

## State Liability for Crime Victims: A Perspective of Public Prosecutor

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### Abstract

Crime prevention are an integral part of efforts to protect society (social defense). In a context of the criminal justice system, the function of criminal law is to provide protection for the rights and interests of individuals, both perpetrators and victims of criminal law. The research is an empirical legal research. The results show that the essence of the claim for compensation for crime victims in national regulations is an effort made by providing a place for crime victims to obtain justice, benefit and legal certainty as an objective of the law. The mechanism for claiming compensation for crime victims has never been prosecuted for compensation by the public prosecutor. Hence, the ideal concept of the provisions in the claim for compensation can be done through regulations in compensation claims both for restitution and compensation in the implementing rules both material and formal criminal law.

**Keywords:** Criminal Law; Public Law; Liability; Prosecutor; Victim.

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### INTRODUCTION

In Indonesia, crime victims show a fluctuating pattern [<sup>1</sup>] during 2016-2018 period. The percentage of crime victims in population has decreased from 1.22 percent in 2016 to 1.08 percent in 2017 and increased to 1.11 percent in 2018 [<sup>2</sup>]. In fact, the crimes have been existed for a long time, which will always increase as the development of human culture itself, it will always exist and develop all the time. The crime do not only occur in big cities with relatively more developed culture and awareness or legal knowledge, but also occur in rural areas where traditions and customs are still relatively high. Crime victims need more intensive and serious attention because it is a criminal act.

For an example: the first case, in Polewali Mandar district, West Sulawesi province, a child (17 years old) was sentenced to 10 (ten) years in prison by the District Court of Polewali district for being proven to have committed the crime of theft with violence, rape

and murder of a housewife.<sup>3</sup> The second case, in Bulukumba district, South Sulawesi province was a man was sentenced to 7 (seven) years in prison by the District Court of Bulukumba for the theft of 17 (seventeen) cows for several victims of cow owners [<sup>4</sup>].

These cases cause many difficulties in resolving them at the stage of investigation, prosecution, and making a decision. Although many crimes have been processed up to the court, but the perpetrators were not sentenced to the maximum sentence in accordance with the provisions of the legislation listed in the criminal code. That to resolve a crime requires a rational effort from the community, namely by criminal politics [<sup>5</sup>]. In essence, policies or efforts for crime prevention are an integral part of efforts to protect society (social defense). Therefore it can be said that the main objective of criminal politics is “social protection to achieve social welfare.”

<sup>1</sup> Njoto-Feillard, G., & Azali, K. (2016). *Is a New Entrepreneurial Generation Emerging in Indonesia?*. SEAS Yusof Ishak Institute. <http://hdl.handle.net/11540/9160>.

<sup>2</sup> Source: <https://www.bps.go.id/statistik/kriminal> 2019, accessed on 17 February 2020, at 08.23.

<sup>3</sup> A child case named Andi Ilham Pratama Pagilingi, based on the Decision of the District of Polewali, No: 9 / Pid.Sus.Anak / 2015 / PN.Pol, dated 15 January 2016.

<sup>4</sup> A case on behalf of Ali Bin Manro, based on the Decision of the District Court of Bulukumba, No: 141/Pid.B/2016/PN.BLK, dated 20 October 2016.

<sup>5</sup> Muladi and Barda Nawawi Arief, *Bunga Rampai Hukum PIDana*, PT. Alumni, Bandung, 2010, p.1

In a context of the criminal justice system, the function of criminal law is to provide protection for the rights and interests of individuals, both perpetrators and victims of criminal acts, the rights and interests of the community including witnesses and the rights and interests of the State represented by the government [6]. To prioritize legal protection for crime victims based on social contract arguments and social solidarity arguments. The first opinion states that the State monopolizes all social reactions to crimes and prohibits personal act, therefore if a crime occurs and brings a victim, the State must also be responsible for the needs of the victim. The second opinion states that the State must maintain its citizens in meeting their needs or if their citizens experience difficulties, through cooperation in society using the facilities provided by the State. This can be done either through service improvements or rights arrangements [7].

