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Topic: Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children

Transformative Constitutionalism: Reconceptualizing State Responsibility for Protecting Women and Children Against Human Trafficking in Indonesia

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Abstract. Human trafficking constitutes a serious violation of human rights that disproportionately affects women and children and poses a significant challenge to the state's constitutional obligation to protect fundamental rights. Although Indonesia has established a legal framework through the 1945 Constitution of the Republic of Indonesia and Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, the implementation of victim protection remains inadequate. This study aims to examine the state's responsibility in protecting women and children from human trafficking through the perspective of transformative constitutionalism and to reconceptualize a more comprehensive model of state responsibility. This research employs a normative legal research method using statutory, conceptual, and comparative approaches, with qualitative analysis based on library research. The findings demonstrate that state responsibility should extend beyond criminal law enforcement to encompass constitutional obligations to prevent trafficking, protect victims, prosecute offenders, and ensure victims' recovery. This study proposes the Constitutional Transformative Responsibility model, which integrates the principles of transformative constitutionalism, positive obligations, due diligence, and the human rights-based approach into a comprehensive constitutional framework for strengthening the protection of women and children against human trafficking in Indonesia.



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1. Introduction

Human trafficking constitutes one of the most serious and complex violations of human rights, as it not only deprives individuals of their liberty, dignity, security, and fundamental rights but also disproportionately affects women and children, who remain the most vulnerable groups to exploitation in both domestic and transnational contexts. As a form of transnational organized crime, human trafficking extends beyond criminal conduct to pose significant constitutional and human rights challenges, requiring states to fulfill their constitutional obligations by ensuring effective prevention, victim protection, prosecution of offenders, and comprehensive recovery measures. The phenomenon of human trafficking has evolved from a conventional criminal offense into a form of transnational organized crime involving cross-border criminal networks, thereby requiring a legal approach that extends beyond the prosecution of offenders to prioritize the protection, assistance, and recovery of victims as a fundamental responsibility of the state. From the perspective of international human rights law, states bear positive obligations to prevent human trafficking, protect victims, investigate violations, prosecute perpetrators, and ensure effective remedies and recovery for victims as part of the due diligence obligation inherent in the rule of law and the state's responsibility to safeguard fundamental human rights. These obligations are derived not only from international legal instruments, particularly the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), but have also evolved through the interpretation of the international human rights regime, which recognizes human trafficking as a violation of multiple interrelated civil, political, economic, social, and cultural rights.

In the Indonesian context, the protection of women and children derives its constitutional legitimacy from the 1945 Constitution of the Republic of Indonesia, particularly through the guarantees of equality before the law, the right to life, the right to personal security, and the rights of children to protection from violence and discrimination. Nevertheless, the existence of constitutional guarantees alone is insufficient to ensure effective legal protection for victims of human trafficking unless they are supported by responsive public policies and effective institutional implementation that address the underlying social and economic vulnerabilities contributing to trafficking. The development of transformative constitutionalism offers a new perspective by viewing the



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constitution not merely as an instrument for limiting state power (negative constitutionalism), but also as a transformative framework that requires the state to actively promote substantive justice, equality, and the protection of vulnerable groups through affirmative measures.⁶ According to Hailbronner (2017), transformative constitutionalism conceptualizes the constitution as an instrument of social transformation that requires the state to take concrete measures to promote a more just and equitable society. Consequently, the protection of women and children should not be understood merely as an administrative responsibility, but as an active constitutional mandate requiring the state to ensure the effective realization of their fundamental rights.

This approach is consistent with the evolving concept of the global constitutionalization of human rights, which recognizes the protection of human rights as a fundamental principle of modern constitutional governance. Nevertheless, its effective implementation continues to face significant challenges arising from persistent social, political, and economic inequalities that undermine the realization of legal protection and substantive justice. On the other hand, existing scholarship on human trafficking has been predominantly framed through the perspectives of criminal law, criminal justice policy, and international cooperation in combating transnational organized crime, with comparatively limited attention given to the constitutional dimensions of state responsibility and the protection of victims' rights. Obokata (2006) develops a human rights-based approach, arguing that the effectiveness of anti-trafficking efforts should be assessed based on the state's ability to fulfill four core obligations: preventing trafficking, prosecuting offenders, protecting victims, and addressing the structural causes of human trafficking. Similarly, Waisman (2010) argues that victim protection cannot be achieved solely through criminal law enforcement but must be grounded in the state due diligence standard, which requires states to assume responsibility for the entire continuum of victim protection, from prevention and identification to rehabilitation and effective remedies.

Despite these important contributions, the existing literature has paid relatively limited attention to the potential of transformative constitutionalism as a conceptual framework for reconceptualizing the constitutional responsibility of the state in protecting women and children from human trafficking, particularly in developing countries such as Indonesia. Consequently, a significant research gap remains regarding the integration of transformative constitutionalism with the concepts of state responsibility, positive human rights obligations, and victim protection policies within a comprehensive constitutional framework.



