

THIRD PARTY IN RESTITUTION (COMPENSATION)

Eko Ariyanto

Trisakti University

eko.lawyer69@gmail.com

ABSTRACT

Restitution (Compensation) is a development or can be said to be a shift from criminal fines, this shift does not eliminate the application of criminal fines. The fundamental difference between criminal fines and restitution is that in criminal fines, compensation for losses incurred is given to the state, while in restitution, compensation is given to the victim or their family. In several material laws that regulate restitution, basically only regulate the definition of restitution and the mechanism for submitting applications but do not regulate the definition of third parties who are part of the restitution itself. Therefore, the researcher conducted research through normative methods supplemented by interviews with several law enforcement officials, it is hoped that it will obtain a comprehensive picture of third parties in restitution. The reconstruction carried out by the researcher is found in the Law on Witness and Victim Protection, namely Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Witness and Victim Protection, where the researcher added a formulation regarding third parties who are not criminal perpetrators. The additional article that is a reconstruction of the research is in Article 1 number 12, which reads "A third party is a party other than a criminal perpetrator who has a legal relationship with the perpetrator of a criminal act in the same crime." With the reconstruction of the formulation of the definition of a third party used in several material laws, it is clear and obvious who the legal subjects are who can be qualified to be held accountable for paying restitution.

Keywords: Restitution (Compensation), Criminal Fines, Victims, Criminal Perpetrators, Third Parties

INTRODUCTION

Indonesia has based itself as a State of Law. As stated in Article 1 paragraph (3) of the Amendment to the 1945 Constitution, it states that "The State of Indonesia is a State of Law ." In the general concept of a state of law, what must be made the fifth in the dynamics of state life is law (Asshiddiqie, 2007). Because law is basically closely related to the legal system adopted by the country concerned and is the main basis for the establishment of a state. Law is the highest source (supremacy of law) in regulating and determining the mechanism of legal relations between the state and society or between members of society with each other (Manan, 2003). This includes the judge's decision in providing justice must be based on law because Indonesia is a state of law.

In relation to its position as a state based on law, the Republic of Indonesia must have several special characteristics to be called a state based on law, namely as follows: (Sunggono & Hartanto, 2001)

1. Recognition and protection of human rights that contain equality in the political, legal, social, cultural and educational fields.
2. A free and impartial judiciary *that* is not influenced by other powers.

According to Sri Soemantri, there are several characteristics of a state based on law, including: (Soemantri, 1992)

1. There is recognition of the guarantee of human rights.
2. There is a division of power.
3. The existence of judicial power which in carrying out its duties is independent of the influence of government power.

According to Padmo Wahjono, the main points of a state based on law are respecting and protecting human rights, the existence of a democratic state institutional mechanism, the existence of a legal order system and the existence of an independent judiciary (Wahjono, 1989).

Judicial power is an independent power to administer justice to uphold law and justice. Judicial power (judiciary) is independent and is exercised for the sake of justice based on the One Almighty God. Without an independent judiciary, there can be no state based on law and no democracy. Democracy only exists when balanced by *the rule of law*, and only when there is *an independent judiciary*. (Asshiddiqie, 2009). An independent judiciary, as the main pillar of a state based on law and democracy, necessitates an independent judicial power.

According to Frank Cross, judicial independence and/or the freedom of judges is not unlimited independence and freedom. Judicial independence and the freedom of judges can be interpreted as the independence or freedom of the judicial process, which includes: (Manan, 2013)

1. Free from pressure, interference and fear when examining and deciding cases.
2. No one can refuse to carry out a judge's decision. A judge's decision is law and must be obeyed and implemented.
3. Judges cannot be challenged or sued on the grounds that their decisions are wrong or detrimental to others.
4. Judges may not be subject to any action (such as demotion, dismissal) because of their decisions.

