

# Restitution for Child Victims as a Recovery Instrument: A Jurisprudential Analysis of Judicial Considerations in Criminal Cases

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## ABSTRACT

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**Purpose of the Study:** This study aims to examine the construction of judicial reasoning across three levels of courts in Case No. 5642 K/Pid.Sus/2022 regarding the determination of restitution for child victims of crimes, as well as identify the points which indicate disharmony between the principle of legality, the criminal justice regime, child protection norms, and state finance regulations that contribute to divergent legal reasoning among the District Court, High Court, and Supreme Court decisions. The paper aims to discover why the authority to grant restitution is not exercised in a uniform manner and the extent to which regulatory gaps affect the justice system's ability to guarantee effective victim recovery.

**Methodology:** This study employed a normative juridical research method using the jurisprudence approach, case approach, and conceptual approach. Primary legal materials included Government Regulation No. 43 of 2017, the Child Protection Law, the Law on the Witness and Victim Protection Agency, the State Financial Law, and international instruments on victims' rights. The jurisprudential analysis focused on Supreme Court Decision No. 5642 K/Pid.Sus/2022 by examining the legal reasoning at each judicial level to map consistency, deviations, and normative conflicts. The conceptual approach was used to interpret the principle of legality, theories of authority, individual offender liability, and victim recovery principles.

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**Results:** The findings show that the District Court's order requiring the Ministry of Women's Empowerment and Child Protection to pay restitution was driven by a victim-oriented recovery approach but conflicted with the principle of legality and exceeded judicial authority. The High Court corrected this by returning the responsibility to the offender, and the Supreme Court reaffirmed this position based on personal liability and adherence to the state finance regime. The Supreme Court emphasized that judges cannot assign restitution obligations to the state without a clear legislative basis. The study further confirms a critical legal vacuum: no substitution mechanism exists when offenders are unable to pay, resulting in incomplete realization of victims' rights despite a comprehensive assessment of losses. The lack of synchronization between child protection regulations, criminal law, and state finance governance constitutes a major barrier to effective restitution.

**Applications of this Study:** This research's findings can serve as a foundation for improving restitution regulations, particularly the need to establish a recovery scheme enabling the state to act lawfully when offenders are unable to pay. The analysis also provides guidance for judges and policymakers on the limits of judicial authority and the importance of harmonizing child protection, criminal law, and state financial regulations in shaping victim-recovery policies.

**Novelty/Originality of this study:** The originality of this study lies in its critical mapping of the relationship between judicial reasoning, limits of authority, and normative conflicts in child-victim restitution cases, an area that is not yet fully elaborated in existing literature. This analysis explicitly reveals the regulatory vacuum that produces divergent reasoning among courts and underscores the need for normative reconstruction, so that restitution mechanisms can operate effectively without violating the legality principle.

**Keywords:** Child; Judicial Considerations; Restitution.

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## INTRODUCTION

Children have legal and sociological characteristics that distinguish them from adults, leading them to require special protection in national and international legal systems. In Indonesian positive law, children are categorised as a vulnerable group requiring not only repressive treatment, but also rehabilitative and restorative treatment, especially when they become victims of crime (Marabessy & Siagian, 2023). Barda Nawawi Arief emphasised that legal protection for children is a guarantee of their freedom and human rights, as well as their best interests to achieve their welfare (Purek, 2024). This principle is strongly legitimised in the 1989 Convention on the Rights of the Child (CRC), which Indonesia ratified through Presidential Decree No. 36 of 1990. The principle of "the best interests of the child" is the main

foundation for policies and judicial actions related to children (Muchlis, 2024). This principle requires preventive protection and a comprehensive response from the state to restore children's physical, psychological, social, and economic rights as part of restorative justice (Dosniroha & Nurwidiyana, 2024). Therefore, legal actions, particularly in criminal proceedings, must prioritise the best interests of the child in accordance with the doctrine of child-sensitive justice, which views children as active subjects whose rights cannot be reduced to mere formal procedures.

In the legal sphere, children are often victims of crimes involving violence and exploitation, including sexual violence, economic exploitation, human trafficking, and crimes committed in armed conflict situations (Agusnawan, 2023). The impact of these crimes on child victims is not only physical, but also causes psychological trauma and chronic social dysfunction, which can hinder the child's optimal growth and development (Al Qorani & Jais, 2025). Based on official data from the Ministry of Women's Empowerment and Child Protection in 2024, there were 4,890 cases of physical violence, 4,838 cases of psychological violence, 11,771 cases of sexual violence, 279 cases of exploitation, 220 cases of human trafficking, 1,381 cases of neglect, and 2,180 other various cases (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2024). These statistics clearly indicate the urgency of adequate and responsive legal protection for child victims of crime. Therefore, the state has a legal obligation to provide effective and comprehensive protection and recovery mechanisms, which do not solely focus on punishing perpetrators, but also accommodate the fulfilment of the rights of child victims through a restorative and rehabilitative approach. This obligation is a concrete manifestation of the state's responsibility to implement constitutional mandates and international agreements regarding special protection for children as vulnerable legal subjects.

