

Judge's Legal Considerations as Determination of the Justice Model in Payment of Restitution for Child Sexual Affair (Decision Study No. 167/ Pid.Sus /2021/PN Krg)

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ABSTRAK

Pada Putusan Nomor 167/Pid.Sus/2021/PN Krg, restitusi yang dibayarkan pelaku kepada anak sebagai korban tindak pidana persetubuhan anak dianggap tidak adil dan tidak dapat memulihkan hak korban yang ditambah munculnya subjek hukum baru akibat perbuatan mereka. Apalagi dalam perhitungan pembayaran restitusi yang ditetapkan oleh hakim tidak terdapat tolak ukur sebagai pedoman pemberian restitusi. Dengan demikian ada kekosongan hukum yang berkenaan dengan pertimbangan hukum hakim yang seharusnya membahas tentang restitusi. Penelitian ini bertujuan untuk mengetahui tinjauan yuridis dan eksistensi perjanjian sewa menyewa terhadap perkara wanprestasi. Penelitian ini termasuk penelitian hukum doktrinal (normatif) yang sifat penelitiannya preskriptif dengan Pendekatan kasus (*case approach*) dengan mengkaji pertimbangan kasus yuridis. Hakim dalam pertimbangan hukumnya tidak memberikan aspirasi terhadap restitusi yang dibayarkan. Dengan demikian ada kekosongan hukum yang berkenaan dengan pertimbangan hukum hakim yang seharusnya membahas tentang restitusi.

ABSTRACT

In Decision Number 167/Pid.Sus/2021/PN Krg, the restitution paid by perpetrators to children as victims of the crime of child sexual intercourse is considered unfair and cannot restore the rights of victims, which is compounded by the emergence of new legal subjects because of their actions. Moreover, in the calculation of restitution payments determined by the judge there is no benchmark as a guideline for granting restitution. Thus, there is a legal vacuum regarding the legal considerations of judges who should discuss restitution. This study aims to determine the juridical review and the existence of lease agreements in cases of default. This research includes doctrinal (normative) legal research which is prescriptive in nature with a case approach (case approach) by examining the considerations of juridical cases. The judge in his legal considerations did not provide any aspirations for the restitution paid. Thus, there is a legal vacuum regarding the legal considerations of judges who should discuss restitution.

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1. INTRODUCTION

Indonesia as a constitutional state which is emphasized in Article 1 Paragraph 3 of the 1945 Constitution, states that all aspects and systems of life are governed by laws and statutory regulations. Related to human behavior that has a public dimension is determined by law and determined in criminal regulations. Criminal acts as acts against the law, in criminal law which is emphasized on the principle of legality states that no act can be punished except based on the strength of criminal provisions according to the existing law (*Nullum delictum nulla poena sine praevia lege poenalli*) (Hiarej, 2007). The formulation of the criminal act is determined by the elements or elements that can be used as a characteristic or characteristic of the prohibition, so that it can be clearly distinguished from other actions that are not prohibited. The proof of the elements or elements is used as a support in sentencing for criminal acts that have been committed.

Punishment for criminal acts is generally aimed at repairing or rehabilitating perpetrators and trying to prevent them from imitating acts or crimes that have been committed. However, the punishment only focuses on the perpetrators of criminal acts. Even though a criminal act has a victim who is someone who has suffered mental, physical, and/or economic losses because of the crime that occurred. Victims as parties who are harmed and feel suffering are usually only involved in giving testimony or means of proof as victims (C. Maya Indah S, 2014). The loss due to the neglect of personal interests has an impact on the consequences of the crime suffered by the victim, which becomes a disaster that must be borne by the victim alone. Because in this case the personal interests of the victim are considered not part of the function of the criminal justice system to bear them.

To realize the arrangements for the protection of victims of criminal acts, one of which must be considered is the essence of the losses suffered and experienced by victims as stated in the Law. No. 31 of 2014 concerning Protection of Witnesses and Victims (Gumelar & Shauki, 2020). The essence of the losses suffered by victims is not only material or physical suffering, but also has an impact on their psychology (Muladi, 2002). The existence of restitution as a form of protection for all efforts to fulfill rights and aid provide victims with a sense of security or what is known as the principle of recovery in its original state (*restitutio in integrum*). This principle emphasizes the form of restoration of the victim's rights as completely as possible which includes various aspects due to the criminal act that occurred. In this case, the victim and/or the victim's family must receive appropriate and fair compensation from the perpetrator of the crime or a third party who is considered responsible.

