



Faculty of Law Unissula

THE 1ST PROCEEDING INTERNATIONAL CONFERENCE AND CALL PAPER

Omnibus Law Opportunities And Challenges Towards
Entrepreneurs And Labor : Comparative Review

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*" Omnibus Law Opportunities And Challenges Towards
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*" Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor
: Comparative Review"*

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Johny Koesoema

ABSTRACT

Criminal punishment is not only focused onto perpetrators of human trafficking, but also oriented to the interests of victims and community so that criminal justice objects to integrally defend many interests. Trafficking crimes are serious crimes, thus the punishment of traffickers is severe punishment. Every country has laws regarding trafficking crimes in accordance with the applicable legal system. Each human trafficking crime case has different characteristics due to the condition of the perpetrator, the victim, the situation when the trafficking crime was committed. Therefore the court considers these factors which can be considered as weighting or reducing in sentence. The problem of this research is incriminating and mitigating factors that must be considered in imposing penalties against traffickers. The purpose of this research discussion is to explain the factors that are burdensome and mitigate in imposing crimes against traffickers. The library research method is used. The principle of punishment is the basis for imposing penalties on perpetrators of human trafficking by taking into account the factors of weighting and mitigation of punishment, in which the proportional principle takes precedence in addition to the other principles.

Keywords: *Criminal punishment, perpetrators, human trafficking crimes*

INTRODUCTION

Human trafficking is increasingly widespread and complicated, and human trafficking is an extraordinary crime, so the handling crime is extraordinary. Extraordinary crimes are transnational and organized crime. International crime has an extraordinary impact on humanity. Transnational crimes describe crimes that occur in international and transnational crimes that include two States which have the nature of crossing the border as a part of a crime. Transnational crime requires the existence of a link of jurisdictions between two or more countries, these are the States that are victims or are severely harmed because of the trafficking crimes, crimes of human trafficking between the sending State and the receiving country (Romli Atmasasmita, 2008). Human trafficking can occur in two regions, but in the national territory, it is in the sense of occurring in a State. As for organized crime or syndicate crime is a criminal act committed by a group (group) of crime that is systemized by social structures by seeking the ultimate goal of profits derived from illegal actions; this crime uses various marketing methods / techniques with threats, extortion, smuggling and its products such as narcotics, sex, gambling, moneylenders, pornography that are beyond the reach of the law. (Mahrus Ali and Bayu Aji Pramono, 2011).

Global data on human trafficking shows that 40.3 million people worldwide are victims of trafficking, 81% of forced labor victims and 75% of women, more than 10 million victims are children and around 15.4 million are forced to marry. (<https://conductscience.com/global-data-on-human-trafficking/>) More than

54% victims of sexual exploitation of all victims of trafficking. (UNODC, 2016). There is no country that is not affected by human trafficking, including developed countries.

In combating trafficking, people use criminal sanctions, especially imprisonment sanctions which are types of crimes that are generally imposed by the court on traffickers, but the number of penalties imposed by the court in deciding cases of trafficking can result in disparity in criminal proceedings. This will create a sense of dissatisfaction in the community and can lead to problem in prison administration and prisoners who have been convicted for a long time; from other prisoners but committing similar crimes will feel treated unfairly, not only the maximum sanction. Maximum criminal sanctions are not only in the form of heavy penalties but can also provide additional types of criminal sanctions.

Each country has a law on Combating Trafficking Crimes that forms the basis for both material and formal law and also anticipates the ensuing of all types of actions in the process, methods or all forms of exploitation that occur in the practice of human trafficking whether carried out between regions within the country and across countries, and both individuals and corporations. Sanctions imposed on perpetrators of human trafficking are capital punishment, imprisonment, fines. Most criminal sanctions use minimum and maximum penalties and are usually imposed on the cumulative offender, namely imprisonment and fines.

Criminal sanctions on human trafficking include severe criminal sanctions, hence crimes on human trafficking include serious crimes.

There are consideration factors that the court use to impose a crime. Each criminal case has its own characteristics caused by the condition of the perpetrator, victim or the situation that existed when the crime of human trafficking occurred. The court sees this case as not turning a blind eye to considering various factors in addition to the court having the freedom to decide a case in accordance with the country's criminal justice system. The court handed down the length or severity of the crime based on the standard between the minimum and maximum limits in accordance with the laws in force in the country. To reduce the tendency of the court to impose a crime which tends to be minimal and the large difference between court decisions in the crime of human trafficking, a criminal guideline can be needed as a guideline for the court to impose a crime. Based on the view of individualization, crime has the following characteristics: 1) personal principle, 2) the principle of culpability, 3) the principle of flexibility and the principle of modification¹ then the court is not given full freedom to adjust the crime that will be imposed with the personal circumstances of the perpetrator. This is in accordance with the opinion of Sheldon Glueck in Barda Nawawi Arief that to determine the individualization of coaching to the offender does not mean having to leave the court at all in this case the judges or apparatus other apparatus without guidelines or without control.² Penalty guidelines can assist the court in considering penalties so that criminal convictions will be more proportional and better understood because of the conviction. Criminal guidelines as a direction in considering the weighting and reducing of sentences against perpetrators of crimes of human trafficking where the crime of human trafficking is a serious crime.

Therefore the problem is the burdensome and mitigating factors that must be considered in imposing a crime against traffickers. The purpose of the discussion of this problem is to explain the differences of factors that are burdensome and mitigate in imposing penalties against traffickers.

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1. Barda Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru, edisi 1, cetakan 2, (Jakarta: Kencana Predana Media Group, 2010), page. 39
 2. Barda Nawawi Arief, Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara, cetakan keempat, (Yogyakarta: Genta Publishing, 2010), page. 142-143

METHODOLOGY

The method used is a library research method based on secondary data and legal materials. The legal material used by the convention and the literature relating to the scope of the discussion.

PRINCIPLES OF CRIMINAL PRINCIPLES

Criminal and criminal offenses receive less attention than attention to criminal acts or actions and mistakes with accountability, whereas crime and punishment are the most important part of criminal law. Perpetrators with crimes have a strong relationship. According to Beccaria in Eva AchyaniZulfa, the basis for a criminal conviction is to *let punishment fir the crime*, which means that criminal punishment must prevent crime.³

Criminal punishment or giving is inseparable from the influence of classical, modern, and neo-classical traditions in criminal law. Classical flow is oriented towards action, modern flow sees criminal because of acts and mistakes while neo-classical flow combines classical and modern, between perpetrators and deeds, so as not to separate perpetrators and deeds. This flow still influences criminal law, a neo-classical school now developing that balances actions and mistakes.

The formulation of criminal and criminal penalties in the law is essentially only a means to achieve the goal of punishment. The development of thinking about criminal purposes occurs more towards a more rational direction. Therefore, thoughts that characterize a sense of justice in criminality bring up various goals of punishment. There are three types of criminal objectives, so that criminal conviction is justified, namely:

1. Absolute Theory or Theory of Retribution (*absolute theory / retributive / vergeldingstheorieen*) is based on the thought of retaliation that is the principle of retaliation. Criminal is an absolute demand, not only something that needs to be dropped, but it becomes a necessity. (Immanuel Kant, Vos, Heigel, Herbart, Stahl)
2. Relative Theory or Objective Theory, looking for the basis of criminal law in organizing public order. The criminal purpose for preventing crime is to prevent people in general from committing a crime and prevent bad intentions from committing a crime. (van Apedoorn, von Feurbach, van Hommel, D. Simmons)
3. Combined Theory, The purpose of punishment is to improve and protect society. (Thomas Aquinas, Hugo de Groot, van Bemmelen)

From the theories of conviction, there is a principle of punishment that has the goal to be achieved with a penalty that is to improve the personality of the offender, make a deterrent person commit a crime, make the offender unable to commit another crime, prevent people from committing a crime. The principle of punishment used in countries in the world varies according to the legal system of each country.

As for the Anti Human Trafficking Manual for Criminal Justice Practitioners Module 14, there is a dominant principle of punishment reflected in various legal systems, namely:⁴

1. Proportionality: A sentence should be proportionate to the harm imposed and the benefits derived from trafficking and related exploitation.
2. Retribution or denunciation: The penalty is imposed in response to the offence and reflect society's outrage towards the offence committed
3. Deterrence (both general and specific)

4. Rehabilitation: The principles suggest that a sentence should assist in rehabilitating the offender so that they can cease to be a threat to society and in turn become a positive participant society.
5. Incapacitation or separation: The sentence is imposed in order to remove the offender and the threat of harm he poses, from society at large.
6. Reparation: The penalty is imposed on the basis that it restores balance by returning the victim to the place they were before the crime was committed.

The principle of punishment from UNODC above is based on the combined theory of punishment.

