



ADVANCING ACCESS TO JUSTICE FOR FEMALE VICTIMS OF SEXUAL VIOLENCE THROUGH RESTITUTION

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ABSTRACT

Victims of sexual violence often face numerous obstacles in accessing justice, including limited access to restitution mechanisms. Restitution is a form of compensation that victims can receive from perpetrators to recover the losses they have suffered. This paper aims to analyze how access to justice for female victims of sexual violence can be enhanced through restitution mechanisms. The method used is a literature review, examining relevant laws and regulations as well as the practice of implementing restitution in various countries. The analysis reveals that strengthening the implementation of restitution could improve access to justice for victims. This can be achieved by simplifying procedures, providing legal assistance, and enhancing coordination between related institutions, namely law enforcement and the Witness and Victim Protection Agency (LPSK). Additionally, efforts are needed to raise public awareness and increase the sensitivity of law enforcement officers to the issue of sexual violence. By doing so, victims can achieve proper recovery through both institutional and legal mechanisms that support victim protection.

1. Introduction

The Online Information System for the Protection of Women and Children recorded 15,120 cases of violence against children from January to November 2023, with 12,158 female victims and 4,691 male victims. Among these, sexual violence ranked first in terms of the number of victims from 2019 to 2023.¹ Additionally, cases of sexual violence against women remain an unresolved issue.² According to data from the National Commission on Violence Against Women, there were 289,111 cases of

¹ Setia Budhi., Implementation of Regional Regulation Number 3 of 2020 Concerning the Implementation of Child-Friendly Districts at the Office of Population Control, Family Planning, Women's Empowerment, and Child Protection in North Barito Regency, *International Journal Political, Law, and Social Science*, Vol.3, no.3, 2022, page.176.

² Nur Azisa, M. Aris Munandar, Hijrah Adhyanti Mirzana, Nurul Hidayat Ab Rahman, Ismail Iskandar, and Muhammad Mutawalli., Empowering SDG 16: Electronics-Based Criminal Law Policy to Combat Sexual Violence in Indonesia, *Jurnal Hukum Novelty (1412-6834)*, Vol.14, no.2, 2023, page.2677.

violence against women in 2023. This represents a decrease of 55,920 cases, or approximately 12%, compared to 2022. Referring to the iceberg phenomenon, this data only represents cases reported by victims, companions, or families. Many cases go unreported due to factors such as shame, fear, and ignorance of victims regarding their rights. Therefore, the actual number of cases may be even higher.³ Despite these figures, the experience of victims in obtaining protection and recovery is still far from satisfactory, even though various policies have been established to protect women from criminal acts. Sexual violence not only inflicts physical harm but also indirectly affects the victim's mental state.⁴ The mental impact of sexual violence is often more enduring than the physical harm and requires a long time for full recovery.

The World Health Organization (WHO) defines sexual violence as any behavior targeting a person's sexuality or sexual organs without consent, carried out with elements of coercion or threats.⁵ Victims of sexual violence face various obstacles in accessing justice.⁶ These obstacles include a lack of understanding of the victim's rights, a complicated and exhausting legal process, and the persistent social stigma attached to victims.⁷ Additionally, many victims struggle to obtain compensation or restitution from perpetrators.⁸ While restitution is supported by laws and regulations, these regulations often fail to fully address the needs of victims. The restitution process is rarely straightforward or easily accessible, and the current system lacks fairness, certainty, and utility due to its weaknesses.⁹

Restitution is often viewed as an additional punishment and can be a meaningful right only if the victim applies for it.¹⁰ Law enforcement officers remain passive in providing protection through restitution and largely depend on the initiative or request of the victim. Many victims, being laypersons, may not fully understand or be aware of their rights, including the compensation they are entitled to for the

³ Sri Wiyanti Eddyono., Restorative Justice for Victim's Rights on Sexual Violence: Tension in Law and Policy Reform in Indonesia, *Journal of Southeast Asian Human Rights*, Vol.5, no.14, 2021, page.176.

⁴ Siti Mas'udah, Asbah Razali, Sughmita Maslacha Amala Sholicha, Priyono Tri Febrianto, Emy Susanti, and Tuti Budirahayu., Gender-Based Cyber Violence: Forms, Impacts, and Strategies to Protect Women Victim, *Journal of International Women's Studies*, Vol.26, no.4, 2024, page.5.

⁵ Rida Madyana and Safik Faozi., Pemulihan Korban Melalui Restitusi Bagi Korban Kekerasan Seksual (Studi Putusan Nomor: 989, PID. SUS/2021/PN BDG), *UNES Law Review*, Vol.6, no.1, 2023, page.429.

