

BASIS FOR JUDGES TO ADJUDICE IMMANTARIL COMPENSATION THAT CAN BE GIVEN TO VICTIMS IN RESTITUTION FOR CRIMINAL ACTS OF SEXUAL VIOLENCE BY CHILD PERPETRATORS

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Received : 01 August 2025

Published : 21 September 2025

Revised : 11 August 2025

DOI : <https://doi.org/10.54443/ijerlas.v5i6.4009>

Accepted : 13 September 2025

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

Immaterial restitution for victims of Sexual Violence (TPKS) is an increasingly pressing issue in the criminal justice system. Although there are legal provisions governing victims' rights to receive compensation for non-material losses, court practice shows that the application of immaterial restitution in judges' decisions is still very limited. This causes immaterial restitution, an important aspect for victims accommodated in the justice system, but is often overlooked. This study aims to explore the basis used by judges in adjudicating immaterial restitution, as well as the guidelines that serve as a reference in the decision-making process. Understanding the basis for judges adjudicating immaterial restitution and the legal guidelines in making decisions is intended to ensure that judges' positions and powers to grant victims' rights can be freely used to adjudicate immaterial restitution in accordance with law and justice. Using a normative juridical approach, this study analyzes court decisions related to immaterial restitution, in order to identify the legal principles underlying judges' decisions. Through a review of various court decisions, this study found that there is a lack of clarity in the legal guidelines governing immaterial restitution, resulting in variations in their application by judges. Furthermore, this study also revealed that judges' understanding of the psychological and social impacts experienced by victims significantly influences their decisions. The lack of adequate training and resources for judges in this regard is a hindering factor. The results of this study are expected to contribute to the development of clearer and more comprehensive guidelines regarding immaterial restitution, as well as to encourage judges' increased understanding of the importance of this aspect in the judicial process. Thus, it is hoped that victims' rights can be recognized and protected more effectively, so that justice can be achieved not only through law enforcement against perpetrators, but also through appropriate reparations for victims.

Keywords: *Judge; Immaterial Restitution; Sexual Violence Crime; Court Decision;*

INTRODUCTION

Compensation for victims of TPKS must first be sought through the restitution mechanism. The right to restitution can be accessed by victims through two submission mechanisms by the restitution applicant, namely the victim, family, parents, guardians, heirs, legal counsel or LPSK when the TPKS case is being examined no later than before the Public Prosecutor's demands or the applicant can submit a restitution application after the court decision has permanent legal force. The court will assess and if granted will also determine the nominal restitution in the Decision that has been BHT according to the procedures regulated in PERMA 1 of 2022. However, if the Respondent for restitution does not pay or the payment is insufficient to cover the specified restitution costs, then the compensation/state compensation for the shortfall in restitution to the Victim through the Victim Assistance Fund can be continued in the event that it is also submitted and decided by the Judge in the Decision. So from there it can be concluded that compensation is complementary or additional if the perpetrator is unable to provide restitution to the victim; National judicial practice has adopted the principle of restorative justice. This principle is an evolution of the principle of justice in the original Indonesian judicial system, which was based on retributive justice. While provisions regarding victims were seen in the original judicial system (KUHAP) as largely neglected/marginalized, while facts show that the impact of sexual violence on victims is very serious and causes trauma that can last a lifetime, the international community has begun to consider aspects of victim recovery through restorative justice. The restorative justice process is characterized by a shift in the principle of balancing interests/protection for both

the perpetrator and the victim. Thus, restorative justice addresses the need to recognize the impact of criminal acts in the form of injustice experienced by victims, thus simply through restorative justice, formal justice can be provided to victims. Sexual violence is the most dangerous crime for children because it leaves multidimensional impacts on its victims, such as physical suffering in the form of wounds or tears to the hymen, sexual suffering, psychological trauma, unwanted pregnancy, risk of death and the threat of infection with infectious diseases. In fact, these detrimental experiences not only affect the victims, but also extend to the victims' families. The impacts that arise for the victims' families include threats, restrictions, ostracism, deprivation of rights and social, political and economic discrimination. In 2020, a survey conducted on aspects of victim recovery found that: 94.5 percent of all respondents experienced trauma, shame, and fear as psychological effects experienced by victims of TPKS, in addition to 83.2 percent experienced injuries to the reproductive organs, 73 percent of victims suffered physical injuries or wounds and 56.7 percent stated that they had been socially impacted. Victims agreed that there were various social impacts, such as dropping out of school, being ostracized by society, and difficulty finding a partner. Some victims also believed that the impact of sexual violence was related to the victims' economic conditions, such as loss of jobs, property, inheritance rights and money.

These impacts are concretely experienced by victims that are completely unintended and unexpected. However, of course, all of these impacts cannot be overcome or restored to their original state. Meanwhile, as evidenced in court, the majority of child victims of sexual violence are those who fall into the socioeconomic category of poverty and have low education. This is in line with research by Syaiful (2015), quoted in the journal of Population and Human Resources Development, which states that the majority of victims of sexual abuse are girls and adolescent girls under eighteen years of age, still students with lower-middle-class families. The victims' economic conditions significantly affect their ability to recover from the negative impacts of TPKS. Therefore, the economic situation of victims who are categorized as poor/lower-middle class actually worsens the physical and psychological condition of TPKS victims. It would be a disregard for the suffering of victims if the circumstances of KS cases were closed without attempting to restore or at least compensate for the actual losses incurred as a result of the perpetrator's criminal acts. Therefore, attention to victims is regulated by the form of losses that can be accommodated through restitution or compensation. Article 30 of the TPKS Law explains that TPKS victims have the right to receive restitution in the form of:

1. compensation for loss of wealth or income;
2. compensation for losses incurred as a result of suffering directly related to the crime of sexual violence;
3. reimbursement of medical and/or psychological care costs; and/or
4. compensation for other losses suffered by the victim as a result of the crime of sexual violence.