Criminal is not a goal, but a criminal is a means or tool to achieve legal goals, although criminal and criminal objectives are interrelated. Criminal law is determined to be influenced by criminal objectives that contain principles of punishment.

CRIMINAL THAT DEFENSES AND LIGHTENS IN HUMAN TRAFFICKING CRIME.

The criminal sentence handed down by the court prioritizes the protection of the public against the crime of trafficking in persons without prejudice to the principle of criminal individualization, which is oriented towards individual perpetrators. Penalties against traffickers in addition to taking into account the rules of Criminal punishment in trafficking laws relating to the criminal and criminal length, but also based on considerations that are in harmony with previous decisions that have already existed, harmonious with the sense of justice and harmonious with a sense of justice convicted person, so that feelings of dissatisfaction with the judge's ruling and marked disparity can be reduced. So the court gives a rational, clear, directed, and proportional consideration.

Penalties given to offenders will vary due to different jurisdictions, legal culture, jurisprudence, national legal practices, and different policy objectives. Awareness of these factors will help law enforcement in imposing penalties based on the severity of the violations committed and the consequences of crimes against victims, family, community, and country.

It is very clear that human trafficking is a violation of human rights, often called modern slavery, which has serious consequences both for victims and their families as well as society and the country. Destroyed the quality of life of victims and lost the lives of victims, while the effects on society can slowly destroy social institutions. If this is organized on an ongoing basis then it poses a strategic risk to the future stability of society and the country. The whole situation is disrupting domestic economic investment, giving rise to political instability and national security that is destroying the entire order of life and welfare of the people, which leads to the collapse of a nation.

Seeing the consequences of trafficking in persons and trafficking in persons including transnational and organized crime, trafficking in persons is a severe crime, stated in the United Nations Convention Against Transnational Organized Crime (UNTOC). For serious crimes, the threat of a minimum sentence of four years or more severe, this is stated in Article 2 letter b UNTOC namely "Serious crime" shall mean conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". Countries that have ratified this convention must take necessary actions or steps such as harmonizing legislation under the principle of sovereignty and territorial integrity of the country concerned.

In general, criminal threats in crime there are several models, namely:⁵

5. Mudzakirdkk, Perencanaan Pembangunan Hukum Nasional Bidang Hukum Pidana dan Sistem Pemidanaan

1. One type is threatened as a single criminal threat except for capital punishment, it must always be alternated with life imprisonment or imprisonment for a certain time.
2. One type of crime is threatened as an alternative to a different kind of crime.
3. One type of crime is cumulatively threatened with another type of crime.
4. Crimes are threatened with a combination of alternative-cumulative.

The threat of criminal trafficking varies by country depending on the legal system in force in the country. Countries in the law governing trafficking in persons use alternative crimes as in the Dutch Penal Code, the Swiss Penal Code. Some countries that have the threat of trafficking in persons use cumulatively such as: Indonesian Trafficking Crime Law, Malaysian Trafficking Crime Act, the Chinese Penal Code, French Penal Code. Turkish Penal Code. A single criminal threat to traffickers as in the Russian Penal Code.

Determining the length of a crime or the amount of a fine in law varies from country to country. There are laws that determine criminal sanctions with minimum-maximum imprisonment and minimum and maximum fines. There are those who use criminal sanctions with minimal and maximum imprisonment. There are articles using maximum imprisonment sanctions and maximum fines, and there are also those using maximum imprisonment sanctions. The system of minimum and maximum sanctions, the court or judge to impose a criminal between the lowest and highest criminal. Besides, each human trafficking case has its characteristics caused by the condition of the perpetrator, the victim, or the situation at the time of the crime of trafficking in persons, which can be considered as a weighting or relief of crimes.

The court in imposing a criminal offense based on the applicable law, besides that, considers the aggravating factors and mitigating factors. Incriminating factors are circumstances in the case that can increase the sentence specified, and mitigating factors are circumstances in the case that can reduce penalties. The burdensome and lightening factors are special, where the different burdensome factors and lighten each case. There are states which state the burdensome factors in their laws explicitly. There are also countries which are fundamental to jurisprudence

