



# *Strengthening Indonesian Trafficking in Persons Law under Restitutio in Integrum Principles*

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*Abstract— The modern criminalization process should take more remarkable account to restore the victims' rights. Under the principle of responsiveness in good governance, the restitution mechanism is used to follow the Trafficking in Persons Law's (TIP Law) provisions. This article aims to explore the inefficiencies of restitution principles and provide alternative solutions to the victim of human trafficking. The legal issue arises because of the provisions that enable the perpetrator to replace the inability in paying restitution with one year prison. The research was conducted using normative juridical methods. A conceptual and legislative approach was chosen to examine the ideal form of implementing fair restitution. The creative restitution theory perspective prioritizes actions that are more than just restoring the victim's condition. This perspective explains alternative models of punishment that also accommodate stronger restitution for victims. The research results show that the prison sentence used to compensate for the perpetrator's inability to pay restitution does not reflect justice for the victim. This provisions increase the number of unpaid restitution. For this reason, this research suggests that the government can accommodate the application of restitution other than in the form of cash payments by revising the TIP Law. This effort is an essential solution to ensure that the implementation of restitution is under the philosophical objectives for which it was created.*

**Keywords— Criminal Justice, Good Governance, Restorative Justice, Restitutio**

## I. INTRODUCTION

restitution process to tackle human trafficking crime under the TIP Law. The normative juridical legal research used as a method in this study. Conceptual and statutory approach is used to support this method. Guided by the application of the modern criminal system in the concept of restorative justice, alternative punishment mechanism oriented towards restoring the victim's condition by ensuring the fulfillment of his rights is using restorative methods. The Indonesian government has recognized this mechanism by requesting restitution in TIP LAW. Restorative justice perspective will bring this study to see the suitability of the TIP Law material regarding the provision of restitution and its effectiveness in fulfilling the fundamental essence of providing restitution to TIP victims.

In the provisions of the TIP Law explain that the act of recruiting, transporting, sending, transferring, or receiving someone is carried out using any methods to make a person can then gain control over another person (or any kind of exploitation). This kind of action can be determined as a human trafficking. Due to this action, the victim can experience any kind of feeling that make they suffering. As a form of crime that attacks human dignity and human rights, it is appropriate that the mechanism for providing punishment for perpetrators should not only

focus on the process of imprisoning the perpetrator but should also be oriented towards protecting and restoring the condition of the victim.[1]

Apart from the fines and imprisonment contained in the TIP Law, the government has also accommodated a restitution to the victim. This procedure is intended to provide justice for victims of TIP so that the perpetrator not only atones for his mistakes with punishment that only affects himself but can also provide benefits to the victim. Restitution is interpreted explicitly in the TIP Law as a form of payment of compensation by the perpetrator following the court decision. This number 13 of the first article in TIP Law. Supreme Court then issued Supreme Court Regulation (SC Regulation) to support the restitution process under TIP Law. With regulations governing the technicalities of resolving requests for the right to restitution, it is hoped that victims of TIP can obtain a fair resolution and that people who have the potential to commit TIP can consider alternative punishments that they also have to bear.

Even though the government has issued regulations regarding TIP, criminal acts of human trafficking are still widespread in Indonesia. In 2023, the government has succeeded in rescuing 2,425 TIP victims. Of these cases, at least 901 people were named as suspects. The suspects developed various methods to deceive their victims. The majority of TIP victims are sent abroad to become illegal migrant workers, commercial sex workers, exploited children, and ship crew members. The number of TIP suspects and victims has increased significantly compared to previous years. In 2019, the police only handled 132 arrests, while in the 2020 period, this number decreased to 42 suspected TIP perpetrators. This increase in the number of TIP reports certainly indicates that the handling of TIP in Indonesia is still not running optimally.

In order to resolve this case, the government continues to support the active role of the *Lembaga Perlindungan Saksi dan Korban* (LPSK) in handling TIP victims and facilitating them with various education about their rights, including seeking restitution for the conditions they experience. In 2020, LPSK protected 314 TIP victims and assisted with restitution requests for 194 victims with a value of 4.96 billion rupiah. The number of requests for restitution had increased compared to the previous year when only 44 applicants were submitted. However, of the total number of requests amounting to 4.96 billion in 2020, the court only approved the payment of restitution amounting to 1.2 billion rupiah. This reality is further exacerbated by the provisions of the TIP Law. It give an opportunity for perpetrators who cannot pay restitution to serve a substitute with maximum of one year imprisonment. This provision means almost half of the restitution claims approved by the judge are not paid by TIP perpetrators.