Meanwhile, compensation for losses incurred due to suffering directly related to the Criminal Act of Sexual Violence (as stated in point two, Article 30) by Article 4 of PERMA 1 of 2022 can be directed towards losses of a material or immaterial nature. However, from the many cases of sexual violence perpetrated by children, requests for restitution costs for victims of TPKS made by child perpetrators are still categorized as minimally decided by judges and only a few decisions accommodate immaterial losses on the restitution request, even though the form of loss experienced by someone due to sexual violence is often in the form of immaterial losses such as tears in the hymen and psychological disorders. Although the judge's actions are based on the Judge having the authority *Contra Legem* (deviating from the Law) by interpreting the Law and legal reasoning in deciding a dispute, for the victim, the failure to take into account the immaterial losses submitted reduces the essence of the goal of recovery, protection and justice for him. The following is an example of a decision that partially grants a restitution request and one that does not grant a claim for immaterial losses: In the special criminal case of children 4/Pid.Sus-Anak/2022/PN Mrh, the thirteen-year-old perpetrator's child is still in elementary school and the thirteen-year-old victim's child, as per the trial facts by the judge, was found guilty of forcing the child to have sex with him. In this case, the parents of the victim's child submitted a request for restitution in the amount of IDR 22,000,000 (twenty-two million rupiah), with the following details:

1. Transportation costs, gasoline for reporting to the police, conducting a medical examination, and accompanying the child victim to a psychologist and to court. Total amount: Rp. 2,000,000 (two million rupiah).
2. The cost of the Ruwatan activity, as a traditional ceremony for self-liberation after a criminal act, is as follows: flowers Rp. 400,000, food Rp. 7,500,000, wages for the priest/priest Rp. 1,000,000,- etc., totaling Rp. 10,000,000,- (ten million rupiah).
3. The cost of immaterial losses in the form of trauma, bullying and hymen surgery amounting to Rp. 10,000,000 (ten million rupiah)

Regarding the restitution request, the Judge has considered it and decided to grant part of the Applicant's restitution with the ruling: "Burdening the Child's Parents to pay restitution in the amount of Rp. 11,000,000.00 (eleven million rupiah)". Where in the judge's consideration only considered the costs of transportation to the hospital, psychology and court as well as the ruwatan event held according to the beliefs of the Child Victim's family and did not grant or consider immaterial losses in the form of trauma, feelings of unhappiness due to the bullying experienced and the cost of hymen surgery. Based on the case, it is connected to the substance of Article 30 of the TPKS Law and the principles in the TPKS Law, namely the best interests of the victim, regulating victim protection as an important aspect in law enforcement that aims to provide justice and attention to the suffering of victims as a result in the form of compensation (restitution) for victims, both material and immaterial. Procedural provisions regarding restitution are guided by PERMA 1 of 2022, furthermore, there are no more provisions/articles of legislation that more specifically regulate or describe the benchmarks or limits for the assessment of the granting of immaterial losses in criminal restitution cases. Fulfillment of the claim for restitution rights for immaterial losses faces obstacles that are not easy and more complex than material losses. This gap has attracted the author's attention to study and discuss this problem comprehensively in a study. This study aims to explore the basis for judges in adjudicating immaterial restitution, as well as analyzing the guidelines used in the decision-making process. With a normative juridical approach, this study will examine decision No. 4/Pid.Sus-Anak/2022/PN Mrh, to identify the legal principles that play a role in the application of immaterial restitution. It is hoped that the results of this study will contribute to the development of clearer and more comprehensive guidelines and improve judges' understanding of the importance of immaterial restitution in the context of TPKS;

LITERATURE REVIEW

Children and Child Victims

The definition of a child in national criminal law is regulated in Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, in General provisions of Article 1 number 1 it is stated that a child is a person who is not yet 18 (eighteen) years old, including children who are still in the womb. Based on the general explanation of Law No. 11 of 2012 concerning Child Protection and Child Protection, it is explained that the urgency of protecting children, guaranteeing their rights and growth by the State is because of the very strategic role of children for the sustainability of a nation. Children who are victims of criminal acts, hereinafter referred to as Child Victims, are children who are not yet 18 (eighteen) years old who experience physical, mental, and/or economic suffering caused by criminal acts. Child Victims are parties who are victims of a crime.

Theory of Justice and Immaterial Compensation

The exploration of the concept of restorative justice essentially seeks better legal solutions to produce substantive justice. Restorative justice encourages perpetrators to realize and admit their actions and provides perpetrators and other related parties to make the best efforts and improvements. The principle of restorative justice is based on the reaction to the crime based on the losses suffered by the victim, the consequences of the losses to the victim and society must be accounted for by the perpetrator, thus the perpetrator has an obligation to be responsible for all criminal acts he committed. Compensation is a forum or opportunity for repair that can be carried out by the perpetrator to the victim. Compensation is divided into two, namely material and immaterial. In Indonesian criminal law, the definition of immaterial losses is not included. Immaterial losses are losses suffered due to unlawful acts that cannot be directly measured in money, such as pain, suffering, emotional losses, humiliation, loss of reputation or even loss of an opportunity.

