Juridical Implication of the Legal Vacuum in Providing Compensation in Lieu of Restitution

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Submit: 15-08-2023; Review: 21-11-2025; Publish: 19-12-2025

Abstract

Criminal offenses position victims as aggrieved parties affected by crimes committed against them. The protection and recovery measures for the losses victims bear should guarantee justice, ensuring victims receive compensation for the harm caused. Law No. 1 of 2023 concerning the Indonesian Penal Code implies that compensation is an additional punishment imposed on the defendant. However, imprisonment, supervision, or community service are only applied if the defendant cannot provide compensation, failing to guarantee the compensation the victim is entitled to, as outlined in the court decision. In such cases, state involvement is required. This research aims to examine juridical implications of the legal vacuum in providing compensation in lieu of restitution. Using a normative method with statutory and analytical approaches, and grammatical and teleological interpretations, the study reveals that the absence of specific regulations leads to injustice, legal disadvantages, and legal uncertainty affecting victims of criminal offenses, particularly regarding their right to restitution.
Keywords: Compensation; Restitution; Redress; Victims of Criminal Offenses.

Introduction

Humans are born to socialize and live with others on a day-to-day basis; they interact within a social structure called *society*. Mac lver believes that society represents a working, procedural system of authority with its reciprocal activities, within which social communities adhere to complex, ever-changing systems.[1] It implies that all conduct and behavior of every individual must be regulated to ensure that each individual's rights are appropriately protected through mechanisms such as laws that require compliance, thereby allowing social life to take place. As a consequence, both the public and law are closely related, parallel to the adage *Ubi*

[1] Beni Ahmad Saebani*, Pengantar Antropologi***,** Pustaka Setia, Bandung, 2012, hlm. 137

Societas Ibi Ius (the existence of a community will lead to the birth of law), as expressed by Tullius Cicero, a Roman legal scholar.[2]

Since humans are social beings, their existence is inextricably linked to threats that undermine their interests.[3] These threats may manifest as criminal offenses that undermine public security and safety.

Criminal offenses can occur at any time to anyone, regardless of age. This negative conduct certainly creates havoc and leaves the public worried. Criminal offenses violate the law and can be intentional or unintentional (due to negligence). Offenders can be held liable under current law for the offenses that are punishable[4]

Any offense will certainly involve both parties, the offender and the victim, following the offense caused. Theo Van Boven defines the term victim as an individual or a group suffering from physical injury, mental and emotional damage, economic loss, or seizure of fundamental rights caused by either intentional conduct or negligence.[5]

In the United Nations Declaration regarding the fundamental principles of justice for victims of criminal offenses and abuse of authority, a victim is defined as a person who individually or jointly suffers from physical injury, mental or emotional damage, economic loss, or substantial loss of fundamental rights caused by conduct or negligence that violates current criminal law.[6]

The above types of definition of a victim from Van Boven and the United Nations Declaration imply that the losses can vary, ranging from physical injury, psychological impacts, material, and social losses that victims suffer from.[7] This implies that victims may suffer from multiple losses simultaneously.

Since victims are those who suffer losses, attempts to protect, address, and recover those losses need to be regulated and protected. The issue regarding the protection and recovery of victims of criminal offenders has attracted attention at

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[2] Darji Darmodihardjo dan Sidharta, *Pokok-Pokok Filsafat Hukum*, Gramedia Pustaka Utama, Jakarta, 1995, hlm. 208
[3] Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, Liberty, Yogyakarta, 2007, hlm. 1
[4] Ismu Gunadi dan Jonaedi Efendi, *Cepat & Mudah Memahami Hukum Pidana*, Kencana, Jakarta, 2014, hlm. 36
[5] Theo Van Boven, *Mereka yang Menjadi Korban***,** Elsam, Jakarta, 2002, hlm. xiii
[6] Lies Sulistiani, *Problematika Hak Restitusi Korban Tindak Pidana yang Diatur KUHP dan Diluar KUHP***,** Jurnal Bina Mulia Hukum, Vol. 7 No. 1, September 2022, hlm. 88
[7] Farhana, *Aspek Hukum Perdagangan Orang di Indonesia***,** Sinar Grafika, Jakarta, 2012, hlm. 158

both national and international levels, as set forth in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[8]

As the outcome of the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, taking place in Milan, Italy, in September 1985, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power formulated measures of protection such as access to justice and fair treatment, restitution, compensation, and assistance given to the victims.[9]

In terms of the type of protection given to the victims of the crime in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, one of the mechanisms to repay the losses caused and fulfill the rights of the victims to help with their recovery is through the rights to restitution and compensation.

