

## **CRIMINAL LIABILITY TO THE PERSONS OF PROSTITUTION**

*(CASE STUDY NUMBER.601/PID.B/2019/PN.SBY)*

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### **Abstract**

*Since the localization Dolly closed by the Surabaya Mayor, obviously prostitutions practical are continuing secretly just like the one in the prostitution case by YEKNO. He was introduced AGUS with I MADE NILO for dating in HENKY house. The aim of this research are to analyze what are the criminal responsibilities towards the prostitution perpetrators and also to find out the criteria of pimp in prostitution. The research methods used in this study is normative law method with constitution approach, conceptual approach, and case approach. The results of this study indicate that YEKNO decided guilty based on Chapter 2 subsection (1) Undang-Undang Republik Indonesia No. 21 Year 2007 about Eradication Criminal Offence of Human Trafficking (UU PTPPO) by the judge verdict number 601/ Pid.B/ 2019/ PN.SBY which is what YEKNO did. YEKNO is not proved as pimp, because a pimp has a special criteria of role thus HENKY as a provide guilty based on Chapter 296 KUHP, beside that for I MADE NILO and AGUS were not guilty because no rules for their role.*

**Keywords: Criminal Liability, Prostitution, Pimp**

### **INTRODUCTION**

Society today is inseparable from various problems developing along with the change of time. One of them is prostitution. Prostitution is a long-standing problem that is always relevant to any kind of development in society. <sup>1</sup> Prostitution is a job that women dislike, but due to financial difficulty, women are willing to take a job as prostitutes. However, prostitution has existed since a long time ago. <sup>2</sup>

<sup>1</sup> Anwar Sahid, 2016, *Polemik Prostitusi Di Indonesia*, Surat Kabar Harian Media Indonesia, No. XIII., p. 6

<sup>2</sup> Mia Amalia, 2017, *Penyuluhan Hukum Terhadap Perda Nomor 21 Tahun 2000 Tentang Larangan Pelacuran Bagi Pelajar Siswi SMK/SMA/MA Dalam Penanggulangan Praktik Prostitusi Dikabupaten Cianjur*. Journal Of Empowerment vol. 1, no. 2, edisi desember, p. 103-120

Etymologically, prostitution derived from the word *prostitutio* which means placing, serving, and offering while the other meanings of prostitution are selling, peddling, but in general, prostitution means submission of a woman to a man and from that submission, the prostitute gets something in return for fulfilling the sexual desires of those who use her sex services. Prostitutes' life is very primeval, and from a sociological point of view, it appears that society looks down on prostitutes because most of the times prostitutes are considered to be lowly in terms of morality and their activities can both distress people and cast aspersions on the neighborhood they are living in or coming from.<sup>3</sup>

Being a social problem for so long time, prostitution's clause is unable to be traced because now and then prostitution is always found in society almost all over the world, especially in Indonesia. Here, prostitution is developed in many different ways, from localized prostitution to the hidden one. Prostitution is considered as a structural problem. Yet, in society's point of view, prostitution is still viewed as a moral problem that blames the victims, and this blaming makes the victims of prostitution more and more cornered in social life.<sup>4</sup>

Prostitution that is happening today has become one of the diseases in society that has several impacts including <sup>5</sup> 1.) Impact in education. Prostitution causes moral downfall for young generations; 2.) Social impact, prostitution becomes a disease that is increasingly eating away every aspect of people's lives; 3.) Impact in religion, prostitution is one of the prohibited deeds; 4.) Impact on health, prostitution can harm future offspring; 5.) The impact on gender, prostitution lowers the dignity of women. Based on some impacts mentioned above, it can be perceived that prostitution found in society is too dangerous that it is a common sense that these activities must be avoided. Several policies have been carried out by heads of the regions in various places in Indonesia to overcome prostitution problems. The policies are as follows:

- 1.) *Criminalization*; capturing the perpetrators involved in prostitution,
- 2.) *Abolition*; revoking permits for localization and providing jobs for the perpetrators,
- 3.) *Legalization*; closing down the prostitution or localization, both overt and covert.

Surabaya is one of the regions that implemented a policy of criminalization and abolition by closing prostitution localization down in Dolly. Although prostitution has been eradicated, it still runs secretly,<sup>6</sup> one of them is the case that occurred in Surabaya District Court Decision No. 601 / Pid.B / 2019 / PN.SBY.