Legal protection for victims should be regulated explicitly in the Criminal Code. For example, in imposing a sentence for perpetrator, it is also necessary to consider the losses suffered by the victim. For that, the perpetrator could be given compensation for the crime which might be more beneficial for the victim [8]. Attention and protection of the interests of victims of criminal acts both through the criminal justice process and certain means of social care is an absolute part that needs to be considered in criminal law and social policies, both by the executive, legislative and judiciary bodies as well as by social institutions. Based on the objective of realizing equitable justice and general welfare, this paper focuses on fulfilling the rights of victims of criminal acts to be protected which are basically an integral part of human rights in the field of social security.

## METHOD OF RESEARCH

The research is an empirical legal research [9]. It focuses on the responsibility of the State for crime victims by the public prosecutor, therefore the High Prosecutor Office of South Sulawesi in Makassar city was chosen as the institution to prosecute criminal cases and the Makassar State Court and the Witness and Victim Protection Agency (LPSK – *Lembaga Perlindungan Saksi dan Korban*) in Jakarta.

<sup>6</sup> Muladi, *Kapita Selekta Sistem Peradilan Pidana*, Semarang : Badan Penerbit Unveristas Diponegoro, 1995, p. 129.

<sup>7</sup> Muladi, *Demokrasi Hak Asasi Manusia dan Reformasi Hukum di Indonesia*, Jakarta : Habibie Center, 2002, p. 14.

<sup>8</sup> Rena Yulia, *Viktimologi Perlindungan Hukum Terhadap Korban Kejahatan*, Yogyakarta, Graha Ilmu, 2010, pp. 181-182.

<sup>9</sup> Irwansyah. (2020). *Penelitian Hukum, Pilihan Metode & Praktik Penulisan Artikel*, Yogyakarta: Mirra Buana Media, p. 61-63

## A Philosophical Basis for Compensation: Legal Protection for Crime Victims in National Regulations

In order to realize a constitutional State, not only legal norms or statutory regulations are required as legal substances, but also an institution or a driving body as a legal structure supported by legal behavior of all components of society as a legal culture. The three elements by L.M. Friedman are said to be the composition of the legal system [10].

Law is an important instrument in regulating the order of community life relations so that community members feel protected by their rights and obligations so that it can be said that law also has the purpose of benefiting the community. This shows that law and law enforcement are exercised to achieve legal certainty, justice and benefit, this is as stated by Gustav Radbruch regarding the objective of law, arguing that in every problem the order of priority in realizing legal objectives is justice, then benefit and finally legal certainty. Gustav Radbruch in his writing entitled "*Legal Philosophy*" compiled by Kurt Wilk [11] stated that the law should ideally guarantee legal certainty.

Benefit as one of the legal objectives was put forward by Riduan Syahrani that law enforcement must also pay attention to its benefits or uses for the community, because legal laws are made for the benefit of the community. Therefore, the implementation and law enforcement must provide benefits for the community and do not allow the implementation and law enforcement to be detrimental to the community, which in turn will cause unrest [12].

In essence, the protection of crime victim is abstract or indirect protection formulated in formulative policies, namely abstract protection which tends to lead to the protection of communities and individuals. As known, the concept of claim for compensation has a place in the criminal justice system. The losses suffered by victims are material and/or immaterial. The problem that arises in this case is who should provide compensation for this? In understanding the issue of compensation, we should not see it in a narrow scope or *victim centered*, but must be understood in a broad scope. In this case, Atmasasmita said that the existence of restitution and compensation is an issue related to justice and security or social order [13].

<sup>10</sup> Friedman, LM, *The Legal System; A Social Perspective*, New York, Russel Sage Foundation, 1975, p. 11

<sup>11</sup> Titik triwulan Tutik, *Pengantar Ilmu Hukum*, Prestasi Pustaka, Jakarta, 2006, pp. 33-34.

<sup>12</sup> Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, PT. Aditya, Jakarta, 1996, p. 192.

<sup>13</sup> Romli Atmasasmita, *Op.cit.*, p. 26

The development of attention to the interests of victims through compensation and restitution mechanisms shows more advanced developments [14]. This can be seen in both international instruments and in the national context. At the national level, several provisions of criminal legislation outside the Criminal Code regulate the right of victims to get restitution and compensation.

