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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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The 5th PROCEEDING

“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Reconstruction Of Criminal Responsibility For Actors Prostitutional Criminal Justice In The Criminal Justice Based On Value

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Abstract

Reconstruction of criminal responsibility against perpetrators of prostitution in the Criminal Code based on the values of justice by criminalizing prostitutes as “acts committed by two or more people who commit obscene acts, adultery, same-sex relations (LGBT) and / or pornographic action with payment, either facilitated or not facilitated by pimps “.

Keywords: Reconstruction, Criminal Liability, Perpetrators, Criminal Acts, Prostitution, Justice

A. preliminary

Pancasila that it contains the basic philosophy of relationship between the state with religion, which is made in Indonesia through “*The Founding Father*” of the Republic of Indonesia³⁸¹, Particularly the First Precept Pancasila which Almighty God. Deity according to Kaelan and Achmad Zubaidi derived from the principal word of God, which is an Essence of the Almighty Creator of all that is in this universe, commonly called the First Cause or Causes Prima. While the term Godhead means confidence and recognition expressed in acts against the One Almighty Creator³⁸², The philosophical foundation of the First Precept Pancasila is based on the constitutional

basis of Article 29 of the 1945 Constitution which states that the State based on Belief in God Almighty.

Prostitution from the point of religion, especially Islam as the majority religion in Indonesia. As is well-known that prostitution was very close to the action fornication, which in the view of Islam can be described as the act of adultery³⁸³, In the Quran itself fornication was classified as an unlawful act. Mentioned among others in Surah Al-Isra, verse 32³⁸⁴:

And do occasionally commit adultery, adultery actually it is an act of vile, disrespectful and bad roads,

In Surah An Nur paragraph 2 stated ³⁸⁵:

³⁸⁰ Penulis adalah Kasat Intel Polres Cirebon, sedang menyelesaikan Program Doktor Ilmu Hukum di Fakultas Hukum Universitas Islam Sultan Agung Semarang.

³⁸¹ Sri Endah Wahyuningsih, 2018, *Model Pengembangan Asas Hukum Pidana Dalam KUHP Berbasis Nilai-Nilai KeTuhanan Yang Maha Esa, Fastindo, Semarang*, hlm. 15.

³⁸² Noor MS Bakry, 1990, *Orientasi Filsafat Pancasila, Liberty, Yogyakarta*, hlm. 81-82 dalam Sri Endah Wahyuningsih, 2018, *Ibid.*

³⁸³ Ahmad Wardi Muslich, 2005, *Hukum Pidana Islam, Sinar Grafika, Jakarta*, hlm. 3.

³⁸⁴ H.B. Jassin, *Al-Quran Bacaan Mulia, Djambatan, Jakarta*, hlm. 429.

³⁸⁵ *Ibid.*, hlm. 270

Women and men who commit adultery, deralah both of them, each one hundred stripes. Do not deal to both of them in running religious laws GOD, if you truly believe in GOD and the Last Day; and let the punishment for both was witnessed by a group of people who believe,

Prostitution in terms of the law, seen as actions contrary to the rules of criminal law³⁸⁶, Prostitution in Indonesia stems from the time of the Javanese kingdom of commodities women as part of the feudal³⁸⁷ system, Etymologically prostitution is derived from the Latin is *Prostituo* meaning as behavior blatant surrender to adultery, while adultery itself means mating between male with a female either one or both of them have tied a valid marriage with a person other³⁸⁸, Understanding prostitution, according to the author, is still not complete if associated with the development of this adult prostitution, adult prostitution is not only a form of adultery but also can be Lesbian, Gay, Bisexual, and Transgender (LGBT), and deviant sex offender, meaning that prostitutes can be done by men, women and transgender.