The terminology of law enforcement is a translation of the terminology of *law enforcement*. According to *Black's Law Dictionary*, it is explained that the terminology of *law enforcement* is interpreted as *The act of putting something such as a law into effect, the execution of a law, the carrying out of a mandate or command* (Campbell, 1990). Meanwhile, according to Soerjono Soekanto, conceptually, the core and meaning of law enforcement lies in the activity of harmonizing the relationship of existing values in solid rules and attitudes as a series of final stage value elaborations to create, maintain, and defend peace in social life (Soekanto, 1983).

In relation to law enforcement, it is necessary to reexamine the theory of legal systems as proposed by Lawrence M. Friedman. According to Lawrence M. Friedman, a legal system consists of the following legal elements:(M. Friedman, 1984)

1. Legal *structure* .
2. Legal *substances* .
3. Legal *culture* .

According to Lawrence M. Friedman, what is meant by legal structure , legal substance , and legal culture is explained as follows:(M. Friedman, 1973)

" In modern American society, the legal system is everywhere with us and around us. To be sure, most of us do not have much contact with courts and lawyers expected in emergencies. But not a day goes by, and hardly a waking hour, without contact with law in its broader sense - or with people whose behavior is modified or influenced by law. Law is vast, though sometimes invisible, presence ."

"In modern American society, the legal system is everywhere, with us and around us. To be sure, most of us have little contact with courts and lawyers except in emergencies. Yet not a day goes by, and hardly an hour, without some contact with the law in its broader sense—or with people whose behavior is changed or affected by it. The law is a pervasive, though sometimes invisible, presence."

The first element in a legal system as explained by Friedman is the legal structure. According to Friedman, the legal structure or *legal structure* (institutional order and institutional performance), is described as follows:(M. Friedman, 1984)

" We now have a preliminary, rough idea of what we mean when we talk about our system. There are other ways to analyze this complicated and important set of institutions. To begin with, the legal system has structure. The system is constantly changing; but parts of it change at different speeds, and not every part changes as fast as certain other parts. There are persistent, long-term patterns-aspects of the system that were here yesterday (or even in the last century) and will be around for a long time to come. This is the structure of the legal system - its skeleton or framework, the durable part, which gives a kind of shape and definition to the whole".

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Law enforcement institutions in Lawrence M. Friedman's theory are the first element of a legal system. Law enforcement institutions include the police, the prosecutor's office, the Corruption Eradication Commission, the judiciary, and other law enforcement institutions. Judicial institutions, according to Lawrence M. Friedman's theory, are examples of legal structures that essentially discuss legal institutions in a legal system.

Meanwhile, the second and third elements of the legal system as explained by Friedman are legal substance (statutory provisions) and legal culture , which are described as follows:(M. Friedman, 1984)

"Another aspect of the legal system is its substance. By this is meant the actual rules, norms, and behavior patterns of people within the system. This is, first of all, "the law" in the popular sense of the term - the fact that the speed limit is fifty-five miles an hour, that burglars can be sent to prison, that "by law" a pickle maker has to list his ingredients on the label of the jar."

"Another aspect of a legal system is its substance. This refers to the actual rules, norms, and patterns of behavior of the people within the system. First of all, these are "laws" in the popular sense of the term, such as the fact that the speed limit is fifty-five miles per hour, that a thief can be thrown in jail, or that "by law" a pickle maker must list the ingredients on the label of the jar."

Based on the explanation from Lawrence M. Friedman, in the implementation of eradicating perpetrators of corruption in Indonesia, it is necessary to establish a legal system consisting of a legal structure *and* legal substance *which* will ultimately form a legal culture, *namely* an anti-corruption culture. Strengthening the formation of this anti-corruption culture certainly requires a legal policy or legal policy from the state in the form of establishing strong or solid legal provisions as elements of legal substance *and* also establishing law enforcement agencies that are given special and extraordinary authority as elements of the legal structure as explained by Friedman.

