

CRITICAL ANALYSIS OF RESTITUTION BURDEN TO THE STATE (STUDY OF HERRY WIRAWAN)

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Article	Abstract
Keywords: Restitution, Sexual Violence, and Judge Consideration DOI: 10.28946/scls.v1i2.2701	<p>The decision of the Bandung District Court sentenced the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia to be paid to 13 child victims of Defendant Herry Wirawan's rape. The decision was controversial in the community, then the public prosecutor filed an appeal at the Bandung High Court with a decision. This research aims to criticize the issue of imposing restitution on the state and legal protection for children against perpetrators of sexual violence who are unable to pay restitution. The type of research used is normative legal research with a statute approach using descriptive-qualitative analysis. The research results show that Bandung District Court Decision Number 989/Pid.Sus/2021/PN.Bdg was fallacious in considering terminology differences between restitution and compensation. On the other hand, Article 33 of Sexual Violence Crime Law reveals the state is obliged to provide compensation for the remaining amount of Restitution owed to Victims following a court decision through victim assistance funds. The study results are recommended in the victim and witness protection enforcement, although it should still refer to examination in the court.</p>

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A. INTRODUCTION

Children are a gift from God and form the next generation who will continue the nation's legacy. The advancement or decline of a nation heavily depends on the well-being of its children, including their protection and fulfillment of their rights.¹ The international community can feel the vital role of children in placing children as human beings who must

¹ Henny Yuningsih et al., "Ratio Legis of Chemical Castration to the Perpetrators of Sexual Violence against Children," *Sriwijaya Law Review* 4, no. 2 (2020): 285-303, <https://doi.org/10.28946/slrev.Vol4.Iss2.432.pp285-303>.

get protection for the rights they have so that the United Nations Convention on the Rights of the Child appears.²

Indonesia has ratified the UN Convention on the Rights of the Child through Presidential Decree Number 36 of 1990. Based on this, the state is obligated to protect, seek, and respect children's rights. As a form of strengthening this ratification in efforts to protect children in Indonesia, legislatively, there is the ratification of Law Number 23 of 2002 concerning child protection, which becomes legal protection for children in general.

In practice, there is a tendency for children as victims to be often neglected by competent institutions within the criminal justice system.³ This should provide sufficient attention and protection based on proven law, as seen in the news in electronic and mass media that highlight the issue of violence against children, both physical and psychological.

Sexual crimes, especially sexual violence, have become too complex and disturbing, causing concern among the community, especially among women, so it cannot be viewed from a micro perspective alone.⁴ To understand and solve such complex problems of sexual violence, it is necessary to have the courage to understand and communicate aspects of life that do not emerge on their own but through processes that are factors in such actions.⁵ Internal and external factors greatly influence such actions as environment, economy, culture, politics, and sociology.

Cases of violence against children are difficult to bring to the surface, like an iceberg phenomenon. Many people, families, and children as victims themselves are unable or unable to report cases of sexual violence, which is considered shameful, even though such cases have been identified in the investigation process and violence against children is caused by structural or internal factors.⁶

In realizing the growth and development of children, children do not receive appropriate treatment, especially in acts of immorality that can cause physical, psychological, material, and immaterial damage. So far, if there is immoral behavior towards children, the child as a victim should not bear the impact mentioned above alone. Still, this loss should also be the perpetrator's responsibility in the form of compensation regarding the impact borne by the victim's child, especially in education.

On the other hand, violence in the educational sphere often occurs in various forms, ranging from physical and psychological to sexual violence. There are many types of violence in which the child plays a role as a victim or perpetrator, or both a victim and a perpetrator. Brawls, violence during student orientation, and bullying even become traditions in some schools that often involve children in masse.

Ideally, an educator or teacher in the field of education is obliged to provide good examples and teaching to their students. However, this was not the case for one educator, Herry Wirawan. From around 2016 to 2021, the defendant committed heinous acts of several criminal offenses. Ironically, the defendant repeated these acts, causing harm to more than one vic-

² Ruben Achmad, "Upaya Menyelesaian Masalah Anak Yang Berkonflik Dengan Hukum Di Kota Palembang," *Dalam Jurnal Simbur Cahaya* 27 (2005): 24.

³ Nur Hidayati, "Perlindungan Anak Terhadap Kejahatan Kekerasan Seksual (Pedofilia)," *Jurnal Pengembangan Humaniora* 14 (2014): 68-73, <https://jurnal.polines.ac.id/index.php/ragam/article/view/496>.

⁴ Ani Purwanti and Marzelina Zianti, "Strategi Penyelesaian Tindak Kekerasan Seksual Terhadap Perempuan Dan Anak Melalui Ruu Kekerasan Seksual," *Masalah-Masalah Hukum*, 2018, <https://doi.org/10.14710/mmh.47.2.2018.138-148>.