Based on problems related to restitution, the author examines the fairness of restitution in Decision Number 167/Pid.Sus/2021/PN Krg. The decision from the Karanganyar District Court dated February 14, 2022, ruled that the perpetrator committed a crime by deliberately persuading a child to have intercourse with him. The perpetrator received a criminal sentence against the convict with imprisonment for 9 (nine) years and a fine of Rp. 100,000,000.00 (one hundred million rupiahs) with the stipulation that if the fine is not paid it is replaced with imprisonment for 3 (three) months. In addition, what needs to be considered in this case regarding restitution in the decision is to charge

the perpetrator to pay restitution to the Victim's Child in the amount of Rp. 37,073,847.00 (thirty-seven million seventy-three thousand eight hundred and forty-seven rupiah).

If considered in detail, the payment of restitution is considered unfair and unequal to what the victim experienced. The victim is a child, according to the law No. 35 of 2014 concerning Child Protection needs to get guarantees and protection. Moreover, according to Dr. Heryuristianto, SpOG Doctor of the Karanganyar Regional General Hospital. The victim's child gave birth to a baby boy on August 19, 2021, which resulted in the emergence of a new legal subject because of the result of the perpetrator's sexual intercourse with the victim's child. Even though Law No. 31 of 2014 concerning the Protection of Witnesses and Victims has guaranteed guarantees for the protection of victims who have an important role in the criminal justice process, this needs to be considered in future implementation. Restitution paid by the victim is solely to restore the victim's rights which cannot be long term. Because the money amounting to Rp.37,073,847.00 will run out and cannot restore the physical, psychological and rights needs of the victim. Even though as a child, the victim should have rights like children, such as the right to education, basic health and welfare, use of free time and cultural activities, family environment and alternative care, as well as special protection for children (Novrizaldi, 2021). Moreover, the birth of a baby needs to get its right to live, grow and develop; raised and cared for by his own biological parents; health services; social security; (Dinas Pemberdayaan Perempuan Dan Perlindungan Anak, 2018) and other rights that will increase in balance with the growth and development of the baby.

Fairness in paying restitution for the crime of intercourse needs to be considered to guarantee and protect the recovery of the rights of victims and their babies. With the adage *Justitiae non est neganda, non differenda* which means that justice cannot be denied or postponed, then restitution payments should need to be followed up so that victims and children receive justice, certainty, and benefits in life. The crime of child intercourse needs protection, because so far, the substance in Law No. 35 of 2014 concerning Child Protection has not been able to fully protect victims (F. Mareta et al., 2021). Child sexual intercourse as a crime regulated in the Child Protection Act and laws and regulations only focuses on punishing the perpetrators who set aside and have not thought of legal remedies for victims of child sexual intercourse. Therefore, the position of victims of child promiscuity in the Child Protection Act is not yet optimally regulated when compared to the position of perpetrators (Marlina & Zuliah, 2015). Moreover, in the calculation of restitution payments determined by the judge there is no benchmark as a guideline for granting restitution. Thus, there is a legal vacuum regarding the legal considerations of judges who should discuss restitution.

With the problems described above, the author is interested in discussing "Analysis of Restitution Payments as a Model of Justice for the Restoration of the Rights of Victims of Child Prostitution (Decision Study Number 167/Pid.Sus/2021/Pn Krg)". This paper aims to conduct a study of the payment of restitution as a model of justice for the restoration of the rights of victims of child prostitution and to offer a new mechanism concept for restitution requests for victims of child prostitution.

Based on the description above, this study aims to find out the legal considerations of judges as determining the model of justice in the payment of restitution for the crime of child intercourse (Decision Study No. 167/Pid.Sus/2021/PN Krg). Apart from that, it can provide protection and knowledge about the importance of justice in the payment of restitution as a form of guarantee of

protection that needs to be considered and is of primary interest in the restoration of victims' rights which is considered ideal for victims.