Historically, a fine that are known in modern criminal law also originate from the tradition of "punishment" for compensation which criminologists are struggling to regain in the framework of the idea of modern criminal law. The compensation turned into a fine controlled by the State, at first it occurred only because of a consideration so that the implementation of the compensation was not conducted personally which could lead to abuse. In addition, state participation in creating order and peaceful living together must also be respected so that part of the criminal compensation must go to the state treasury. Unfortunately, in the development of legal science, the field of criminal law operates independently from the development of civil law, so that damages and fines also develop separately. The compensation is considered a civil sanction, while a fine is categorized as a criminal sanction.

In terms of the responsibility of the perpetrator for the losses or suffering suffered by the victim (as a result of crime), for several criminal acts that occur in society, the settlement is often made on the basis of peace between the two parties. This method of settlement is a fact that lives among certain members of society in Indonesia who base the settlement on customary law. This means that before the stipulation of an act as a criminal act, against this act, customary law has first provided a solution. In this regard, L.H.C. Hulsman relates it to the principle of subsidiarity, that is, firstly the State's power tool to implementing criminal law does not move if through a single system of social sanctions the same goal can be achieved or has indeed been achieved. In other words, things that are against the law (as well as things that are against the law with a criminal sanction) will be endeavored to resolve as much as possible through means other than criminal law [15].

Protection of crime victims in the form of compensation for victims by perpetrators is actually not without problems. The problem that arises is when the perpetrator does not have the ability or property to pay compensation to the crime victim. In this regard, Sudarto argued that the punishment of the

compensation obligations imposed on the perpetrator would have meaning if the perpetrator was able to pay the compensation. If not able to pay, and it can be estimated that the majority of people who commit these crimes are among those who are unable [16]. In addition, protection for crime victims through the compensation mechanism can also be viewed in terms of the general purpose of punishment. So far, the objectives to be achieved with criminal and criminal law have never been formally formulated in statutory regulations.

The dimension of compensation for the suffering of the victim is related to the restitution system, which in the meaning of victimology is related to the repair or restoration of physical, moral, property and rights of victims caused by criminal acts [17]. The main character of this restitution is indicated by the responsibility of the perpetrator for restitution action that are criminal in criminal cases, which in the meaning of victimology is related to the repair or restoration of physical, moral, property and rights losses caused by criminal acts. Unlike compensation, compensation is requested on the basis of a request, and if it is granted it must be paid by the community or the State. Whereas restitution is demanded by the victim to be decided by the court and if the claim is accepted, it must be paid by the perpetrators of the crime. Because such differences has not yet been realized in reality, there is often no difference between the two payments, because most importantly, attention to the victim first, then the payment for the losses of victim [18].

In fact, compensation in the form of material (goods or money) is one of the oldest forms of criminal system ever known in human civilization. Every community group in the world knows material compensation, including in Indonesia [19]. Starting from the era of the kingdom until now, especially in the environment of indigenous peoples, the compensation system as a form of punishment system is still recognized.

In another dimension about the responsibility of the State for victims, Kunter argues that victims have the right to claim the State. In expressing his opinion, Kunter gave an example of the responsibility of factories/companies towards their workers. Suffering, accidents experienced by workers is the responsibility

<sup>16</sup> Sudarto, *Hukum dan Hukum Pidana*, Bandung: Alumni, 1986, p. 187

<sup>17</sup> Parman Soeparman, 2007b, *Op.cit.*, p. 52

<sup>18</sup> Bambang Poernomo, *Hukum dan Viktimologi*, Bandung: Bahan kuliah pada Program Pascasarjana Ilmu Hukum Pidana Universitas Padjadjaran Bandung, 2002, p. 14.

<sup>19</sup> Muhadar, et.al., *Perlindungan Saksi dan Korban dalam Sistem Peradilan Pidana*, Jakarta : Penerbit Putra Media Nusantara, 2010, p. 42.

<sup>14</sup> Hellmann, O. L. L. I. (2015). "The Institutionalisation of Corruption: The Neglected Role of Power." In *th PSA Annual International Conference Sheffield*, vol. 30. 12-43.