⁶ Sandra M. Parra-Barrera, Nieves Moyano, Miguel Ángel Boldova, and María del Mar Sánchez-Fuentes., Protection against sexual violence in the Colombian legal framework: obstacles and consequences for women victims, *International journal of environmental research and public health*, Vol.18, no.08, 2021, page.4171; See to, Alfitri Alfitri., Protecting women from domestic violence: Islam, family law, and the state in Indonesia, *Studia Islamika*, Vol.27, no.2, 2020, page.277.

⁷ Abu Rokhmad and Sulistiyono Susilo., Conceptualizing authority of the legalization of Indonesian women's rights in Islamic family law, *Journal of Indonesian Islam*, Vol.11, no.2, 2017, page.495.

⁸ David Miers., Offender and state compensation for victims of crime: Two decades of development and change, *International Review of Victimology*, Vol.20, no.1, 2014, page.151; See to, Luke Moffett., Reparations for 'guilty victims': Navigating complex identities of victim-perpetrators in reparation mechanisms, *International Journal of Transitional Justice*, Vol.10, no.1, 2016, page.156.

⁹ Clare McGlynn and Nicole Westmarland., Kaleidoscopic justice: Sexual violence and victim-survivors' perceptions of justice, *Social & Legal Studies*, Vol.28, no.2, 2019, page.192.

¹⁰ Doug Rendleman., Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages, *Washington and Lee Law Review*, Vol.68, no.3, 2011, page.973.

losses and suffering caused by the tragic incident. The lack of awareness and understanding among victims regarding their right to restitution results in several issues: (1) Victims may not claim or apply for restitution or may not know how to do so properly; (2) The amount, scope, and process of restitution must go through Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban/LPSK*), making the process less effective; (3) Administrative and legal challenges, such as complicated legal processes, convoluted bureaucracy, and a lack of resources, can intimidate or frustrate victims trying to apply for restitution; (4) There are no clear guidelines for sentencing restitution, including when it should be given and what it should include. The absence of regulations regarding the calculation of restitution amounts means that the restitution requested may not be comparable to the assets owned by the perpetrator; (5) Restitution is often only affirmed in specific laws, and other laws may not address it, focusing instead on witness and victim protection; (6) The financial status of the perpetrator can also obstruct access to restitution. Criminals who lack sufficient resources to pay restitution may make the recovery of losses difficult or impossible, and there is no benchmark for dealing with situations where the perpetrator cannot pay restitution. Additionally, perpetrators may have low awareness of their obligation to comply with restitution orders or may not have the intention to pay.¹¹

The absence of regulations governing the criteria for the inability of perpetrators to pay restitution and the procedures for addressing such inability makes it easy for criminals to claim they cannot pay. This often leads them to choose subsidiary sentences or substitute imprisonment, which are considered much lighter than paying restitution. Additionally, there is a lack of regulations concerning coercive measures to pressure perpetrators to pay restitution. Such measures are crucial for enforcing justice for victims. Judges have significant discretion in determining restitution, which can lead to inconsistency in the application of LPSK restitution guidelines. Judges often adjust restitution based on the facts of the trial and their own considerations, which necessitates examining the concept of judge-made law and its alignment with the principle of justice based on the One Almighty God. Therefore, this paper aims to analyze how access to justice for children and women who are victims of sexual violence can be improved through the restitution mechanism. The study is expected to provide recommendations for the government and other stakeholders to enhance the implementation of restitution as a means of restoring victims' rights.

2. Research Methods

This research was a normative legal study that used both a statutory approach and a philosophical approach. More specifically, the research adopted a normative legal research design, primarily focusing on analyzing existing legal frameworks and philosophical principles. The research design involved a detailed examination of statutory laws and regulations related to restitution for victims of sexual violence, particularly children, in Indonesia. The study reflected on the regulation of restitution in Law Number 23 of 2002 concerning Child Protection, in conjunction with Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002,

¹¹ Andrew S. Gladfelter, Brendan Lantz, and R. Barry Ruback., Beyond ability to pay: Procedural justice and offender compliance with restitution orders, *International Journal of Offender Therapy and Comparative Criminology*, Vol.62, no.13, 2018, page.4324.

Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence, Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Criminal Acts, Government Regulation Number 7 of 2018 concerning the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims, and Government Regulation Number 35 of 2020 concerning Amendments to Government Regulation Number 7 of 2018. The analysis employed a descriptive qualitative approach to provide a comprehensive understanding of the legal provisions and their practical implications. This method allowed for an in-depth exploration of the statutory and philosophical aspects of restitution, focusing on the effectiveness and fairness of the mechanisms in place for protecting and compensating victims.

3. Results and Discussion

3.1. Access to Justice and Restitution: Analyzing Legal Principles and Cultural Barriers

Access to justice is a fundamental principle in legal systems, ensuring that individuals can seek redress and protection of their rights through judicial mechanisms. According to Jasminka¹² access to justice entails a series of arrangements enabling individuals to access the judicial system as a safeguard for their legal rights. A system that facilitates access to justice must exhibit several key attributes: fairness, effectiveness, accessibility, responsiveness, and adequate resourcing. Fairness in the legal system requires that the process and outcomes are just and impartial, ensuring equitable treatment for all individuals. This principle ensures that the rights and interests of all parties are respected and that the legal outcomes are just and consistent with legal standards. Accessibility pertains to the ability of individuals to use the legal system without undue barriers. This includes geographic, financial, and informational accessibility, which allows people to engage with the legal system regardless of their socio-economic status or location. Responsiveness involves tailoring the legal system to meet the specific needs of individuals seeking justice. This means that the system should be adaptable and attentive to the varied contexts and issues faced by users. Proper resourcing refers to the provision of adequate funding, personnel, and infrastructure necessary for the effective functioning of the legal system. Without proper resources, the system cannot deliver justice efficiently or equitably. Together, these attributes ensure that the legal system not only provides a means for protecting rights but does so in a manner that is equitable, accessible, and effective.¹³

A person who experiences physical or other losses that threaten their rights and dignity as a human being has the right to receive protection that fully safeguards them. Additionally, every community has the right to legal certainty to create order within that community. The concept of a rule of law in Indonesia, which upholds moral and cultural values, is a fundamental principle in regulating law enforcement

¹² Jasminka Kalajdzic., *Class actions in Canada: The promise and reality of access to justice*. Kanada, UBC Press, 2018, page.53.

¹³ Faisal Bhabha., Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions, *Queen's Law Journal*, Vol.33, no.12, 2007, page.139.

in the country.¹⁴ Regulations concerning the protection of women's human rights in Indonesian national law are guided by international agreements formulated by countries worldwide. One such international convention specifically addressing the respect, fulfillment, and protection of women's human rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This convention has been ratified by the Indonesian Government through Law Number 7 of 1984, concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. Article 32, paragraph 2(b) of CEDAW contains the obligation of States Parties to ensure that laws prohibiting discrimination and promoting equality between women and men provide appropriate remedies for women who experience discrimination contrary to the Convention. This obligation requires States Parties to provide reparation to women whose rights under the Convention have been violated.

Without reparation, the obligation to provide appropriate remedies will not be fulfilled. Such remedies must include various forms of reparation, such as monetary compensation, restitution, rehabilitation, and restoration; satisfactory measures, such as public apologies, public warnings, and guarantees not to repeat the violations; changes in relevant laws and practices; and bringing perpetrators of violations of women's human rights to justice. One of the direct legal protections for victims is the provision of restitution. Restitution is compensation given to the victim or their family by the perpetrator or a third party. It must adhere to the Principle of Restoration in the Original State (*restitutio in integrum*), which aims to return victims to their condition prior to the crime, although it is recognized that returning to their original state may be impossible due to the losses and suffering caused by the crime.¹⁵ This principle emphasizes that restitution should be as comprehensive as possible, covering various aspects arising from the crime's consequences. Through restitution, victims can regain their freedom, legal rights, social status, family life, citizenship, homes, jobs, and assets.¹⁶

Restitution is paid by the perpetrator or a third party either before or after the final court decision.¹⁷ The perpetrator must be found guilty of committing a criminal offense for the victim to receive restitution.¹⁸ Restitution serves several purposes. First, it compensates the victim for their losses and provides financial support. Second, it helps trace the losses caused by the crime and acts as a deterrent by warning potential perpetrators that they will be held accountable for any incurred

¹⁴ Irvan Rizqian., Upaya Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Kekerasan Seksual Dikaji Menurut Hukum Pidana Indonesia, *Journal Justiciabelen (Jj)*, Vol.1, no.1, 2021, page.51.

¹⁵ Arghyrios A Fatouros., International Law and the Internationalized Contract, *American Journal of International Law*, Vol.4, no.1, 1980, page.139.

¹⁶ Farhan Touska Nasty and CSA Teddy Lesmana., Perlindungan Hukum Terhadap Korban Perdagangan Orang Dihubungkan Dengan Undang-Undang Nomor 31 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 13 Tahun 2006 Tentang Perlindungan Saksi Dan Korban (Studi Kasus Putusan Nomor 536/Pid. B/2019/Pn. Bdg.), *Jurnal Hukum Dan HAM Wara Sains*, Vol.2, no.01, 2023, page.60.

¹⁷ Mahrus Ali, Andi Mulyono, Wawan Sanjaya, and Ari Wibowo., Compensation and restitution for victims of crime in Indonesia: Regulatory flaws, judicial response, and proposed solution, *Cogent Social Sciences*, Vol.8, no.1, 2022, page.2069910.