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This study addresses this gap by proposing a Constitutional Transformative Responsibility model that reconceptualizes state responsibility through the lens of transformative constitutionalism. Under this framework, the protection of women and children is understood not merely as the implementation of statutory provisions, but as an active constitutional obligation requiring institutional reform, policy transformation, and effective protection mechanisms to ensure the fulfillment of fundamental human rights. The significance of this study lies in its contribution to strengthening the constitutional paradigm for protecting women and children against human trafficking in Indonesia by repositioning the state not only as a regulator and law enforcer, but also as a constitutional guarantor responsible for ensuring prevention, protection, recovery, and the empowerment of victims in accordance with constitutional principles and international human rights standards.

Based on the foregoing discussion, this study addresses the following research questions: (1) How can the concept of transformative constitutionalism be utilized to reconceptualize the state's responsibility for protecting women and children against human trafficking in Indonesia? (2) To what extent do Indonesia's constitutional framework and national policies reflect the state's obligations under international human rights principles? (3) How can a more transformative legal protection model be developed to strengthen the constitutional protection of women and children as victims of human trafficking? Accordingly, this study aims to examine the state's responsibility for protecting women and children against human trafficking through the perspective of transformative constitutionalism, identify the gap between constitutional norms and policy implementation, and formulate a Constitutional Transformative Responsibility model that strengthens constitutional protection by integrating human rights principles, positive state obligations, and substantive justice.

2. Research Methods

This study employs normative legal research (doctrinal legal research) to examine the legal norms, constitutional principles, and legal doctrines governing the state's responsibility to protect women and children against human trafficking.⁹ The research applies three complementary approaches: the statutory approach, conceptual approach, and comparative approach to examine the relationship between Indonesia's constitutional framework and the development of international human rights law concerning the protection of victims of human trafficking (Hutchinson & Duncan, 2012; Setia Negara, 2023). The statutory approach is employed to analyze the provisions of the 1945 Constitution of the Republic of Indonesia, Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, and relevant international legal instruments ratified by



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Indonesia as the legal basis for the constitutional protection of women and children.

The conceptual approach is employed to examine the theories of transformative constitutionalism, state responsibility, positive obligations, and the human rights-based approach as the theoretical foundation for reconceptualizing the state's constitutional responsibility to protect victims of human trafficking. Meanwhile, the comparative approach is used to compare the development of state responsibility principles under international legal instruments and constitutional practices in selected jurisdictions in order to identify a more effective constitutional framework for protecting women and children from human trafficking. The data sources consist of primary, secondary, and tertiary legal materials, which were collected through library research. The primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as the principal legal framework governing the constitutional and international protection of women and children against human trafficking.

Secondary legal materials were obtained from peer-reviewed international journals, academic books, previous studies, and official publications of international organizations addressing transformative constitutionalism, human rights, human trafficking, and state responsibility. The legal materials were collected through library research by identifying, classifying, and systematically reviewing relevant legal sources in accordance with the objectives of the study.

The data were analyzed qualitatively using a normative legal analysis based on grammatical, systematic, teleological, and comparative interpretation of the applicable legal norms. The analysis was conducted to examine the consistency between Indonesia's constitutional principles and international human rights standards concerning the state's obligations to prevent human trafficking, protect victims, prosecute offenders, and ensure effective remedies and recovery. The findings were subsequently used to develop a legal argument for reconstructing state responsibility through the perspective of transformative constitutionalism, resulting in the proposed Constitutional Transformative Responsibility model as a framework for strengthening the constitutional protection of women and children against human trafficking in Indonesia.

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3. Results and Discussion

3.1. Transformative Constitutionalism as the Foundation of State Responsibility for Protecting Women and Children Against Human Trafficking

The findings indicate that the state's responsibility for protecting women and children against human trafficking can no longer be understood merely as an administrative obligation limited to legislative enactment and criminal law enforcement. Rather, the state bears a constitutional obligation to respect, protect, and fulfill human rights through policies and institutional measures that provide effective protection for vulnerable groups. Accordingly, the effectiveness of victim protection depends not only on the existence of legal norms but also on the capacity of state institutions and the effective implementation of public policies. Transformative constitutionalism redefines the function of the constitution from a mechanism for limiting governmental power to an instrument of social transformation that requires the state to address the structural drivers of human trafficking, including poverty, gender inequality, limited access to education, and inadequate labor protection. This perspective is consistent with the concept of positive obligations, which recognizes the state as the primary duty bearer responsible for ensuring the effective realization of constitutional rights through affirmative legal and policy measures.

Furthermore, the development of the constitutionalizing of international law demonstrates that the protection of human rights has become an integral component of the constitutional obligations of the modern state. Therefore, the protection of women and children against human trafficking should be understood not only as the implementation of constitutional mandates but also as the fulfillment of the state's obligations under international human rights law. Based on the findings, this study argues that the state should be understood not only as a rule maker and law enforcer, but also as a constitutional guarantor responsible for ensuring preventive, protective, restorative, and transformative measures to safeguard women and children as the groups most vulnerable to human trafficking.

