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

Implementation of The Principle of Non - Criminalization for Children and Women Who Are Victims of Human Trafficking

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Abstract. *The Crime of Human Trafficking (TPPO) constitutes one of the most degrading violations of Human Rights (HR), in which women and children consistently occupy the most vulnerable positions to exploitation. Within the grip of human trafficking syndicates, victims are often coerced, threatened, or deceived into committing various unlawful acts, such as forging immigration documents, working in the illegal prostitution sector, or becoming drug couriers. Based on the principles of justice and human rights, individuals who are forced to commit crimes as a direct consequence of their status as victims of human trafficking must not be subjected to criminal punishment. This concept is known as the principle of non-criminalization, an internationally recognized pillar of protection that ensures states do not punish those who, in reality, require assistance and recovery. This study aims to analyze the implementation of the principle of non-criminalization for women and child victims of human trafficking in Indonesia, as well as to uncover the various obstacles that cause law enforcement officers to continue targeting the wrong individuals. This Research using a normative juridical research method with statutory and conceptual approaches, this study highlights how an overly rigid legalistic-positivistic legal paradigm and the lack of gender sensitivity frequently result in secondary victimization. The findings of this study affirm that the failure to implement the principle of non-criminalization stems from the weakness of victim identification mechanisms at the initial stage of investigation. The police and immigration authorities often act in a sectoral manner without involving multidisciplinary teams, causing victims' status to go undetected before judicial proceedings commence. This article recommends amending the Human Trafficking Law to incorporate an absolute and explicit non-criminalization clause, as well as developing cross-institutional Standard Operating Procedures (SOPs) for victim identification. Ultimately, the state is required to shift its law enforcement approach from one focused on*



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blind punishment toward restorative justice centered on recovery, in order to ensure that victims of human trafficking are no longer punished for crimes forced upon them by organized trafficking syndicates.

Keywords: *Criminalization; Children and Women; Human Trafficking.*

1. Introduction

Human Rights (HR) are inherent gifts of nature attached to every human being from the moment they are born, requiring absolute respect and protection from the state. The Constitution of Indonesia, the 1945 Constitution of the Republic of Indonesia, has established a very strong philosophical foundation by guaranteeing every person's right to live freely, free from slavery, and free from degrading treatment. Within this constitutional framework, the state has a positive obligation to ensure that all its citizens, especially vulnerable groups, are protected from all forms of exploitation. However, alongside the dynamics of globalization, this promise of protection continues to be challenged by transnational crimes that reduce human beings to mere economic commodities.¹

The Crime of Human Trafficking (TPPO) stands as a manifestation of modern slavery that massively violates these fundamental human rights values. This crime operates by depriving individuals of their freedom through manipulation, threats, violence, and debt bondage, with the ultimate aim of exploiting victims' labor, sexual services, or organs. The scale of this crime is horrifying because it is controlled by organized syndicates with substantial financial resources and cross-border networks. Human trafficking not only destroys its victims physically and mentally but also completely strips them of their autonomy.

Within this structured landscape of crime, women and children are consistently trapped in the deepest layers of vulnerability. Sociological realities show that patriarchal culture, structural poverty, and limited access to education and decent employment are the main push factors that make them easily deceived. Human traffickers cunningly exploit this economic desperation by offering enticing promises of high-paying jobs in major cities or abroad. Once these women and children enter the network, they immediately lose control over themselves and their own destinies.²

¹, Jimly Asshiddiqie. *Konstitusi dan Konstitusionalisme Indonesia*. Jakarta: Konstitusi Press, 2006

² Saptari, Ratna, dan Brigitte Holzner. *Perempuan, Kerja dan Perubahan Sosial: Sebuah Pengantar Studi Perempuan*. Jakarta: Kalyanamitra, 1997



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The modus operandi of human trafficking syndicates is designed in such a way as to ensure that victims have no means of escape. During the exploitation process, syndicates often force victims to commit acts that violate national laws. For example, victims are forced to use forged passports or visas, compelled to work as commercial sex workers in jurisdictions where prostitution is prohibited, or even forced to transport narcotics across national borders as drug mules. This coercion is carried out under threats of murder against the victims or their families back home, leaving no genuine element of criminal intent (*mens rea*) on the part of the victims.