Supreme Court Regulation No. 1 of 2022 and Law No. 12 of 2022 concerning TPKS

PERMA No. 1 of 2022 and Law No. 12 of 2022 provide two types of compensation to victims of TPKS, according to the source of the provider: restitution and victim assistance funds/compensation. Restitution is the payment of compensation to TPKS victims by the perpetrator of the crime or a third party. Meanwhile, the Victim Assistance Fund is compensation funds to TPKS victims provided by the State. In TPKS cases where the perpetrator is a child, it is also mandatory to follow guidelines for the implementation of restitution for TPKS victims, this has been regulated in Article 37 of Law No. 12 of 2022 concerning TPKS, which states that if the perpetrator is a child who is still a minor, restitution is provided by a parent or guardian. Compensation for victims of TPKS must first be sought through restitution mechanisms. However, if the applicant for restitution fails to pay or the payment is insufficient to cover the specified restitution costs, the compensation process, or the state's provision of compensation

for the shortfall to the victim through the Victim Assistance Fund, may proceed, provided the request is submitted and decided by the judge in the decision.

Previous Studies and Literature Gaps

Previous research by Juniadi Purba (2024) Implementation of Restitution for the Rights of Child Victims of Sexual Violence, while Prima Putri Nurina (2023) discussed the Granting of Restitution Rights to Child Victims of Sexual Violence. These two studies do not discuss the context of Intangible Losses in Restitution for Sexual Violence Crimes Committed by Child Perpetrators, namely including the basis for judges to adjudicate immaterial compensation that can be given to victims in Restitution for Sexual Violence Crimes by Child Perpetrators. Thus, there is a gap in the legal literature regarding the basis for judges to adjudicate and guidelines for adjudicating TPKS restitution for immaterial damages committed by child perpetrators against child victims. This study aims to fill this gap by examining the relevant legislation and legal sources related to immaterial damages.

METHOD

This research uses a normative juridical legal research method. Therefore, this research was conducted by analyzing primary legal sources, such as legislation, and combining them with secondary legal sources. In some cases, tertiary legal materials were also added. These legal materials were systematically compiled, tested, and reviewed. Conclusions were then drawn that answered the research questions. This type of research was chosen considering that in the decision of sexual violence crimes committed by child perpetrators, very few decide on immaterial losses even though Article 16 of Law No. 12 of 2022 stipulates that in addition to imprisonment, the judge is obliged to determine the amount of restitution for TPKS. Therefore, the author wants to research and find out the basis for judges to judge. Therefore, with this research, it will be normatively reviewed how the existing written rules related to child protection cases, how judges adjudicate within the limitations of the governing legal provisions so that ultimately answers can be found to the problem.

This research uses 2 (two) approaches, namely:

- a. The regulatory approach involves analyzing legislation and policies related to minimum criminal penalties in child protection cases, especially for judges.
- b. Case approach, namely examining how judges apply the law in child protection cases that apply for immaterial restitution, based on various existing decisions.

The types and sources of legal materials used include primary, secondary, and tertiary legal materials. The author obtained primary legal materials by inventorying relevant laws and policies. These legal materials serve as guidelines for beginning the process of examining and adjudicating the immaterial restitution of TPKS (Targeted Victims of Violence) presented to him, namely:

- 1) The 1945 Constitution of the Republic of Indonesia;
- 2) Law No. 1 of 1946 concerning Criminal Law Regulations;
- 3) Law No. 48 of 2009 concerning Judicial Power;
- 4) Law No. 12 of 2022 concerning TPKS
- 5) Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection;
- 6) Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims;
- 7) Law No. 11 of 2012 concerning the Juvenile Criminal Justice System;
- 8) Law No. 12 of 2011 concerning the Formation of Legislation, Government Regulations, Ministerial Regulations, Regional Regulations;
- 9) Law No. 39 of 1999 concerning Human Rights;
- 10) PP No. 35 of 2020 concerning Amendments to PP No. 7 of 2018 concerning the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims;
- 11) PP No. 43 of 2017 concerning the Implementation of Restitution for Children Who Are Victims of Crime
- 12) Supreme Court Regulation Number 1 of 2022 concerning procedures for resolving applications and providing restitution and compensation to victims of criminal acts;

The author obtained secondary legal materials through a literature review, while tertiary legal materials were obtained through Black's Law Dictionary and the Great Indonesian Dictionary (KBBI). Once all the data is well-organized, organized, and systematically structured, the author will then analyze it. This analysis process utilizes an extensive interpretation method, a legal interpretation method designed to connect or bridge the application of existing legal provisions with concrete cases encountered in the field.

RESULTS AND DISCUSSION

A. The Basis for Judges to Award Immaterial Compensation for Restitution in Sexual Violence Crimes by Child Perpetrators

In both primary and secondary victimization, victims of sexual violence experience both material and immaterial suffering. From a victimological perspective, these two losses are generally associated with more immaterial than material losses. This is in line with what psychiatrist Professor Dadang Hawari stated, stating that victims of sexual violence experience more psychological trauma than physical trauma. The actions experienced by victims of sexual violence generally have long-term impacts and a domino effect on aspects of the victim's life that are difficult to quantify numerically. The provisions regarding immaterial losses that are the impact of sexual violence are acknowledged in Law No. 12 of 2022 concerning the Crime of Sexual Violence. The definition of Restitution based on Article 1 number 20 of Law No. 12 of 2022 concerning the Crime of Sexual Violence is the payment of compensation imposed on the perpetrator based on a court decision that has permanent legal force for material and/or immaterial losses suffered by the victim or their heirs. However, the meaning and description of immaterial losses that can be submitted as TPKS restitution are further explained in Article 30 paragraph (2) of Law No. 12 of 2022 concerning TPKS, which states that restitution includes "compensation for loss of wealth, income, medical expenses, and/or suffering experienced by the victim due to sexual violence....." the phrase suffering experienced legally can be interpreted as legal recognition of the form of immaterial losses. An understanding of the meaning of immaterial losses can be found in several expert opinions:

1. Subekti in his book on Contract Law, states that immaterial losses are losses that cannot be assessed or measured in monetary terms directly because they are in the form of suffering, shame in the soul or loss of enjoyment in life.
2. R. Soeroso in his book Introduction to Legal Science states that immaterial losses are psychological suffering experienced by a person due to unlawful acts and are of a nature that disturbs the peace of mind. According to R. Soeroso, immaterial losses have a real influence on the quality of life of the victim, although it is difficult to prove empirically.
3. In his writing, Lilik Mulyadi explains that immaterial losses are any form of attack on a person's honor or personal integrity that causes psychological disturbance and the victim's dignity.

To find and properly apply the basis for judges to adjudicate immaterial compensation for TPKS restitution, it is necessary to approach it using the Theory of Justice approach. This is because the existence of restitution in the Indonesian legal system is inseparable from the movement of justice theory that continues to develop to meet the public's need for justice. Justice or Fairness as initiated by Aristotle (Plato's student) is to treat others proportionally and equally, meaning treating similar things equally and unequal things unequally according to their portion. The principle of equality in question is not absolute equal treatment but equality that is proportional and relevant. According to Aristotle, with the realization of the principle of equality in justice, society will achieve a harmonious and balanced life in the state (polis). From the justice approach initiated by Aristotle, it can be concluded that the form of distributive justice applies in public legal relations as the goal of the State, because the essence of the state's goal is to achieve a good life for all its citizens. While the form of corrective justice applies in individual/private relations, because if a norm is violated or a mistake is made - corrective justice seeks to provide adequate compensation for the injured party or appropriate punishment for the perpetrator who caused the victim. Distributive justice and corrective justice re-establish this equality in their respective legal relations. The justice initiated by Aristotle has a similar perspective in John Rawls's principle of justice regarding the measure of justice based on the principle of equality and the principle of inequality.

Restoring equality is done by imposing punishment according to the nature of the punishment and which is also intended so that every person who is a victim of another person's mistake is given compensation/restitution without differentiating legal issues or the status of the perpetrator or victim, because the law only looks at the character of the loss that occurs. Corrective justice is used as a middle point between the poles of loss and the pole of profit, with a balance characterized by reciprocity in the exchange of goods or services between individuals and individuals (members of society). Reciprocity is held because the nature of both parties is equal, so that this reciprocity will realize justice if what is obtained is comparable to what has been given, issued in the form of losses. Corrective or commutative justice is justice that is often applied in the civil field but its principles have recently entered and are also found in criminal law, especially in the aspects of compensation, restitution and recovery of victim losses. Therefore, Aristotle's theory of justice became an inspiration for other thinkers, one of whom was John Braithwaite, for the birth of the theory of restorative justice which does not only focus on the balance of rights and losses but also the restoration and healing of social relations between the perpetrator, victim and community. In his

approach, justice, John Braithwaite in his book *Crime, Shame and Reintegration*, is not only seen as the imposition of punishment but as a dialogical process that allows the perpetrator to admit his mistakes, apologize, take responsibility for his actions and be reintegrated back into his community. This justice is interpreted as giving new life and strength/medicine/repairing/rebuilding or renewing the damaged order with the root word restorative which in Latin is "restaurare". Restorative justice has developed as an alternative to formal criminal justice, particularly in the handling of minor offenses or those involving children, as a correction to the retributive criminal system. Under restorative justice, victims can receive restitution as a moral obligation for the perpetrator to compensate for the harm caused, take responsibility for their actions, and repair the injuries they have caused, including through apologizing, returning recoverable items, or volunteering for the community. Thus, restorative justice focuses on crime as an act against another individual or society, rather than against the state.

Indonesian positive criminal law, especially the Child Protection and Child Protection System (SPPA), has adopted a restorative justice system. This restorative justice is approached through various media regulated in legislation, one of its forms is the implementation of the granting of the right to material and immaterial restitution for victims of TPKS in the TPKS Law. The inclusion of the right to restitution for victims of sexual violence crimes only appeared explicitly in Law No. 35 of 2014 concerning Child Protection, specifically Article 71 D in conjunction with Article 59 paragraph 1 letter j and its explanation, which states that child victims of sexual crimes have the right to file a claim to the Court for the right to restitution which is the responsibility of the perpetrator of the crime. The implementing regulation for the provisions of Article 71D paragraph (2) of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection is Government Regulation No. 43 of 2017 concerning the Implementation of Restitution for Children who are victims of criminal violence. The material requirements for a restitution application are as stated in Article 5 number 2 of PERMA 1 of 2022. In adjudicating the substance of the amount of restitution in the Restitution Applicant's application letter, the following documents must be attached by the Applicant: a) photocopy of the Applicant's identity, b) proof of material losses suffered by the Applicant and/or victim made or authorized by an authorized official or based on other valid evidence, c) proof of the victim's costs during treatment or medication authorized by the agency or party providing the treatment or medication or based on other valid evidence, d) description of the immaterial losses suffered by the applicant and/or victim, e) photocopy of the death certificate in the event that the victim dies, f) certificate of family relationship, heir, or guardian if the application is submitted by the family, heir or guardian, g) special power of attorney if the application for restitution is submitted through a power of attorney, and h) copy or excerpt of the Court's decision, if the case has been decided and has permanent legal force.

