

The Policy of Criminal Determination and Restitution by The Victims of Human Trafficking Crime (Perspective of Human Rights)

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Abstract. The law enforcement concerning the crime of human trafficking has not been implemented optimally regarding the less accommodation of court decision to the rights of the victim. The criminal imposition by judges does not adequately address the sense of justice for the victim, especially if there is no restitution of the perpetrators required in the victims' recovery process. The criminal case of human trafficking mostly causes the victim suffering from either material or immaterial losses. Victims need special attention and protection, mainly children who become victims of trafficking about their human rights. Legal protection of victims, including children, is one of the state's obligations in the recovery process and to realize the welfare of children. So far, the legislation gives more focus on accommodating the perpetrators' rights than the victims, and in the court examination, the victim usually only acts as a witness. Optimal fulfillment of the victims' rights can be done by providing opportunities to victims in the criminal justice system that plays a role in the examination in court to convey considerations in determining the criminal, the number and form of restitution. Especially for children victims, it can be done with the role of the state in the recovery process, accommodating the role of the victims in the criminal justice system and renewing the restitution.

Keywords: Human Trafficking, Victim Rights, Restitution, Penal Policy

1. Introduction

A victim in human trafficking crime refers to a person who suffers from psychological, mental, physical, sexual, economic, and social suffering resulting from human trafficking. In Indonesia, women, men and children are exploited for forced labor in areas such as fishing, fish processing, and construction sectors; in plantations, including oil palm plantations; and mining and manufacturing industries. Many women are also exploited in the domestic and sex trade, including women from Colombia who are forced into commercial sex workers[1]. Data from the International Organization for Migration (IOM), until December 2014, human trafficking recorded 7193 people identified victims. Of these, Indonesia ranked first with a total of 6665 people or about 92.46 percent, with details of female victims of children aged 950 people and adult women aged 4,888 people. On the other hand, male victims represent 166 children and adult men, as many as 647 people [2]. Based on these data, women and children are victims with more significant numbers.

Especially in Indonesia, LPSK(Indonesia witness and victim protection institution) protects 323 people from various types of criminal acts by 2015. The highest number of shelter comes from human trafficking (TPPO) with 100 witnesses and victims[3]. The government estimates about 1.9 million of the 4.5 million Indonesian workers in overseas-

most of them women-have no documents or have overstayed. This situation might cause an increasing number for their vulnerability to trafficking[1].

Children and women are the primary targets for the perpetrators of human trafficking. This can be seen from the high number of women and children victims of trafficking in persons. The critical factors that are affecting them to be targeted in human trafficking are poverty, less supportive social intercourse, education, wages, being deceived, and others. Those can make children and women very easy to become objects of trafficking. The rise of child trafficking cases and the lack of optimization of child protection have caused problems in law enforcement. Indonesia's position as a country with a relatively large population and low availability of employment in addition to limited human resource quality, many victims choose to work abroad that promises being highly paid by traffickers to exploit victims[4][5]. Consequently, as a country that is ratifying Convention on the Rights of the Child, Indonesia is obliged to comply with the provisions of that convention with the consideration of the children's best interests. The spirit of this convention is to provide maximum protection for children in any circumstances, including those with legal problems [6].

They are there shifting the definition of human trafficking, in the old form of slavery the African people were transferred to a new world based on their race and specific capabilities. In the modern form of slavery goes beyond racial lines.

Human trafficking is controverted with human rights as trafficking is done by threats of violence, pressure, abduction, fraud, deception, lies and abuse of power besides the intention to prostitution, pornography, forced labor, slavery or similar practices[7]. The State keeps protecting children by eradicating and preventing human trafficking, especially in the children trafficking crime. These efforts include the creation and reformation of legal instruments that are basically to protect the children's rights and interests. The Indonesian government has not fully obeyed the minimum standard of human trafficking deletion, but the government makes significant efforts for fulfillment[1]. State efforts with current legal instruments have been less accommodating of the victim's interests, including children. In reality, the victims in the criminal justice system only perform as witnesses and restitution, which are the victim's rights are not given by the perpetrators.

Recently, protection has been given more to offenders than to crime victims. In the constitution, the position of every citizen is equal in accordance with Article 27 clause (1) of Republic of Indonesia Constitution of 1945 which states that all citizens have equal position before the law and government and shall uphold the law and government without exception that victims and perpetrators have equal rights before the law and are also entitled to the same legal protection.

Especially for children victims, in this case, the victim of human trafficking crime also have rights guaranteed by the constitution mainly in Article 28 B clause (2) stating that every child has the right to survival, grow, and develop and is entitled to protection from violence and discrimination. The child as a victim of a criminal offense has the right to grow and to develop according to his or her age and is also entitled to protection from violence, especially in the crime of human trafficking. The child of the victim suffers both material and immaterial, hence must get maximum protection as a manifestation of respect toward human rights. Protection to soften the suffering of both material and immaterial can be completed by updating legal instruments in order to fulfill the rights of victims, including children.

The Act of Children Protection adjusts for criminal penalties for child traffickers in the form of imprisonment and cumulative imposed penalties. In the Law of the Criminal Act of

HumanTraffickingEradication, the criminal penalty for the offender of human trafficking besides imprisonment and fines which charged cumulatively, there is also additional criminal. This additional punishment shall be imposed on the state authorities in the form of dismissing disrespectfully from his position and for corporations, additional criminal in the form of revocation of business permits, deprivation of proceeds of crime, the removal of legal entity status, dismissal of the administrator, and/ or the prohibition to the management to establish a corporation in the same business line. The law does not regulate the restitution that should be paid to the victim.

Criminal adjudication in court shall be the jurisdiction of a judge based on Article 183 of the Criminal Procedure Code that the judge shall not impose a penalty on a person except where, with at least two valid evidence, he/she obtains the conviction that a criminal act actually occurred and that the defendant was guilty of doing so. The role of the victim, including the victim's son who was accompanied by his guardian in the hearing, is as a witness, and not consulting the law and restitution that will be imposed on the perpetrator.

In the criminal justice system, the victim (child) lacks legal protection. Victims only get a role as part of evidence as a witness, so they have less chance to struggle for their rights, including to get restitution. Restitution, as a victim's right, in its arrangement, does not accommodate victims' right. This can be seen from the verdict of punishment that does not include the restitution to the perpetrators of human trafficking. Also, many victims do not know the legal aid that they should receive in facing legal problems. Legal assistance is part of the legal protection that the victim should receive.

Increasing criminal acts of trafficking in persons is one of the factors requiring the renewal of the legal protection policy for children as victims. Also, the existence of a judicial verdict imposed by the judge without considering the opinion of the victim in the determination of the criminal. Moreover, many criminal verdicts in trafficking in persons are not followed by restitution obligations that are the responsibility of the perpetrator. The problem in this paper is focused on how the state policy makes victims can play a role in the criminal justice system, so they will achieve their right to receive restitution, viewed from the human rights perspective.

2. Method

The method used is normative legal research, which laid the law as a building norm system. The system of norms is about the principles, norms, rules of legislation, court decisions, agreements, and doctrines (teachings)[8]. The data used are secondary data or bibliographic data related to the victim in trafficking and restitution. Secondary data is obtained from the primary legal materials, namely the law on criminal procedural law, the crime of trafficking in persons, and the protection of children. Secondary law materials consist of books or journals related to the crime of trafficking in persons and the protection of children.

3. Findings

Every person, including a child, has a human right guaranteed by the1945 Constitution of the Republic of Indonesia, in Article of 28 B clause (2), that every child shall have the right to live, to grow, and to develop, and shall have the right to get protection from violence and discrimination. That protection from violence includes child trafficking.

The state takes responsibility on the child protection, which is regulated in the Article 8 of the Indonesia Republic Act No. 39, 1999 about Human Rights, that the human rights' protection, promotion, enforcement, and fulfillment are the primary responsibility of the Government. Article 20 of the Indonesia Republic Act No. 39, 1999 on Human Rights, the first paragraph (1) stated that nobody should be enslaved or subjected to slave. Furthermore, the second paragraph (2), stated that slavery, slave trade, women trafficking, and any deeds related to those activities are prohibited. The firmness of Article 20 includes a prohibition on the child trafficking, explicitly mentioned in Article 65, stated that every child has a right to be protected from sexual exploitation and abuse, kidnapping, child trafficking, and drugs' abuse.