2. LITERATURE REVIEW

2.1 *Justice Concept*

Justice as a value in social life has a very broad meaning. Even in a perspective it can provide an understanding that is against the law as one of the social values. A crime committed is a mistake. However, if this is not a mistake in the form of greed, it cannot be called an act that causes injustice. Conversely, if an action that is not considered a crime can lead to injustice. In creating justice, the main principles that must always be upheld are (Fattah, 2013):

- 1) The principle of inequality that can be used to give an advantage to the weakest.
- 2) The same freedom if it continues to provide benefits to all parties.

John Rawls specifically developed the idea of the principles of justice by using a concept known as the original *position position*) and the veil of ignorance (*veil of ignorance*) (Fattah, 2013). The original position emphasizes the principle that everyone is essentially and compatible and unequal in terms of social, universal, and economic freedoms in everyone. Whereas the veil of ignorance states that every person who is faced with a closed fact and situation about himself (certain social positions and doctrines) which can blind him to the existence of concepts or knowledge about justice being upheld. With these two concepts Rawls leads and teaches people to obtain the principle of equality of justice with his theory called "Justice as *fairness*" (John Rawls, 2006)

2.2 *Restitution*

Restitution in public life is defined as compensation. However, on Restitution in the Act No. 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, restitution is defined as compensation given to victims or their families by perpetrators or third parties. Whereas in the perception of criminal law, restitution is defined as the payment of compensation which shows concern and understanding of the suffering of the victim due to a crime, in which the compensation must be paid to the victim or the victim's heirs (Theodora Syah Putri, 2006). According to Marjono Reksodiputro, arrangements relating to compensation given to victims in positive law in Indonesia are distinguished between those paid by one or several official agencies from state funds or what is known as compensation and those paid by the perpetrators of criminal acts or *those* who interpreted as restitution (*restitution*) (Reskodiputro, 1994).

Restitution in terms of *Basis and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law* states that victims of criminal acts are given five reparation rights, namely restitution; rehabilitation; compensation; guarantee of *non*-recurrence; and satisfaction (Wagiman & Abidin, 2007). Restitution according to international human rights instruments is interpreted as a form of re-enforcing the situation that existed for victims before the occurrence of violations of human rights. In addition, the payment of restitution requires the restoration of freedom, citizenship or place of residence, and the existence of employment or property rights for the victim. Therefore, if the dimension of compensation is related to the restitution system in the view of victimology, it will relate to the restoration or repair of moral,

physical, property losses and the rights of victims of criminal acts caused by criminal offenders (Hendrojono, 2005).

2.3 Legal Considerations

On a court decision, *ratio decidendi* or known as legal considerations is seen as a legal basis based on the decision handed down by the judge to the defendant. According to the Mackenzie *ratio decidendi* is a theoretical approach that can be used by judges in considering the decision of a case (Rifa, 2011). Judge according to the law No. 48 of 2009 concerning Judicial Power is defined as judges at the Supreme Court and judges at judicial bodies under it within the general court environment, religious court environment, military court environment, state administrative court environment, and judges at special courts within the judiciary. So, in this case the judge uses the legal reasons considered by the judge to arrive at his decision. Thus, the *ratio function decidendi* or in other terms legal reasoning is used as a means of presenting main ideas about the problems of legal conflicts between the community and the government in cases that are controversial or counterproductive or one person and another person to become a replica and exemplary duplication. In this case, it can relate to the good and bad attitudes of the legal apparatus, the system of implementing and enforcing the law, and the judiciary (Abraham, 2007).

Ratio fundamental *decidendi* by considering all aspects relating to the subject matter in dispute which then seeks legislation that is relevant to the subject matter in dispute as a legal basis in deciding. The judge's consideration must be based on a clear motivation to uphold the law and provide justice for the parties to the case. *Ratio decidendi* in handed down a decision according to Rusli Muhammad can be divided into two categories (Muhammad, 2007).

- a. Juridical considerations, that is based on facts juridical which revealed in trial and is determined by law as mandatory loaded in in decision. Things which meant the between other stuff evidence, explanation accused, accused prosecutor general, description witnesses, Articles in regulation law criminal.
- b. Consideration which characteristic non juridical, which is based on consequences deed defendant, background behind accused, religion accused and conditions self-defendant.