Over time, the ideal concept of a judge's decision has been shown to be based not only on the three basic values that underlie the idea of balance, but also on consideration of certain aspects. The Supreme Court of the Republic of Indonesia, as the highest institution exercising judicial power, has determined that a judge's decision must consider legal, philosophical, and sociological aspects. This is based on the desire and hope that the certainty achieved in a judge's decision is one that is oriented towards legal certainty (*law for certainty*).¹

Judges are not the only ones who interpret laws or regulations or law in general. However, it needs to be acknowledged that the role of judges is very important because judges are the ones who embody the law (in a concrete sense). Through the judge's decision, abstract legal provisions become a reality. There

¹Ahmad Rifai, *Op.Cit .*, p.126.

are those who lose and there are those who win, there are those who are punished or acquitted and other forms of concrete law. Apart from that, judges not only declare the law for those involved (creating law for the parties) but also create law that applies in general (society).

One of the characteristics of a state based on the rule of law is the establishment of positive laws that apply to all citizens within a country, along with the principles for their enforcement. One such instrument is criminal law, which essentially contains norms governing prohibited acts or consequences, along with the sanctions imposed on legal entities who commit or cause such prohibited acts.

Based on theoretical principles, criminal law has several objectives, but first the researcher will explain several schools of criminal law itself, including: (Prasetyo, 2010)

1. The classical school of thought is to deter everyone from committing bad deeds. According to this school, the purpose of criminal law is to protect individuals from power or the state.
2. modern school aims to educate people who have committed bad deeds to become good and be accepted back into their community. According to this school, the purpose of criminal law is to protect society from crime, and therefore criminal law must take into account the crime and the circumstances of the criminal.

The objectives of criminal law can certainly be realized through the formulation of criminal sanctions. According to Article 10 of the Criminal Code, criminal sanctions are classified as follows:

1. Principal Criminal Offenses include:
 - a. Death penalty.
 - b. Prison sentence.
 - c. Imprisonment.
 - d. Criminal fine.
 - e. Cover up crime.
2. Additional penalties include:
 - a. Revocation of certain rights.
 - b. Confiscation of certain goods.
 - c. Announcement of the judge's decision.

The current thinking regarding the objectives of punishment is not actually a new idea, but rather has not been influenced to some extent by the thoughts of experts who have expressed their opinions about justification or about *rectavaargingsgrond* from the perspective of punishment alone or with the objectives to be achieved by punishment itself.

According to Roeslan Saleh, the objectives of criminalization are: (Saleh, 1987)

1. Prevent transmission between convicts.
2. Make the convict regret the actions he has committed and become aware of his evil deeds.

3. So that the convicts become good members of society.

According to Sianturi, the objectives of criminalization are:(Sianturi, 1996)

1. Preventing a crime from occurring by imposing a threat of punishment that is severe enough to deter potential criminals.
2. Correction or education for criminals (*vertebeterings theory*), where criminals are given education in the form of punishment so that they can return to society in a better and more useful mental state.
3. Eliminate criminals from the environment or social circles (*onshadelijk make*)
4. Guaranteeing public order (*rechtsorde*).

In relation to the objectives of punishment, several theories of punishment have emerged, including:(Hamzah & Rahayu, 1983)

1. Absolute or absolute theory

According to this theory, every crime must be punished, no matter what, and no compromise is possible. It doesn't take into account any potential consequences of imposing a punishment. It doesn't matter whether society might be harmed or not. This theory states that the reason for criminalizing a crime is for retribution (*vergelding*). In this case, the pursuit is for personal satisfaction.

2. Relative or relative theory

Based on this theory, a crime does not necessarily require a punishment. The existence of a crime is not enough; the benefit of punishment for society and for the criminal must be considered. Therefore, there must be a purpose beyond simply imposing a punishment. This theory is also called the theory of purpose (*doel*) This objective must first be directed towards efforts to ensure that crimes do not recur in the future (*prevention*) .

The consequence of this theory is that sentencing depends on its benefit to society. Consequently , to achieve the goal of *prevention* , not only negative punishments are appropriate, but also positive ones are considered good. This means that the state can take non-criminal actions.

