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## Reinventing the Criminalization of Commercial Sex Workers and Prostitution Service Users in Indonesia in the Perspective of Indonesian Criminal Law Reform

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**Abstract:** The advent of technology and easier internet access has led to a surge in internet and social media users in Indonesia, with apps like MiChat facilitating social interactions that could heighten the risk of HIV spread due to online prostitution. Commercial sex workers, once predominantly victims of trafficking, are increasingly promoting their services independently without intermediaries. This study aims to examine the enforcement of laws against online prostitution practices. The research method employed is normative juridical with a conceptual approach and statutory approach. The study finds that legal analysis of the criminalization of commercial sex work in Indonesia highlights the need for legislative renewal that emphasizes social justice and avoids disproportionate social consequences due to excessive criminalization. The necessary criminal law reform should harmonize sanctions with efforts for prevention, rehabilitation, and social reintegration to create a legal framework that supports individual well-being while maintaining social and moral integrity.

**Keywords:** Online; Criminalization; Commercial Sex Workers; Criminal Law.

### INTRODUCTION

The evolution of technology has changed the way people use the internet, making it easier to access and providing various features that have significantly increased the number of internet users. Global data shows an upward trend in the number of internet users every year, including in Indonesia. According to a report by Hootsuite, there was an increase in the number of social media users in Indonesia of around 15.5%, or more than 27 million people, from January 2020 to January 2021, and 6.3%, or more than 10 million people, in the same period.<sup>1</sup> Between 2021 and 2022, the number of social media users in Indonesia increased again by around 21 million people, or 12.6%, to 191.4 million.<sup>2</sup> Pada awal tahun 2023,

<sup>1</sup> Simon Kemp, "Digital 2021: Indonesia", Kepios, <<https://datareportal.com/reports/digital-2021-indonesia>> diakses pada tanggal 27 Januari 2023.

<sup>2</sup> Simon Kemp, "Digital 2022: Indonesia", Kepios, <<https://datareportal.com/reports/digital-2022-indonesia>> diakses pada tanggal 27 Januari 2023.

jumlah pengguna internet mencapai 212,9 juta dan pengguna media sosial 167 juta, yang merupakan 60,4% dari total populasi.<sup>3</sup> By early 2023, the number of internet users reached 212.9 million and social media users 167 million, accounting for 60.4% of the total population.<sup>3</sup> The widespread availability of smartphones has facilitated easy access to social media including messaging apps, especially for children (Kürtüncü dkk., 2021).

Messaging apps have become powerful communication tools, allowing people to meet, discuss or simply chat with just an internet connection. In this context, such apps have also been known to facilitate online prostitution transactions. Baihaqi and Rabathy in their research showed that online prostitution transactions involve the use of secondary communication patterns with prostitutes acting as message senders and potential customers as recipients (Baihaqi & Rabathy, 2023).

The phenomenon of prostitution is a complex topic, involving various causes, processes, and social impacts that arise in society. Another vulnerability is contributed by the escalation of online prostitution, which is facilitated by the use of instant messaging apps for sex service providers to advertise their services and for clients to search for commercial sex workers. MiChat, for example, is a free messaging app compatible with various devices such as smartphones, tablets, and computers, and has been used for online prostitution activities, which is a practice outside of the localization provided by the government by leveraging technology.

MiChat has been known to be used as a communication medium by online prostitution offenders. The high number of users and visits to the MiChat social media platform has created significant vulnerabilities in online prostitution cases. Research conducted by Efthariena et al, showed MiChat to be a medium in conducting online prostitution transactions, where prostitutes as communicators and potential customers as communicants, this was known in observations and interviews with 3 research subjects who have been in the profession as commercial sex workers for 6 months to 2 years. In the last three-month period, MiChat usage peaked in May 2023 with 231.4 thousand visits, but declined in June to 136.3 thousand, and continued to decline to 131.5 thousand visits. In terms of user demographics, MiChat is preferred by men, who make up 66.21% of the overall users, while women make up the rest with 33.79%. The app is also popular among the younger generation, especially 18-24 year olds, who make up about 36.73% of the total users.

