

The Implementation of the Right of Restitution against Victims of the Crime of Trafficking in Person

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Abstract. *The aims of this research are to study and analyze law enforcers in an effort to fulfill the right of restitution for victims of human trafficking and to study and analyze the fulfillment of the right of restitution for victims of human trafficking. This study uses a sociological juridical approach. The results of this study show it is necessary to have the role of law enforcers at the level of the police, public prosecutors and judges so that the application of restitution can be given to victims of the crime of trafficking in persons and Law enforcement carried out by the Court has not provided serious protection for victims of the crime of trafficking in persons. In imposing sanctions on the defendant, the judge only focuses on sentencing the defendant.*

Keywords: *Restitution; Trafficking; Victim.*

1. Introduction

Trafficking in persons is not a new thing in human life. History records that in ancient times slavery had occurred in various parts of the world. Slavery is known as a form of one's domination over another person and the right to obtain material (by selling it to others) and immaterial (serving/serving/serving the master) benefits from that ownership.¹ Trafficking in persons is now not only a domestic concern, but has become a universal issue that is increasingly complex and has increased from year to year. Its increase seems inevitable, there is no time lag to prevent or stop it. Trafficking in persons is one of the worst forms of treatment as a violation of human dignity, especially for women and children

¹Sidqi Ferin Diana, "Criminal Legal Policy in Eradicating Trafficking in Persons", in Khaira Ummah Law Journal Vol 15, No 3 September 2020, p. 99. Url: <https://jurnal.unissula.ac.id/index.php/jhku/article/view/2297/1725>

who are vulnerable to being trafficked.² This crime occurred because there was no respect for human dignity. Humans are seen as goods whose price can be determined without their consent, brought, collected, locked up, and placed without considering their needs as humans.³

International Organization for Migration(OMI) recorded that in the period March 2005 to December 2014, the number of human trafficking that occurred in Indonesia reached 6,651 people. This figure is the largest among countries where human trafficking occurs in the world. Of these, Indonesia occupies the first position with a total of 6,651 people or around 92.46 percent, with details of 950 female victims and 4,888 adult women. While the male victims were 166 children and 647 adult males. The remaining 18 percent are men, the majority of whom experienced exploitation when working as crew members (ABK).⁴ However, from 2017 to October 2022, there were 2,356 reported victims of trafficking in persons (TPPO). This data is listed in the Online Information System for the Protection of Women and Children (SIMFONI PPA).⁵

In Indonesia efforts to deal with the problem of human trafficking have been regulated in Act No. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons. It is hoped that this law will become an instrument of law enforcement in prosecuting perpetrators of the crime of trafficking in persons while protecting the rights of victims.

Human trafficking has a very negative impact on the lives of the victims. From a physical point of view, it is not uncommon for victims to contract diseases due to their living situation and the impact of their work, for example HIV/AIDS which is transmitted through sexual intercourse. From a psychological perspective, victims lose the opportunity to experience social, moral, and spiritual development. The majority of victims experience stress and depression as a

²Rachmad Syafaat, 2015, Human Trafficking; Trafficking Study of Women and Children in East Java, https://www.researchgate.net/publication/320302972_PERLINDUNGAN_TERHADAP_ANAK_KORBAN_TRAFFICKING, accessed 28 October 2022.

³Candra Muzaffar et al, 2007, "Human's Wrong: Bad Record of Western Domination of Human Rights", Yogyakarta: Pillars of Media, p. 401.

⁴Septian Deny, "IOM Notes: Most Human Trafficking Occurs in Indonesia" <http://news.liputan6.com/read/2249883/note-iom-human-trafficking-paling-banyak-terjadi-di-indonesia>, 19 October 2022 , at 08.00 WIB.

⁵ Ade Nashudin Al Ansori, "Victims of Trafficking in Persons Reach 2,356 in 2022, the Majority of Children", <https://www.liputan6.com/health/read/5170337/korban-perdagang-orang-reach-2356-di-2022-majoritas-anak-child>

result of what they experience. Often victims alienate themselves from social life and even family.⁶

On the other hand, a study on human organ trafficking concluded that The factors that affect the implementation of the criminal investigation of organ trafficking the human body that is carried out by the Police Criminal Investigation divided into two: a supporting factor comes from: the power of law officers who have sufficient personnel and high professionalism, Police efforts to combat trafficking in organs, namely prevention, eradication and prevention of the crime of trafficking of human organs by running strategy repressive functions, namely in the form of punishment with the most severe penalties. Factors inhibiting factor is the legal, law enforcement, means infrastructures, society and culture.⁷ Another study conducted in Brebes concluded that the factors that cause trafficking of women in the jurisdiction of the Brebes Police are as follows: Lack of awareness and wrong concept of thinking in society; The poverty factor forces many families to plan their life support strategies so that they are attracted to work abroad due to debt bondage, the desire to get rich quickly, and the cultural habits of the population; The lack of jobs in Indonesia has attracted some people to work abroad.⁸

