

## State Responsibility in Providing Legal Protection against Child Victims of Sexual Violence

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### Abstract

*The background of this study discusses the state's responsibility to provide legal protection for children who have been sexually abused, while social norms still reveal the blurred norms between the rules and the implementation. The problem problem with this study is the urgency of the state's responsibility to provide legal protection to child victims of sexual abuse and state responsibility to provide legal protection against child abuse. The approach method used in this study is a normative-law study, which is a study that examines law regulations, legal principles, and also a theory or doctrine of law. The study also employed a constitutional approach and a case approach. The conclusion of this study is the rights of children who are victims of criminal ACTS accommodated by 2017 government government regulation no. 43 year 2017 on the implementation of restitution to children who are victims of criminal crimes, and there is yet another flawless flaw in the forced efforts of the implementation of restitution by the perpetrator to the child who has committed the crimes, If the perpetrator fails to render a court ruling of consistent force.*

### Keywords

state responsibility; child;  
sexual abuse; legal protection;  
restitution



## I. Introduction

Children are a group that is very vulnerable to sexual violence crimes because they are always positioned as weak or helpless figures and have a high dependence on the adults around them. This is what makes children helpless when threatened not to tell what happened. In almost every case revealed, the perpetrator is someone close to the victim. Not a few of the perpetrators are people who have dominance over the victim, such as teachers, uncles, biological fathers, stepfathers, and neighbors.

Victims who incidentally are children should receive protection, not to receive treatment that can have a psychologically traumatic impact that lasts until he is an adult for the rest of his life and makes him lose his future due to the trauma. In fact, it is not uncommon for victims as adults to become perpetrators of criminal acts of sexual violence as a result of deep psychological trauma, and will even continue to be imagined in their memories when the perpetrator's actions are carried out with violence so that it will bring up the nature of revenge that is difficult to remove. As a result of this vengeful nature, it is possible for children to become perpetrators of sexual violence when they grow up, because it is not uncommon for perpetrators of sexual violence to also be victims of sexual violence as a child.

To protect children's rights, governments around the world including Indonesia have agreed to promise equal rights for all children by adopting the United Nations Convention (hereinafter abbreviated as UN) on children's rights. The convention, which was born in 1989, regulates various things that each child must do. Among them are the rights to be able to grow up healthy, go to school, be protected, have their opinions heard and be

treated fairly. The Convention on the Rights of the Child is born from an awareness that children according to their nature are vulnerable, dependent, innocent and have special needs. Therefore, children need special care and protection, both physically and mentally.

The challenge in child protection in Indonesia is to realize the fulfillment of children's rights but at the same time being able to provide protection to children from the dangers that lurk them, which in turn can keep children from the threat of deprivation of children's rights. For this reason, the state is obliged to fulfill children's basic rights to obtain survival, be treated fairly, be given special protection both physically and mentally, and be given the right to get optimal growth and development.

The purpose and rationale of legal protection for children cannot be separated from the goal of how to realize children's welfare as an integral part of realizing social welfare as a whole, as also stated in Article 28 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that every child has the right to survival, grow and develop and have the right to protection and discrimination. Thus, the Government of Indonesia not only recognizes the rights of children that need to be protected, but also recognizes the responsibility of the state to ensure the fulfillment of children's rights.

The relationship between the victim of a crime and the state, which in this case is represented by the police and prosecutors, is described as an indirect relationship that does not cause real legal consequences. Very different when compared with the relationship between the suspect (perpetrator) and his legal advisor (advocate) where the relationship between these two subjects is woven into a direct relationship so that it will produce definite and directed legal consequences.

A scene that is often encountered is when a victim who has been examined in court looks as if he is no longer the one who has been harmed. There is a tendency of omission from the state towards victims of criminal acts, thus causing this to be very ironic considering how important it is to provide compensation for the constitutional rights of victims who have been harmed by the perpetrators.

Mojokerto District Court Decision Number: 69/Pid.Sus/2019/PN. Mjk on April 25, 2019 resulted in a law that was only oriented to the perpetrators. So far, victims are only represented by the state as recipients of suffering, which will retaliate against the perpetrators who are implemented with criminal sanctions that have been regulated by laws and regulations. Children as victims of sexual violence crimes here are not very popular to be considered, because the concentration of punishment is only given to the perpetrators, which indicates the completion of the problem.

In an interview with Suwanti as the victim's mother conducted by researchers on Friday, October 29, 2021, it was shown that there is no state responsibility in providing legal protection to children who are victims of sexual violence after a court decision. The legal protection in question is not carrying out medical or social rehabilitation, the costs of which are borne by the state, but instead it becomes an additional burden for the families of victims of sexual violence.