Prostitution is not a new phenomenon that has emerged in recent times (Salman, 2022a). The business of prostitution, known as the commercialization of sex, has existed and developed since the Dutch colonialism. Society considers prostitution an important issue that is closely related to moral issues. To date, there are still issues that have not been fully resolved about the persistent existence of prostitution practices that follow the times (Pais, 2010). Prostitution is very complex due to various aspects of social, gender, legal, health, moral and ethical, religious, educational, psychological, economic, and industrialization, as well as political issues (Blackburn dkk., 2010). The issue of commercial sex work in Indonesia is very much against legal standards, especially religious standards, decency, and modesty. In Indonesia, there are many places for commercial sex workers. Commercial sex work has turned into prostitution as a result of the huge demand for sexual gratification services (Sirait, 2008).

Prostitution, which is still prevalent in society and is practiced openly or covertly, is one of the social problems (Salman, 2022a). In 2015, the Ministry of Social Affairs reported that the number of commercial sex workers reached 64,435. This condition is of increasing concern, especially since UNICEF estimates that the involvement of women under the age of

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<sup>3</sup> Simon Kemp, "Digital 2023: Indonesia" Kepios, 9, <<https://datareportal.com/reports/digital-2023-indonesia>> diakses pada tanggal 11 Januari 2024.

18 reaches 30%. In addition, it is estimated that between 40,000 and 70,000 children are sexually exploited each year (Unicef, 2020).

At the same time, the rise of online prostitution, including the use of MiChat as a marketing tool, also increases the risk of spreading HIV/AIDS, especially among adolescents. The latest data on HIV in Indonesia shows that the number of HIV cases is projected to reach 515,455 cases during January-September 2023, with 454,723 cases or 88% confirmed cases. The majority of people living with HIV in Indonesia are in the 25-49 age group, accounting for 69.9% of total cases. The 20-24 age group followed with 16.1%, followed by those over 50 years old with 7.7% and 15-19 years old with 3.4%. The high number of HIV cases is known to be caused by low contraceptive use. Along with that, a study conducted by Smriti Agarwal et al, found that most men who use paid sex services are known not to use contraceptives in their sexual activities.

From the various vulnerabilities that exist, the government and society work together to eliminate prostitution. The business of prostitution is rejected and fought against because it violates the values of Pancasila, the 1945 Constitution, and the ideals of the Indonesian nation. In addition, the prostitution business violates the values, religious norms, and customs of the Indonesian nation. In addition, the health and welfare of women is an issue for local governments. Several factors contribute to the spread of prostitution in Indonesia. Soekamto said that endogenous and exogenous are the two sources of prostitution practices (Jailani, 2020). Exogenous factors include economics, massive and irregular urbanization, and others. Endogenous factors include great sexual appetite, great desire, and laziness. In addition, lack of parental attention and even victims of violence are also causes of prostitution.

However, according to Article 1 paragraph (1) of the Criminal Code, "An act cannot be punished unless it is based on the strength of existing criminal legislation", Indonesian criminal law is based on legality. In the Criminal Code, there is no clear and firm regulation on prostitution. Articles 296 and 506 of the Criminal Code only regulate pimping. If a person intentionally facilitates the commission of obscene acts by another person as a means of livelihood, he shall be punished with a maximum imprisonment of one year and four months or a maximum fine of fifteen thousand rupiahs, according to Article 296 of the Criminal Code. In addition, a person who draws wages from a woman employed as a prostitute is punishable with a maximum imprisonment of one year under Article 506 of the Penal Code. Because in criminal law, prostitution is only considered a criminal offense against its intermediaries, namely pimps and pimps. It is very difficult to apply to prostitution workers and prostitution service users due to moral considerations stipulated in the Indonesian Criminal Code, specifically Articles 201-303. In other words, service users and commercial sex workers often evade the law. In the same way, online prostitution that utilizes technology and information can only be enforced if the parties involved disseminate pornographic content, as stipulated in Article 45 of Law No. 11/2008 on ITE.

