though it is known that the woman is in a marriage bond; d) d. a woman who is not in a marriage bond has intercourse with a man, even though it is known that the man is in a marriage bond; or e) men and women who are not bound by marriage, have intercourse.”

“(2) What is meant by "children" in this provision are biological children who are 16 (sixteen) years old. “

Category II fine according to Article 79 Paragraph (1) Letter b of the Draft Criminal Code is Rp. 10,000,000.00 (ten million rupiah). From the explanation of Article 417 Paragraphs (1) and (2) of the Criminal Code Bill, it can be seen that there is an expansion of the meaning of adultery. The



provisions related to the offense of adultery were originally regulated in Article 284 of the Criminal Code, which emphasizes that it is said to be 'zina' only if one or both of those who have sexual relations outside of legal marriage are bound by marriage bonds. Meanwhile, the Draft Criminal Code makes criminal law reforms that are adapted to the culture and norms that develop in society so that the meaning of 'zina' in Article 284 of the Criminal Code is expanded. This expansion can later have implications for users of prostitution services. Although basically, there is a significant difference between prostitution and adultery, the article can still be used to ensnare users of prostitution services even though the user is not bound by marriage bonds. Unfortunately, this offense is included in the complaint offense so that the handling can be less than optimal if the party who can report does not feel aggrieved.

In addition to the Draft Criminal Code, the author also found that there are articles that can be used to criminalize users of prostitution services in the Bill on the Elimination of Sexual Violence. This is explained in Article 13 which reads:

"Sexual exploitation as referred to in Article 11 Paragraph (2) Letter b is sexual violence carried out in the form of violence, threats of violence, deceit, a series of lies, names or identities, or false dignity, or abuse of trust, so that someone has sexual relations with him or another person and/or acts that take advantage of that person's body related to sexual desire, with the intention of benefiting oneself and/or others."

"Article 11: (1) Everyone is prohibited from committing sexual violence. (2) Sexual violence as referred to in paragraph (1) consists of: a. sexual harassment; b. sexual exploitation; c. forced contraception; d. forced abortion; e. rape; f. forced marriage; g. forced prostitution; h. sexual slavery; and/or i. sexual abuse, (3) Sexual violence as referred to in paragraph (1) includes incidents of sexual violence within the scope of personal, household, work relations, public relations, and other special situations."

The provisions in Article 13 of the Bill on the Elimination of Sexual Violence can be used to ensnare users of prostitution services. Unfortunately, the Draft Law on the Elimination of Sexual Violence has been included in the National Legislation Program (Prolegnas) since 2016 but has not been ratified until now, as well as the Draft Criminal Code. Both of these designs are still reaping the pros and cons that hinder their ratification.



However, according to the author, these two drafts are not yet firm enough to address the problem of prostitution. These two drafts do not specifically address the crime of prostitution and make it a special offense. The existence of problems caused by the imperfection of a statutory regulation will actually hinder and hinder the law enforcement process. Considering that laws and regulations are also the main component that has a major influence in the law enforcement process.

Punishment of parties involved in prostitution is not only a basis for justification of the crime, namely retaliation for actions that are detrimental and violates norms, but must pay attention to what is to be achieved with the punishment. According to Pellegrino Rossi, the purpose of the crime is to improve public order. The punishment must be able to provide benefits to the community, this crime makes a warning to the community so that they have a fear of committing and engaging in the practice of prostitution. Criminals are given not only because people commit crimes but also as orders so that someone does not commit crimes (Aditya 2016:20).

By incorporating new norms regarding prostitution into the laws and regulations in Indonesia, especially the Criminal Code, is a form of legal progress. The existence of a more specific, specific and firm regulation on the crime of prostitution is expected to be able to reduce the number of prostitutions in Indonesia. According to Satjipto Rahardjo, the law is not a final (*schemefinite scheme*), but continues to move, change and follow the dynamics of human life. Therefore, the law must continue to be dissected and explored through progressive efforts to reach the light of truth in achieving justice (Rahardjo 2010:vii). In principle, progressive law is based on two basic components of law, namely rules and behavior (Rahardjo 2006:4).