¹⁸ Benedict J. Monachino., Enhancing Victims' Rights: Crime Victims Compensation, *NY ST. BJ*, Vol.80, no.10, 2008, page.36.

losses. Third, restitution forces the perpetrator to acknowledge the actual losses caused by their actions by requiring them to pay a sum of money directly to the victim. Unlike fines paid to the state, restitution is more personal, as it is linked directly to the victim's suffering.¹⁹ Therefore, restitution establishes a causal relationship between the crime and the losses suffered by the victim.²⁰

Restitution is beneficial not only for the victim but also for the perpetrator, the government, and society. The benefits of restitution for victims include compensation for financial losses and repair or treatment for physical injuries or psychological suffering resulting from the crime. Restitution is particularly meaningful as it addresses the fact that crime victims often face a double burden: first, the direct impact of the crime, and second, the challenges of navigating a criminal justice system that is still oriented toward the perpetrator. For perpetrators, restitution offers several advantages. It can serve as an effective rehabilitation tool, providing opportunities for involvement in meaningful activities that foster self-esteem. Restitution may also help ease the perpetrator's guilt and improve their acceptance by the victim and society. Additionally, it provides an educational value by promoting self-responsibility for the harm caused to others. Restitution can have a deterrent effect, with the assumption that individuals who make restitution are less likely to re-offend after serving their criminal sanctions.²¹ When integrated with conditional criminal institutions, restitution can mitigate the negative effects of incarceration. For the government and society, restitution has several benefits. It acts as a preventive measure, reducing recidivism rates. Restitution integrated with conditional criminal institutions can also decrease the prison population, thereby saving government expenditure on feeding, caring for, and rehabilitating prisoners.²²

Restitution is not included in the legislation related to children and women in Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection. However, restitution is addressed in Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Specifically, Article 71D of this law states that every child who is a victim, as referred to in Article 59, paragraph (2) letters b, d, f, h, i, and j, has the right to file a lawsuit for restitution, which is the responsibility of the perpetrator of the crime. Restitution is intended for children who are in conflict with the law, those who are economically or sexually exploited, victims of child pornography, kidnapping, sale, trade, physical or psychological violence, and sexual crimes. Further provisions regarding the implementation of restitution are regulated by Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Crime.

¹⁹ Bridgett N. Shephard., *Classifying Crime Victim Restitution: The Theoretical Arguments And Practical Consequences Of Labeling Restitution As Either A Criminal Or Civil Law Concept*, *Lewis & Clark Law Review*, Vol.18, no.3, 2014, page.801

²⁰ Dennis F. DiBari., *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution is Sought*, *Cardozo Law Review*, Vol.33, no.13, 2011, pager.297.

²¹ Thalia Gonzalez., *Restorative Justice From the Margins to the Center: The Emergence of a New Norm in School Discipline*, *Howard Law Journal*, Vol.60, no.41, 2016, page.267.

²² Dewi Ervina Suryani., *Restitusi Sebagai Upaya Ganti Kerugian atas Derita yang Dialami Anak Akibat Pencabulan yang Dilakukan Oknum Guru di Lingkungan Sekolah*, *Ius Civile: Refleksi Penegakan Hukum dan Keadilan*, Vol.7, no.2, 2023, page.97.

The definition of restitution in Law of the Republic of Indonesia Number 12 of 2022 concerning Criminal Acts of Sexual Violence is provided in Article 1, number 20: "Restitution is the payment of compensation imposed on the perpetrator or a third party based on a court decision or ruling that has permanent legal force, for material and/or immaterial losses suffered by the victim or their heirs." The regulation of restitution in sexual violence laws represents a progressive step in addressing restitution for victims of sexual violence, as it establishes restitution as an obligation.²³ Under Law of the Republic of Indonesia Number 12 of 2022 concerning Criminal Acts of Sexual Violence, Article 16, paragraph (1), stipulates that in addition to imprisonment, fines, or other criminal penalties, judges are required to determine the amount of restitution for criminal acts of sexual violence that carry a prison sentence of four years or more.

Friedman²⁴ argued that the effectiveness and success of law enforcement depend on three interrelated elements: the legal structure, the substance of the law, and the legal culture. The legal structure involves law enforcement officers, the substance of the law includes legislative instruments, and legal culture encompasses the living law adopted by society. Friedman²⁵ contended that law is not an independent force but responds to external pressures, reflecting the wishes and powers of social forces exerting that pressure. He posited that legal behavior is influenced by a mix of self-interest, social, and moral motives, and that the actual influence of individuals and groups stems from personal interests monitored by cultural factors. These factors determine which interests will become demands. Friedman²⁶ view suggests that law is not a free-standing entity but a response to social pressures aimed at reflecting societal hopes. Customary law, therefore, is seen as a blend of interests with social and moral motivations, influenced by cultural factors that shape which desires and needs are addressed. This perspective assumes that the structure and rules of law operate at a theoretical level, while actions or behaviors occur at the level of lived experience.