⁵ Butje Tampi, "Kejahatan Kesusilaan Dan Pelecehan Seksual Dalam Hukum Pidana Indonesia," *Kejahatan Kesusilaan Dan Pelecehan Seksual Dalam Hukum Pidana Indonesia*, 2010.

⁶ Raden Muhammad Arvy Ilyasa, "Legal and Victimological Perspective on Sexual Violence against Children Cases in Indonesia," *The Indonesian Journal of International Clinical Legal Education* 3, no. 3 (2021): 281-300, <https://doi.org/10.15294/ijicle.v3i3.48269>.

tim in various locations, including Yayasan Komplek Sinergi Bandung, Yayasan Pesantren Tahfidz Madani Bandung, Yayasan Margasatwa Bandung, Yayasan Komplek Sinergi Jalan Nyaman Bandung, Yayasan Pesantren Tahfidz Madani Bandung, Yayasan Manarul Huda Bandung, Basecamp Jalan Cibiru Bandung, Apartemen TSM Bandung, Apartement Suites Metro, Hotel A Bandung, Hotel PP Bandung, Hotel B&B Bandung, Hotel N Bandung, Hotel R Bandung, and Rumah Tahfidz Al Ikhlas Bandung. This is the opposite of Herry Wirawan, an educator who committed sexual violence crimes. The incident was repeated with different victims. There are several victims of the defendant's actions who are minors under 18 years of age:

Table 2. List of Child Victims Due to the Defendant's Actions

No.	Victim	Dampak Psikologis dan Kesehatan
1.	Child Victims I	Experiencing trauma from psychological disturbances such as hatred, fear, and anger towards the defendant HW.
2.	Child Victims II	Gave birth to 1 child on October 17 th , 2019, and experienced psychological trauma.
3.	Child Victims III	Gave birth to 1 child on January 26 th , 2021, and experienced psychological trauma.
4.	Child Victims IV	Gave birth to 1 child on January 7 th , 2021, and experienced psychological trauma.
5.	Child Victims V	Gave birth to 1 child on January 19 th , 2019, and experienced psychological trauma.
6.	Child Victims VI	Pregnant with a second child for 3 months after giving birth to 1 child, as well as experiencing severe psychological trauma.
7.	Child Victims VII	Gave birth to 1 child on May 30 th , 2016, and experienced psychological trauma.
8.	Child Victims VIII	Pregnant for 19 weeks since the <i>visum et repertum</i> on June 3 rd , 2021, and experiencing psychological trauma.
9.	Child Victims IX	Gave birth to 1 child on January 19 th , 2019, and experienced psychological trauma.
10.	Child Victims X	Experiencing trauma from psychological disturbances such as hatred, fear, and anger towards the defendant HW.
11.	Child Victims XI	Experiencing trauma from psychological disturbances such as hatred, fear, and anger towards the defendant HW.
12.	Child Victims XII	Experiencing trauma from psychological disturbances such as hatred, fear, and anger towards the defendant HW.
13.	Child Victims XIII	Experiencing trauma from psychological disturbances such as hatred, fear, and anger towards the defendant HW.

Source: Analysis from Primary Sources (Bandung District Court Decision Number 989/Pid.Sus/2021/PN.Bdg)

There are at least several child victims as a result of the sexual violence committed by the defendant HW, totaling 12 child victims, and some of the acts resulted in a child being born. This case is alarming and has received attention from the public and stakeholders to uphold the protection of the dignity and rights of children in Indonesia. Based on the decision of the Bandung District Court which sentenced the defendant (Herry Wirawan) to life imprisonment, then imposed restitution on the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia to be paid to 13 (thirteen) santri (children as) victims of

rape, the decision was controversial in the community, then the public prosecutor filed an appeal at the Bandung High Court with a decision, namely; firstly Improving the Bandung District Court's decision from life imprisonment to death penalty, secondly Imposing restitution to the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia to be borne by the defendant (Herry Wirawan) by paying a total of three hundred million rupiahs in restitution to the 13 victims, and the third is the confiscation of property or assets the accused is to be confiscated and auctioned off. The results are handed over to the government. The Regional Government is to be used for educational expenses and for the survival of the victim's children and their babies until they are adults

This study traces several examples of previous studies that discuss the criminal liability of the defendant Herry Wirawan and restitution payments in the form of journals, including, Journal entitled "Inability Formulation of Perpetrators to Pay Restitution to Children Victims of Sexual Exploitation" by Rezha Marinda, et.al. in the Indonesian Journal of Social Science Vol. 3, No. 6, June 2022. This research explains the State that compensation may consist of the payment of a nominal sum of money to criminals who are unable to pay restitution. However, this compensation is only available for heinous human rights abuses and acts of terrorism. The following research is entitled "Legal Protection of Child as Victim of Crime of Rape" by Arianus Harefa in the Educational Journal of History and Humanities, 6 (1), 2023, pp. 212-221 The conclusion is legal protection for Children as Victims of the Crime of Rape in the Bandung District Court decision Number 989/Pid.Sus/ 2021/PN.Bdg and the Bandung High Court decision Number 86/Pid.Sus / 2022/PT.Bdg on behalf of the defendant Herry Wirawan, still has not provided enough protection to victims.

