



## Compensation And Restitution For Victim Of Crime As The Implementation Of Justice Principle

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**ABSTRACT:-** On the 11<sup>th</sup> August 2006 have ratified and entry into force through the Law Number 13 Year 2006 of the protection of victim and witness which have been amendment in some articles through the Law Number 31 Year 2014. Also through the Law Number 26 Year 2000 of Human Rights Court, Law Number 15 Year 2003 of determination of government regulation in Law Number 1 Year 2002 of eradication of terrorism to the law that have cover about compensation and restitution. The purposed of this study is to evaluate the policy of eliminate the compensation that conduct by the legislator and the weakness of substances the right of restitution and the mechanism from the law aspect and fair philosophy. This study is used the normative research which cover the legal principles, legal systematic, legal comparative, positive law inventory with approach philosophy, empiric and concept approach. The result of this research have shown that the management of right substances of restitution and compensation with the mechanism under the positive law is still partial and plural mechanism so demanding the initiative of the victim to fight for while in general life, people have not known if there is a guarantee of rights and its mechanism. Limitation of compensation is only for the terrorism victim and victim of human rights violation is not significant with the principle of equal before the law, the principle of legal determination and principle of justice. State shall be responsible to create the regulation model and the effective and easy protection, like the guarantee of equal rights of the restitution and compensation, regulation of criminal sanction, the enforcement of execution, regulation of additional criminal sanctions of restitution payment, when the restitution cannot be getting from the perpetrators so the state must take the responsibility with implemented the concept of subrogation. So the fulfillment of the right of compensation and restitution for the victim of crime as one of the purpose achievement of the welfare state with principle of justice.

**KEYWORDS:-** Compensation, Restitution, Victim of Crime, Principle of Justice.

### I. INTRODUCTION

The Criminal justice process today is still oriented to the criminal justice and through the victimology approach, it is raised the claim to the criminal law and executive of justice which is oriented to the criminal perpetrators by questioning why justice is given to the violator of law and is not given to the people who became the victim. (Mudzakkir, 2005[1]). The argument of social contract stated that the state may called as monopoly to the whole social reaction to the crime and forbid to personal actions. So if its happen and have victims, so the state shall be responsible to pay attention of the victim demanding. (Muladi)[2].

In Universal Declaration of Human Rights, victim protection is one of the matter that get the international attention. Declaration determined to have access to the court and have fair treatment, restitution, compensation and other help to determine the rights of the victims. (C. de Rover, 2000)[3].

The Law Number 13 Year 2006 of the protection victim and witness that have amendment to the Law Number 31 Year 2014, the Law Number 15 Year 2003 determination of government regulation in Law Number 1 year 2002 of the Eradication of Terrorism to the Law Number on articles 36-42 have the arrangement of compensation, restitution and rehabilitation, the Law number 26 year 2000 of Human Rights Court, also the article 98 of penal code of the criminal procedural law that arrange the incorporation of lawsuits for damages

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and became of one alternative for the victim crime to fights for the rights to get the compensation for the materiel lost of the victim.

Restitution is lost replace that given to victim or the family by the perpetrators or third parties, while the compensation is lost replacement by the state due to the perpetrators can not afford to pay the whole damages to the victim (article 1 point 10 and point 11 Law Number 31 Year 2014 jo Law Number 13 Year 2006)

Although the arrangement of the compensation and restitution under the Indonesia Law if can be mentioned is still partial, viewing the guarantee of payment and the arrangement under the law is only to certain crime like to the victim of terrorism and the victim of human rights violence.

One of the right of the citizen that guarantee under the Constitution 1945 is the right of protection for itself, family and honorable and dignity and property trough the law mechanism. And if the crime is raise the lost of materiel to the victim so the state assumed to fail to fulfill the obligation to protect its citizen.

The reality has shown that many victim of crimes cannot get restitution for the crime that had happened and if they get it as the effort trough non litigation way like mediation with the perpetrators with expectation the case is not to bring into the court. It is open our eyes that is there is a crime so its must be oriented to the criminal evidence while the lost of payment is become the personal matter that must be fights for by the victim itself. Although the criminal law have provided the incorporate claim of lost payment under the article 98 of penal code in procedural criminal code, but the regulation is still not maximal yet in the implementation.