In modern criminal legal systems which are oriented towards victim protection, restitution is a form of legal responsibility that is remedial in nature and is based on the principle of restorative justice (Oktadiana & Sambas, 2025). For children who are victims of crimes, the right to restitution is an integral part of comprehensive physical, psychological, and social recovery (Yuliawan & Bhakti, 2025). In national law, guarantees for this recovery are regulated through Government Regulation No. 43 of 2017 on the Implementation of Restitution for Children who are Victims of Crimes, which is a further implementation of Articles 71D and 76 of Law No. 35 of 2014 on Child Protection. This regulation explicitly stipulates that perpetrators of criminal acts are obliged to compensate child victims, and such restitution can only be

determined by a court through an imperative decision. Thus, the obligation to pay restitution obtains juridical legitimacy not only from legislation, but also from the judicial authority that formally stipulates it in a court decision.

Article 2 clause (1) of Governmental Regulation No. 43 of 2017 states that, "Every child who is a victim of a criminal act is entitled to restitution." Meanwhile, Article 3 stipulates that restitution is granted based on the victim's request to the Witness and Victim Protection Agency, which is then forwarded to law enforcement officials until it reaches the court decision stage. Thus, the role of judges in deciding restitution is imperative and constitutes a concrete form of protection for victims, as guaranteed within the national legal framework (Halim, Chandra, & Mau, 2023). However, in practice, there has been a dynamic development in court decisions, whereby judges do not always impose restitution directly on perpetrators, but rather on the state through the Witness and Victim Protection Agency. This happens especially when perpetrators are declared economically incapable. This creates a normative contradiction, because Articles 7 and 8 of Government Regulation No. 43 of 2017 do not explicitly regulate that the state can replace the perpetrator in paying restitution, except in the form of compensation for gross human rights violations or criminal acts of terrorism, which are subject to a different scheme, based on Law No. 31 of 2014 in conjunction with Law No. 13 of 2006 on the Protection of Witnesses and Victims.

A legal problem arose in the implementation of restitution as an instrument for restoring the rights of child victims when, in Bandung District Court Decision No. 989/Pid.Sus/2021/PN Bdg against the defendant Herry Wirawan, the judge ruled that the state must bear the restitution payment through the Witness and Victim Protection Agency (Harefa, 2023). This ruling has sparked debates regarding its compatibility with Article 2 clauses (1) and (2) of Government Regulation No. 43 of 2017, which normatively states that restitution is the responsibility of the perpetrator of the crime, rather than the state. From an international law perspective, as outlined in United Nations General Assembly Resolution No. 60/147 of 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the state does indeed have an obligation to guarantee victims' rights to restitution. Even so, the implementation of the state's responsibility in restitution must still be subject to the principles of legality, proportionality, and legal binding in the national legal system (Salmón & Pérez-León-Acevedo, 2022). Therefore, there is an urgent need to critically

examine whether the judge's decision can be justified normatively as a form of guarantee for the restoration of child victims' rights in line with the national legal framework and international legal standards.

This raises a fundamental legal question: Can judges legally designate the state as responsible for restitution in general criminal cases involving child victims, even though Government Regulation No. 43 of 2017 does not stipulate this? Is this a progressive form of child victim protection, or does it deviate from the principles of legality and judicial authority in criminal procedural law? From the perspective of state administrative law, a judge's decision to impose restitution on the state without an explicit legal basis has the potential to violate the principle of accountable state financial management as stipulated in Law No. 17 of 2003 on State Finances and Law No. 1 of 2004 on State Treasury, because the use of public funds must be based on valid and specific laws and regulations.

Bandung District Court Decision Number 989/Pid.Sus/2021/PN Bdg decides the case of sexual violence against children involving Defendant Herry Wirawan and is a crucial example in the discourse on the recovery of child victims in Indonesia. In the first instance ruling, the panel of judges sentenced the defendant to life imprisonment and controversially ordered him to pay restitution to the state through the Witness and Victim Protection Agency. This ruling raises legal issues as it contradicts the definition of restitution in Article 1, which states that compensation is the responsibility of the perpetrator, rather than the state. Moreover, according to Law No. 13 of 2006, the Witness and Victim Protection Agency does not have the authority to take over the obligation of restitution, which should be borne by the perpetrator of the crime. Government Regulation No. 44 of 2008 does not provide such a mandate either.

The controversy gained further significance when the case proceeded to the cassation level in Supreme Court Decision No. 5642 K/Pid.Sus/2022, in which the Supreme Court corrected and stated that the imposition of restitution on the state was not in line with the national legal framework regarding restitution, criminalisation, and state financial management. This cassation decision also opens up an important space for analysis regarding how judges at each level of the court build legal considerations related to restitution. It also opens the chance to analyse the basis for the Supreme Court's correction of the Bandung District Court's decision, and how consistent the two decisions are with the principle of the best interests of the child and international standards on victim recovery. Therefore, a study of the dynamics of these differences in interpretation is relevant to ensure that restitution truly functions as an instrument

for restoring the rights of child victims without causing conflicts of norms and deviations from fundamental principles in the rule of law.