The authors refer to these previous studies to deepen and enrich academic writing in conducting research. Suppose the two studies focus on paying restitution under Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims. In that case, the authors focus more on judge considerations and the imposition of restitution regulated in Law Number 12 of 2022 concerning Crimes of Sexual Violence.

There are formulation problems in this study, namely: What are judges considerations in applying restitution to the perpetrator of sexual violence in a school environment in Bandung District Court Decision Number 989/Pid.Sus/2021/PN.Bdg and the Bandung High Court Decision Number 86/Pid.Sus/2022/PT.Bdg? and How is legal protection for children against perpetrators of sexual violence who are unable to pay restitution fees?

B. RESEARCH METHODS

This research is a type of normative legal research. Normative legal research emphasizes using primary legal materials in the form of written laws, such as statutory regulations. Based on the point of view of science used, this study uses mono-disciplinary research using a statutory approach and a conceptual approach. The research was carried out by selecting methods using one discipline, including law.⁷ Researchers used several relevant legal materials in this study, including:

1. Bandung District Court Decision Number 989/Pid.Sus/2021/PN.Bdg
2. Bandung High Court Decision Number 86/Pid.Sus/2022/PT.Bdg
3. Laws and regulations that are still valid and have not been repealed, especially in the aspects of the Crime of Sexual Violence and Victim Protection
4. Doctrines, Journals, and Books that are relevant to research.

⁷ Sri Mamudji et al., "Metode Penelitian Dan Penulisan Hukum," Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005, p. 23.

The legal material that has been obtained is then analyzed using descriptive-qualitative analysis. Qualitative descriptive analysis is a procedure for solving problems or drawing conclusions by presenting the data received and then analyzing it in the form of the findings to obtain conclusions that can be scientifically justified.

C. ANALYSIS AND DISCUSSION

1. Considerations of Judges in Imposing Restitution for Child Victims

This research focuses on the judge's consideration in imposing restitution. This is based on the fact that a judge's decision is a determination of a case that is being examined and adjudicated by a panel of judges. A judge provides consideration in the form of proven acts, legality or legal basis, and the goal of criminal prosecution as a consequence of criminal liability.⁸ McKenzie argues there are several theories or dogmatic aspects that judges can consider when making a decision, including the ratio decidendi theory, balance, art and intuition approach, scientific approach, experience approach, and discretion.⁹

In making a decision based on their consideration, judges can use juridical considerations that can be seen normatively based on Article 183 of the Criminal Procedure Code, as well as non-juridical considerations that can be in the form of the impact of the defendant's actions on the victim, and the defendant's condition to carry out criminal liability. The defendant, Herry Wirawan, was charged with the primary indictment of Article 81 paragraph (1) and paragraph (3) in conjunction with Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 23 of 2002 concerning Child Protection in conjunction with Article 65 paragraph (1) of the Criminal Code. The defendant was also charged with the subsidiary indictment of Article 81 paragraph (2) and paragraph (3) in conjunction with Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 23 of 2002 concerning Child Protection in conjunction with Article 65 paragraph (1) of the Criminal Code.

On the other hand, in the context of education on child protection, defendant Herry Wirawan violated Article 9 paragraph (2) of the Child Protection Law. It states that every child has the right to receive protection in an education unit from sexual crimes and violence committed by educators, educational staff, fellow students, and/or other parties. Children within and within the education unit are required to receive protection from acts of physical and psychological violence, sexual crimes, and other crimes committed by educators and educational staff as stipulated in the Child Protection Law.

The prosecutor demanded that the defendant be found guilty of the primary offense and be sentenced to death, in addition to a supplementary sentence of the public announcement of the perpetrator's identity and chemical castration, a fine of IDR 500,000,000, and a subsidiary sentence of 1-year imprisonment. The defendant was also required to pay the restitution for 12 child victims of IDR 331,527,186.

2. Restitution for Sexual Violence Child Victims

The emergence of restitution can be seen in the Hammurabi law, which aimed to punish perpetrators of crimes according to proven actions.¹⁰ The historical context of the law in

⁸ T MASDUKI, "Penetapan Kriteria Unsur-Unsur Tindak Pidana Ujaran Kebencian (Hate Speech) Pasal 45 a Ayat (2) Jo Pasal 28 Ayat (2) Tentang ...," 2019, [https://dspace.uui.ac.id/handle/123456789/16275%0Ahttps://dspace.uui.ac.id/bitstream/handle/123456789/16275/05.3 bab 3.pdf?sequence=8&isAllowed=y](https://dspace.uui.ac.id/handle/123456789/16275%0Ahttps://dspace.uui.ac.id/bitstream/handle/123456789/16275/05.3%20bab%203.pdf?sequence=8&isAllowed=y).

