



# Fulfilling the Right to Restitution for Children Victims of Sexual Violence Through Victim Trust Funds

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**Abstract.** *Public attention continues to be drawn to cases of sexual violence, especially those involving child victims. In several cases of sexual violence that occur, it is essential to examine matters related to the protection and fulfillment of the victims' rights specially victim right to restitution. This article aims to examine how the implementation of fulfilling the right to restitution for child victims of sexual violence by perpetrators has been implemented so far and how Victim Trust Funds can be a breakthrough in fulfilling the right to restitution for victims. The research methods used are doctrinal legal research methods and non-doctrinal research methods. From the research results, it is known that so far, the fulfillment of victims' rights to restitution has often not been implemented, causing great harm to victims. The concept of a Victim Trust Fund is a brilliant idea as a form of great attention to the suffering of victims, especially child victims of sexual violence. Suppose the confiscated assets of the perpetrator as a convict do not cover the cost of restitution. In that case, the state compensates the victim by the Court's decision. This compensation is paid through the Victim Trust Fund, which can be obtained from philanthropy, society, individuals, corporate social and environmental responsibility, and other legal and non-binding sources, as well as the state budget by statutory provisions.*

**Keywords:** *Children, Compensation, Sexual Violence, Restitution, Victim Trust Fund*

## 1. Introduction

Sexual violence is a form of crime that is often unexpected and is very likely to occur in many communities, this is because the perpetrators and victims are very heterogeneous, ranging from people closest to their family and other people who did not know each other at all. Recently, sexual violence that befell child victims has attracted much attention because it occurs in the environment where children go to school and is carried out by teachers who are highly respected people. There are also quite a few cases involving a child whose biological father is the perpetrator.

Regarding the age, children tend to be more at risk of becoming victims than adults.<sup>1</sup> In Indonesia, based on data from the Witness and Victim Protection Agency, throughout 2022 cases of sexual violence against children increased by 25 percent compared to 2021, from 426 cases to 536 cases. Of that number, 379 applicants have victim status, with 84 of them being victims of sexual violence in the place where the victim studied or in the school/education environment.<sup>2</sup>

The issue of sexual violence against children requires urgent attention as it hinders their growth and causes trauma that affects both the victims and society, disrupting safety and trust. Children, as the future generation, must be protected to ensure their development, and sexual violence can cause long-term psychological and physical harm.[1, p. 540] Moreover, improper handling of cases can lead to re-victimization, exacerbating their suffering. Therefore, consistent efforts are needed to protect victims' rights, restore their

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<sup>1</sup> [11, p. 77]

<sup>2</sup> [12, pp. 58–63]

physical and psychological well-being, and ensure the criminal justice system prioritizes victim protection to safeguard both individual futures and the nation's quality. [2, p. 7]

In several cases of sexual violence that occur, it is essential to examine matters related to the protection and fulfillment of victims' rights because not all victims receive what their rights and needs are. One of them is the right to restitution; it is known that not all requests for restitution can be fulfilled by the perpetrator. Often, restitution is not paid due to the perpetrator's financial inability, so the victim does not get his rights, and he has to bear the consequences of the perpetrator's actions himself.

Restitution is a form of compensation given to the victim or their family by the perpetrator or third party, through a judge's decision in the criminal justice process.<sup>3</sup> Restitution is given as compensation for material and immaterial losses resulting from criminal acts of sexual violence committed by the perpetrator against the victim. Apart from being able to submit a request for restitution, the victim can also file a claim for compensation through a civil lawsuit or by combining the claim for compensation into a criminal case as regulated in Article 98 of the Criminal Procedure Code (this mechanism is somewhat inefficient because the claim for compensation losses are limited to material losses only). [3, p. 97]

In this regard, the government and legislature have realized that there are various obstacles to fulfilling the right to restitution, so in Law Number 12 of 2022 concerning Crimes of Sexual Violence, a breakthrough has been formulated in the formulation of Article 35, which regulates Victim Trust Funds. The victim aid fund is a brilliant idea as a form of great attention to the suffering of victims. Suppose the confiscated assets of the perpetrator as a convict do not cover the cost of restitution. In that case, the state compensates the victim based on the Court's decision. This compensation is paid through the Victim Trust Fund, which can be obtained from philanthropy, society, individuals, corporate social and environmental responsibility, other legal and non-binding sources, and the state budget by statutory provisions.