Specifically, there is no single article found in the Criminal Code (KUHP)<sup>7</sup> to regulate this specific case of prostitution. In a criminologist review, prostitution is a victim-less crime, it does not harm anyone involved in the case, not a prostitute, not a pimp, not a customer, not a prostitution dealer, no one is a victim in a case of prostitution.<sup>8</sup> Additionally, there is no article written in Islamic law either that specifically regulates prostitution. Prostitution is run by someone who acts as a pimp. This pimp provides sexual services to make money. That is why this activity is regarded as a job and is

<sup>3</sup> Henny Nuraeny, dan Tanti Kirana Utami, 2016, *The Victim Handling Model Of Human Trafficking Through Economic Independence*, Jurnal Dinamika Hukum, vol. 16, no. 2, edisi september, p. 121

<sup>4</sup> *Ibid*, p. 122

<sup>5</sup> Sri Pangastoeti, 2009, *Dari Kyuushuu ke Ran'in : Karayuki-San dan Prostitusi Jepang di Indonesia (1885-1920)*, Jurnal Humaniora vol. 21, no.2 edisi juni, p. 138-149

<sup>6</sup> Nida Issabela, Wiwin Hendriani, 2010, *Resiliensi pada Keluarga yang Tinggal di Lingkungan Lokalisasi Dupak*, Bangunsari, Jurnal Insan, vol. 12 no. 03, edisi desember, p. 181

<sup>7</sup> E. Fernando M Manullang, 2016, *Legisme Legalitas dan Kepastian Hukum*, Pranadamedia Group, Jakarta, p. 33

<sup>8</sup> Suyanto Bagong, 2012, *Anak Perempuan Yang Dilacurkan, Korban Eksploitasi di Industri Seksual Komersial*, Graha Ilmu, Yogyakarta, p. 39

differentiated from adultery because they have different offenses.<sup>9</sup> In Islamic law, the perpetrators of adultery are punished based on their marital status; if they are married or *muhsan*, they are sentenced by being stoned to death, while if they are unmarried, or *ghair muhsan*, they are sentenced by being flogged or whipped 100 (one hundred) times, then later exiled for 1 (one) year.<sup>10</sup>

Prostitution case based on Surabaya District Court Decision No. 601 / Pid.B / 2019 / PN.SBY involved the perpetrators namely YEKNO as the pimp who was looking for customers to use sexual services, Mr. HENKY, the person who provided the room for sexual intercourse (prostitution), I MADE NILO as Commercial Sex Worker (CSW) and AGUS as the customer. In terms of moral offenses in Criminal Code from Article 281 to Article 297, particularly Article 296 of the Criminal Code, these articles are not subjected to all perpetrators involved in the case, but it only targets several perpetrators such as the owner of localization, the pimp, and the intermediary. While for prostitution actors such as prostitutes and customers (who use the services of prostitutes), no decency offense regulates them.<sup>11</sup>

In dealing with prostitution cases, commonly, investigators (police officers) apply Article 296 of the Criminal Code to ensnare pimps, one of the core offenses in this article is making prostitution as a job or a habit. So, to enmesh the pimps, the police need to prove their activities. Taking something as a job means that someone gets paid for what they have done, even though the amount of money earned is set aside, and they do it repeatedly. Whereas, in the case of prostitution mentioned previously, when investigated by a public prosecutor, YEKNO admitted that he did it only once and that was when he was arrested. So, it cannot be considered as a job.<sup>12</sup>

Therefore, this study will examine criminal liability for all perpetrators including prostitutes and customers (the ones who use the services of prostitutes) and examine the borderline between pimps and human trafficking based on Article 296 of the Criminal Code and PTPPO Law because no studies have been conducted to examine the criminal liability concerning perpetrators of prostitution especially to commercial sex workers and their customers (the ones who use the services of commercial sex workers). Accordingly, this research will be a recommendation for the government to issue special regulations (*lex specialis*) governing prostitution. Based on the description above, the statements of problems in this study include; what is the form of criminal liability for the perpetrators of prostitution in case No. 601 / Pid.B / 2019 / PN.SBY and what are the criteria for being pimps in the practice of prostitution?

This research employed a normative juridical approach by using a statute approach, conceptual approach, and case approach. It was carried out by examining prostitution cases based on decision No. 601 / Pid.B / 2019 / PN.SBY. The data used in this paper includes primary data that is in the form of direct interviews with public prosecutors, secondary data which is in the form of primary legal material in the form of law. Secondary legal material is in form of books, journals, papers, etc., and non-legal material

<sup>9</sup> Cesare Beccaria, 2011, *Perihal Kejahatan dan Hukuman*, Genta Publishing, Yogyakarta, p. 21

<sup>10</sup> Dian Andriasari, 2011, Studi Komparatif Tentang Zina dalam Hukum Indonesia dan Hukum Turki, *Jurnal Syiar Hukum FH Unisba*, Vol. XIII. No. 3 November p. 39-40

<sup>11</sup> Jhon Kenedi, 2015, *Pelacuran dalam Perspektif Hukum Positif dan Implikasinya*, *Jurnal Manhaj* Vol. 3, No.1 Edisi April, p.62

<sup>12</sup> Hasil Wawancara dengan Penuntut Umum, Pompy Polansky Alanda, S.H., Jaksa Penuntut Umum pada Kejaksaan Negeri Surabaya. Kamis 21 Maret 2019

in form of news, dictionaries, and others that have no legal elements but are needed in discussing the problems in this paper.