Normatively, the regulation governing the provision of losses through restitution and compensation mechanisms is set forth in Law Number 31 of 2014, amending Law Number 13 of 2006 on the Protection of Witnesses and Victims. Article 1, point 11 of this Law highlights the definition of restitution as follows:

"Restitution refers to redress provided for a Victim and his/her Family by an offender or Third Party"[10]

The definition of compensation is regulated in Article 1, point 10 of the Law concerning Witnesses and Victims:

"Compensation refers to redress provided by the state when an offender is not capable of providing restitution as his/her full responsibility for the victim and his/her family"[11]

The difference between restitution and compensation lies in who facilitates the repayment to the victims. In this context, restitution is the repayment directly imposed on criminal offenders to help recover the conditions the victims are facing

[8] Rena Yulia, *Viktimologi Perlindungan Hukum Terhadap Korban Kejahatan*, Graha Ilmu, Yogyakarta, 2013, hlm. 58
[9] *Ibid*, hlm. 58
[10] Article 1 point 11 of Law Number 31 of 2014 concerning the Amendment to Law Number 13 of 2006 concerning Protection of Witnesses and Victims
[11] Article 1 point 10 of Law Number 31 of 2014 concerning the Amendment to Law Number 13 of 2006 concerning Protection of Witnesses and Victims

(*restitutio in integrum*).[12] The concept of restoring the condition to its previous state is similar to the restorative concept in restorative justice.[13]

Furthermore, in line with the development of criminal law in Indonesia, the pattern of the protection of the victims within the scope of criminal law in Indonesia is manifested in Law Number 1 of 2023 concerning the Penal Code of Indonesia (henceforth referred to as the National Penal Code) as *lex generalis*. One of the forms of protection for the victims concerned refers to compensation. Article 66 paragraph 1 letter b of the National Penal Code asserts that compensation is given as additional punishment. This Article regulates the compensation like the restitution as referred to in Law concerning Witnesses and Victims.

Furthermore, the provision of Article 94 of the National Penal Code regulates the judiciary power in imposing compensation as additional sentencing in the court decision, as in line with the provision of Article 94 of the National Penal Code:

1) The court decision may state the defendant's liability to pay compensation to the victims or their heirs, in addition to the punishment referred to in Article 66, Paragraph (1), letter d
2) If the compensation as referred to in Paragraph (1) is not given, the provision regarding the imposition of fines as referred to in Articles 81 to 83 may, mutatis mutandis, apply.[14]

Given that restitution, as the responsibility imposed on an offender, has disadvantages for victims, legal certainty is needed to ensure that offenders can discharge their liability by paying some amount of compensation to victims. Regarding this issue, Article 94, Paragraph 2 of the National Penal Code clearly regulates some measures in case of the condition where criminal offenders fail to pay the compensation through the implementation of the criminal provision concerning fines as referred to in Articles 81 to 83, in which fines charged are, mutatis mutandis, paid to the victims.

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[12] Fauzy Marasabessy, **J***urnal : Restitusi Bagi Korban Tindak Pidana : Sebuah Tawaran mekanisme Baru,* Tahun ke-45, No. 1 Januari-Maret 2015, hlm. 55

[13] Heny Saida Flora, Jurnal : *Pendekatan restorative Justice Dalam Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana di Indonesia*, Jurnal Law Pro Justitia Vol II, No. 2- Juni 2017, hlm. 50

[14] See Article 94 of Law Number 1 of 2023 concerning Penal Code

Articles 81 to 83 of the National Penal Code principally govern the confiscation of assets or income earned by the defendants, which may be further auctioned by the prosecutors. If these assets fail to fully cover the losses, imprisonment, supervision, or social services can be imposed.

These three vicarious types of imposing fines to replace compensation in cases of inability to repay losses to victims indicate that they are more focused on physical punishment imposed on the defendants. When this is the case, the victims will be positioned as aggrieved parties facing material and physical losses, given that no measures are taken to help restore the conditions they have suffered. This condition certainly injures the justice of the victim of a criminal offense.

The state, therefore, needs to get involved in providing compensation as a measure to help recover for the conditions victims have suffered when defendants cannot afford to pay. This idea refers to the definition of compensation as governed in Article 1, point 4 of Government Regulation Number 35 of 2020 concerning the Amendment to Government Regulation Number 7 of 2018 concerning Compensation, Restitution, and Aid for Witnesses and Victims, as follows:
"Compensation is defined as a redress provided by the state because an offender is not capable of providing the compensation that should be provided by the offender's full responsibility[15]

As a consequence, it is vital to examine the legal implications of the absence of regulation on compensation as a vicarious responsibility to provide restitution to victims of criminal offenses in Law Number 1 of 2023 concerning the Penal Code of Indonesia.

