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Criminal Policy Concerning Restitution and Its Implementation for Victims of Sexual Violence in Aceh

Nursiti[1*], Alvi Syahrin[2], Faisal[3], Mohd. Din[3]

[1]Faculty of Law, Universitas Syiah Kuala, Banda Aceh, Indonesia
[2]Faculty of Law, Universitas Sumatera Utara, Medan, Indonesia
[3]Faculty of Law, Universitas Syiah Kuala, Banda Aceh, Indonesia
*Corresponding author's e-mail: nursitish@unsyiah.ac.id

ABSTRACT
This paper aims to analyze policies regarding restitution for victims of sexual violence and how they are implemented in court decisions in Aceh Province. Payment of compensation charged to the perpetrator based on court decisions that have permanent legal force for material and/or immaterial losses suffered by the victim or her heirs. The method used in this writing is normative juridical with a qualitative approach. At the beginning, an inventory of laws and regulations governing restitution was prepared. The next stage was to examine the application of the restitution policy in court decisions in Aceh upon cases of sexual violence that were tried in the general court or through the Syar'iyah Court. The results show that the government and Aceh government have set policies on restitution in the Human Rights Law, the Trafficking in Persons Act, the Child Protection Law, Law on Witness and Victim Protection, Qanun Jinayat, and Qanun on the Treatment for Violence against Women and Children. Procedures for requesting restitution are regulated in Government Regulation Number 43 of 2017 and Government Regulation Number 7 of 2018. An analysis of 10 court rulings showed that none have given restitution to victims of sexual violence. This analysis is expected to encourage law enforcement officials to make it easier for victims to know their rights and get appropriate restitution for the suffering they experience.
Keywords: *Indemnity, compensation, Qanun on the Treatment for Violence against Women and Children*

1. INTRODUCTION

Pancasila is the source of all laws. It is a constitutive, substantive and regulative reference for all legal rules, including criminal law. The criminal justice system will only work well if the policy is formulated clearly and firmly, and does not conflict with higher policies and harmonious with equal policies.

Criminal law policy is also called formulation policy, which is defined as an effort to re-orient and reform criminal law in accordance with the socio-political, socio-philosophical and socio-cultural values of the Indonesian people which underlie social, criminal and law enforcement policies in Indonesia. (Barda Nawawi Arief, 2017: 25) [1]

Criminal law is one of the means in overcoming social problems that arise in society, particularly crime. However, criminal law alone will not be able to solve the problem of crime. Glorifying criminal law as the main effort to solve the problem of crime that is constantly developing, will eventually lead to a crisis of over criminalization, and exceed the authority in law enforcement. (M. Ali Zadan, 2016: 338) [2]

Unequal development planning is a criminogen factor that is closely related to poverty, uneducatedness and powerlessness. The complexity of the factors causing these crimes is a difficulty in combating crime. Indeed, to solve the problem of crime, a variety of approaches are required, either in state administration, civil service or others. The consequence is that the use of criminal law solely to overcome the problem of crime has limitations that must be complemented by other approaches such as economic, social, cultural and political approach. Without knowing the criminogen factor, the use of criminal law is only a treatment of symptoms (*kurieren am symptom*) which will recur immediately if the trigger factor arises. The crime prevention policy is the responsibility of the nation as a whole by involving all the potential that exists to realize prosperity. Every statutory regulation that includes "criminal provisions" has consequences for the birth of new institutions and new budget burdens, while institutions that already exist will demand additional authority which also has financial consequences. Criminal policy will always give birth to a cost of crime that must be carefully calculated at the time of policy making. (Muladi, 1997: 46) [3]

In line with Muladi's opinion, Barda Nawawi also identified the limitations of criminal law in overcoming crime because it is only a small part (subsystem) of existing social control facilities that are not possible to

overcome the problem of crime as a very complex human and social problem (as a socio-psychological problem , socio-political, socio-economic, socio-cultural and so on). The application of criminal law is only symptomatic treatment and not causative treatment. Criminal law also has limited types of sanctions that are rigidly and imperatively formulated, causing the imposition of remidium sanctions which are contradictory or paradoxical in nature and contain negative side effects. Criminal system is fragmental and personal, not structural and functional. Because of that, the operation of criminal law requires supporting facilities that are more varied and require high costs. (Barda Nawawi Arief, 2005: 46) [4]

