

Exercise of Victims' Right to Restitution in Human Trafficking Crimes

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Abstract

This paper examines the role of law enforcement (prosecutors) in protecting victims of human trafficking crimes in Indonesia, especially in terms of applying for restitution rights following the promulgation of Law Number 21 of 2007 on the Eradication of the Criminal Act of Trafficking in Persons. In addition, this paper also sheds light on various issues arising from the prosecutor's authority to represent victims in compensation claims for trafficking offenses. The restitution procedure for victims of trafficking crimes under Law Number 21 of 2007 differs from the procedure for submitting restitution for victims of trafficking offenses, as stipulated in the Criminal Procedure Code (KUHP). The application for restitution according to Law Number 27 of 2007 can be filed by the prosecutor concurrently with the filing of criminal charges. On the other hand, the application for restitution under the Criminal Procedure Code must be submitted by the victim/family through a consolidation of cases. Even though Law Number 21 of 2007 authorizes prosecutors to submit restitution claims on behalf of victims, this authority has not been fully implemented due to a lack of implementing regulations. There are technical obstacles, such as the victims' return to their homes before the filing of restitution claims.

Keywords: Trafficking; Authority; Restitution; Prosecutors; Victims.

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1. Introduction

Along with advances in virtually every aspect of life, crime has evolved and become more varied, including human trafficking. Human Trafficking unquestionably causes victims losses, both material in the form of physical recovery and immaterial in the form of loss of mental balance, self-confidence, and vitality. The psychological and physical pain of the victim never ends until the case is revealed to the police and during the trial. The cost incurred by the victim during the examination process, the mental strain incurred when the victim recalls the events he/she experienced, and the cost of summoning witnesses at trial make the situation even worse.

In addition to prostitution and other forms of sexual exploitation, victims of human trafficking are also subjected to other forms of exploitation, such as forced labor or forced enslavement, slavery, or practices resembling slavery. Criminals recruit, transport, transfer, cover up, or take victims to capture, entrap, or exploit them in all forms of exploitation. They also engage in kidnapping, forgery, fraud, the abuse of power or a vulnerable position, or offering of payment or benefits to obtain the consent of the individual in control of the victim.

The majority of victims of human trafficking are women, both adults and infants. This is due to the persistence of patriarchal sociocultural values, which place men and women in unequal positions and roles. These sociocultural factors that cause gender inequalities include women's lack of economic empowerment relative to men, women's and children's ignorance of globalization, and women's lack of decision-making authority in the family and society.

According to Schafer, Human Trafficking is a consequence of poverty, inequality, and discrimination.¹ It is associated with a classification of victims based on the circumstances and status of victims, namely:²

1. Unrelated victims. A victim who has no relationship with the perpetrator.
2. Provocative victim. A person who actively promotes his own victimhood.
3. Participating victims, namely Someone who does not do but with his attitude encourages himself to become a victim.
4. Biologically weak victims. Those who physically have weaknesses that

1. Stephen Schafer, "the Victims and His Criminal," (1968), quoted in Lilik Mulyadi, *Capita Selecta of Criminology and Victimology: Criminal Law* (Jakarta: Djambatan, 2007).

2. Lilik Mulyadi, *Capita Selecta of Criminology and Victimology: Criminal Law* (Jakarta: Djambatan, 2007).

- cause them to become victims.
- 5. Socially weak victims. Those who have a vulnerable social position that causes them to become victims.
- 6. Self-victimizing victims. Those who become victims because of crimes committed by themselves.

The Indonesian government has a commitment to preventing and combating human trafficking. This was demonstrated by the 12 December 2000 signing of the United Nations Protocol to Prevent, Suppress, and Punish Human Trafficking, especially of women and children, Supplementing the United Nations Convention Against Transnational Organized Crime, also known as the Palermo Protocol.

The government issued Presidential Decree No. 88/2002 on the National Action Plan for Eliminating Trafficking in Women and Children (RAN-P3A) in response to the Palermo Protocol. On April 19, 2007, the Indonesian Government promulgated Law No. 21/2007 on the Eradication of the Criminal Act of Trafficking in Persons. In addition to criminal provisions, Law No. 21/2007 also regulates the Rights of Human Trafficking Victims.