. This raises a research question that needs to be answered in this paper, namely: “What is the *ratio decidendi* of Bandung District Court Decision Number 989/Pid.Sus/2021/PN Bdg regarding the determination of the state as the party responsible for providing restitution?” This question is key in examining the dynamics of differences in interpretation at each level of the judiciary to ensure that restitution truly functions as an instrument for restoring the rights of child victims without causing conflicts of norms and without deviating from fundamental principles in the rule of law.

From an international legal perspective, the principle of restitution for child victims has been clearly regulated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation (UN General Assembly Resolution No. 60/147 of 2005), which affirms the state's obligation to ensure effective restitution for victims. Although restitution is legally the perpetrator's responsibility, the state is obliged to provide a restitution mechanism if the perpetrator is unable to fulfill his obligations, while adhering to the principles of legality, legal bindingness, and the rule of law. Therefore, it is crucial to undergo a profound examination on whether the judge's decision in imposing restitution on the state can be normatively accounted for and whether it is aligned with national legal corridors and international legal standards, without ignoring the principle of accountability in state financial management as stipulated in Law Number 17 of 2003 on State Finance and Law Number 1 of 2004 on State Treasury. This study is necessary so that as an instrument for restoring the rights of child victims, there is a guarantee for the restitution without causing normative conflicts and violations of fundamental legal principles.

In previous studies, a number of studies on restitution for child victims have focused on normative aspects without adequately analysing how judges develop legal considerations in their decisions. Research of Ramadhani and Subekti (2025) emphasises the effectiveness of restitution implementation and technical obstacles in the field, but does not enter into legal debates regarding the limits of a judge's authority in determining the party obliged to pay restitution. Next, a study written by Attamimi and Tanudjaja (2024) emphasises the importance of restitution as a right of victims that must be guaranteed by the state, but the discussion stops at the conceptual level and does not examine how this principle is applied or even disregarded in court decisions. After that, a research paper by Abdillah and Setyorini (2025) discusses

restitution in the context of child protection, highlighting the state's obligation to provide recovery mechanisms, but does not discuss methodological issues when judges interpret the state's obligations directly in their verdicts without strict legal basis. The three studies have not critically explained how judicial reasoning can cause conflicts between criminal law, child protection law, and state financial law. This is where the urgency of this study lies, as it provides an in-depth examination of judges' considerations in their verdicts. This article offers a more precise legal understanding of the limits of perpetrators' responsibility, the role of the state as a facilitator of recovery, and the consistency of verdicts with the principles of the rule of law and international legal standards.

Based on these conceptual and juridical problems, this study aims to critically examine how judges construct legal considerations related to restitution in criminal cases involving children as victims, particularly when there is a practice of imposing restitution responsibilities on the state, which has the potential to cause normative conflicts. This study seeks to reveal the extent to which judicial reasoning in court decisions is consistent with the national legal framework, ranging from the principle of legality, the criminal justice system, to the state financial regime, and is compatible with the principles of victim recovery as stipulated in international legal instruments. Thus, this study not only offers a descriptive analysis of the rulings but also provides a normative evaluation of the limits of judicial authority, the state's position in the recovery scheme, and the construction of restitution as an instrument for fulfilling victims' rights that must be implemented within the rule of law.

## **RESEARCH METHOD**

This study used a normative legal research method, which was a form of research that relied on analysis of positive legal norms as reflected in court decisions, legal doctrines, and legal principles relevant to the issue under review. Marzuki explained that normative legal research was the process of studying law as embodied in court decisions or jurisprudence, with the aim of providing prescriptions or “recipes” on how judges should construct their legal considerations in resolving specific legal issues (Kristiawanto, 2022). This perspective was in line with van Hoecke's opinion, which emphasized that legal research was a means of discovering legal norms, principles, and legal theories in order to provide legal answers to a concrete issue (Efendi & Rijadi, 2022).

This study used a normative legal method, which was an approach based on analysis of applicable positive legal norms, including court decisions or jurisprudence, national legislation, and relevant international legal instruments. The selection of this method was based on the nature of the study, which focused on reconstructing restitution norms in the juvenile criminal justice system through an analysis of jurisprudence or court decisions, as well as their relationship to general legal principles and human rights principles. The approaches used in this study consisted of three main approaches, namely the case approach, the jurisprudence approach, and the conceptual approach. The case approach was carried out by examining the applicable legal norms applied in court decisions, particularly those related to restitution in the criminal justice system (Saputra & Nugraha, 2022). Meanwhile, the jurisprudence approach was used to examine patterns of legal considerations in relevant previous decisions in order to understand the consistency and direction of the restitution norms' development in judicial practice.

The primary legal materials used in this study included a number of instruments which are directly related to the reconstruction of restitution norms. The main source was Bandung District Court Decision Number 989/Pid.Sus/2021/PN Bdg, which was the object of analysis to identify the *ratio decidendi* related to the determination of the state as the party responsible for providing restitution. In addition, this study used various relevant laws and regulations, namely Law Number 35 of 2014 on Child Protection, Law Number 13 of 2006 in conjunction with Law Number 31 of 2014 on Witness and Victim Protection, Government Regulation Number 43 of 2017 on the Implementation of Restitution for Children as Victims of Crime, and Law Number 12 of 2022 on Sexual Violence Crimes, specifically in explaining the compensation mechanism as a complement to recovery when the perpetrator is unable to fulfill their restitution obligations.