⁹ *Ibid*, p. 3-4

¹⁰ Marlina and Azmiati Zuliah, *Hak Restitusi Terhadap Korban Tindak Pidana Perdagangan Orang*, ed. Anna, Cet. 1 (Bandung: Refika Aditama, 2015).

Indonesia was initially only known with the concept of compensation, which can be seen in the provisions of regulations in Indonesia before the birth of legal provisions regulating the protection of witnesses and victims.¹¹ Positive criminal law basically currently regulates provisions regarding compensation known as restitution. This is regulated in Article 1 number (11) of Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Witnesses and Victims Protection, which states that:

"Restitution is indemnity given to the victim or their family by the perpetrator or a third party."

To understand the context of the difference between restitution and compensation in the Criminal Procedure Code, the researcher explains the differences between restitution and compensation in the Criminal Procedure Code, including:

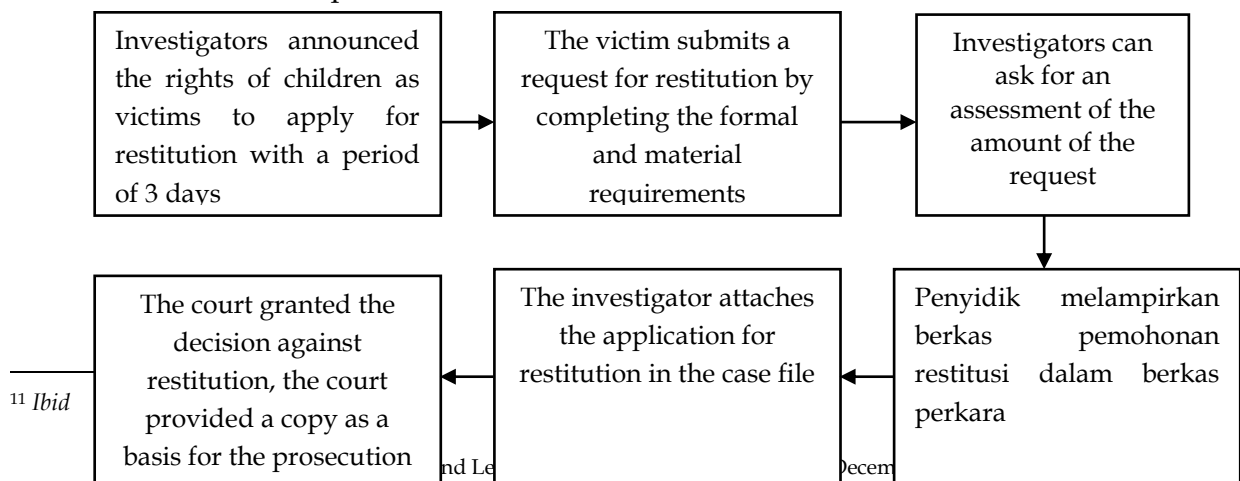
Table 3. Difference Between Restitution and Compensation

No.	Restitution according to <i>Lex Specialis</i>	Restitution according to Criminal Procedure Code
1.	Restitution can ask for compensation, both material and immaterial	Compensation only includes material compensation for costs
2.	Submission of an application can be submitted at the time of making a Police Report	Submission of compensation can be made before the public prosecutor submits criminal charges
3.	Submission of requests for restitution can be submitted by victims or public prosecutors.	The victim or family must submit submission of an application for compensation with a combination of cases.
4.	If the defendant is unable to pay restitution, assets can be confiscated or substitute confinement.	It does not regulate efforts if the defendant is unable to pay

Sources : Analysis from Primary Sources

There are several restitution mechanisms regulated in various laws and regulations, namely Government Regulation Number 43 of 2017 concerning Implementation of Restitution for Children who are Victims of Crime and Government Regulation Number 35 of 2020 concerning Amendments to Government Regulation Number 7 of 2018 concerning Provision of Compensation, Restitution , and Assistance to Witnesses and Victims as follows:

Picture 1. Restitution Request Mechanism

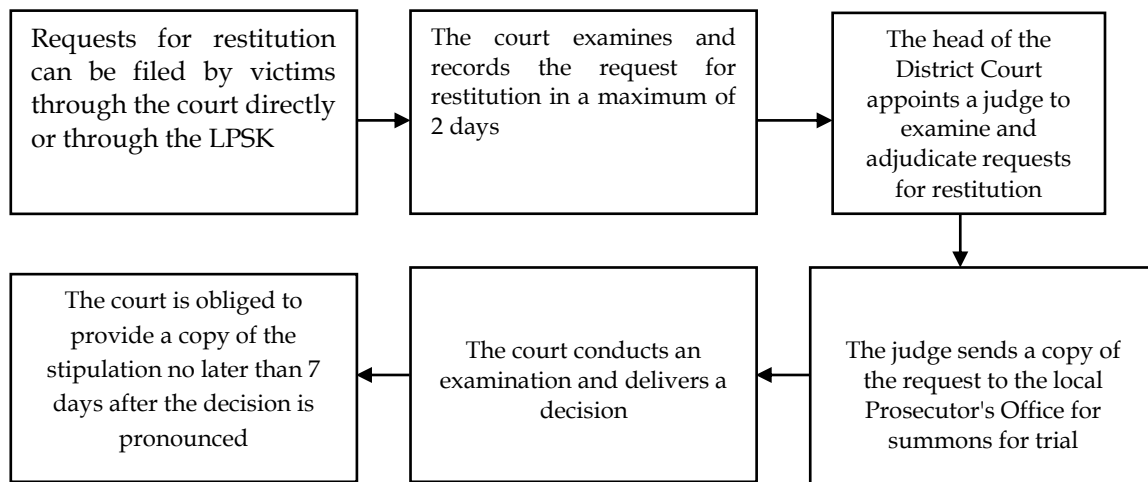


Sources: Analysis from Primary Sources

Restitution functions in the context of victim recovery, including rights regulated by law, namely social status, recovery of assets, and crimes. On the other hand, restoring the victim's rights compensates for losses.¹² The point of view of victimology as science itself demands that the perpetrators of criminal acts be responsible for losses both materially and immaterially.¹³

On the other hand, to fulfill a sense of justice for victims, the Supreme Court has issued Supreme Court Regulation Number 1 of 2022 concerning Procedures for Completing Applications and Granting Restitution and Compensation to Victims of Crime. This is based on legal uniformity; this Supreme Court Regulation can be used for victims to apply for restitution after a decision has been made with the following scheme:

Picture 2. Restitution Application Mechanism After Court Decision



Sources : Analysis from Primary Sources

a. Analysis of Bandung District Court Considerations for Restitution

In the analysis of the restitution considerations of the District Court, the Ministry of Women's Empowerment and Child Protection was ordered to pay restitution, which is different from the prosecutor's demand that the defendant pay restitution. The court concluded that 12 child victims had filed and met the requirements for restitution. Before the court could order restitution, it was necessary to prove that the defendant had committed the crime as charged beyond a reasonable doubt. The district court judge has considered all juridical, philosophical, and sociological aspects to achieve and justify justice per the principles of judicial power. In this aspect, the judge stated that Article 81 paragraph (5) of

¹² N A Adisti and A Mardiansyah, "Permasalahan Pelaksanaan Restitusi Bagi Pelaku Tindak Pidana Perdagangan Orang," *Simbur Cahaya* 26, no. 1 (2019): 1-15, <http://journal.fh.unsri.ac.id/index.php/simburcahaya/article/view/339>.

¹³ Marlina and Zuliah, *Hak Restitusi Terhadap Korban Tindak Pidana Perdagangan Orang*.

Law Number 23 of 2002 concerning Child Protection, even though it was not included in the indictment by the Public Prosecutor, was considered.

The judge's juridical consideration is based on the restitution imposed on the defendant, and the judge believes that it cannot be applied based on Article 67 of the Criminal Code. There is a provision in Article 67 of the Criminal Code as follows:

"If a person is sentenced to death or life imprisonment, no other penalty may be imposed besides the revocation of certain rights, seizure of confiscated property, and the announcement of the judge's decision."

Based on this consideration, the defendant cannot be charged restitution costs because they have already been sentenced to death, except for the revocation of certain rights, confiscation of confiscated property, and announcement of the judge's decision as additional penalties referred to in Article 10 of the Criminal Code. On the other hand, the judge believes that because the defendant cannot be burdened with paying restitution, this is a penalty that has been stipulated outside of the additional punishment referred to in Article 67 of the Criminal Code.

Panel judges state the restitution payment should be charged to someone else. The argument of the judges' panel also added that in Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Victims of Criminal Acts, there is no provision regarding the requirement if the defendant is unable to pay restitution. To determine the party that will be charged with paying the restitution, the judges' panel is of the opinion that the state will bear the burden of paying the restitution, specifically the Ministry of Women's Empowerment and Child Protection. To answer for this issue, further research will explain the sanctions provided for in Article 10 of the Criminal Code, which are as follows:

"Penalties consist of:

- 1). Basic penalties:
 - a) The death penalty
 - b) Imprisonment
 - c) Light imprisonment
 - d) Fines
- 2) Additional penalties:
 - a) Deprivation of certain rights
 - b) Forfeiture of specific property
 - c) Publication of judicial verdict"

On the other hand, based on Government Regulation Number 43 of 2017, there are no compelling rules regarding refunds that cannot be paid. This creates a dilemma with the argument that Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Criminal Acts does not regulate the defendant's inability to pay. In addition, based on the defendant's statement, he cannot pay because his assets have been seized. This creates a legal vacuum for the judges in delivering a verdict.