There are some purposes in The Act No. 23, 2002 on The Child Protection which is revised with The Act No. 35, 2014 on The Alteration of The Act No.23, 2002 which is then revised with The Act No. 23, 2002 about Children Protection which is also revised with The Act No. 17, 2016 about The Decision of Interim Government Regulation No. 1, 2016 about Second Alteration of The Act No. 23, 2002 about children protection (The Act of Children Protection), including assuring the fulfillment of children's rights to live, grow, develop, and participate optimally based on the human dignity and prestige, and get protection from violence and discrimination in order to create qualified, well-mannered, and prosperous Indonesian children. It means the state guarantees children protection, including the fulfillment of victim' rights and needs. In the case of children becoming victims of human trafficking, the state has an obligation to provide exclusive aegis as regulated in The Act of Children Protection, Article 59 clause (1) and clause (2) letter d which is about economically and / or sexually exploited child; and letter h that is child of abduction, sales, and / or trafficking. In the case of children becoming victims of human trafficking, the state has an obligation to provide exclusive aegis as regulated in The Act of Children Protection, Article 59 clause (1) and clause (2) letter d which is about economically and / or sexually exploited child; and letter h that is child of abduction, sales, and / or trafficking.

Based on Article 66 of the Child Protection Act, children who are exploited sexually and economically have special protection done through the dissemination or socialization of specific regulations related to those. In article 68, special protection for children's victim on abduction, selling, and trafficking is carried out through surveillance, protection, prevention, care, and rehabilitation efforts. Legal protection of victims, including the child's rights, is also regulated in the Act No. 21, 2007, about Eradication of Trafficking in Persons, including the secret of identity, restitution, health rehabilitation, social rehabilitation, repatriation, and social reintegration.

The Act of Children Protection also arranges for the rights of child victims to obtain legal assistance, in which Article 18 stating that every child victim or offender is entitled to legal aid and other assistance. Nowadays, many victims are less aware or tend to not know of the existence of legal assistance for victims of criminal acts that are part of the legal protection by the state. Legal aid understood is for offenders. Victims are mostly ignorant of their rights and procedures for claiming their rights, including how to report and the steps they must take to deal with their cases. The existence of legal aid rights are regulated in the Child Protection Act; the state must implement it by facilitating the representation of the victim in claiming their rights. The state must increase the socialization of this legal aid, especially for victims of crimes, to give knowledge about their rights and the steps taken. Non-governmental organizations also have an essential role in providing legal assistance through assistance for victims of crimes, so that besides country, they can also participate in

efforts to fulfill the rights of non-criminal victims in the provision of legal aid.

The prohibition of children trafficking in international instruments including Universal Declaration of Human Rights is stated in Article 4, that nobody shall be enslaved or slaves, slavery and any slave trade shall be prohibited. Also, it is stated in Article 10, point 3 that children and youth should be protected from economic and social exploitation. As a consequence, employing them in a particular work which can decrease morals and health, endangers their lives, and obstruct their development should be subject to legal sanctions. Based on the explanation above, the perpetrators who are endangering the future children life should be punished.

The protection for children victim in various legal instruments is a form of children's rights fulfillment. For the sake of protection and fulfillment of victims' rights, it is necessary to maximize the rights of victims to play a role in the criminal justice system. The crime's victim lacks sufficient law protection, both immaterial and material protection; the victim is positioned as an evidence tool which gives information, only as a witness. Therefore, it cannot gain the freedom to struggle in their rights. Moreover, there are pressures or threats from certain parties and trauma or insecurity[7].

The Act No. 13, 2006 on the Witness and Victim Protection which is revised with The Act of No.31, 2014 about the alteration of the Act No. 13, 2006 about Witness and Victim Protection, the victim's rights have been regulated. Those give information without any pressure, obtaining information on the development of the case, obtaining information on the court decisions, and obtaining information about the release of the prisoner. Also, there are medical, psychosocial, and psychological rehabilitation assistances. During this period, the victim has not been allowed to participate in giving an opinion on the punishment for the perpetrator; the victim is limited in giving the information as a victim-witness in the investigation in the court. Technically, the victim investigation during this time was good enough since the investigation does not make the child afraid or depressed. The victim suffers from both physical and psychological, so she has a right to state their opinion. Nevertheless, the judge keeps considering other evidence.

Another legal protection against child victims of human trafficking is restitution. According to Article 1 Sub-Clause 13 of the Law on the Eradication of human trafficking, restitution is a compensation payment charged to the perpetrator based on a court decision with the permanent legal force for the material and immaterial damage suffered by the victim or their heirs. Based on the definition, restitution is the responsibility of the perpetrator as a result of the crime committed. Compensation payments include loss of income, expenses incurred for medical treatment and psychological rehabilitation for victims, as well as other costs incurred by victims of human trafficking. The purpose of restitution is to alleviate the victim's child suffer as a form of current justice in the recovery effort to restore to its original condition or at least to repair the damages caused by the crime of human trafficking.