Conditions that do not yet support recovery with restitution for TIP victims still occur in 2021. Even though LPSK has protected more than 200 TIP victims and facilitated 177 requests for restitution, the perpetrators prefer to receive alternative punishment. This is demonstrated by the fact that no more than 12% of perpetrators are willing to pay restitution. Based on these facts, it is clear that the provisions of Article 50 of the TIP Law have provided space for perpetrators to avoid the obligation to pay restitution so that victims do not receive restoration for their lost rights.

The inability of the TIP law to ensure that restitution will be carried out and that the victim's condition will return to its original condition has indicated a failure to realize a responsive policy. If we refer to the principles of implementing good governance, the government should be able to increase the responsiveness of its policies. The needs of people who have experienced violations of their rights to life need to be specifically addressed.

Due to these legal issues, this research will analyze the suitability of the concept of restitution in the TIP Law based on the views of the creative restitution theory put forward by Albert Eglash.[2] This theory was chosen because it can provide an overview of the modern punishment model, which is not only oriented towards taking revenge or imprisoning the perpetrator.[3] This modern legal theory approach emphasizes the importance of efforts to restore the victim's condition to normal. This analysis is needed to restore public confidence in the criminal system that operates in Indonesia so that compensation is not solely sought in a non-litigation mechanism, which then eliminates the perpetrator's obligation to fulfill the punishment decided through the judicial process.

Analysis of these legal issues will be presented in several sub-topics. *First*, the theory of restorative justice and the ontology of Restitutio in Integrum will be reviewed in the sub-topic entitled 'The Basic Nature of Restitution in Restorative Justice Theory.' *Second*, the analysis will conduct to fine basic principles that underlie the restitution payment process using the material in the TIP Law. This analysis will be presented in a sub-topic entitled 'The Urge of Restoring Human Trafficking victim's condition in Indonesia.' Finally, the study's results will be summarized in the closing section following the problem formulation discussed in this study.

## II. LITERATURE REVIEW

Traditional legal concepts emphasize the retributive justice model, which is guided by the need to imprison the perpetrator. Along with social development, public awareness grows to see injustice in implementing the retributive justice system.[4] This injustice primarily arises when the crime cause harm to the victim. In the view

of retributive justice, the losses incurred will immediately be resolved when the perpetrator receives criminal sanctions, especially imprisonment. This conventional view emphasizes the existence of attempts at revenge and the unpleasant conditions that must befall the perpetrator. Unfortunately, this view lacks sensitivity to the victim's need to obtain benefits after the suffering they have experienced.

Based on this development of awareness, a paradigm shift emerged in implementing the criminal system. Given modern criminal theory, the development of a restorative justice model is used to provide special attention to victims. The use of restorative justice principles is nothing new. Several countries, such as Ancient Arabia, Greece, Germany, India, and Rome, already viewed punishment as a logical consequence of criminal acts. The perpetrators of crimes have the right to show remorse and have their mistakes forgiven in restorative justice perspective.[5] In these countries, this approach has even been used to prosecute perpetrators of murder. In the view of regulatory theory, the restorative approach is quite effective in preventing criminal acts while supporting social and economic development. However, in the criminal law system, this approach is included in modern criminal law theory.

Albert Eglash was one of the legal experts who developed the theory of creative restitution as part of a modern criminal system that prioritizes restorative justice.[6] In his theory, Eglash emphasizes the basic concept of restitution, which is oriented towards restoring the victim's condition. Concern for making reparations for the losses suffered by victims must be the primary consideration in determining punishment for perpetrators. In this concept, it can be interpreted that criminal sanctions do not only consider revenge against the perpetrator but must provide benefits to the victim. This concept not only fulfills the semantic provisions of 'restoration' and 'redemption.'[2] More than that, Eglash emphasizes that penance is not limited to the original state. This concept does not rule out the possibility that the perpetrator can provide more benefits than the original situation.