Until now, it is not yet clear how the concept of Victim Trust Funds can be implemented as a new model in the criminal justice system in Indonesia. Therefore, this article aims to examine how the implementation of the right to restitution for child victims of sexual violence by perpetrators has been implemented so far and how the model of fulfilling the right to underpayment of restitution through Victim Trust Funds can be implemented in order to optimize the protection of child victims of criminal acts of sexual violence.

## 2. Methodology

This paper is the result of a study conducted using a socio-legal approach, namely an empirical study to find the process of law and how law works in society. [4, p. 13] This approach uses two types of methods: the doctrinal legal research method and the non-doctrinal research method. With this method, a document study is carried out to examine laws and regulations, literature, previous research results, and journals related to the research object. A field study was also conducted by interviewing several experts and law enforcement officers selected according to the research objectives. The data and facts obtained are processed, analyzed qualitatively, and described in the final stage.

### **Fulfillment Of The Rights Of Restitution For Children As Victims Of Sexual Violence**

Recently, sexual violence against children has often been carried out in the immediate environment and by perpetrators who should be protecting children, like the case that happened to some students by the head of an Islamic boarding school in Bandung, where the perpetrator, Herry Wirawan, committed the crime of raping 13 of his female

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<sup>3</sup> Article 1 Number (20) [13]

students who were still children, resulting in several of the victims becoming pregnant and giving birth.<sup>4</sup> Many more cases of sexual violence against children that we can trace in News.

Victims are people who experience suffering and loss, both material and immaterial, caused by a criminal act. What is meant by immaterial loss is a form of loss that is difficult to measure or value in money, such as mental suffering or shame, trauma, being unable to carry out daily activities due to loss of self-confidence, or other forms of suffering experienced by the victim. For example, because the perpetrator has forced the victim. Meanwhile, material loss is the actual loss of a sum of money, property, or assets belonging to the victim. The term material loss is not recognized in the Witness and Victim Protection Law, but economic loss is used to mean victims.<sup>5</sup> It is the material and immaterial losses experienced by child victims as a result of criminal acts of sexual violence that must then be recovered, one of which is through providing restitution to child victims.

Children as victims of criminal acts of sexual violence have the right to receive restitution for all forms of material and immaterial losses suffered as a result of the perpetrator's actions. Restitution is nothing more than a form of taking sides with the interests of the victim.[5, p. 132] In handing down a sentence, the Judge must consider the impact of criminal acts on victims or their families. Regarding punishment, Van Dijk said that the principle of sentencing should state that written reasons for sentence should be given, following criteria to include :[5, p. 132]

- a. the foreseeable consequences of the offense to the victim;
- b. the likelihood of the victim's safety being affected; and
- c. *the priority of restitution to the victim is over any sanction for the state.*

Referring to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 on November 29th, 1985, restitution is a punishment option available in criminal cases, in addition to other criminal sanctions, in the form of compensation justice to the victim, the victim's family or dependents, by the perpetrator or a third party who is responsible for their behavior (the perpetrator). Such restitution should include the return of property or payment for loss or damage suffered, reimbursement of costs incurred due to victimization, provision of services, and restoration of rights.

Restitution compensates for the victim's losses and punishes the perpetrator. Apart from that, restitution is also seen as an element of prevention that scares people from committing criminal acts. Restitution forces the perpetrator to admit the losses caused by his actions by ordering him to pay the victim a certain amount. This condition makes the perpetrator specifically responsible for his actions. In contrast to fines paid by the perpetrator to the state, restitution is more direct because it is given directly by the perpetrator to the victim, and its existence is specifically linked to the actual losses suffered by the victim due to the perpetrator's actions. Therefore, in restitution, there is a causal relationship between the criminal act and the losses suffered by the victim.<sup>6</sup>

Before Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence was enforced, child victims of criminal acts of sexual violence can apply for restitution as based on Government Regulation Number 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Criminal Acts. Article 4 states that the victim who applies for restitution is the parent or guardian of the child victim, the child's heir, or a person authorized by the parent, guardian, or heir of the child victim. The forms of restitution that can be submitted are: a) compensation for loss of wealth; b) compensation for suffering arising from the crime; c) reimbursement of medical and/or psychological care costs.