In discussing law and the legal system, Friedman²⁷ identifies three components: legal structure, legal substance, and legal culture. The legal structure encompasses all existing legal institutions and their personnel, including the police, the prosecutor's office, the courts, and other related bodies.²⁸ Friedman²⁹ theory describes this as a structural system that determines whether the law can be effectively implemented. The legal structure in Indonesia is defined by Law No. 8 of 1981, which covers institutions such as the Police, Prosecutor's Office, Courts, and Penitentiaries. The authority of these law enforcement agencies is guaranteed by law, ensuring that they operate independently from government influence and other pressures.

²³ Ribut Hari Wibowo, Ahmad Busro, and Ani Purwanti., Reassessing Restorative Justice: Addressing Sexual Violence Cases in Indonesia, *Indonesia Law Review*, Vol.13, no.3, 2023page.8.

²⁴ Lawrence M. Friedman., *The legal system: A social science perspective*, New York, Russell Sage Foundation, 1975, page.76.

²⁵ Ibid page.78.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Achmad Ali., *Menguak teori hukum (legal theory) dan teori peradilan (judicialprudence) termasuk interpretasi undang-undang (legisprudence)*, Jakarta, Kencana, 2009, page.32.

²⁹ Lawrence M Friedman., *The legal system: A social science perspective*, New York, Russell Sage Foundation, 1975, page.46.

The principle "*fiat justitia et pereat mundus*" — even if the world collapses, the law must be enforced — underscores the necessity of credible, competent, and independent law enforcement officers. A law cannot function effectively without such officers, regardless of how well-crafted the law is. The effectiveness of law enforcement is compromised if officers have weak mentalities, which can stem from various factors such as limited understanding of religion, economic pressures, or non-transparent recruitment processes.³⁰ Therefore, it is essential to emphasize that the quality of law enforcement plays a crucial role in the functioning of the legal system. Even with well-drafted regulations, poor law enforcement can hinder justice, while good law enforcement cannot compensate for flawed regulations.

Legal substance encompasses the entire body of law, including both written and unwritten legal norms, as well as court decisions.³¹ According to Friedman³² theory, this constitutes the substantial system that determines the effectiveness of legal implementation. Legal substance includes not only the written laws (law in the books) but also the unwritten laws that exist in practice (the living law). This system aims to create a national legal framework that effectively manages state functions and the relationship between citizens and the government.

In countries adhering to the Civil Law System or Continental European system, written regulations are typically considered the law, while unwritten regulations are not formally recognized as such. This distinction influences the legal system in Indonesia. For example, the principle of legality in the Indonesian Criminal Code reflects this influence. Article 1 of the Criminal Code states, "No criminal act can be punished if there is no regulation that prescribes it." Thus, whether an act can be subject to legal sanctions depends on whether it is explicitly regulated by statutory law.

Legal culture, namely opinions, beliefs, habits, ways of thinking, and ways of acting, both from law enforcers and from citizens, about the law and various phenomena related to the law.³³ Legal Culture according to Friedman³⁴ is the attitude of humans towards the law and the legal system. This attitude of society includes beliefs, values, ideas, and expectations towards the law and the legal system. Legal culture is the atmosphere of social thought and social power that determines how the law is used, avoided, or misused. Legal culture is closely related to the legal awareness of society. The higher the legal awareness of society, the better the legal culture will be created and can change the mindset of society regarding the law so far. Simply put, the level of public compliance with the law is one indicator of the functioning of the law.

In the formulation of criminal law policies, the legal culture concerning the fundamental idea of victim protection through restitution is outlined through various

³⁰ Wahyuni Wahyuni., Law Enforcement in Creating Good Governance Towards A Value Of Justice, In *The 1st Proceeding International Conference And Call Paper*, vol.1, no.1, 2020, page.126

³¹ Achmad Ali., *Menguk teori hukum (legal theory) dan teori peradilan (judicialprudence) termasuk interpretasi undang-undang (legisprudence)*, Jakarta, Kencana, 2009, page.51.

³² Lawrence M. Friedman., *The legal system: A social science perspective*, New York, Russell Sage Foundation, 1975, page.37.

³³ Achmad Ali., *Menguk teori hukum (legal theory) dan teori peradilan (judicialprudence) termasuk interpretasi undang-undang (legisprudence)*, Jakarta, Kencana, 2009, page.31

³⁴ Lawrence M. Friedman., *The legal system: A social science perspective*, New York, Russell Sage Foundation, 1975, page.21.

legal provisions.³⁵ In the formulation of laws related to access to justice for obtaining restitution, there are obstacles due to legal limitations, which state that restitution is a right rather than a fundamental criminal penalty. Restitution depends on the victim's awareness to request it.³⁶ The lack of openness from law enforcement and discrimination against victims result in blocked access to justice for victims. At the investigation and prosecution stages, not all police officers and prosecutors have a culture of protecting victims. The prevailing perspective is often oriented more towards protecting the perpetrators, and there is a bias in how victims are viewed. Victims' rights to information on obtaining restitution, how to acquire restitution, and legal assistance for obtaining restitution are not yet understood and implemented by law enforcement, including both police officers and prosecutors.³⁷ In court proceedings, judges' empathy towards the victims' suffering is also not necessarily implemented. Judges are constrained by norms that limit restitution decisions, such as the lack of restitution requests by victims, the absence of restitution as a fundamental or even additional criminal penalty in legal provisions.