To determine the factors which incriminate or alleviate the crime of trafficking in persons, it is necessary to guide the penalties in the crime of trafficking in persons. In the international instrument, there are already criminal guidelines to determine your minimum standards under the United Nations Convention Against Transnational Organized Crime Article 11 (1), namely "Each State Party shall make the commission of an offense established under articles 5, 6, 8 and 23 of this convention liable to sanctions that take into account the gravity of that offense."⁶ So the criminal imposed must be precise and proportionate to the severity of the crime. Therefore the implementation steps are adjusted to the requirements of this convention, where serious crimes are threatened with a maximum sentence of at least four years (Article 2 number b). In implementing this convention, the International Framework for Action to Implement the Trafficking in Persons Protocol regulates, it states that the five operational indicators of implementing trafficking sanctions are:⁷

1. severity of sanctions imposed for trafficking in persons;
2. number of sanctions reflecting aggravating circumstances;
3. number of additional administrative and/or other non-criminal sanctions used;

(PolitikHukumdanPemidanaan), BPHN, 2008, p. 17

6. UNODC, Op.cit, p. 11

7. UNODC, International Framework for Action to Implement the Trafficking in Persons Protocol, (United Nation: New York, 2009), p. 24

4. number of penal sanctions applied; and
5. number of recidivist/repeat offenders.

UNODC said there were 13 factors which were burdensome to increase the seriousness of the crime of trafficking in persons, namely:⁸

1. “the offence involves serious injury or death of the victim or another person, including death as a result of suicide;
2. the offence involves a victim who is particularly vulnerable, including a pregnant woman;
3. the offence exposed the victim to a life-threatening illness, including HIV/AIDS;
4. the victim is physically or mentally handicapped;
5. the victim is a child;
6. the offence involves more than one victim;
7. the crime was committed as part of the activity of an organized criminal group;
8. drugs, medications or weapons were used in the commission of the crime;
9. a child has been adopted for the purpose of trafficking;
10. the offender has been previously convicted for the same or similar offences;
11. the offender is a [public official] [civil servant];
12. the offender is a spouse or the conjugal partner of the victim;
13. the offender is in a position of responsibility or trust in relation to the victim; and the offender is in a position of authority concerning the child victim.”

According to the Anti Human Trafficking Manual for Criminal Justice Practitioners Module 14, the aggravating factors are as follows:⁹

1. Previous conviction(s), particularly for trafficking offences
2. Prior “bad” Conduct
3. The offence was motivated by bias, prejudice or hate based on race, religion, sex, age or other personal characteristic that are immutable
4. The offence involved planning and deliberation
5. The offender intended more serious harm than actually resulted
6. The offender operated in conjunction with an organized criminal group
7. The offence was motivated by financial or material gain
8. Deliberate attempts to obstruction of justice
9. The offence was committed while subject to condition
10. Deliberate targeting of vulnerable groups
11. Use of weapon to frighten or injure victim(s) or persons known to them
12. Cruelty or brutality demonstrated through deliberate, repeated or gratuitous violence or other forms of degradation
13. Assaults in the presence of others.

8. Cameron, Matthew and Schloenhardt, Andreas, Punishing trafficking in persons: International standards and Australian experiences, *Bond Law Review*: Vol. 24: Iss. 1, Article 1, 2013, p. 7

9. UNODC, *Anti Human Trafficking Manual for Criminal Justice Practitioners*, Op.cit, page. 4 - 8

14. Abuse of a position of power/authority or a position of trust
15. The use narcotics to maintain control over the victim
16. Multiple victims or multiple incidents
17. The victim is exposed to serious illness or injury

In connection with concerns about the phenomenon of trafficking in persons among the European Union countries, the European Parliament and the Council adopted the Legislative Act namely Directive 2011/36 / EU of the European Parliament and the Council instructing that traffickers be punished with the following conditions:¹⁰

“... When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability. When the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or has otherwise caused particularly serious harm to the victim, this should also be reflected in a more severe penalty. When, under this Directive, a reference is made to surrender, such reference should be interpreted in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The gravity of the offence committed could be taken into account within the framework of the execution of the sentence.”

Based on the discussion above, it can be concluded that weights are imposed for the perpetrators of trafficking in persons. Penalties for criminal traffickers are:

1. Vulnerable victims such as children, women, including pregnant, weak women, and others
1. As a result of victims or other people, including death, including death due to suicide, life disability, psychological trauma, exposure to life-threatening severe diseases including HIV / AIDS
2. A large number of victims and a high level of damage often cases of trafficking involving many victims and repeated crimes against victims
3. Victims play an important role in society
4. The victim is attacked in the presence of others
5. The perpetrators use narcotics, drugs or weapons in carrying out the crime of trafficking in persons
6. Perpetrators use physical, psychological, sexual violence
7. Acting public officials or state apparatuses
8. Actors abusing positions of power, authority or trust in relations with victims, including adopted children as victims of trafficking of children and spouses of victims
9. Perpetrators, previously have been convicted of the same or similar crime or related to trafficking in persons (Recidivists) or have criminal records / bad behavior
10. Trafficking crimes committed by groups whether organized or not or gang (gang)