3.2. Evaluation of Indonesia's Constitutional and Legal Framework in Protecting Women and Children Against Human Trafficking

The evaluation reveals that Indonesia has established a relatively comprehensive legal framework through the 1945 Constitution of the Republic of Indonesia, Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, and the ratification of the Palermo Protocol. Nevertheless, significant gaps remain between constitutional commitments and policy implementation, particularly with respect to inter-agency coordination, victim identification, rehabilitation

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services, and social reintegration. This study finds that anti-trafficking efforts in Indonesia continue to be predominantly shaped by a criminal justice approach, whereby the effectiveness of state intervention is measured primarily by the prosecution and punishment of offenders rather than by the protection and restoration of victims' rights. However, victim protection should extend beyond criminal proceedings to include legal assistance, rehabilitation, restitution, and social reintegration as integral components of the state's positive obligations to ensure the effective protection and fulfillment of victims' rights.

Beyond implementation deficiencies, human trafficking is closely associated with structural factors such as poverty, social inequality, gender discrimination, and limited access to education, all of which increase the vulnerability of women and children to exploitation. Furthermore, the transnational nature of human trafficking as a form of transnational organized crime necessitates stronger international cooperation in victim protection, cross-border law enforcement, and judicial collaboration (Gómez-Mera, 2017; Obokata, 2006). Accordingly, the effectiveness of anti-trafficking efforts cannot depend solely on the existence of legal regulations, but also on the state's capacity to integrate social policy, sustainable development, and human rights protection into a comprehensive anti-trafficking framework.

3.3. Reconceptualizing State Responsibility through Transformative Constitutionalism

The findings indicate that the prevailing paradigm of state responsibility requires reconceptualization, as an approach primarily centered on law enforcement has not been sufficient to provide comprehensive protection for victims of human trafficking. Through the perspective of transformative constitutionalism, the state is reconceptualized as a constitutional guarantor responsible for addressing the structural causes of human trafficking through human rights-based policies and social justice-oriented measures aimed at eliminating the conditions that perpetuate the exploitation of women and children. This study develops the Constitutional Transformative Responsibility model, which is structured around four interrelated pillars: Constitutional Prevention, Constitutional Protection, Constitutional Prosecution, and Constitutional Recovery. Together, these pillars integrate prevention, victim protection, law enforcement, and rights-based recovery into a unified framework of the state's constitutional obligations. The proposed model suggests that the effectiveness of state responsibility should no longer be assessed solely by the number of offenders prosecuted or convicted, but by the state's capacity to reduce societal vulnerability to human trafficking through social development, the protection of human rights, and the strengthening of institutional capacity. By integrating the principles of

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transformative constitutionalism, positive obligations, due diligence, and the human rights-based approach, this model offers a more comprehensive constitutional framework for protecting women and children against human trafficking in Indonesia. This approach is also consistent with the evolving concept of the global constitutionalization of human rights, which recognizes the protection of women and children as an integral component of the constitutional obligations of modern states.

The principal contribution of this study is the development of the Constitutional Transformative Responsibility model, which integrates the principles of transformative constitutionalism, positive obligations, due diligence, and the human rights-based approach into a unified constitutional framework for state responsibility that is preventive, protective, restorative, and transformative in nature. This model advances a new perspective by arguing that the effectiveness of anti-trafficking policies should be assessed not merely by the successful prosecution and punishment of offenders, but by the state's capacity to ensure the continuous protection, fulfillment, and realization of the rights of women and children as victims of human trafficking.

4. Conclusion

This study concludes that the protection of women and children against human trafficking requires a reconceptualization of state responsibility, shifting from a predominantly criminal law enforcement paradigm toward the fulfillment of constitutional obligations through the perspective of transformative constitutionalism. Within this framework, the state's responsibility extends beyond prosecuting offenders to encompass the prevention of human trafficking, the protection of victims, and the effective restoration of victims' rights. Although Indonesia has established a comprehensive legal framework, its implementation remains largely enforcement-oriented and has yet to provide comprehensive, victim-centered protection. Accordingly, stronger inter-agency coordination, victim-centered policies, and preventive strategies addressing the structural causes of human trafficking are essential. The principal contribution of this study is the development of the Constitutional Transformative Responsibility model, which integrates the principles of transformative constitutionalism, positive obligations, due diligence, and the human rights-based approach into four interrelated pillars: Constitutional Prevention, Constitutional Protection, Constitutional Prosecution, and Constitutional Recovery. This model provides a comprehensive constitutional framework for strengthening state responsibility and serves as a foundation for developing more effective legal and public policies to protect women and children against human trafficking in Indonesia. The government should strengthen the implementation of policies to combat human



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trafficking through a transformative constitutionalism approach that emphasizes prevention, victim protection, enhanced inter-agency coordination, and the comprehensive fulfillment of the rights of women and children. Furthermore, international cooperation should be reinforced to improve the effectiveness of efforts to address human trafficking as a transnational crime. Future research is recommended to examine the implementation of the Constitutional Transformative Responsibility model through empirical or comparative studies to evaluate its effectiveness in strengthening the protection of women and children against human trafficking.

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