## DISCUSSION AND ANALYSIS

### Criminal Liability Theory

Criminal liability, in English, has two meanings; responsibility and criminal liability. The concept in criminal liability does not contain only about legal matters but also about moral values and/or morality that the community or groups in the community believe in so that the criminal liability is just.<sup>13</sup> Criminal liability is a method imposed on someone who has become a suspect or defendant to determine whether they are responsible for a committed crime so that the suspect or defendant can be freed or convicted according to a court decision that has permanent legal force.

Criminal liability can only be imposed on someone if it relates to the basis for imposing criminal sanctions. Someone is charged for criminal liability if the crime committed by that person is against the law, but a suspect or a defendant can lose their liability if there are conditions in themselves that cause loss or the eradication of one's responsibility.

The principle of legality underlies criminal offense, while a crime committed by a person is the reason why the person is convicted, thus a person only has criminal liability if that person is suspected of committing an act that has a crime and there is a specific article of law regulating it. Thus, criminal liability can also be defined as a mechanism designed to react to an offense in which its punishment is written in the law.<sup>14</sup>

Criminal law is made to create a sense of justice in society. Criminal law also plays a role as a control over an alleged crime committed by a person, because in a criminal law a person suspected of committing a crime will be educated to remake him to being a good person and the perpetrator will also be sanctioned per crime he/she committed to giving a deterrent effect to make the perpetrator repents. Additionally, the existence of criminal sanctions written in the law will make the community to live their life based on the regulations. The community is also expected to not committing a crime. The existence of criminal law is even expected to be able to suppress a criminal act committed by someone.

Several forms of criminal liability can be inflicted on someone including the case of decency. Decency, according to the Indonesian Dictionary, derives from the word *Susila* (morality) which means 1.) Civilized, polite, polite-spoken, and orderly. 2.) Politeness, civilization, good manners, good customs. 3.) Knowledge about customs. While the definition of decency is an act related to morality which is inherent in every human being.<sup>15</sup> In conclusion, decency offense can be defined as an act against the law committed by someone related to the ethics inherent inside human beings and the actions that have been done are regulated in the existing laws and regulations.<sup>16</sup>

The responsibility of the perpetrators against decency is regulated in Article 281 of the Criminal Code to Article 299 of the Criminal Code in which the criminal acts of decency are divided into 2 (two) types, namely, rape criminal offenses which is regulated in Article 285 of the Criminal Code and rape or sexual abuse which is regulated in Article

<sup>13</sup> Hanafi Mahrus, 2015, *Sistem Pertanggung Jawaban Pidana*, Cetakan pertama, Rajawali Press, Jakarta, p. 16

<sup>14</sup> Chairul Huda, 2006, *Dari Tindak Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggung jawab Pidana Tanpa Kesalahan*, Cetakan ke-2, Kencana, Jakarta, p. 33

<sup>15</sup> Elizabeth Pisani, 2008, *Kearifan Pelacur : Kisah Gelap di Balik Bisnis Seks dan Narkoba*. Jakarta : Serambi.

<sup>16</sup> Marpaung Leden, 2008, *Kejahatan Terhadap Kesusilaan Dan Masalah Prevensinya*, Sinar Grafika, Jakarta, p. 2

289 of the Criminal Code to Article 296 of the Criminal Code. Additionally, sexual abuse is also regulated in Article 2 verse (1) of the Law of the Republic of Indonesia number 21 year 2007 concerning Eradication of the Criminal Act of Human Trafficking, especially sexual abuse on children is regulated in Article 81 and Article 82 of the Republic of Indonesia Law No. 17 of 2016 concerning Establishment of Government Regulation in place of Law No. 1 of 2016 concerning the Second Amendment to RI Law No. 23 of 2002 concerning Child Protection becomes a law. The crime of decency in the Criminal Code has the criminal sanctions in the form of imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years of imprisonment and fine as much as IDR 5,000,000,000.00 (five billion rupiahs) at most.

### **Criminal Liability for YEKNO in Decision No. 601 / Pid.B / 2019 / PN.SBY**

#### **Position Case**

Initially, YEKNO was hanging out at Gang Dolly in Surabaya to find a male guest who wanted to have sex with a woman, and then when YEKNO saw AGUS who was around, YEKNO approached AGUS and offered a woman to have sex with for IDR 335,000 (three hundred thirty-five thousand rupiahs) with room included, then AGUS agreed.

YEKNO took AGUS to HENKY's house, the person who provided a room for intercourse on Jl. Putat Jaya Lebar B / 20, Surabaya, then YEKNO went to pick up the offered woman for AGUS, I MADE NILO, at her boarding house located at Jl. Head to Mount VII / 4 and took I MADE NILO to HENKY's house.