The Code of Penal (Penal Code) itself does not clearly explain what is meant by the crime of prostitution, the Criminal Code tend to be set forth pimps, resulting in law enforcement who dealt only pimp, does not process the perpetrators of prostitution, in addition to ensnare pimps with Article pimp in the Penal Code, and with Act No. 21 of 2007 on the Eradication of Trafficking in Persons (Act TPPO), Law Number 44 Year 2008 on Pornography (Pornography Act),

and Act No. 19 of 2016 on the Amendment to Law Number 11 Year 2008 on Information and Electronic Transactions (UU-ITE). In line with the above description then the crime of prostitution need to be reconstructed, which formulated the problem is:

1. How is the construction of the law governing the crime of prostitution or prostitution in Indonesian positive law?
2. Why are the laws governing the construction of the criminal act of prostitution or prostitution in Indonesian positive law does not yet reflect the values of justice?
3. How is the reconstruction of accountability for criminal offense to prostitution in the Criminal Code based on the values of justice?

This study is a qualitative research approach that departs sociolegal of constructivism³⁸⁹, Also through Empirical juridical approach is a method or procedure used to solve the problem by first examining the existing secondary data and then proceed with research on primary data in the field³⁹⁰, This approach aims to understand that the law is not solely as a statutory set of rules that are normative, but legal as *menejela* community behavior in public life, interact and relate to aspects of society, socio-cultural aspects.

B. Results and Discussion

The legal system according to Lawrence M. Friedman is composed of three elements, namely the structural elements of the

³⁸⁶ *Ibid.*, hlm. 7.

³⁸⁷ Hull, Terrence, Dkk, 1997, *Pelacuran di Indonesia*, PT Penebar Swadaya, Surabaya, hlm. 1.

³⁸⁸ Landrawan, I Wayan. 2005. *Buku Ajar Pengantar Kriminologi. Institut Keguruan dan ilmu Pendidikan, Singaraja*, hlm. 38

³⁸⁹ Lihat Sudarwan Danim, 2002. *Menjadi Peneliti Kualitatif*, Pustaka Setia, Bandung. Lihat juga dalam Lexy J. Maleong, 2005, *Metodologi Penelitian Kualitatif*, Rosda Karya, Edisi Revisi, Bandung, hlm. 165. Juga dalam Anas Saidi, 2005 “*Metode Penelitian Kualitatif*”, *Makalah Workshop Penyusunan Proposal Penelitian*, LIPI, Jakarta. hlm. 6. Dan Juga dalam S. Nasution, *Metode Penelitian Naturalistik Kualitatif*, Transito, Bandung, hlm.12. lihat juga Esmi Warassih, 2006, “*Penelitian Socio-Legal: Dinamika Sejarah Dan Perkembangannya*”, *Makalah Workshop, Forum Kajian Dinamika Hukum dan Majalah Ombudsman*, Bandung, hlm. 5. Juga dalam Bambang Sunggono, 2003, *Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, hlm. 103.

³⁹⁰ Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Press, Jakarta, hlm, 52.

law (legal structure), the substance of the law (legal substance), and the legal culture (legal culture)³⁹¹, Basically the same legal development with the construction of the legal system components³⁹², This statement refers to the primary purpose of the law is to realize the order (order)³⁹³, The need for this order is an objective fact and the need for any human society³⁹⁴, Basically there are three purposes of the law, namely; certainty, order, and justice³⁹⁵, Thus, the purpose of the development of the law against the crime of prostitution is legal certainty, order, and justice in the legal system. Proper justice theory used in dissecting the problem the criminal responsibility of the perpetrators of criminal acts of prostitution, Is a theory of justice Pancasila. Indonesia's justice depicted in Pancasila as the state, social justice for all Indonesian people, The values contained in the precepts of social justice for all Indonesian³⁹⁶ people based on and inspired by the precepts of Pancasila³⁹⁷,

Criminal accountability is accountability by the people against the criminal acts that have done it. At its essence criminal liability is a mechanism built by the criminal law to react to the deal refused a certain ac-

tion³⁹⁸, Such as the crime of prostitution, is a reaction to the rejection of the criminal prostitution. relative theory considers that criminal prosecution is not in retaliation for the fault of the perpetrator, but as a means to achieve the objectives that are useful to protect society towards prosperity. Departing from this theory³⁹⁹ comes the purpose of punishment as a means of prevention, whether special precautions are aimed at the perpetrators and prevention aimed at the general public⁴⁰⁰,