3. METHODOLOGY

Doctrinal legal research (normative) which is descriptive in nature. The nature of the research in this research is prescriptive, which aims to get suggestions about what to do to overcome certain problems. The approach used is the case approach (*case approach*) by examining the considerations of juridical cases. The legal material that will be used as a basis to support this research is data collected from secondary data in the form of primary legal materials and secondary legal materials.

4. RESULTS AND DISCUSSION

In people's lives, crimes still often occur with the motive of gaining profit, hurting, or even killing other people. Crime as a criminal act will legally involve two legal subjects, namely the perpetrator and the victim. In Government Regulation No. 35 of 2020, victims are people who experience physical, mental and/or economic losses because of crimes or criminal acts. Daniel Glaser revealed *the victim is the person or organization injured by the crime* (Glaser, 1970), which means the victim is a person who feels a loss because of a crime. With this understanding, victims as legal

subjects need to get guarantees and protection because they have experienced losses and suffering because of criminal acts. Guarantees and protection are intended as a form of giving and or fulfilment in the form of rights and assistance as a form of justice and a sense of security for victims.

In granting and fulfilling rights and assistance, Indonesia has issued PP No. 35 of 2020 which regulates the granting of restitution, compensation, and assistance to witnesses and victims. Compensation is the inability of the perpetrator to provide compensation, which is his responsibility, which is then compensated by the state because the perpetrator is unable to provide full compensation which is his responsibility. While restitution is compensation given by the perpetrator to the victim. So, the issuance of this regulation is a form of concern and protection for the government and the state for witnesses and victims in order to obtain justice and a sense of security.

Restitution as a claim for compensation through a criminal court decision is charged by the perpetrator of the crime or a third party (Maya Indah, 2014). In accordance with *restitutio in integrum* (Principle of Recovery in its Original Condition), the existence of restitution is to return the victim's condition to how it was before the crime occurred even though it is since it is impossible for the victim to return to his original condition perfectly. The purpose of giving or paying restitution can be concluded from several sides, which can be in the form of alleviating the suffering of victims, ways to rehabilitate convicts, elements that alleviate the sentence to be imposed, facilitate the judicial process, and can reduce threats or reactions of revenge from the community.

The policy for requests for restitution made by victims can be submitted before or after a court decision that has obtained permanent legal force since the crime was decided by the LPSK (J. Mareta & Kav, 2018). The existence of the LPSK (Witness and Victim Protection Agency) has the duty and authority to provide protection and guarantees for the rights of witnesses and/or victims. This protection is a form of fulfilling rights and aiding Witnesses and/or Victims to provide a sense of security. The request for restitution was submitted by the LPSK before the court's decision, the LPSK submits it to the public prosecutor to be included in its claim. If submitted after a court decision, the LPSK submits it to the court for a stipulation. Whereas if the victim dies, Restitution will be distributed to the victim's heirs.

In providing guarantees for victims' rights, requests for restitution can be submitted through the investigative stage prior to a court decision. Then the investigator will notify the child's rights to the victim who is a victim of a crime to obtain restoration of his rights in the form of restitution. Which is where the victim submits a request for restitution no later than 3 (three) days after the investigator notifies the rights of the child who is the victim of a crime.

The restitution policy that has been paid by the perpetrator creates a relationship between the perpetrator and the Victim's Child as a form of material responsibility of the perpetrator towards the victim to pay his obligations because of the crime he committed or as a sanction (J. Mareta & Kav, 2018). With restitution, child victims of criminal acts and their families or third parties have the right to receive compensation that must be given by the perpetrator. This aims to make the perpetrators aware of their crimes and provide a deterrent effect on the perpetrators, so they do not repeat their mistakes. According to Muladi, the purpose of punishment is also known as *restorative the justice* model of restitution as a means of improving the parties, namely the perpetrators and victims, reconciliation, and restoration as the main goals (Muladi, 1995). In addition, the position of the perpetrator and the victim is recognized as equal both in the settlement of the rights and interests of the victim, the perpetrators of criminal acts have an obligation to be responsible.