<sup>4</sup> [14] <https://bandung.kompas.com/read/2022/04/04/225025378/perjalanan-kasus-pemeriksaan-13-santri-oleh-herv-wirawan-kronologi-hingga?page=2> accessed on 18 Juli 2024.

<sup>5</sup>[15, p. 83] DOI: <http://dx.doi.org/10.23920/jbmh.v7i1.948>

<sup>6</sup> [16] quote from [17] doi:10.1177/002087287401700407.

If the application for restitution is accepted, but the perpetrator is unable to pay either part or all of the restitution that is his obligation, the victim can apply for compensation. However, it's important to note that compensation has historically been applied to acts of terrorism and serious human rights violations. If compensation for cases of sexual violence is indeed possible, there is no permanent source of funds that can be given to the victim. For example, in the case of Herry Wirawan, the judge imposed the burden of payment of restitution on the state through the Ministry of Women's Empowerment and Protection, and not through the Victim Assistance Fund (because it does not yet exist).

However, this is now different with the enactment of the provisions of Law Number 12 of 2022 concerning Sexual Violence Crimes which regulates the compensation scheme with funds originating from the Victim Assistance Fund. Law Number 12 of 2022 concerning Sexual Violence Crimes state that restitution is paid by the perpetrator or, if the perpetrator is a minor, by their guardian or parent. It applies if the individual is charged for at least four years in prison. For legal entities, restitution and fines are considered principal penalties.[6, p. 64] Restitution can be deposited with the district court, and the perpetrator's assets may be seized as collateral. If the case is dropped or the defendant is acquitted, the assets are returned. If found guilty and restitution isn't paid within 30 days, the assets are auctioned. If the auctioned assets don't cover the full restitution, the perpetrator serves a substitute sentence, and the state covers the shortfall from the Victim Assistance Fund.

Restitution regulations in Law Number 12 of 2022 on Sexual Violence Crimes are more precise than previous rules, especially in the compensation mechanism. Before Law Number 12 of 2022 on Sexual Violence Crimes exist, restitution faces obstacles, with few victims applying for it despite their legal right to do so. Restitution is also rarely granted, typically granted only in high-profile cases or with expert support. When a request for restitution is granted, the perpetrator avoids or cannot pay because he does not have assets (despite hiding his true financial capabilities) and various other reasons.<sup>7</sup> For example, in the Mario Dandi case, the perpetrator always denied that the Rubicon car he was using was not his; it belonged to his uncle. It appears that the perpetrator denied ownership of the car so it would not be confiscated and auctioned off to cover restitution costs.[7, p. 189] These things are very detrimental to the victim, who is entitled to restitution, and also detrimental to the state as the party who must pay off the underpayment of restitution.

Another major obstacle in fulfilling restitution rights is the perpetrator's lack of financial capacity. In cases like Herry Wirawan's sexual violence against children in Bandung, restitution has not been paid due to issues with the perpetrator's assets. Similarly, in Banjarnegara, a religious teacher was ordered to pay IDR 1.5 billion in restitution to 7 victims but could only pay a small fraction. The asset confiscation and auction mechanisms often fail because the perpetrators have no assets to seize.

Thus, in general, positive law regarding the right to restitution for victims, including children as victims, is very supportive, especially with the presence of Indonesia Witness and Victim Protection Agency in criminal justice procedures in Indonesia which is given responsibility for implementing the protection of the rights of witnesses and victims, including fulfilling the right to restitution for victims. Therefore, positive legal support and Indonesia Witness and Victim Protection Agency institutional support should be reliable to guarantee the fulfillment of these rights. However, in practice, fulfilling the right to restitution still faces many obstacles. The obstacle that most often occurs is not law enforcement that does not side with the victim, but rather the perpetrator's willingness to emphasize his attitude and sense of responsibility, namely his sincerity in wanting to lighten the burden on the victim due to his behavior.