Criminal, according Soedarto, is sorrow given by the state to a person who violates the provisions of the law (criminal law), deliberately in order to be given as sorrow⁴⁰¹. Meanwhile, Saleh declared Ruslan is a criminal offense and this reaction tangible an intentionally inflicted plight Country makers that offense⁴⁰². Wirjono prodjodikoro use the term crime, that is an act which the perpetrator may be subject to criminal law⁴⁰³, Utrecht use the term criminal act, arguing that the term "criminal act" includes an action (positive) or a dereliction of (negative) and consequently that the state incurred because of acts or neglect it⁴⁰⁴,

391 Lawrence M. Friedman, 1977, *Law and Society, an introduction*, Prentice Hall, New Jersey, p.7.

(Selanjutnya disebut Lawrence M. Friedman I) Pada prinsipnya menurut Friedman bahwa sistem hukum terdiri dari struktur hukum, substansi hukum dan budaya hukum. Struktur hukum menyangkut lembaga-lembaganya, substansi hukum mencakup semua peraturan hukum, sementara itu budaya hukum mencakup gambaran sikap dan perilaku terhadap hukum, dan faktor-faktor yang menentukan diterimanya sistem hukum tertentu dalam suatu masyarakat.

392 Lili Rasjidi, Wyasa Putra IB., 2003, *Hukum Sebagai Suatu Sistem*, Mandar Maju, Bandung, hlm. 184.

393 Andrieansjah Soeparman, 2013, *Hak Desain Industri Berdasarkan Penilaian Kebaruan Desain Industri*, PT. Alumni, Bandung, hlm. 56.

394 Mochtar Kusumaatmadja, 1976, *Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional*, Bina Cipta, Bandung, hlm. 2-3.

395 Lili Rasjidi, Wyasa Putra IB., *Op.Cit.*, hlm. 185.

396 Agus Santoso H.M., 2012, *Hukum, Moral, dan Keadilan*, Kencana Prenada Media Group, Jakarta, hlm. 86

397 Ibid

398 Chairul Huda, 2011. *Dari 'Tiada Pidana Tanpa Kesalahan' menuju kepada 'Tiada Pertanggung Jawaban Pidana Tanpa Kesalahan'*, Kencana, Jakarta, hlm. 71.

399 Menurut teori ini suatu kejahatan tidak mutlak harus diikuti dengan suatu pidana, untuk itu tidaklah cukup adanya suatu kejahatan melainkan harus dipersoalkan pula dan manfaatnya suatu pidana bagi masyarakat atau bagi si penjahat itu sendiri. tidak saja dilihat dari masa lampau, melainkan juga masa depan, maka harus ada tujuan yang lebih jauh daripada hanya menjatuhkan pidana saja. dengan demikian teori ini juga dinamakan teori tujuan "doel theorien".

400 Sudarto, (4), 1993, *Hukum Pidana I*, Badan Penyedia Fakultas Hukum Universitas Diponegoro Semarang, hlm. 60-61.

401 Rahman Syamsuddin & Ismail Aris. 2014, *Merajut Hukum Di Indonesia*, Mitra Wacana Media, Jakarta, hlm. 191.

402 Dwidja Priyanto, 2006, *Sistem Pelaksanaan Pidana Penjara Di Indonesia*, PT. Refika Aditama, Bandung, hlm. 6.

403 Wirjono Prodjodikoro, 2008, *Azas-Azas Hukum Pidana Indonesia*, PT Refika Aditama, Bandung, hlm. 59.

404 Utrecht, 1986, *Hukum Pidana I*, Pustaka Tindak Mas, Surabaya, hlm. 251.

A person can be punished is if the person has fulfilled the elements of criminal acts that have been formulated in a legislation either within the Criminal Code and criminal laws other than the Criminal Code. Regarding the elements of the crime of Lamintang found the elements of a criminal offense in general can djabarkan into basic elements consisting of the elements of subjective and objective elements⁴⁰⁵.