3. Combined theory, this theory is a combination of absolute theory and relative theory.

Prohibitions in a state of law are inseparable from the positive laws that apply to the nation and state, one of which is criminal law. Discussions of criminal law require attention, particularly regarding punishment. However, before that, researchers need to discuss criminal law itself.

According to scholars, the infliction of suffering as retribution for a crime is a distinctive characteristic of the word "criminal," distinguishing it from the meaning of "punishment." The following are the opinions of several scholars who offer different definitions of the term "criminal," including:(Hamzah & Rahayu, 1983)

1. Prof. Soedarto

Punishment is suffering that is deliberately imposed on people who commit acts that meet certain conditions.

2. Ruslan Saleh

- Criminal punishment is a reaction to a crime in the form of misery that is deliberately inflicted by the state on the perpetrator of the crime.
3. Fitzgerald
Punishment is the authoritative infliction of suffering for an offence .
 4. Sir Rupert Cross
Punishment means the infliction of pain by the state on some one who has been convicted of an offence .
 5. Garland
Criminal law is a legal process which is a form of punishment and sanction against violators of criminal law in accordance with established legal categorizations and regulations.
 6. Ted Honderich
Punishment is an authority's infliction of penalty (something involving deprivation or distress) on an offender for an offence .
 7. Burton M. Leiser
A punishment is harm inflicted by a person in position authority upon another who is judged to have violated a rule or a law .

Based on the opinions of the experts above , it can be concluded that criminal acts contain 3 (three) elements, namely:

1. In essence, punishment is the imposition of suffering/misery or other unpleasant consequences;
2. Punishment is given intentionally by a person/body who has power or by an authorized person.
3. The punishment is imposed on people who have responsibility, meaning on people who are guilty/capable of being responsible.

One thing that distinguishes criminal law from other laws is its harsh sanctions. The most severe sanction in criminal law is the death penalty . (*penalty*) is certainly very frightening because it separates the convict from life forever and causes loss to his family. The fine itself is a punishment that is currently widely used in addition to imprisonment. In fact, the trend in the Netherlands and other developed countries is to eliminate short sentences of freedom and replace them with fines. Fines have a different nature than imprisonment because they do not cause or are less stigmatizing. For the convict. The defendant is not uprooted from his family and social environment. The defendant generally will not lose his job. Although lighter than imprisonment or detention, a fine is not without deterrent *power* .

What about fines? Fines may seem light compared to other punishments, but they can actually be devastating, draining the convict's assets, leading to poverty and the misery of their families. Beyond that , In the criminal justice process for sentencing, suspects or defendants have experienced various negative consequences, such as stigma for themselves and their families. This raises a major question: what is the rationale for using criminal law? Are there no other laws that can also be used to resolve problems/conflicts? Should criminal law,

with its harsh and even cruel sanctions, be used, when we also have civil law, state administrative law, state constitutional law, or other principles such as rules of decency, religious principles, customs, traditions, and others to address these issues.

The answer is that criminal law is also known as *ultimum remedium*, which means that criminal law is used as a last resort when there is no other way to resolve the problem and some call it *ultimum Remidium* is the last treatment (remedial) or ultimate weapon.(Santoso, 2022)

Indonesian criminal law experts also discussed the *ultimum* This *remedium* is like Barda Nawawi Arief who stated that in general criminal law has limitations/weaknesses as a means of dealing with crime due to the following things:(Nawawi Arief, 2003)

1. The causes of crime are very complex and beyond the reach of criminal law;
2. Criminal law is only a small part (subsystem) of the means of social control which cannot possibly overcome the problem of crime as a very complex humanitarian and social problem as a sociopsychological , sociopolitical , socioeconomic , sociocultural problem, and so on;
3. The use of criminal law in dealing with crime is only a *jurieren am symptom* (remediation /treatment of symptoms). Therefore, criminal law is only a “ symptomatic treatment ” and not a “causal treatment”;
4. Criminal law sanctions are “ remedies ” which contain contradictory/paradoxical characteristics and contain negative elements and side effects;
5. The criminal justice system is fragmentary and individual/personal, not structural/functional;
6. The limitations of the types of criminal sanctions and the system for formulating criminal sanctions are rigid and imperative;
7. The working/functioning of criminal law requires more varied and more expensive supporting facilities;

The researcher has experience in the world of legal practitioners in this case as an advocate who defends his clients to obtain justice, where at that time the client experienced turmoil due to the vacuum and uncertainty in the law regarding a request for restitution from a company that had absolutely no relationship with the client.

In Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, namely:²

Article 1 number 11

Restitution is compensation given to the victim or his family by the perpetrator or a third party.

²Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims.

Meanwhile, due to the lack of provisions governing restitution and the third parties involved in restitution, Supreme Court Regulation (PERMA) No. 1 of 2022 concerning Procedures for Resolving Applications and Granting Restitution and Compensation to Victims of Crime was issued, which serves as a guideline for judges in examining and deciding restitution cases. The provisions are as follows:³

Article 1 paragraph (1), which reads:

Restitution is compensation given to the victim or his family by the perpetrator of a crime or a third party.

Article 1 paragraph (15), which reads:

A party other than the perpetrator of a crime who is willing to pay restitution.

However, in reality, companies often hold other parties accountable for the actions of one of their employees who embezzled company funds. The author is interested in researching and discovering novelties resulting from the lack of norms in positive law regarding restitution, particularly regarding the involvement of third parties in criminal liability, which ultimately results in compensation being imposed on the victim or their family.

Furthermore, based on several explanations regarding the importance of restitution (compensation) and, of course, the application of third parties in law enforcement, the New Criminal Code (2023) includes restitution as part of additional penalties. Additional penalties in the New Criminal Code (2023) that include restitution are in the categories of Adults (Article 66 paragraph 1) and Corporations.

Article 66

(1) Additional penalties as referred to in Article 64 letter b consist of:

- a. Revocation of certain rights;
- b. Confiscation of certain goods and/or bills;
- c. Announcement of the judge's decision;
- d. Compensation payment;
- e. Revocation of certain permits;
- f. Fulfillment of local customary obligations.

Article 120

(1) Additional criminal penalties for corporations as referred to in Article 118 letter b consist of:

- a. Compensation payment;
- b. Correction due to criminal acts;
- c. Implementation of obligations that have been neglected;
- d. Fulfillment of customary obligations;
- e. Financing of job training;
- f. Confiscation of goods or profits obtained from criminal acts;
- g. Announcement of court decisions;
- h. Revocation of certain permits;

³Supreme Court Regulation ("Perma") No. 1 of 2022 concerning Procedures for Settling Applications and Granting Restitution and Compensation to Victims of Criminal Acts.

- i. Permanent prohibition from performing certain acts;
- j. Closure of all or part of business premises and/or corporate activities;
- k. corporation;
- l. Dissolution of corporation.

Therefore, this article explores the following research question: How can the reconstruction of third-party determination fulfill the aspect of legal certainty?

RESEARCH METHODOLOGY

The type of research used in this study is normative legal research. The researcher also used primary data supplemented by conducting interviews.⁴

In this research, the researcher, in addition to using primary data in the form of the results of interviews with competent parties in answering the formulation of the problems proposed in this research, also uses secondary data which is generally available in the form of written and public literature which is ready to use .

RESULTS & DISCUSSION

A. Draft

In this article, we will explain several concepts contained in restitution (compensation), including:

a) The Concept of Victim

According to Bambang Waluyo, the term victim is defined as "a person who has suffered physical or mental suffering, loss of property, or death due to an act or attempt to commit a minor offense committed by a criminal or other person." Here, it is clear that "a person who has suffered physical suffering and so on" is a victim of a violation or criminal act (Gosita, 1993). Meanwhile, according to Arif Gosita, the term victim is defined as "those who suffer physically and spiritually as a result of the actions of others who seek self-fulfillment or others who are contrary to the interests and human rights of the sufferer."

b) The concept of restitution (compensation)

The law enforcement process through criminal justice is not solely focused on imposing criminal sanctions on perpetrators. In addition to imposing criminal sanctions on perpetrators, criminal justice also accommodates the interests and rights of victims, one of which is through the provision of restitution (compensation).