When arriving at HENKY's house, YEKNO received payment from AGUS as much as IDR 300,000 (three hundred thousand rupiahs). After that, YEKNO gave IDR 150,000 (one hundred and fifty thousand rupiah) to I MADE NILO as a payment to serve AGUS, after that AGUS and I MADE NILO entered a room in HENKY's house to have intercourse.

Prostitution that occurred in YEKNO's case began with YEKNO's role in introducing AGUS to I MADE NILO, and that, with this encounter, AGUS intended to have sex with I MADE NILO. Because of YEKNO's help, AGUS then gave YEKNO some money in return, which amount is already agreed upon. The description of the position, in this case, showed us the actors involved; I MADE NILO as a Commercial Sex Worker (CSW) and AGUS as a customer.

The judge's consideration in deciding YEKNO's case is based on the pieces of evidence and YEKNO's statements during the examination process, so that the judge could issue a decision.

Points in judge's considerations are as follows:

That YEKNO violated Article 2 verse (1) of the Law of the Republic of Indonesia Number 21 of 2007 concerning Eradication of the Criminal Act of Human Trafficking.

That the request for relief means that the person has acknowledged his action and did not deny legal rules or facts so that this cannot break the decision considered above. Therefore, the judges still stated that the crime committed by YEKNO had fulfilled the conditions of the criminal act for which he was convicted, while the relief is considered done in terms of incriminating and mitigating matters.

That from the facts obtained at the trial, the council did not find any matters that could discharge criminal liability towards YEKNO, both for justification and forgiving reasons. Thus, the council concluded that YEKNO can take responsibility.

that YEKNO has been legally and convincingly proven to be guilty of committing a crime “Recruiting, transporting, accommodating, delivering, transferring or receiving of someone by threatening, kidnapping, confinement, forgery, fraud, abuse of power or vulnerable position, debt bonding or paying some amount of money or profit despite of obtaining approval from the person in control of another person, to exploit that person in the territory of the Republic of Indonesia “

Judges’ decisions generally cover several things, i.e.: 1.) About the criminal offense, whether the defendant was attested that he has committed a crime 2.) about the law, whether the defendant’s actions ascertained to fulfill the elements in the articles that were alleged to him. 3.) about the crime, whether the defendant can be responsible for the crimes he has committed.<sup>17</sup>

The main task of the judge is to conduct a careful and meticulous examination of a case in a trial and if the trial has been completed then the judge must issue a decision based on his knowledge and belief about criminal law. Additionally, the judge, when carrying out his duties, must be free to uphold justice and uphold the law. In considering to decide on a case so that the judge’s decision is following the facts in the Minutes of Examination (BAP) and the facts of the trial and can bring justice, the judge’s decision can be tested at least through 4 (four) basic questions such as whether the decision made is right, whether the decision taken is honest and following beliefs, whether the decision taken is just for the perpetrators, whether the decision taken is beneficial.<sup>18</sup>

The discretion of a judge in making a decision must be a balance in the sense that it cannot be lower or higher than the statute. In sentencing a defendant, a judge will make a decision using several considerations such as juridical or non-juridical. Juridical considerations include facts revealed during the trial process or trial facts, usually those juridical considerations are written in the decision.

In addition to judicial considerations, a judge can also decide a case by using non-juridical considerations such as 1.) The impact of the defendant’s actions, both for witnesses who are being the victims and community. 2.) the defendant’s condition, including his physical condition in terms of age and maturity, or psychological condition 3.) matters considered burdensome as well as alleviating for the defendant including attitudes of the defendant when undergoing the trial process, whether the defendant complicates the trial or not.

The judge deciding the case based on the ratio *decidendi* based his decision on a comprehensive philosophy that brings together the main points of the case conducted by the defendant as long as the elements in the articles are following the defendant’s acts and then he pays attention to the examination process during the trial process so that the judge has an orderly and proper ratio in making decisions, especially in sentencing a defendant so that the decision provides justice for the criminal based on a clear legal basis.

YEKNO’s acts made him suspected as a pimp because he began his acts that were indeed looking for a customer to be invited to have sex. Therefore, YEKNO’s intention

<sup>17</sup> Devananda Wahyu Kusumawardhana, Pujiyono, Henny Juliani, 2012, *Penegakan Hukum dalam Upaya Penanggulangan Prostitusi di Kota Semarang*, Jurnal Diponegoro Law Review, vol.1, no.4

<sup>18</sup> Lilik Mulyadi, 2007, *Kekuasaan Kehakiman*, Bina Ilmu, Surabaya, p. 136

can also be classified as *Mens rea*. *Mens rea*, in criminal liability, is related to the inner mood of the person which is influenced by the thought to do bad deed. The act is consciously done and the person wants his acts. That is why the defendant is considered capable and must be responsible for his acts. Therefore, with a criminal liability imposed on him, he must be punished, and pieces of evidence are needed to prove whether he played the role of a pimp or not.