In response to this deeply complex situation, international human rights law has developed a fundamental protection known as the non-criminalization principle. This principle affirms that a person should not be prosecuted, detained, or punished for legal violations committed when those violations are a direct consequence of their status as a victim of human trafficking. The legal reasoning behind this principle is simple yet profound: it is highly unjust and inhumane for a state to punish someone for criminal acts that were forced upon them by another party under threats of violence.

At the global level, this principle is clearly articulated in the guidelines issued by the United Nations Office of the High Commissioner for Human Rights (OHCHR) through the Recommended Principles and Guidelines on Human Rights and Human Trafficking. This document urges member states to ensure that trafficking victims are not punished for immigration violations or other criminal offenses that are direct consequences of their trafficking situation. The Palermo Protocol, ratified by many countries, also provides a moral foundation for states to prioritize victim rescue over the blind enforcement of administrative laws that disregard human suffering.

In Indonesia, the spirit of providing such protection has, in fact, been realized through the enactment of Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking. This legislation, supported by the Law on Witness and Victim Protection, aims to dismantle criminal networks down to their roots while providing physical and psychological recovery for victims. Several provisions implicitly prohibit law enforcement officers from prosecuting victims based on their testimony; however, unfortunately, the law still does not contain an explicit and comprehensive non-criminalization clause covering all types of criminal offenses related to exploitation.³

³ Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang

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The absence of such an explicit provision has created a serious problem in law enforcement practice (*das sein*). Instead of being protected, many women and child victims of trafficking are arrested, interrogated without legal assistance, and criminalized by police and immigration authorities. Law enforcement officers operating under a legalistic-positivist paradigm often focus solely on the fact that victims possess forged documents or are found in illegal prostitution venues, without investigating whether they were there voluntarily or were held captive by pimps. This phenomenon of wrongful arrests and victim criminalization remains a deep-rooted flaw in Indonesia's criminal justice system.

The consequences of criminalizing victims are profoundly destructive and multifaceted. When victims are imprisoned, they experience secondary victimization. The state, which should act as their protector, instead transforms into a new perpetrator of violence. The stigma of being a former prisoner remains with them for life, destroying the futures of these women and children. Furthermore, victim criminalization represents a major victory for human trafficking syndicates; while authorities remain occupied with punishing victims at the lowest level, the masterminds remain free, continuing to recruit new victims without ever being brought to justice.

Therefore, this article is prepared to comprehensively examine the implementation of the non-criminalization principle for victims of human trafficking from a human rights perspective. This research aims to analyze the weaknesses of the national legal framework, identify the structural causes that lead law enforcement officers to continue criminalizing victims, and formulate recommendations for a system reform centered on protection. Through a comprehensive analysis, this paper is expected to provide a foundation for legal reform to ensure that justice for survivors of exploitation is no longer replaced by the punishment of imprisonment.

2. Research Methods

This study is normative legal research (juridical normative research) focusing on the analysis of legal texts, principles of justice, and regulatory harmonization.⁴ The approaches employed include the Statutory Approach and the Conceptual Approach. The primary legal materials used consist of the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 on Human Rights, Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, and international instruments such as the Palermo Protocol and the OHCHR guidelines. All literature data were analyzed qualitatively to explain the gap

⁴ Peter Mahmud Marzuki. *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group, 2005



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between human rights theory and practice in the field, after which prescriptive conclusions were drawn to formulate an ideal framework for law enforcement.

3. Results and Discussion

3.1. The Legal and Philosophical Foundations of the Principle of Non-Criminalization from a Human Rights Perspective

The principle of non-criminalization is not a standalone concept; rather, it is rooted in the philosophical foundations of criminal law and the most fundamental principles of Human Rights. In criminal law, a person may only be held criminally liable if they possess both *actus reus* (a wrongful act) and *mens rea* (criminal intent). For women and children who become victims of Human Trafficking (TPPO), the element of *mens rea* is substantively absent. Any unlawful acts they commit—whether falsifying their age on a passport, crossing national borders illegally, or engaging in prostitution—are carried out under threats of physical violence, psychological manipulation, or unlawful confinement. Punishing someone who lacks free will is contrary to the fundamental principles of justice.

