



Urgency of Reformulating the Act of Prostitution in the Reform of Criminal Law

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Abstrak

Praktik prostitusi saat ini berkembang pesat dan semakin meluas, dengan perkembangan tersebut semakin dipercepat oleh penyebaran informasi melalui media elektronik. Kurangnya pengaturan yang komprehensif mengenai prostitusi membuat hukum berperan dalam mempengaruhi dinamika praktik tersebut. Minimnya regulasi yang ada menciptakan budaya hukum baru di kalangan para pelaku prostitusi, yang berdampak pada berbagai lapisan masyarakat. Salah satu dampak negatif paling serius dari maraknya praktik prostitusi adalah penyebaran penyakit menular seksual, yang dapat menyebabkan gangguan kesehatan, baik pada individu yang terlibat langsung dalam praktik tersebut maupun pada orang lain yang terpapar, seperti pasangan dari para pelaku prostitusi. Tujuan dari penelitian ini adalah untuk menganalisis pengaturan prostitusi dalam hukum pidana Indonesia saat ini. Berdasarkan analisis tersebut, penelitian ini juga mengidentifikasi alasan-alasan mengapa penting untuk melakukan pembaruan hukum yang lebih komprehensif terkait pengaturan praktik prostitusi di masa depan. Metode yang digunakan dalam penelitian ini adalah penelitian hukum dengan pendekatan normatif. Data yang digunakan berasal dari sumber sekunder yang diperoleh melalui penelitian kepustakaan dan kajian terhadap peraturan perundang-undangan yang berlaku. Adapun metode analisis yang diterapkan adalah teknik analisis deskriptif. Hasil penelitian menunjukkan bahwa meskipun beberapa peraturan daerah telah mengatur praktik prostitusi, namun belum ada regulasi yang mengatur secara tegas dan nasional mengenai prostitusi. Beberapa usulan yang diajukan untuk perbaikan ke depan antara lain adalah pemberian definisi yang jelas mengenai prostitusi, kriminalisasi terhadap konsumen atau pengguna jasa prostitusi, kriminalisasi terhadap pekerja seks komersial (PSK), reformulasi delik terhadap mucikari, penerapan sistem dua jalur dalam pemberian sanksi (double track system), pengenaan pidana yang lebih berat, serta perumusan bentuk delik yang lebih spesifik.

Kata Kunci: prostitusi, hukum pidana, reformulasi

Abstract

The practice of prostitution is currently growing rapidly and becoming more widespread, with this development being accelerated by the dissemination of information through electronic media. The lack of comprehensive regulation regarding prostitution has led to the law playing a significant role in influencing the dynamics of this practice. The minimal existing regulations have created a new legal culture among the actors involved in prostitution, which impacts various layers of society. One of the most serious negative consequences of the widespread practice of prostitution is the transmission of sexually transmitted infections, which can lead to health issues not only for individuals directly involved in the practice but also for others who may be exposed, such as the partners of the sex workers. The purpose of this research is to analyze the regulation of prostitution under Indonesia's criminal law. Based on this analysis, the study also identifies the reasons why it is important to update and establish a more comprehensive legal framework for regulating prostitution in the future. The methodology used in this research is a normative legal research approach. The data utilized comes from secondary sources obtained through library research and a review of relevant laws and regulations. The analytical method applied is a descriptive analysis technique. The findings of the study show that although some regional regulations have addressed prostitution, there is no clear and national regulation governing prostitution. Several suggestions for improvement in the future include: providing a clear definition of prostitution, criminalizing the consumers or users of prostitution services, criminalizing commercial sex workers, reformulating the offense related to pimps, implementing a dual-track system in the imposition of sanctions, imposing heavier penalties, and formulating more specific offenses.

Key Words: prostitution, criminal law, reformulation

A. Introduction

The world has now shifted from the era of industrialization to the era of information. Industry 4.0 is a concrete example of the integration of information technology into industry (Idayanti et al., 2019). This shift in eras has transformed humans into an information society and has brought about an age defined by information (Bahram, 2023). This term is attributed to the rapid growth and development of information technology, making access to information incredibly easy. The fast-paced advancement of science and technology has led to the creation of a new medium called the internet. Technological progress, such as computerization, the internet, and telecommunications devices, has become a new trend that has influenced shifts in work patterns and even lifestyle. Technology (the internet and computer devices) now plays a crucial role in shortening distances, narrowing spaces, and reducing time, all of which are connected within cyberspace (Miarsa & Romadhon, 2020).

