

PROVIDING RESTITUTION RIGHTS FOR CHILD VICTIMS OF SEXUAL VIOLENCE OUTSIDE THE PROSECUTOR'S DEMANDS

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Abstract. Although sexual violence often occurs against underage children, not many people understand or are sensitive to this issue. They often perceive it merely as a moral offense rather than a crime against humanity, resulting in repeated victimization of the survivors. One of the efforts that can be made to protect and restore the rights of child victims is through obtaining restitution. However, the implementation and fulfillment of restitution rights are not fully realized in all cases of sexual violence against children. This can happen because there is no obligation for public prosecutors to include restitution in their demands and there is no forced effort to ensure restitution rights. Nevertheless, restitution is a right that should be granted to the child victims, and its application should be maximized in Indonesia's criminal justice system. Judges should rule for additional punishment in the form of restitution even without a request, as restitution is often overlooked. This uncertainty in the legal process regarding restitution implementation does not provide a solution for the loss of restitution rights for child victims of sexual violence. Therefore, other efforts must be undertaken to ensure that child victims of sexual violence receive their rightful restitution.

Keywords: restitution; demand letter; sexual violence; child

I. INTRODUCTION

Minister of Women's Empowerment and Child Protection, Bintang Puspayoga, stated that the number of sexual violence cases experienced by children recorded in the Online Information System for Women and Child Protection (Simfoni) throughout 2021 was 7,004 cases, which means it constituted 58.6% of the 11,952 cases of violence against children. [1] One of the efforts that can be made in the protection and recovery of the rights of child victims is to obtain restitution. Based on Article 1 of Law Number 31 of 2014 Concerning Amendments to Law Number 13 of 2006 Regarding Witness and Victim Protection, it is explained that restitution is compensation given to the victim or their family by the perpetrator or a third party. According to Forensic Psychology Expert, Reza Indragiri A, he believes that restitution is not a form of deterrent effect but rather a means to improve the victim's life. [2]. However, the implementation and fulfillment of this restitution right is not fully carried out in all cases of sexual violence against children. The biggest problem in fulfilling the right to restitution is that the victim does not understand their rights because the prosecutor and legal advisor do not inform the victim about it, as they do not want to be bothered. [3] In fact, restitution is one form of criminal accountability (liability based on fault) besides body criminal law that needs to be fulfilled in order to achieve the three objectives of law: justice, certainty, and utility. [4] Therefore, the application of the concept of restitution rights should ideally be implemented to the fullest in the Indonesian criminal justice system.

However, in reality, prosecutors often overlook or even ignore the restitution rights of child victims in the

indictment letters submitted during the court process [5]. This is because there is no obligation for the prosecutor to include restitution in their indictment letter. According to the law, prosecutors are only required to inform the victim about their restitution rights. As in the rape case in Larantuka where the victim was 14 years old girl and had been raped approximately 8 (eight) times until the victim became pregnant with the results of a post mortem et repetum and based on the testimony of the victim's child and witnesses that the victim's child never wanted this intimate relationship and was always forced with physical threats, giving money and promising to marry the victim's child if the victim's pregnant child is not requested for restitution in the lawsuit filed by the public prosecutor [6]. However, in his decision the judge still decided on restitution of Rp. 218,800,000.00- (two hundred eighteen million eight hundred thousand rupiah) even though there was no application and was not contained in the previous claim letter. In the ruling, the panel of judges also based their decision on the book "Bunga Rampai Kebijakan Hukum Pidana" concerning the purpose of punishment, which is to reduce the high rate of indecency crimes in East Flores Regency. It is necessary to have a ruling so that others/the defendant themselves do not repeat or are influenced by their actions. Additionally, in filing for restitution, there is a procedure through the LPSK (Witness and Victim Protection Agency in Indonesia) which could take quite a long time waiting for confirmation from the LPSK. Also, the LPSK is not part of the criminal justice system, so it isn't a law enforcement agency with executorial authority. [7] In accordance with the power of the judiciary in its freedom to exercise its authority, judges' decisions must also consider the

rights of crime victims. Given the vital role and position of victims in the criminal justice process, the rights and protection of victims should be prioritized.

Even in cases where there is no governing law, in order to achieve the justice desired by the community, Article 5, paragraph (1) of Law Number 48 of 2009 concerning Judicial Power explains that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live within the community. However, the basis for making a decision is that the ruling issued by the judge must still be bound by relevant facts and the legal norms that form the legal foundation of the decision. This certainly does not fulfill the rights of the child victim which should be met and has been regulated by the state.[8] If restitution cannot be carried out during the trial process or after the court's decision has been executed, it can still be resubmitted through the LPSK (Witness and Victim Protection Agency in Indonesia).[9] Thus, if grounded in legislation, the judge does not need to exceed his authority in order to fulfill the rights of the victim.