Constitutionally, the application of this principle is a direct manifestation of Article 28I paragraph (1) of the 1945 Constitution, which guarantees the right not to be subjected to torture and the right not to be prosecuted under retroactive laws. More than that, protecting human dignity requires the state to distinguish between genuine criminals and individuals who have lost their autonomy. When state authorities impose punishment on trafficking victims, the state consciously legitimizes that exploitation and fails to perform its essential function of protecting the most vulnerable members of society.

Within the framework of international legal instruments, the commitment not to criminalize victims is strongly emphasized. The Palermo Protocol (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons) explicitly requires States Parties to provide protection to victims rather than impose criminal sanctions upon them. The Protocol is reinforced by the principle that the consent of an exploitation victim is considered invalid and legally void if obtained through manipulation or coercion. Once such consent is rendered invalid, any criminal acts that follow must be attributed to the traffickers rather than to the victims.⁵

⁵ Harkristuti Harkrisnowo, *Tindak Pidana Perdagangan Orang: Panduan Bagi Penegak Hukum*. Jakarta: Kemitraan (Partnership for Governance Reform), 2008.

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The Office of the United Nations High Commissioner for Human Rights (OHCHR) provides even stricter guidance through Principle No. 7. This international document explicitly states that trafficked persons shall not be detained, charged, or prosecuted for their direct involvement in unlawful activities insofar as such involvement is a consequence of their situation as trafficking victims. This guidance was formulated because the United Nations recognizes that criminal syndicates deliberately use the threat of police arrest as a psychological weapon to prevent victims from escaping or seeking assistance from state authorities.

Within Indonesia's national legal framework, Law Number 21 of 2007 on the Eradication of Human Trafficking actually embodies this spirit, although its regulation remains only partial. Article 18 of the Anti-Trafficking Law states that victims who commit criminal offenses because they were compelled by traffickers cannot be punished. Furthermore, Article 29 guarantees the confidentiality of the identities of witnesses and victims. However, the phrase "because they were compelled" in Article 18 often becomes a double-edged sword because law enforcement officials frequently demand evidence of physical coercion, which is extremely difficult for victims to provide when they have typically experienced psychological coercion or debt bondage rather than physical violence.

In addition to the Anti-Trafficking Law, the Witness and Victim Protection Agency (LPSK), through Law Number 31 of 2014, also serves as a human rights safeguard. LPSK has the authority to recommend that law enforcement agencies refrain from prosecuting victims who have become justice collaborators or who are clearly proven to be victims of other related crimes. These recommendations aim to prevent police and prosecutors from viewing criminal cases through an overly narrow lens while ensuring that the victims' medical and psychological recovery is prioritized over criminal punishment.

However, understanding this philosophical foundation also requires recognizing that the principle of non-criminalization is not a limitless ticket to legal immunity. This principle does not apply when a victim later voluntarily becomes a recruiter or a principal agent in human trafficking. This human rights protection is specifically designed as a shield against secondary victimization, applying only to violations that have a direct causal relationship with the victim's vulnerable status during the period of exploitation by criminal syndicates.

In conclusion, the legal and philosophical foundations of the principle of non-criminalization are well established conceptually. Human rights recognition, the criminal law doctrine of *mens rea*, and the mandates of international conventions all agree that punishing survivors of human trafficking constitutes an



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anomaly of justice. The primary challenge no longer lies at the level of academic or conceptual debate but in ensuring that these noble human rights values penetrate the bureaucracy of law enforcement and transform the mindset of investigators who confront the complexities of crime on a daily basis.

3.2. The Reality of Law Enforcement and the Criminalization of Human Trafficking Victims in Indonesia

Moving from the realm of ideal concepts to practical reality, law enforcement in Indonesia presents a situation far removed from humanity for survivors. The gap between *das sollen* (what the law ought to be) and *das sein* (reality in practice) remains striking. Police officers, immigration authorities, and municipal public order officers (Satpol PP) in various regions frequently adopt an extremely rigid positivist approach. When they raid nightlife establishments or detain undocumented migrants at airports, their first instinct is to enforce immigration or public morality laws without conducting an initial assessment of whether those arrested are victims of human trafficking.⁶

The most common criminalization occurs in the immigration sector. Women and children recruited from impoverished villages are often provided with passports and visas whose information has been falsified by illegal labor recruitment agencies (fraudulent P3MI). When they are apprehended by immigration officers, whether in transit countries or destination countries, they are immediately designated as suspects for document forgery and illegal entry. Officers are often unwilling to investigate those who facilitated and financed the production of the forged documents, resulting in victims bearing administrative criminal penalties and being deported as criminals.