3.2. Challenges and Progress in Victims' Restitution Rights: A Comparative Analysis of Indonesian and International Practices

So far, the model for regulating the fulfillment of victims' rights to restitution in legislation generally requires the victim's initiative to file a lawsuit. This model reflects a clear separation between criminal law and civil law, as well as between public law and private law. This classical view continues to influence the regulation of legal provisions for protecting victims in their quest for compensation. Such legal regulation is disadvantageous for victims of criminal acts, particularly since many victims are unfamiliar with the legal system and unaware of their rights and the mechanisms for claiming restitution and compensation. Consequently, this model places victims at a disadvantage within the existing system. Data obtained by the author from the Ministry of Law and Human Rights in 2021 highlights the reality of victims' conditions: only 1.6% (2 out of 120 victims) were aware of their right to restitution and its mechanisms, while 98.4% did not know about these rights or mechanisms. Additionally, many perpetrators are from low-income communities (69.17%), which often leads victims to surrender to the situation and rely on authorities to secure justice through judicial decisions.³⁸

The regulation that has made significant progress in terms of restitution is the Law on Sexual Violence Crimes. Law Number 12 of 2022 concerning Sexual Violence Crimes introduces new provisions to support the implementation of restitution. This law requires judges to determine the amount of restitution for sexual violence crimes that are punishable by imprisonment of four years or more. However, this mandatory

³⁵ Cortney E. Lollar., What is Criminal Restitution?, *Iowa Law Review*, Vol.100, no.1, 2014, page.95.

³⁶ Jo-Anne Wemmers., Restitution: Helping Victims or Offenders?, *An International Perspective on Contemporary Developments in Victimology: A Festschrift in Honor of Marc Groenhuijsen*, Vol. 16, no.7, 2020, page.289; See to, Sean M. Laurent, Narina L. Nuñez, and Kimberly A. Schweitzer., Unintended, but still blameworthy: The roles of awareness, desire, and anger in negligence, restitution, and punishment, *Cognition and emotion*, Vol.30, no.7, 2016, page.1278.

³⁷ Salvatore Zappalà., The Rights of Victims v. the Rights of the Accused, *Journal of International Criminal Justice*, Vol.8, no.1, 2010, page.146.

³⁸ Halomoan Freddy Sitingjak Alexandra., Pemberian Restitusi dan Kompensasi Bagi Korban Tindak Pidana Berdasarkan Nilai Keadilan, *Jurnal Pendidikan dan Konseling (JPDK)*, Vol.4, no.5, 2022, page.5978.

restitution is limited to sexual violence crimes carrying a sentence of four years or more, whereas restitution should ideally not be restricted by the type of crime or the length of the sentence. In cases where a corporation is involved in a sexual violence crime, the corporation can face a fine ranging from IDR 5,000,000,000.00 (five billion rupiah) to IDR 15,000,000,000.00 (fifteen billion rupiah). In addition to this fine, the judge is also required to determine the amount of restitution for corporate perpetrators, as outlined in Article 18 of Law Number 12 of 2022. Furthermore, Article 30, paragraph (1) of the same law stipulates that victims of sexual violence crimes have the right to receive both restitution and recovery services. Moreover, Article 30 paragraph (2) regulates that restitution is in the form of:

- a. Compensation for loss of wealth or income;
- b. Compensation for losses caused by suffering directly related to the Criminal Act of Sexual Violence.
- c. Compensation for medical and/or psychological treatment costs; and/or
- d. Compensation for other losses suffered by the victim as a result of the criminal act of sexual violence.

Based on Article 31, paragraph (1) of Law Number 12 of 2022 concerning Sexual Violence Crimes, investigators, public prosecutors, and judges are required to inform victims and the Witness and Victim Protection Agency (LPSK) about the right to restitution. This implies that from the initial stage of police investigation, victims must be informed about their rights, including the right to restitution and other forms of assistance. Notification of these rights is mandatory in cases of sexual violence. If the police fail to provide this information, the case cannot proceed to the prosecutor's office or be declared complete (P-21), meaning that the fulfillment of restitution rights becomes a fundamental obligation for law enforcement officers. Additionally, investigators are authorized to seize the assets of perpetrators as collateral for restitution, with the approval of the local court.