During the trial process, YEKNO was confirmed to be facilitating obscene between AGUS and MADE NILO. However, his acts are not included in the criteria for being a pimp because this is the first time he did this, he neither did it repeatedly nor took it as a job. Therefore, the elements in article 296 of the Criminal Code were not violated. Based on these facts, YEKNO was not confirmed to be a pimp.

Pimps have specific criteria in carrying out their activities which YEKNO has not and did not do. According to Wahyu Adi Prasetyo, who researched prostitution in Sanggrahan Tretes, pimps, in doing their roles, have several identified criteria including<sup>19</sup>:

1. Have a special communication pattern. The pattern of communication is only among prostitutes, pimps and localization providers. So, the well-organized communication patterns cannot be easily identified by outsiders or non-customers.
2. A series of ties, a unique pattern of communication created by pimps has its steps and differs from one pimp to the others.
3. Link, the guaranteed commitment between prostitutes and their customers is permanent, but it still has a relationship duration agreement, so there is a freedom in choosing or changing partner.
4. Having a law that has been agreed upon by commercial sex workers, pimps and localization providers. This law regulates the rights and obligations of commercial sex workers, pimps and localization providers. The concept of rewards and punishments applies in this type of relationship.

An important role played by a pimp is to guarantee that women are available to be employed as sex workers so that prostitution can be run. After getting the prostitutes, the pimp must guarantee his/her safety, starting from supervising the pimp's relationship with the customer, a reasonable relationship, because the pimp also gives the prostitute the freedom to build relationships with customers and to choose the preferred customer as her date.

The social relationship between pimp and prostitute has the main goal that is to get benefits through prostitution. Prostitution in localization is fully controlled by a pimp to protect their interests and prostitutes' interests. A pimp will protect their entire working area including the safety of prostitutes and intermediaries who assist them. Security becomes the main concern for prostitutes because commonly capital owners demand their investments, prostitutes, to be safe. On the other hand, prostitutes can do their job perfectly. Therefore, a pimp must guarantee that all prostitution activities are monitored so that they run optimally and obtain maximum income.<sup>20</sup>

Based on this elaboration, it can be concluded that the role and function of a pimp in prostitution are not limited to only providing prostitutes, but also to protect them from

<sup>19</sup> Wahyu Adi Prasetyo, *Jaringan Sosial Prostitusi Peran dan Fungsi Mucikari Di Lokalisasi Sanggrahan Tretes*, Tanpa Tahun, Departemen Antropologi FISIP Universitas Airlangga, p.24

<sup>20</sup> Shalahuddin Harahap, 2010, *Perlindungan Hukum terhadap Perempuan dan Anak Korban Perdagangan Orang di Indramayu*, Jurnal Mimbar Hukum, vol. 26, no. 2, edisi desember p. 108

several aspects such as health and safety. Such protection is given to make the customers feel comfortable. For pimps, prostitutes are assets to earn money.<sup>21</sup>

### **Criminal Liability of HENKY who Serves as an Accommodation Provider for Prostitution in Verdict No. 601 / Pid.B / 2019 / PN.SBY**

The role taken by HENKY in the prostitution case happened between MADE NILO and AGUS was as an Accommodation Provider. According to the Criminal Code, the role taken by HENKY is regulated in Article 296 of the Criminal Code. Therefore, the investigator, police officers, separate his case file (splitting) from YEKNO's because he deliberately eased the prostitution done by MADE NILO and AGUS, and so he is considered taking a different role from that of YEKNO. Besides, HENKY rented a room in his house for prostitution, to earn some money. He has done this since the 1980s since he opened a prostitution localization on Jl. Jarak, Surabaya, to this day, HENKY is still doing it secretly.

Intermediary or facility provider always plays a role as a person who introduces a prostitute to a customer. So, what they do makes prostitution happening. Their acts have been formulated in Article 296 of the Criminal Code which, if elaborated, is divided into two elements, namely Objective and Subjective. The elaboration of each element is as follows<sup>22</sup>:

#### **Objective Elements:**

- a. Actions carried out by the perpetrators: Causing or facilitating obscene. That is giving convenience by providing facilities that can be used by prostitutes to ease their activities.
- b. Between actors (legal subjects): legal subjects who build relationships with other legal subjects based on an agreement.
- c. As a source of income or a job for the offender: Taking an activity as a job means that the offender receives payment for the services he gives, which is introducing a prostitute to a customer.<sup>23</sup>
- d. As a habit: that the perpetrator has committed prostitution for more than once.<sup>24</sup>

#### **Subjective Elements:**

Actions that are done intentionally: i.e. inner mood of the person is influenced by their thought to commit a bad deed.

