



TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 26, 2021

**A new decade
for social changes**

www.techniumscience.com

ISSN 2668-7798



9 772668 779000

The nature of giving compensation and restitutions for just rape victims

R. Arif Muljohadi, Made Warka, Otto Yudianto

Faculty of Law, Universitas 17 Agustus 1945 Surabaya

arifdyfaz31@gmail.com

Abstract. The essence of providing compensation and restitution for rape victims is to achieve justice by providing legal protection for rape victims and respecting the human rights of rape victims as the party most harmed. The concept of providing fair compensation and restitution for rape victims uses the concept of subrogation in civil law as an effective solution in solving the problem of recovering rape victims. In the subrogation concept approach, the state is a third party who takes over the responsibility for paying compensation to rape victims because the perpetrators are classified as financially incapable. In this subrogation concept, the government requires bailout funds to realize a compensation program for the recovery of rape victims, but in fact the real ones who provide compensation are the perpetrators of the crime of rape with the application of the next concept that while serving a sentence in a correctional facility, inmates are empowered as befits workers who work in prisons in a correctional facility and produce an item (product). The results of the prisoners' work wages are partly set aside to be paid to the state treasury as a consequence of the state as a sub-roger who replaces the position of rape victims who have the right to claim the perpetrators of the crime of rape.

Keywords. compensation; victim; right

Introduction

The birth of the provision of compensation and restitution is due to the high rate of rape that occurs in Indonesia. Rape is a form of violence against women which is an example of the vulnerability of women's positions, especially to men's sexual interests. The sexual image of women who have been placed as sexual objects of men, turns out to have far-reaching implications on women's lives, so they are forced to always face violence, coercion and physical and psychological torture. (Furqania & Michael, 2021)

Article 1 Government Regulation no. 44 of 2008 states that compensation is compensation given by the state because the perpetrator is unable to provide full compensation for which he is responsible. While restitution is compensation given to the victim or his family by the perpetrator or a third party, it can be in the form of returning property, payment of compensation for loss or suffering, or reimbursement of costs for certain actions.

However, in relation to compensation and restitution, Articles 8 to 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulate a number of principles:

- a. Law violators must provide compensation (restitution) to the victims (Article 8);

b. States should review their customs, regulations and laws to consider restitution as an available punishment option in criminal cases, in addition to other criminal sanctions (Article 9);

c. In the case of compensation if it cannot be obtained from the violator of the law or other sources, the state is recommended to provide such compensation (compensation) (Article 12);

d. The establishment of a special fund for this purpose is recommended (Article 13).(Rover, 2000)

According to the philosophical aspect, sexual crimes (Agustina & Panyella-Carbó, 2021) against women are a violation of the constitutional rights of citizens as stated in the 1945 Constitution of the Republic of Indonesia. Violation of rights is intended, in particular the right to self-protection and the right to a sense of security, in Article 28G paragraph 1 the right to live in physical and spiritual prosperity and to have a good and healthy living environment (Article 28H paragraph 1) as well as the right to be free from unfair treatment discrimination on any basis and the right to protection against discriminatory treatment (Article 28 I paragraph 2), the right to receive facilities and special treatment to obtain the same opportunities and benefits in order to achieve equality and justice (Article 28 paragraph 2), as well as the right to recognition, guarantee, protection, and fair legal certainty as well as equal treatment before the law (Article 27 paragraph 1 and Article 28 D paragraph 1). Violation of a person's human rights.

According to the juridical aspect, that the crime of rape is one of the crimes against decency as regulated in Article 285 of the Criminal Code, which reads: "Anyone with violence or with threats of violence forces a woman to have intercourse with him outside of marriage, threatened with rape, with a maximum imprisonment of twelve years" and Government Regulation no. 44 of 2008 concerning the Provision of Compensation, Restitution, Assistance stipulates that victims are entitled to compensation, restitution, medical assistance and *psychosocial* rehabilitation. Meanwhile, Article 5 letter (a), Article 6 letter (a) and letter (b), Article 7 letter (a) and letter (b) of the Law of the Republic of Indonesia Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 Regarding the Protection of Witnesses and Victims of Rape, they are entitled to restitution from the perpetrators of rape as well as compensation, security guarantees and medical rehabilitation from the State.