In the law on sexual violence crimes, there are additional progressive measures regarding the fulfillment of restitution if the perpetrator is unable to pay. Article 35, paragraph (1) of Law Number 12 of 2022 concerning Sexual Violence Crimes provides that if the confiscated assets of the perpetrator are insufficient to cover the restitution amount, the state will provide compensation for the shortfall. This compensation is paid to the victim in accordance with the court's decision. Article 33, paragraph (2) specifies that this compensation is disbursed through the Victim Assistance Fund, a state fund designated for compensating victims of sexual violence crimes. This fund will be managed by the Witness and Victim Protection Agency (LPSK) to ensure the payment of compensation. However, it is important to note that the Victim Assistance Fund is applicable only to sexual violence crimes and does not extend to other types of cases. To facilitate restitution payments, the police have the authority to confiscate or freeze the perpetrator's assets from the outset. Once the court has issued a final verdict, the assets of the perpetrator will be auctioned off to fulfill the restitution obligations.

The calculation of restitution by the Witness and Victim Protection Agency (LPSK) generally includes categories such as loss of wealth, other losses, or losses that are difficult to quantify materially. For example, trauma recovery costs are assessed by

consulting with a psychologist to determine the necessary number of consultations required for the victim's recovery. In cases of sexual violence, LPSK might also assess unique losses, such as the cost of hymen surgery (hymenoplasty) for the loss of virginity, even though the victim may choose whether or not to undergo the surgery. LPSK provides a cost estimate for such procedures, which can be charged to the perpetrator. Evidence required for restitution includes medical examinations for losses related to virginity, proof of ownership for lost assets, and documentation for transportation costs related to case management. Regarding coercive measures for restitution, Article 33, paragraph (7) stipulates that if the confiscated assets are insufficient to cover the restitution amount, the convict may be subject to a substitute prison sentence, but this sentence cannot exceed the original prison term. This regulation implies that the coercive measure for restitution may be relatively lenient, as the substitute prison sentence is capped at the length of the principal sentence, which could potentially incentivize perpetrators to prefer serving a substitute prison sentence over paying restitution.

As a comparison, California considers a restitution order to be a lifelong debt or one that does not go away until the restitution order is paid.³⁹ The offender must still pay restitution even if they are declared bankrupt or released from parole. In addition, an offender who moves out of the state of California must have paid the fines and the restitution order. The criminal court can assist the victim in obtaining restitution by ordering the offender to withhold income. If the offender is employed and able to pay, the judge can order income withholding. This requires the offender's employer to withhold a portion of the offender's wages to make restitution payments directly to the victim, the probation department, or a collection agency. If the judge has made an income withholding order at sentencing and has stayed the order or waited to enforce it until the offender has actually failed to pay, the victim will need to notify the probation department or collection agency that the offender has not paid restitution to the victim and that the victim now wants the court to lift the suspension and enforce the order.

If an offender has assets, such as property or bank accounts, frozen by the judge before sentencing, the judge can order these assets to be used for restitution payments. Until restitution is paid in full, the victim can request that the offender come to court once a year for a debtors' check, which allows the victim to find out if the offender has acquired new assets or income that could be used for restitution. In the UK, convicted offenders who work while in prison can have their sentences set in terms of financial payments rather than time served. The offender's earnings are used to make financial restitution to the victim and/or the state-run victim support and compensation fund. Payments made from prison earnings can reduce the length of the sentence, making the offender's efforts to provide direct financial restitution crucial in determining their sentence duration.

Whether placed on probation, ordered to pay a fine, or granted conditional release, every convicted offender is required to pay restitution to the victim as part of their sentence, where applicable. Additionally, offenders may be fined for their offenses against the community. The proceeds from these fines are donated to the National Compensation Fund, which provides compensation to victims who are too ill

³⁹ Nathaniel Amann., Restitution and the Excessive Fines Clause, *American Criminal Law Review*, Vol.58, no.1, 2021, page.216.

(physically or mentally) to work. For those unable to find work for other reasons, the state and community are responsible for assisting them in securing employment to meet their compensation obligations.⁴⁰ Witness and victim protection agencies, such as LPSK, typically focus on safeguarding witnesses and victims during the legal process rather than collecting restitution from perpetrators. LPSK does not have direct authority to collect restitution for sexual violence cases involving child victims. However, if restitution is not paid and the victim's rights are not respected, LPSK can take several actions: (a) Notify the Attorney General or Prosecutor if restitution is overdue; (b) Report to the Public Prosecutor and Chief Justice if restitution is delayed beyond the court-mandated timeframe, with LPSK assisting the victim; (c) Coordinate with law enforcement to ensure the restitution collection process follows legal procedures, including asset confiscation; (d) Seek a third party to voluntarily replace the restitution; and (e) Ensure that any shortfall in restitution is covered through victim assistance funds.⁴¹