Intermediary in prostitution plays a very important role because an intermediary is a key factor that causes prostitution to happen. An intermediary can be affiliated with pimp or work on their own. If an intermediary has been affiliated, then it is clear that the person has been involved in a more organized prostitution network and his work can be categorized as a job. However, an intermediary that is not affiliated with pimps, it is certain that the act is not a part of organized prostitution and so it is not categorized as a job. Sometimes unorganized intermediary carries out actions based on trial and error, and they do not make money for living by doing it.

It has been discussed that in addition to an intermediary, there is also an accommodation provider involved in prostitution. A facility provider provides several

<sup>21</sup> *Ibid*, hal. 25

<sup>22</sup> P.A.F. Lamintang, 1990, *Delik-Delik Khusus, Tindak Pidana-Tindak Pidana Melanggar Norma Norma Kesusilaan dan Norma Norma Kepatutan*. Mandar Maju, Bandung, p. 228 – 229

<sup>23</sup> Leden Marpaung, 2004, *Kejahatan Terhadap Kesusilaan dan Masalah Prevensinya*, Sinar Grafika, Jakarta, p. 72

<sup>24</sup> *Ibid*, p. 73

things and they already know the things needed to run the activities smoothly. Facilities are things, commonly objects, to expedite activities. Facility providers in prostitution can be someone who provides accommodation for having intercourse.

The case of the position described above involves two perpetrators who were suspected of committing criminal acts as an intermediary and a facility provider, namely YEKNO and HENKY. In a further elaboration, based on Article 296 of the Criminal Code, the roles taken by YEKNO and HENKY meet the following elements<sup>25</sup>:

- a. Actions carried out deliberately by the perpetrator: Causing or facilitating obscene acts. That is to provide convenience by providing facilities that can be used by prostitutes to facilitate their actions.
- b. Between actors (legal subjects): Legal subject who builds relationships with other legal subjects based on an agreement.
- c. As a source of income or a job for the offender: Doing this work as a job means that the offender receives payment for the services, which is introducing a prostitute to a customer.
- d. As a habit: that the perpetrator has committed the act of prostitution more than once.<sup>26</sup>

The description of the case above shows that HENKY has been legally confirmed as a facility provider because he provided a place at his house to be used for prostitution. Thus, he fulfills the elements of Article 296 of the Criminal Code. Unlike YEKNO's case, the role played by YEKNO was not confirmed to be an intermediary because he did not do it to make money and he did it for the first time. Therefore, YEKNO's acts did not violate any of the elements in Article 296 of the Criminal Code.

Criminal Liability for MADE NILO who Serves as a Commercial Sex Worker (CSW) and AGUS who Serves as a Customer in verdict No. 601 / Pid.B / 2019 / PN.SBY

Unlike HENKY's case whose role is to provide a facility for prostitution, MADE NILO acts as a prostitute and AGUS acts as a customer. In the Criminal Code, prostitutes and customers are close to violating Article 281 of the Criminal Code and Article 284 of the Criminal Code. In YEKNO's case, it can be said that prostitution was not carried out in a crowd or a public place because it happened in HENKY's house. So Article 281 of the Criminal Code could not ensnare MADE NILO and AGUS. The perpetrators' marital status is also unknown, whether one of them is married or not because both of them were absent during the trial even after they had been summoned. Therefore Article 284 of the Criminal Code could not be applied.

The acts of these perpetrators cannot be complied with using criminal code. So, the investigator's decision, in this case, to make MADE NILO and AGUS as witnesses is right because based on Criminal Code, particularly Article 281 of the Criminal Code and Article 284 of the Criminal Code, MADE NILO who acts as a prostitute and AGUS who acts as a customer cannot be sentenced.

So far, the Criminal Code does not have a specific regulation concerning prostitutes and customers. That is why MADE NILO and AGUS are free from criminal liability. The Draft of Criminal Code (RKUHP) seeks to regulate intercourse between man and woman through Article 446 paragraph (1) letter (e) which states that man and woman who are not bound in marriage, but they have intercourse will be sentence with a

<sup>25</sup> Lutfi Irwansyah, *Kemiskinan, Keluarga dan Prostitusi pada Remaja, Seminar ASEAN 2nd Psychology & Humanity, Universitas Airlangga*, 19 – 20 Februari 2016

<sup>26</sup> Oksidelfa Yanto, 2016, *Prostitusi Online sebagai Kejahatan Kemanusiaan terhadap Anak* : Telaah Hukum Islam dan Hukum Positif, jurnal Ahkam, vol. XVI, no. 2. p.145.