The sense of justice and legal certainty is unclear because there are no clear rules on how to calculate the burden of fair punishment in imposing criminal sanctions, especially imprisonment in the criminal court process in Indonesia (Alin, 2017). In criminology, prostitution is known as a victimless crime. Users of prostitution are rarely caught during raids. Prostitution also includes supply and demand, like economic theory. In line with that, the recently passed Law No. 1 of 2023 on the Criminal Code does not even regulate customers of prostitutes.

Commercial sex work has long been recognized as a result of victims of trafficking, but nowadays commercial sex workers are promoting their services privately without intermediaries. Therefore, it is important to conduct research on legal certainty and benefits, as well as a way to enforce the law against the practice of prostitution. In addition, it is

expected to eradicate the practice of prostitution that has mushroomed and become a problem that disturbs the community and contradicts the values and norms of Indonesian society.

## **METHOD**

The research method used in this research is normative juridical with conceptual approach and law. The data source used in this research is secondary. Data analysis is done descriptively-qualitatively. The specification of this research uses descriptive analytics, which is describing data that aims to obtain a complete picture of certain legal events that occur in society in order to be analyzed based on relevant rules.

## **RESULT AND DISCUSSION**

### **Dynamics of Criminalization of Commercial Sex Workers**

In the analysis of the socio-economic dynamics of criminalization of commercial sex workers and prostitutes, the focus is on economic drivers such as poverty and lack of access to education and employment opportunities. Migration, both internal and external, often increases vulnerability to sex work due to the lack of social and economic support in large cities (International Labour Organization dkk., 2017). According to a survey conducted in Denmark, 85% of commercial sex workers work for financial gain. On the other hand, many commercial sex workers are interested in entering the paid sex market independently. Saggurti et al. noted that 5,498 Commercial Sex Workers in India and found that 9.4 percent of respondents entered the paid sex service market independently. It was confirmed by a survey conducted by Devine et al, that 13% of Commercial Sex Workers responded affirmatively that they entered the sex service sector for pleasure and profit.

Criminalization leads to stigmatization and marginalization, narrowing access to formal employment and resulting in operating in more dangerous conditions with unstable incomes. The sex industry's move online creates a new economic model, but still faces legal and security challenges (Blakey & Gunn, 2018). The impact of government policies on sex work often does not address the structural issues at the root of the problem, so policy interventions are geared towards improving access to health and social services. Comparative studies of approaches to prostitution in different jurisdictions suggest that rights-oriented policies can offer more effective and humane solutions.

In the legal context, this analysis requires a thorough consideration of the implications of policies and regulations, taking into account social justice and human rights as principles that underpin public policies and legislation. Policy adjustments should be oriented towards addressing the underlying causes and not just the symptoms of this socio-economic phenomenon. In the legal context, the criminalization of commercial sex workers and prostitution service users raises deep questions about the harmonization between criminal regulations and human rights principles (Cimino, 2019). Referring to international human rights instruments and domestic constitutions, there are guaranteed rights to work, privacy, and access to justice that must be defended (Human Rights Watch, 2016).

Under the shadow of criminalization, commercial sex workers are often deprived of the right to choose their occupation and strive for a decent living, which is contrary to basic human rights guarantees (Dolinsek & Hearne, 2022). Criminalization also calls into question the right to privacy, where the state intervenes in private activities between consenting adults who provide and receive sexual services (Salman, 2022b). Furthermore, access to justice for sex workers is often hindered by the stigma and discrimination associated with their work (Farley, 2003). This results in a situation where they are reluctant to seek legal protection when their rights are violated, whether work-related or in other aspects of life, for fear of legal and social reprisals.