Criminal law reform policy must use a value approach so that the law created has an effective ability to tackle crime. Principles that are used as a limitation on the use of criminal law consisting of prohibitions and recommendations. Criminal law does not need to be applied if there are other more effective ways with lower levels of loss. It should not be used emotionally for mere retaliation or punish acts which are unclear who the victims are and what the losses are. Criminal policy also does not need to be used if it does not have strong support from the community or its application will not be effective (unenforceable). Criminal law policy must be uniform, universal and rational, and maintain harmony between order, legitimacy, and competence. It must maintain harmony between social defense, procedural fairness and substantive justice, and must maintain communal morality, institutional morality and civil morality. The use of criminal law as a repressive means must be utilized simultaneously with non-penal prevention measures (prevention without punishment). Another important limitation is that criminal law must pay attention to victims of crime, must consider specifically the scale of priorities and regulatory interests. (Muladi, 1997:27)

If the use of criminal law does not pay attention to the limiting principles as stated above, it will give rise to groundless, which does not have a rational justification basis, inefficacious, that is not appropriate because it is not able to prevent the occurrence of crime, unprofitable, meaning that the costs incurred are greater than the the results to be achieved, and needless, that is, as long as there are other ways, then the use of criminal law is only a subsidiary (Jeremi Bentham, 2015: 56) [5]

The opinions of the experts as stated above, are an important rationale that must be considered in making criminal policies to deal with sexual violence. Sexual violence is a crime that needs to be explicitly regulated in criminal law policies because this crime has victims and causes enormous losses. As a serious crime that destroys human dignity, the criminal sanctions imposed must be maximal and provide a deterrent effect for the perpetrators. It's just that deterrence for the perpetrators of crime does not necessarily be able to solve the problems faced by the victims. Therefore it is necessary to formulate a criminal law policy that also prioritizes the interests of victims specifically. One effort that can be done by the state is by setting a restitution payment policy.

The problem discussed in this paper is how to regulate restitution in criminal policy in Indonesia and its harmonization with other policies at national and local levels. The implementation of the restitution policy has been tested in ten court decisions regarding sexual violence.

2. MATERIAL AND METHOD

The research method in this article is normative juridical or doctrinal legal research methods. Normative legal research is carried out by examining literature or secondary data, including research on legal principles, legal systematics, vertical and horizontal synchronization, legal comparisons, legal history and positive legal inventory. (Soerjono Soekanto and Sri Mamudji, 2016: 13) [6] Conducting an inventory of positive laws is a very basic and not independent preliminary activity carried out before finding in-concreto legal norms. The activity of inventorying positive laws is a critical analytical and systematic logic identification process. (Amiruddin and Zainal Asikin, 2004: 120) [7] This stage was then followed by a synchronized analysis of legislation carried out vertically at the international, national and regional levels to review the arrangements regarding restitution as part of protection for victims of sexual violence. The legislation that is inventoried and synchronized the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), convention on violence against women, the Law on Child Protection, the Law on Witness and Victim Protection, the Law on the Criminal Act of Trafficking in Persons and the Aceh Qanun on *Jinayat* Law (Islamic criminal law) and the Aceh Qanun regarding the Implementation of Treatment for Violence Against Women and Children. In addition to a review of legislation, 10 court decisions regarding sexual violence in Aceh Province were also reviewed.

3. RESULTS AND DISCUSSION

The high rate of sexual violence requires the government to pay great attention through criminal law policies to tackle criminal acts of sexual violence, while providing protection and fulfillment of rights to victims of sexual violence.

Legal protection for victims of crime is part of community protection, which can be realized through various forms for example through the provision of restitution and compensation to victims, medical services, and also legal assistance. (Didik M. Arif Mansur, 2006: 31) [8]

Imposing high criminal sanctions on perpetrators of sexual violence is one side of criminal policy to reduce crime rates. However, there are many other policies that need to be implemented by the government as outlined in the Draft Law on the Elimination of Sexual Violence, especially in the prevention section.

The government must seriously consider aspects of the recovery of the rights of victims of sexual violence,

both physical and psychological medical recovery, as well as social recovery.

