

Responsive Legal Approach to Law of Human Trafficking in Indonesia

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Abstract

Formation and legal changes influenced by the social and political dynamics. Law understood as the rules are rigid and too much emphasis on the legal aspects of the legal system or emphasize aspects of the legitimacy of the rules themselves, without associated with social problems. A Responsive legal approach is an approach the legal establishment who consider that the law as a facilitator of various responses to social needs and aspirations so that the function of the law is not just to achieve procedural fairness, but to serve as a facilitator of the response to the needs and aspirations of the community. Therefore, whether the Act No. 21 of 2007 on the Eradication of Trafficking in Persons is responsive. Objective discussion of this problem is to explain and analyze the Law No.21 of 2007 with responsive legal approach. The method used is the normative method with primary law material and secondary law. Law No. 21 of 2007 on the Eradication of Trafficking in Persons not purely responsive, because not yet meet all the characteristics of the type of responsive law. Procedural justice has been achieved but justice has not been achieved and necessary substance formulation objective of sentencing objective and authoritative for the trade laws that are adaptive.

Key words: *Responsive, Law, Human trafficking*

Introduction

The development and changes to the law relating to social dynamics with all the real interests were behind the law. The unavoidable law is always evolving, its development cannot be ensured evolve in a certain direction, but ultimately bring change after the fight with a variety of interests are behind the law itself. Laws relating to society, society has changed, the law must also be changed.

Law is the creation of the community, but at the same time, he also created the community, so that the law in accordance with the development of society. This is in accordance with the opinion that "a good law should be in accordance with the law in public life (*the living law*). So the law must reflect the values in the society (Rasyidi, 1985). "Cicero states that where there are people there are no laws or *ubi societas ibi ius*. (Rasjidi, 2004). Cicero opinion is still in accordance with the circumstances of today's society. Each community life actually has a

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mechanism for creating legal norms derived from the relationship and interaction between the communities of fellow citizens. So the law is a social phenomenon to the values and behaviors that live and thrive in human beings due to human relationships in the communities where people live.

Often the law is only understood as the rules are rigid and too much emphasis on the aspects of the *legal system* without looking at the link between the legal sciences with social problems. Law is identical to the order as a mirror arrangement of the ruler, on the other hand, there is also an understanding of the laws that emphasize aspects of the legitimacy of the rules themselves. In fact, should the law not be closed to the social factors that influence the development of society. Law is not only the *rules*, but there are also other logics (*logic and rules*). That imposing *jurisprudence* is not enough, but law enforcement should be enriched with other sciences such as social science, psychology, religious studies. This is in line in the Journal of Law Pro Justitia, that the law in Indonesia is still focused on the principle of legal certainty, (Suhardin, 2007) and the Law of the progressive one component of law enforcement with integrity as an instrument of social change, in other words "*Good law enforcement agencies are not born but made*" (Zulfadli, Abdullah, & Nur, 2017) this is a challenge for all parties involved in the process of law enforcement, in order to free themselves from the confines of pure rigid legal and analytical. No emphasis on the rule of law but justice to be achieved in law enforcement.

The role of law is strongly influenced by political forces. Growing political configuration between the democratic and authoritarian character of the product while following the law between responsive and conservative. Often the legal and law enforcement functions do not work in harmony. As the law is often weakens when confronted with politics, even though the law is supreme.

Legal development progressed quite well at this time, when viewed from the codification and unification in the legal field. But in the implementation and enforcement function tends to weaken. Non-synchronization between the growth of the function of law and legal structures for political interference or influence on the function of law enforcement efforts. According to Sri Soemantri Martosuwignyo these circumstances "*like a railroad train, if the railroad is like a legal and political train as it will be seen that the train had been running outside the rails.*"(Mahfud, 2011) This occurs because of the meddling of political power. Idealized view (*das sollen*) that politics should be subject to the law, but in view of the empirical (*das sein*)

that the law is determined by the underlying political configuration. Each product law is a product of political decisions so that the law can be seen as a crystallization of the political thought of interacting. If the laws are made by political interference with the consequences according to Abdul Hakim Garuda Nusantara, regulatory and legal products are considered not to realize political stability and economic growth. (Mahfud, 2011)

Since the reform emerging demands to the government to make laws. One of the Law No. 21 of 2007 on the Eradication of Human Trafficking. Countries that have the power to establish laws that determine what the policy enforcement of a law. In setting policy or law-making is often influenced by various factors, internal factors are derived and the domestic and external factors are derived and abroad.