The empirical reality as mentioned by Eva Achjani Zulfa under her research which is located in Jakarta, Bogor dan Tangerang as on general, the alternative solution of the criminal case is outside the court is become the choice of people. Its conclusion got from the opinion of 250 respondents that have involved either as victim or perpetrator with the composition 62 % respondents of the murder case, torture, rape, stealing that choose not bring to the court (stopped in police officer) and 82 % respondent of traffic cases choose to have reconciliation as the solution of its cases (Eva Achjani Zulfa, 2009)[4]. This reality has shown that people have not fully trusted to the criminal system court. The government should have a policy due to the law enforcement that also pay attention for the victim interest both trough penal way or non penal. Remaining not all the criminal cases may solve by stop its claim.

According to this phenomena on above this research issue, it seem the weaknesses of the substances regulation about the compensation and restitution also the justice guarantee for the victim of crime in general. The existing law have not given the guarantee maximum yet for the victim of crime to get the compensation. So need to deep analysis especially the legal substance of the compensation and restitution under the law in order to reflex the justice principle and maximal protection for the victim of crime.

## **II . RESEARCH METHODS**

### **Type of Research**

The research is a legal normative research or doctrinal that will analysis and review the right of compensation and restitution for the victim of crime. Normative research type cover the research to the legal principles, comparative law, inventory positive law by conduct the philosophy approach, socio-legal approach and conceptual approach.

### **Type of Legal Material**

Legal materiel type that used in this research are primary legal material and secondary legal material that supported by the empirical data.

### **Data Analysis**

The legal primary materiel, the legal secondary material and empirical as supporting data to be treated, analysis by correlation with the legal principles and legal theories so defined the legal matter that could be studied.

## **III. RESULTS AND DISCUSSION**

Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power asserted that the perpetrators must be pay for the restitution to the victim (article 8), under the restitution if un able to get from the perpetrators or other sources, so the State shall pay for the restitution like compensation (article 12). Moral declaration is to mentioned the states to evaluate back the customary, regulation and its law to consider the restitution as a legal choice that provided in the cases of criminal, apart from the criminal sanctions (article 9).

Law is a basic legality and also based legal recognition for the rights of person. Legal protection to the victim of crime will be defined by the existing legal norms. The guarantee of the rights under the legal materiel

will be strong legal based for the victim of the crime. Also need the responsive formal legislation to make the procedure of fulfillment easier.

There is a relationship correlation between the substance arrangement of legal substance of the criminal law materiel and criminal law formal with the effort to the protection of the victim of crime. In this following will be mentioned the reality of the law that guarantee the right for compensation and restitution also the mechanism of its fulfillment so will seen the problem of legal enforcement of the protection of victim is not only in the implementation part but also in the existing law that have not given the maximal protection yet.

The guarantee of right for the compensation under the law as mentioned in the following :

1. Law Number 26 Year 2000 of Human rights Court, mentioned that “every victim in human rights severe violation and or the heir can be get the compensation, restitution and rehabilitation” (article 35 point 1).
2. Law Number 15 Year 2003 of determination of government regulation in Law Number 1 Year 2002 of the eradication of terrorism replace to Law, mentioned that “every victim or its heir due to the terrorism act have right to get compensation or restitution” (article 36 point 1).
3. Law Number 31 Year 2014 of the Replacement of the Law Number 13 Year 2006 of the protection of the witness and victim, mentioned “each of the victim of human rights severe violation and the victim of the terrorism beside to get the rights as mentioned under article 5 and article 6,also have rights for the compensation” (article 7 point (1)).