In formulating and evaluating public policies and laws and regulations, it is necessary to give serious consideration to the principles of social justice and the protection of human rights. Criminalization-oriented policies must be measured for their impact on human rights and social justice to avoid rights violations and create a fair and inclusive justice system for all individuals, without exception. Faced with the complexity of the issue of criminalizing commercial sex workers and prostitution service users, an examination of human rights-oriented policy alternatives is essential (Fronzizi & Porcher, 2021). These policy alternatives should encapsulate human rights principles, ensuring the protection and promotion of the well-being of the individuals involved.

Decriminalization of commercial sex work is a policy strategy that eliminates criminal sanctions for sex work. Decriminalization opens space for a more rights-focused approach by reducing stigma and strengthening sex workers' legal position to protect themselves from violence and exploitation (Ikawati, 2022). It also enables policy-making that is evidence-based and responsive to the needs of sex workers. Controlled legalization, on the other hand, regulates sex work within a clear legal framework, creating protection mechanisms and regulations that can reduce health and safety risks (Suryani & Purwanti, 2018). This legalization may include registration of sex workers, regulation of work locations, and regular health checks, ensuring that sex work is carried out in safe and controlled conditions (Haya, 2017).

A public health-based approach places the health and well-being of sex workers as a top priority (Farley, 2022a). It emphasizes the importance of access to health services, sexually transmitted disease prevention programs, and social support that can reduce the negative impacts of sex work on both the individual and the wider community. In formulating this policy alternative, it is necessary to conduct an in-depth study of the social and legal impacts that may arise, taking into account the principles of social justice and the protection of human rights as the main foundation (Farley, 2022b). Policy evaluation should be inclusive, participatory, and sustainable to ensure that the policy reflects the values of society and respects the rights of the individuals involved.

Comparative analysis is a vital tool for understanding how other jurisdictions deal with the issue of criminalizing commercial sex workers and prostitutes (McCann, 2014). International case studies offer valuable perspectives on the implementation of different legal approaches and their impact on the communities and individuals involved. First, an examination of the Swedish model, often referred to as the 'Nordic Model', is interesting (Ward, 2010). This model places a focus on criminalizing buyers of sexual services, rather than sellers, with the aim of reducing demand and supporting individuals who wish to exit commercial sex work. Outcomes of this approach include a decrease in sex trafficking and stigma towards sex work, however critics note an increase in risk for sex workers as their practices become more hidden.

Second, the Netherlands and Germany adopted legalization policies, with strict regulation of the sex industry, including registration of sex workers, licensing of brothels, and regular health checks (Seals, 2015). The results have been mixed, with some studies showing a decrease in exploitation rates and an improvement in the health and safety conditions of sex workers. Third, in New Zealand, full decriminalization of sex work has been implemented, recognized as a progressive step that reduces stigma and improves the rights of sex workers. This approach allows sex workers to be part of the legal process and increases their access to legal and health services (Abel dkk., 2009).

In the Indonesian context, lessons from these international policies can be adapted by taking into account social norms, cultural values, and the existing legal framework (Alin, 2017). The analysis must consider local complexities in determining the effectiveness of a legal model and ensure that any policy adopted not only reduces crime but also strengthens



human rights and social justice (Arief, 2017a). The implementation of such policies requires in-depth studies and inclusive discussions with all stakeholders to ensure that solutions are appropriate to the Indonesian context and needs (Arief, 1992a).

Further study of policies in different countries provides a deeper understanding of the potential for policy adaptation within national legal systems. Adapting lessons from the international context to Indonesia requires careful consideration of the existing legal framework, culture and social norms. The approach taken should reflect social consensus and respect cultural values and human rights principles. The legislative approach taken should ensure that sex workers and prostitutes are treated fairly in the criminal justice system, with full access to legal and health services.

### **Legal Framework for the Criminalization of Commercial Sex Workers and Prostitution Service Users in Indonesia**

In the context of Indonesian law, the criminalization of commercial sex workers and prostitution service users can be understood through various legal theories. Criminal law theory, for example, highlights the aspects of prevention and punishment as a means to protect society from behavior that is considered detrimental to social norms and public order. In this case, criminalization is considered as a means to enforce prevailing moral and social values, with the assumption that such action can prevent similar behavior in the future.