According to the researcher's analysis, if the law in the legislation is incomplete or unclear, judges are obliged to find or discover it (*rechtsvinding*). According to Sudikno Mertokusumo, the process of creating law by judges is to apply more concrete events.¹⁴ In this case, the judge is required to find a law that can fulfil the sense of justice in society without ignoring

¹⁴ Robert Pranata, Erlyn Indarti, and Tri Laksmi Indraswari, "Penemuan Hukum Dan Paradigma: Suatu Telaah Filsafat Hukum Tentang Proses Peradilan Pidana Di Pengadilan Negeri Kota Semarang," *Diponegoro Law Journal* 5, no. 4 (2016): 1-20, <https://doi.org/https://ejournal3.undip.ac.id/index.php/dlr/article/view/15755>.

the principles of law. Restitution to the state does not actually fulfill the sense of justice in society, although the state is responsible. This is also strengthened by the fundamental differences in the instruments of compensation for victims, which are restitution and compensation, as regulated in the Law. In essence, there are differences between these, including:

Table 4. Difference Between Restitution and Compensation

No.	Restitution	Compensation
1.	Restitution is compensation given to victims or their families by perpetrators or third parties.	Compensation is compensation provided by the state because the perpetrator cannot provide full compensation, which is his responsibility to the victim or his family.
2.	Victims of criminal acts have the right to receive restitution in the form determined by the LPSK, for example, child protection and human trafficking.	Victims who are entitled to compensation are gross human rights violations and victims of criminal acts of terrorism.
3.	Further regulated in various provisions of government regulations.	It is only carried out under the provisions of the terrorism law by <i>mutatis mutandis</i> .

Sources: Analysis from Primary Sources

Restitution and compensation are two different legal concepts often used in compensating for damages or restoring the rights of victims. The fundamental difference between restitution and compensation is that restitution requires the perpetrator of a crime to directly compensate the victim for damages, while compensation is generally provided by other parties, such as the state or insurance institutions, to the victim. Restitution is more focused on the direct financial or material compensation related to the criminal act. In contrast, compensation covers a broader range of damages, such as non-material losses or the restoration of mental health.

According to the researchers' analysis, although judges must make legal findings, they must still consider the principles of the concept of compensation itself. The first-level judges misunderstood the provisions of compensation that have been regulated imitatively for victims of gross human rights violations and terrorism, so in the future, law enforcement regarding restitution for sexual violence must consider Law No. 11 of 2022 on Sexual Violence Crimes

The victim suffered due to the Defendant's actions, and the victim needs protection because the impact felt by the victim is very complex. The impact felt by the victim is double suffering that includes physical, psychological, and social suffering that will be felt for a long time, even a lifetime.

b. Analysis of Bandung High Court Considerations for Restitution

Arif Gosita and Angkasa found that the absence of guaranteed legal protection for victims within the criminal justice system could lead to victimization.¹⁵ It is the responsibility of the state to aid individuals who have suffered from criminal acts. The state is obligated to apply

¹⁵ Hafrida Hafrida, "Restorative Justice in Juvenile Justice To Formulate Integrated Child Criminal Court," *Jurnal Hukum Dan Peradilan* 8, no. 3 (2019): 439, <https://doi.org/10.25216/jhp.8.3.2019.439-457>.

criminal penalties to offenders to maintain the rule of law and prevent vigilante justice. By applying such penalties, it is hoped that offenders can be reformed. The state's justice system, which entails imposing penalties on offenders to rehabilitate and reintegrate them into society, must be equitable and balanced with the justice that victims receive. If the state is involved in enforcing the law against offenders, it should also be accountable for compensating victims for their losses, especially in juvenile criminal justice. Based on Article 69A of Law Number 35 of 2014 concerning Child Protection, it is stated that special protection for child victims of sexual crimes is carried out through efforts:

- 1) Education about reproductive health, religious values, and moral values;
- 2) Social rehabilitation;
- 3) Psychosocial assistance during treatment until recovery; and
- 4) Providing protection and assistance at every level of examination, from investigation prosecution to examination in court.

Restitution functions in the context of victim rehabilitation, including the rights stipulated by law such as social status, property recovery, and justice. On the other hand, victims' rights are recovered to compensate for losses. The victimology perspective as a science demands that criminal offenders be held accountable for both material and immaterial losses.¹⁶ Positive criminal law basically currently regulates provisions regarding compensation known as restitution.