The rights of victims stipulated in Law Number 21 of 2007 are as follows:³

1. The right to identity;⁴
2. The right to protection from threats that endanger himself, his life, and/or property;⁵
3. The right to restitution;⁶
4. The right to health rehabilitation, social rehabilitation, repatriation, and social reintegration from the government if persons are subjected to physical or psychological suffering as a result of trafficking;⁷
5. Foreign victims can be protected and repatriated to Indonesia at state expense.⁸

Regarding compensation for Human Trafficking, Article 48 of Law No. 21 of 2007⁹ on the Eradication of the Criminal Act of Trafficking in Persons mandates that victims of trafficking have the right to restitution. Restitution is

3. Republic of Indonesia, Law Number 21 Year 2007 on the Eradication of the Criminal Act of Trafficking in Persons (ECATP), promulgated on April 19, 2007, 1. <https://www.warnathgroup.com/wp-content/uploads/2015/03/Indonesia-TIP-Law-2007.pdf>

4. Republic of Indonesia, ECATP, Art. 44.

5. Republic of Indonesia, ECATP, Art. 47.

6. Republic of Indonesia, ECATP, Art. 48.

7. Republic of Indonesia, ECATP, Art. 51.

8. Republic of Indonesia, ECATP, Art. 54.

9. Republic of Indonesia, ECATP, Art. 54.

the payment of material and/or immaterial damages to the victim or his relatives by the perpetrator per a court order that has a permanent legal effect. This led us to questions: What is the function of law enforcement in applying for restitution and implementing (executing) restitution decisions in cases of human trafficking? What are the obstacles in applying for restitution and how can they be overcome?¹⁰

2. Restitution as Victim's Right in Law Number 21 of 2007

One of the government's efforts to protect the rights of trafficking victims is to require trafficking victims to provide restitution for victims or their families. Protecting the rights of victims of Human Trafficking, based on the Palermo Protocol, is also intended to provide justice and welfare for victims and their families. Because in general, trafficking victims come from communities with low education and economic levels, so they easily fall into trafficking with material promises.¹¹

Establishing Law No. 21/2007 on the Eradication of the Criminal Act of Trafficking in Persons manifests Indonesia's commitment to implement the 2000 UN Protocol on Preventing, Eradicating and Punishing Human Trafficking, especially Women and Children (Palermo Protocol), signed by the Indonesian government. The importance of protecting victims of crime has received serious attention from the government. We can be seen in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by the United Nations as a result of The Seventh United Nations Conference on Prevention of Crime and The Treatment of Offenders in Milan, Italy, in September 1985. The definition of protection has been expanded, not only to victims of crime but also to the protection of victims due to abuse of power. In the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, there are several fundamental rights for victims, which is:¹²

1. Equal Treatment and Access to Justice. Victims must be treated with compassion and dignity. They are entitled to recourse and access to justice processes. Administrative and judicial instruments should be introduced and strengthened to allow victims to seek redress through

10. Republic of Indonesia, ECATP, Chapter 1 General Provisions, Art. 1, item 13.

11. One of the objectives of the Palermo Protocol as enumerated in Art. 2 (b) is to protect and assist victims of trafficking crimes, while fully respecting human rights.

12. Rene Yulia, *Victimology of Legal Protection against Victim Crime* (Yogyakarta: Graha Ilmu 2009), 118.

official and informal procedures that are timely, efficient, fair, accessible, and affordable. Victims' requirements in court procedures include notifying victims about the status of their cases, hearing their requests for consideration, treating victims well, and protecting victims' family and witnesses from threats and intimidation.

2. In restitution, the perpetrator of the crime or a third party is held accountable for reimbursing the victims, their family, or others who rely on the victim.
3. Compensation. The criminal performs this action on the victim. When the criminal is unable to pay, the state must pay the compensation.
4. Medical, social, and psychological assistance is provided through the government or community.