Justice theory provides another perspective, particularly in the context of the distribution of punishment that is fair and proportionate to the offense committed. In the context of prostitution, this theory demands a careful assessment of the extent to which punishment can be considered a reflection of social justice, taking into account factors such as individual choice and the socio-economic conditions that might push someone into commercial sex work. Furthermore, human rights theory adds another dimension to this discussion, emphasizing the protection of individuals' basic rights, including the right to work and the right to privacy. In this context, overreaching in the criminalization of commercial sex workers and service users can run counter to human rights principles, particularly if such measures ignore the conditions that drive individuals into commercial sex work or if they produce disproportionate social consequences.

One of the requirements that positive law must fulfill, according to Lon Fuller, is that regulations must be used as a basis for decision-making. It must be conditional and general (Arief, 2017b). In other words, the legal form must give the ruler the authority to make decisions, even if it is not based on Ad hoc. As a result, policies are made freely and based on general standards. Going forward, rules must be created to regulate actions and ensure that the law is applied. Rules must be understood by the people. Rules should not contradict each other. Each sub-section of the law is an interconnected system. There are no legal provisions that govern parties who behave beyond their capabilities. Therefore, the law cannot force something that is not possible.

The adage goes that justice must be served even if the sky falls. The legal system consisting of regulations, procedures, and binding criminal sanctions is very important in the citizenship system (Sapardjaja, 2016). G.P. Hoefnagels said that law enforcement policy comes from criminal policy, and the law enforcement system is part of social policy (Arief, 2001). Therefore, social policy as a whole must also be considered when dealing with criminal offenses of commercial sex offenders. One of the purposes of criminal law is to protect the principles and customs of society.

Human rights stipulated in Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant on Civil and Political Rights, the problems that occur are considered as excessive state involvement in the private affairs of its citizens (Melander dkk., 2004). However, according to Article 28J paragraph (2) of the 1945

Constitution, there are restrictions on human rights that are regulated by law and must be followed by all people. Prostitution in Indonesia enters into people's lives in ways that are covered up, and some are even obvious, causing unrest in the community. Society often blames victims of prostitution for the complex and structural problems of prostitution. Prostitution is divided into two categories based on its activities: registered prostitution and unregistered prostitution. A clear distinction between the two is the registered organizations in a particular area, also known as localization.

Criminalization in criminology means that behavior that was not previously considered a criminal act is later considered a criminal act by society. In this context, the concept of "criminalization" allows the study and research of human behavior, which was not initially considered a norm but only censured based on society's moral values. Herbert Lionel Adolphus Hart considered these values to be primary law rather than secondary legal norms (Moeljatno, 2008).

Prostitution is one type of crime that is very difficult to tackle and is widely practiced. In practice, prostitution includes not only commercial sex workers, but also service users of sexual workers, pimps, and pimps. According to Article 506 of the Criminal Code, "Whoever as a pimp (souteneur) profits from the prostitution of women, shall be sentenced to imprisonment for a maximum of three months". If the act of using prostitution services meets the three criteria mentioned above, then the act must be classified as a criminal offense based on the formulation of the norm so that the person is considered to have committed an unlawful act based on the basic principle in criminal law, namely the principle of legality can be punished. This article refers to Article 1 paragraph (1) of the Criminal Code, which states that an act cannot be punished except based on the strength of the provisions of existing criminal legislation. In Indonesia, the regulation of online prostitution only applies to pimps and pimps, not to commercial sex workers and users of prostitution services. Thus, for commercial sex workers and users of prostitution services, the Criminal Code has a legal vacuum. Therefore, in order to stop the increase in prostitution, violation of women's rights, and other criminal offenses caused by prostitution, it is imperative to make a clear law on criminalizing prostitution and the use of prostitution services (Sumera, 2013).