Research Method

This research employs a normative-juridical method grounded in laws, doctrines, and principles of legal studies. The statutory approach used identifies and analyzes the juridical implications of the absence of regulation on compensation as a vicarious responsibility to provide restitution to victims of criminal offenses in

[15] Article 1 Point 4 of Government Regulation Number 35 of 2020 concerning the Amendment to Government Regulation Number 7 of 2018 concerning Provision of Compensation, Restitution, and Aid for Witnesses and Victims

Law Number 1 of 2023 concerning the Penal Code of Indonesia. The regulation and results were analyzed using grammatical and teleological interpretations.

Result and Discussion

The Loophole of Law Number 1 of 2023 concerning the Penal Code of Indonesia

As defined earlier, the term victim refers to a person or group of people who are the aggrieved party or parties due to criminal offenses affecting them. Therefore, victims are entitled to be treated with respect and benevolence, as well as to access to justice and compensation for the losses they have suffered.

The following are some rights that victims of criminal offenses are entitled to, according to Arif Gosita:

a) Victims are entitled to compensation for the conditions that cause them suffering, and the amounts of compensation should be adjusted to the offenders' ability to pay and to the extent the victims have been affected by the criminal offenses.
b) Victims can always refuse to be given restitution for their interest (in the condition in which the victims are not in need of the restitution)
c) Heirs of the victims may receive restitution/compensation if the offenses concerned have caused the death of the victim.
d) Victims have the right to counseling and rehabilitation.
e) Victims have the right to repossess all the rights they are entitled to
f) Victims can always refuse to serve as witnesses if it harms them.
g) Victims are entitled to protection from all threats posed by offenders following the report made by the victims, and if the victims serve as witnesses.
h) Victims have the right to legal aid.
i) Victims have the right to all legal remedies[16]

Compensation is one of the rights victims can obtain, as it is a vital element in helping them recover from the conditions they suffer due to criminal offenses.

The concept of compensation that directly imposes on criminal offenders the responsibility to restore the victims' conditions is not a new mechanism in society.

[16] Arif Gosita, *Masalah Korban Kejahatan*, Akademika Pressindo, Jakarta, 1983, hlm. 52

From a historical perspective, Romli Atmasasmita reveals that attempts to recover losses from crime have been around since the mid-century, when the law was primitive. This mechanism for restoring conditions caused by criminal offenses was termed Personal Reparation—compensation paid by the person who committed a criminal offense to the person who must bear the loss arising from the deed. Considering that this mechanism of compensation has existed since the mid-century, the implementation of restitution to victims is deemed normal today, as the responsibility for recovering the losses incurred.[17] This practice aligns with Mardjono Reksodiputro's view, which holds that it is the responsibility of offenders to compensate victims for material losses.[18]

Compensation to recover the loss paid to victims has received much attention from the international community. As stated earlier, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth several rights for victims, including the right to restitution and compensation. Restitution is imposed as a direct responsibility on offenders or defendants to encourage them to re-socialize and assume the responsibilities of adult offenders. This matter is stipulated in several provisions of Indonesian legislation, as set out in the Law concerning the Protection of Witnesses and Victims.

Similarly, the compensation mechanism for directly recovering losses from the state and providing it to victims is regulated in several provisions of, inter alia, the Sexual Violence Law, which provides that compensation may be granted if the asset fails to cover the restitution paid to the victim. That is, the state should be involved in ensuring victims' rights to receive compensation.

Parallel to the development of criminal law in Indonesia, in January 2023, the Indonesian Government stipulated the new Penal Code, replacing the legacy Penal Code left by the Dutch, which remains in use to date. The provisions concerning the National Penal Code are set out in Law Number 1 of 2023 on the Penal Code. The stipulations of the National Penal Code have brought fresh air to the paradigm

[17] Nurini Aprilianda & Ryan Ilham Fibriansyah, *Implication of Legal Loophole concerning Liability over Delay in Restitution Payment by Criminal Offender*, Jurnal Media Hukum, Vol. 28, No. 1, June 2021, hlm. 50

[18] Josefhin Mareta, *Penerapan Restorative Justice Melalui Pemenuhan Restitusi Pada Korban Tindak Pidana Anak,* Jurnal Legislasi Indonesia, Vol. 15, No. 4, Desember 2018, hlm. 315

of criminal law in Indonesia, with new concepts more oriented toward balancing the interests of criminal offenders and victims[19]

Recalling that this National Penal Code aims to balance the interests of the two parties, its regulation has been within the attention it deserves. The protection that should be given to victims, as provided in the National Penal Code, may involve treating compensation paid to victims as a new form of additional criminal punishment. The provisions concerning the types of the National Penal Code are outlined in Article 64 of Law Number 1 of 2023 concerning the Penal Code:

"Punishment consists of:

a) Primary punishment;
b) Additional punishment;
c) