



Comparative analysis of criminal liability in *kuhp* and *qanun aceh* against online prostitution crime

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Abstract

The modus operandi of a criminal act follows the development of human wares, prostitution which was initially conventionally turned into online prostitution. In conventional prostitution pimps take advantage by selling Commercial Sex Workers, while online prostitution Commercial sex workers benefit by selling themselves, because of this the position and accountability of Commercial Sex Workers who take advantage of online prostitution do not have clarity in positive law in Indonesia. This research is a normative study using two approaches namely legislation and conceptual. Use of this approach to determine the position and accountability of online prostitution commercial sex workers in the legislation. Analysis of legal materials used by analytical perspectives. The results of the study show that the law on online prostitution commercial sex workers is not included in the category of victims, but cannot be sentenced under the law because the formulation of offences is not fulfilled, and criminal penalties based on local regulations related to prostitution cannot be threatened because contrary to the Law based on the principle of superior lex legio inferior derogate.

Keywords: Commercial sex workers, criminal liability, online prostitution

Introduction

Prostitution is a transaction between the female commercial sex worker (PSK) and the user of PSK services who gives a certain amount of money for sexual interaction. Prostitution can also be interpreted as the exchange of sexual relations for money or gifts as a trade transaction in which the party who prostitutes themselves gets money or gifts and the party who uses the services of prostitutes gets sexual services from the prostitute. In the transaction activity there is also a pimp, Pimp is a man or woman whose life is ostensibly financed by prostitutes, who in prostitution helps find subscriptions from which he gets his share and draws profit from the work done by prostitutes ^[1].

The development of technology and information in Indonesia has grown rapidly. The development of technology can have a positive influence on society such as making it easier to do work in obtaining information ^[2]. But besides that, there are also negative impacts from the development of technology itself, one of which is prostitution activities carried out through technology and information media or what is known as online prostitution ^[3].

Online prostitution is a societal phenomenon where women sell themselves, perform immoral acts as a livelihood and social media as a tool to help negotiate the price and place of prostitution. This online prostitution is a new mode of offering women through a website address. The owner displays photos of the woman in minimal clothing. Interested parties simply call the mobile phone numbers of the pimps, then the pimps deliver the order to the hotel room or to the apartment according to the customer's wishes ^[4].

The practice of online prostitution is now very common in society. This online prostitution practice makes a person an object to be traded through electronic or online media. Online media used by online prostitution actors can be in the form of applications (social media) such as; Instagram, Whatshaap, Twitter, Facebook, Tiktok and there are even

applications made by developers for no other purpose than to bring together actors and customers (masher men) such as the Michat application, and Bigo.

The practice of online prostitution is also carried out through the media of a special website created only to bring together the perpetrators and customers, on the website, photos of the perpetrators, complete identities, and even prices are presented, like a marketplace in general that trades goods. Online prostitution is done because it is easier, more practical and safer from officer raids. Therefore, the practice of online prostitution is now often heard and seen in the news. Such deviant actions are usually driven or motivated by the urge to fulfil life needs that are relatively difficult to meet.

Online prostitution is a form of crime of decency that is prohibited in both Islamic and positive law. The Criminal Code (KUHP) prohibits those who have a profession as a provider of facilities and those who have a profession as commercial sex workers (PSK) as well as pimps or protectors of PSK. Related to online prostitution is explained in Article 296 of the Criminal Code which explains that:

"Any person who with deliberate intent causes or facilitates obscene acts by another person with another person, and makes it an occupation or a habit, shall be punished by a maximum imprisonment of one year and four months or a maximum fine of fifteen thousand rupiahs".

Based on the substance of the article, it is very clear that online prostitution is a form of criminal offence, if the act is committed repeatedly and has become a profession for the perpetrator, but the article can only ensnare pimps or people who provide prostitutes or people who offer prostitutes to customers, in practice the article cannot ensnare prostitutes because it is not accommodated in Article 296 of the Criminal Code, and it is not uncommon for prostitutes to be positioned as victims by the police. This phenomenon is clearly very contrary to the norms of decency and religion

because prostitutes who have been secured are only coached not to repeat their actions and do not have a deterrent effect on the prostitute so it is very likely that she will repeat the act.

Furthermore, the trafficking of women and trafficking of minors are also punishable by a maximum imprisonment of six years as stipulated in Article 297 of the Criminal Code. Every person is also prohibited from providing pornographic services that explicitly present nudity or the appearance of nudity, explicitly present genitals, exploit or exhibit sexual activities, and offer or advertise, either directly or indirectly, such sexual services.

Furthermore, the regulation of online prostitution in national law is also regulated in Article 27 of Law Number 19 of 2016 Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions which states that every person intentionally and without the right to distribute and/or transmit and/or make accessible Electronic Information and/or Electronic Documents that have content that violates decency is an act prohibited in the ITE Law.

The crime of prostitution practices carried out through the internet electronic media has also been regulated by criminal provisions in Article 27 Paragraph (1) of the Law on Electronic Information and Transactions, namely Every person who intentionally or without the right to distribute and / or transmit and / or make accessible electronic information and / or electronic documents that have content that violates decency can be punished with a maximum imprisonment of 6 six years and / or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Aceh Province is a province that has the privilege of implementing Islamic sharia, this is based on Law No.44 of 1999 concerning the Privileges of Aceh and Law No. 11 of 2006 concerning UUPA, based on the mandate of the Law in the implementation of Islamic sharia, Qanun No.6 of 2014 concerning Jinayat was issued, in the Qanun also regulates adultery, which specifically also relates to the practice of online prostitution.

Based on the results of norm tracking, it is found that there are differences in the meaning of zina in the concept of positive law and the concept of Qanun Jinayat Aceh, the difference is substantially centred on the formulation of the offence which has real implications for law enforcement against online prostitution offenders in Aceh. Based on the positive legal norms stipulated in Law No. 1/1946 on the Criminal Code or its latest amendment, namely Law No. 1/2023, it is explained that adultery is an act of intercourse with a person who is not his husband or wife, then in the formulation of the offence, both in Law No.1/1946 and Law No.1/2023 both are absolute complaint offences, meaning that prosecution can only be carried out on the complaint of the wife, husband, parents, and children. So that without a complaint from these four people, the perpetrator cannot be charged with criminal law. Against pimps, both in Law No.1/1946 and Law No.1/2023, the formulation of the offence is a general offence, even in Law No.1/2023 there is an aggravated sanction against people who enslave others to commit obscene acts and become a livelihood for them.

Conceptually, there is a difference between Qanun Aceh No. 6 of 2014 concerning Jinayat Law and positive law, Qanun Jinayat Aceh defines adultery as an act of intercourse between one or more men and one or more women without the bond of marriage with the willingness of both parties, in the formulation of the offence, the nature of the offence in

Article 33 of Qanun Jinayat Aceh is a general offence, so that without a complaint from husband, wife, parents and children, the perpetrators of adultery, both prostitutes and pimps, can be legally processed based on Qanun Jinayat Aceh. Based on the description above, there are differences in the meaning of adultery in the Criminal Code and Qanun Jinayat Aceh, this research wants to see how the criminal liability of online prostitution offenders in this case prostitutes in Aceh.

Research Method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this writing is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data^[5]. Comparative Analysis of Criminal Liability in Kuhp and Aceh Qanun Against Online Prostitution Crimes.

Results and Discussion

Classification of Online Prostitution

Prostitution is the giving of one's body by a woman to a man in exchange for sexual intercourse and sexual gratification for the payer outside the bonds of marriage^[6].

While online prostitution is a new way that facilitates the process of body delivery / prostitution transactions using a social media, which is a new mode in the criminal act of prostitution in Indonesia, this modus operandi develops along with technological developments. Before the development of technology, prostitution was carried out conventionally, namely by means of service users coming directly to the place of prostitution service providers (embroidery houses) or by making an agreement in advance with pimps.

In the history of prostitution in Indonesia, prostitution activities have been known since the royal era, which is evidenced by the large number of concubines owned by each king at that time. Where the concubines came from the noble caste and the low caste. The women from the low caste who were sent to be the king's concubines were not all accepted as the king's concubines, only women chosen by the king could become the king's concubines, while others would be sent out of town to be used as prostitutes, with the proceeds from prostitution to be handed back to the king regularly^[7].

During the Dutch colonial period, prostitution grew rapidly, with a more organised system of traditional slavery and prostitution for Europeans, especially soldiers, merchants and envoys. In 1852 a new regulation on the commercialisation of the sex industry was made, which stipulated the obligation of the police to monitor prostitutes directly, as well as the obligation for prostitutes to have themselves examined regularly to prove that they were free from venereal diseases. To facilitate police surveillance, prostitutes were encouraged to have sexual intercourse in prepared embroidery houses, with proceeds from prostitution going to the colonisers.

After two decades the 1852 regulation was repealed and replaced by a regulation of the local authorities, which essentially left each region free to make its own regulations regarding the control of prostitution. This was because prostitution activities in the regions were not only carried

out in embroidery places, but also spread along with the expansion of plantation areas, the construction of railways and the sugar industry so that supervision was left to each region^[8].

In conventional prostitution practices, pimps have a very dominant position so that in the distribution of prostitution proceeds, pimps get very dominant results as well. Along with the development of information and communication technology and the increasing number of internet and social media users, the dominant role of pimps seems to be replaced by social media. Prostitution using social media or what is often called online prostitution, where social media that is often used by prostitutes include Twitter, Instagram, Facebook, WhatsApp, and Line.

Conventional prostitution is regulated in Indonesian positive law, namely in the PTPPO Law in Article 12, which basically means that every person who uses / takes advantage of victims of trafficking in persons by employing in exploitation practices to take advantage of exploitation activities^[9]. In this law only provides criminal sanctions to pimps who use and take advantage in every human trafficking exploitation activity. For users of prostitution services, there are no binding rules under the PTPPO Law, while prostitutes are always protected because they are categorised as victims, namely someone who experiences mental, psychological, sexual, physical, economic and/or social suffering as a result of the criminal act of trafficking in persons^[10].

In the Pornography Law Article 4 Paragraph (2) explains that every person is prohibited from providing pornographic services, namely^[11]

- a. Explicitly present nudity or impressive displays
- b. nudity;
- c. Explicitly presents genitals;
- d. Exploiting or flaunting sexual activity;
- e. Offer or advertise, directly or indirectly, sexual services.

Based on this article, it only prohibits activities that provide pornographic services, especially in letter c, which is shown to pimps who have provided pornography services by exploiting sex, where sexual exploitation based on the PTPPO Law is any form of use of the sexual organs or other organs of the victim for profit. Based on the PA Law which provides criminal penalties for pimps and users of prostitution services who use children in every prostitution activity, namely as Article 15 of the PA Law which reads: Every child has the right to obtain protection from

- a. Abuse in political activities;
- b. Involvement in armed disputes;
- c. Involvement in social unrest;
- d. involvement in violent events;
- e. involvement in warfare, and;
- f. sexual offences;

In addition to the above laws, conventional prostitution is also regulated in several local regulations or Qanuns in Indonesia, but because local regulations are made based on the needs of each region, the arrangements also experience differences in each region. One of them is based on Aceh Qanun Number 6 of 2014 concerning Jinayat, in Article 33 Paragraph (3) of Qanun Jinayat it is explained that every person who facilitates adultery or promotes it is threatened

with Uqubat Ta'zir chastisement 100 times and a maximum fine of 1000 grams of pure gold.

While online prostitution can be punished under Article 27 of the ITE Law which regulates the prohibition of distributing and/or transmitting and/or making accessible information and/or electronic documents that have content that violates immorality intentionally and without rights. In addition, it is also regulated in the Pornography Law in Article 4 Paragraph (2) of Law No.44 of 2008 concerning Pornography which prohibits every person from providing pornographic services by offering/advertising either directly or indirectly.