Meanwhile, the conceptual approach used taken to examine the legal principles and doctrines that have developed in modern legal theory, such as the principle of the best interests of the child, restorative justice, the principle of legality, and state responsibility towards victims from the perspective of international human rights law. This approach was based on Satjipto Rahardjo's view that law cannot be separated from the values of substantive justice that exist in society. Thus, legal interpretation must consider the philosophical and sociological aspects of the analyzed norms (Yanto, 2022).

The legal materials used in this study consisted of primary legal materials, including legislation, court decisions, and international conventions ratified by Indonesia. Secondary legal materials were obtained from academic literature, scholarly writings, and scientific articles relevant to child protection and restitution (Lubis & Siregar, 2021), Tertiary legal materials such as legal dictionaries and legal encyclopedias were used to strengthen terminological understanding. The analysis was conducted deductively, drawing conclusions from general norms to their application in concrete contexts, using grammatical, systematic, and teleological interpretation techniques. Through this approach, the research attempted to test the conformity between restitution norms in national law and the practice of judicial decisions in the field, as well as assess their consistency with international legal principles that guarantee the right to restitution for child victims of crime.

## **RESULTS & DISCUSSION**

### **A. The Concept and Legal Framework of Restitution in the Protection of Child Victims**

Restitution in the criminal law system is understood as a mechanism for restoring the rights of victims which contains an element of compensation for the suffering caused by a criminal act (Mahrus Ali, Mulyono, Sanjaya, & Wibowo, 2022). This mechanism is rooted in the principle of restorative justice, which places the restoration of the victim's well-being as the primary goal of the criminal justice process. Restitution is not merely an instrument of punishment for the perpetrator, but rather a form of legal recognition of the losses suffered by the victim, both material, such as loss of property and income, and immaterial, such as psychological injury, trauma, and damage to personal dignity (Rahmah, 2019).

The function of restitution becomes very significant when linked to child victims, who are legally positioned as legal subjects with special needs for protection (Eleanora & Wijanarko, 2021). As victims, children not only experience economic losses but also profound psychological and social disruption. In this context, restitution serves as a comprehensive means of recovery, oriented not only toward replacing the value of the losses but also toward restoring the victim's dignity and honor in an integral manner (Maryam & Prasetyo, 2025). The principle of the best interests of the child, which is recognized in international legal instruments and has been adopted in national legal systems, is an ethical and legal basis for ensuring that restitution

is treated as a right of child victims that must be enforced through a legal mechanism that is valid and enforceable (Pădurariu, 2020). Thus, restitution not only plays a role in ameliorating the legal consequences of criminal acts, but also represents the state's presence in fulfilling its responsibility to protect and restore children's rights in a real and just manner.

In the Dutch criminal law system, the mechanism for restitution and compensation for victims, including children as a vulnerable group, is regulated through a scheme that is oriented towards the effective and immediate restoration of victims' rights. Restitution by the perpetrator is accommodated in the provisions of *Schadevergoeding aan slachtoffers*, namely a criminal court order requiring the defendant to pay compensation to the victim as an integral part of the criminal verdict (Sonnekus, 2024). However, if the perpetrator does not have the financial ability to fulfill the obligation to pay restitution, the state takes over the responsibility for recovery through the *Schadefonds Geweldsmisdrijven* (Violent Crime Compensation Fund) institution, which directly provides compensation to the victim, while maintaining the right of recourse against the perpetrator as a form of secondary responsibility (Elbers, Meijer, Becx, Schijns, & Akkermans, 2022). This model reflects the commitment of the rule of law to guarantee victims' access to substantive justice, without having to rely on the perpetrator's capacity. It also demonstrates the recognition of victims' rights as justiciable and non-deferrable legal rights (Vellinga, 2024).

Protection of children who are victims of crime in Indonesia has been accommodated in various national legal instruments, which explicitly contain provisions regarding restitution (Pratiwi & Harpa, 2022). Restitution is defined as compensation imposed on the perpetrator or third party based on a court decision that has permanent legal force (Martin & Fowle, 2020). In the context of child protection, restitution is not only compensatory in nature, but also has a restorative meaning that prioritizes restoring the victim's condition to its original state (Wiyanti, Noerdajasakti, & Djatmika, 2022). The main normative instruments that form the basis for regulating restitution for child victims of crime include Law Number 35 of 2014 on Child Protection, Law Number 31 of 2014 in conjunction with Law Number 13 of 2006 on the Protection of Witnesses and Victims, and Government Regulation Number 43 of 2017 on the Implementation of Restitution for Child Victims of Crime.

Article 71D of the Child Protection Law states that, "Every child who is a victim as referred to in Article 59 clause (2) letters b, d, f, h, i, and j has the right to file a lawsuit in court for the right to restitution which is the responsibility of the perpetrator of the crime." This norm

provides legal recognition of the child's right to recovery that is commensurate with the suffering they have experienced. Restitution here includes material and immaterial losses, such as medical costs, psychological recovery, loss of property, and suffering due to the crime they have experienced (Fahim Attamimi & Tanudjaja, 2024). However, these normative provisions remain declarative in nature without a robust and systematic implementation mechanism. Law No. 13 of 2006 in conjunction with Law No. 31 of 2014 stipulates that restitution is a victim's right, which can be requested during the criminal justice process. However, this norm has not been accompanied by imperative regulations regarding who must be responsible for executing court decisions regarding this restitution, thus hampering the effectiveness of victim recovery.