The advancement of information technology today is inseparable from its positive and negative impacts. The positive impacts of this progress contribute significantly to the improvement of welfare, progress, and human civilization. On the other hand, the negative impacts of technology often involve its use as an effective means to commit unlawful acts (as explained in Law No. 11 of 2008 on Electronic Information and Transactions). The rapid advancement of technology has led to various legal issues, such as the emergence of intentions by irresponsible parties to use technology for unlawful purposes for personal gain. This activity is known as cybercrime, which is currently under international scrutiny. One of the new forms of criminal activity that has emerged is online prostitution, which utilizes computers and the internet as its medium.

Prostitution is not a new phenomenon in Indonesia. Looking at history, the practice of prostitution has actually been present since the Dutch and Japanese colonial periods in Indonesia (Fibiona, 2016). Over time, it has become clear that prostitution is a complex issue because it involves various aspects of societal life, including social, gender, legal, health, moral and ethical, religious, educational, psychological, economic, industrialization, and political issues. In practice, prostitution can be divided into two types of activities. First, there is organized prostitution, which is characterized by the emergence of red-light districts, such as nightclubs, brothels, and massage parlors. Second, there is individual or unorganized

prostitution, which is marked by women offering themselves on street corners (Rahmawati, 2020). Currently, individual prostitution is rarely encountered, as it has shifted to an online platform due to advancements in computer technology, commonly referred to as online prostitution.

Currently, there are several regulations that govern prostitution, but these regulations have not been fully effective in prosecuting those involved in prostitution. Most often, only pimps or brokers can be charged for their involvement, while the prosecution of the consumers of prostitution remains limited due to insufficient regulation. At present, there are no clear laws regarding the prosecution of individuals engaged in prostitution, even though there may be potential victims or social factors involved. Therefore, there is a need for comprehensive changes in criminal law to fully criminalize prostitution in Indonesia.

This research aims to examine the regulations on prostitution in Indonesia, which are still not effective enough to address the widespread problem of prostitution in the country. Therefore, it is necessary to reframe policies and regulations regarding prostitution in order to prevent the negative impacts that arise in society. The discussion in this study will be divided into two parts: the regulation of prostitution under criminal law in Indonesia and the importance of reconstructing the act of prostitution in the future.

B. Methodology

The method used in this research is normative legal research, which focuses on the study and analysis of applicable laws and regulations, as well as their application to a specific legal issue (Marune, 2023). Legal research is a process of applying positive law to issues raised by legal facts, and generally, legal research employs analytical principles. The analysis used in this study is prescriptive analysis. Prescriptive analysis aims to present arguments regarding what is right or wrong, or what should be according to the law, based on the facts or legal events arising from the research conducted (Irianto, 2017). The data used in this research is secondary data, which involves analyzing primary legal materials in the form of relevant regulations, secondary legal materials such as books, journals, or papers related to the issue, as well as tertiary legal materials. The approach used in this study includes both a statutory approach and a conceptual approach. The statutory approach is employed to examine, review, and analyze regulations related to prostitution. The conceptual approach is used to understand legal perspectives and doctrines that can provide insights into the concept of criminalizing prostitution in the future.

C. Result and Discussion

Legislation Regulating Prostitution in Indonesia

Indonesia does not yet have any regulation that explicitly and comprehensively governs prostitution activities. In the author's investigation, several regulations addressing prostitution offenses in Indonesia were found. The following are some of the regulations that govern prostitution-related activities in the country:

1. The Indonesian Penal Code

Articles 296 and 506 of the Indonesian Penal Code regulate acts closely related to prostitution. Article 296, for example, mentions that one of the activities linked to prostitution is the role of a "mucikari" (pimp). A "mucikari" is an individual, either male or female, who earns an income from immoral activities typically involving young women who live with them. These young women are referred to as prostitutes. They engage in sexual acts with men who are customers of the "mucikari," and these men are not the women's husbands. A different interpretation of the term "mucikari" is provided by Soesilo (1995), who draws a parallel between a "mucikari" (or "souteneur") and a pimp. Soesilo defines a "mucikari" as a man who assists and finds clients for the prostitutes living with him, deriving his income from the proceeds of their sexual activities. Additionally, an arrest by the Hoge Raad (Dutch Supreme Court) ruled that a husband who prostitutes his own wife and benefits financially from this act is also considered a "mucikari" and subject to punishment.