While the guarantee of restitution rights under the law as mentioned in the following:

1. Civil Code, mentioned that “each of the act that violate the law that caused the damage to other people due of his sin must replace that lost” (article 1365).
2. Law Number 26 Year 2000 of Human Rights Court, mentioned that “each of the victim under the severe human rights violation or its heir can get the compensation, restitution and rehabilitation” (article 35point 1).
3. Law Number 21 Year 2007 of eradication of the human trafficking that “each of the victim of the human trafficking or its heir have a right to get the restitution” (article 48 point 1).
4. Law Number 40 Year 2008 of the eradication of racial and ethnic discrimination, mentioned “everyone have the right to claim for compensation trough the court of the racial and ethnic discrimination act that cause damaged to himself.” (article 13).
5. Law Number 22 Year 2009 of traffic and transportation, mentioned “ the victim of traffic accident have the right to get: a). Help and Medicare from the party who responsible for the accident and/or government; b). Compensation from the one who must take responsible for the accident; and c). Payment from the insurance agent of the accident” (article 240).
6. Law Number 32 Year 2009 of the protection and management the living environmental, mentioned : “each of the duty of activity who break the law like contamination and /or destruction of the environment that cause the damage to other people or to the living environmental must compensate and/or conduct certain activity” (article 87 point 1).
7. Law Number 36 Year 2009 of Health, mentioned “everyone have right to claim the compensation to the person, medical officer, and/or the health maker that caused the damage due to the wrong act or culpa in order to accept the service of health” (article 58 Point 1).

According to mentioned above, it seemed that the regulation of right guarantee of the restitution and compensation under the law is still partial, so will be bothering the legal system and logical law. The reality has shown that some of the law have arranged and guarantee the right of restitution, so on behalf of legal system can be defined for the other victim crime can not determined as the right so seemed the victim have no right of restitution and compensation according to the *a contrario*. Logical law which is arrange the legal substance cause the opinion of discrimination of law to the victim for other crime. As same as John Dussinch opinion on his thesis “Concept and Forms of Victim Services” that delivered on Asian Postgraduate Course on Victimology and Victim Assistance 18-29 Juli 2011 in Universitas Indonesia that one of the factor that victim of crime in Indonesia have not get the maximal protection due to the existing law. There are many legal aspect that have not cover yet by the law in specific way. The law is still partial characteristic and exist in many regulation so only happen to the certain of criminal. There are laws that have no implementation regulation yet so can not be implemented optimal. It is need to harmonize between those laws (Maharani Siti Shopia, 2002)[5].

Also the legal discrimination under the guarantee of compensation where the state is only to guarantee right for the severe human rights violation and the victim of terrorism. This situation is obviously against with the principle equality before the law, the legal state principle and the justice principles. The victim of crime is should be the same before the law and have right to get the treatment and protection from the state. The guarantee of compensation right is only for the victim from certain crime is a discrimination and against with

human rights. According to Albert Vann Dicey, one of the meaning of the rule of law is the equal position before the law (Sedarmayanti, 2003)[6]. Legal framework must be fair and conduct without the distinguish. Indonesia as a state which based the government to the rule of law must build the legal supreme meet the principle of constitution. Under the law number 12 year 2011 of the law making treaty, mentioned under the article 6 and its explanation that the principle as guidance in the substance of the law must be reflected to the justice, equal position under the law and can not be contain the thing that differentiate based on background, must be reflected to the protection and respect of human rights. According to principle law and legal theory analysis, what mentioned above can be defined as limitation right of the compensation that conduct by the state only for the certain victim that mentioned under the law without concern to the equal before the law principle, justice principle and the law making treaty principle.

To find the legal justified on why the state have obliged to give compensation to the victim, in theoretic frame based on the contract social theory. Citizen is the legal subject that have rights and obligation from and to the State. Everyone have the rights that must be recognized by the state and must be respected, protected, and facilitated, also fulfilled by the state. While each citizen also have obligation to the state that also rights of the state to be recognized, respected, and complied by each of the citizen (Jimly Asshidiqie, 2012)[7]. This relationship has birth due to the consensus, agreement or treaty as the beginning of the birth of state as described by the contract social theory.

Basically, the right of citizen is the obligation of the state and the obligation of the citizen is the right of the state. The state have the authority to enforced the citizen to conduct its obligation and so on. (Taliziduhu Ndraha, 2003)[8]. So the rights and obligation of the state and the citizen must be based on the constitution. The legal concept of the state is one guarantee to enforce the human rights protection.