Internal factors derived from the desire of individuals who hold the power to make laws, the desire of political parties, NGOs, even the desires of the community. Internal factors establishment of Law No. 21 of 2007 on Combating Anti-Trafficking Not because Indonesia to uphold human rights which every person as a creature of God Almighty has rights in accordance with their dignity. In the Constitution of 1945, one of the objectives the establishment of the State of Indonesia is to protect the entire Indonesian nation and the entire homeland of Indonesia, promote the general welfare, and Article 28 I UUDNKRI 1945 states that the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the State, especially the government. So the state is responsible for performing the acts legally, politically, economically and socially to prevent, remove and eradicate and punish perpetrators of the crime of trafficking in persons.

External factors derived from the desire of the international financial institutions or donors, even obligations under international agreements. Countries Indonesia has ratified several conventions relating to trafficking in persons, namely 1) the Convention on the Elimination of Discrimination against Women or the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* by Law No 7 of 1984 on the Elimination of All Forms of Discrimination against women. *CEDAW* obliges States Parties to establish regulations on the prohibition of trafficking and exploitation of women for prostitution. 2) ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor by the constitution of the Republic of Indonesia No. 1 in 2000, 3) the CRC by Presidential Decree 36 in 1990. 4) The *United Nations Convention Transnational Organized Crimes* along with the protocol that *Protocol to Prevent, Suppress*

and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, signed in December 2000 in Palermo Italy. United Nations Convention Transnational Organized Crimes has been ratified by the Law of the Republic of Indonesia Number 5 of 2009 on the Ratification of the *United Nations Convention Against Transnational Organized Crime* (United Nations Convention Against Transnational Organized Crime), 5) *Protocol Against the Smuggling Of Migrants By Land, Sea And Air, Supplementing the United Nations Convention Against Transnational Organized Crime* ratified by the Law of the Republic of Indonesia Number 15 of 2009 on ratification of the *Protocol Against the Smuggling Of Migrants by Land, Sea And Air, Supplementing the United Nations Convention Against Transnational Organized Crime* (Protocol against the Smuggling of Migrants By Land, Sea, and Air, Supplementing the United Nations Convention against Transnational organized Crime). The substance is arranged on the prohibition of human trafficking.

Enacted Law No. 21 of 2007 on Eradication of Human Trafficking for the internal and external factors. Law No. 21 of 2007 on the Eradication of Human Trafficking, was formed on the premise and the most influential political expediency. The enacted Law on democratic legal political conditions mentioned by Mahfud MD as a democratic political configuration. According to Mahfud MD that political configuration on the configuration divided into the democratic and authoritarian configuration. Results of a political product is legal, legal product is a product of the political democratic political configuration will bear legal product or autonomous character responsive while authoritarian politics (non-democratic) will give birth to a legal product that characterized conservative or orthodox or oppressive.

Therefore formulated the problem whether Law No. 21 of 2007 on the Eradication of Human Trafficking responsive laws that character ?

The purpose of the discussion of this issue is to explain and analyze the Law No.21 of 2007 with a responsive legal approach. The method used is a method of normative or doctrinal method based on legal materials. Legal materials used primary legal materials, namely Law No. 21 of 2007 on the Eradication of Human Trafficking and the laws and regulations that relate to the problems examined, secondary law, namely literature-literature relating to the scope of the discussion.

Characteristics of Law No. 21 Of 2007 on the Eradication of Human Trafficking

The development of society makes the public system becomes increasingly complex and increasingly widespread job descriptions of life. Therefore, the law made must follow the development of society. If the law is made not to follow the development of the society then the law says it is lagging behind, the law required to be more sensitive and responsive to all the problems that occur in the community. Law cannot be separated in the life of society and the law regulates everything that exists in society. In accordance with the opinion of Philippe Nonet and Philip Selznick that: (Selznick & Nonet, 1978)

"our understanding of social change is incomplete if we do not seek out the modes of adaptation that create new and potentially viable historical alternatives, for examples, the movement from status to contract, from Gemeinschaft to Gesellschaft."