The right to restitution is one of the rights of victims of human trafficking. Perpetrators make restitution to victims as compensation for the pain and suffering caused by human trafficking. Restitution is granted and incorporated in a court judgment on trafficking cases under Article 48 paragraph (3) of Law Number 21 of 2007. Restitution in the form of "compensation" is stipulated in Article 48¹³ paragraph (2) of Law Number 21 of 2007 for: (1) loss of wealth or income; (2) suffering; (3) costs for medical and/or psychological treatment; and/or (4) other losses victims suffer due to trafficking include (a) loss of property; (b) basic transportation costs; (c) attorneys' fees or other costs related to legal proceedings; and/or d) forfeit of the offender's promised income.¹⁴

In the beginning, we look for the victim's interests in the concept of compensation. There are two benefits to replacing material losses and all costs incurred, which constitute the emotional satisfaction of the victim. On the other hand, while viewed from the side of the perpetrator's interests, the obligation to compensate is seen as a form of crime imposed and described as something concrete and directly related to the mistakes committed by the perpetrator. According to Chaerudin and Syarif Fadillah, in *Victims of Crime in the Perspective of Victimology and Islamic Criminal Law*, five objectives of the obligation to repay, consists of:¹⁵

1. Alleviating the suffering of victims;
2. As an element that mitigates the punishment to be imposed;
3. As a way of rehabilitating convicts;
4. Simplify the judicial process;

13. Republic of Indonesia, ECATP, Art. 48.

14. Republic of Indonesia, ECATP, Art. 48, para. (3).

15. Chaerudin and Syarif Fadillah, *Victims of Crime in the Perspective of Victimology and Islamic Criminal Law* (Jakarta: Grhadika Press, 2004), 65.

5. Can moan threats or community reactions in the form of retaliatory measures.

Victims of human trafficking are no longer typically individuals, but rather groups of people. The government is responsible for preventing its citizens from becoming victims or being harmed as a result of the illegal conduct of others. As a result, all state officials, including law enforcement, must work together to prevent and prosecute traffickers. In this regard, it is necessary to care for those who suffer, have their rights violated, or have been victims of arbitrary and brutal acts committed by others. Article 2 of Presidential Decree Number 88 of 2002 about the National Action Plan for the Elimination of Trafficking in Women and Children (NAP P3A) affirms mutual care for victims of trafficking, which is:¹⁶

1. Ensure the advancement and enhancement of efforts to protect trafficking victims, particularly women and children;
2. Carry out preventive and repressive activities to prevent and counter trafficking practices, particularly against women and children;
3. Encourage the establishment and/or improvement of human trafficking laws and regulations, particularly those targeting women and children.

Restitution in trafficking crime, in the form of compensation, contains loss of wealth or income, costs for medical treatment, and other losses suffered by victims due to trafficking. Restitution for trafficking victims was included in court rulings. The submission of restitution can be filed by the public prosecutor (prosecutor) along with the prosecution. However, victims can also file their lawsuits for damages suffered as a result of trafficking crimes.

In addition to authorizing the prosecutor to apply for restitution, Article 50 paragraph (3) of Law Number 21 of 2007¹⁷ also allows the prosecutor, after an order from the court, to confiscate the perpetrator's property to be auctioned. The proceeds are used to pay restitution if within 14 (fourteen) days after receiving a warning from the court the perpetrator has not provided restitution to the victim. This provision differs from the procedure for implementing the execution of compensation awards submitted through the merger of cases as stipulated in Article jo Article 101 of the Code of Criminal Procedure.

16. Republic of Indonesia, Presidential Decree Number 88 of 2002 concerning the National Action Plan for the Elimination of Trafficking in Women and Children (NAP P3A), promulgated on December 30, 2002, Art. 2. <https://peraturan.go.id/files/kp88-2002.pdf>.

17. Republic of Indonesia, ECATP, Art. 50.

According to Article 274 of the Code of Criminal Procedure,¹⁸ court decisions on compensation claims filed through merging cases are carried out according to civil judgment procedures. This means that the person who executes the considerate judgment of the clerk of court by order of the Chief Justice of the District Court is not the prosecutor, the prosecutor only carries out his criminal decisions.

3. Criminal Justice Process

Law No. 21/2007 concerning the Eradication of the Criminal Act of Trafficking in Persons, Article 28¹⁹ states that investigations, prosecutions, and court hearings in trafficking cases are conducted under the Code of Criminal Procedure unless otherwise provided in this law. Therefore, this discussion will include investigation, prosecution, and examination in court hearings.