According to Lawrence Friedman, the legal elements consist of legal structure, legal substance and legal culture. These elements have a mutually influencing relationship. Legal substance is norms (rules) resulting from legal products, legal structures created by the legal system that are possible to provide services and law enforcement, legal culture is behavior, opinions and values related to law (Suteki and Galang Taufani 2018:102). Reflecting on this theory, the three elements must have good



interactions to create a good legal system. The importance of incorporating new legal norms in the RKUHP (which is a legal product) is part of the legal progressive step to respond to community needs.

In the end, the purpose of the existence of a criminal policy for users of prostitution services is solely for the welfare of the community. This policy is an effort to tackle the crime of prostitution by introducing new legal norms into the RKUHP which has been adapted to the conditions and needs of the Indonesian people, so that substantial justice which was originally in the hands of law enforcement is adopted to appear in the legal substance, namely legislation. Religion also obliges every human being to be fair. This provision regarding justice is regulated in the Qur'an.

The provisions regarding justice in Islamic teachings state that justice must be served to anyone regardless of social status, even to kinship. This is of course in line with substantial justice where moral ethics and religion are also the focus and consideration in achieving justice. Substantial justice is the truth justice because the main consideration of this search for substantial justice no longer lies in the formal (state law) and material (living law) aspects of law but rather aspects of the nature of the law, namely the involvement of considerations moral, ethical and religious. If law enforcement has considered the urgency of natural law (moral, ethical and religion), then in fact legal issues have exceeded the three legal systems introduced by Lawrence M. Friedman, namely substance, structure and legal culture, but have reached the degree of human self-awareness that sourced from the conscience, a sense of *rumangsaning heart* or in the language of philosophy called intuition. This is why Werner Menski mentions that substantial justice is the perfect justice.

Conclusion

Criminal law policies regarding the crime of prostitution are regulated in several regulations in positive law in Indonesia, namely: a) Article 296 and Article 506 of the Criminal Code (KUHP); b) Law 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection; c) Law Number 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons; d) Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions.



Article 296 and Article 506 of the Criminal Code, which regulates prostitution can only criminalize people who connect, facilitate and profit from obscene acts. That is, acts that are considered as criminal acts are only those committed by pimps or pimps. Users of prostitution services cannot be convicted because, based on the principle of legality, their actions are not considered as a mistake. This means that the 'person' who in this case is a user of prostitution services cannot be punished because the 'action' he has committed is not a crime (*delik*). Thus, the regulation of prostitution in positive law in Indonesia, both from the Criminal Code and laws outside the Criminal Code, shows that there is a legal vacuum and uncertainty due to the absence of explicit and specific regulations relating to criminal liability for users of prostitution services.

Criminal policies are required as an attempt to overcome the legal vacuum regarding the crime of prostitution in the positive law in Indonesia. This policy is a rational effort that can be carried out as part of the reaction in dealing with and overcoming crime, both through criminal law policies and non-penal efforts. Efforts to penalize can be done by criminalizing, namely designing human behavior that was originally not a crime to become a crime (criminal act). With the implementation of this policy, there will be a reformulation of laws and regulations that are adjusted based on the values that develop in the community, namely by adding new legal norms related to prostitution, in particular regulating the criminalization policy for users of prostitution services which are expected to be able to reduce the number of requests for (demand) so that it also affects the decrease in the number of offers made by pimps. This effort is also integrated with non-penal efforts through religious, social and cultural approaches to suppress the practice of prostitution in Indonesia. This will be a legal progressive step in tackling the crime of prostitution so that it can realize the substantial justice aspired by the community. The steps that can be taken are by making rules or regulations governing prostitution where punishment is not only carried out against pimps, but also users of prostitution services. Or the second step that can be taken is to ratify the Criminal Code Bill and the Draft Law on the Elimination of Sexual Violence, which have regulated criminal liability for users of prostitution services. []



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