



**REFORMULATION OF THE CRIMINAL LIABILITY AS AN  
ACTOR OF ONLINE PROSTITUTION: A NORMATIVE STUDY**

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**Article Information    Abstract**

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*One of the rational efforts used to tackle online prostitution activity is with the approach of criminal law through criminal law formulation as a concrete form of criminal responsibility to the perpetrators of online prostitution. There is no provision that regulates the criminal to the users of online prostitution services because of the maximum prevention of online prostitution itself. If there is no national regulation governing the matter, online prostitution users will feel secure and remain free to buy services for their satisfaction alone, while it is contrary to various aspects of norms in the ethical norms of society. Therefore a criminal law is required, related to criminal liability for users of online prostitution services. The method used is normative juridical, ie by examining or analyzing secondary data using basic materials, with legal sense as a set of rules or positive norms in the legislation system that regulates prostitution online, as well as using secondary legal materials, and tertiary. So this research is library research (library research), that is research to secondary data. Thus, the juridical-normative approach in the study is used to analyze issues relating to criminal law reform regarding criminal liability to online prostitution actor.*

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## INTRODUCTIONS

The Government considers that Act No. 11 of 2008 on Information and Electronic Transactions which amended by UU No. 19 of 2016 on Amendment to Act no. 11 of 2008 on Information and Electronic Transactions, hereinafter referred to as the IET Act is absolutely necessary for Indonesia, because Indonesia today is one of the countries that widely and efficiently use and utilize information technology. Thus, the Government on April 26th 2008 has been ratified the coming into effect of the Act on Information and Electronic Transactions (IET). Furthermore, on October 27th 2016, the government re-enacted Act No. 19 of 2016 on Amendment to Act No. 11 of 2008 on Information and Electronic Transactions and started to be in force on November 28 th 2016. The IET Act was intended to provide many benefits, including to ensure legal certainty for people who make electronic transactions, encourage economic growth, to prevent the occurrence of information technology-based crimes and protect the community of by utilizing information technology. This is suit perfectly to Bambang Sunggono statement that is:

The development of law is not only used to regulate existing behavior in society and to maintain existing patterns of habit, but more than that, the law leads to its use as a means. To implement the objectives that have been chosen and determined so that it can be realized in the community it is necessary to have several utilities. One of the sufficient

means is the law with various forms of existing regulation.<sup>1</sup>

Based on the explanation above, the policy to overcome prostitution online as part of criminal acts in technological information can be done through criminal liability to perpetrator of online prostitution by using "penal" procedure (criminal law). So there is needed a study of prostitution online as a subject when this is particularly related to criminal liability on the perpetrator.

Starting from this it is clear that the scope is very wide, in order to prevent the scope of coverage, and to have a specific discussion it is necessary to limit the problem. The problem in this research is how the criminal liability reformulation on perpetrators of online prostitution in the future?

Based on that issues above, this study aims to determine the criminal liability reformulation on perpetrators of online prostitution in the future rely on the perspective of criminal law policy. Meanwhile, the results of this study are expected to contribute both theoretically and practically, namely:

1. Theoretical contribution, the results of this study are expected to contribute for science, especially criminal law relation between criminal liability and perpetrators of online prostitution in the perspective of criminal law policy.

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<sup>1</sup> Law is the norm that leads people to achieve goals and circumstances by not ignoring the world of reality. Therefore, the law is primarily made with full awareness by the state and it has been used to achieve a certain goal. Bambang Sunggono. *Hukum dan Kebijakan Publik*. Jakarta: Sinar Grafika, P.76.

2. Practical contribution, the results of the study is expected to provide benefits for law enforcement officers to expand the discourse on the prevention of online prostitution, especially related to criminal liability to perpetrators of online prostitution. For policy actors, this research is expected to provide input in establishing policies on criminal formulation and implementation in order to complement and improve the legislation relating to online prostitution.