3.1. Investigation

According to the general provisions of Article 1 Point 2 of the Indonesian Code of Criminal Procedure (KUHP),²⁰ the investigation is a series of actions of investigators to search for and collect evidence that, with that evidence, makes light of the criminal act that occurred and to find the suspect. In comparison, Article 1 Point 1 of the Criminal Procedure Code states that investigators are police officials of the Republic of Indonesia or certain civil servant officials who are given special authority by law to conduct investigations.

Regarding the authority of investigators as stipulated in Article 7 paragraph (1) of the Criminal Procedure Code, they are as follows:²¹

1. Receive reports and complaints from a person about a criminal act;
2. Perform the first action at the moment of the scene;
3. Ordering a suspect to stop and check the suspect's ID;
4. Make arrests, detentions, searches, and seizures;
5. Conducting checks and confiscation of mail;
6. Taking fingerprints and photographing a person;
7. Summoning persons to be heard and examined as suspects or witnesses;
8. Bring in the necessary experts in connection with the examination of the case;

18. Republic of Indonesia, Law Number 8 Year 1981 on the Code of Criminal Procedure (KUHP), promulgated on December 31, 1981, Art. 274. <https://bphn.go.id/data/documents/vcv.pdf>.

19. Republic of Indonesia, ECATP, Art. 28.

20. Republic of Indonesia, Code of Criminal Procedure (KUHP), Art. 1.

21. Republic of Indonesia, Code of Criminal Procedure (KUHP), Art. 1.

9. Hold a termination of the investigation;
10. Conduct other acts according to responsible law.

In an investigation, a "preliminary examination" is needed, essentially an examination of a case to find and collect evidence. In this case, Karjadi and Soesilo stated what should be done to find and order this evidence. Searching for evidence must systematically go through three processes as follows:²²

1. Information, namely investigating and collecting data and evidence called "processing" the place of crime;
2. Interrogation, i.e., examining and hearing suspected persons and witnesses who can usually be processed at the scene of the crime;
3. Instrumentarium uses technical tools for case investigation, such as photography, microscopes, and others at the crime scene.

In these three processes, investigators always try to obtain evidence in criminal cases related to crimes that have occurred (*corpora delicti*) and tools that have been used to commit crimes (*instrumenta delicti*) according to Karjadi and Soesilo, is "trying to find the means or methods that have been used by criminals when committing crimes (*modus operandi*); and trying to find out who the criminal (identity) is."²³

As the main investigator, the National Police conduct trafficking investigations in accordance with appropriate legal provisions. Law enforcement has had difficulty discovering cases of human trafficking since victim witnesses always suffer physical and psychological damage, causing devastation in their lives. She may become pregnant, contract venereal illnesses, or be humiliated and degraded by those who sell her honour.

This position is extremely unfavourable during the examination and investigation procedure by police investigators, particularly if the examiner is a male police officer. As a result, many experts advocate for policewomen to handle violence against women, including trafficking, to overcome psychological barriers, create dialogue, and maximise the evidence gathered. So, in conducting investigations, especially to identify organised networks of perpetrators and get "legitimate evidence," a distinctive approach is required, including solid relationships and confidence in victim witnesses to police investigators. Feeling safe, protected, and trusted is a basic human right that

22. M. Karjadi and R. Soesilo, *Criminal Code with Explanations and Comments* (Bogor: Politeia, 1983), 97.

23. Karjadi and R. Soesilo, *Criminal Code*, 97-98.

police officers must nurture for victim-witnesses to help in disclosing crimes. As a result, the public prosecutor can accept files, and the court procedure can begin, allowing trafficking defendants to be punished with the maximum punishment mission to serve as a deterrence.²⁴

Furthermore, as indicated in Article 45 of Law Number 21 of 2007,²⁵ each province and district/city shall create a Special Service Room or “Ruang Pelayanan Khusus” (RPK) at the local police office in order to undertake investigations at the level of the inquiry of witnesses and/or victims of trafficking offenses. In the National Police unit, the Special Services Room is particularly closed and pleasant. Women and children who have experienced sexual violence or harassment can securely report their situations to sympathetic, caring, and professional policewomen. Furthermore, the special service room's (RPK) goal and mission are as follows:²⁶

RPK Vision: Women and children, victims of trafficking, receive protection and assistance, both medical, psychological, and legal so that the problem is resolved fairly.