The submission mechanism is carried out through the following stages: if the restitution application is submitted at the investigation level through the investigator or LPSK, the investigator or LPSK submits the restitution application file to the PU along with the LPSK Decision regarding the amount of restitution. The restitution application submitted before the file is submitted must be included in the indictment and case file. Furthermore, if in the trial it is not found in the indictment or case file related to the TPKS victim's restitution application, then in the evidentiary hearing, when the victim and family are presented as witnesses, the judge informs the victim of the right to restitution and the right of the restitution applicant to submit a response in the form of evidence for the Applicant's restitution application. This right can be submitted before the PU files a claim (or can also use the restitution application mechanism after the decision has permanent legal force). If it is agreed that the victim will submit a restitution application, the Application is read by the Restitution Applicant in this case the parent/guardian of the victim's child on the restitution application hearing agenda. At the restitution application hearing, the applicant or PU submits evidence in court and then the judge also gives the opportunity to the restitution Respondent. If the restitution application hearing has been completed, the PU on the prosecution agenda has the obligation to include the restitution application in the criminal charges to be subsequently decided by the Juvenile Judge who is hearing the case. The explicit regulation on adjudicating immaterial losses by the Supreme Court Regulation only stipulates that the submission of such losses must be in the form of a description of the immaterial losses suffered by the applicant and/or victim (Article 5 number 2 letter d of Supreme Court Regulation 1 of 2022). It is observed that in all articles of the Supreme Court Regulation, there are no technical or normative guidelines used as a reference for judges in adjudicating immaterial losses other than Article 5 number 2 letter d of Supreme Court Regulation 1 of 2022. In practice, legal norms have varying characteristics that influence how they are regulated for legal subjects. Understanding the nature of legal norms is very important, especially for judges in making decisions that are in accordance with the legal system and the community's sense of justice.

Judging from the wording of the norm "must be accompanied by a description of immaterial losses..." indicates that the norm is an Imperative Norm (*Dwanggregels*). This norm is absolute and cannot be deviated from by the parties. In criminal law, almost all provisions are imperative because they are directly related to the protection of public interests and the principle of legality. In civil law, imperative norms protect public order and morality, such as the valid conditions of an agreement, etc. Meanwhile, in adjudicating the restitution claim, the judge is also obliged to provide a quality decision to the justice seeker and legal considerations that contain the basis for adjudicating for the judge to resolve the immaterial loss claim in the Motivering of his decision. The basic limitations for the judge to adjudicate concrete circumstances such as the description of immaterial losses being faced in the case, whether it is decided to be granted or not, if it is partially granted, how and what is the basis for adjudicating it, how much is the nominal and the basis used to determine the nominal - can only be overcome by the judge through the method of legal discovery (*rechtsvinding*). This is adjusted by the Author as the substance of Article 10 of Law Number 48 of 2009 explains that the court is prohibited from refusing to examine, try and decide on a case submitted on the grounds that the law does not exist or is unclear but is obliged to examine and try it.

According to Sudikno Mertokusumo regarding the meaning of legal discovery, it is explained that legal discovery is a process of concretizing or actualizing general and abstract norms in statutory regulations regarding a concrete situation submitted to the Court. According to Sudikno Mertokusumo, this process does not only apply the law but the judge also finds the law if the positive law is incomplete, unclear or even non-existent. Article 10 is the basis for adjudicating immaterial restitution of TPKS, furthermore, for the implementation of the legal discovery, there must be a basis/basis as an important limitation to be followed so that the legal product resulting from the discovery is logical and based. According to Jonaedi Efendi regarding the theory of legal discovery in his book, the reconstruction of the basis of legal considerations of judges, explains that in finding the right law for the concrete events faced by him, the judge will process legal sources, by taking primary references from certain sources which are hierarchically consecutive and tiered starting from written law (statutory regulations) as the main source, if not found then to customary law or unwritten law, then jurisprudence and so on, continuing to international agreements, then doctrine and science. Judges are faced with several situations in applying legislation in the sense of written law as the main source when forming laws, looking for appropriate laws and legal discoveries for a particular case. In relation to the discovery of the law, the discovery by the judge must be carried out with certain principles or principles as the basis and guidelines for the judge in implementing his freedom to find the law. The steps taken by the judge according to the circumstances faced by him are as follows:

1. If the material provisions of the statutory regulations that regulate the case before the judge already exist and are clear, the judge applies these provisions;
2. If the material provisions of the statutory regulations that regulate the case before the judge exist, but their meaning and significance are unclear, then the judge concerned will interpret the material provisions of the statutory regulations;
3. If the material provisions of the statutory regulations governing the case before the judge are incomplete or there are no regulations yet, the effort taken by the judge concerned is to fill the gap by using logical reasoning.

Legal reasoning as a method of legal discovery, is essentially studying scientific accountability from a legal perspective towards the process of making a legal decision (judicial decision making) which includes arguments and logical reasons which are the justification for the legal decision made. A legal decision will be appropriate if it uses appropriate logic and legal arguments and is based on authoritative legal materials. Furthermore, to make the right legal decision, Kennerth J Vandeveldt mentions five steps of legal reasoning, namely: 1) identifying the appropriate legal sources, usually in the form of statutory regulations and court decisions. 2) analyzing relevant legal sources to determine the rules and policies within them. 3) combining the substance of ideas into a coherent structure, namely a structure that groups specific rules under general rules. 4) examining the existing facts. 5) applying the structure of the rules to the facts to determine the rights or obligations arising from those facts, by using the policies contained in the legal rules in the problem/case.