Definitively, *Restitutio in Integrum* in Latin is translated as an effort to make restitution for the original condition. This understanding was later adopted by many countries that implemented the principle of restitution as a form of effort to provide protection and benefits for victims. Indonesia is one of the countries that also applies this principle in several laws that regulate sanctions for criminal acts, such as (a) Human Rights Courts Law; (b) Law to protect witness and victim; (c) Penal Code; (d) TIP Law; (e) Criminal Procedure Code. Per the focus of this study, the analysis will only be carried out on the concept of restitution in the TIP Law. This study will provide an in-depth understanding of the concepts contained in the TIP Law and whether or not the concept of creative restitution is accommodated in the Law. From this study, it will be seen whether the concept of restitution in the TIP Law has been able to provide justice that focuses on restoring the human trafficking victim's condition.

### III. METHOD

This research using doctrinal legal research to analyze the case.[7] This research method was chosen as a means of finding the ideal form of a legal rule so that it can conceptually resolve legal problems that arise in society. In order to support this research method, this research will use a conceptual and legal approach.[8] Restorative justice theory is used to see a paradigm shift in the criminal system in Indonesia so that it can then explain the fundamental nature of the principle of *Restitutio in Integrum*, which is recognized as a way to provide justice for victims. The legal approach in this study is used to examine legal regulations relating to handling criminal acts of human trafficking and also the mechanism for requesting and settling restitution. The study results are then presented in descriptive and prescriptive form.

### IV. DISCUSSIONS AND RESULTS

Based on the TIP Law's provision, the victim or their heirs has the right to request for restitution. Restitution in human trafficking ask the perpetrator to pay for material and immaterial losses suffered by the victim or his heirs. The court has the rights to calculate the losses and the amount of compensation that have to be handled by the perpetrator according to the permanent legal force. Losses that can be submitted in a request for restitution include: (a) have no more income or the wealth is loss; (b) misery; (c) costs of medical needs; and (d) other loss. Based on this application, the judge can consider whether to accept it, accept it in part, or reject it. The judge will include this decision in his decision.[9]

The payment for restitution purpose can be made before or after the court decision by the perpetrator or the third party who can be trusted. If the judge's decision grants part of the request for restitution, the remaining money that has been deposited will be returned. For perpetrators who have not deposited money to pay restitution, they will be given up to 14 days after the decision is notified. Furthermore, technical instructions regarding submitting requests for restitution have been regulated by the government through SC Regulation concerning Technical Submission of Restitution. In Article 4 of the SC Regulation, the right to receive restitution including: (a) victim losses their wealth or job; (b) the costs to compensate for material or immaterial suffering that arises as a direct result of TIP according to the Law provision; (c) medical needs; (d) other losses.[10]

The restitution request can be made directly by the victim or through LPSK, investigators, and public prosecutors. Suppose the application is made through LPSK or an investigator. In that case, the documents accompanying the LPSK Decision containing the amount of restitution can be submitted to the public prosecutor

for consideration. If the application is made before the case file is submitted, the application must be included in the indictment. According to the provisions of Article 8 SC Regulation concerning Technical Application for Restitution, the judge will notify the victim of their rights, and they can submit a request after *inkracht* if the victim doesn't make any request for restitution. The application files and evidence submitted will be material for the judge to consider whether the request for restitution can be accepted and in what amount.

Following the opportunity to apply for restitution, in his decision, the judge not only includes the prison sentence imposed but is also obliged to include a statement regarding whether or not the request is accepted, along with the reasons and amount of restitution agreed. Apart from that, the judge must also provide information regarding substitute imprisonment if the assets are insufficient based on a proportional calculation of the amount of restitution paid by the defendant or a third party. This provision also confirms Article 50 paragraph (4) of the TIP Law, which opens up opportunities to the perpetrator to substitute the restitution payment with maximum one year of imprisonment if they cannot pay the restitution. [9] This substitute imprisonment can be imposed when the restitution payment limit has been exceeded, a written warning letter has been given, and assets have been confiscated for auction. However, the perpetrator cannot pay the restitution money approved by the judge.