However, in the practice of courts in Indonesia, restitution is often subsidiary to imprisonment. Therefore, if the convict is unable to pay restitution, he may be subject to imprisonment as an alternative to restitution. This creates a weakness in the execution of restitution, as it is not uncommon for the perpetrator to choose to serve a prison sentence rather than pay restitution. As a result, the victim's right to restitution is lost. The judge's discretion greatly influences the restitution decision. The judge is not bound by the restitution application submitted by the LPSK, which may not align with the LPSK's considerations. The judge will review the facts of the trial and assess the economic capacity of the defendant when imposing restitution. In normative studies, there are no guidelines for judges in deciding restitution. Unlike restitution provisions in other countries, its execution cannot always be enforced. Moreover, in assisting victims, particularly in cases of sexual violence, the Witness and Victim Protection Agency (LPSK) faces several obstacles and challenges. Victims often experience significant social impacts, such as exclusion from society and, in the case of children, the loss of their right to education. Support from the victim's attorney and the surrounding community is crucial to maintain the victim's motivation throughout the trial process and to help them continue their lives. Another challenge is the limited availability of psychologists to assist victims of sexual violence. In some areas, there is a shortage of qualified psychologists, both in terms of quantity and quality. Additionally, effective fulfillment of restitution rights for victims of sexual violence requires support from law enforcement officers.

One significant obstacle is the lack of regulations regarding coercive measures for perpetrators of sexual violence.⁴² Perpetrators who are sentenced to pay restitution often choose to avoid payment and opt for subsidiary sentences, which are

⁴⁰ Dave Nicholson., 'Giving Back'by'paying Back': Recasting Community Payback As'mutual Restitution'through Financial Payback-Making A Restorative Criminal Justice System A Reality Through Co-Operatives And Values-Based Purposeful Companies?, *British Journal of Community Justice (BJCJ)*, Vol.17, no.1, 2021, page.278.

⁴¹ Ketut Diastu, Marsudin Nainggolan, and Mohamad Ismed. "Pemenuhan restitusi oleh pelaku kepada anak korban kekerasan seksual, *Community Development Journal: Jurnal Pengabdian Masyarakat*, Vol.5, no.1, 2024, page.1866.

⁴² Sandra M. Parra-Barrera, Nieves Moyano, Miguel Ángel Boldova, and María del Mar Sánchez-Fuentes., Protection against sexual violence in the Colombian legal framework: obstacles and consequences for women victims." *International journal of environmental research and public health*, Vol.18, no.08, 2021, page.4171.

perceived as less severe. This situation creates the impression that many restitution decisions are unenforceable because restitution payments rely on the perpetrators' willingness to comply. Furthermore, law enforcement officers have not conducted extensive training on approaches to victims and restitution, especially for sexual violence cases. This lack of training hampers efforts to achieve a thorough understanding and awareness necessary for maximizing the fulfillment of restitution for victims.⁴³ This indicates that factors affecting access to justice from the perspective of legal culture include the influence of patriarchal values. Access to justice requires an approach that upholds the human rights of victims, particularly by directly protecting victims through restitution.⁴⁴ Respect for victims' human rights, especially female victims of sexual violence, is impacted by patriarchal cultural constructs that can permeate law enforcement within the criminal justice system. This issue begins with the marginalization of female victims' voices, where their suffering is not adequately heard or protected. This marginalization originates from cultural constructions about victimization and even extends to the tendency to scrutinize the victim's role in the crime. Consequently, the provision of restitution is viewed as a subsequent stage after establishing that victimization has occurred to the individual who has been subjected to sexual violence.

4. Conclusion

Access to justice for women victims of violence is still weak because the laws and regulations in Indonesia do not fully guarantee justice for these victims. Various obstacles and shortcomings in the legal system continue to hamper efforts to restore and protect the rights of victims. One key weakness is that restitution for victims is not considered a principal remedy but only an additional measure. This means that restitution is only recognized as a right if the victim files a claim; otherwise, the judge cannot grant it. Additionally, the execution of restitution lacks clear legal certainty, making its implementation difficult to ascertain.

Theoretically, this study reinforces the notion that justice for victims is not solely achieved through punitive measures but also through reparative mechanisms like restitution. It emphasizes the need to integrate a victim-centered approach within legal theories, which prioritize the restoration of victims' rights and dignity. Practically, the paper suggests several measures to improve the restitution process. Simplifying procedures and enhancing coordination between law enforcement and the Witness and Victim Protection Agency (LPSK) are critical steps towards making restitution more accessible. Providing targeted legal assistance and increasing public awareness about victims' rights can also empower victims to navigate the justice system more effectively. Training for law enforcement officers on handling sexual violence cases with sensitivity and respect is essential to ensure that victims' rights are upheld throughout the legal process.

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⁴³ Maria Novita Apriyani., Restitusi Sebagai Wujud Pemenuhan Hak Korban Tindak Pidana Kekerasan Seksual di Indonesia, *Risalah Hukum*, Vol.17, no.6, 2021, page.6.

⁴⁴ Hasnah Aziz, Putri Hafidati, and Rotua Sagala., Transformative Justice for Child Victims of Sexual Abuse: Legal Protection and Applications in Restorative Approaches, *Lex Publica*, Vol.10, no.1, 2023, page.169.

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