B. Legal Sources That Serve as Guidelines for Judges in Adjudicating Immaterial Restitution

The legal sources for judging immaterial compensation that can be used as guidelines by judges in making legal findings are as follows:

1. Study of Legal Sources of Legislation

PERMA 1 of 2022 regulates the provisions of restitution procedures for criminal acts specifically (specifically for criminal acts referred to in Article 2 number 1, while in general compensation for losses due to criminal acts has

been regulated in the Criminal Procedure Code. Although the Criminal Procedure Code accommodates the demands of victims' rights for criminal acts as per Article 98 of the Criminal Procedure Code, the regulations in the Criminal Procedure Code are limited in the substance of the instructions for trying them. Therefore, to prevent any obstacles in trying compensation regulated by the Criminal Procedure Code, a norm was introduced which states: if a criminal case is filed including a request for compensation, the provisions of civil procedural law apply to the compensation as long as the Criminal Procedure Code does not regulate otherwise (Article 101 of the Criminal Procedure Code). The provisions of civil procedure regarding compensation referred to in the Criminal Procedure Code also serve as basic guidelines in trying immaterial compensation for TPKS restitution as long as it is not regulated otherwise.

The imposition of immaterial damages in civil cases has long existed in the civil court process because the procedure for demanding such damages has become an integral part of the purpose of filing a lawsuit for an unlawful act. The material law regarding the responsibility for compensation for damages caused by unlawful acts is regulated in Articles 1365, 1366, and 1367 of the Civil Code. Article 1365 states that every unlawful act that causes harm to another person must compensate for such loss, the loss can be material or immaterial. Article 1365 of the Civil Code is a model of liability for losses with an element of error due to intent or negligence, Article 1366 of the Civil Code is liability for losses with an element of specific error in the form of negligence, while Article 1367 is absolute liability for losses, liability not only for losses caused by one's own actions, but also for losses caused by the actions of people who are his dependents or caused by goods under his supervision, for example parents and guardians are responsible for losses caused by children who are not yet adults, who live with them and are under their supervision.

The provisions for fulfilling the rights of victims of criminal acts for a criminal act of a person who has been decided in a criminal case and then submitted for the fulfillment of his right to compensation in a civil case are determined by the conditions based on Articles 1918 to 1919 of the Civil Code that the Judge who examines the claim for compensation in an unlawful act in a civil case is not bound by the Judge's decision that has permanent legal force that sentences a person for a crime or violation if it can be proven otherwise. In addition, Article 1919 of the Civil Code determines that "if a person has been acquitted of a crime or violation charged to him, then the acquittal before a civil Judge cannot be advanced to win a claim for compensation." The sources of civil procedural law in the form of legislation are widespread, not limited to laws but also include MPR Decrees, Government Regulations in Lieu of Law (Perpu), Government Regulations (PP), Ministerial Regulations, and others. However, regulations that examine the assessment of immaterial damages are not among these laws. The next sources of civil procedural law that are used and play an important role in filling the legal vacuum are Jurisprudence, Supreme Court Instructions (i.e., Supreme Court Circulars, Decrees of the Director General of General Courts), Doctrines (teachings according to legal science put forward by experts) and Legal Principles. Therefore, the following will describe what provisions can be used as guidelines for the basis for judges to adjudicate immaterial damages for TPKS restitution in order to achieve a balance of legal certainty, child protection, and victim justice based on the following legal sources.

2. Study of Legal Sources of Doctrine

So, based on the study of legal sources of civil procedural law doctrine, it can be concluded that the immaterial losses that the Court has the right to try are:

- Any loss arising from the unlawful actions of other people.
- The loss has a causal relationship with the actions of other people which according to common sense is a reasonable (adequate) consequence of his actions.
- There is protection for the fulfillment of these losses in law.

positive/protected by law.

In addition to the doctrine of *conditio sine qua non*, there is a compensatory doctrine in the Indonesian legal system as a guideline in understanding the meaning of compensation adopted by Indonesia. Still sourced from the same article but analyzed from the perspective of the type or nature of compensation adopted by Indonesia, one of which is implemented in Article 1356 of the Civil Code. In the Indonesian legal system, which is rooted in Continental European traditions (civil law), the award of compensation in civil cases is always placed within the framework of recovery (compensation) for the actual losses suffered by the victim, not in the context of imposing additional punishment on the perpetrator. This concept is fundamentally contrary to punitive damages, namely compensation awarded not only to compensate for losses, but also to punish the perpetrator so that they deter in the future. This type of compensation model is known in common law systems such as the United States and England, but is not known in the Indonesian legal system.