The Panel of Judges' considerations at the appellate level itself can be linked in the perspective of the *Ratio Decidendi* theory. This theory states that the judge must consider all aspects of the main case when making a decision. The panel of Judges has formally and materially examined the considerations at the first level as stipulated by formal criminal law provisions. The judge's guideline for imposing criminal sanctions based on the relative theory caught the researcher's attention.

The Panel of Judges believed that the defendant HW should be given a punishment commensurate with their actions, but the punishment should also have a deterrent effect and serve as an example for others not to commit similar acts to those of the defendant. The imposed punishment is not intended as revenge for the defendant's actions but generally as an effort to protect society from similar future acts and the possibility of the defendant HW repeating their actions.

To impose restitution sanctions against the defendant HW, the Panel of Judges is formally authorized because they have successfully proven the criminal act committed by the defendant HW. This is justified because the Prosecutor in their indictment has imposed an obligation on the defendant to pay restitution in the amount of Rp.331,527,186 to the child victims who have submitted 12 restitution requests out of 13 child victims as regulated in Article 71D of the Child Protection Law.

High court panel judges believes that a crime is not only a violation of criminal law, but also a conflict between individuals that results in losses for the victim, society, and the perpetrator himself. The victim should feel the trial process fulfilling justice for the victim as a form of recovery, where the victim and society can understand how the process takes place and what results from it (equality justice means equal treatment of victims).¹⁷ In general, judges are obliged to consider all juridical, philosophical, and sociological aspects so that the justice

¹⁶ Marlina and Zuliah, *Hak Restitusi Terhadap Korban Tindak Pidana Perdagangan Orang*.

¹⁷ Marlina and Zuliah.

sought, realized, and accountable in the judge's decision is justice-oriented towards legal justice, moral justice, and social justice.¹⁸

Sexual harassment cases that occur in the education sector mostly involve female victims. However, it is possible for men also to be victims of sexual violence. This is reinforced by the role of Child Victims as Biologically Weak Victims. In this case, the defendant is an educator or teacher with unequal power relationships with the Child Victims. Power relations make victims, who are generally female, trapped or difficult to get out of intimidating relationships. It must be recognized that there is a gender-based power imbalance underlying sexual violence against women.¹⁹

According to the researcher's analysis, the high court decision against the defendant HW was appropriate and met the public's sense of justice as regulated in Law Number 48 of 2009 concerning the Judicial. The appellate court believes that the decision would be very unfair if the action was proven, but the victims did not receive justice. The judges must provide a balance to the Defendant and the victims, in addition to the position of sexual violence victims who are very vulnerable in the criminal justice system. Thus, benefits and justice will be obtained for the victims, the Defendant, and the community.

In its considerations, the court believes that restitution payments should be charged to the defendant, where the cost for it if the defendant cannot pay, can be taken from the proceeds of the sale of his property, not charged to the state. The imposition of restitution payments on the state will be a bad precedent for dealing with child sexual violence crimes because perpetrators will feel comfortable not being burdened with compensation payments to the victims.

The restitution payment must be charged to the Defendant, where the cost of it, if the Defendant is unable to pay, can be taken from the proceeds of the sale of their property rather than being charged to the state. Charging the restitution payment to the state sociologically will set a bad precedent in combating sexual violence against children, as the perpetrator will feel comfortable not being burdened with the restitution payment to the victim, and this has the potential to eliminate the deterrent effect of the perpetrator.

3. Legal Protection for Child Victims of Sexual Violence that Does Not Cover Cost of Restitution

Sexual violence is a violation of human rights, a crime against human dignity, and a form of discrimination that must be eliminated. Sexual violence is increasingly prevalent in society, causing extraordinary impacts on the victims. These impacts include physical, mental, health, economic, social, and political suffering. The impacts of sexual violence are also very much alive for the victims. The impact of sexual violence becomes stronger when the victim is part of a community that is economically, socially, and politically marginalized or when they have special needs, such as children and persons with disabilities. To date, there have been laws and regulations that regulate some forms of sexual violence, but they are very limited in form and scope. The available laws and regulations are not fully able to respond to the facts of sexual violence that occur and develop in society.

The crime of sexual violence is very disturbing and has received a lot of attention to uphold human dignity and protection in Indonesia. The government and the DPR (House of Representatives) have enacted the Bill on Sexual Violence Criminal Acts into Law Number 12 of 2022 concerning Sexual Violence Criminal Acts. This enactment signifies the state's

¹⁸ Bambang Sutiyoso, "Mencari Format Ideal Keadilan Putusan Dalam Peradilan," *Jurnal Hukum Ius Quia Iustum* 17, no. 2 (2010): 217–32, <https://doi.org/10.20885/iustum.vol17.iss2.art5>.