In carrying out their work, pimps generally play a role in providing and renting out houses that consist of rooms with beds, which are rented to clients along with the prostitutes. However, a person cannot be convicted under Article 296 unless it is proven that they were aware that the house they owned was being rented out by a prostitute. There

must be evidence showing that the individual is a pimp, typically demonstrated by the act being carried out as a livelihood or as a habitual practice (repeated behavior).

Article 506 clarifies that a person who can be penalized under this provision is someone who earns income from women engaging in immoral acts. Both Article 296 and Article 506 can only punish pimps or intermediaries who act as the owners or managers of a brothel (Sevrina, 2020). It can be said that only intermediaries in prostitution can be prosecuted under these two articles. However, in such activities, there is also the involvement of users or consumers of prostitution services, yet there is no criminal provision to hold them accountable. Only users or consumers of prostitution who are in a marital relationship can be punished. Even then, the punishment is not for engaging in prostitution, but for committing adultery, which is regulated under Article 382 of the Penal Code. Unfortunately, the offense of adultery is a complaint-based offense, meaning it requires a formal report from the legal spouse of the users or consumers of prostitution services. If no such complaint is filed, these users or consumers cannot be legally prosecuted (Anindia & Sularto, 2019).

2. Law No. 21 of 2007 on the Crime of Human Trafficking

Sexual exploitation is a form of human trafficking regulated under Law No. 21 of 2007. Sexual exploitation occurs through threats of violence, the use of violence, kidnapping, confinement, coercion, fraud, abuse of power, or situational pressures such as poverty and unemployment. These actions clearly take place without the victim's free choice. Similar to the provisions in the Penal Code, this law does not allow for the prosecution of consumers or users of prostitution services in relation to human trafficking offenses and can only hold pimps accountable as owners or managers of brothels. Furthermore, the expansion of subjects in the crime of human trafficking, as stated in Article 1, paragraph 4, which defines "any person as an individual or corporation who commits the crime of human trafficking," shows that not only individuals (natural persons) can be perpetrators, but also corporations (juridical persons) (Periani & Rusito, 2021).

3. Law No. 44 of 2008 on Pornography

The criminal offenses related to pornography in the Pornography Law can be found in Articles 29 to 38 of the law. According to the provisions in this law, only pimps and "Pedila" (women who are prostituted) can be punished under it. "Pedila" is an acronym for women who are prostituted. They are forced to work in the prostitution industry. Pedila are considered a marginalized group because they are vulnerable to impoverishment, initially being above the poverty line but falling into poverty due to economic systems, social conflicts, and natural disasters. Pedila often face stigma from society, being labeled as prostitutes or immoral women. In this article, the terminology used to describe the legal subject related to women who sell their bodies is "PSK" (prostitute). This term is more familiar compared to "Pedila," making it easier for readers to engage with the text (National Commission on Violence Against Women, 2019). Furthermore, this law limits the definition of pornography to objects such as images, sketches, illustrations, photos, writings, sounds, noises, moving pictures, animations, cartoons, conversations, body movements, or other forms of messages conveyed through various types of communication media and/or public performances (Monica, 2015).

4. Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection

Prostitution can also involve children who become "Pedila" (a term for child prostitutes), which is known as Commercial Sexual Exploitation of Children (CSEC). Child exploitation is prohibited by the Indonesian government through the inclusion of Article 76I in the Child Protection Law. This provision makes it clear that the act of purchasing prostitution services is a criminal offense or an unlawful act, meaning that individuals who engage in or use prostitution services can face criminal penalties. However, as explained in previous regulations, criminal sanctions under this law can only be applied to users or consumers of prostitution services if the Pedila involved is still a child (Saputra, 2020).