The compensatory doctrine is clearly reflected in Article 1365 of the Civil Code (KUHPerdata), which states: "Every unlawful act that causes harm to another person, requires the person whose fault causes the loss to compensate for said loss." This article forms the basis for civil liability for unlawful acts (*onrechtmatige daad*), which essentially requires the perpetrator to compensate for the actual loss, not to be punished civilly. According to Subekti, the purpose of compensation in Indonesian civil law is to restore, not to punish. He stated, "The purpose of compensation is to restore the loss suffered by the injured party due to the wrongful act of another party, not to punish the perpetrator." Thus, the mechanism of punishment remains within the realm of criminal law and may not be adopted into civil compensation instruments. Comparatively, in their analysis of Continental European legal systems, Zweigert and Kotz assert that punitive damages are an unacceptable form of compensation because they blur the functions of civil and criminal law. They state: "Punitive damages are generally regarded as incompatible with the principles of civil law countries, which see compensation rather than punishment as the function of tort law." Thus, it can be concluded that the existence of punitive damages is a deviation from the fundamental principle of the civil law system which emphasizes recovery, not punitiveness. Similarly, Barda Nawawi Arief provides a critical note that the mixing of civil and criminal functions can lead to confusion in law enforcement. He explains: "Criminal law and civil law have different objectives. Criminal law is to create a deterrent effect and impose sanctions, while civil law, including in terms of compensation, is aimed at restoring the situation." With this argument, it can be emphasized that Indonesian law normatively rejects the idea of punitive compensation and remains consistent with the compensatory-reparative doctrine. If the conditions of compensation for restitution of sexual violence crimes in criminal cases are studied or approached with this doctrine, then a conclusion will be found that is related to the purpose of the existence of the compensation order, which is a civil compensation in a criminal forum, the nature of which is punishment which is not like a sanction in a criminal decision, but rather a form of civil recovery for the victim in the criminal path.

3. Study of the Sources of Jurisprudential Law

Based on the permanent jurisprudence of the Supreme Court, there are guidelines regarding the basis for judges to adjudicate claims for compensation of a material or immaterial nature, which the author has summarized into points. This is intended to shorten and facilitate understanding of the rules in the Supreme Court Decision regarding the guidelines for adjudicating immaterial losses brought before the Court, namely:

1. Supreme Court Decision No. 18 K/Sip/1956, dated May 25, 1957 with the legal principle: In general, if in a civil case one party submits a criminal decision to prove something, the opposing party must be given the opportunity to submit counter-evidence, but in this case the provision of counter-evidence is not necessary because the facts are clear and do not constitute a dispute between the two parties. So that the party who is harmed in an unlawful act can immediately file a claim for compensation without waiting for the criminal process to have permanent legal force.
2. Supreme Court Decision No. 117 K/SIP/1971, dated 1971, with the legal rule: that a lawsuit, whether in its *posita* or *petitum*, the plaintiff does not explain completely and perfectly the compensation he is demanding. And the Plaintiff cannot prove the amount/amount of losses demanded and must be paid to him by the Defendant, so this lawsuit demanding compensation cannot be granted or rejected by the judge.
3. Supreme Court Decision No. 196 K/Sip/1974 dated 7 October 1976 with the legal principle: "the amount of compensation for unlawful acts is based on the principle of Article 1372 of the Civil Code, namely based on an assessment of the socio-economic status of both parties."
4. Supreme Court Decision No. 588 K/Sip/1983 dated 28 May 1984 with the legal principle: The Plaintiff's claim for compensation, because it is not accompanied by evidence, must be rejected.
5. Supreme Court Decision No. 3191/K/Pdt/1984 dated February 8, 1986 with the legal principle: expanding unlawful acts which are the foundation for immaterial compensation, that by not fulfilling the Defendant's promise to marry the Plaintiff, the Defendant has violated the norms of morality and propriety in society and the Defendant's actions constitute PMH which causes losses to the Plaintiff, therefore the Defendant is obliged to pay for these losses.

4. Study of Legal Sources in the form of Principles

Legal principles play a role in the formation of law, its application, and the development of legal science. These legal principles, in the formation of law by judges, provide a general foundation for the provisions that need to be incorporated into legal regulations. In the application of law, legal principles are very helpful in the use of

interpretation and legal discovery, as well as analogy. Therefore, this section will outline several principles that, according to the author, are relevant to adjudicating compensation, namely:

1. The Principle of Civil Procedure: Judges Are Waiting and Passive
2. The Principle of Restitutio In Integrum
3. The principle of the distribution of the burden of proof (*verdeling van bewijslast*)

Analysis of Decision 4/Pid.Sus-Anak/2022/Pn Mrh Regarding the Tpk's Case Carried Out by a Child and Simultaneously Deciding on the Claim for Compensation for Immaterial Damages

In the decision of this case, the Judge outlined the restitution demands filed by the Restitution Applicant. One of these demands is related to immaterial compensation, in the form of compensation for the impact of trauma, bullying and hymen surgery in the amount of Rp. 10,000,000. While other losses are material in the amount of Rp. 12,000,000. Regarding the demands for immaterial and material compensation based on the judge's consideration, it was found that the facts were not accompanied by evidence of losses. According to the judge, the demands for immaterial compensation should be accompanied by evidence of losses, which the judge said is a requirement in Article 7 of PP Number 43 of 2017 and Article 5 (2) of Perma Number 1 of 2022. As mentioned in the previous sub-chapter, the PP regulates the basis for adjudicating restitution for TPKE submitted through or at the investigation stage and/or prosecution stage, while in this case, restitution was submitted during the process at the court level. Therefore, according to the author, the relevant basic provisions for adjudication in this case are as per Article 5 (2) of Perma No. 1 of 2022. It is appropriate that if the material losses of TPKE victims submitted through the restitution mechanism are accompanied by relevant evidence to prove it. Meanwhile, as per the provisions of the PERMA article, immaterial losses in restitution require the Judge to adjudicate them by conducting legal findings. With all the limitations of evidence regarding proving material losses and the basis for adjudicating immaterial compensation, it can be seen that the judge in this case is trying to remove all legal limitations to adjudicate compensation submitted by the Victim/Restitution Applicant.