An interesting discussion in Decision Number 167/Pid.Sus/2021/Pn Krg regarding child intercourse is the payment of restitution given from the perpetrator to the victim. The decision charged the Defendant with paying Restitution for the Victim's Child in the amount of Rp. 37,073,847.00 (thirty-seven million seventy-three thousand eight hundred and forty-seven rupiah). Restitution which is considered as a form of restoration of the victim's rights is given to realize a return or to re-enforce the original state of the victim before the crime occurred. According to PP No. 35 of 2020, restitution is defined as giving compensation to the perpetrator or a third party given to the victim. In this way, restitution can be termed as a right owned by a citizen who arises to commit an act in accordance with applicable law. Therefore, restitution is the right of every citizen to be treated according to their privileges in providing guarantees and protection.

Judges as the personification of the judiciary are required to have high intellectual as well as moral and integrity abilities that can be expected to reflect a sense of justice, guarantee legal certainty, and be able to provide benefits to society. The Panel of Judges in this decision considered the Public Prosecutor's First Alternative Charges, namely: The perpetrator's actions as stipulated and subject to criminal penalties in Article 81 paragraph (2) of Law Number 17 of 2016 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning Amendments Second, Law Number 23 of 2002 concerning Child Protection Becomes Law, the elements of which are as follows:

1. Each person;
2. Deliberately Committing Deception, Composing Lies, or Enticing Children;
3. Having intercourse with him or with other people.

Restitution services for victims use the conception of the procedural rights model approach. Based on Article 2 PP No. 43 of 2017 it is stated that every child who is a victim of a crime has the right to receive restitution and one of the crimes that receives restitution is regarding child victims of sexual crimes. In this conception, victims are required to actively defend their interests, starting from demanding compensation and pursuing their juridical rights which were seized by the perpetrators; investigative process, court prosecutor; be present and hear their testimony in court proceedings; and make peace with the perpetrators and or third parties. The juridical rights charged with the payment of restitution are emphasized in Article 7A Paragraph 1 of the Law No. 31 of 2014, which states that

"Victims of criminal acts have the right to obtain restitution in the form of:

- a. compensation for loss of wealth or income;*
- b. Compensation for losses incurred because of suffering directly related to a crime; and/or*
- c. reimbursement of medical and/or psychological treatment costs."*

The restitution payment charged to the perpetrator to pay restitution to the Victim's Child amounted to Rp. 37,073,847.00 (thirty-seven million seventy-three thousand eight hundred and forty-seven rupiah). This is a form of Child Victims entitled to obtain protection and guarantees from criminal acts that must be respected and fulfilled by the perpetrator. On the other hand, giving a mandate to perpetrators is responsible for protecting child victims from losses that can affect the survival, growth, and development of children naturally. Moreover, in this case the crime committed by the perpetrator against the Child Victim not only causes physical and psychological suffering that

affects the growth and development and quality of life of the Child, but also causes material and immaterial losses for the family.

Based on the analysis of the payment of restitution to child victims made by the perpetrator based on this decision, the judge in his legal considerations did not provide any aspirations for the restitution paid. Thus, there is a legal vacuum regarding the legal considerations of judges who should discuss restitution. If it is associated with judges who have judicial power to administer justice to uphold law and justice, the author considers that this has not been fully enforced. Because with the payment of restitution that was decided by the judge it was considered not fair to be able to restore and restore the rights of the Victim's Child especially when accompanied by the emergence of a new legal subject, namely their child. On the other hand, the decision has not comprehensively stated the judge's legal considerations regarding the restitution paid to the perpetrator. Therefore, *legal reasoning* as the freedom of judges in formulating legal considerations to decide cases of child intercourse which they try has not implemented justice.

Determination of decisions that are not accompanied by legal considerations must be considered and avoided, one of which is the determination of payment of restitution. This is evidenced by the existence of child intercourse which is considered a criminal offense regulated in the Child Protection Act and other laws and regulations that only focus on punishing the perpetrators who set aside and have not thought of legal remedies for victims of child sexual intercourse. Therefore, the position of victims of child sexual intercourse in the Child Protection Act is not yet optimally regulated when compared to the position of perpetrators, including benchmarks and determination of restitution. Even though according to Article 50 of the Law No. 48 of 2009 states that court decisions must contain the reasons and basis for the decision, certain articles of the relevant laws and regulations, or unwritten sources of law which are used as the basis for adjudicating.