Child trafficking in the Child Protection Act is provided in Article 76F which mentioned that everyone is prohibited from placing, letting, doing, ordering, or participating in the abduction, sale, and trafficking of the Child. Those who transgress Article 76 F shall be subject to imprisonment of a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of at least Rp 60,000,000.00 (sixty million rupiahs) and a maximum of Rp300,000,000, 00 (three hundred million rupiahs). This is by Article 83 of the Child Protection Act. The criminal threat is not accompanied by the restitution of the perpetrator against the victim's child.

Today, the definition of human trafficking is not restricted to those of a particular age,

gender, race or ethnic, and those who moved across the border or those exploited in a particular industry. This is according to the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children[9].

For restitution, the state is still not accommodating the rights of the victim, its protection for the continuation of children growth and development. The Law on the Eradication of Trafficking in Persons, in Article 48, does not regulate or explain in detail the basis of consideration of the size of the restitution that the child should receive. Compensation in Article 48 clause (2) due to loss of wealth or income, suffering, costs for medical and psychological treatment actions; and other losses suffered by victims as a result of human trafficking. Other disadvantages include loss of property, necessary transportation costs, attorneys' fees, or other costs associated with legal proceedings, or loss of income promised by the offender. Under Article 48, the form of compensation is in the form of money.

The judge does not impose restitution in any decision of punishment. It does not mean that every petition will be granted. It is only granted if there is a specific request. There is a provision that if the defendant is unable to pay restitution, it will be replaced with a maximum of 1 (one) year imprisonment, indicating that the protection of the victim is not maximum yet. Such provision may be the reason for the defendant to argue that he is unable to pay the reimbursed restitution and prefer a replacement punishment.

In Article 10 of the KUHP, the ultimate penalty consists of capital punishment, imprisonment, confinement, penalties and additional rules such as the revocation of individual rights, the deprivation of certain goods and the announcement of the judge's decision. The criminal threat for perpetrators of human trafficking based on Act no. 21, 2007, about the Eradication of Human Trafficking Crime is imprisonment and cumulative imposed fines, and additional punishment. Restitution does not include the additional so that many judges do not impose restitution payments. In order to gain better protection, the restitution policy needs to be updated by formulating restitution as an additional criminal act in the decision of punishment.

Including restitution as an additional penalty is by the provisions of the KUHP master plan in 2015. Criminal types consist of principal and additional criminal sanctions. In Article 66 clause (1) of the KUHP master plan, the first punishment consists of imprisonment, criminal cover, criminal supervision, beautiful and social work penalty. Based on Article 68 paragraph (1), additional criminal punishment consists of the revocation of individual rights, the appropriation of certain goods or claims, the announcement of the judge's decision, the payment of compensation and the fulfillment of local customary obligations or legal obligations in the society. Restitution as an additional crime may be imposed together with the main penalty as a stand-alone criminal or may be imposed along with other additional penalties. In terms of restitution as an additional criminal, it can provide maximum protection for children victims.

Furthermore, there is a term it will be replaced with a maximum of 1 (one) year replacement penitentiary if the perpetrator is unable to pay restitution. A maximum of 1 (one) year imprisonment is not equal to the suffering of both physical and psychological victims. Those provisions which are a maximum of 1-year replacement penalty has been renewed with the determination of (for example) maximum imprisonment of (two) years with consideration based on the restitution amount. The renewal can protect the victim by resolving conflicts caused by criminal acts, restoring the balance of the victim's children, and bringing peace within the community. The aim of punishment, as stated in the draft of KUHP comprises of:

- a. Prevent the criminal acts by enforcing legal norms for the protection of the people;
- b. Socialize the convicted person by conducting coaching to make a right and useful person;
- c. Resolve conflicts generated by criminal acts, restore the balancing, bring peace to society; and
- d. Free the guilty of the convicted person.

The definition of criminal law policy based on Marc Ancel which is quoted by Barda Nawawi Arief is "penal policy" is both a science and an art that ultimately has a practical purpose to enable the better formulation of definite law rules and to provide guidance both for lawmakers and the courts that apply the law and also to the organizers or executor of court decisions [10]. Thus, the renewal of the policy on the protection of child victims rights in human trafficking is done to formulate definite legal rules in a better way for the parties concerned.