Government Regulation Number 43 of 2017 then emerged as a *lex specialis* that technically regulates the restitution mechanism for child victims of crime. This Government Regulation covers provisions ranging from the forms of losses that can be requested for restitution (Article 3), the parties authorized to submit (Articles 4-6), to the mechanism for calculating and submitting assessment results to the court (Articles 7-11). However, the substance of this Government Regulation does not address the aspect of institutional strengthening in the context of implementing restitution decisions. In this case, the Witness and Victim Protection Agency is not given executorial authority over restitution decisions. In fact, in Law 13/2006, the Witness and Victim Protection Agency is only mandated to provide protection and fulfill the rights of victims and witnesses; there is not a single provision that authorizes the Witness and Victim Protection Agency to implement restitution decisions, and Government Regulation No. 44 of 2008 does not explicitly regulate the delegation of such executive authority.

The absence of regulations regarding executive bodies or procedures for implementing restitution decisions within the national legal framework creates a gap (*lacuna legis*) that can lead to legal uncertainty and reduce the coercive power of criminal laws against perpetrators of criminal acts. When perpetrators are unwilling to voluntarily fulfill their restitution obligations, there is no legal procedure that provides victims with an alternative to effectively obtain their rights (Aljamalulail, Rani, & Muazzin, 2024). This situation contradicts the principle of access to justice and the principle of protecting children as a vulnerable group under national and international law. Therefore, the legal framework regarding restitution needs to be strengthened not only at the declarative normative level, but also at the institutional and procedural levels, so

that the right to restitution can truly be accessed and enjoyed by child victims, without relying on the good faith of the perpetrator or the initiative of individual law enforcement officers.

It is important to emphasize that restitution is not a voluntary policy of the perpetrator of a crime, but rather a legal right of the victim which must be granted and fulfilled through a binding legal process (Alyafedri & Koto, 2024). From the perspective of modern criminal law, restitution is a legal consequence of a criminal act that causes real harm to the victim, including children as victims who have a vulnerable position (Nasution, Panjaitan, & Harahap, 2025). Therefore, restitution cannot depend solely on the good intentions or abilities of the perpetrator, but must be explicitly and imperatively stated in the court's decision. This is in accordance with the principle of *restitutio in integrum*, namely the principle of full restoration of the victim's violated rights. Judges, as representatives of the state in law enforcement, hold a constitutional responsibility to ensure that restitution is not only stated in the legal considerations (*considerans*), but also ordered in a executorial manner in the dictum of the decision, which has permanent legal force and can be executed (Wiranata & Darmadi, 2025).

The legal implication is that restitution's status as part of a verdict makes its implementation equivalent to fulfilling other elements of punishment, such as imprisonment or fines. When restitution is included in a verdict, the obligation is binding, and failure to comply can be interpreted as a violation of the court's order. In this regard, the criminal justice system is obliged to develop legal instruments to ensure that restitution is carried out through an effective execution mechanism, as is customary for other crimes. The absence of enforcement of restitution decisions can actually lead to an imbalance in justice and a degradation of the criminal law's legitimacy. Therefore, within the framework of the Indonesian legal system, restitution should not be positioned as a complementary or secondary element, but rather as an integral and mandatory part of a modern criminal justice system that is oriented towards justice for victims.

## **B. Legal Analysis of the Judge's Decision in Determining Restitution for Child Victims**

A judge's decision in a criminal case involving a child as a victim of a crime, particularly in the context of sexual crimes, is a manifestation of the judicial function, which aims not only to impose a penalty on the perpetrator but also to restore the harm suffered by the victim. One legal mechanism used to ensure this recovery is carried out through restitution, i.e., a form of compensation derived from the perpetrator's individual responsibility, as explicitly regulated in

Government Regulation Number 43 of 2017 on the Implementation of Restitution for Child Victims of Crimes.

A judge's decision regarding restitution is not optional, but rather a legal order that is inherent when the normative and factual requirements as referred to in the provisions of the legislation are met. Article 1 number 1 of Government Regulation No. 43 of 2017 expressly defines restitution as, "The payment of compensation imposed on the perpetrator based on a court decision has permanent legal force." This definition emphasizes that the legal basis for restitution is the court's decision, rather than simply the result of an agreement outside the judicial process (Septia & Suhartini, 2024).

If it has been proven that the victim suffered losses as a result of the criminal act committed by the perpetrator, the judge, through his authority, is obliged to include an order for restitution in the verdict (Putra & Multiwijaya, 2025). The decision has constitutive force, creating a new obligation for the perpetrator to provide compensation to the victim, both material (direct economic loss) and immaterial (trauma, shame, psychological suffering) (Meliala, Tobing, & Oktaviana, 2025). However, the determination of restitution by the judge is not a mechanical process, but rather involves the *ratio decidendi*, namely comprehensive legal reasoning based on the applicable legal system, substantive justice values, and the objective conditions of the victim and perpetrator. The judge will consider at least two main parameters: (1) the level and type of loss experienced by the victim as supported by evidence and/or Witness and Victim Protection Agency recommendations, and (2) the perpetrator's economic ability to meet the compensation.