The law is the creation of the community, but at the same time, he also created the community, so that the law in accordance with the development of society. This is in accordance with the opinion that "a good law should be in accordance with the law who live in the community (the *living law*). So the law must reflect the values in the society "(Sanjoy and Chaman, 2017)

Often the law is only understood as the rules are rigid and too much emphasis on the aspects of *the legal system* without looking at the link between the legal sciences with social problems. Law is identical to the order as a mirror arrangement of the ruler, on the other hand, there is also an understanding of the laws that emphasize aspects of the legitimacy of the rules themselves. The law should not close themselves to the social factors that influence the development of society. Law is not only the *rules*, but there are also other logics (logic and rules). That imposing *jurisprudence* is not enough, but law enforcement should be enriched with social sciences. This is a challenge for all parties involved in the process of law enforcement, in order to free themselves from the confines of pure rigid legal and analytical.

The law was a "political product so that the content of each product code of law to be determined by the strength or the political configuration of the baby." (Barner et. al, 2014). The legal product, in this case, the law is a political product. The certain legislation is a product of a particular political background by certain political configuration. Political configuration divided into two "*democratic and authoritarian, the character of the legislation is divided into law character responsive or autonomous and laws that conservative or orthodox.*" (Mahfud, 2011)

As for the configuration of democratic politics is

"the configuration opens opportunities for involvement of the potential of the people to the maximum to actively participate in determining the State policy, while the configuration of authoritarian politics is the configuration that places the government in a dominant position with the nature interventionist in determining and implementing State policy so that the potential and aspirations of the people are not aggregated and articulate professionally,(Mahfud, 2011)

while law responsive is "a legal product that reflects the fulfillment of the demands of individuals and social groups so as better able to reflect the sense of justice in society and the conservative law is a legal product that reflects the vision The dominant political powerholders." (Mahfud, 2011)

Every political and legal product configuration has its own characteristic-self, then the democratic political configuration is as (Mahfud, 2011)

1. "Opening up opportunities for potential people to participate optimally to participate actively determine government policy.
2. The role of government into committees that carry out the will of the people
3. will of the people is formulated in a democratic
4. the function of Board of Representatives and political parties proportionately and more decisive policy-making State
5. Press can perform its function freely"

As for the characteristics of the political configuration authoritarian as (Mahfud, 2011)

1. "The government's position dominant by nature interventionist in determining and implementing State policy so that the potential and aspirations of the people are not aggregated and articulated proportionately
2. Board of Representatives and the political parties do not work were and more a justification tool (rubber stamps) over the will of the people.
3. The press does not have freedom because under government control."

Characteristic legislation that is responsive has the following (Mahfud, 2011)

1. "Reflecting the aspirations of the people and community groups
2. in the process of lawmaking which is responsive openly invite participation and aspirations of the people.

3. The judiciary and the law was given function as a means of implementing
4. formulas in law in sufficient detail,”

while the characteristics of the legislation that is conservative is as (Mahfud, 2011)

1. The contents of the legislation reflects the political views of the holder of the dominant power
2. The legislation is made by not inviting the participation and aspirations of the people, like there then it is formalistic
3. functions are positivist law instrumentalists or as a tool for implementing the ideology and program of the government.
4. the contents of legislation is only the main point
5. can be interpreted by the government in accordance with the views and will of its own with various implementing regulations."

To more clearly seen in the chart below:

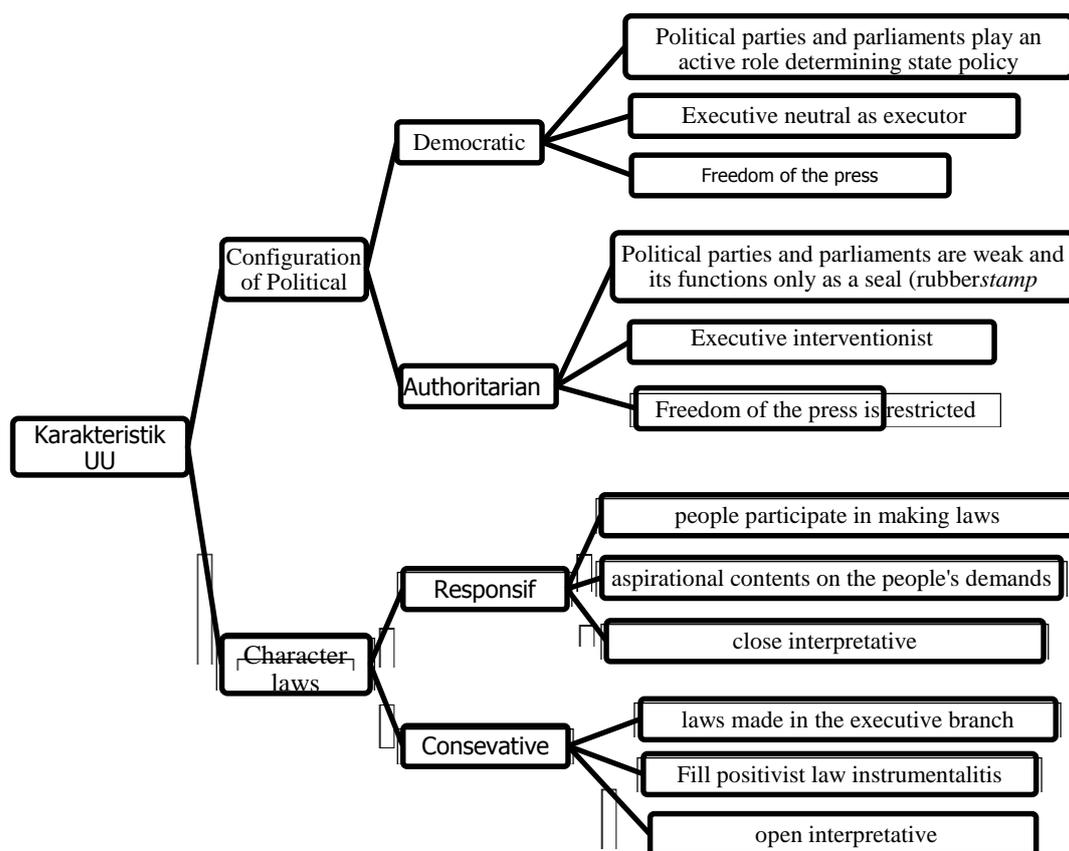


Chart 1

Characteristics of Law (Mahfud, 2011)

Developments political configuration affects product development law (statute). Act as a political product marred by political configuration gives birth so that these laws have character. Empirically every law is a product of political decisions so that legislation is seen as a crystallization of the political thought of interacting with politicians.

Law No. 21 of 2007 on the Eradication of Human Trafficking issued in the reform era (Mahfud, 2011) began democratic political life. Political life in the reform era upholds the spirit of freedom, openness, and democracy both at the level of executive, the legislature and the public in general. Therefore, in the manufacture of Law No. 21 of 2007 on the Eradication of Human Trafficking, society and community groups are included. Community represented by the organization stages, the solidarity of women, the network is the national legislation program women, Sayap Ibu foundation, Center for Indonesian Migrant Workers and community groups such as the Indonesian Child Welfare Foundation, the National Commission on Children, Migrant Workers Union, LBH APIK, Migrant Workers Defense Consortium. Therefore, in the process of law-making community has been involved so characteristic of the characteristic responsive to follow the role and aspirations of the people are met, then the Law No. 21 of 2007 on the Eradication of Human Trafficking has a first characteristic that is responsive to the people's and participatory preparation and both are based on the aspirations of the people.

The third characteristic is the formulation of responsive law legislation usually sufficient detail so as not open to be interpreted is not fulfilled in Law No. 21 of 2007 on the Eradication of Human Trafficking, as is still likely to be interpreted. There are several things that are likely to be interpreted in terms of punishment. As criminal weighting dropped threefold or third. Not specified one-third or threefold of Criminal minimum or maximum of a criminal or after the judge ruled. In addition, no provision of judges should not be decided under the criminal offense in the minimum, because there are two models in the criminal punishment is absolute model of (*fixed* sentence) or a mandatory minimum punishment and are relative (model *unfixed* sentence) (Arief, 2012) If absolute then dropping below the minimum contravene the law, but if are relative then dropping below the minimum does not conflict with the law.

Law No. 21 of 2007 on the Eradication of Human Trafficking Including the Type of Law Responsive

Human trafficking, slavery and exploitation of the weak are as ancient as civilization itself. Since ancient times, affluent people have kept and traded in slaves for physical pleasure, manual labor, and profit. Over four hundred years ago, Africans were seized from their

homelands and carried over the Atlantic to be exported to different parts of the world for labor. The same slaves who were used for labor were often exploited to fulfill the sexual desires of their owners and masters. The bloodiest war in the history of the United States was fought in large part to end the ugly practice of exploiting other human beings for profit, personal gain and pleasure (Walter, 2011).

Human trafficking is the second largest fast growing criminal industry in the world today. The illegal trade of humans is often misunderstood and misrepresented as purely an international issue, often overlooking that human trafficking happens throughout the United States. Human trafficking is a multifaceted issue that includes fraud, force, coercion, and exploitation for sexual purposes as well as for purposes of forced labor. Human trafficking is not an issue exclusively about children; however, children are most vulnerable to these forms of exploitation and will be the focus of this paper. Additionally, while human trafficking includes both labor and sexual exploitation, the focus of this paper on sexual exploitation is not to devalue focus on slave labor but time and length constraints force a specific focus on one issue. (Moser, 2012)

The United Nations, under the Palermo Protocol, adopted the following global definition for human trafficking: Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, or deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal or organ (Barner, et.al, 2014).

Legal approach responsiveness of Philippe Nonet and Philip Selznick that divides the characteristics of the law or laws are divided into three types of law is *"the law as a waiter power repressive (repressive law), legal as a separate institution that is able to tame the repressive and protect the integrity of himself (autonomous law) and the law as a facilitator of the various responses to the needs and aspirations of social (legal responsive)."* (Selznick & Nonet, 1978)

According to Philippe Nonet and Philip Selznick that" repressive laws, law autonomic and legal responsive not only types of different laws but also the stages of evolution in the legal relationship with the social order and political order. (Selznick & Nonet, 1978) "All three of

these stages is referred to as a developmental model law. The legal developments can be seen from the socio-political development milestone in the history of a State which is a nuance to the emergence and the enactment of a rule in society.

The characteristics of the legislation that has the type of law responsiveness are as follows:(Selznick & Nonet, 1978)

1. Competence
2. Substantive justice
3. Subordinate of principle and policy
4. Purposive: enlargement of cognitive competence
5. Expanded, but accountable to purpose
6. Positive search for a alternatives, e.g incentives, self -sustaining system of obligation
7. civil morality: morality of cooperation
8. Legal and politics aspirations integrated: blending of powers
9. Disobedience assessed in light of substantive harms: perceived as raising issues of legitimacy
10. Access enlarged by integration of legal and social advocacy

Nonet and Selznick seeks to clarify the various attachments systematically growing in society (*law society*) that 1) *Law as the servant of repressive power*; 2) *Law as differentiated institution capable of taming repression and protecting its own integrity*, and 3) *Law as facilitator of response to social needs and aspirations*.

The responsive law as a facilitator of various responses to social needs and aspirations so that the function of the law is not just to achieve procedural fairness, but to serve as a facilitator of the response to the needs and aspirations of the community. A good law should be competent and fair, the law should be able to meet the public desire and commitment for the achievement of substantive justice. Substantive justice granted in accordance with the rules of substantive law, regardless of procedural errors that do not affect the substantive rights of the Plaintiff. (Black, Garner, & McDaniel, 1999) Substantive justice is justice not provided for in the rules of law, but rather to look at the substance of the case although it is not regulated by law. Justice contains universal principles, namely the principle of equality (in-discrimination), not favoritism (*anti-nepotism*), impartiality (*fairness*), and the principle of objectivity (not subjective). This did not happen in the cases of human trafficking. A responsive law seeking

implied values contained in the legislation and the policies issued. Those values encourage the formation of new regulations. Responsive nature can be interpreted as serving the needs and interests of socially experienced and discovered not by officials but by the people. The values implicitly contained in the trading laws are to protect human dignity or human rights that pushed for Law No. 21 of 2007 on the Eradication of Human Trafficking.