The judge's legal considerations in determining the decision, including the payment of restitution, must be based on law. There is an adage that says *Judicandum est legibus non exemplis*, which means the judge's decision must be based on law, not based on examples. Therefore, the judge in deciding on the payment of restitution to be received by the Victim's Child or guardian must consider juridical, sociological, and philosophical truths. Juridical truth must be based on law that meets the provisions of applicable law. Sociological truth, judges must consider the impact of their decisions in making wise and fair decisions by considering legal and other impacts. Meanwhile, the philosophical judge must consider the fairest justice in deciding a case.

Analysis of restitution payments to child victims made by perpetrators which is an implementation of the theory of Criminal Law Policy which is a form of criminal law policy which is the responsibility of the perpetrators of crime, as well as a form of compensation for the perpetrators. So that restitution payments made by criminals cover the scope of policies in the field of material, formal, and criminal law. However, so far when a crime is committed against a child, the victim does not only bear the material (which can be calculated) and immaterial (which cannot be calculated) losses. However, Child Victims also experience other losses in the form of shame, low self-esteem, loss of self-esteem, and/or traumatic excessive anxiety. Other losses like that the perpetrator should also bear in the form of restitution for the suffering experienced by the victim's child as a form of compensation. Restitution that must be paid by the perpetrator is intended to alleviate suffering and uphold justice for child victims of criminal acts because of criminal acts committed by perpetrators of criminal acts.

The protection of justice for child victims by paying compensation is part of the form of guaranteeing or granting the rights of victims. The protection of justice carried out by perpetrators by paying restitution is considered a form of justice and a deterrent effect due to losses. Even though in this case justice has not been realized for the Child Victims and their families until the future as a result of the criminal acts committed by the perpetrators. Victim's child is "forced" to be graceful and satisfied with the punishment of the offender. If other things are considered, losses from child victims, both material and immaterial, cannot be accommodated optimally from criminal sanctions to recover losses for victims.

Arrangements for the protection of justice for Victim Children are the first concern is the essence of the loss suffered by the victim. The essence of the loss is material and immaterial. With the loss suffered by the victim's child and the perpetrator providing restitution, it can illustrate that the law solely pays attention to the victim, not only to punish the perpetrator. This protection and guarantee are in accordance with the theory of *equality before the law* that guarantees the right of every individual to get protection and equal treatment in terms of getting equal and fair treatment before the law, getting fair treatment in government, and getting services and legal protection. This equality guarantee must be protected, guaranteed, and ensured by every citizen, state, and government. Moreover, if in the case of child sexual intercourse, the victim becomes pregnant, this will create a new legal subject. If restitution is not implemented and is not considered, it will lead to discrimination against legal protection and certainty.

Legal protection for child victims must be carried out through criminal law policies by taking into account the fundamental legal reconstruction of material and formal criminal law. The idea of reconstructing criminal sanctions for the payment of restitution in the form of compensation is part of the idea of reforming criminal law in realizing substantive justice, especially for child victims. This is in line with John Rawls's concept of specifically developing the idea of the principles of justice by using a concept known as the original position (*position*) and the veil of ignorance (*veil of ignorance*). With these two Rawls provides lessons on how to solve problems must lead and teach people to obtain the principle of equality of justice with his theory referred to as "Justice as fairness" (John Rawls, 2006)

The applicable criminal regulations are too focused on regulating punishment and punishment for perpetrators of criminal acts without paying attention to the rights of victims, including child victims. On the other hand, if the perpetrator gives compensation to the victim, the victim feels that this cannot be said to be fair. Through the theory of John Rawls' "Justice as fairness" which is a combination of *liberty* and *equality* can conclude that "everyone has the same rights to basic freedoms, and if injustice occurs, it is the people who are left behind who must benefit from it". (Ben-Jonathan et al., 1996) With this statement, in law enforcement and sentencing the principle of protection for victims must be embedded in law enforcement if social justice is to truly be realized. That is why everyone must be protected by the same principles of justice as the first virtues of social institutions as the truth of systems of thought (*Justice is the first virtue of social institutions, as truth is of systems of thought*).