## RESEARCH METHODS

Research on the reformulation of criminal liability on online prostitution perpetrators is a normative legal research, is research that focuses on secondary data. This research includes the type of descriptive-analytical research, which describes the legislation that applies as positive law is associated with legal theory and practice implementation of positive law in society. Thus, from this research can provide an overview of the reorientation of criminal law policy on criminal liability to perpetrators of online prostitution. Sources of data used in this study are secondary data in the form of primary legal materials, secondary legal materials and tertiary legal materials. Legislation as the primary legal material used in this study are: Criminal Code; Act no. 44 of 2008 on Pornography; Act no. 11 of 2008 on Information and Electronic Transactions as amended by Act no. 19 of 2016 on Amendment to Act no. 11 of 2008 on Information and Electronic Transactions. Secondary legal material is a legal material that provides an explanation of the primary legal material, such as the

results of research, obtained through literary materials, in the form of literature such as text books written by influential law experts (*der herseende leer*), legal journals, the opinions of scholars, legal cases, jurisprudence.<sup>2</sup> Tertiary legal materials are legal materials that provide guidance or explanation of primary legal materials and secondary legal materials<sup>3</sup> in the form of general dictionary, language dictionary, newspapers, articles, and the internet. Based on the approach used in this research, the data collection method used is literature study or document (library research). Data analysis was done qualitatively then identified and categorized. Qualitative analysis is the method of analysis that basically uses logical thinking, analysis with logic.<sup>4</sup> by induction, deduction, analogue-interpretation, comparison and the kinds.<sup>5</sup> The method of thinking used is a deductive method that is based on the basis of general knowledge to examine issues that are

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<sup>2</sup> Jhony Ibrahim. 2008. *Teori dan Metodologi Penelitian Hukum Normatif*. Surabaya: Bayumedia. P. 296.

<sup>3</sup> *Ibid*.

<sup>4</sup> Qualitative analysis basically uses analytical logical thinking (M. Sommers. 1992. *Logika*. Bandung,: Alumni. P. 2, Jujun S. Suriasumantri.1996. *Filsafat Ilmu-Sebuah Pengantar Populer*. Jakarta: Pustaka Sinar Harapan. P. 43.)

<sup>5</sup> Tatang A. Amirin. 1986. *Menyusun Rencana Penelitian*. Jakarta: CV. Rajawali. P. 95. According to Niles and Huberman, these steps to analyze data include data collection, data reduction, data display and conclusion formulation. ((Lihat Esmi Warassih. 1999. *Metodologi Penelitian Bidang Ilmu Humaniora*, Kompilasi makalah Pelatihan Metodologi Penelitian Ilmu Sosial, Semarang: Bagian Hukum dan Masyarakat, Fakultas Hukum UNDIP. Hlm. 51-52. And also : Matthew B. Mikles & A. Michael Huberman. 1992. *Analisis Data Kualitatif*, terj. Tjetjep Rehendy Rohidi. Jakarta: UI Press. Hlm. 15-21.)

special. From the results of the analysis will then be drawn conclusions as an answer to the existing problems.

## FINDINGS AND DISCUSSIONS

### Review of Criminal Legal Policies

Criminal law as a legal system consisting of culture, structure and substance of law, while regulation is part of the substance of the law. Thus the reform of criminal law does not merely renew the criminal law policy alone but also renews other sectors such as criminal law and criminal law ideas through educational processes and academic thought.<sup>6</sup> In fact, the scope of criminal justice policy is wider than the reform of criminal law. This is because the criminal law policy is implemented through three concrete steps<sup>7</sup> :

1. Legislative/formulation policy, the step for making criminal law policy
2. Judicative/aplicative policy, the implementation of criminal law
3. Administration/excecution policy, the enforce of criminal law

In this criminal law reform is more related to stage of formulation or making of criminal law or related to formulation policy. It is clear that criminal law policy can not be separated from the criminal law system. In this case Marc Ancel stated that every organized society has a legal system consisting of rules of criminal law and its sanctions, a criminal law procedure and a criminal enforcement mechanism.<sup>8</sup> A.

Mulder argues, that criminal law policy is the policy views to determine<sup>9</sup> :

1. how far the applicable criminal provisions need to be changed or updated;
2. what can be done to prevent the occurrence of a crime;
3. the manner in which investigations, prosecutions, judicial and criminal proceedings must be carried out.

Thus the criminal law policy relates to the process of law enforcement as a whole. Therefore, criminal law policy is aimed at the concretization of operationalization of the functioning of material criminal law, formal criminal law (criminal procedure law), and criminal law.