RPK Mission: RPK provides a sense of security to women and children as victims of violence and provides services quickly, professionally, empathetically, and compassionately. RPK may also build a network of cooperation between related agencies, agencies, or institutions to solve the problem of violence against women.

3.2. Prosecution

The Criminal Procedure Code that the investigator must send the case file to the public prosecutor.²⁷ The submission of the case file took place in two stages. The investigator just submits the case file at the first step. If the investigation is completed, the investigator transfers responsibility for the suspect and evidence to the public prosecutor in the second step. The public prosecutor's authority is defined in Article 14 of the Criminal Procedure Code as follows:

1. Receive and review case files from investigators or auxiliary investigators;

24. Murniati, *Efforts to Overcome Violence against Women Include Trafficking (Writing on Pleidoi Media Communication and Transformation of Children's and Women's Rights, Vol. 1 No. 1. April 2006)* (Bandung: Pusaka Indonesia, 2006), 96.

25. Republic of Indonesia, ECATP, Art. 45.

26. Murniati, “Efforts to Overcome Violence,” 99.

27. Republic of Indonesia, Code of Criminal Procedure (KUHP), Art. 8 para. (2) and (1).

2. Conduct pre-prosecution if there are inadequacies in the investigation, in accordance with Article 110 paragraphs (3) and (4), by giving the investigator directions to complete the inquiry;
3. After the investigator has transferred the case, grant an extension of detention, carry out incarceration or additional detention, and/or change the detainee's status.
4. Bringing an indictment;
5. Refer cases to court;
6. Notify the defendant, through a court letter, of the day and time the matter will be heard, and encourage both the defendant and witnesses to attend the scheduled hearing.
7. Conduct prosecutions;
8. Close cases for legal reasons;
9. Perform other acts within the scope of duties and responsibilities as a public prosecutor under the requirements of this legislation;
10. Execute the judge's decision.

In human trafficking cases, public prosecutors may file criminal charges against individuals, corporations, and state administrators who abuse their authority and power. This is stipulated in Article 6, Article 7, Article 8, Article 9, Article 10, Article 11, Article 12, Article 15, Article 16, and Article 17 of Law Number 21 of 2007.

According to the guidelines for the investigation and prosecution of trafficking crimes and the protection of victims during the law enforcement process, the sanctions (punishments) that the public prosecutor can prosecute will depend on the specifics or characteristics of the case concerned, which includes:²⁸

1. Number of casualties;
2. The extent of material and immaterial losses suffered by victims;
3. The fact that the defendant has violated the law to enrich himself or to seek financial gain;
4. Age and background of the victim;
5. Death or resulting injury or severe disability to the victim;
6. The degree of cruelty or cunning of the deed of the accused;
7. The time during which trafficking has been committed;
8. Ways of using threats of force or coercion in exceptional cases;
9. The level of organizing trafficking offenders;
10. Other crimes have been proven, such as involvement in criminal

28. National Police, Indonesian Prosecutor's Office, *IOM: Edoman for Investigators and Prosecution of Trafficking and Protection of Victims during Law Enforcement Process* (Jakarta: International Organization for Migration (IOM), 2005), 34.

organizations, persecution, etc.

In addition, the public prosecutor may seek administrative sanctions, such as business closure or license revocation. These financial and administrative sanctions are very effective if they are agents or companies involved in trafficking crimes because they are aimed at economic interests and have a preventive function.

In the guidelines for the investigation and prosecution of trafficking crimes, the elements of trafficking are also mentioned, namely:²⁹

1. Deceit;
2. Threats or use of physical or sexual violence;
3. The worker finds himself in a situation similar to slavery and the worker is sold to/bought by the employer;
4. Abuse of power or authority
5. Intimidation and/or the use of threats to take retaliatory measures if the victim resists;
6. Threats to disseminate information to families or communities on trafficking for prostitution;
7. Use of false identity papers;
8. Abduction;
9. Deprivation or restriction of freedom of movement;
10. Withholding of wages or refusal to pay workers' wages;
11. Withholding of passports and/or other identity papers;
12. Taking, confiscation, or confiscation of personal belongings;
13. Threats to report workers to law enforcement.