Based on this explanation, in granting restitution, the panel of judges' considerations are generally based on two main components: (1) the victim's losses and (2) the defendant's economic capacity. In practice, this second aspect, namely the perpetrator's financial condition, often becomes an obstacle in the realization of restitution. If the defendant comes from a lower-middle economic background, this is often used as a reason to set the amount of restitution far below the value of the victim's actual losses. As a result, victims of sexual violence, who have essentially experienced deep trauma, suffer from more losses as their right to recovery is not fully fulfilled.

In fact, restitution is not merely a financial instrument, but a symbol of justice and recognition of the victim's suffering. Therefore, when the restitution paid by the perpetrator is less than the requested or deemed appropriate amount, the state should take an active role in

providing compensation to cover the shortfall. This compensation has a strong legal basis, as stipulated in Article 1, number 2 of Law Number 12 of 2022 on Sexual Violence Crimes, which states that compensation is restitution provided by the state in cases where the perpetrator is unable to fully compensate for the losses for which they are responsible.

Within this framework, the state acts as a guarantor of last resort, guaranteeing the victim's rights when the individual perpetrator's accountability mechanism proves ineffective. In accordance with the court's ruling, the state will compensate the perpetrator for any restitution underpayment. This mechanism not only redresses the victim's losses but also strengthens the legitimacy of a victim-centered criminal justice system. The source of funds to pay this compensation has been regulated in the Sexual Violence Crime Law, namely through the Victim Assistance Fund, which can originate from:

- a. philanthropic donations,
- b. the public,
- c. individuals,
- d. corporate social and environmental responsibility,
- e. other legitimate and non-binding sources,
- f. and the state revenue and expenditure budget in accordance with statutory provisions.

In addition to the aspect of compensation, the state is also responsible for ensuring comprehensive and sustainable recovery services, as stipulated in Article 70 clause (3) of the Sexual Violence Crime Law. These services include post-case monitoring and examination, regular and ongoing physical and psychological health services for victims, and strengthening community support to facilitate the victim's social reintegration into his/her community. Thus, the judge's decision to determine restitution must not stop at formal recognition of the victim's losses, but must be framed within a comprehensive protection architecture, which includes the possibility of the perpetrator failing to fulfill his obligations, and anticipation through compensation mechanisms by the state. This principle emphasizes that the restitution system should not be completely subject to the perpetrator's capabilities, because it will create inequality and deepen the victim's suffering (Hendriana, Raharjo, Prayitno, Wahyudi, & Retnaningrum, 2024). On the contrary, restitution and compensation are two instruments that must work in a complementary manner, to ensure that every child victim of sexual violence

receives fair, complete, and dignified recovery (Widodo, Mashdurohatun, Santoso, & Yunanda, 2025).

Thus, normatively, the judge's decision to determine restitution in cases of children as victims of criminal acts is based on Article 1 clause (1) of Government Regulation Number 43 of 2017, which explicitly states that, "Restitution is the payment of compensation imposed on the perpetrator based on a court decision that has obtained permanent legal force." This provision emphasizes that the primary responsibility for restitution legally rests with the perpetrator of the crime, rather than the state. However, in practice, it is not uncommon to find judges' decisions that take non-normative factors into account, such as the socio-economic conditions of the perpetrator, the psychological condition of the victim, and the urgency of immediate recovery for the child victim. In such a context, the judge's considerations can extend to designating the state as a party that is also responsible as a subsidiary, especially when the perpetrator is proven unable to pay restitution in full.

If the judge's decision stipulates that the state must directly pay restitution without relying on the compensation mechanism stipulated in Law Number 12 of 2022 on Sexual Violence Crimes, there is a risk of violating the *lex lata* principle, because in positive law, restitution is only imposed on the perpetrator, not the state. In this case, the decision can be qualified as a form of error *in judicando*, because it deviates from the normative construction stipulated in Government Regulation No. 43 of 2017. However, if the basis of the decision refers to additional provisions related to the compensation mechanism, then state involvement in restoring the victim's rights can still be justified, as long as it is based on the principle of state protection for crime victims and the principle of restorative justice adopted in modern criminal law.

In the eyes of international law, this principle is in line with the provisions in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, adopted by the UN General Assembly (A/RES/60/147), which emphasizes that the state is obliged to provide access to effective remedies, including compensation, to victims who do not directly receive remedies from the perpetrator (Anggraeniko, Palah, & Kania, 2025). Therefore, in the national context, when formal norms cannot address victims' substantive needs for justice, the state is obliged to act as

a guarantor of last resort, not to replace the perpetrator, but to fulfill the moral and constitutional mandate of guaranteeing the right to effective, just, and dignified reparation.