The policy of using criminal law as part of criminal politics is basically a rational effort to support and achieve "social welfare" and "social defense". Thus, the use of criminal law as a tools of criminal politics and socio-political, is intended to protect certain social interests and values in order to achieve social welfare.

### Criminal Liability

In other languages criminal liability is referred to as, *toerekenbaarheid*, criminal responsibility, and liability. Criminal liability is intended to determine whether a suspect or defendant is held liability for a crime committed or not. In other words whether the defendant will be convicted or acquitted. If he is convicted, it should be found that the act is unlawful and the defendant is responsible. This ability shows the errors of the act in the form of deliberate or negligent. This means that the actions are

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<sup>6</sup> Barda Nawawi Arief. 2005. *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Edisi Revisi. Bandung : PT. Citra Aditya Bakti. P. 11.

<sup>7</sup> Ibid. P. 29

<sup>8</sup> Ibid. P. 28-29

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<sup>9</sup> Ibid.

reprehensible accused aware of the actions taken.<sup>10</sup>

Criminal liability is a disgraceful act for public sense that must be responsible to the actor for the deed that he or she had been committed. By liability for the wrongdoing from the actor, whether the actor is also guilty or not. In the first case then the actor is certainly convicted, whereas in the second case the actor of course is not punished.<sup>11</sup> Thus the error in the widest view, can be equated with the understanding of responsibility in the criminal law. In it contained the meaning that the actor can be blamed for his action or not. So, if it is said that the person is guilty for a crime, then it means that he can be blamed for his actions. According to Roeslan Saleh<sup>12</sup>:

In the sense of criminal conduct does not include liability. Criminal conduct only refers to the prohibition of deeds. Whether the person who has committed the deed is then also convicted, depending on whether or not he or she has committed any wrongdoing. If the person who commits the criminal act does have a mistake, then of course he will be punished.

Criminal liability leads to the criminal prosecution, if it has committed a crime and fulfills its elements as determined in law. Seen from the point of occurrence of a prohibited (required) action, a person will be held liable for such actions if the action is

unlawful (and there is no omission of the law or *rechtsvaardigingsgrond* or justification) for it. Viewed from the point of liability, that is only someone whom have capability to responsible. It is said that a person can be responsible (*toerekeningsvatbaar*), in general views.<sup>13</sup>

Certainly, criminal liability is the responsibility of a person against a criminal offense. Thus, the occurrence of criminal liability because there has been a crime committed by a person. Where the community has agreed to reject a certain act which is manifested in the form of a prohibition on the act. As a consequence of the community's refusal, so the person who commits the act will be reproached, because in the event the actual actor can do otherwise. Criminal liability is essentially a mechanism established by criminal law to react to a breach of an agreement against a particular act.

### Basic Comprehension of Online Prostitution

Online prostitution comes from two words that each can stand alone prostitution and online. Prostitution comes from the Dutch language is *prostitutie*, which means prostitution. Prostitution according to Soerjono Soekanto can be interpreted as a work that is surrender to the public to perform sexual acts with a wage. Prostitution or prostitution is the provision of sexual services by men or women for money or satisfaction.

Some formulation of prostitution as statement by some experts above can be drawn a conclusion that what is meant by prostitution is worker of both men and woman who surrender or sell service to

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<sup>10</sup> E.Y.Kanter & S.R Sianturi. 2002. *Asas-asas Hukum Pidana di Indonesia dan. Penerapannya*. Jakarta: Stora Grafika. P. 249.

<sup>11</sup> Roeslan Saleh. 1982. *Pikiran-pikiran tentang Pertanggungjawaban Pidana*. Jakarta: Ghalia Indonesia. P. 75-76.

<sup>12</sup> Ibid.

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<sup>13</sup> E.Y.Kanter & S.R Sianturi. *Op. Cit.* P. 249.

public to do sexual acts by getting wage according to what previously agreed upon.

From the juridical aspect, the regulation on prostitution as a criminal act at this time, other than stipulated in the Criminal Code, is also regulated in Article 27 Verse (1) of the IET Act:

Every person intentionally and without right to distribute and or transmit and or make accessible Electronic Information and or Electronic Document having a violation of morality shall be punished to a maximum imprisonment of 6 six months and or a fine of not more than Rp 1,000,000,000.00 one billion rupiah.