<sup>15</sup> Roeslan Saleh, *Segi Lain Hukum Pidana*, Jakarta : Ghalia Indonesia, 1984, p. 21

of the factory/company, as well the relation of the State and its citizens [20].

As explained above, it can be concluded that protection of the interests of victims is an integral part of public protection efforts and to improve social welfare which cannot be separated from the objective of the State, namely to protect the entire Indonesian nation and to advance the general welfare. A State through its apparatus is obliged to maintain public order and security. Therefore, crimes that occur are the responsibility of the State. This means that the emergence of victims is also the responsibility of the State. The occurrence of a crime victim can be considered a failure of the State in providing good protection to its citizens. The philosophical basis of the provision of compensation is based on the obligations/responsibilities of the community towards those who suffer bad luck and the responsibility of the State for failure to take action to prevent crime.

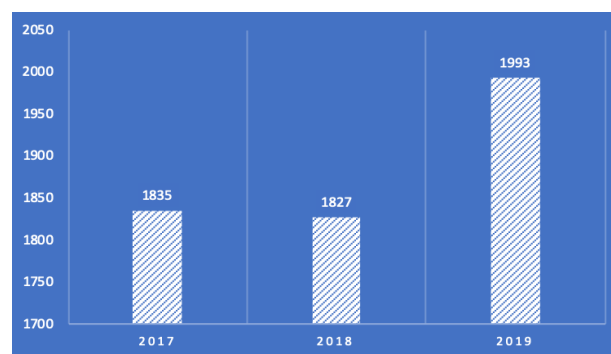
### Assessing Mechanism and Ideal Concept for Compensation Claim

The substance of law is a very important factor as a guide in determining claims for compensation, both in the form of rights to restitution and compensation. The law is a basis as a guarantee for justice and protection. Achieving justice as one of the steps of legal supremacy will be impossible to achieve if the law is not aspirational in ensuring the interests of the people as a whole. Legal protection for crime victims will be determined by legal norms that govern it. Guaranteed rights in material law will be a strong legal basis for crime victims as well as responsive legal norms needed to facilitate compliance procedures in claiming compensation.

Based on the results of the research, the mechanisms for fulfilling the rights to claims for compensation, both restitution and compensation have different mechanisms, in terms of implementation arrangements and submission periods. Guarantee arrangements for claims for compensation in legislation, both for restitution and for compensation are still partial in the sense that from the point of view of filing a claim for compensation that there are laws and regulations that do not regulate the mechanism for submitting requests for restitution or compensation, but rather regulate the procedures for implementing decisions, both restitution and compensation, where most mechanisms for fulfilling victim's rights to compensation and restitution require the initiative of the victim to submit a request to court.

After analyzing legislation regarding the mechanism for fulfilling the rights to claims for compensation, both restitution and compensation, it greatly influences the implementation of fulfilling the

rights of crime victim. The following is the recapitulation data on the number of criminal cases in the jurisdiction of the Makassar District Court (Graph-1).



**Graph-1: Criminal cases decided by the Makassar District Court in 2017-2019**

Based on the number of general criminal cases at the Makassar District Court in 2017-2019, there were 5655 cases of general criminal acts, in which the criminal acts which contained victims mostly suffered both material and immaterial losses from 44 cases of fraud, 1434 cases of theft, 232 cases of embezzlement, 57 cases of forgery, 128 cases of public crime, 65 cases of receive stolen goods, 3 cases of destruction, 16 cases of extortion and threatening, 230 cases of maltreatment, 3 cases of negligence which resulted in death/injury, 6 cases of crimes against morality and 5 cases of domestic violence.

As data above, the crime victims need compensation, especially restitution and compensation in the form of recovery, psychological, medical care and education. And for this reason, it is desirable that the concern of the perpetrators of crime and the attention and responsibility of the State in seeking improvements to regulations concerning procedures that are easy and fast in obtaining restitution, including efforts to prosecute criminal cases without going through a merger of civil and criminal cases and appropriate solutions if the restitution is submitted in charges against the perpetrator of a criminal act.