This research focuses more on the victim's side, namely how to strengthen the alignment of the victim. The position of the victim in criminal justice as a party seeking justice has been neglected. Victims are not given authority and are not actively involved in the investigation and trial process so that they lose the opportunity to fight for their rights and recover from a crime. In relation to the examination of a crime, often the victim is only positioned as a witness, as a reporter in the investigation process, and as a source of information, or as one of the keys to settling a case.⁹

When examined from the purpose of punishment in positive criminal law, criminals receive more attention, such as rehabilitation, treatment of offenders,

⁶Mawardi ST, 2014, "Stop Human Trafficking" Linked in, <https://www.linkedin.com/pulse/20141207013003-202824554-perdagangan-human-human-trafficking>, accessed October 1, 2022.

⁷Yeremias Tony Putrawan, Jawade Hafiz and Aryani Witasari, "Crime Investigation of Trade of The Human Body Organs on Criminal Investigation Police (Case Study Police Report Number: LP / 43 / I / 2016 / Bareskrim dated 13 January 2016)" in Daulat Hukum Journal: Volume 2 Issue 4, December 2019 : 653-658, p. 653, [urls:https://jurnal.unissula.ac.id/index.php/RH/article/view/8442/3921](https://jurnal.unissula.ac.id/index.php/RH/article/view/8442/3921)

⁸Vinorika Padmadayani and Lathifah Hanim, "Investigation On Human Trafficking Especially Women", in Law Development Journal Volume 2 No 2, June 2020, (85 - 90), p. 89, [url: https://jurnal.unissula.ac.id/index.php/ldj/article/view/11440/4489](https://jurnal.unissula.ac.id/index.php/ldj/article/view/11440/4489)

⁹M. Arief Mansur and Elistaris Gultom, 2007, "The Urgency of Crime Victim Protection Between Norms and Reality", Jakarta: PT. Raja Grafindo Persada, p. 26-27.

social adaptation, correctional, and others.¹⁰The legal side of the victim seems lame when compared to the suspect/defendant. In fact, victims with the majority of women and children are the successors of the nation whose rights must also be protected and cared for. The physical and psychological suffering experienced by the victim is considered only relevant to be used as an instrument of imposing a sentence on the perpetrator, while this has nothing to do with the suffering of the victim.

One form of legal protection for victims of human trafficking is to obtain restitution.¹¹The definition of restitution itself is the payment of compensation that is charged to the perpetrator based on a court decision that has permanent legal force for material and/or immaterial losses suffered by the victim or his heirs. This has also received recognition in the Universal Declaration of Human Rights, namely Article 25 paragraph 1 which states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and health care and necessary social services, and the right to security in times of unemployment, sickness, inability to work, widowhood, old age, or lack of other means of living in circumstances beyond his control."

At present there are many laws and regulations that include restitution including: the Criminal Code (KUHP), Act No. 26 of 2000 concerning the Human Rights Court, Act No. 8 of 1999 concerning Consumer Protection, Act No. 31 of 2014 concerning Amendments to Act No. 13 of 2006 concerning the Protection of Witnesses and Victims, and Act No. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons.

However, in practice the law enforcement process related to restitution has not run as it should. In imposing sanctions, judges do not consider the suffering and losses experienced by victims for compensation (restitution). In addition, the regulation on restitution in Act No. 21 of 2007 does not formulate a method for calculating restitution issues, making it very difficult to determine the appropriate amount of compensation for victims. Therefore the implementation of restitution is an important matter to be carried out in order to reflect the workings of the law or legal institutions in accommodating the protection of victims.

Based on the description of the research aims to know and analyze law enforcers in an effort to fulfill the right to restitution for victims of criminal acts of

¹⁰Maya Indah S, 2008, "Protecting Victims from a Victimological and Criminological Perspective", Jakarta: Kencana, p. 97

¹¹Ibid., p. 110.

trafficking in persons (human trafficking); and review and analyze the fulfillment of the right to restitution for victims of human trafficking

2. Research Methods

This study uses a Juridical Sociological approach, the specifications in this study are analytical descriptive, the data used are primary data and secondary data, using data collection by interviews and literature studies, qualitative data analysis, problems are analyzed by theory, law enforcement and legal certainty .