This provision then creates the possibility that the victim will not receive compensation. Referring to the phenomenon that creates a higher chance for the TIP perpetrators to avoid paying restitution, legal issues arise regarding the responsiveness of policies issued by the government. The implementation of good governance should be guided by several principles at once. Concerning this study, the principle of government responsiveness is needed to create a restitution policy that can truly protect the rights and interests of TIP victims.

If we refer to these provisions, it can be said TIP Law have accommodated a form of restorative justice through the opportunity to provide restitution to victims. If we refer to the theory of restorative justice, the material in these regulations has opened up opportunities for approaches that are oriented towards providing benefits to victims. However, if examined further, based on the theory of creative restitution put forward by Eglash, the implementation of restitution in Indonesia still needs to improve.

This weakness can be seen in several ways. *First*, the definition of restitution and the technical provisions governing the restitution application process still limit the form of restitution to the restoration of the victim's condition following the losses they have suffered. This is demonstrated by the evidence relating to the victim's material expenditure. Meanwhile, for immaterial losses suffered by victims, there is still no definite standard that can be used as a reference, so decisions will only be based on the judge's considerations. *Second*, Imprisonment can be used to compensate for the perpetrator's inability to meet restitution demands. This indicates that the principles of restorative justice have not been fully used because they still rely on imprisonment, which is retributive and does not provide beneficial value for the victim. *Third*, the procedure for requesting restitution is complicated, with concrete evidence that the victim must meet. If the victim suffers severe physical or psychological injuries, the family will undoubtedly have difficulty meeting urgent medical needs. Moreover, when undergoing treatment, it does not rule out the possibility that the medical treatment will have to continue.

*Fourth*, the definition of restitution is limited, which still explicitly requires the perpetrator to pay compensation in the form of money. Suppose we refer to the theory of creative restitution. In that case, the perpetrator should be able to provide compensation not only in the form of money but also in restoration to its original condition. Under certain conditions, creative restitution hopes that there will be a form of penance carried out by the perpetrator of the crime by carrying out more outstanding actions so that it can help the victim and impact social and economic development. This limitation of the definition of restitution then has a very significant impact on the legal efforts that victims can take to return to living their lives.

As seen from LPSK data for 2021, the number of perpetrators who choose to pay restitution is also deficient. They tend to prefer to get confinement. The provisions of the TIP Law which allows restitution payments to be replaced with imprisonment for one year, will undoubtedly give rise to rational action for the perpetrator. This provision turns out to cause more harm to victims because they can no longer obtain the return of their rights. For this reason, reflecting on the theory of creative restitution, it is appropriate for the government to change the prison sentence to a substitute sanction when the perpetrator cannot pay restitution. The punishment can be replaced with something more beneficial for the victim.

For example, if the victim has to leave his job, the perpetrator or a third party can find another job or provide training and working capital. Apart from that, the government must also consider whether the perpetrator can pay restitution periodically according to his ability.[11] Alternative mechanisms like this must be considered more by the government if the government is truly serious about fighting for the recovery of victims. Thus, the definition of compensation payments given from the perpetrator to the victim must also be changed so that the form of atonement for the perpetrator's sins is not only in the form of money. In this way, it is hoped that the punishment system for perpetrators of human trafficking can be more oriented towards restoring the rights of victims so that they can return to living a decent life.

## V. CONCLUSION

From this analysis, it can be concluded that Indonesia has adopted a modern criminal system based on the principles of restorative justice. Regulations regarding the enforcement of criminal acts of human trafficking, which include the payment of restitution for victims, are one of the legal regulations that accommodate the restorative justice system. However, there are still many weaknesses that appear in these regulations. The research results show that the prison sentence used to compensate for the perpetrator's inability to pay restitution does not reflect justice for the victim. This provisions increase the number of unpaid restitution. For this reason, the government needs to revise the definition of restitution and substitute punishment that is more beneficial for victims as a form of implementing a good governance system. By adopting the principle of creative restitution in the TIP Law, it is hoped that the government can provide legal protection and more significant benefits for victims that can be, but not limited to the form of restitution payment with cash. According to the philosophical meaning of *Restitutio in Integrum* and the concept of creative restitution, the government should accommodate all kind of efforts that perpetrators can do to restore the victims' rights.

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