10. Official Journal of the European Union, Directive 2011/36/EU of The European Parliament and of The Council, 5 April 2011

11. Committing crimes in trafficking in persons is motivated by prejudice or hatred on the grounds of race, religion, and others
12. Trafficking crimes are premeditated
13. There are efforts to obstruct and frustrate the judicial process

With the existence of these criminal charges, the court can consider the above weighting to determine the criminal severity. The weighting of the conviction is not restrictive because the weighting of the conviction is a minimum of the judge or court must consider if there are other things which, according to the judge or court, need to be added, then the judge or court can add them.

The relief of punishment (mitigation) to reduce penalties refers to all aspects of cases of trafficking in persons. The mitigating factors in trafficking are as follows:¹¹

1. First time offender
2. Prior good character
3. Remorse or conduct following arrest
4. The offender has also been a victim of trafficking in persons
5. Actions committed under duress
6. Offender's age
7. Role in the offence, examples of minor roles in trafficking cases include:
 - a. One-off transporting a victim for short distance
 - b. Working as a cook or cleaning-person in a trafficking operation
 - c. Renting facilities knowing that they will be used by trafficking operation
 - d. Loaning vehicles knowing that will be used to move trafficked persons
 - e. Preparing fraudulent documents knowing they will be used to facilitate the movement of trafficked people.

Jason Haynes stated that the factor of leniency in trafficking in persons is¹²

1. No previous convictions or no relevant/recent convictions
2. Remorse
3. Previous good character and/or exemplary conduct*
4. Age and/or lack of maturity where it affects the responsibility of the offender
5. Mental disorder or learning disability, particularly where linked to the commission of the offence.

The results of research from Jessica Jacobson and Mike Hough, that the commutation of punishment refers to the factors that have many forms of actors associated with:¹³

1. The offender's past (e.g., good character, productive life, deprived background) the offender's circumstances at the time of the offence (e.g financial pressures, psychiatric problems, intellectual limitations, immaturity)
2. The response to the offence and prosecution (e.g., remorse, acts of reparation, addressing the problems that led to the crime, cooperation with the police)
3. The offender's present and future prospects (e.g., family responsibilities, supportive partner, capacity to address problems underlying the criminal behaviour)

Judging from the reference above, the light sentence for perpetrators of trafficking in persons refers to the internal factors of the perpetrators and the minor role in trafficking in persons, which generally has less impact on the risk of serious harm. The role of perpetrators of trafficking in persons tends to be considered the same as committing trafficking in persons, recognizing that trafficking in persons is a severe crime or extraordinary crime.

Thus, the lightness of the sentence against the perpetrators of trafficking in persons is more oriented to factors relating to the perpetrators of the crime than trafficking in persons. Therefore the factor in criminal relief relates to the background or condition of the offender or the response of the offender when committing and after committing a crime of trafficking in persons.

Based on the discussion above, it can be concluded that the commemoration of punishment for the perpetrators of trafficking in persons Penalty relief for traffickers is:

Based on the discussion above, it can be concluded that the commemoration of punishment for the perpetrators of trafficking in persons Penalty relief for traffickers is:

1. The knowledge that is lacking (layman) and deceived
2. Before committing trade crimes, the offender has good character
3. Perpetrators also become victims of trafficking
4. Demonstrate responsibility or regret by making improvements to the consequences of the crime of trafficking in persons

In addition to weighting considerations, the court can also consider the relief of punishment by taking into account the proportional principle. The carefulness of the judge or the court in considering mitigation is necessary so that the relief of this sentence does not reduce the spirit of combating the crime of human trafficking.

CONCLUSION

Criminal punishment of human trafficking is based on the principles of Criminal punishment that reflect the objectives of integrative Criminal punishment which are concerned on the interests of the perpetrators, victims and community so as to achieve the goal of fair punishment for all parties.

Consideration of legal weighting and reducing in deciding human trafficking cases is carried out by judges or courts based on proportional principles and other principles that are included in the principles of crimes, therefore criminal guidelines are needed as a direction to consider the punishment weighting and reducing of human trafficking crimes.

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