Domestically, criminalization frequently affects women who are victims of commercial sexual exploitation. During joint raids on prostitution venues or illicit massage parlors, women working there are often immediately taken to police stations, publicly exposed before the media, and charged under Regional Public Order Regulations or the Pornography Law. In reality, deeper investigations often reveal that many of them were deceived with promises of employment as restaurant servers, subsequently confined, had their identity cards confiscated, and were forced to serve male clients to repay "travel debts" that continuously accumulated interest. Criminalizing them represents a betrayal by the state against impoverished women.

⁶ Sulistyowati Irianto, *Perempuan dan Hukum: Menuju Hukum yang Berperspektif Keadilan dan Keadilan*. Jakarta: Yayasan Obor Indonesia, 2006.



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An even more brutal form of criminalization occurs when trafficking victims are forced to become international drug couriers. International narcotics syndicates frequently collaborate with human trafficking networks. They trap women through fraudulent romantic relationships (love scamming) and then coerce them into carrying suitcases containing narcotics. When arrested at airports, Indonesia's highly punitive narcotics laws immediately expose these women to the possibility of the death penalty or life imprisonment. Judges and prosecutors often ignore their status as victims of manipulation, allowing human rights-based justice to be overshadowed by the ambition to eradicate narcotics.

The root cause of this widespread criminalization lies in the weakness of victim identification mechanisms during the early stages of investigation. In Indonesia, determining whether an individual is a suspect or a victim remains monopolized by the police institution. The absence of multidisciplinary identification teams involving clinical psychologists, social workers, and NGOs results in highly biased assessments. Investigators who lack sufficient time, resources, and gender-sensitive perspectives often choose the easiest path: if someone is caught possessing forged documents, they are considered the perpetrator. The inability of authorities to recognize power imbalances and signs of psychological trauma leaves the door to criminalization wide open.

Other structural obstacles are exacerbated by institutional rivalry among law enforcement agencies and performance targets (Key Performance Indicators). Success is often measured by the number of suspects arrested and prosecuted through the courts. Handling trafficking cases in which those apprehended are treated as victims requires lengthy investigations, network tracing (asset tracing), and sufficient funding to accommodate victims in safe houses. Consequently, charging victims with easily proven minor offenses (such as immigration violations) is considered a faster way to improve case-resolution statistics than dismantling human trafficking syndicates.

The psychological and social consequences of this criminalization are profoundly destructive. When women or child trafficking victims are imprisoned alongside ordinary criminals, they experience compounded trauma. Their trust in state authorities is completely shattered. The stigma of being a former prisoner, prostitute, or undocumented migrant causes them to be rejected upon returning to their families and makes it difficult to secure lawful employment in the future. In conditions of despair and economic hardship, they become highly vulnerable



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to being recruited once again by the same syndicates, perpetuating an endless cycle of exploitation.⁷

Ultimately, this reality of criminalization constitutes a legal anomaly that benefits the masterminds behind organized crime. By allowing the criminal justice system to target victims at the lowest level, the state indirectly becomes a mechanism for absolving major human traffickers. Criminal syndicates can continue operating with confidence because they know law enforcement authorities are preoccupied with punishing their prey. Therefore, ending the criminalization of victims is not merely a technical matter of criminal procedure but a moral battle to preserve the state's humanity.

3.3. Strategies for Implementing and Strengthening the Victim-Centered Principle of Non-Criminalization

To dismantle systemic rigidity and end victims' suffering, the state must immediately undertake comprehensive and measurable criminal justice reform. The first strategic step is to amend the Anti-Trafficking Law, particularly Article 18. The phrase "because they were compelled" must be expanded so that it encompasses not only physical coercion but also psychological coercion, debt threats, manipulation, and deception. The law should establish an absolute immunity clause stating that trafficking victims are immune from immigration, labor, and morality-related criminal charges directly connected to their exploitation.

The second urgent strategy is the formulation and implementation of cross-ministerial and interagency Standard Operating Procedures (SOPs) for victim identification. The identification process should no longer be monopolized solely by the police. Indonesia should adopt a multidisciplinary team model involving National Police investigators, Immigration officers, psychologists from the Ministry of Women's Empowerment, social workers, and NGOs specializing in women's rights. Whenever a raid is conducted, this team should jointly assess individuals before determining their legal status so that criminalization can be prevented within the first hours after arrest.