In online prostitution activities there are 2 (two) types of actions, namely pre-prostitution and prostitution. Pre-prostitution itself is an activity before prostitution, namely a form / way to agree on the existence of prostitution activities which are carried out online between pimps and service users or between prostitutes and service users, while prostitution is a sexual relationship that is carried out outside of marriage for a profit.

In the above rules, it can be concluded that criminal charges in online prostitution activities based on the ITE Law and the Pornography Law only regulate pre-prostitution crimes, namely in the form of how a person commits prostitution, namely by utilising technology or what can be called online, while the prostitution activity is not given a sentence because the ITE Law and the Pornography Law do not regulate it. In other words, if the act of online prostitution is only charged with the Article, then the crime committed is only limited to the crime of pre- prostitution, while the prostitution activity is not considered a crime.

Criminal Liability of Commercial Sex Workers (CSWs) under the Criminal Code

Based on Van Hammel's opinion, responsibility is a normal state and psychological maturity that must exist so that a person can be held criminally responsible, so a prostitute to be held criminally responsible for her actions must fulfil the following elements^[12]

a. Understand the consequences of their own actions

In online prostitution and conventional prostitution, a prostitute knows the meaning and consequences of her prostitution, but here there are differences in the views of conventional prostitutes and online prostitutes. Conventional prostitutes know the consequences of their prostitution activities in the form of misery for them because they are no longer considered human beings but only lust fulfilers, while online prostitutes also know the negative consequences of being a prostitute, namely venereal disease and insults from the community, but they still choose to become prostitutes because they get economic benefits and/or sexual satisfaction,

b. Understand that such actions are not justified or prohibited by society

In this case, both online prostitutes and conventional prostitutes know that being a prostitute in prostitution is an act that is not justified by society because it is considered an activity that is contrary to the norms of decency, customary norms, norms of decency, legal norms and religious norms by society.

c. Determining the ability of the maker to be held accountable for his/her actions

In the Criminal Code, it has been regulated regarding the ability to be held responsible in Article 44 Paragraph (1) of the Criminal Code, namely anyone who cannot be held responsible for his actions because his soul is defective in growth or disturbed due to disability, is not punished, so both conventional prostitutes and online prostitutes when engaging in prostitution are not mentally disabled or their growth is disturbed due to smallpox can still be held accountable in accordance with Article 44 Paragraph (1) of the Criminal Code.

When viewed based on Article 44 Paragraph 1 of the Criminal Code, it explains that people whose souls are defective in growth or disturbed due to disability cannot be held accountable and cannot be convicted. Where this mental disability is divided into 2 conditions, namely psychiatric conditions and psychological conditions. In psychiatric conditions in the form of lack of perfection of reason or a state of insanity (idiot) that exists since birth or because of a mental illness and this condition occurs continuously. It is certain that someone who becomes a prostitute, both online and conventional prostitution, there is not a single prostitute in a state of continuous mental disability because it is certain that no one will be willing to spend money to have sex with them. Psychological conditions in the form of mental disorders that must exist before the perpetrator commits a criminal act, while mental disorders that arise after the event cannot be the cause of a person not being subject to punishment, in online prostitution activities with prostitutes who offer themselves to users it is certain that he cannot be in a state of insanity or idiot because this online prostitution prostitute must agree on the price, place and service with the users, so it can be ascertained that he is not in a state of mind, and even though this mental disorder is found after the prostitution activity is completed, criminal liability still attaches to him after his state of mind recovers.