### **C. Judicial Considerations in Determining Restitution for Child Victims: A Jurisprudential Analysis of Supreme Court Decision No. 5642 K/Pid.Sus/2022**

The trajectory of the restitution claim in the case of Herry Wirawan began with the first-instance examination at the Bandung District Court, which imposed a life sentence on the defendant and determined the amount of restitution for the victims based on the loss assessment submitted by Witness and Victim Protection Agency. The first-instance judgment noted that the Bandung District Court accepted the full details of the material and immaterial losses suffered by the victims as the direct consequences of the prolonged sexual violence committed by the defendant. In its ruling, the District Court determined that the restitution payment was not to be borne by the defendant but by the Ministry of Women's Empowerment and Child Protection. This provision became the most controversial aspect of the District Court's judgment, as its deviation from the normative construction of restitution only became evident when the case proceeded to the appellate and cassation levels.

The placement of the state as the party responsible for restitution by the first-instance judges appears to have been constructed from a desire to ensure that the victims obtain real recovery without being hindered by the offender's financial condition. The Bandung District Court viewed the victims' need for recovery as an extraordinary circumstance requiring state intervention. In many cases involving sexual crimes against children, first-instance judges often consider the victims' concrete situations, the urgency of medical and psychological needs, the socioeconomic conditions of their families, the costs of childbirth and childcare, and the long-term developmental harm suffered by the children. From this construction, it can be inferred that the judges at the Bandung District Court sought to guarantee a stable and immediately available source of funding, something that could not be assured if restitution remained the defendant's responsibility, given indications of his inadequate financial capacity.

The Bandung District Court seemed to base its decision on the notion that the state has a moral and administrative obligation to be present in the recovery of child victims of sexual violence, making the Ministry appear to be the most capable institution to provide the necessary funds quickly. However, this step was not accompanied by any normative reference that would allow the transfer of restitution responsibility to the state. This ruling then became a serious legal problem when the case proceeded to appeal and subsequently to cassation, as the Supreme

Court found that the District Court had exceeded the limits of authority established by existing rules on restitution and the state finance regime. This error by the District Court was corrected by the High Court and further affirmed by the Supreme Court. These issues became an entry point for examining how the structure of judicial reasoning was formed from the outset, as errors at the first-instance level directly influenced the body of jurisprudence that later emerged at the appellate and cassation stages.

The restitution dispute in Supreme Court Decision No. 5642 K/Pid.Sus/2022 originated from repeated sexual crimes committed by the defendant, Herry Wirawan, against children in the care of his institution. At the first-instance level, the Bandung District Court determined restitution based on Witness and Victim Protection Agency's assessment of the victims' losses but inserted an order directing the Ministry of Women's Empowerment and Child Protection to pay the entire restitution. Consequently, the ruling immediately generated normative issues, because it contradicted the formulation of Article 1(2) of Government Regulation No. 43 of 2017, which explicitly states that "Restitution is compensation charged to the perpetrator of the criminal act." Therefore, the District Court's order to charge restitution to the Ministry directly conflicted with the fundamental construction of placing the financial responsibility on the offender.

This District Court decision created systemic uncertainty, because it shifted an individual obligation onto a state institution without any normative bases. It appears that the Bandung District Court attempted to fill a vacuum in state instruments to ensure victim recovery, but in doing so generated a normative conflict with state financial regulations. When the case was reviewed by the Bandung High Court, the appellate judges immediately corrected the error. The High Court emphasized that restitution must be borne by the defendant, not by the Ministry of Women's Empowerment and Child Protection. This was reaffirmed in the Supreme Court's reasoning, which explicitly stated, "The High Court affirmed the decision on restitution with the correction that restitution is charged to the Defendant, not to the Minister of Women's Empowerment and Child Protection."

At the cassation stage, the Supreme Court not only agreed with this correction but also elaborated its legal basis. The Supreme Court stated that restitution falls within an authority governed by Government Regulation No. 43/2017 and the Child Protection Law; therefore, the Bandung District Court exceeded the legal corridor by assigning the state as the bearer of restitution obligations. The Court stated, "The High Court's considerations are correct, that

restitution is the responsibility of the offender, in accordance with the regulations concerning restitution for children as crime victims.” This statement affirms that the Supreme Court adopted a textual reading of Government Regulation No. 43/2017 and the Child Protection Law, which do not recognize any mechanism for state guarantorship in cases like this.

Further, the Supreme Court stated clearly that the Bandung District Court’s action of imposing restitution on the state contradicts the basic principles of state finance, as regulated in Law No. 17 of 2003. The Court emphasized, “Charging restitution payment to the Ministry of Women’s Empowerment and Child Protection has no basis in the laws on state finance nor in the regulations on restitution.” This clarification shows that the Supreme Court not only examined criminal norms but also assessed whether financial obligations of the state may be mandated through a judicial decision without statutory foundation. The Supreme Court concluded that they may not.