5. Law Number 19 of 2016 on Amendments to Law Number 11 of 2008 on Information and Electronic Transactions

Although the term "prostitution" is not explicitly mentioned in the Information and Electronic Transactions Law, if we consider the definitions of electronic information and electronic documents outlined in the law, Article 27 can be used to penalize anyone involved in such activities. This article prohibits the distribution and/or transmission and/or access creation of electronic information and/or documents that contain content that violates public decency. Users or consumers of prostitution services could be implicated if they are

involved in actions such as distributing or making accessible electronic information that violates public decency, which is spread to the public via electronic media. However, this article does not pertain to the act of purchasing prostitution services directly (Muhtadi, 2021).

6. Law Number 12 of 2022 on Sexual Violence Crimes

In the provisions of Article 12, the actions that can be penalized under this article are those of pimps or prostitution service providers. Based on the wording of the article, it is not intended to target consumers or users of prostitution services, nor does it address the actions of sex workers or prostitutes. In addition to the provisions of Article 12, this law mainly focuses on various forms of sexual violence in general and does not specifically regulate prostitution-related activities.

The Importance of Reformulating the Act of Prostitution in Indonesia

As seen in the earlier discussion, it is clear that, to date, the legal framework surrounding prostitution in Indonesia primarily targets pimps, intermediaries, or service providers. Although other legal subjects involved in prostitution, such as consumers, can also be penalized under different provisions, a consumer who is married and engages in prostitution as a client or user of such services can be prosecuted under Article 284 of the Indonesian Criminal Code (KUHP). However, prosecuting under this article is not straightforward; it requires a formal complaint from one of the parties involved, specifically a spouse in a legally recognized marriage, for the case to be processed legally.

With the current regulations in place, it seems that the complexity of the prostitution crime has not been adequately addressed, particularly regarding the consumers and sex workers, who have barely been touched by or are still minimally regulated, and the framework for prosecuting these two legal subjects involved in prostitution is unclear. According to the author, consumers and sex workers in prostitution cases should also be regulated and sanctioned if involved in prostitution activities. Below are some points that need to be regulated in the future concerning prostitution.

1. Defining Acts of Prostitution

The first thing that needs to be regulated regarding prostitution in the future is the definition of prostitution itself. Lawmakers, in this case, the Parliament along with the government, need to provide a clear and precise definition to avoid ambiguity regarding what exactly is meant by prostitution, what actions can be considered acts of prostitution, what forms those actions may take, who the legal subjects involved are, and so on. Moving forward, what constitutes prostitution should be regulated in a specific legal framework. The formulation of this regulation can be carried out by legislators, choosing from several possible approaches. If lawmakers intend to impose penalties, the future regulation of prostitution should utilize criminal law instruments, either by creating a specific criminal law related to prostitution or by incorporating it into other special criminal laws, such as reformulating the Law on the Eradication of Sexual Violence (UU TPKS), either partially or in its entirety.

If the lawmakers' intention is not to impose punishment, it would be sufficient to regulate it in the form of administrative offenses. This could be done by: (1) creating a new law that outlines criminal provisions related to prostitution; or (2) incorporating it into existing administrative laws, such as the Pornography Law.

The distinction between regulating prostitution as a pure criminal offense and as an administrative offense lies in the nature of enforcement and punishment. If prostitution is classified as a pure criminal offense, the enforcement will be considered *primum remedium* (the primary remedy), meaning it is the first line of action. On the other hand, if prostitution is regulated as an administrative offense, the enforcement will be viewed as *ultimum remedium* (a last resort). Regarding punishment, if prostitution is treated as a pure criminal offense, the penalty could involve imprisonment for more than one year, up to a maximum of 20 years if sentenced to a fixed-term prison sentence. However, if it is regulated as an administrative offense, the penalty cannot exceed one year of imprisonment or detention. As explained by Andi Hamzah in an Indonesia Lawyer Club discussion, the penal provisions within administrative law are not intended to punish individuals but to ensure compliance with the regulations. Therefore, the penalties prescribed in such laws cannot include heavy criminal sentences, with a maximum of only one year in prison or detention.