3. Results and Discussion

3.1. The Role of Law Enforcement in Efforts to Fulfill the Right to Restitution for Victims of Human Trafficking

In combating trafficking in persons, police investigators, public prosecutors and judges play an important role in fulfilling the rights and protection of victims. According to Muladi, in the concept of regulating the protection of victims of criminal acts, the first thing that must be considered is the essence of the losses suffered by the victims. The essence of the loss is not only material or physical suffering, but also psychological.¹²

The role of law enforcers in implementing the fulfillment of the right to restitution for victims of the crime of trafficking in persons can be described below. First, Regarding the Role of Investigators, that in the elucidation of Article 48 of the PTPPO Law, the mechanism for filing for restitution is carried out from the time the victim reports the case he has experienced to the local police and is handled by the Investigator concurrently with the handling of the crime committed. If the victim wants compensation, the investigator is obliged to inform the victim about how the victim gets compensation from the perpetrator, for example that the victim must collect evidence to be submitted as a basis for obtaining restitution (expenses, treatment in the form of receipts/bonuses). This evidence must be attached with the case file.

Collection of information regarding the losses suffered by the victims and the willingness of the perpetrators of the crime of trafficking in persons to compensate for the losses is in the hands of the police. Therefore the police must open opportunities for victims to provide all information regarding evidence of the losses suffered by victims.¹³This is also clearly stipulated in the Regulation of

¹²Muladi, 1995, "Kapita Selektta Criminal Justice System", Semarang: Diponegoro University Publishing Agency, page 177.

¹³Sondang Kristine, "Implementation of the Right to Restitution for Victims of Trafficking in Persons based on Law Number 21 of 2007 concerning the Eradication of Trafficking in Persons

the Head of the State Police of the Republic of Indonesia Number 3 of 2008 concerning the Establishment of Special Service Rooms and Procedures for Examining Witnesses and Victims that in examining victims of the crime of trafficking in persons questions must be asked in order to obtain information regarding the substance of the case. being examined, including losses suffered by witnesses and/or victims as material for filing restitution or granting compensation.¹⁴

Furthermore, it is explained in Ministerial Regulation Number 22 of 2010 concerning Standard Operational Procedures for Integrated Services for Witnesses and Victims of Trafficking in Persons in Chapter IV Number 6 that:

"Trained police with the nature of human rights, gender, and children (Polwan Unit PPA) after receiving a report from the victim, the victim's attorney, or the victim's assistant, immediately conduct an investigation and investigation, convey to the victim the victim's rights including restitution, submit the file to the Prosecutor Public Prosecutor (JPU)".

The treatment and handling of victims of trafficking in persons, especially victims of sexual exploitation, requires special expertise. Therefore, in every police station there should be a number of officers who are specially trained to handle cases of trafficking in persons. These officers are police officers who have social skills, knowledge of the position and problems faced by victims and are familiar with institutions that provide assistance, services and assistance to victims, both non-governmental organizations and government agencies. This is important to prevent victim re-victimization because the police receiving the report or the investigator who is later appointed does not understand and understand the condition of the victim of the crime of trafficking in persons.¹⁵

Analyzing the description above, the support of police personnel plays a strategic role in understanding the handling of victims in the context of seeking restitution in cases of trafficking in persons. The mechanism mentioned above clearly demands a dual role for the investigator to take care of the interests of the victim in addition to his main task in resolving cases. Moreover, investigators are the victim's first source of information in finding out about legal efforts to

(Study of the Decision of the Tanjung Karang District Court Number 1633/Pid.B/2009/PN.TK on behalf of Fitriyani Binti Muradi)", Thesis, Master of Law, Faculty of Law, University of Indonesia, Jakarta, 2012, page 67.

¹⁴See Article 17 paragraph (3) point c Regulation of the Head of the Indonesian National Police Number 3 of 2008 concerning the Establishment of a Special Service Room and Procedures for Examining Witnesses and Victims.

¹⁵Farhana, 2010, "Legal Aspects of Trafficking in Persons in Indonesia", Jakarta: Sinar Graphic, page 126.

demand compensation from the perpetrators. So that the focus of investigators is not only pursuing legal certainty but also oriented towards protecting victims.