Article 5 of Law Number 31 Year 2014 concerning the Protection of Witnesses and Victims regulates the rights of witnesses and victims which can generally be grouped into (1) the right to obtain protection for personal, family and property security, therefore the victim has the right to participate in the process of choosing and determining the form of protection and security support, including the right to withhold his identity or obtain a new identity, (2) the right to obtain legal protection and free from threats relating to his/her testimony that will, are or have been given, obtain legal advice, obtain translators, free from questions that ensnare and have the right to provide information without being pressured, (3) the right to get good information about the legal process being undertaken, information about court decisions and information when the convict is acquitted, (4) fulfillment of basic rights to get assistance for temporary living costs, reimbursement for transportation, temporary residence or a new residence and assistance.

Victims of a crime of sexual violence, besides getting the rights as stated in Article 5, are also entitled to receive medical assistance, psychosocial and psychological rehabilitation assistance as regulated in Article 6 of Law Number 31 of 2014. In the explanation of Article 6, it is stated that medical assistance is the assistance provided to restore the physical health of the victim, including undertaking funeral arrangements if the victim dies. Medical assistance can also be in the form of a medical examination of the victim and a written report (post mortem or medical certificate that has the power as evidence). This is needed if the victim wants to report the crime she experienced.

Victims of sexual violence are also entitled to psychosocial rehabilitation and social assistance aimed at helping to alleviate, protect and help restore victims' physical, psychological, social and spiritual conditions, so that they can carry out their social functions properly again. The LPSK (Witness and Victim Protection Agency) must make efforts to improve the quality of life of victims by providing assistance in fulfilling the need for clothing, food, shelter, assistance in seeking job as well as assistance for continuing education.

Victims of sexual violence who suffer trauma or psychiatric problems are entitled to psychological rehabilitation provided by psychologists with the aim of restoring the victim's mental state.

The government must firmly place sexual violence as one form of gross human rights violations, so that victims of sexual violence can be protected by Article 7 of Law Number 31 of 2014 which states that “every victim in a case of gross human rights violations and victims of a crime of terrorism are entitled to compensation and rehabilitation.”

The Child Protection Act No. 35 of 2014 has provided special protection arrangements for children who are victims of sexual violence in Article 69 through Article 71. These special protections are carried out through rapid response measures, including physical, psychological and social treatment and rehabilitation as well as prevention of diseases and other health problems, psychosocial assistance from the time of treatment to recovery, the provision of social assistance for children from disadvantaged families and the provision of protection and assistance at every stage of the judicial process.

In addition to the rights as mentioned above, children who are victims of sexual violence, children who are sexually exploited and children who are victims of pornography get special protection through education efforts on reproductive health, religious values and moral values, socialization of legislation, monitoring, reporting and imposing sanctions on violators and involving various companies, trade unions, non-governmental organizations and the general public in the elimination of sexual exploitation of children.

Article 71D of Law 35 of 2014 also states that "every child who is a victim in Article 59 paragraph (2) letter b, children who are exploited economically and / or sexually, children who are victims of pornography, children who are victims of physical violence and / or psychological violence and children victims of sexual crimes have the right to submit to court in the form of the right to restitution which is the responsibility of the perpetrators of crime.

The implementation of Article 71D mentioned above is carried out through Government Regulation Number 43 of 2017 concerning Implementation of Restitution for Children who are Victims of Criminal Acts. If the victim of sexual violence is a child, then the victim can apply for restitution that can be submitted from the start at the police, prosecutor or trial level. Even if the petition is not submitted at the same time with the indictment regarding the crime of sexual violence experienced by the victim, the request can be submitted after the decision is made by a judge.

If the victim of sexual violence is no longer a child, the reference that can be used is Government Regulation No. 7 of 2018 concerning Provision of Compensation, Restitution and Legal Aid to Witnesses and Victims.

Procedures stipulated in Government Regulation No. 7 of 2018 is no different from Government Regulation No. 43 of 2017. Both require that the application for Restitution be submitted to the LPSK. It's just that until now LPSK is only available at the central level and does not yet have representatives at the provincial level. Therefore it will be very difficult for victims of sexual violence to apply for the restitution.

Restitution is a criminal sanction arising from a court decision related to a criminal case, in this case a criminal act of sexual violence that has permanent legal force. Restitution is paid by the convicted person as a form of responsibility.

Requests for restitution can be submitted for three things, namely:

a. compensation for loss of wealth or income;
b. compensation resulting from suffering directly related to violence; and / or

c. reimbursement of medical and / or psychological care costs.