Based on the background that has been described, the researchers conducted a study with the title: "State Responsibility in Providing Legal Protection against Children Victims of Sexual Violence".

## **II. Research Method**

### **2.1 Types of Research**

This research is juridical normative, namely legal research carried out by examining library materials or secondary data as the basis for research by conducting a search on regulations related to the problems discussed in order to answer legal issues faced in juridical aspects and their implementation.

The problem approach used in this study is divided into three parts, including:

- a. Legislative Approach (Statute Approach)
- b. Conceptual Approach
- c. Case Approach

### **2.2 Theoretical Basis**

The theoretical basis or the so-called theoretical framework is a framework of thought or theoretical opinion, a thesis on a case or problem that is the subject of comparison, theoretical guidance. Later, to be able to answer the legal probematics in this thesis, the author will use 2 (two) theories, namely:

#### **State Responsibility Theory**

State responsibility is a fundamental principle in international law which is sourced from the doctrines of international legal experts. State responsibility arises when there is a violation of an international obligation to do something, whether that obligation is based on international agreements or based on international customs.

In addition, state responsibility arises as a result of the principle of equality and sovereignty of the state contained in international law. Sugeng Istanto provides an understanding of state responsibility by using the term state responsibility. According to him, state responsibility is the state's obligation to provide an answer which is a calculation of something that happened and an obligation to provide remedies for losses that may be caused. Legal Protection Theory

Philipus M. Hadjon is of the view that the principle of legal protection for the people against government actions rests and originates from the concept of recognition and protection of human rights because historically in the West, the birth of concepts regarding the recognition and protection of human rights was directed to restrictions and placing obligations on society and the government."

Legal protection for every Indonesian citizen without exception can be found in the 1945 Constitution of the Republic of Indonesia, for that every product produced by the legislature must always be able to guarantee legal protection for everyone, even must be able to capture the aspirations of law and justice that develop in society. This can be seen from the provisions governing the existence of equal legal status for every citizen.

Legal protection can also be interpreted as an action or effort to protect the community from arbitrary actions by authorities that are not in accordance with the rule of law, to create order and peace so as to enable humans to enjoy their dignity as human beings.

In the Unitary State of the Republic of Indonesia (hereinafter abbreviated as NKRI), the concept of legal protection cannot be separated from the protection of human rights.

Legal protection is a description of the workings of the legal function to realize legal goals, namely justice, expediency and legal certainty. Legal protection is a protection given to legal subjects in accordance with the rule of law, whether it is preventive (prevention) or

in a repressive (coercive) form, both written and unwritten in the context of enforcing legal regulations.

The theory of legal protection developed by Philipus M. Hadjon is basically that "... preventive legal protection aims to prevent disputes from occurring while on the contrary repressive legal protection aims to resolve disputes".

According to Satjipto Rahardjo, in the context of legal protection, law exists in society to integrate and coordinate interests that may collide with one another. The coordination of these interests is carried out by limiting and protecting these interests.

Meanwhile, Yovita Arie Mangesti stated that legal protection must be based on human values, namely the protection of human dignity which is carried out by the entire community holistically, through harmonious, responsive, adaptive legal postulates.

The theory of legal protection will be used as an analytical tool to discuss the formulation of the problem of state responsibility in providing legal protection for children who are victims of sexual violence.

### **III. Results and Discussion**

#### **The State's Responsibility in Providing Legal Protection for Children Victims of Sexual Violence**

##### **3.1 Restitution as a Form of State Responsibility in Providing Legal Protection for Children Victims of Sexual Violence**

In the settlement of criminal cases, it is still found that victims of sexual violence crimes lack adequate legal protection, both immaterial and material protection. This raises the classic problem, that criminal justice as the basis for resolving criminal cases does not recognize the existence of crime victims as justice seekers.

According to Andi Hamzah, in a criminal case, the victim of a crime is actually the party who suffers the most. In case resolution criminal law, often the law puts too much emphasis on the rights of the suspect or defendant, while the rights of the victim are ignored, one of which is the right to compensation (restitution) which is a right that requires someone who has acted detrimental to another person to pay a sum of money or goods to another person. harmed, so that the losses that have occurred are considered to have never occurred. Compensation is actually a civil law domain, but to realize the principle of a simple, fast, and low-cost justice this compensation can be combined with a criminal examination.