This clarity is crucial because restitution is directly related to the use of public funds. Article 3(1) of the State Finance Law states that, “State finances shall be managed in an orderly, lawful, efficient, economical, effective, transparent, and accountable manner, with due regard to the principles of justice and propriety.” If a judge orders a Ministry to pay restitution without legal basis, then the decision effectively commands the execution of state funds without legislative authorization. The Supreme Court viewed the Bandung District Court’s action as a violation of the principle of legality and an overreach of judicial authority (*ultra vires*), a condition which, in Jimly Asshiddiqie’s doctrine, is understood as an act carried out beyond the limits of authority granted by law (Caesario, 2024). In addition to correcting the normative error made by the District Court, the Supreme Court also developed an argument concerning victims’ rights. The Court accepted the entirety of the Witness and Victim Protection Agency’s calculations of the victims’ losses, ranging from medical and psychological needs to long-term educational expenses. This demonstrates that the Court recognizes restitution as a recovery instrument that must comprehensively account for its losses. However, even though the Supreme Court sided with the victims’ recovery, it has clearly stated that the responsibility to pay restitution cannot be shifted to the state. This was emphasized through the statement, “Restitution is a form of the offender’s responsibility to the victim; therefore, it cannot be transferred to the state without a statutory basis.”

This statement demonstrates a dual-layered approach in the Supreme Court’s reasoning. On one hand, the Court ensures that the rights of victims are recognized and protected through

comprehensive restitution. On the other hand, the Court maintains the coherence of the legal system by ensuring that victim recovery is not carried out at the expense of fundamental principles of state finance and the offender's individual responsibility. This approach aligns with Hans Kelsen's view that the validity of a state action depends entirely on its conformity with higher norms within the *Stufenbau des Rechts*, meaning that judges cannot expand their authority without a clear normative basis (Rinaldi, Anggrainy, Malva, Sari, & Pratama, 2025). There is no attempt to adopt a progressive interpretation that positions the state as a guarantor when the offender is unable to pay, because such a space simply does not exist within the current regulatory framework. The regulatory limitations become evident when the Supreme Court upholds restitution as the offender's responsibility, even though the Court acknowledges that the victims who suffered from severe losses require substantial financial support. The Court does not consider the possibility of applying victim-recovery principles based on international instruments, such as the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, because there is no legal foundation permitting their direct implementation.

The Supreme Court's cautious stance simultaneously reveals a gap in national law regarding the availability of a substitution mechanism when an offender is unable to pay restitution. Government Regulation No. 43 of 2017 contains no provision allowing the state to assume restitution obligations. Meanwhile, Law No. 31 of 2014, which amends Law No. 13 of 2006 on Witness and Victim Protection provides compensation only for specific types of crimes, and sexual violence against children is not included among them. The Supreme Court explicitly chose not to exceed the wording of the statute. This approach is consistent with the doctrine of *non liquet* in legal philosophy, as explained by Gustav Radbruch, which holds that judges cannot create new norms when legislation has not provided a legitimate space for interpretation (Anam, 2019). From the perspective of legal harmonization, the decision shows that the Court places great emphasis on maintaining consistency among criminal law, child protection law, and state finance law, even though such consistency comes at the expense of enabling more substantive recovery mechanisms. The Supreme Court interprets all relevant regulations in a linear and textual manner, leaving no room for teleological arguments that could position victims' rights as the basis for expanding state authority.

In theoretical review, the Supreme Court's judicial reasoning demonstrates a strong positivistic tendency. When confronted with the dilemma between protecting victims' rights

and adhering to the principle of legality, the Court chooses legality. This choice is understandable, because judges are not authorized to create public financial instruments without statutory basis. Yet, it also reveals that victim recovery depends on the effectiveness of legislation, not on judicial initiative. This stance aligns with H. L. A. Hart's view that within the "open texture of law," where judges remain bound by the limits of their normative authority and cannot expand the meaning of a rule when there is no clear delegation from the legislature (Narwadan, Lubis, & Hakim, 2025). Decision No. 5642 K/Pid.Sus/2022 illustrates that as an instrument for child-victim recovery, restitution still operates within an underdeveloped legal system. The Supreme Court has preserved the integrity of positive law, but the ruling simultaneously exposes the fact that the state has not yet provided an adequate mechanism to ensure victims receive proper recovery when the offender is unable to pay. This jurisprudential analysis shows that regulatory reform is urgently needed, so that restitution can function as an effective recovery instrument without placing judges in a dilemma between victim protection and the limits of their authority.

## CONCLUSION

A review of Bandung District Court Decision No. 989/Pid.Sus/2021/PN Bdg, Bandung High Court Decision, and Supreme Court Decision No. 5642 K/Pid.Sus/2022 shows that the *ratio decidendi* established at each level of the court is fundamentally different: The District Court placed the state as the party responsible for restitution on the basis of urgent victim recovery, even though there was no adequate normative basis for this; the High Court amended this ruling by emphasizing the principle of individual responsibility of the perpetrator; and the Supreme Court confirmed that restitution can only be legally imposed on the perpetrator, because there is no legislative basis that allows the state to take over this financial obligation. These differing legal reasons highlight the disharmony between child protection regimes, criminal law, and state financial law, and show that the absence of a substitution mechanism when perpetrators are unable to pay creates a legal vacuum that hinders effective recovery for child victims. From this analysis, this study concludes that regulatory reconstruction is necessary to ensure that restitution functions as an operational, fair, and harmonious instrument of recovery, in line with the principle of the best interests of the child. Scientifically, this study contributes by precisely identifying the *ratio decidendi* at each level of the judiciary and offering a normative harmonization framework for policymakers in improving the child restitution system in the future.

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