Based on the discussion of the two options, the author is more inclined to treat prostitution as a pure criminal offense. In other words, the author agrees that prostitution

should be regulated under a specific criminal law, by creating a law titled "Law No. ... of ... on the Eradication of Prostitution-Related Crimes." The author proposes that prostitution be addressed in a separate law and classified as a pure criminal offense for two main reasons. First, prostitution has far-reaching consequences, particularly in terms of public health, and therefore needs to be regulated strictly with heavy penalties, such as a minimum prison sentence of five years or more. Second, as a consequence of the first point, imposing severe criminal penalties is expected to achieve the goals of punishment based on the relative or purposive theory, as described by Feuerbach with his **psychologische Zwang** doctrine (Hiariej, 2016). This means that the threat of severe punishment would create a deterrent effect, discouraging potential offenders from engaging in such activities. In addition to criminal sanctions, there will also be other forms of measures in the regulation of prostitution, which will be explained in the following section.

2. Criminalization of Prostitutes' Clients

There are several reasons why consumers of prostitution services should be punished through criminal law, or in other words, criminalized. First, the new Criminal Code (KUHP) includes provisions related to cohabitation (living together without marriage). This means that the act of living together based on mutual consent, without a legal marriage, is considered a violation of societal values and is deemed necessary to be criminalized. Since cohabitation is criminalized, consumers who use prostitution services should also be criminalized. This is because the underlying characteristics of prostitution and cohabitation are quite similar, as both are based on mutual consent or mutual attraction in the context of engaging in sexual relations. While prostitution may not be entirely based on the same principles, it is also linked to the sexual behavior of individuals who use such services, often exceeding the average.

Secondly, a potential danger that may arise if consumers as legal subjects are not criminalized is the concern of future potential victims. The potential victims referred to in this context are those who could contract diseases or viruses, such as HIV/AIDS, from individuals who engage in sexual relations with consumers who were previously infected with HIV/AIDS. These consumers may have contracted the virus through sexual intercourse with sex workers in the prostitution network. Potential victims could include the consumers' partners, spouses, other women, or anyone else who may be at risk of contracting the HIV/AIDS virus as a result of the consumer's sexual involvement with women involved in prostitution activities.

Thirdly, prostitution activities would not likely have been able to take place and expand rapidly to the extent they have today if there were no consumers willing to use the services provided by pimps. From the author's perspective, referring to the theory of relativity in the context of general prevention, as proposed by von Feuerbach in Hiariej (2016), along with the theory of **psychologische Zwang** (psychological coercion), which suggests that imposing criminal penalties on perpetrators of crime serves as a deterrent to others from committing the same offense. Based on this doctrine, the author believes that threatening consumers with criminal penalties could make them fearful, thereby creating a deterrence effect that would discourage them from engaging in such activities in the future. Even if it doesn't fully achieve deterrence, at the very least, criminalizing the consumers or users of prostitution services could help reduce the occurrence of prostitution.

The sanctions that could be imposed on consumers in the future may use a dual-track system, which involves both criminal sanctions and corrective measures. Criminal sanctions could include primary criminal penalties, such as imprisonment, detention, or fines, as well as additional criminal penalties. In addition to the sanctions provided in the current Criminal Code, additional penalties may be imposed if deemed appropriate by lawmakers to address the acts of prostitution in the future. Corrective measures could involve treatment at a hospital, particularly for consumers found to be infected with HIV/AIDS. Other corrective measures may include social rehabilitation for consumers who engage in such activities for sexual gratification.

3. Criminalization of Commercial Sex Workers

If there are three reasons for criminalizing prostitution consumers, the following outlines several justifications for criminalizing sex workers (prostitutes) involved in prostitution. In fact, the reasons for criminalizing sex workers are not significantly different from those for criminalizing consumers of prostitution. First, it is closely related to cohabitation, as explained earlier, but with the motive of obtaining material gain from sexual

activities. In the context of sex workers, earning money through prostitution is their own right. However, in exercising this right, they should not violate the rights of others. What rights are violated by sex workers in prostitution cases? In the author's view, the rights of others that are violated by sex workers are the rights to maintain a healthy body. What is a citizen's right is also the state's duty to protect, including ensuring citizens' health rights. One way the state can provide such protection is by criminalizing acts that may threaten public health, including criminalizing sex workers involved in prostitution. This is because sex workers are among the highest risk groups for spreading HIV/AIDS to consumers.