Criminal acts against children not only cause physical and psychological suffering that affect the growth and development and quality of life of children but also cause material and immaterial losses to the family. So far, if there is a crime against a child, the victim does not only bear the material losses (which can be calculated) and immaterial losses (which cannot be calculated) including losses in the form of shame, loss of self-esteem, low self-esteem, and/or excessive anxiety. traumatic. This loss should also be borne by the perpetrator in the form of restitution as a form of compensation for the suffering experienced by the child who is the victim of a crime or the victim.

Regarding victims of criminal acts of sexual violence against children themselves, it is necessary to know that basically there are forms or models of protection that can be given to children as victims of sexual violence, one of which is the provision of restitution. Restitution is the payment of compensation charged to the perpetrator based on a court decision with permanent legal force for material and/or immaterial losses suffered by the victim or his heirs.

The restitution that must be paid by the perpetrator of a criminal act is intended in addition to compensation for loss of property, compensation for suffering as a result of a crime, and/or reimbursement of medical and/or psychological treatment costs as a form of responsibility for the crime committed, it is also intended to relieve suffering and enforce justice for children who are victims of criminal acts as a result of criminal acts committed by perpetrators of criminal acts.

Provisions regarding compensation or restitution are contained in several laws. Among them are Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection, Law Number 13 of 2006 concerning Protection of Witnesses and Victims, Law no. 26 of 2000 concerning the Human Rights Court and Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Crime.

Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Become Victims of Crime is a mandate from Article 59 and Article 71 D of the Child Protection Law, where this Government Regulation specifically regulates the procedure for submitting restitution to perpetrators through the courts. This government regulation consists of 4 (four) Chapter 23 (twenty three) Articles, namely: CHAPTER I General Provisions consisting of 1 (one) Article, namely Article 1; CHAPTER II Procedures for Filing an Application for Restitution which consists of 17 (seventeen) articles, namely from Article 2 to Article 18; CHAPTER III Procedures for Granting Restitution which consists of 4 (four) articles, namely from Article 19 to Article 22; and CHAPTER IV. Closing Provisions which consist of 1 article, namely Article 23. The article that regulates restitution for victims of criminal acts is Article 2 paragraph (1) which states "Every child who is a victim of a crime has the right to receive restitution". And the provisions of Article 3 regulate the form of restitution that will be received by victims who apply for restitution.

The regulation of restitution in this government regulation regulates starting from the understanding, procedures for submitting applications and procedures for granting restitution to children who are victims of criminal acts, in this case especially victims of sexual violence (rape). Article 1 point 1 states that restitution is "payment of compensation charged to the perpetrator based on a court decision with permanent legal force for material and/or immaterial losses suffered by the victim or his heirs". The technical arrangements for restitution for child victims of crime according to this government regulation are in Chapter II and Chapter III.

Based on the provisions of Chapter II which consists of 17 articles in this government regulation, it can be clearly seen that the makers of these government regulations have seriously thought about the rights of children who are victims of crime, because each article in Chapter II explains starting from the category of children who are victims of criminal acts which are entitled to restitution, filing a request for restitution by the victim, submitting a request for restitution made in writing in Indonesian with a stamp duty addressed to the court at the stage of investigation and prosecution, notification of the right to apply for restitution by investigators or public prosecutors, the provisions contained in the request for restitution after notification, the period for studying the request for restitution by the investigator or public prosecutor and the period for completing if there is a shortage, calculating the amount of restitution by the Witness and Victim Protection Agency (hereinafter referred to as LPSK) based on the request of the investigator or public prosecutor, filing for restitution at the time of diversion, up to the prosecution's provisions. generally include the request for restitution in the letter of claim in accordance with the facts of the trial.



That what is contained in Chapter II and Chapter III is the result of a policy-oriented approach because in essence it is part of a policy step or "policy" and at the same time a value-oriented approach ( value-oriented approach) because every policy or "policy" contains value considerations. This value is stated in the form of the formulation of this government regulation which is clearly described in article by article. Because when viewed from the point of view of the Criminal Code, namely Articles 14c and 14d, restitution or compensation is more oriented to the perpetrator and from the point of view of the Criminal Procedure Code, namely Articles 98 to 101.

As well as the provisions in Chapter III containing the Procedure for Giving Restitution which consists of 4 (four) articles, namely from Article 19 to Article 22, it also clearly states that restitution is given based on a court decision that has permanent legal force which is carried out by the prosecutor as the executor. and the obligation for the victim to report to the court to report that the granting of restitution has been carried out in accordance with the time limit specified in this government regulation.