The judge's basis in this case is based on considerations that synergize with the objectives of the current Indonesian justice system, which is not only oriented towards the interests of the perpetrator, but must also be oriented towards the protection of the victim. This is evident in the judge's explicit understanding of the law, which emphasizes the justice to be achieved in regulating compensation for TPKE. Justice for victims in the criminal justice system is interpreted as fulfilling the victim's right to obtain truth, justice, and restitution. TPKE victims have the right to information, participation in the judicial process, protection, as well as restitution and compensation for the suffering they have experienced. This demand is in line with developments in international human rights that emphasize the importance of recognizing and protecting victims of crime. Legally, justice for victims is reflected in contemporary Indonesian criminal law policy, as stipulated in Law Number 31 of 2014 concerning Witness and Victim Protection, which expands the scope of protection for victims of crime, including the right to restitution and rehabilitation. Furthermore, Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence explicitly places the victim at the center of consideration in law enforcement, prioritizing the principles of restorative justice and a comprehensive recovery approach. Therefore, by examining restorative justice as the focus of the judge's trial, it can be concluded that the basic construction of the judge's legal reasoning in this case is a philosophical one.

Furthermore, in the judge's legal reasoning, reasoning is found that implies the judge is trying to realize justice without abandoning the other two main objectives of justice, namely certainty and benefit. This reasoning is found in the considerations that state the Court's recognition of the impact of TPKE and the guarantee of protection of the victim's rights to the impact of TPKE as protected in the TPKE Law, but on the one hand, the Judge in the *a quo* case in his understanding of judging immaterial and material losses must be supported/based on evidence so that the conclusion of the judge's reasoning states that even though it is not based on evidence, the judge pays attention to the impact of TPKE/the victim's condition and still tries to protect the victim's rights to losses that have been clearly incurred by the victim/and his family. The construction of the reasoning is found in the following legal reasoning that "as a result of the criminal act committed by the Child, the Parents of the Child Victim must lose their income because they cannot work for several days to accompany the Child Victim and also have to pay transportation costs to take the Child Victim to the Hospital, Psychologist, and Court". In addition, the consideration regarding "according to the beliefs of the Child Victim's family, which must hold a *ruwatan* ceremony for the release and purification of the Child Victim due to the Child's bad actions towards the Child Victim, it is considered sufficient and appropriate if he is given compensation for the costs that have clearly been incurred, the amount of which will be determined in this decision." So it shows that the judge does not only judge to fulfill the legal objectives but also fulfills the components of the juridical requirements, namely having a legal basis, providing legal certainty and providing legal

protection. In the process of legal discovery, such reasoning is part of the axiological approach method. The axiological approach is an approach based on basic values (axiology) such as justice, humanity, morality, and propriety. The axiological approach plays a fundamental role in ambiguous legal situations (vague norms) or when a legal vacuum occurs (rechtsvacuum), thus requiring judges not only to adhere to normative texts alone, but also to consider the basic values underlying the validity of the law itself. According to Gustav Radbruch, a key figure in legal philosophy, law is not merely a formal rule, but also a means to actualize the values of justice. In his theory known as Radbruchsche Formel, he asserts that "when legal provisions are truly unjust, then justice must be prioritized."

Meanwhile, regarding the basis of the Judge's consideration in granting the ruwatan ceremony for the release and purification of the Child Victim, the reasoning is based on the recognition of the justification principles contained in religious teachings/religious values. The legal discovery made by the judge in this consideration is reasoning based on an epistemological approach method. The epistemological approach method is interpreted that reasoning must contain a scientific methodology or knowledge. The desired methodology as stipulated in Article 52 paragraph 2 of Law 48 of 2009 is a decision that is presented scientifically and can be accounted for. The decision contains the judge's legal considerations based on appropriate or at least logical legal reasons and grounds, which have a rational justification basis. In the science of logic, there are several theories of truth, one of which is theological theory. Theological theory argues that something is considered true if it is in accordance with religious teachings.

CONCLUSION

Based on the results of the research and analysis that has been done, it can be concluded that the basis for adjudicating immaterial compensation for TPKS is Article 10 of the Judicial Power Law which states that judges are obliged to examine, try and decide cases even if a case submitted does not exist or is unclear in law. As for the instructions given to the court in adjudicating complex cases that have obstacles or barriers such as legal vacuum, as Article 4 of the Judicial Power Law, the Court assists justice seekers and tries to overcome all obstacles and barriers to achieve a simple, fast and low-cost trial. The interpretation of the article provides an understanding that the authority given to the judge to freely search for the basics/principles/legal values to be applied in cases that have obstacles by first exploring and understanding the legal values and sense of justice that live in society so that the Judge's Decision is in accordance with the law and the sense of justice of society. The results of the legal search are abstracted in a concrete way the meaning of the activities of legal discovery by the Judge. The guidelines that become the basis for the implementation of the legal discovery have been found in existing legal sources. However, implementation in the field is not easy because judges often encounter several obstacles. The author has formulated normative, institutional, and policy recommendations to address these issues. This supports the implementation of more certain and equitable legal policies that benefit TPKS victims and also serve as a guide for judges in imposing fair sentences without violating the rights of TPKS victims.

1. Legislative Reformulation: Affirmation of the Norm of Immaterial Restitution
2. Strengthening LPSK Institutions in Developing Restitution Assessment Instruments
3. Revision of Technical Guidelines by the Supreme Court regarding directions regarding the forms of immaterial losses that can be considered by judges, Minimum evidence standards in proving immaterial losses, Procedures for judges to evaluate psychosocial assessments from LPSK, local social services or expert witnesses.
4. Integration of Gender and Victim Perspectives in Legislation.

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