II. RESEARCH METHODS

"The method used in this writing is the normative juridical approach method, which will analyze based on secondary materials as the main source. The referred primary materials are related to Decision Number 41/Pid.Sus/2020/PN.Lr and the applicable laws and regulations such as Undang-undang Nomor 13 Tahun 2006 Tentang Perlindungan Saksi dan Korban, Undang-undang Nomor 31 Tahun 2014 Tentang Perubahan Undang-undang Nomor 13 Tahun 2006 Tentang Perlindungan Saksi dan Korban, Peraturan Pemerintah Nomor 43 Tahun 2017 tentang Pelaksanaan Restitusi Bagi Anak yang Menjadi Korban Tindak Pidana, Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual, and Perma Nomor 1 Tahun 2022 tentang Tata Cara Penyelesaian Permohonan dan Pemberian Restitusi dan Kompensasi kepada Korban Tindak Pidana. The secondary source is such as literature, scientific works, expert opinions, journals and research results related to research..

III. RESULTS AND DISCUSSION

Legal Consequences in the Decision of Granting Restitution Outside the Indictment in Cases of Sexual Violence Against Minors

This certainly does not fulfill the rights of the child victim which should be met and has been regulated by the state. According to Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Criminal Acts, restitution can be requested either before the verdict or after. Based on Article 5 of Government Regulation Number 43 of 2017, if done before the verdict, it can be carried out during the investigation or prosecution phase, and if done after the verdict, it can be submitted through the LPSK (Witness and

Victim Protection Agency in Indonesia) and adjusted to the existing legislation. However, in a ruling by the Larantuka District Court Number 41/Pid.Sus/2020/PN.Lrt., the judge decided to grant restitution without prior request, neither during the investigation nor in the indictment. Essentially, according to the Supreme Court of the Republic of Indonesia Decision Number 589 K/Pid/1984 dated October 17, 1984, a judge cannot alter the indictment and impose a penalty on the defendant for acts not previously accused by the Public Prosecutor in his indictment. (Putra, 2017: 22) Thus, decisions to grant restitution outside the indictment can be considered *ultra petita*. This is a dilemma because granting restitution outside of the indictment certainly restores the rights of the victim that were previously unmet due to certain aspects. Although the value and amount of restitution provided cannot fully compensate, restitution can alleviate the burden of suffering experienced by the victim. Restitution in this case can help alleviate the cost burden of raising their child; moreover, these funds can assist in psychological counseling or other long-term or short-term needs. Granting restitution outside the indictment is deemed to be within the judge's authority to explore, follow, and understand the legal values and sense of justice that live within the community.

When viewed from the perpetrator's perspective, granting restitution outside of the indictment is considered unfair. This is because the perpetrator also has the right to defend themselves and prove the allegations made against them. With a restitution decision outside of the indictment that the judge uses as a foundation to rule, the judge also violates the Criminal Procedure Law, Article 182 paragraph (4), which stipulates that a judge, when passing a verdict, must be based on the prosecutor's indictment. The judge's own decision must also provide justice for both parties while upholding the certainty of the law, even though legal certainty and justice often clash. Based on Article 6 paragraph (2) of Law Number 48 of 2009 concerning Judicial Authority, it states that:

" Tidak seorang pun dapat dijatuhi pidana, kecuali apabila pengadilan karena alat pembuktian yang sah menurut undang-undang, mendapat keyakinan bahwa seseorang yang dianggap dapat bertanggung jawab, telah bersalah atas perbuatan yang didakwakan atas dirinya."

Furthermore, if it's based on the principle of *litis contestatio*, where the indictment is the foundation for the judge's examination, decisions made outside of the indictment can result in being void by law. This is also regulated in several provisions, including Article 197 paragraph (1) letter c of the Criminal Procedure Code, which is then affirmed in Article 197 paragraph (2) of the Criminal Procedure Code, and the Supreme Court of the Republic of Indonesia Decision Number 321 K/Pid/1983 dated May 26, 1984, and Supreme Court of the Republic of Indonesia Decision Number 694 K/Pid/1984 dated May 15, 1994. Therefore, if further examined based on the procedures and methods of implementing restitution in Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Criminal Acts, this cannot be justified because there's no indictment, providing no

foundation for the judge to decide. However, various stages through investigation, verification, and calculation through the LPSK, inclusion of restitution in the indictment, up to the indictment letter, if concluded, are useful to complete valid evidence in calculating the losses suffered by victims to achieve justice for both victims and perpetrators. However, if this evidence isn't used to fulfill the victim's right to restitution compensation, then such evidence gathering will also be deemed futile. If restitution continues to be ignored, there is a possibility that in other regions, investigators and prosecutors will also frequently neglect issues related to victims' rights, namely restitution. This oversight also means overlooking the legal fact that victims have suffered material and immaterial losses, proven through a medical examination or other evidence to prove a crime. This also means that victims have met the criteria to receive restitution as part of their rights. This is further emphasized in Article 71D paragraph (1) of Law 35/2014, which states:

"Setiap Anak yang menjadi korban sebagaimana dimaksud dalam Pasal 59 ayat (2) huruf b, huruf d, huruf f, huruf h, huruf i, dan huruf j berhak mengajukan ke pengadilan berupa hak restitusi yang menjadi tanggung jawab pelaku kejahatan."

This is also confirmed by Mr. Syahrial, an expert from LPSK, during an interview stating that, "(as a result of the decision on restitution outside the indictment) there will be no legal certainty and law and order. In fact, during the trial, the judge can inform the victim as a witness about their right to file for restitution to avoid violating procedural legal norms. Any negligence by the public prosecutor or investigator in intentionally not informing the victim of their right to restitution is also considered a violation of Article 40 of Law 31/2014, which states:

"Setiap Orang yang menyebabkan dirugikannya atau dikurangnya hak Saksi dan/atau Korban sebagaimana dimaksud dalam Pasal 5 ayat (1), Pasal 6 ayat (1), Pasal 7 ayat (1), atau Pasal 7A ayat (1) karena Saksi dan/atau Korban memberikan kesaksian yang benar dalam proses peradilan, dipidana dengan pidana penjara paling lama 3 (tiga) tahun dan pidana denda paling banyak Rp100.000.000,00 (seratus juta rupiah)."

Yet, there is a regulation, Government Regulation Number 43 of 2017 on the Implementation of Restitution for Children who are Victims of Crime, aimed at technically simplifying the application process and providing maximum protection and increased attention from law enforcement to victims of crimes against minors. The multitude of rules that outline how restitution is a right that can be granted to victims does not influence the practice of neglecting restitution. The lack of further education regarding the implementation of restitution to victims results in the loss of child victims' rights as a form of responsibility for the suffering they have endured. Fundamentally, the judge's decision in the Larantuka Court Decision Number 41/Pid.Sus/2020/PN.Lr remains consistent with relevant facts, namely the presence of a Visum Et Repertum result and the defendant's acknowledgment of committing rape eight times until the victim became pregnant.

There is also a legal basis in the decision, in line with Article 5 paragraph (1) of Law Number 48 of 2009 on Judicial Power, which explains that Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live within the community. However, in its application, if based on the principle of legality, the additional criminal decision in the form of restitution outside of the indictment and the prosecution's demands cannot be justified as it does not align with the mechanism set out in regulations. From an interview with Judge Mr. Bagus Sujatmiko, S.H, M.H, he stated that "the majority of the community's economic condition being lower to middle class makes victims vulnerable due to parents who do not have money. Thus, their lives would become more difficult if they had to settle all of that, so restitution can ease their burden, and the perpetrators can also make up for their mistakes." It would be better if the implementation of restitution was carried out according to the existing mechanism. Thus, there would be no feeling of injustice. If restitution is done following the mechanism, the perpetrator can defend themselves in court, and the victim will still receive the restitution they are entitled to. Besides being a right of the victim, restitution can also be a lesson and rehabilitation for perpetrators to think twice before committing a crime. Long-term suffering will not only be experienced by the victim, but the perpetrator will also always have long-term consequences to fulfill.

Efforts to Implement Restitution for Underage Victims of Sexual Violence Not in Accordance With the Indictment

Issues surrounding sexual violence against underage victims present a complex challenge to resolve. This complexity is evident in cases where victims remain dissatisfied with court decisions. Such dissatisfaction arises because individuals who become victims of crimes often experience further victimization due to their involvement in the legal process, which is perceived as burdensome and can potentially affect the effectiveness and efficiency of law enforcement officers' work. In a decision by the Larantuka Court under case number 41/Pid.Sus/2020/PN.Lr, an additional penalty in the form of restitution was granted to restore the rights of the victim. However, this restitution was not requested in the indictment or in the prosecution's demand letter. The court's decision was based on the good faith shown by witness Karolus, indicating that the Defendant would take responsibility for the Child Victim. Yet, to ensure this good intention does not cease after the Defendant completes their prison sentence, it was legally reinforced through the panel of judges' decision. If a court's decision is rendered outside of what's stipulated in the indictment, it may be deemed void by law. Should this occur, the possibility arises that the child victim's right to restitution might also be lost. In resolving such a situation, if the decision is nullified by law, restitution can be re-included in a renewed indictment, in accordance with procedures set by legislation. Indictments are drawn up based on statements from the accused, witnesses, and evidence such as medical examinations, serving as guidelines

for drafting prosecution demands, detailing facts presented during trials, including proven losses.