Article 27 Verse (1) of the IET Act above confirm the existence of acts that violate morality is to display a set of electronic data in the form of photographs, and distribute, and access the electronic documents that are inside the suspect site. As contained in Article 5 Verse (1) of the IET Act stating that "Electronic information and or electronic documents and / or prints are legal evidence". The article affirms that the acts committed by prostitute may be proven to an act of crime, by displaying photographs of prostitute, and if electronic documents in the form of photographs obtained from the suspect's website have printed. The printed result is an extension of valid evidence in accordance with applicable Indonesian law, as described in Article 5 Verse (2) of the IET Act, stating "Electronic information and / or electronic documents and / or prints as referred to in Verse (1) is an extension of valid evidence in accordance with applicable law of procedure in Indonesia".

The notion of "violating morals" as referred to in Article 27 Verse (1) of the IET Act can be understood through the systematic interpretation of a number of

provisions in the Criminal Code. Article 296 of the Criminal Code states that "a person who deliberately causes or facilitates lewd acts with other people, and makes it a search or habit." With reference to the article it can be understood that in prostitution known three elements which have a mutual synergy, that are prostitute, pimp and customers (clients). Not all of these components are subject to criminal penalties, which can only be criminalized only pimps as provided for in Article 296 of the Criminal Code. The current criminal provisions set forth in Article 296 of the Criminal Code by the National Legal Development Board of the Department of Law and Human Rights of the Republic of Indonesia have been deemed necessary to be maintained in the new Criminal Code. If what is prohibited in the criminal provisions as regulated in Article 296 of the Criminal Code, among others, makes intentional causes of acts of violating morality by others with a third person as a livelihood, then prohibited in the draft penal provisions include making the work of connecting others do lewd.

Another Act explaining the violation of the practice of prostitution is also contained in Article 4 Verse (2) sub-Verses d of Law Number 44 Of 2008 on Pornography which states: "Everyone is prohibited from providing pornographic services: offering or advertising, directly or indirectly indirect sexual services ". In this regard, in addition to the above legal provisions it should be noted also the security and legal certainty in the utilization of information technology, media, and communications in order to develop optimally.

The last word of the term prostitution online describes the place where this activity

is performed. Online is a term people use to state something related to the internet or cyberspace. Thus online prostitution is an activity offering sexual services through cyberspace. This online prostitution that can be defined by an act of prostitution by using the internet or online media as a means of transactions for those prostitute and any person who want to use his services. Although if we want to deep meaning then the understanding of online prostitution is a prostitution transaction that uses the internet media as a means of liaison between the prostitute with who wants to use his services. So the internet only as a means of support or liaison only. Unlike in general, prostitute transactions are waiting for customers on the sidewalk. All the definitions mentioned have their own problems because they are defined from different societies that basically have different social and moral standards about prostitution.

Based on the above description, then prostitution online is a prostitution transactions that uses the internet media as a means of liaison between commercial sex workers and those who want to use his services. So the internet only used as a means of support or media only.

The issue of criminal liability is another aspect of the subject of the offense that can be distinguished from the problem of the actor (who commits a crime). This means that the definition of criminal subjects can include two things: who is doing the criminal act and who can be responsible for.

In general, criminal liability in the penal law has been held for the actor, but it is not always like that. This issue also depends on the method or formulation of liability adopted by the legislator. This

means that the determination of criminal liability issues is who can be responsible for. This issue involves the subject of a criminal offense that is generally formulated by the legislator for the crime concerned. Determining a person that can be held for criminal liability must be based on the formulation policy of a criminal offense and who responsible for the act. If it is based on that, in determine and reconstruct the responsible subject in the event of an online prostitution crime. It must then examine the legal basis or legal system on which to determine it.