Third, continuous human rights-based capacity building for law enforcement officials is essential. Training for police officers, prosecutors, and judges should no longer focus solely on interrogation techniques and the application of criminal statutes but should prioritize gender sensitivity, child protection, and trauma-

⁷ Gosita, Arif. *Masalah Korban Kejahatan: Kumpulan Karangan*. Jakarta: Akademika Pressindo, 1993.



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informed approaches. Law enforcement officers must be trained to recognize indicators of trafficking victims that are often concealed, such as fearful body language, lack of access to their own passports, and responses that appear to be controlled by third parties.

Fourth, Indonesia should adopt a Safe Harbor policy applicable during the pre-investigation stage. This policy would guarantee that individuals who report themselves as trafficking victims, or who are identified during raids, are granted a temporary period (for example, 30 days) during which they are exempt from immigration sanctions or detention. During this period, the state must transfer them to safe houses where they can receive physical and psychological rehabilitation, enabling them to disclose information about the criminal networks that exploited them without fear of imprisonment.

Fifth, the role and authority of the Witness and Victim Protection Agency (LPSK) should be strengthened to provide more effective intervention. LPSK should be granted imperative authority to halt police investigations (SP3) whenever it has officially determined that an individual is a trafficking victim. Cooperation between LPSK, the National Police, and the Attorney General's Office should be formalized through high-level Joint Regulations (MoUs) to eliminate situations in which prosecutors continue prosecuting victims merely to meet administrative case-completion targets.⁸

Sixth, legal diplomacy and international cooperation should be optimized. Since most trafficking cases are transnational, the Ministry of Foreign Affairs, through Indonesian Embassies (KBRI) in destination countries such as Malaysia, the Middle East, and Hong Kong, must proactively defend Indonesian citizens entangled in immigration cases abroad. The Indonesian government should actively lobby foreign legal authorities to reciprocally apply the principle of non-criminalization, ensuring that Indonesian female migrant workers deceived by recruitment agents are repatriated as survivors entitled to rehabilitation rather than imprisoned abroad.

Seventh, public education and civil society empowerment should be expanded. Rural communities, which frequently become recruitment centers for trafficking, must be educated not to stigmatize families or women returning with deportee status. A cultural shift from victim-blaming toward community support is essential. Furthermore, the government should fully support the operations of NGOs and independent legal aid organizations, which are often the first to

⁸ Irianto, Sulistyowati. *Perempuan dan Hukum: Menuju Hukum yang Berperspektif Keadilan dan Keadilan*. Jakarta: Yayasan Obor Indonesia, 2006.



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defend victims when confronting law enforcement officers determined to criminalize them.

Eighth, as a synthesis of all the above strategies, strengthening the principle of non-criminalization requires a fundamental shift in the paradigm of justice. Criminal law must evolve from a system focused merely on retribution and punishment toward one centered on restoring balance and human dignity. Saving women and children from imprisonment is not simply a matter of legal compliance but tangible proof that the state still possesses the moral conscience to embrace its most wounded citizens and place human rights protection above the rigidity of administrative law enforcement.

4. Conclusion

The implementation of the principle of non-criminalization for women and children who are victims of Human Trafficking serves as a litmus test for Indonesia's legal civilization and commitment to human rights. When the state instead uses its legal apparatus to punish individuals whose lives have already been devastated by confinement, manipulation, and exploitation by organized trafficking syndicates, it has failed to fulfill its constitutional mandate. The criminal prosecution of victims for immigration violations, morality offenses, and document forgery demonstrates that a legalistic approach blind to the context of human suffering only perpetuates cycles of violence and creates severe secondary victimization. To end this malpractice in law enforcement, the state must immediately undertake radical and integrated legal reforms. Amending legislation to provide absolute immunity for victims, adopting multidisciplinary victim identification systems at the pre-investigation stage, and implementing trauma-informed training for law enforcement officers are necessities that cannot be postponed. Ultimately, the highest measure of justice is not how full our prisons are with minor offenders but how effectively the state distinguishes between genuine criminals and those who are merely struggling to survive the chains of modern slavery. Only through a victim-centered system of recovery can human rights become not merely rhetoric but a genuine shield protecting Indonesian women and children.

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