The responsiveness implies a commitment to the law within the meaning contained community perspective, that the law responsive to the public good. So the purpose of the law or the purpose of making the legislation is to order and legitimacy also considers competence. So the trade laws are procedural legitimacy has been reached but not yet to the substance, the views of the Article 25 of Law No. 21 of 2007 on the Eradication of Human Trafficking which allow maximum criminal fine and a minimum fine was replaced by imprisonment for a maximum of one year. In the criminal justice system has not focused on the need for community involvement and victims of human trafficking.

Legal responsive, results-oriented, the objectives to be achieved outside the law. In responsive law, legal order is negotiated and not be won through subordination. In this model of responsive law, they expressed disapproval of the doctrine which regarded them as the default interpretation and inflexible. Good flow analytical and Nonet and Selznick through legal types of response against autonomy law that is final and cannot be sued. A responsive legal theory is a theory of law that contains a critical view. This theory holds that the law is a way of achieving the goal, however in the process of law making trafficking was not discussed and formulated the objective of sentencing in criminal acts of trafficking and is not discussed reasons defined types of criminal and duration of punishment imposed on the crime of human trafficking, so that responsive characteristic that is a goal-oriented incomplete in the trade laws.

Discretion can be widely used in law is responsive, but still, fit for purpose. Objectives can control discretionary and thus can reduce the risk of institutional release. When an institution really has a goal will there be between integrity and transparency guidelines, rules and discretion. Thus the law responsive to assume that the purpose can be made sufficiently objective and authoritative enough to control adaptive regulatory actions. Therefore, it required the formulation of the objective of sentencing objective and authoritative for the trade laws that are adaptive.

In the human trafficking laws, contain civil morality and morality cooperation. This is illustrated in the human trafficking laws Chapter VII on international cooperation and public

participation. The community shall participate and help the prevention and handling victims of the crime of human trafficking (Article 60). Forms of community participation by providing information, report a crime of human trafficking and communities have the right to obtain legal protection. The government must open access to the widest possible public participation, both nationally and internationally in accordance with the provisions of the legislation, the applicable international habits and conducted responsibly in accordance with laws and regulations.

Products responsive legal character seen from the manufacturing process is participatory intention to invite as much participation of all elements of society, both in terms of individuals, or groups of people and also should be aspirational that comes from the desire or the will of the people. That means they are not a legal product whim of rulers to legitimize his power. Judging from the process of making laws trafficking more likely on the legal character as responses responsive to the aspirations of the social needs of the community law develops in the need to combat the crime of human trafficking. Draft Law Crime of trafficking initiative of the House of Representatives and backed by the government resulting in the alignment of power.

Ruler which can remove or make the rules as a means to power but may not be in accordance with the wishes legislator. The ruler will increase its credibility if the rule is legitimized if the rule is accepted and followed by the community. The community did not protest against the trafficking rules even supports the Law No. 21 of 2007 on the Eradication of Human Trafficking.

Law No. 21 of 2007 on the Eradication of Human Trafficking created in addition to its aim to protect the public interest but also to the State as an authority in protecting the public from crime is the duty and obligation of the State which is listed in the national goals in the Indonesian constitution. The enactment of Law No. 21 of 2007 on the Eradication of Trafficking in Persons was formed to meet the needs of society in protecting the people who have the appropriate rights to human dignity and encourages the community to have a legal awareness on dignity, dignity and their human rights.

Conclusion

The Law No. 21 of 2007 on the Eradication of Human Trafficking issued in the reform, era began democratic political life so that it meets the legal responsive characteristic features that

are responsive law that is created through community participation so that it meets the aspirations of the people. A characteristic feature of the law that is to be limitative responsive (*close interpretative*) has not been met because the Law No. 21 of 2007 on the Eradication of Trafficking in Persons is still likely to be interpreted. So the Law of the Republic of Indonesia No. 21 of 2007 on the Eradication of Trafficking in Persons has not fully responsive.

Law No. 21 of 2007 on the Eradication of Trafficking in Persons not fully meet all the characteristics of the type of law that is responsive, because the law of trafficking in procedural justice has been achieved but justice the substance has not been achieved and the necessary formulation of the objective of sentencing objective and authoritative for legislation adaptive human trafficking.

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