Second, the Public Prosecutor's role is to inform victims about their right to apply for restitution. Furthermore, the Public Prosecutor submits the amount of losses suffered by victims of the crime of trafficking in persons, together with the charges.¹⁶

In the Restitution Submission Technical Instructions based on the JAMPIDUM letter No. 3618/E/EJP/11/2012 dated 28 November 2012 Regarding Restitution in Cases of Trafficking in Persons: "Remind the Public Prosecutors (JPU) who handle cases of criminal acts of trafficking in persons (Trafficking in Person) where the victim has not applied for restitution in investigation stage: a. So that the public prosecutor informs the victim about his right to apply for restitution in the form of compensation for loss of wealth or income, suffering, costs for medical treatment, other losses suffered by the victim as a result of trafficking in persons; b. In criminal charges, the public prosecutor conveys simultaneously the amount of losses suffered by victims as a result of trafficking in persons. In the pre-prosecution stage, the investigating prosecutor regarding the TIP case files that have not included restitution has given instructions so that restitution is used as the substance of the examination, both examinations of witnesses, victims and suspects. Asking investigators to mediate (conducted not in the context of stopping the handling of criminal cases), but to find an agreement on the amount of restitution requested by the victim with the ability of the suspect to pay restitution. Furthermore, at the prosecution stage, if an agreement is not reached at the investigative level, then progressively the public prosecutor at the time of submission of the second stage of the file again tries to mediate about the restitution requested by the victim with the ability of the suspect/defendant."

The provisions in Article 48 of the PTTPO Law clearly state the obligation of the Public Prosecutor to notify the victim's right to file for compensation (restitution) which is clearly different compared to the provisions for merging compensation cases in Article 98 of the Criminal Procedure Code. In this provision there is no order for the public prosecutor to notify the victim that the victim has the right to apply for restitution. The Public Prosecutor's obligation is very important considering that victims are usually ordinary people who lack knowledge and understanding of their rights as victims to obtain restitution.

Third, the Role of the Judge. The role of the judge is very large in considering the amount of restitution, both material and immaterial, as set forth in the court's

¹⁶Explanation of Article 48 of Law Number 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons.

decision. Give fair and commensurate decisions with TIP crimes committed by perpetrators and provide material or immaterial compensation to victims. In this case, it is hoped that the judge will consider not only based on legal justice, but also based on moral justice to get Practice Justice. Because justice is not only the right of the accused/perpetrator of a crime, which is his right. It should not also be forgotten, that the community also has the right to obtain justice from a judge's decision in the form of a feeling of security, calm, and relief because the judge's decision can be accepted and considered commensurate with the perpetrator's actions.¹⁷

3.3. Fulfillment of the right of restitution for victims of criminal acts of trafficking in persons (human trafficking)

In Article 26 of the PTPPO Law, at least one action or process is carried out in at least one way for the purpose of at least one form of exploitation of a person's food which can be said to be carrying out human trafficking. The consent of victims of trafficking in persons will not eliminate the prosecution of perpetrators. Based on this law, with or without the consent of the victim, the perpetrators of the crime of trafficking in persons can still be prosecuted and punished.

The court's decision was in imposing sanctions on the defendant, the judge only focused on punishing the defendant. As stated by Andi Hamzah: "In discussing criminal procedural law, especially those related to human rights, there is a tendency to explore matters relating to the rights of suspects without paying attention to the rights of victims". Meanwhile, the role of the victim in the trial is more as part of a material seeker, namely as a witness.¹⁸

Law enforcement carried out by the Sumber District Court has not provided serious protection for victims of trafficking in persons. In the previous chapter, it was explained that victim protection can include forms of protection that are both abstract (indirect) and concrete (direct). Meanwhile, a form of protection that can only be felt emotionally (psychically), such as satisfaction. Meanwhile, the concrete or direct form of victim protection is in the form of compensation which can be in the form of restitution or compensation.

When it is related to the court decision handed down by the judge to the perpetrators of the crime of trafficking in persons, in essence it is an indirect

¹⁷Marlina and Azmiati Zulia, 2015, "Right of Restitution Against the Crime of Trafficking in Persons", Bandung: PT Refika Aditama, p. 87.

¹⁸Dian Eka Putri Ismail, 2017, "Right of Restitution for Victims of Trafficking in Persons", Thesis Faculty of Law, University of Hasanuddin Makassar, page 78.

provision of protection for victims. However, the provision of this punishment has not been able to provide a perfect sense of justice for the victim.

For the case above, the judge did not impose an additional sentence in the form of giving restitution by the perpetrator to the victim. In practice, this will injure the victim's right to obtain restitution. The emergence of such a court decision seems to want to justify the opinion that has been developing so far, that by imposing a sentence on the perpetrator (defendant), protection for the victim has automatically been given. Yet such protection is not sufficient.