The primary issue lies in the absence of legislation mandating the public prosecutor to request restitution. Thus, in the indictment and prosecution demand letter, restitution for victims of sexual offenses often goes unmentioned. Although restitution is a victim's right as a form of criminal liability (liability based on fault) in addition to corporal punishment, the absence of such a rule illustrates the insufficient application of the concept of restitution rights, which should be maximally applied in Indonesia's criminal justice system. If a ruling is nullified due to its inconsistency with the indictment and the decision exceeds the charges, it will undoubtedly prolong the suffering of the victim, who would have to testify twice to obtain their rights. Furthermore, there is a chance that restitution may still not be included even after going through the court process twice. As a result, the process of fulfilling the right to restitution is not as effective as it should be. This situation further burdens the law enforcement officers as they have to handle the case twice. Especially ambiguous procedures burden the victim as they have to navigate a perceived cumbersome legal process. With this in mind, victims sometimes feel resigned and reluctant to continue the process to apply for restitution, which is their right from the outset.

Although an indictment up to the charges might not include a request for restitution, restitution can still be pursued and implemented post-verdict by submitting a request through LPSK. As stipulated in Article 5 paragraph (3) of PP 43/2017: "Besides through the investigation or prosecution stage as referred to in paragraph (2), Restitution requests can be submitted through LPSK in accordance with the provisions of the legislation."

However, if the restitution request is made through LPSK after the verdict is read, it will take a longer time to obtain the restitution rights due to various LPSK procedures, and the process seems time-consuming. Most people prefer to settle matters quickly due to fatigue or lack of funds to deal with ongoing legal issues. Yet, if law enforcement paid more attention to victims' rights, victims could resolve their cases more swiftly and gain their full rights. Looking at the basis of decisions, rulings issued by judges must remain bound to relevant facts and legal principles forming the foundation of their decisions. In their verdicts, judges are also obligated to seek the absolute truth according to criminal procedure law, ensuring the legal implications of their decisions remain valid as long as no legal remedies are pursued. Judges and constitutional judges also have the right to explore (augment) and consider restitution rights as a form of living justice in the community, which is one form of judicial power as in Article 5 Paragraph (1) of UU 48/2009:

*"Hakim dan hakim konstitusi wajib **menggali**, mengikuti, dan memahami nilai-nilai hukum dan rasa keadilan yang hidup dalam masyarakat."*

This is supported by a statement from Mr. Bagus Sujatmiko, S.H, M.H, as the Judge of PN Lantuka in an interview, stating that the additional penalty in the form of restitution remains in effect as long as it is decided by the

judge because the Public Prosecutor is bound by the judge's decision. In the Verdict of Larantuka District Court Number 41/Pid.Sus/2020/PN.Lr, it is consistent with trial facts that a sexual violence crime against the Child Victim occurred and was committed repeatedly, making it a case where the child has the right to restitution. However, the decision does not align with the application procedure in Article 5 paragraph (2) which states that:

*"Permohonan Restitusi kepada pengadilan sebagaimana dimaksud pada ayat (1) yang diajukan sebelum putusan pengadilan, diajukan melalui tahap: a. **penyidikan**; atau b. **penuntutan**."*

But the restitution request wasn't submitted through either of these stages. Although the decision wasn't made through the investigation or prosecution stage, the absence of legal remedies ensures the decision becomes legally binding and has the right to be executed in accordance with the restitution application procedure. In the absence of legal remedies, the restitution procedure will comply with Article 19 of PP 43/2017, in which the court registrar will send a copy of the legally binding court decision containing restitution to the victim. Subsequently, the prosecutor will execute the court's decision by making a record of the court's decision's implementation to the perpetrator to implement restitution. Furthermore, based on Article 21 paragraph (1) of PP 43/2017, which regulates how long restitution can be paid after the verdict:

*"Pelaku setelah menerima salinan putusan pengadilan dan berita acara pelaksanaan putusan pengadilan wajib melaksanakan putusan pengadilan dengan memberikan Restitusi kepada pihak korban **paling lama 30 (tiga puluh) hari** sejak menerima salinan putusan pengadilan dan berita acara pelaksanaan putusan pengadilan."*