3.3. Examination in Court

According to Article 153, paragraphs (1) and (2) of the Code of Criminal Procedure, a judge nominated by the chief justice to hear the case determines the day of trial.³⁰ In this case, the judge ordered the public prosecutor to summon the accused and witnesses to appear in court. Furthermore, the public prosecutor issues an indictment, which serves as the foundation of criminal procedural law because the examination during the trial is based on that indictment. Meanwhile, judges are not permitted to inflict offenses beyond the charge's scope. The indictment must include a detailed, unambiguous, and complete statement of the crime accused, including the time and location of the crime. The preliminary examination results, where the defendant's

29. National Police, Indonesian Prosecutor's Office, "*IOM: Edoman for Investigators*," 43.

30. Republic of Indonesia, Code of Criminal Procedure (KUHAP), Art. 153.

testimony can be found, witness statements, and other evidence, including expert testimony such as *visum et repertum*, are used to formulate charges. Under terms of proof, the crime of human trafficking is enlarged further under Article 29 of Law Number 21 of 2007.

Article 29 of Law Number 21 of 2007 states that evidence other than that stipulated in the Criminal Procedure Code may be admissible:³¹

1. Information spoken, transmitted, received, or stored electronically by optical means or similar; and 2. Data, recordings, or information that can be seen, read, and/or heard, and that can be issued with or without the aid of a means, whether on paper, any physical object other than paper, or electronically recorded, including but not limited to:
2. writing, music, or visuals;
3. maps, patterns, photographs, or the like; or
4. letters, signs, numbers, symbols, or perforations with significance or that can be understood by someone who can read or interpret them.

According to Article 34 of Law Number 21 of 2007, witness statements can be delivered remotely via audio-visual communication technologies if witnesses and/or victims cannot be present for examination at a court hearing. Meanwhile, according to Article 37, witnesses and/or victims have the right to request that the presiding judge allow them to testify in court without the offender present. Abstention may also be terminated in trafficking offenses. Article 41 stipulates that if a defendant has been called legitimately and appropriately and fails to appear in court for any reason, the matter may be heard and decided in his or her absence.

Trafficking offenses can arise owing to a variety of causes, including a lack of employment, poverty, and a lack of education, all of which motivate many Indonesians to become migrant workers in the goal of earning a decent living. They have, however, been exploited by traffickers by doing unlawful crimes, notably enticing or fooling them with the promise of high earnings and respectable jobs. However, after paying a lot of money, they became victims and discovered totally different circumstances than what was promised. They are subjected to inhumane treatment, which includes exploitation of labor without concern for health and even without sufficient wages, as well as prosecution or forced prostitution with physical and mental agony.

31. Republic of Indonesia, ECATP, Art. 29.

Muhammad Joni presented several characteristics of the crime of Human Trafficking, namely:³²

1. Organized and widely networked;
2. Involving many perpetrators/actors;
3. Includes various prohibited derivative acts;
4. Crossing state borders or crossing regional (domestic) borders;
5. Passing people in a "haram" and illegitimate mode;
6. Not with original consent, but by coercion or fraud and other crimes;
7. For exploitation (economic, sexual), prostitution, and organ transfer;
8. By using or making a lot of money.

The formulation in Law Number 21 of 2007 includes both material and formal criminal law, with several addendums, including:

1. The definition of perpetrators is intended to catch criminal syndicates (groups of people or corporations), both legal and non-legal entities, and state administrators who abuse their authority and power;
2. Trafficking networks operate not just within domestic regions but also between countries.
3. Evidence expansion (Article 29) allows investigators to wiretap telephones or other means of communication allegedly used in connection with trafficking, as directed by the Chief Justice of the District Court;³³
4. Victim protection, including restitution, rehabilitation, and repatriation to compensation from the state;
5. Expressly define human trafficking (Article 1 point 1), and provide sanctions more severe than those in the Criminal Code relating to human trafficking.³⁴

The Witness and Victim Protection Agency (LPSK) submits restitution requests to the court on behalf of the victim, her family, or her attorney. A restitution application must include at least:

1. Identity of the applicant;
2. Description of the criminal offense;
3. Identity of the perpetrator of the crime;
4. Description of the actual losses suffered; and

32. Muhammad Joni, "Eradication of Human Trafficking and Protection of Victims" *Writing on Plei Media Communication and Transforming Children's and Women's Rights*, Vol. 1 No. 1 April 2006 (Bandung: Pusaka Indonesia, 2006), 71.