Act No. 21, 2007 about The Eradication of Human Trafficking Crime is a manifestation of Indonesia's commitment to implement the UN Protocol No.2000 on Preventing, Eradicating and Punishing the Human Trafficking Crime, Especially Women and Children (Palermo Protocol) signed by the Indonesian government. There are 3 (three) intents and purposes of Protocol Trafficking[11]

1. Preventing and combating human trafficking and giving special attention to the protection of women and children;
2. Adequately protecting and assisting human trafficking victims regards to their fundamental rights;
3. Promoting cooperation among the member of countries to prevent and combat human trafficking.

In order to regulate criminal law against the victim, there are two basic models, namely The Procedural Rights and The Service Model[12]. The procedural model, the victim's role as a witness, are included to consider in determining the victim's opinion statement when the perpetrator is given a conditional release up to the reconciliation[13]. In *the service* model, the victim is treated as a specific target to be served within the framework of the criminal justice system, and so on [11].

The victims (including children) should not become witness Tsongas before. They must be given an opportunity to express their opinion on suffering experience, the loss or the criminal to the perpetrator. The procedural model can be used as legal protection for the victims by taking part in the court to convey consideration in determining the criminal, the amount, and the form of restitution. The procedural model can accommodate the victims(Including children) right to participate in the criminal justice system.

The service model is focused more on the victims, restoring them to the original or proper condition in order to grow, develop, and participate optimally with human dignity and pride, and get protection from violence and discrimination for the realization of Indonesian children of quality, noble, and prosperous in accordance with the purpose of child protection. In the emphasis service model, it needs to create a standard of service and development of crime victim for law enforcement officer[13], so it needs to understand and train for a law enforcement officer to meet the service and maximal development towards the victim.

Thus, the renewal of the legal protection policy for the victim's child can be done in the presence of restitution provisions as an additional criminal and in case the convicted person is unable to pay the restitution is replaced by imprisonment as a deterrent effect and also as

an attempt to prevent the human trafficking crime. Furthermore, legal protection can also be applied by providing an opportunity for the victim' to take part in the court to convey consideration in the criminal decision, the amount, and the form of restitution.

Aristotle's distinguished justice into two: distributive and corrective justice. Distributive justice concerns about the distribution of goods and honor to each person and according to their place in society [14]. Corrective justice provides a measure of daily law that we must have a common standard in order to correct (recover) the consequences of an action that people commit concerning each other[11]. The perpetrators of human trafficking criminal get the consequences of a crime that has been committed. The emergence of material and immaterial losses, oblige the perpetrator to account for the consequences of his actions. Provision of compensation can alleviate the suffering of victims, reduce the adverse reaction of the community to the perpetrators, so it is also expected to restore disturbed public neatness and open the opportunity for the perpetrators to re-enter in their society. For the perpetrators, the compensation is a form of rue, the acknowledgment of the mistakes so that it can reduce the guilty conscience. Indemnification before the judicial process can be one of the judges' considerations to alleviate the punishment. The existence of compensation can provide justice for the child of the victim, especially to reduce the suffering and to recover their circumstances from the human trafficking crime. With the renewal of the legal protection policy for child victims in human trafficking, it can provide justice optimally for the child best interests.

In many countries have not yet established an effective victim protection mechanism [15].

4. Conclusion

Legal protection policy for child victims of human trafficking can be done by formulating restitution as an additional crime in the decision of punishment. Restitution as an additional crime can be imposed along with the maximum penalty, as a stand-alone criminal or can be imposed along with other additional penalties. A provision in that if the offender is unable to pay the restitution is replaced with a maximum of 1 (one) year replacement penalty, renewed with replaced by imprisonment. Further protection is provided by giving the fulfillment of the child's victim right by giving the opportunity to participate in the examination in court to convey the consideration in determining the crime, the amount and the form of restitution. Moreover, there is a need to provide services to the victim's children to restore to the original or appropriate condition so that the child can grow, develop, and participate optimally by the dignity of humanity. In this case, standard guidelines for service and child counseling for law enforcement officers are needed. Furthermore, the state and society should increase the socialization of legal aid so that the people, especially the victims of crime, know their rights and the steps are taken, so that society can also participate in the effort to fulfill the criminal victims' rights in providing legal aid. Such renewal can further protect the child victim by resolving conflicts caused by criminal acts, restoring the balance of the children victims, and bringing peacefulness within the society.

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