The issues in fulfilling restitution are not just limited to the inclusion of a restitution request in the charges but also in the restitution payment phase. Criminal offenders often prefer not to provide restitution to victims of their crimes rather than granting restitution to crime victims. For example, reasons for not paying restitution range from insufficient assets to cover restitution. In cases of sexual violence, there is also no enforcement action if a convict commits sexual crimes against minors. Article 30 of the Penal Code (KUHP) itself also does not provide a time limit for when fines should be paid. All developments in restitution procedure regulations are not accompanied by policies on the consequences or results that can occur if restitution is not paid. In fulfilling restitution rights, the process does not only stop after the verdict is read. Hence, there's a lack of effectiveness in a restitution decision.

Procedures regulating the restitution granting method have indeed been arranged to facilitate law enforcement or victims in applying it. However, the absence of an obligation to include restitution, enforcement in payments, and complex procedures, makes most victims feel that restitution requests are cumbersome and that the court process is often overlooked. Yet, it is a right that victims should rightfully receive as a form of perpetrator's responsibility for their actions.

Victims should not be burdened with numerous problems, such as lengthy administrative procedures and waiting for their rights to be paid. The absence of regulations governing the obligation to include restitution as a victim's right and enforcement in paying restitution will complicate matters, often being overlooked and considered 'troublesome'. The existence of legislation regulating these two matters will encourage law enforcement to pay more attention to restitution rights and also force perpetrators to fulfill their restitution obligations.

IV. CONCLUSION

The judge's authority in fulfilling the provision of restitution, when viewed from the legislation, is only to decide based on the restitution application. The decision to grant restitution outside of the indictment in cases of sexual violence against minors can result in being void by law due to non-conformity with the procedure and inconsistency with the accused act. This is because of the lack of complete evidence and the inability of the accused to defend themselves and provide proof of the allegations, which can harm the sense of justice. However, looking at the fact that restitution is often ignored results in the loss of the right to restitution, leading to legal uncertainty about the restitution implementation procedure. To resolve the restitution issue, if the decision is inconsistent with the indictment and can be void by law, efforts can be made to resubmit it and include it in the indictment or claim letter. If it is still not included, a restitution request can be made through the LPSK (Witness and Victim Protection Agency in Indonesia) after the verdict is read. However, in the effort to make the payment, there is no legislation that can provide protection because the perpetrators often choose not to provide restitution to the victims of crime. Thus, it does not guarantee for the child victim that they can receive restitution post-court verdict.

REFERENCES

- [1] Ardhito Ramadhan, "Kementerian PPPA: 11.952 Kasus Kekerasan terhadap Anak Terjadi Sepanjang 2021, Mayoritasnya Kekerasan Seksual", *Kompas*. 2022
- [2] Aryo Putranto Saptohutomo, "Pakar Sebut Restitusi Korban Kekerasan Seksual Dibebankan ke Pemerintah Bentuk "Hukuman" bagi Negara", *Kompas*. 2022
- [3] Bambang Waluyo, *Viktimologi, Perlindungan, Korban, dan Saksi*, Jakarta : Sinar Grafika, 2011.
- [4] Miszuary Putri, *Pelaksanaan Restitusi bagi Anak yang Menjadi Korban Tindak Pidana Sebagai Bentuk Pembaruan Hukum Pidana Berdasarkan Peraturan Pemerintah Nomor 43 Tahun 2017*, SOUMATERA LAW REVIEW, 2019, Vol. 2.
- [5] Ramadhan Yekso Yudanto, *Permohonan Restitusi dalam Surat Tuntutan Jaksa Sebagai Bentuk*

- Perlindungan Hukum Bagi Korban Tindak Pidana Perdagangan Orang*, Universitas Brawijaya, 2015.
- [6] Putusan Pengadilan Larantuka Nomor 41/Pid.Sus/2020/PN.Lr.
- [7] Fauzy Marasabessy, *Restitusi Bagi Korban Tindak Pidana : Sebuah Tawaran Mekanisme Baru*, Jurnal Hukum dan Pembangunan, 2015, Vol. 45.
- [8] M. Yahya Harahap, *PEMBAHASAN PERMASALAHAN DAN PENERAPAN KUHP : Pemeriksaan Sidang Pengadilan*, Bandung, Kasasi, dan Peninjauan Kembali (Edisi Kedua), Jakarta : Sinar Grafika, 2016.
- [9] P. Pemerintah. "Peraturan Pemerintah Nomor 43 Tahun 2017 tentang Pelaksanaan Restitusi Bagi Anak yang Menjadi Korban Tindak Pidana"