Criminal liability based on errors is primarily limited to deliberate acts (*dolus*). The conviction of a *culpa* offense shall only be exceptioned if it is expressly defined by law, while the liability of certain consequences of a crime by which the law is liable to its criminal punishment shall only be liable to the accused if it is reasonably suspect the possibility the occurrence of the consequences or if there is at least negligence. So the Criminal Code does not embrace the doctrine of pure consequence, but remains oriented to the principle of error. It is seen in Article 40 Draft of Criminal Code (RKUHP) which formulation is as follows:

- (1) A person can only be held a responsibility if the person committed a criminal act intentionally or because of negligence.
- (2) A criminal act shall be a deliberate intentional act, unless the law requires that a crime perpetrated by negligence is punishable.
- (3) A person can only be held a responsibility for the consequences of a specific crime which by law is compounded by his criminal

penalty, if he knows of the possibility of such a consequence or at least there is a negligence.

In case of any error, either *error facti* or *error iuris*, RKUHP has the principle of the actor can not be responsible for and therefore can not be punished. However, if the error (his false belief) is to be blamed or blamed on him, then the actor can be convicted. The establishment of the concept of the Criminal Code is thus formulated in Article 43 Verse (1) RKUHP which reads:

Not punished, if a person is unaware or misguided about the circumstances regarding the element of a crime or believes that his conduct is not a criminal act, unless his ignorance, heresy, or belief is to blame him.

Normatively is customary for every actor who commits a criminal offense and his actions are to be blamed and can be proven then it is considered the punishment. However, the RKUHP does not set out in accordance with the above conventional terms but rather revolutionarily authorizes the judge to consider forgiving and forgiving. Sorry and forgiveness here means the author is not subject to criminal penalties or any action. Guidance on the remedy of judges is set forth in Article 56 Verse (2) RKUHP as part of the guidance of punishment.

In the RKUHP 2015, the regulation on prostitution is formulated in Article 470, namely:

Any person who produces, reproduces, reproduces, distributes, broadcasts, imports, exports, offers, sells, leases or provides pornography shall be liable to a maximum imprisonment of 12 (twelve) months or a maximum fine of Category V.

Prostitution as formulated in Article 470 RKUHP can be used to reach the

prostitution activity online, because in the formulation of a criminal act it is formulated that the material related to prostitution activity is broadcast or disseminated through paper media, electronic media and or communication media. The Internet is one of the electronic media, so it can be categorized as a medium that can be used to broadcast and disseminate prostitution activities as defined in the offense. In addition, in relation to aspects of jurisdiction, RKUHP also formulates territorial jurisdiction to anticipate and reach the crime of information technology, including prostitution stipulated in Article 4 RKUHP stating that: Criminal provisions in Indonesian legislation apply to every person who undertakes:

1. a crime in the territory of the Republic of Indonesia;
2. criminal acts in Indonesian ships or aircraft; or
3. a criminal offense in the field of information technology which consequently felt or occurred in the territory of Indonesia or in Indonesian ships or aircraft.

Prostitution is a problem that not only involves prostitutes, but more than that it is an activity that involves many people like pimps, brokers, and service users who are mostly perpetrators of men who often escape the attention of law enforcement officers. In the provisions of positive law in Indonesia it can only impose criminal liability on those who assist and provide sex services illegally, meaning that criminal liability is only granted for pimps or pimps, brokers and prostitutes while commercial sex users themselves have absolutely no clause which governs it.



In practice, the prevention of prostitution is mostly done by disciplining and arresting female prostitutes conducted by law enforcement officers, while men of commercial customers or users are rarely and never even caught or missed by law enforcement officers. This type of discipline demonstrates gender injustice, as there is discrimination against women. The existence of gender inequality can lead to the difficulty of preventing prostitution, since prostitutes are the paradigm of interaction between women and men outside marriage. In such interaction women are likened to hired party, while men (service user) as party tenant.

Prostitution handling is only prostitutes only as the hired party is subject to criminal sanctions, while the hiring party can not be sanctioned. Normatively discrimination against women has been abolished under the Convention on Women (CEDAW) which has been ratified by Law Number 7 Of 1984. But in reality there are still discriminative cultural values of society. This can hinder the realization of gender equality and justice in law enforcement related to the prevention of prostitution. Whereas when referring to economic law, people will provide goods services due to the demand. Thus, prostitutes appear because there is a needy. Should there be the term Women of "Tuna Susila" (WTS) as the seller of commercial sex services, there should also be the term "Tuna Susila" (WTS) as the user of commercial sex services as an appropriate counterpart so that both men and women involved in prostitution have the same position to blame, including being labeled the same as an immoral act.