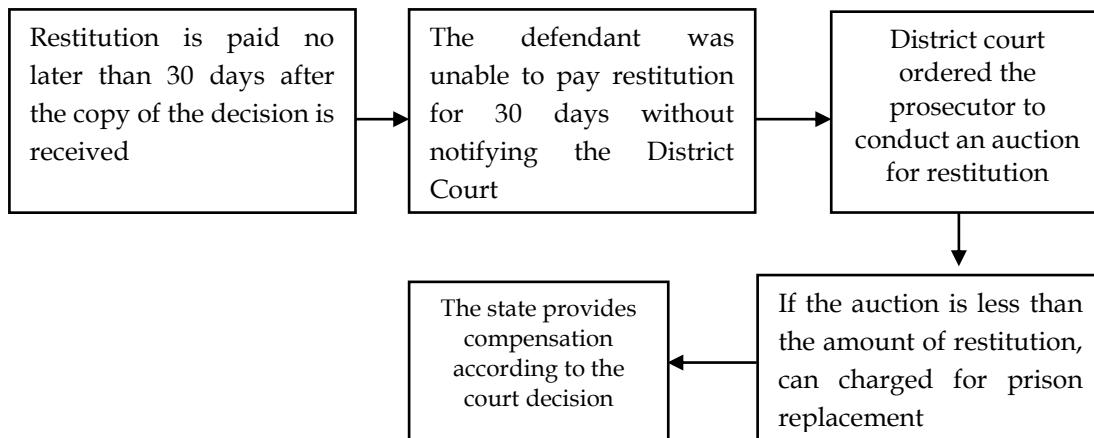
¹⁹ Firda Yanis Hardianti et al., "Urgensi Percepatan Pengesahan Rancangan Undang-Undang Penghapusan Kekerasan Seksual," *Jurnal Suara Hukum* 3, no. 1 (2021): 26, <https://doi.org/10.26740/jsh.v3n1.p26-52>.

responsibility to protect and restore victims of sexual violence comprehensively.²⁰ This law is expected to have more comprehensive arrangements, especially in procedural law that focuses on the victim's interests.

In the Law on Sexual Violence Crimes, sexual violence crimes against children include rape, indecent acts, sexual intercourse with a child, indecent acts against a child, as well as sexual exploitation of a child, acts that violate the victim's will regarding morals, pornography involving a child, or pornography that explicitly contains sexual violence and exploitation as referred to in Article 4 of the Law on Sexual Violence Crimes. Legally, children as victims of sexual crimes are regulated both in the Law on Sexual Violence and the Law on Child Protection. Children have the right to seek restitution through adults. The great attention to the suffering of victims is also reflected in the form of restitution.

On the other hand, in Law Number 12 of 2022 concerning Sexual Violence Crimes, provisions have been regulated regarding the Defendant who is unable to make the restitution payment, which will be explained in the picture below.

Picture 3. Mechanism of Restitution for Defendants who are unable to pay



Sources : Analysis from Primary Sources

This is regulated in Article 35 of the Law on Sexual Violence, which states that if the wealth of the convicted person that has been confiscated is insufficient to cover the cost of Restitution as referred to in Article 33 paragraph (7), the state shall provide compensation for the remaining amount of Restitution owed to the Victim by the court's decision through a victim assistance fund. In the case of the defendant HW, this provision could not be applied considering the non-retroactive principle. Although this is not retroactively applicable, it can be used as an effort to protect victims of sexual violence in the future. There are several processes for confiscating assets, such as the defendant's inability to pay.

D. CONCLUSION

The judge's basis for imposing restitution on a perpetrator of sexual violence in a school environment in the Bandung District Court Decision Number 989/Pid.Sus/2021/PN.Bdg was mistaken in not considering terminology differences between restitution and compensation.

²⁰ Eko Nurisman, "Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022," *Jurnal Pembangunan Hukum Indonesia* 4, no. 2 (2022): 170-96, <https://doi.org/10.14710/jphi.v4i2.170-196>.

District Court judges attempted to establish legal precedent by imposing restitution on the Ministry of Women's Empowerment and Child Protection, based on the legal vacuum in Government Regulation Number 43 of 2017 on the Implementation of Restitution for Children Victim Crime and Article 67 of the Criminal Code, which should still take into account the fundamental distinction between restitution and compensation. On the other hand, Bandung High Court Decision No. 86/Pid.Sus/2022/PN.Bdg, considered both legal and non-legal aspects of the imposition of restitution on the defendant HW were carefully, and the judge's reasoning in the *ratio decidendi* took into account the potential for repeated offenses and fulfilled the community's sense of justice by imposing restitution on the perpetrator.

Even though the defendant cannot pay compensation to the victim, especially the crime of sexual violence, it has been stipulated that if the convict's assets are confiscated, it is not enough to cover the cost of restitution as intended. In Article 33 paragraph (7), the state is obliged to provide compensation for the remaining amount of Restitution owed to Victims in accordance with a court decision through victim assistance funds. This is also rational based on the state's obligation to protect children under the Child Protection Act.

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