maximum imprisonment of 2 (two) years. However, to apply this article, further detail and elaboration of a case are needed, whether the intercourse is done for money, like what happens between a prostitute and her customers, or intercourse happens between a man and a woman who are in love. Article 447 paragraph (1) states that intercourse, which is referred to Article 446 paragraph (1) letter e, is done by the woman's consent because the woman is promised to be married, but then the man breaks his promise. If this is the case, then the perpetrators will be sentenced with imprisonment for a maximum of 4 (four) years or to be fine (category III) for maximum IDR 50,000.00 0.00 (fifty million rupiahs). Besides adultery, the RKUHP also drafted the regulation of obscenity in Article 458. In this article, the perpetrators can be sentenced to a maximum imprisonment of 12 (twelve) years for each person who takes it as a job or habit, facilitating other people to commit adultery, or taking advantage of adultery and earn money from it. The RKUHP rules have worse criminal threats compared to the regulation in article 296 of the Criminal Code where defendants will only be imprisoned for 1 (one) year and 4 (four) months.

Criminal liability can be defined as a way to ensnare the perpetrators who are suspected of committing a crime. Then the perpetrators become suspects, and after going through the examination process, the suspect's status changes to the defendant. Then the defendant undergoes the trial and verification process, and if the defendant confirmed guilty, the defendant can be sentenced based on the judges' verdict.

The concept in criminal liability consists of regulations that can control the community, not only those listed in the law but also morality existed and acknowledged by the community. If someone who violates it, then that person can be punished. This is solely to create a sense of justice in the society.<sup>27</sup> Although MADE NILO and AGUS were free from the punishments, their acts, viewed from Indonesia's philosophical point of view, *Pancasila*, certainly violated the values and morality of Indonesian that has been embedded and ingrained, especially as what is stated in the second point of *Pancasila*.

Systematically, the second percept of *Pancasila* is imbued by the first, the third, the fourth, and the fifth percept. Humanity has a philosophical meaning, which means that humans are individual and social beings at the same time who possess honor, have manners, courtesy and uphold one's dignity. Commercial sex workers, who have intercourse with a man, have violated manners, decency and religious norms, and noble values of human beings.<sup>28</sup>

I MADE NILO and AGUS who acted as a prostitute and customer, in this case, could be free from punishment. But it is unfair and lowers human dignity as a social being as well as a God's creature if it is seen from the philosophy of *Pancasila*. Although I MADE NILO and AGUS's acts did not cause any casualty or material loss, the concept of criminal liability of these people is contrary to morality and decency in the society. The customary law for adulterers is only applied in certain areas such as Aceh that applies Islamic law. In Aceh, if an adulterer is married or *muhsan*, they will be stoned to death, while if the adulterer is not married or *ghair muhsan*, the sentence is being whipped 100 (one hundred) times, then being exiled for 1 (one) year.<sup>29</sup>

<sup>27</sup> *Ibid*, p.58

<sup>28</sup> Saefudin Mashuri, 2014, *Peranan Majelis Taklim dalam Meningkatkan Sikap Keagamaan Pekerja Seks Komersial (PSK) di Lokalisasi Tondo Kecamatan Mantikulore Kota Palu*, Jurnal Istiqra, vol. 2. no. 1. Edisi Juni, p.128

<sup>29</sup> Dian Andriasari, 2011, *Studi Komparatif Tentang Zina dalam Hukum Indonesia dan Hukum Turki*, Jurnal Syiar Hukum FH Unisba, Vol. XIII. No. 3 November, p. 39-40.

The law to ensnare customers and prostitutes must be immediately created to create justice. The justice meant here is the legal justice which every citizen knows about the rules and so they must obey the regulations to create an orderly life in society. The policymaker (lawmaker) should immediately create a special law or a new Criminal Code because prostitution has many negative consequences both for commercial sex workers and their offspring as well as customers and other actors involved. The Government and the legislature should make specific regulations on prostitution apart from the Criminal Code and PTPPO Law so that these regulations can ensnare all prostitution actors including commercial sex workers, customers, intermediaries, facility providers, and pimps.

### **The borderline between Pimping and Human Trafficking**

It has been mentioned earlier that YEKNO's prostitution case involved several parties, namely a prostitute, a customer, an intermediary, and a facility provider. Regulations on prostitution, especially those governing intermediaries and facility providers, are stated in Article 296 of the Criminal Code. The following problem needed to be discussed is to what extent an intermediary is called a pimp.

Someone is called a pimp if they fit the criteria of pimp discussed previously, but what makes or limit someone to become a pimp or human trafficker if someone acts as an intermediary but he is not categorized as a pimp because they do not meet the criteria of a pimp. The prostitution case involving YEKNO can be elaborated further through PTPPO Law about human trafficking. Article 1 number (1) of the PTPPO law states that human trafficking refers to the activity of recruiting, transporting, accommodating/sheltering, transferring, moving or accepting someone using threat, using violence, kidnapping, confining, forgery, fraud, and misuse of power, money entrapment, payment or benefit provision, so that they get the consent from the person who controls the other person (victim), whether it is carried out in-country or inter-states for exploitation or to cause the victim to be exploited.<sup>30</sup>

Based on the definition of the article above, the types of human trafficking are:

1. Overseas migrants aiming to find a job, i.e. those who migrate from the country of origin where they were born to another country and then that person works there for a long time and tends to stay.
2. Children labors.
3. Prostitution, which is defined as selling sexual services from an intermediary to customers which includes the act of fulfilling sexual desires.
4. Children Trafficking through processes that are against the law.
5. Slavery under the guise of marriage and order brides.
6. Illegal Organ Implantation.