Referring to Article 296 of the Criminal Code, it is explained that anyone who facilitates obscene acts by another person with another person shall be punished with a maximum imprisonment of one year and four months^[13], furthermore, Article 506 of the Criminal Code also explains that anyone who takes advantage of the obscene acts of a woman and makes it a profession shall be punished with a maximum imprisonment of one year, based on the explanation of the two articles, the subject in the article is a pimp or intermediary who brings prostitutes together with customers, in the Article it is not explicitly explained that prostitutes are the main actors in the crime of online prostitution, However, in the Article on adultery as regulated in Article 284 of the Criminal Code which regulates adultery for married people, however, the type of offense in this Article is an absolute complaint offense, meaning that the criminal act of adultery committed by a husband or wife must be reported by the husband, wife, parents, or children who are victims of the act, without a complaint from the specified group, the result is that prosecution cannot be carried out.

Based on the description above, it is clear that there is a legal vacuum in the Criminal Code against the perpetrators of online prostitution crimes due to the absence of articles that explicitly regulate the criminal liability of prostitutes, it

is even possible that in some cases prostitutes are categorised as victims of sexual violence, etc. Another thing that is a factor in law enforcement against prostitutes is that the Criminal Code adheres to the principle of legality *nullum delictum nulla poena sine praevia lege poenali*, as regulated in Article 1 of the Criminal Code, an act cannot be punished without the existence of laws and regulations governing it, if we correlate the principle of legality with the current facts, then commercial sex workers (CSWs) cannot be held criminally responsible because the Criminal Code does not accommodate articles governing this matter, resulting in a legal vacuum.

Criminal Liability of Commercial Sex Workers (CSWs) under Qanun Jinayat

Aceh is a special region based on Law No. 44 of 1999 concerning Aceh Privileges, the mandate of the Law explains that Aceh can specifically carry out Islamic law enforcement activities, then its implementation is regulated in Aceh Qanun No. 6 of 2014 concerning Jinayat Law. *Jarimah* is a criminal act/criminal offence known as general terminology in positive law. The word *jarimah* refers to criminal acts committed by legal subjects and can be held criminally responsible based on Qanun Aceh No.6 of 2014 concerning Jinayat Law.

The crime of online prostitution in the perspective of Qanun Jinayat can be categorised into several *jarimah*, such as *ikhtilath*, *khalwat*, and *zina*. Based on Article 1 Number 24 of the Aceh Qanun Jinayat explains that: "Ikhtilath is the act of making out such as making out, touching, hugging and kissing between men and women who are not husband and wife with the willingness of both parties, either in a closed or open place".

Furthermore, regarding the *jarimah khalwat*, it is explained in Article 1 Number 23 of the Aceh Qanun Jinayat: "Khalwat is the act of being in a closed or hidden place between 2 (two) people of the opposite sex who are not Mahram and without marital ties with the willingness of both parties which leads to the act of Zina"^[14].

Then related to the *jarimah zina* explained in Article 1 Number 26 Qanun Jinayat Aceh: "Zina is cohabitation between one or more men and one or more women without the bond of marriage with the willingness of both parties".

Based on the explanation of several articles that explain the acts of *jarimah iktilath*, *khalwat* and *zina*, all of these *jarimah* lead to the crime of online prostitution, as for the elements of *jarimah iktilath*, *khalwat* and *zina* are as follows: Based on Article 1 Number 24 of the Aceh Qanun Jinayat there are several classifications of *jarimah iktilath* including

- a. Intimate behaviour such as making out
- b. Touching between men and women
- c. Hugging between men and women
- d. Kissing between men and women
- e. Not husband and wife
- f. Willingness of both parties
- g. Closed and open spaces

Based on this classification, the perpetrators of *jarimah iktilath* and the providers of facilities for this can be subject to the sanction of *uqubat ta'zir* flogging, based on the provisions in Article 25 Paragraphs (1) and (2) of Qanun Aceh No.4 of 2016 concerning Jinayat Law.

Furthermore, related to jarimah khalwat as regulated in Article 1 Number 23 of the Aceh Qanun Jinayat has the following classification:

- a. Actions that are in a hidden place
- b. Between men and women
- c. Without a marriage bond
- d. Willingness of both parties
- e. Leading to adultery

Based on this classification, the perpetrators of jarimah khalwat and the providers of facilities for this can be subject to the sanction of uqubat ta'zir flogging, based on the provisions in Article 23 Paragraphs (1) and (2) of Qanun Aceh No.4 of 2016 concerning Jinayat Law. Finally, jarimah zina as stipulated in Article 1 Number 26 has the following classification:

- a. Intercourse
- b. Between men and women
- c. Two or more people
- d. Willingness of both parties

Based on this classification, the perpetrators of jarimah zina and the providers of facilities for this can be subject to the sanction of uqubat hudud flogging, in addition to the perpetrators and providers of facilities in Qanun Aceh also accommodate perpetrators who commit *recidivism* (*recidivist*) jarimah zina and are threatened with uqubat hudud sanctions, based on the provisions in Article 33 Paragraphs (1), (2), and (3) of Qanun Aceh No.4 of 2016 concerning Jinayat Law.

Based on the description above relating to jarimah which has a relationship with the crime of online prostitution, there are differences with the Criminal Code, in Qanun Aceh the act of initiation to commit adultery such as making out can be held criminally responsible, it's just that between jarimah ikhtilath and khalwat the form of sanctions is ta'zir, unlike the case with jarimah zina the form of sanctions is hudud, hudud itself terminologically comes from the origin of the word *had* which means limitation, so that hudud sanctions are sanctions that have been determined in the Koran and are qat'i.

Conclusion

The existence of a legal vacuum in the Criminal Code against the perpetrators of online prostitution crimes is due to the absence of articles that explicitly regulate the criminal liability of prostitutes, it is even possible that in some cases prostitutes are categorised as victims of sexual violence, etc. Another thing that is a factor in law enforcement against prostitutes is that the Criminal Code adheres to the principle of legality *nullum delictum nulla poena sine praevia lege poenali*, as regulated in Article 1 of the Criminal Code, an act cannot be punished without the existence of laws and regulations governing it, if we correlate the principle of legality with the current facts, then commercial sex workers (PSK) cannot be held criminally responsible because the Criminal Code does not accommodate articles governing this matter, resulting in a legal vacuum. jarimah which has a relationship with the crime of online prostitution, there are differences with the Criminal Code, in Qanun Aceh the act of initiation to commit adultery such as making out can be held criminally responsible, it's just that between jarimah ikhtilath and khalwat the form of sanctions is ta'zir, unlike the case with jarimah zina the form of sanctions is hudud,

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References

1. Lulu Yulianti, *et al.* "Criminal Law Enforcement Against Pimps Related to Online Prostitution in Indonesia", *Jurnal Risalah Hukum*, 2020, 15(1).
2. Amar Ahmad. "The Development of Communication and Information Technology: The Roots of the Revolution and Its Various Standards", *Journal of Dakwah Tabligh*, 2012, 13(1).
3. Djamaludin. *The escalating business of prostitution*, Rineka Cipta, Jakarta, 2011.
4. Eko Noer Kristiyanto. "The Reach of National Law towards Online Prostitution", *Journal of Legal Research, Centre for Legal Research and Development, Legal Research and Development Agency*, 2018.
5. Soerjono Soekanto. *Sri Pamudji Normative Legal Research*. Rajawali Press, Jakarta, 2011.
6. Mudji Sutrisno, Hendar Putranto. *Theories of Culture*, Kanisius, Yogyakarta, 2005.
7. Wakhuddin. *The Process of Moral Value Degradation in Prostitutes and its Solutions*, Master Programme in General Education, University of Education Indonesia Bandung, 2006.
8. *Ibid*
9. Law Number 21 Year 2007
10. Article 1 point 3 of Law Number 21 Year 2007
11. Article 1 Paragraph (2) of Law Number 44 Year 2008
12. Andi Hamzah. *Introduction to Indonesian Criminal Procedure*, Ghalia Indonesia, Gresik, 1985.
13. Law No.1 Year 1946 on the Criminal Code
14. Aceh Qanun Number 6 Year 2014 on Jinayat