33. Republic of Indonesia, ECATP, Art. 29.

34. Republic of Indonesia, ECATP, Art. 1.

5. The requested form of restitution.³⁵

In addition, the request for restitution must be accompanied by:

1. Photocopy of the victim's identity certified by the competent authority;
2. Evidence of actual harm suffered by the victim or family made or authorized by the competent authority;
3. Proof of costs incurred during treatment and/or treatment authorized by the agency or party carrying out treatment or treatment;
4. Photocopy of death certificate in case of death;
5. A certificate from the Indonesian National Police showing the applicant as a victim of a criminal act;
6. Certificate of family relationship, if the family applies; and
7. The extraordinary power of attorney is if the request for restitution is filed by the victim's power of attorney or family attorney.

The Witness and Victim Protection Institute (LPSK) performs an urgent substantive examination after receiving a request for restitution from the victim, his family, or his attorney. Based on a court ruling that has gained permanent legal effect, a claim for reparation is submitted, and the perpetrator of the crime is found guilty. The LPSK applies to the district court for resolution, judgment, and deliberation. The restitution request is made before the charges are read. Following that, the LPSK submits the request to the public prosecutor, along with its conclusion and consideration. The public prosecutor then included the demand for reimbursement in his complaint, along with its judgment and consideration to secure a court ruling. The conclusion of the LPSK and its review determine the restitution request. Meanwhile, the LPSK is considering whether to grant or deny the request for restitution.³⁶

According to the explanatory provisions of Article 48 paragraph (1) of Law Number 21 of 2007, it does not preclude victims from filing claims for losses.³⁷ In this case, Article 98 of the Criminal Procedure Code contains one legal provision respecting victims. Please assume that the victim asserts his rights through a compensation claim. In that situation, it will be time-consuming and costly. According to Code of Criminal Procedure Article 98 paragraph (1), "if an act on which an indictment is based in a criminal case by a district court

35. Republic of Indonesia, Government Regulation Number 44 Year 2008 Concerning Providing Compensation, Restitution, and Assistance to Witnesses and Victims (PCRA) [Government Regulation No. 44/2008 PCRA], promulgated on May 29, 2008. Art. 22. <https://peraturan.go.id/files/pp44-2008.pdf>.

36. Republic of Indonesia, Government Regulation No 44/2008 PCRA, Art. 27.

37. Republic of Indonesia, ECATP, Art. 48.

causes harm to another person, the presiding judge may decide to combine the claim for compensation into the criminal case."³⁸

Several perspectives support the use of crime victims' rights as a result of violations of human rights as a foundation for crime victim protection, such as restitution:³⁹

1. Utility Theory

This theory focuses on the most significant benefit to the greatest number. Protecting victims of crime can be applied as long as it provides more significant benefits than the non-application of the concept, not only for victims of crime but also for the criminal law enforcement system.

2. Theory of Responsibility

In principle, the subject of the law (person or group) is responsible for all legal acts committed so that if a person commits a criminal act that causes others to suffer harm (in a broad sense), that person must be responsible for the harm caused, unless there is a reason that exonerates it.

3. Indemnity Theory

As a manifestation of responsibility for his fault towards others, the perpetrator of the criminal act is burdened with the obligation to compensate the victim or his heirs.

In the case of the implementation of restitution, in Law Number 21 of 2007, there is a provision stating that if, within a specific time, the perpetrator does not pay restitution, the prosecutor, by order of the Chairman of the District Court, can confiscate the perpetrator's assets to be auctioned to pay restitution. However, the law does not explicitly state whether, from the beginning, the execution of restitution must go through the prosecutor or the prosecutor only acts if the perpetrator does not want to pay.⁴⁰

4. Sub-obstacles and Countermeasures in Filing for Restitution

Obstacles in legislation can be seen from the fact that the restitution regulations in Law Number 21 of 2007 still need to be practical, resulting in different interpretations that cannot be applied effectively. Meanwhile, no implementing rules such as Government rules (PP), Implementation Guidelines (Juklak), or Technical Guidelines (Juknis), have been issued by the Government, the Attorney General's Office, or the Supreme Court, on this matter. The lack of

38. Republic of Indonesia, Code of Criminal Procedure (KUHP), Art. 98.

39. M. Arief Mansur and Elisatris Gultom, *The Urgency of Protecting Crime Victims* (Jakarta: PT. Raja Grafindo Persada, 2006), 163.