Although there are already related regulations that formulate obligations, the perpetrator to pay the restitution to the victim, but in practice the court's decision to provide compensation to victims of sexual violence against children was not carried out, such as the case of sexual violence in Mojokerto on May 2, 2018 which was carried out by Muh Aris Bin Syukur against Farah Bilqis Maghfiroh's child. Mojokerto District Court Decision Number: 69/Pid.Sus/2019/PN. The Constitutional Court on April 25, 2019, which has permanent legal force, has resulted in a law that is only oriented to the perpetrator and ignores the rights of the victim as regulated in the legislation.

### **3.2 Factors Inhibiting the Implementation of Restitution**

Restitution is a form of state responsibility in providing legal protection for child victims of sexual violence. The implementation of the restitution is regulated in Government Regulation no. 43 of 2017. However, there are still some factors that hinder its implementation. As for the inhibiting factors, the authors describe below:

#### **a. Administrative requirements for restitution**

Administrative requirements for filing or requesting restitution in PP No. 43 of 2017 provides a new burden for the victims. In Article 7 PP No. 43 of 2017 stipulates that the application for restitution submitted by the victim must at least contain the following:

1. the identity of the applicant;
2. identity of the perpetrator;
3. a description of the criminal event experienced; a description of the losses suffered; and the amount or amount of restitution.

The request for restitution also attaches the following documents:

- a) photocopy of the identity of the child who is the victim of a crime legalized by the competent authority;
- b) valid proof of loss;
- c) photocopy of death certificate which has been legalized by the competent authority if the child who is the victim of a crime dies; and
- d) evidence of a special power of attorney if the application is submitted by the attorney of the victim of a crime.

The requirements mentioned above can be said to be difficult for the victim, which should be facilitated by law enforcement officers, both investigators and/or public prosecutors as well as LPSK, so as to guarantee the implementation of the request for restitution.

#### **b. Regulations in PP No. 43 of 2017 Has Not Included Rules if Restitution is Not Paid**

In fact, it is very rare for perpetrators to pay compensation or restitution except in the case of the Criminal Act of Trafficking in Persons (hereinafter abbreviated as TPPO), which is due to the existence of a "coercive" mechanism that is given to the perpetrator, such as confiscation of assets if the perpetrator pays the restitution.

While restitution outside of TIP cases, generally the perpetrators do not want to pay because of the subsidiary punishment of 2 to 3 months imprisonment, so that the victim still cannot get financial compensation. Then in Government Regulation No. 43 of 2017, there is no further regulation regarding the consequences if this restitution is not paid by the perpetrator of the crime. Thus making the implementation of Government Regulation no. 43 of 2017 is not effective.

#### **c. Proof of Material Value in Requests for Restitution**

Government Regulation No. 43 of 2017 it is stated that in applying for restitution, the victim can ask the LPSK to calculate the loss. The proof of the loss of material value is sometimes not owned by the victim. The victims have problems with formal proof, where they bear the costs for the victim but cannot prove it.

Research on restitution is carried out through calculating medical expenses, property damage, or costs from legal proceedings carried out by the victim. Then a new problem arises, where the granting of this restitution remains dependent on law enforcement officials. The cost has been calculated by LPSK, but the Public Prosecutor is not willing to include it in the indictment.

#### **d. Lack of Awareness from Law Enforcement Officials**

In PP No. 43 of 2017 it has been regulated that applications for restitution can be submitted during the investigation and prosecution process. However, what happened in the field, from the results of the author's research, it was found that neither the investigators nor the public prosecutor had an active role in implementing this right of restitution.

Article 9 and article 14 stipulate that investigators and public prosecutors can notify victims of the right of restitution. The regulation should require investigators and public prosecutors to notify victims of the right to restitution and the procedures for submitting it.

But in reality, investigators and public prosecutors do not provide information or knowledge about the existence of the right of restitution for children who are victims of criminal acts to the victims, with the argument that this restitution only applies to victims of the crime of trafficking in persons (TPPO), so that according to the author, investigators and the public prosecutor is not aware of the PP No. 43 of 2017 concerning the right of restitution for children who are victims of criminal acts.

Then due to the absence of implementing regulations which according to the author, the leadership of the relevant institutions should be aware that there is a need for special handling in terms of applying restitution to children who are victims of criminal acts such as the issuance of technical or implementing instructions for the restitution mechanism or circulars or decisions from each party. institutions to fully support the application of restitution to all legal apparatus, which in this case are investigators and public prosecutors

so that they can play an active role in fulfilling the rights of restitution for children who are victims of criminal acts. For this reason, according to the author, there needs to be encouragement and awareness from law enforcement officers to be active and responsive in supporting victims' requests for restitution rights and must facilitate the administration of restitution requests.