Article 1 point 3 of Law No. 21/2007 on the Eradication of the Crime of Trafficking in Persons also defines what a victim is, namely "a person who experiences psychological, mental, physical, sexual, economic, and/or social suffering caused by the criminal act of trafficking in persons". Then holds an important position in the continuity of prostitution carried out by service users and prostitutes. Because in the practice of prostitution there is an agreement between the prostitute and the user which is carried out directly or through the intermediary of a pimp or pimp, although there are also those who fall into the trap without knowing that they will be employed as prostitutes (Nurdin, 2023).

In the formulation of Article 296 of the Criminal Code which states that "any person who intentionally causes or facilitates obscene acts by another person with another person, and makes it a profession or habit, shall be punished by a maximum imprisonment of one year and four months or a maximum fine of fifteen thousand rupiahs", can be qualified as a discriminatory formulation by not touching the idea that commercial sex workers and service users must be criminalized as an effort to enforce the law to take firm action and prevent prostitutes and service users from getting out of the law.

The provisions that can be imposed on users of prostitution services if referring to Article 284 of the Criminal Code which contains the provisions of the criminal offense of adultery (overspel) can only be imposed on prostitutes and service users, one of which is in a marital bond and the offense applied is a complaint offense. In the provisions of the Criminal Code mentioned above, none of them mention the word "prostitution" or provide certain clear limitations on prostitution. The criteria for criminalizing prostitution include prostitution

activities carried out by commercial sex workers and prostitution service users because these activities violate the values and norms of society, including customs, morals, and religion, and exceed the permissible limits. Prostitution activities have a negative impact, namely the erosion of public morals and the creation of an obedient generation.

In line with what Nonet and Selznick said, the law must be able to understand changes or changes in the surrounding circumstances because the law is also a tool to achieve goals (Darmodiharjo & Shidarta, 1995). To do this, there are two criteria: the law must be functional, pragmatic, directed, and rational. In addition, the law must be able to serve as a benchmark in assessing the entire implementation of the law. However, the provision of punishment against prostitution offenders is not in accordance with the nature of punishment as an *ultimum remedium*, which is the last method or effort used after other methods cannot be used (Arief, 1992b). The complexity of the problem of prostitution, which is related to various aspects, shows that prostitution is not only related to criminal acts but also to other phenomena such as poverty and difficulty in obtaining employment. According to GP Hoefnagles, crime prevention can be done in several ways, including the application of punishment, the prevention of punishment without punishment, and the influence of the mass media on society's views on crime and punishment (Moeljatno, 2008). Thus, in solving the problem of prostitution in Indonesia, not only punishment can be used, but also other methods can be used. However, it is also necessary to have rules that regulate these activities.

Thus, to address the problem of prostitution, reform of the criminal law system is required. This reform can cover a very broad scope, namely reforming the "nature of the criminal law", which means reforming criminal law articles. In the UK, section 53A of the Sexual Offences Act 2003 makes it an offense when a person knowingly promises or makes a payment to a person who facilitates the obtaining of sexual services from another person. As prostitution is closely related to the demand for sexual services and the act of prostitution falls into the category of voluntary prostitution, criminalization as an effort to punish users of prostitution services is an important part of the practice (Hornor dkk., 2019). Therefore, it is expected that there is a penal policy to achieve the goal of reducing and eliminating the practice of prostitution in Indonesia which is not in accordance with human values.

## CONCLUSION

Technological developments and easier access to the internet have significantly increased the number of internet and social media users in Indonesia. The existence of messaging apps such as MiChat has facilitated broader social interactions, including risky activities that could potentially lead to an increase in HIV cases such as online prostitution. In discussing the legal framework for the criminalization of commercial sex workers and prostitution service users in Indonesia, legal analysis shows the importance of updating the legislative approach to better reflect the principles of social justice, as over-criminalization may result in disproportionate social impact. Therefore, proposed criminal law reforms must address the socio-economic complexities that drive individuals into commercial sex work, while maintaining social and moral order. Criminal law reform must lead to policies that focus not only on sanctions, but also on prevention, rehabilitation, and social integration. An inclusive approach will result in a fairer and more effective legal framework that strengthens the rights of individuals while protecting society at large from the negative impacts of prostitution.

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