Law enforcement officials, especially public prosecutors consider that the problem of compensation for crime victims has not yet become a problem in the realm of criminal law, because the main task of public prosecutors in the criminal justice system is how to find material truths on the crimes of the perpetrators.

In order to empower the victims in the criminal justice system, 2 (two) models are known [21]: the procedural rights model and the service model. *The first*, the procedural rights model, emphasizes the possibility of an active role for the victim in the

<sup>20</sup>Made Dharma Weda, *Loc.cit.*, p. 91.

<sup>21</sup> Muladi & Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Bandung: PT. Alumni, 2010, p. 85

criminal justice process, such as assisting the public prosecutor, being involved in every level of case examination, having to hear his opinion if the convict is released on condition of a sentence, and so on. In addition, by actively participating in the criminal justice process, victims can regain their self-respect and confidence. However, the involvement of victims has a positive aspect in law enforcement, and it also has a negative side because the active participation of victims in the implementation of the criminal justice process can lead to personal interests over the public interest.

Another reason put forward by the group that opposes the granting of procedural rights to victims is that the giving of an individual role to the victim in the trial process or prosecution of the perpetrator means making him responsible for the proceedings of the trial and the outcome of the process so that this burden of responsibility will become a pressure that will create it is quite heavy for the victim in various ways which in turn can make him a second victim (*risk of secondary victimization*). Pressure can arise from people with whom the victim made contact and/or is caused by the police or prosecutors who will use their rights in the public interest. Perpetrators and their lawyers will try to influence the behavior of victim during the process and sometimes by using intimidation.

*The second*, the service model emphasizes the provision of compensation in the form of compensation, restitution and efforts to restore the condition of victims who have experienced trauma, fear and depression due to crimes. When compared, it turns out that both the procedural rights model and the service model have weaknesses. This procedural rights model can place the public interest under the individual interests of the victim, in addition to an atmosphere of free trial based on the presumption of innocence which can be disturbed by the victim's opinion about the sentencing because it is based on emotional thinking as an attempt to retaliate. Apart from the above, the public prosecutor representing the victim in practice often does not pay attention to the aspirations of the victim in the criminal justice process, causing dissatisfaction from the victim and/or his family to the prosecutor's demands and the judge's decision. One of these aspects was triggered because procedurally the victim did not have the opportunity to express his dissatisfaction with the prosecutor's demands and the judge's decision [22].

This second dimension dominates the establishment of the Drafting of the Criminal Procedure. Reforming the criminal law must regulate the guarantee of the protection of human rights that is balanced and just for all people, both as perpetrators

and crime victims. Because in the context of the criminal justice system, the function of criminal law is to provide protection, guarantee security, order and realize justice for the rights and interests of individuals, both perpetrators of criminal acts and victims of criminal acts without discrimination. Because victims of crime are legal subjects that must be protected and have the same interests as the perpetrators in criminal law.

## CONCLUSION

The essence of the claim for compensation for crime victims in national regulations is an effort made by providing a place for crime victims to obtain justice, benefit and legal certainty as an objective of the law where crime victims are an inseparable part of a legal system as this effort is contained in laws and regulations that provide clear arrangements for claims for compensation regarding the rights of victims and the mechanism for claiming compensation.

The mechanism for claiming compensation for crime victims has never been prosecuted for compensation by the public prosecutor. A factor that causes the absence of prosecution for compensation for crime victims is the lack of understanding and knowledge of law enforcement officials, especially the public prosecutors themselves regarding the rights of crime victims in the criminal justice system. The ideal concept of the provisions in the claim for compensation can be done through regulations in compensation claims both for restitution and compensation in the implementing rules both material criminal law and formal criminal law, easy mechanisms and strengthening so that claims for compensation can be accepted by victims and fulfill a sense of justice and the essence of the claim for compensation.

<sup>22</sup>Alamsari, S. Heny., Irwansyah, Muhadar, Heryani, W. (2019). Law Enforcement of Money Laundering: Case Studies on Fighting Narcotic Crime, *Journal of Law, Policy and Globalization*, Vol. 88, 12