40. Republic of Indonesia, ECATP, Art. 50.

these implementation rules makes it difficult for prosecutors to deal with real-world realities.

We assess the hurdles as a lack of legal understanding in the community, particularly among victims and their family, and that victims are relieved to be free of the practice of human trafficking. Victims are also embarrassed if the case becomes public, so many are hesitant to submit compensation claims, even through prosecutors. Even when prosecutors represent them, victims rarely bother to take care of themselves or file for reparations. Furthermore, victims may not necessarily come from locations covered by the district court that hears their cases. The victim had already left home and did not wish to return to make a reparation claim when the court heard the matter. This makes it extremely difficult for prosecutors to decide whether to continue applying for compensation without the victim's cooperation or not.

The restitution measures of Law Number 21 of 2007 must be updated and incorporated into implementing rules as soon as possible. The government should establish a Government Regulation (PP) on the processes for asking for restitution for victims of human trafficking offenses as soon as possible. Similarly, relevant entities such as the Attorney General's Office and the Supreme Court must establish technical guidelines and implement rules to aid prosecutors and judges in addressing restitution claims as soon as possible. Furthermore, socialization from central institutions to regions is required to ensure uniformity in field practice. Prosecutors in the region can also provide this socialization to victims and their families so that they are not hesitant or unwilling to submit restitution demands because it is their right and they don't have to bother because prosecutors will represent them.

5. Conclusion

The role of law enforcement (prosecutors) in representing victims applying for restitution should begin from the beginning, including determining the size of restitution to be submitted to the court and acting as the executor of restitution decisions. However, that is not expressly regulated in Law Number 21 of 2007. The prosecutor's role in applying for restitution is only explained in Article 48, paragraph (1). Still, that provision only mentions applying for restitution along with the claim and does not reduce the victim's right to use for restitution. Law Number 21 of 2007 does not explain the extent of the prosecutor's role in the relationship between the prosecutor and the victim, and there is no firmness of the prosecutor's authority to file legal remedies. In addition, the authority as

the executor of the restitution decision "from the first start" is also not expressly regulated because Article 50 paragraph (3) only authorizes the prosecutor to confiscate the perpetrator's property after an order from the chief justice if the perpetrator does not pay restitution.

Obstacles from the juridical side (legal substance): 1) the restitution provisions in Law Number 21 of 2007 are still not firm and cause many interpretations; 2) there is no Government Regulation (PP) on the procedure for applying for restitution and the role of prosecutors in applying for restitution; and 3) there are no Implementation Guidelines (Juklak) and Technical Guidelines (Juknis) on the role of prosecutors in applying for restitution for trafficking victims, which can be used as guidelines for prosecutors in handling such cases. Meanwhile, obstacles in terms of legal culture: 1) low legal awareness from victims and their families; 2) the victim is grateful to have quit trafficking and has not bothered to file a claim for restitution; and 3) the victim who came from an area outside the court where the case was examined and at the time the case was examined the victim had returned home.

6. Suggestion

It is important to amend Law Number 21 of 2007, particularly in regard to the prosecutor's competence to make restitution claims, as specified in the Explanation to Article 48 paragraph (1). This authority should be regulated in the core articles rather than the article's explanation. Furthermore, the phrase "it does not prejudice the victim's right to apply for restitution" should be clarified to state that the victim's right should be filed through a civil lawsuit, not during criminal proceedings. Furthermore, Law No. 21/2007 shall be immediately followed by the publication of a Government Regulation (PP) on Mechanisms and Procedures for Submitting Restitution for Human Trafficking Victims. The Government Regulation (PP) must at the very least regulate: 1) procedures for calculating the value of losses to be submitted to the court and the prosecutor's authority in determining the number of losses to be submitted to the court; 2) the prosecutor's authority to apply for restitution is mandatory rather than voluntary, so he does not need to obtain consent from the victim unless the victim requests that the prosecutor not file a claim for restitution; and 3) there is no requirement for the prosecutor to obtain consent.

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