In determining and formulating the payment of restitution by the offender, there will never be any measure of justice derived from a comprehensive doctrine that varies from law enforcers. Determination of restitution and payment of restitution must be based on the principle of social

justice which guarantees equity and benefits for victims, including child victims. If viewed from Rawls's theory, then 3 things that can be considered are (Anggara, 2013):

- a. Contract justice that guarantees the fair interests of all parties. Which states that the victim has the right to determine the understanding, circumstances, and conditions of justice as well as what efforts should be made to realize and maintain fair justice. To place restitution payments received by victims as individuals (*persons*) who are free and have reason that is not based on utilitarian justice (positioning justice as a situation where all can enjoy goodness and happiness equally in the life of the nation and state).
- b. Justice as *fairness* contractual. Then justice must be achieved in a free, rational, and democratic discourse. Through this principle, restitution payments received by victims are realized up to the understanding and implementation of justice.
- c. Justice has a concept of social and economic inequality that must be interesting to pay attention to. Victims as people who experience suffering and losses who are free and rational have different abilities to try. This is what causes social and economic differences in the payment of restitution according to the crime committed by the perpetrator.

Payment of restitution if considering justice based on John Rawls's principles, it must be in the form of a complete recovery for the victim and cover various aspects arising from the consequences of the crime committed by the perpetrator. Apart from that, by paying restitution, victims can be restored to their freedom, social status, legal rights, return to their place of residence, restoration of their activities, family life and citizenship, as well as other rights. In addition, the granting and determination of restitution must be made on the basis that (1) the victim as an individual has equal rights with the same basic rights as other rights; and (2) social and economic inequalities of victims must be regulated in such a way that both (a) are sufficiently expected to benefit all individuals, both victims, families and perpetrators, and (b) are attached to the dignity and dignity that are open to all as equality and justice.

Payment of restitution as justice for restoring the rights of victims of child sexual intercourse in this case is a form of providing protection, certainty, welfare, and justice for child victims. This is the image of a rule of law state which is emphasized in Article 28 G paragraph 1 of the 1945 Constitution concerning every person who has the right to protection of himself/herself, family, honor, dignity, and property under his control, and is entitled to a sense of security and protection from threat of fear, to do or not do something that is a human right. This fundamental article explains concerns about violations against any person who suffers a loss by a person or legal entity that can cause immaterial and material losses. Individual rights as human rights in improving human quality, increasing freedom or independence in exercising control, and obtaining freedom to pay attention to contemplation, feelings, and privileges according to human dignity (Djafar, 2019).

Therefore, legal considerations in determining a decision on child sexual intercourse must be complete, containing facts of events, legal facts, formulation of legal facts, application of legal norms, both in positive law, customary law, jurisprudence, and legal theories, etc., which are based on aspects and legal interpretation methods and even a judge can make appropriate legal discoveries in compiling arguments or reasons that become the legal basis in the judge's decision. Moreover, in Article 54 Paragraph (3) of the Judicial Law regarding the implementation of court decisions, court decisions must be carried out with due regard to human values and justice. This means that if there

is a void in the rule of law or the rules are not clear, then to overcome this a judge must have the ability and activeness to find the law (*recht vinding*) in the application of general regulations to concrete legal events and the results of legal findings become the basis for making decisions. Therefore, *legal reasoning*, which is the main task of the judge, must receive, examine, and try and settle every case submitted to him, then adjudicate those who have an interest in their rights or law.

5. CONCLUSION

The judge in his legal considerations did not provide any aspirations for the restitution paid. Thus, there is a legal vacuum regarding the legal considerations of judges who should discuss restitution. This is evidenced by child sexual intercourse which is regulated in the Child Protection Act and other statutory regulations that only focus on punishing the perpetrators who set aside and have not thought of legal remedies for victims of child sexual intercourse. Therefore, the position of victims of child sexual intercourse in the Child Protection Act is not yet optimally regulated when compared to the position of perpetrators, including benchmarks and determination of restitution. According to Article 50 of the Law No. 48 of 2009, Court decisions must contain the reasons and basis for the decision, certain articles of the relevant laws and regulations, or unwritten sources of law which are used as the basis for adjudicating. So that judges who have judicial powers to administer trials to uphold law and justice, the payment of restitution decided by judges is deemed not to have reached fair words and has not comprehensively included the judge's legal considerations regarding restitution to be able to restore the rights of Victim Children.

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