According to the sociological aspect, the crime of rape is all forms of actions and behavior that are economically, politically and *socio-psychologically* very detrimental to society, violate ethical norms, and attack the safety of citizens. Therefore, the existence of the rule of law in Indonesia is required to develop in line with the dynamics of society, therefore it is urgently needed a comprehensive legal reform or improvement so that it can regulate the balance between the public interest and the interests of the State with individual interests, a balance between certainty and legal justice, balance between human rights and obligations.

The crime of rape is regulated in Book II Chapter XIV of the Criminal Code on Crimes against Morals. In short and simple, decency offenses are offenses related to (problems) decency. In the Big Indonesian Dictionary, decency is defined as an act related to etiquette and manners; moral behavior. However, to determine how far the scope is not easy, because the understanding and boundaries of decency are quite broad and can vary according to the views and values prevailing in society.(Arief, 2011)

The problem is that many rape victims don't receive compensation for the crimes they have experienced, and even if they do, it is an effort taken through non-litigation channels, in the form of mediation with the hope for the perpetrators that the case will not be processed legally. It is proven that if there is a crime then the work of criminal law is only oriented to

proving a crime, while the issue of compensation becomes a personal matter that must be fought for by the victim himself. Based on the background of the problems described above, the following problems can be formulated, namely the nature of providing compensation and restitution for rape victims? And the concept of providing fair compensation and restitution for rape victims?

Research methods

The type of research in this legal research is normative legal research.(Refina Mirza Devianti, 2021)

Research results and discussion

The Nature Of Providing Compensation And Restitution For Rape Victims

The nature of providing compensation and restitution for rape victims is a form of legal protection for victims of rape. This means that the provision of compensation and restitution for rape victims is to achieve justice by providing legal protection for rape victims and respecting the human rights of rape victims as the party most harmed. However, in terms of providing legal protection to victims of rape, the perpetrators of rape are obliged to provide restitution to victims of rape. However, if the perpetrator of the rape victim is unable to provide restitution, then the State provides legal protection by providing compensation to the rape victim.

Law of the Republic of Indonesia Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, Article 5 paragraph (1) letter a of the Law on Protection of Witnesses and Victims stipulates that victims are entitled to personal protection or security, his family and property, as well as being free from threats related to the testimony he will, is currently or has given;

Article 6 paragraph (1) letter a of the Law on the Protection of Witnesses and Victims stipulates that victims of gross human rights violations are entitled to medical assistance and letter b stipulates that victims of gross human rights violations are entitled to psycho-social rehabilitation assistance.

Article 7 paragraph (1) letter a of the Law on the Protection of Witnesses and Victims stipulates that the right to compensation in cases of gross human rights violations; and Article 7 paragraph (1) letter b stipulates that the right to restitution or compensation is the responsibility of the perpetrator of a criminal act which is granted through a court decision.

To analyze the formulation of problem 1, it is analyzed with the theory of legal protection according to Satjipto Rahardjo, saying that legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law.(Rahardjo, 1997) This means that in the application of legal protection to rape victims, the principles of law should be guided, namely the principle of benefit, the principle of justice, the principle of balance and the principle of legal certainty. This is in accordance with the context of criminal law, that legal principles must color both material criminal law, formal criminal law and criminal law enforcement.

Human rights are natural rights that come from Allah (Milbank, 2021), so that no one or any power in this world can take away these rights that have been inherent since humans were born. Human rights are not given by humans, governments or laws.(Mughal, 2012) Only by respecting and upholding these natural rights can humans live in accordance with their dignity and worth. This is in accordance with the concept of John Locke, who argues that human rights are given directly by God the Creator as a gift in the form of natural rights. Therefore no power in this world can uproot it.(Montuori, 2021)

Research findings, rape victims in ordinary circumstances can only apply for compensation to rape perpetrators based on the provisions of Article 98 of the Criminal Procedure Code, so that the position of rape victims is very weak and has not received legal protection. This is completely contrary to the principle of the rule of law (*rechtsstaat*) (Eck et al., 2018), which requires fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law as mandated in Article 28 D paragraph (1) of the 1945 Constitution.

The results of the research above are supported by the results of Alvianto R.V. Ransun, said that the guarantee of legal protection for the rights of victims of criminal acts is very important considering that the consequences of a criminal act can cause a person to experience physical, psychological and property losses and suffering. Through the legislation guaranteeing the protection of the rights of victims, it is necessary to obtain legal certainty and justice as a result of the occurrence of a crime. For criminal acts of gross human rights violations, victims need to receive compensation and for victims of crimes other than serious human rights violations, restitution and assistance for recovery from physical and psychological conditions are necessary. (Ransun, n.d.)

This is in line with the results of Firgotun Naziah's research, which states that legal protection for rape victims must be carried out regarding the complex impacts that occur on rape victims. They not only get physical impacts but also psychological and social impacts, the law must act directly to protect rape victims. Rape protection can be done in 2 ways, namely victim restitution and medical assistance and psycho-social assistance. The victim's restitution must be carried out because rape is a crime, especially a crime of morality as regulated in Book II of the Criminal Code Article 285. (Naziah, 2017)

The Concept Of Providing Fair Compensation And Restitution For Rape Victims

Recovery from the suffering/loss of rape victims in the context of criminal law has become a must and the perpetrator's obligation to fulfill it and if the restitution is not obtained from the perpetrators, the state is obliged to provide compensation to rape victims as a form of state responsibility towards its citizens. (Aulia & Afifah, 2019)

The state's responsibility in the form of making regulations on the protection of rape victims in empirical reality cannot be said to be satisfactory. The messages of the international victim declaration instruments clearly mandate member states to make regulatory policies and open a full way for rape victims to get reparation, and in this policy it is also demanded how the state must also bear its responsibility for compensation for rape victims. The positive legal construction of the protection of rape victims for restitution and compensation built by the state in the Criminal Code, Criminal Procedure Code and other laws has not yet been strong enough to guarantee for rape victims to get legal protection.

As regulated in Article 50 of Law Number 21 of 2007 that if the victim does not get restitution from the perpetrator because he is classified as financially incapable, the perpetrator is subject to a subsidiary penalty whose construction is the same as imprisonment in lieu of a fine as regulated in Article 30 paragraph (2) of the Criminal Code, but subsidiary confinement in lieu of restitution is not actually regulated in the Criminal Code. This policy can be said as a norm that breaks the chain of responsibility of the perpetrator for restitution to the responsibility of the State for compensation.

So that the implementation of fines is not effective because it is not regulated to strengthen the power of execution. In many cases, especially offenses outside the Criminal Code, the criminal sanctions of fines imposed by judges cumulatively with other crimes always

lead to the application of a substitute confinement subsidiary even though the convict is not classified as incompetent.

The concept of providing fair compensation and restitution for rape victims uses the concept of subrogation in civil law as an effective solution in solving the problem of recovering rape victims. The concept of *subrogation* in civil law is regulated in Article 1400 of the Civil Code which states that the *subrogation* or transfer of the rights of a creditor (rape victim) to a third party (state) who pays to the creditor (rape victim), can occur due to approval or because of law.

However, in the concept of subrogation, the state is a third party who takes over the responsibility for paying compensation to rape victims because the perpetrators are classified as financially incapable. This subrogation concept, the government requires bailout funds to realize a compensation program for the recovery of rape victims, but in fact the real ones who provide compensation are the perpetrators of the crime of rape with the application of the next concept that while serving a crime in a correctional institution, prisoners are empowered as befits workers who work in prisons penitentiary and produce an item (product). The results of the prisoners' work wages are partly set aside to be paid to the state treasury as a consequence of the state as a sub-roger that replaces the position of rape victims who have the right to claim for the perpetrators of the crime of rape.