In the case of making a decision related to restitution, a request must first be submitted by the victim or public prosecutor, as stipulated in the elucidation of Article 48 of the PTPPO Law. However, during the trial the victim submitted a request for restitution along with the demands of the public prosecutor. That in order to grant the letter of submission for restitution, the Panel of Judges will first examine, assess and consider the facts at trial, to what extent the active role of the perpetrators of the crime has resulted in or caused actual losses experienced by the victim, starting from loss of income, suffering while being a victim and are there any costs incurred for the victim's medical and psychological as well as other immaterial losses. Even though the judge's decision does not include the restitution that must be given to the victim, this will not invalidate the decision. In essence, the main punishment has been imposed, namely imprisonment and fines. And it is possible for the victim to sue through a civil lawsuit.

The judge's consideration is based on the reason that compensation (restitution) is not in accordance with the mechanism for submitting a request for restitution as stated in Article 48 paragraph 1 of the PTPPO Law, the judge's reason is contrary to the principles of criminal procedural law, namely the principle of an active judge, meaning that even if the victim does not express things certain things to court, but if the judge considers something that needs to be known, then the judge can consider matters that were not brought forward by the victim or the public prosecutor.

Examining the facts at trial regarding the criminal acts of the perpetrator, the judge also at least uncovered the facts of the loss suffered by the victim. The judge must be concerned with the suffering of the victim by notifying the victim's right to obtain compensation so that when compensation is not included in the criminal charge, the judge on the basis of justice may apply additional criminal compensation for payment of damages or apply special conditions for perpetrators of criminal acts to pay compensation in imposition conditional sentence without having to see that the application is not in accordance with the mechanism stated in the law.

This research shows that the mechanism for implementing restitution is not easy for law enforcers to implement, in fact it is inversely proportional to what is stated in the law (law in text) and the reality on the ground (law in action).¹⁹

The implementation of restitution was not effective because it was only delegated to the conservative intentions and thoughts of law enforcement officials.²⁰Therefore, the method of judging does not only use reason (logic) but is also loaded with conscience or compassion.

In fact, law enforcers in criminal justice often do not see themselves as representing victims, but rather as representing the maintenance of order in society. This can be seen from the handling process which only conditions victims to obtain justice and access to know how justice is carried out.

Since the investigation at the Police level and prosecution at the Prosecutor's Office level, claims for compensation (restitution) have not been included. As already regulated in articles 58 to 50 of the PTPPO Law. According to the author, the Public Prosecutor pays little attention to the provisions of the PTPPO Law, especially regarding restitution which is the victim's right. Victims as parties who experience suffering and loss are often forgotten because the focus of attention of law enforcement is only concentrating on solving cases.

This was also because the prosecutor met the victim only during trial and never invited the victim to undergo additional examinations, because they considered that this had already been stated in the police investigation report (BAP). Thus, the prosecutor's considerations are often the prosecutor's own perspective, the circumstances and considerations of the victim are never projected by the prosecutor in their charges.

In overcoming the obstacles faced, maximum effort is needed for law enforcers to realize the fulfillment of restitution as a reflection of legal protection for victims. This is an important part of the task of criminal justice in the framework of law enforcement and justice in a comprehensive manner and at the same time complying with and implementing regulations that have been in effect regarding this issue.

Fauzy Marasabessy explained that a new mechanism was needed in submitting requests for restitution where the Public Prosecutor could compel the perpetrators of criminal acts by confiscating or auctioning off the perpetrator's assets as guarantee for payment of restitution money to the victim, so the

¹⁹Op. cit, p. 82.

²⁰<http://www.tempo.co/read/kolom/2013/01/24/641/Tantangan-Berat-Restitute-Korban-Kejahatan>.

perpetrators are not entitled to a reduced sentence and not get parole. ²¹This opinion should be used as an alternative in improving the mechanism for implementing restitution for victims of the crime of trafficking in persons.

However, it takes time to introduce restitution in the midst of the legal system as a new paradigm within the scope of criminal justice. Socialization of laws relating to the protection of victims of trafficking in persons needs to be increased by all levels of society, especially groups of people who are vulnerable to becoming victims of the crime of trafficking in persons. Law enforcement human resources in every agency must be able to understand and master the crime of trafficking in persons, especially regarding restitution.

4. Conclusion

It is still rare that judges do not grant the victim's request for restitution on the grounds that the victim did not apply for restitution when the case was being handled by the Indonesian National Police. Law enforcement carried out by the Court has not provided serious protection for victims of the crime of trafficking in persons. In imposing sanctions on the defendant, the judge only focuses on sentencing the defendant.

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²¹Fauzy Marasabessy, "Restitution for Victims of Crime: An Offer of a New Mechanism", 45th Year Journal of Law and Development, Faculty of Law, University of Indonesia, Number 1 January-March 2015, p. 68 <http://jhp.ui.ac.id/index.php/home/article/view/9/9>

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