The concept of contract social theory contained under the constitution of each state that involved the obligation and responsibility of the state to take its people on the welfare life. But it is not impossible the state trough the government officer in order to conduct with an appropriate policy so implicated to its people. If trough philosophy analysis, the victim of the crime caused of the government that fail to protect its citizen as mentioned under Article 28 G point (1) UUD 1945 second amendment year 2000 that "everyone have right for the individual protection, family, honor and dignity and property under its authority, also have right of the secure and protection from the fear to do and not to do a thing which is called human rights." under maintain the policy, the government seen as not proper in managed his govern. The number of police officer whom held the first duty for security in Indonesia is not as much as number of population that must be protected. United Nation of International standard is 1 : 350, while in Indonesia 1 : 564 people. To achieve the comparative is 1 : 350 the state need around 700.000 police officer to monitor the 242 million people (<http://www.kompolnas.go.id/kapolri-rasio-perbandingan-jumlah-sdm-polri-saat-ini-1-564-jiwa>). The limitation of the police officer number is supposed to counted the people awareness and Legal compliance. By seen the reality in Indonesia with the high number of the crime can be sure that the number of Legal compliance of people are still low in the level of, so according this situation must be balance with the number of police officer that continuously keeping the monitor and protect the people from become a victim. According to Achmad Ali that the number of legal compliance is the lowest of legal compliance so need the monitoring continually. (Achmad Ali, 2009)[9].

From the public policy view by Kimber which is an issue or problem will be an agenda of the public policy if meet some of the criteria, like the issue have reached the certain critical point, while the issue is related to the certain emotion from people interest where the issue have the huge implicated (Ismail Nawawi, 2009)[10]. The government should have seen the serious problems and have the huge implicated to the people. The inappropriate policies in the set of government due to raise many crime, posited the state as the one who have responsible for the lost that severe by the victim. So the State must be obliged to give the compensation when the perpetrator failed to pay for the restitution.

Furthermore the mechanism of the fulfillment of right of the restitution under the law, basically have two model, like:

a. Initiative from the victim to claim or bring it into the court based on civil suit (article 1365 civil code), petition of combined the case of lost claim (article 98 penal code), petition of restitution or compensation to the court trough the institute of witness and victim protection (Law Number 31 Year 2014 jo Law Number 13 Year 2006).

b. The wisdom of judges trough the conditional criminal decisions by stipulate the special condition to pay the lost to the victim (article 14c point (1) Penal code), stipulate the additional criminal sanction of the lost of payment in certain criminal crime (Law Number 8 Year 1998 of the consumer protection, Law Number 31 Year 1999 jo Law Number 20 Year 2001 jo Law Number 31 Year 1999 of the eradication of Corruption, Law number 40 year 2008 of the eradication of racial and ethnic discrimination, Law Number 22 Year 2009 of Traffic and transportation, Law number 32 year 2009 of the protection and environmental, Law Number 41 Year 2009 of the protection of agricultural land sustainable food.

This diversity mechanism have shown that legal making treaty of criminal procedural law that restoration oriented is still temporary. It should be have repeal all the diversity mechanism by the existing Law Number 31 Year 2004 jo Law Number 13 Year 2006 of the witness and victim protection. Apart from that, the exist of LPSK is not strong enough yet to be a foundation in order to give the maximal protection for the victim. The existence of LPSK as the institution that expecting to taking care of the victim, in fact have not made good progress yet based on the reality as in the following :

- a. The position of LPSK which is out of the court system so is not strong enough to fight for the victim.
- b. The authority of LPSK that have passive character, means that the protection is only given if there is a requested from the victim in order to claim for restitution or compensation, while it is face on empirical reality that according to 6 legal area of the first court which are the Court of Makassar, Sunnguminasa, Maros, Pangkep, Barru dan Pare-pare in year 2012-2014, there is no one who claim for restitution trough LPSK caused from 120 respondent of victim have not known about this right. As same as the other mechanism that need initiative from the victim, there was only one case that claim the restitution, due to the victim have accompanied by the lawyer.
- c. The weak of mechanism that arrange by the law which is demanding the regulation policies from the government to make a model of the victim protection in the court system that used restoration whether trough the penal or non penal.
- d. State responsible have cover the whole of making policies that give the easier way for the victim to get their right trough the effective mechanism. Strengthening power of execution to the restitution power need to conduct in order the responsibility of perpetrators is not just move to the state trough compensation.
- e. The position and existent ion of LPSK is only found in the capital city of the state and its became the main problem for the people to have access for the assistance and victim protection. Also the limitation of human resources in LPSK which is not rational with the number of people who became victim of the crime that need a protection. According to the data since Desember year 2013, LPSK is only have 175 staffs, include the head, expert, administration, courier, security, medical staff (year of reported of LPSK 2013).