Thus, the issue of implementing the fulfillment of the right to restitution for victims still faces many obstacles, which result in the victim not obtaining this right. The

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<sup>7</sup> [3, p. 102] strengthened by [9]

restitution that the perpetrator must pay cannot simply be stipulated as a norm in an article of law but must be fulfilled or accepted by the victim. Therefore, obstacles that occur in the perpetrator's ability must be overcome by articles or laws that regulate the next steps if the perpetrator's fulfillment of restitution is not achieved. In other words, the state must have a real solution to overcome it all.

### **Compensation For Children Victims Of Sexual Violence Through Victim Trust Funds**

In the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which was adopted on November 29 1985 by General Assembly Resolution 40/34, the provisions regarding Restitution on Article 8,9,10, and 11 state that the perpetrator or third party who is responsible for the perpetrator's actions must provide fair restitution to the victims, their families or dependents. Restitution can take the form of returning property or payment for losses suffered by victims, reimbursement of costs incurred due to victimization, provision of services and restoration of rights.<sup>8</sup> The third party in question is the party responsible for the perpetrator's behavior. This means that there is a special relationship of responsibility regarding the perpetrator's behavior between the perpetrator and the third party. For example, the perpetrator commits certain acts that violate the law while carrying out work under the responsibility of a third party. In other words, the perpetrator's actions occurred when he was carrying out work under the responsibility of a third party or the perpetrator was a child still under his parents' supervision. Likewise, Law Number 31 of 2014, concerning Amendments to Law Number 13 of 2006, which concerns the Protection of Witnesses and Victims, formulates restitution as compensation for losses given to victims or their families by perpetrators or third parties. In this formulation, there is the term third party, which is not explained further, so that in practice, third parties may be interpreted differently from the wishes or aims and objectives of the drafters of the law in question.

The right to obtain restitution is a form of right to material or non-material reparation that victims can obtain in addition to knowing about the progress of the case and the right to justice.[8, p. 43] In the event that the perpetrator cannot fulfil the right to restitution due to the perpetrator's limited financial capacity, the state will pay the remaining underpaid restitution through a compensation mechanism. From this description, the difference between the two can be seen; namely, restitution is compensation for losses to victims of criminal acts by perpetrators. In contrast, compensation is the fulfillment of compensation for the amount of underpaid restitution by the state with funds sourced from the Victim Trust Fund.

Regarding compensation, Article 12 and Article 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, states that the state have responsibility to compensates victims of criminal acts if the perpetrator or third-party responsible for the perpetrator's actions cannot pay restitution. The victims who are entitled to receive compensation are victims who have suffered severe injuries or health problems, whether physical or mental, as a result of the crime that occurred to them. Apart from that, the victim's family is also entitled to compensation, especially the dependent family of the crime victim who has died or experienced physical or mental disabilities as a result of the crime. Then, the state must establish a source of funds to provide compensation.

So far, the compensation funds paid by the state through the Indonesia Witness and Victim Protection Agency come from the APBN and other legitimate sources,[9] however, in practice, compensation is only provided to victims of serious human rights violations and victims of terrorism. Now, Law Number 12 of 2022 concerning Crimes of Sexual Violence provides a breakthrough regarding victim trust funds that were previously unknown in providing compensation to victims of criminal acts in Indonesia. Article 35 of Law Number 12 of 2022 concerning Crimes of Sexual Violence mentions that the state is obliged to

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<sup>8</sup> Article 8 - Article 11 of [18]

compensate victims for underpaid restitution. This compensation comes from Victim Trust Funds obtained from philanthropy, society, individuals, corporate social and environmental responsibilities, and other legal and non-binding sources, as well as the state budget following the provisions of statutory regulations, which are further regulated in Government Regulations.

Not only for compensation, the Victim Assistance Fund must also be used to support the victim recovery program by restoring the victim's physical, mental, spiritual, and social conditions to their original state. This idea is in line with the purpose of restitution, which requires the victim to recover from their condition before the crime occurs. The institution responsible for managing the Victim Assistance Fund will be LPSK, the leading sector in the witness and victim protection program. In carrying out its duties to manage the Victim Assistance Fund, LPSK will later have the authority to formulate general management policies, seek and collect funds, distribute funds, and prepare reports on the activities and finances of the Victim Assistance Fund.