In criminal procedural law, compensation for victims is divided into 2 (two) types, namely restitution (compensation) and compensation.

a. The Concept of Criminal Acts .

The word " *Dader*" is of course related to " *dadershap*" . The word " *dader*" comes from the word " *daad*" which in Dutch also has the same meaning as the word " *het*". *doen*" or " *handeling*" which in Indonesian means the act of doing or an action.(Lamintang et al., 2019)

b. The Concept of Third Parties Not Being Criminal Actors.

⁴Bambang Waluyo, *Op.cit* ., p.16.

According to the Big Indonesian Dictionary (KBBI), a third party is someone who is not involved, for example, in an agreement. Another definition of a third party is another nation or country, etc., that does not take sides in a dispute (war, etc.).

B. Legal basis

In this research, there are several legal provisions used by researchers as guidelines in the analysis, including:

- a) Criminal Code
- b) New Criminal Code (2023)
- c) Criminal Procedure Code
- d) Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims.
- e) Supreme Court Regulation Number 1 of 2022 concerning Procedures for Settling Applications and Granting Restitution and Compensation to Victims of Crime.

C. Case study

Case Number: 1/ Res.Pid/2023/PN. Plw jo. Case Decision Number: 268/Pid.B/2022/PN. Plw At the Pelalawan District Court.

D. Analysis

The researcher will re-explain several positive laws that regulate restitution (compensation) after which they will be linked to legal theory as an analytical tool for the researcher to explain them.

The reconstruction carried out by the researcher is based on the Witness and Victim Protection Law, namely Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Witness and Victim Protection, where the researcher added a formulation regarding third parties who are not criminal perpetrators.

The additional article which is a reconstruction of the research is in Article 1 number 12, which reads "A third party is a party other than the perpetrator of a crime who has a legal relationship with the perpetrator of a crime in the same crime."

With the formulation of third parties contained in the Law above, other laws that also regulate restitution must use the definition of third parties so that legal certainty can be achieved in law enforcement.

Researchers believe that the lack of a definition of a third party in positive law and the definition in the aforementioned Supreme Court Regulation creates uncertainty because it doesn't clarify who can be considered a third party other than the perpetrator of a crime, thus creating chaos in law enforcement. Therefore, in this study, researchers formulate a definition of a third party to provide clarity and clarity regarding who constitutes a third party.

In order to explain this question, the researcher will use the theory of legal certainty. According to Utrecht, legal certainty has two meanings: first, the existence of general regulations that enable an individual to know what actions are permissible and what are not. While the second meaning is legal security for an individual from government arbitrariness because, with the existence of general regulations, an individual can know what may be charged and what the state may do to an individual.

Legal certainty can also be concluded as the certainty of legal rules and not the certainty of actions towards actions that are in accordance with legal rules.

Based on the description above, the researcher analyzed as follows:

1. That there is already a value of legal certainty from positive law regarding the definition of restitution (compensation).
2. That there is already a value of legal certainty from positive law regarding the mechanism for applying for restitution (compensation).
3. That there is already a value of legal certainty from positive law regarding the subject and object of restitution (compensation).
4. That there is already a value of legal certainty from positive law regarding the scope of restitution (compensation).
5. That there is already a value of legal certainty from positive law regarding the application of criminal sanctions from restitution (compensation).
6. That there is already a value of legal certainty from positive law regarding the definition of a third party in restitution (compensation) , but it does not explain who can be considered a third party.
7. That the researcher then found a formulation of the definition of a third party which is new or novel in this research.

CONCLUSION

The reconstruction carried out by the researcher is based on the Witness and Victim Protection Law, namely Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims, where the researcher added a formulation regarding third parties.

The additional article which is a reconstruction of the research is in Article 1 number 12, which reads "A third party is a party other than the perpetrator of a crime who has a legal relationship with the perpetrator of a crime in the same crime."

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