The results of this study are supported by the results of Achmad Murtadho's research, saying: First, the decision on the case Number 13/Pid.Sus-Child/2017/PN.PBR in the paradigm of Child Victim protection has been constructed by applicable laws and regulations, namely the absence of Articles in the Criminal Code and Criminal Procedure Code include law enforcement policies, namely the obligation to provide claims for compensation in court decisions. Second, the progressive implementation of *cross-examination* by giving the perspective of Child Victims who must be given the obligation to consider compensation in criminal justice as an additional or alternative criminal policy, namely being imposed with the main criminal and placing the victim's perspective as one of the requirements for making the Child Protection Act as well as on Court Decision.(Murtadho, 2020)

Conclusion

The essence of providing compensation and restitution for rape victims is to achieve justice by providing legal protection for rape victims and respecting the human rights of rape victims as the party most harmed.

The concept of providing fair compensation and restitution for rape victims uses the concept of subrogation in civil law as an effective solution in solving the problem of recovering rape victims. In the subrogation concept approach, the state is a third party who takes over the responsibility for paying compensation to rape victims because the perpetrators are classified as financially incapable. In this subrogation concept, the government requires bailout funds to realize a compensation program for the recovery of rape victims, but in fact the real ones who provide compensation are the perpetrators of the crime of rape with the application of the next concept that while serving a sentence in a correctional facility, inmates are empowered as befits workers who work in prisons in a correctional facility and produce an item (product). The results of the prisoners' work wages are partly set aside to be paid to the state treasury as a consequence of the state as a sub-roger who replaces the position of rape victims who have the right to claim the perpetrators of the crime of rape.

References

- [1] Agustina, J. R., & Panyella-Carbó, M. N. (2021). Redefining drug-facilitated sexual crimes. *Politica Criminal*, 15(30). <https://doi.org/10.4067/S0718-33992020000200526>
- [2] Arief, B. N. (2011). *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*. Kencana.
- [3] Aulia, M. C., & Afifah, W. (2019). PEMIDANAAN PELAKU PEMERKOSAAN DENGAN ORIENTASI SEKSUAL SEJENIS. *Mimbar Keadilan*. <https://doi.org/10.30996/mk.v12i1.2170>
- [4] Eck, B., Bovens, M., & Zouridis, S. (2018). Algoritmische rechtstoepassing in de democratische rechtsstaat. *Nederlands Juristenblad*, 93(40).
- [5] Furqania, M. A., & Michael, T. (2021). *LEGAL CONSTRUCTION AND IMPLICATIONS RELATED TO PROTECTION OF MAKING SEX TAPE WITH A COUPLE*. 14(2). <https://doi.org/10.30996/MK.V14I2.4843>
- [6] Milbank, J. (2021). Between catastrophes: God, nature and humanity. *Revista Portuguesa de Filosofia*, 77(2–3). https://doi.org/10.17990/RPF/2021_77_2_0489
- [7] Montuori, M. (2021). John Locke: On Toleration and the Unity of God. In *John Locke: On Toleration and the Unity of God*. <https://doi.org/10.1163/9789004463950>
- [8] Mughal, M. A. (2012). Comparative Study of Western Concept of Law and Islamic Concept of Law. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2055906>
- [9] Murtadho, A. (2020). Pemenuhan Ganti Kerugian terhadap Anak yang Menjadi Korban Tindak Pidana Pencabulan. *Jurnal HAM*, 11(3). <https://doi.org/10.30641/ham.2020.11.445-466>
- [10] Naziah, F. (2017). Analisis Perlindungan Hukum Terhadap Wanita Korban Pemerkosaan. *Lex Scientia Law Review*, 1(1).
- [11] Rahardjo, S. (1997). PEMBANGUNAN HUKUM DI INDONESIA DALAM KONTEKS GLOBAL. *Perspektif*. <https://doi.org/10.30742/perspektif.v2i2.153>
- [12] Ransun, A. R. V. (n.d.). *Ransun, Mekanisme Pemberian Kompensasi Dan Restitusi Bagi Korban Tindak Pidana*, *Jurnal Lex Crimen Vol.I/No.1/Jan-Mrt/2012*.
- [13] Refina Mirza Devianti, T. M. (2021). Accountability of mosque administrators against violation of Covid-19 health protocols in the mosque environment. *International Journal of Research in Business and Social Science (2147-4478)*, 10(2), 284–289.
- [14] Rover, C. de. (2000). *To Serve & To Protect - Acuan Universal Penegakan HAM*. Raja Grafindo Persada.