Secondly, criminalizing sex workers (PSK) will instill fear in them, discouraging them from engaging in prostitution in the future, as suggested by Feuerbach's concept of psychological coercion (*psychologischer Zwang*). The simple logic is that if consumers are criminalized in the future in an effort to minimize prostitution by reducing, or even eliminating, demand for sex services, the reverse logic applies as well: criminalizing sex workers could minimize or even potentially eliminate prostitution activity because it would be unlikely for consumers to seek such services if there are no sex workers available to fulfill their demand.

The context of regulating sex workers or prostitutes who could be prosecuted is focused on individuals (women) who engage in prostitution activities with the intention of gaining material profit. In other words, their involvement in prostitution is deliberately for the purpose of earning an income or as part of their livelihood, whether due to lifestyle demands or other economic motives. However, if a woman engages in prostitution due to a need for sexual satisfaction (such as hypersexuality), she should be subjected to rehabilitation measures rather than punishment. Women who should not be penalized for participating in prostitution are those who are involved not by their own choice but due to coercion or exploitation by others, such as being sexually exploited through deceit, manipulation, lies, or other means by individuals who provide the infrastructure for prostitution (pimps).

The criminal sanctions that can be imposed or threatened upon sex workers or prostitutes may include both principal and additional criminal penalties, as well as corrective actions. The explanation regarding the types of criminal sanctions, whether principal or additional, as well as corrective actions, is the same as the sanctions discussed earlier concerning the criminalization of consumers or users of such services.

4. Reformulation of the Offense for Pimps

From the discussion of the first problem formulation, various regulations regarding the criminalization of pimps can be seen. However, the current formulation in the existing legal framework (*ius constitutum*) concerning the criminalization of pimps, intermediaries, or prostitution service providers needs to be reformulated by including elements that could increase the severity of the punishment for pimps. One such element is the inclusion of the factor "the act was carried out using electronic means," which would lead to a harsher penalty. Why is this element necessary? This is because it is known that the rapid growth of prostitution activities is influenced by the fast development of information and communication technology. What was once done conventionally—such as visiting brothels and similar locations—can now be carried out with just the internet and telecommunications devices. This ease of access has made prostitution easier to execute and more accessible to those involved in the prostitution cycle. Specifically, the regulation for pimps, in the author's view, should be in the form of a pure criminal offense, not an administrative offense.

Further, by criminalizing the three legal subjects involved in the prostitution cycle, it can minimize the prevalence of prostitution activities. Based on the simple reasoning that pimps, sex workers, and clients are all criminalized, and referring to the psychological compulsion theory by Feuerbach mentioned above, this would create fear among these three legal subjects, discouraging them from engaging in prostitution. Consequently, it would be impossible for there to be clients without service providers and vice versa in the case of prostitution.

5. The Aggravation of Penalties in Prostitution

There are several factors that can aggravate the penalties in prostitution, some of which were mentioned in point 4, such as when prostitution is conducted through electronic media. Additionally, other factors that can increase the penalty include the presence of violence that causes injury, whether minor or severe, or results in death. Another

aggravating factor is when the act of prostitution involves children or individuals with disabilities.

6. The Form of Offense in Prostitution

The form of offense is an equally important aspect of the policy for addressing prostitution crimes through penal measures. Generally, the offense of prostitution would take the form of a formal offense, which focuses on the act or behavior itself. However, it is also possible for it to be defined as a material offense, emphasizing the consequences of the act. This is a logical consequence of one of the provisions that can aggravate the penalty, as mentioned earlier, such as when a prostitution act causes injury, whether minor or severe, or even results in death or the loss of life.

D. Conclusion

Prostitution in Indonesian criminal law is currently regulated in several provisions, including the Penal Code (KUHP), the Law on the Crime of Human Trafficking, the Pornography Law, the Child Protection Law, the Information and Electronic Transactions Law, and the Law on Sexual Violence Crimes. In these regulations, the focus is primarily on penalizing pimps or service providers, leaving an incomplete framework that has led to the emergence of new criminal methods, as these regulations fail to address the issue comprehensively. This gap has resulted in a new legal culture that shapes the approach to the shortcomings in prostitution regulations. Several points have been proposed for formulating future policies on prostitution, including providing a clear definition of prostitution, criminalizing consumers/users of prostitution services, criminalizing sex workers, reformulating offenses for pimps, applying a dual-track system in determining sanctions, enhancing penalties, and redefining the criminal offense.

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