Today, human trafficking has become a global discussion because human trafficking is closely related to human rights violations such as forced labor, sexual exploitation under the guise of a job, exploitation, violence, doing inhumane acts to someone. The way to ensnare victims of human trafficking is to promise someone to have a wealthy life, giving false hope and taking advantage of someone's ignorance using violence, isolating victims and threatening victims so that victim follows the human trafficker's command. The victim is forced to obey the offender's command because in the past the victim has

<sup>30</sup> Abdul Rahman Prakoso, Putri Ayu Nurmalingda. 2018, *Kebijakan Hukum Terhadap Tindak Pidana Perdagangan Orang*, Seminar Nasional Hukum Universitas Negeri Semarang Volume 4 Nomor 1 Tahun p. 4

a huge amount of debt to the perpetrator, while the perpetrator only wants to be paid through a marriage (*contract*) as a cover which then the victim falls into prostitution.<sup>31</sup>

Prostitution has turned into the most promising business if it is well-organized using plans and systems. The pimp or localization owner gets the whole amount of money from each pimp who has succeeded in selling prostitutes to customers, but the amount of money the pimp received has been deduced due to force major budget. The money received by the pimp will be managed to add prostitutes, to renovate the house, to pay force major needs, to pay other employees, as well as to provide payment for several people who have the authority to protect and protect the prostitution so that the prostitution can continue without chaos.

A pimp in Indonesian dictionary means *muncikari*, a person who protects prostitutes, *muncikari* is also called *germo*. The developing stereotype today is that pimps are the people who sell commercial sex workers to customers, while in prostitution, the commercial sex workers wait somewhere and the customers come because pimps also act as intermediaries between commercial sex workers and customers. For that role, the pimps get some money which amount is calculated based on the percentage agreed in advance. Pimps have a dominant role in regulating prostitution because the prostitutes think that they owe pimps since pimps help them make their living. Commercial sex workers feel that they have a better financial condition than before, feel welfare and pay off their debts even though pimps are exploiting them.

Pimping is specifically regulated in Article 296 of the Indonesian Criminal Code, but there is no clause mentioning a pimp as a job in that article. Therefore, YEKNO's case cannot be regulated using Article 296 of the Criminal Code because, during the examination and trial processes, YEKNO acknowledged that it was the first time he carried out the act. The legal snare under Article 296 of the Criminal Code does not meet the mentioned element. Therefore, YEKNO was sentenced based on Article 2 paragraph (1) of the PTPPO Law which in terms of *lex specialis* the article regulates prostitution.

Eradicating prostitution is a necessity that must be done by all stakeholders of society especially those who have the authority because prostitution has spread to all aspects of society including social and economic. Therefore, the regulation for prostitution becomes urgent and so it is very important to immediately produce a special law on prostitution so that the mushrooming prostitution can slowly be diminished counting several impacts of prostitution wherein human trafficking is also included. So, there is no reason for legislators to include prostitution in the upcoming national legislation program.

## CONCLUSION

The form of criminal liability for prostitution cases that occurred in case No.601 / Pid.B / 2019 / PN.SBY conducted by YEKNO, that is, YEKNO was sentenced to criminal with Article 2 paragraph (1) of the PTPPO Law because of YEKNO's role in the practice of prostitution that is, as an intermediary between prostitutes, customers and providers of prostitution facilities not as pimps. Brother HENKY who played the role of providing prostitution facilities was charged under Article 296 of the Indonesian Criminal Code. So far, the Criminal Code has not specifically regulated PSK and customers, so that you I MADE NILO as a PSK and you will not be held liable for criminal liability.

<sup>31</sup> Maslihati Nur Hidayati, 2012, *Upaya Pemberantasan dan Pencegahan Perdagangan Orang Melalui Hukum Internasional dan Hukum Positif Indonesia*, Jurnal Al-Azhar Indonesia Seri Pranata Sosial, Vol. 1, No. 3, Edisi Maret p.163

Arrangements on prostitution become urgent and it is very important to immediately make a special law on prostitution (lex specialist) in the hope that the mushrooming practice of prostitution can gradually diminish. Considering the negative impact caused by the practice of prostitution so there is no reason for the legislature to prioritize prostitution cases. into the national legislation program (Prolegnas) in the future.

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