Service users are a combination of two words of users and services. Users are

people who use something, while services or services are economic activities that involve a number of interactions with consumers or with property, but do not result in ownership transfers.<sup>14</sup>

In Indonesia the government does not expressly prohibit the existence of prostitution practices. It is said to be unequivocal because the arrangement of online prostitution crimes does not stipulate provisions on criminal sanctions for commercial sex service users, so that online prostitution service users can not be criminally responsible, and those who use the services of commercial sex workers can freely without fear of criminal law sanction.

Judging from the various explanations of the article in the Criminal Code and Act no. 11 Of 2008 on Information and Electronic Transactions as amended by Act no. 19 of 2016 on Amendment to Act no. 11 of 2008 on Information and Electronic Transactions, and Act no. 44 of 2008 on Pornography has not been effective in ensnaring and tackling the online prostitution business, in no way regulating the users of services in online prostitution, so that the prostitution service users themselves can not be criminally liable and charged under positive law in Indonesia. It should be specifically in the Act no. 11 Of 2008 on Information and Electronic Transactions as amended by Act no. 19 of 2016 on Amendment to Act no. 11 of 2008 on Information and Electronic Transactions and Act no. 44 of 2008 on Pornography can entrap the subject of prostitution as a whole.

Users of online prostitution services are essentially normal and responsible people. Criminal liability to the users of

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<sup>14</sup> <http://id.wikipedia.org/wiki/Jasa> had been accessed on February 14th 2016.

prostitution services is deemed necessary in-depth analysis and positive law is not sufficient for it. The discussion of the criminal code has warned criminal actors of regulatory arrangements that have not existed and are likely to exist for national validity. The analysis of criminal liability in theory explains that criminal liability can only occur if someone has previously committed a criminal offense. Moeljatno said "people can not be responsible if they do not commit a crime".<sup>15</sup> That is, criminal liability will only occur if someone has previously committed a crime. In the context of legislation it is also said that the presence or absence of criminal offenses is determined by legislation, which is interpreted that there is no criminal liability without the rule of law governing it first.<sup>16</sup> Prostitution service users can not be convicted because the elements mentioned above have outlined the current weaknesses of criminal law. Then in the thinking of the coming law or *ius constituendum*: the law that is aspired by the association of life and the state, but not yet become the rule in the form of law or other rules, namely RKUHP has not regulated criminal matter against them. In Chapter XVI on Criminal Acts, the RKUHP has not regulated it. The idea of the need for rules governing the social phenomenon of prostitution especially for its service users is a solid basis since such action has become commonplace and is a downfall phenomenon for many societies and especially criminal law, it is expected to

regulate it. The user is the point of how this online prostitution transaction can happen. Although of course the other party also give encouragement until this practice of prostitution. But the service user is the target for the website owner or online prostitution forum to use the services of the sex commercial worker from him.

## CONCLUTIONS

The reform of criminal law policy on criminal liability to perpetrators of online prostitution in the future (*ius constituendum*) can be traced based on the formulation contained in Article 470 RKUHP. Bad behavior in society is the continued use of prostitution services that significantly grow and develop will cause the bad image of the nation, so its enforcement officers are seen can not do anything because it is hindered by the absence of rules that regulate the criminal to the users of the services of prostitution because the Criminal Code so far has not set clearly and clearly about the users of prostitution services. In the absence of a national regulatory arrangement prostitution service users will feel secure and remain free to buy services for their satisfaction alone, while they are contrary to various aspects of norms, especially legal norms in society. Therefore, it is necessary to reform the criminal law, related to criminal liability for the consumers of prostitution.

An in-depth assessment is needed so that criminal law can reach online prostitution crimes committed in cyberspace. This means the need for an extension of interpretation as well as a discussion of the comparability of criminal liability to perpetrators of online prostitution crimes that can reach the

<sup>15</sup> Moeljatno. 1987. *Asas-asas Hukum Pidana*. Jakarta: Bina Aksara. P. 155.

<sup>16</sup> Chairul Huda. 2011. *Dari Tiada Pidana Tanpa Kesalahan Menuju kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*. Jakarta: Kencana Prenedia Media Group. P. 20-21.

activities in cyberspace in the Criminal Code which will become a positive legal provision.

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