The above provisions show that victims of sexual violence can apply for restitution for material and non-material losses. The difficulty in the implementation process lies in the calculation and verification of the amount of compensation requested for restitution.

Compensation is something that is given to those who suffer or have losses, commensurate with the damage they have suffered. (Jeremy Bentham, 2006: 316) [9]

The law does not specify how to calculate and impose a time limit on the calculation of compensation that can be submitted. The statement about "compensation for loss of wealth or income" in cases of sexual violence cannot be easily determined. Is the time limit since the sexual violence was carried out until the court's verdict is handed down, or are there other provisions. Because as it is known that victims of sexual violence will experience trauma for a long time which will interfere with their activities at work to get income. If it is associated with restitution in the form of "compensation incurred due to suffering directly related to violence" then the difficulty will be the same. Sexual violence will cause infinite suffering for victims physically, sexually and primarily psychic suffering. The victim and family will hesitate when mentioning a nominal amount that is realistic to compensate for the losses arising from the crime of sexual violence. Especially if the victims are children whose growth and development conditions are not yet perfect and the journey of life is still long and full of struggle. The next difficulty is to calculate "reimbursement of medical and / or psychological care costs". Which costs can be calculated, whether the costs have been incurred or can also be calculated the cost of treatment that will be incurred. Victims of sexual assault need physical and psychological medical care. Related to this cost calculation, government regulations only provide an opportunity for investigators to consult the amount of the application for restitution to the LPSK.

In addition to the issue of the amount of compensation that can be requested for restitution, there are also issues regarding the ability and willingness of the convicted person to pay the restitution. Regarding the financial capacity of the convicted person, the judge must also considere when deciding the application for restitution submitted by the victim or the family of the victim of sexual violence (rape) as referred to in Article 51 paragraph (2) of the Qanun on Jinayat Law.

Article 51 in paragraph (1) of the Qanun Jinayat states "in the event of a request by the victim, anyone who is subject to *uqubat* as referred to in Article 48 and Article 49 may be subject to an *uqubat* restitution of at most 750 (seven hundred fifty) grams of pure gold. "

Based on an analysis of ten court decisions regarding cases of sexual violence in forms of rape or sexual abuse or sexual harassment, not a single court verdict was found which imposed a criminal restitution payment. This was preceded by the lack of information provided to the victim or the victim's family regarding the application for restitution. (Nursiti, 2019: 188) [10]

The lengthy time a victim takes to get her right to restitution is also a problem in itself. As stated, restitution is a sanction imposed on an offender determined in a court decision that has permanent legal force. This means that the victim must wait until the case has been examined. Not to mention if the perpetrators or public prosecutors make use of all possible legal remedies (appeal and cassation) which will take months. When in fact the physical and psychological treatment must have been obtained by the victim, immediately after sexual violence occurred.

In response to these difficulties, Aceh Government has made arrangements through the Qanun on Implementation of the Handling for Violence against Women and Children (PPKTPA). In the qanun which was adopted in September 2019, there were also provisions regarding restitution. If in the Qanun Jinayat restitution is placed as a form of sanction, then in the Qanun PPKTPA restitution is placed as a right for the victim and the victim's family.

The Qanun PPKTPA stipulates that requests for restitution can be submitted by victims or the families of victims or persons who have been given special powers for this and service provider institutions. Those who are obliged to pay restitution are not only convicted, but can also be charged to family members. In the event that the convict and his family are unable to pay the restitution determined by the court, then the restitution can be replaced as compensation.

Compensation is payment given to the victim or the victim's family as a form of state responsibility in protecting its citizens. The Qanun PPKTPA stipulates that the Government of Aceh will appoint *Baitalmaal* (Islamic house of treasury) to provide compensation to victims or victims' families. It is expected that this Qanun may bring victims of sexual violence closer to protection, service and recovery.

4. CONCLUSION

Indonesia already has a regulation on restitution to provide recovery for women and children who are victims of sexual violence. The implementation of this policy is still not optimal because in Aceh Province there has been no court decision on cases of sexual violence that stipulate sanctions for the payment of restitution for victims.

At present Aceh already has a Qanun on the Implementation of Handling for Violence Against Women and Children, which also regulates restitution and compensation for victims of sexual violence.

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