In Stephen Schafer book with the title *The Victim and His Criminal* have five systems of pay restitution and compensation to the victim of crime, like: a) damage payment that civil characteristic that given trough civil process. This system is separate the damage claim of victim from the criminal process. b) Compensation that civil characteristic is given trough criminal process. The investigation of compensation claim, in Germany called *Adhasion-prozess*, c) Restitution that civil characteristic mixed with criminal characteristic is given trough criminal process. Although is not doubt about the punitive characteristic . One of restitution model according to this system is compensatory fine that known as “*Busse*” (in German dan Swiss), d) Compensation that have civil characteristic is given to punitive process and supported by the state income sources. In this case, the compensation have not punitive aspect at all although have given into the punitive process. So the permanent compensation is real civil institution but state that obliged to compensate by the court. This is a recognition that state have failed to prevent the crime. e) the neutral compensation, is given trough special procedure. This system exist in Swiss (since 1937), in New Zealand (since 1963) and In UK (since 1964). This system is implemented on case of the victim need the payment of damage while the perpetrator is in bankrupt situation and not able to fulfill the claim of restitution to the victim. The instituted that have competent ion to investigated is not civil court or criminal court but with the special procedure and independent which is demanding state intervention on behalf of the victim (Barda Nawawi Arief, 1998)[11].

The arrangement of legal substance of victim protection on restitution and compensation under the positive law have not expected yet as effective way in order to reach the goal and appreciation to the Human Rights. The regulation of criminal law, materiel, the criminal law formal and the implementation of the criminal law is the policy that must be conduct by the government. Victim Declaration has proclaim the morality message that the state should be take a look at the custom, regulation and the law to consider restitution as a choice of law in the criminal cases (article 9).

In case of compensation, declaration proclaim that when the payment of damaged can not get from the perpetrators or other sources, so the state must be give the compensation to: a) victim whom severe in physical condition or lost mental as the serious victim, b) family especially the heirs of the death or palsied due to the victim.

The provision on this declaration, annunciation to states parties to maximized as the effort to fulfill the right for crime of victim with promote the mechanism informal like mediation and if it is not possible so the mediation for penal law trough stipulated the payment of sanction and can be a choice of solution to the perpetrators. To get the restitution access from perpetrators in order to effort the model or pattern that may able for them to fulfill their obligation based on judge decision to pay the damage to the victim , so in the



investigation step conducted the conservatoir beslag to the property of the perpetrators, the payment is by credit, transfer of responsibility to pay the damage to the parents of children perpetrators to their labor.

One of the victim protection is how to recover the suffering the victim due to criminal act, especially in restitution matter. The right of the victim for the restitution basically is integral part from the right in social security as mentioned in article 25 UDHR / Universal Declaration of Human Rights (Barda Nawawi Arief, 2007)[12].

The strengthening of execution restitution power need to be conduct since the positive law is not arranged so there is no chance for victim to get the right of the restitution from the perpetrator, it is need to sought in order to minimalistic in transfer of responsibility of the perpetrator to the state.

In order to fulfillment the rights of compensation, the concept that was offered is a *subrogasi* concept that found in civil law code. Under civil code have arranged under article 1400 civil code. *Subrogasi* means replacement while the creditor position by the third parties in the agreement as due as the conduct of payment. (M. Yahya Harahap, 1986)[13]. Legal implicated of *subrogasi* is the transfer of credit to the third party that pays it. (Suharmoko and Endah Hartati, 2005)[14]. In this case, the third party that have paid the credit of debitur and have new position as a new creditor. The transfer of position have covered the whole right and claim as long as recognized by creditor (M. Yahya Harahap, 1986)[13].