Construction is the arrangement and relationship of words in a sentence or group of words. The meaning of a word is determined by konstruksi sentence or group of words⁴⁰⁶, According Sarwiji is the meaning construction (construction meaning) is the meaning contained in the linguistic construction⁴⁰⁷, Thus, the construction of meaning can be interpreted as meaning associated with a sentence or group of words that are in a word in the study of language. Construction can also be defined as the arrangement (style, layout) a building bridges, houses, etc⁴⁰⁸, Reconstruction in Indonesian Dictionary comes from the word "construction" means construction then added the suffix "re" in the construction said to be a "reconstruction" which means returns to normal⁴⁰⁹.

The basic assumption of progressive law is the view of the relationship between law and human. There affirmation principle that "*the law is for man*" and not vice versa⁴¹⁰, In connection with that that law does not exist for itself, but for something larger and larger. Whenever there is a problem with the law, is the law that is reviewed and improved and not the man who pushed for inclusion in the legal scheme⁴¹¹, Similarly, in the crime of prostitution, because the law is considered to itself, not the laws of man, for the rule of law, and religious norms stated

that prostitutes contrary to the moral and religious values, implicates not captivated prostitutes, the target of the crime of prostitution only pimping the goods who facilitate prostitution, but it is not going to happen though many pimps prostitution if no prostitutes. Pemasalahan prostitution staple of this is the notion of prostitution itself that do not have the clarity of the more future virtual world that gave rise to the term "prostitution on line" which actually is not prostitution that is on line because it is not possible to happen,

Authors agree to penalize pimps, but the prostitutes themselves must be criminalized prostitution as a criminal act must be interpreted as acts committed by two or more people who commit a lewd act, adultery, same-sex relationships (LGBT) and / or porn action-paid, well facilitated and not facilitated by pimps. The act of prostitution is a criminal offense committed by two or more people, because prostitution can now terkad between a woman or a gigolo with one or more men or women, and prostitutes now not only in the form of intercourse alone, but can be in the form of abuse, same-sex relationships (LGBT) and or pornographic acts like a stripper. By broadly criminalize prostitutes,

C. Conclusions and suggestions

1.knot

- a. Construction law governing the crime of prostitution or prostitution in Indonesian positive law has not entrap prostitutes.
- b. Construction law governing the crime of prostitution or prostitution in Indonesian positive law does not yet reflect the values of justice, because prostitu-

405 P.A.F. Lamintang, 1997, *Dasar-Dasar Hukum Pidana Indonesia*, PT Citra Aditya Bhakti, Bandung, hlm. 193.

406 Alwi, Hasan, 2007, *Kamus Besar Bahasa Indonesia Edisi Keempat*. PT. Balai Pustaka, Jakarta.

407 Suwandi, Sarwiji. 2008, *Semantik Pengantar Kajian Makna*. Media Perkasa, Yogyakarta.

408 Pusat Bahasa, 2005 *Kamus Besar Bahasa Indonesia Edisi Ketiga*. Balai Pustaka, Jakarta.

409 Departemen Pendidikan Nasional, 2005, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, hlm. 942.

410 Satjipto Rahardjo, *Hukum Progresif, Hukum Yang Membebaskan*, Jurnal Hukum Progresif, PDIH Semarang, Volume I Nomor 1, April, 2005, hlm. 5.

411 Endang Sutrisno, 2013, *Bunga Rampai Hukum dan Globalisasi*, In Media, Jakarta., hlm. 67.

tion is interpreted narrowly, and based to a complaint, so that there is no mention of prostitution a criminal offense but not convicted offender prostitution.

- c. Ideal reconstruction of accountability for criminal offense to prostitution in the Criminal Code based on the values of justice to criminalize prostitutes and expand deeds and prostitutes.

2. Suggestion

- a. Construction law governing the crime of prostitution or prostitution in Indonesian positive law must be reconstructed.
- b. Criminalization of prostitution a criminal offense in Indonesian positive

law must reflect the values of justice, and prostitution should be interpreted broadly, so as to ensnare criminals prostitution either in the form of abuse, adultery, same-sex relationships (LGBT) and Porno action.

- c. Reconstruction of accountability for criminal against the perpetrators of the crime of prostitution in the Criminal Code based on the values of justice to criminalize prostitutes as “acts committed by two or more people who commit a lewd act, adultery, same-sex relationships (LGBT) and / or porn action with a fee, well facilitated and not facilitated by pimps “.

D.References

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