### **3.3 Guarantee of Legal Certainty in Giving Restitution to Children Victims of Sexual Violence in the Future**

Guaranteeing legal certainty is one of the goals of the law itself in addition to benefits and justice, because how justice can be achieved if legal certainty is not clear, and how the benefits of law can be felt if certainty and justice are not clear. By having guaranteed legal certainty regarding the implementation of restitution for children who are victims of criminal acts, especially rape crimes in the form of government regulations, it is hoped that justice can be felt by children who are victims of these crimes. And it is hoped that it can be a guide for prosecutors to sue in criminal charges and guidelines for judges to impose a crime in the form of giving restitution to the defendant which is handed over to the victim in his verdict.

The imposition of a crime in the form of providing restitution for children who are victims of criminal acts in a judge's decision which has permanent legal force is also a mandate from Article 9 paragraph 1 of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power which is the basis for the victim to receive compensation. and rehabilitation. The form of the judge's decision on granting restitution for children who are victims of these crimes in the future is in the form of additional crimes, where the main crime is corporal punishment and fines as stated in the article which is the subject of the problem, specifically in this case is the crime of rape against children. namely Article 81 paragraph (1) of Law Number 17 of 2016 concerning Child Protection,

Sanctions against perpetrators who fail to carry out their obligations to pay or provide restitution to victims or their heirs are still an obstacle in the writer's heart, because as appropriate, an additional crime stated in the judge's decision is usually accompanied by a substitute punishment if the additional punishment is not carried out, whether in the form of a long prison. the substitute punishment does not exceed the principal punishment. There is no article that regulates such as the provisions in Article 18 paragraph (1) letter b, paragraph (2) and paragraph (3) of Law Number 31 of 1999 which has been amended and added to Law Number 20 of 2001 concerning Eradication of Acts Corruption Crimes and Article 48 of Law Number 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons, in the Government Regulation Number 43 of 2017, then the fangs of this government regulation do not exist, because the perpetrators may disobey and ignore the court's decision which has permanent legal force because there are no coercive provisions, because like a criminal statute there are coercive measures so that these provisions can be effectively implemented. So that in the future a court decision with permanent legal force regarding the provision of restitution for children who are victims of criminal acts will be difficult to implement because there are no sanctions for perpetrators who do not implement them, and certainty for children who are victims of non-crime receiving restitution from the perpetrators will be a mere hope because there is no coercion. because it is possible for the perpetrator to deny and not heed the court's decision that has permanent legal force because there is no coercive provision, because like a criminal statute there is a coercive effort so that the provision can be effectively implemented. So that in the future court decisions with permanent legal force regarding the provision of restitution for children who are victims of criminal acts will be difficult to implement



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For this reason, it is necessary to issue a government regulation related to this issue in the hope that in the future additional criminal penalties against the defendant in the form of providing restitution to victims can be implemented and carried out as expected by the government, legislature or lawmakers as well as implementing the provisions of the legislation and the community. , because so far there has been no special regulation regarding restitution for children who are victims of these crimes. So that it can provide legal certainty for the community in general and for child victims or their heirs in particular.

#### **IV. Conclusion**

Restitution is a form of state responsibility in providing legal protection for child victims of sexual violence. The regulation of restitution for child victims of criminal acts according to Government Regulation of the Republic of Indonesia Number 43 of 2017 regulates starting from the understanding, procedures for submitting applications and procedures for granting restitution to children who are victims of criminal acts, in this case especially victims of rape, because restitution is a child's right that become a victim of a criminal act, as well as the obligation of the perpetrator of a criminal offense that is given based on a court decision that has permanent legal force. The rights of children who are victims of criminal acts which are accommodated by Government Regulation of the Republic of Indonesia Number 43 of 2017 have not accommodated all the rights of children who are victims of criminal acts, because from the description of article by article in Chapter II which contains procedures for submitting requests for restitution and Chapter III on the procedure for granting restitution, indeed only regulates the procedures for the implementation of the provision of restitution for children who are victims of criminal acts, and there are still other imperfections, namely regarding the forced efforts of the implementation of giving restitution by perpetrators to children who are victims of criminal acts, if the perpetrators deny carrying out court decisions that have permanent legal force, so there is no guarantee of legal certainty in providing restitution to children who are victims of sexual violence in the future, because of the Government Regulation of the Republic of Indonesia Number 43 of 2017 concerning the Implementation of Restitution for Children Who Become Victims of Crimes. But still has shortcomings, especially regarding substitute punishment if the decision to grant restitution is not implemented, it is not regulated in this government regulation.

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