The *subrogasi* concept can be constructed in the fulfillment of the right of lost payment for the victim, while in this case the state as third party that replace the position of the perpetrators to pay the damages to the victim since the perpetrator can't afford to fulfill its obligations. In order the perpetrators have able to fulfill their obligation to pay, so the state must conduct a policy to empowerment the human resources as convicted in penitentiary by giving the professional training and have the cooperation with private agent or government worker to employ the convicted in order to be able to produce a good and service to cover his credit.

The implementation of compensation giving basically with consideration that stipulated the perpetrators, the can not afford to pay the compensation, while from the victim logy view the intensity of victim must be consider, the victim is need recovery, the role of play of the witness as a responsibility of the citizen in the legal enforcement.

At least, the consideration above can me use as the requirement to give the compensation by the State. Apart from that, the compensation can be modified in financial, medical care/psychology, or scholarship for the heir of the victim. The form of compensation, in the case of implementation need coordinate with the monetary minister, Health minister and education minister. It is need to be pursued in order the conduct of compensation is effective is the formulation system of payment whether restitution or compensation in regulator from with the guarantee number of compensation and take no long time.

Apart from that, it is need the legal framework that work in the court system to fight for the victim interest. Model that have constructed is the court system of the criminal act (*daadstrafrechts*) based on the perpetrators, its should be leave by now. According to Muladi bahwa the realistic model I the model that concern some of the interest, like the interest of the country, the interest of the individual and event the interest of the perpetrators. Model which is based on the concept of *daaddaderstrafrecht* called the balance of interest (Muladi,1995)[2]. The criminal system is shall to create the justice for the victim. According to these opinion, the criminal court system need the role of institution which is work to help the judge in finding the materiel right in order to achieve the justice. By consider with the The Servis Model where the victim under this system is the one who are protected and to strengthening its position so need to be protect and concern by put this institution under the government structural which is under the law and human rights minister as unit of victim protection. The form of victim protection as the consequence of included the restitution as additional sanction in the draft of penal code. Duty and function of victim protection is conduct the research and verification of the victim role in the case of the victim, the implicated of crime to the victim. There are 2 benefits of the victim protection research for the judge like, first as based consideration to light or aggravate for the perpetrators or consideration to implemented sanction of criminal to pay the restitution if the victim have no get its rights. Second, as basic to recover the victim for the restitution trough mediation mechanism or trough the judge decision with restoration situation. For that interest, the court of victim protection read the report and its analysis in front of the judge.

The transfer of restitution payment for the perpetrators to the state if the perpetrator have no able to pay financially. In this situation, the concept of subrogasi and the competent institution to held the compensation of LPSK, which is work together with the monetary minister, health minister and education and culture minister.

The institution which is taking responsible to held the restitution is UPK while the compensation is handled by LPSK with considering that the financial sources of compensation is state monetary so to keep its objectivity under the authority of the LPSK as the independent institution t keep the neutrality in order the implementation of these right can be fulfill as the expectation.

#### IV. CONCLUSION AND SUGGESTION

Restitution is in charged to the perpetrators based on the judge decision that legally binding for the lost of materiel and /or immaterial that suffer by the victim or their heirs. While the state fault trough the government is implicated under the responsibility to the victim of crime that must be conduct in justice to all the victim of the crime based on equal before the law principles. It is need the regulation on criminal materiel, criminal law formal and the implementation of the criminal act who arranged the right and mechanism also the execution power of restitution decision in order to implemented easier. Sequestration of the property of the perpetrator, the payment by credit, transfer of responsibility of the parents, employer, husband/wife, payment as joint liability to the strengthening power of execution of the restitution. The Concept of subrogation is become the alternative of solving the fulfillment of the right of the compensation when the restitution is not get it from the perpetrators. Due to this situation, the legal protection of the victim in the case of restitution and compensation is demanding the good faith and *political will* of the government as the one of the effort to create the goal of state which is welfare justice state.

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