Implementing the Victim Trust Fund in the future has its own challenges. On interview, the Indonesia Witness and Victim Protection Agency expert said that the challenge was related to the disparity in restitution figures and the adequacy of the Victim Trust Fund budget to fulfill all underpaid restitution throughout Indonesia. So far, it has been seen that there is a disparity in the restitution funds granted by the Judge. There have been requests for restitution that have been granted up to billions of rupiah for one victim, for example, in the case of Mario Dandi, the perpetrator of the abuse of child victim David Ozora. In this case, the child victim was granted his request for compensation of Rp. 25,140,161,900,- (twenty-five billion one hundred forty million one hundred sixty-one thousand nine hundred rupiah).[7, p. 190] Meanwhile, in the Herry Wirawan case, the perpetrator of the rape of 12 (twelve) child victims was required to pay restitution amounting to Rp. 331,527,168.00 (three hundred thirty-one million five hundred twenty-seven thousand one hundred and eighty-six rupiah), for which every child victim received restitution ranging from 8 – 85 (eight to eighty-five) million rupiah.[10, pp. 2–3].

The problem of disparity in the amount of restitution granted will be related to the adequacy of the budget from the Victim Trust Fund in fulfilling restitution for underpayments.<sup>9</sup> How can the state, through the Victim Trust Fund, provide compensation for the many cases of criminal acts of sexual violence every year in Indonesia? For this reason, the Victim Trust Fund, as the central point in fulfilling compensation for child victims of criminal acts of sexual violence, must be managed and appropriately optimized. The aim is that compensation can be paid so that the victim's losses can be recovered immediately. Sources of funds and funds that have been collected in the Victim Trust Fund must be managed in such a way as to avoid a deficit. However, a deficit of funds in the Victim Trust Fund will be the worst possibility because if that happens, the state will not be able to provide sustainable and comprehensive compensation.

In order for the Victim Assistance Fund not to experience a budget deficit, as an alternative, the state does not have to provide compensation in the form of cash but can be in the form of programs in the form of psychological, psychosocial, and medical assistance. The quality of these programs must be ensured to be appropriately implemented and can genuinely eliminate the physical and psychological trauma experienced by the victim.[9] Restitution as a form of perpetrator responsibility for the consequences of his actions to the victim is expected to restore the victim to his original condition before the crime occurred. For this reason, it must be understood that restitution does not always have to be in the form of money but can be in the form of assistance for the physical and psychological recovery of victims injured due to the crime.

The challenges projected to occur in the future are not to indicate that the Victim Trust Fund is not a solution to overcome underpayment of restitution. These challenges are

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<sup>9</sup> [9]

intended to be answered when they occur. After all, the Victim Trust Fund aims to solve the lack of restitution from perpetrators to victims and provide certainty that victims' rights to compensation are fulfilled. The Victim Trust Fund is a breath of fresh air for victims who need help to recover from losses resulting from criminal acts they have experienced.

Looking at the description above, returning to the Victim Trust Fund mentioned in Law Number 12 of 2022 concerning Crimes of Sexual Violence is actually needed to overcome the problem of obstacles to fulfilling restitution as a right of victims of crimes of sexual violence, especially child victims of crimes of sexual violence who have been It turns out that his rights are still being neglected due to the perpetrator's inability to pay restitution. In the future, LPSK, as the leading sector, is expected to be able to manage the Victim Assistance Fund as well as possible. Through their social responsibilities, Philanthropy, and society, individuals are also expected to play an active role in donating some of their money to help the growth of the Victim Assistance Fund because it is a shared responsibility to be able to provide more attention to victims of crime so that they can recover and return to their normal activities without experiencing any trauma.

### 3. Conclusion

The fulfillment of restitution rights for child victims of sexual violence in Indonesia faces significant challenges, particularly when perpetrators lack financial capacity or evade responsibility. The mechanism for asset confiscation and auction often fails due to the absence of assets. The newly introduced Victim Trust Fund, aimed at covering underpaid restitution, faces challenges regarding its adequacy in addressing all cases nationwide. To improve restitution, the state must ensure proper management and optimization of the Victim Trust Fund and encourage perpetrators to take responsibility for compensating victims' material and immaterial losses.

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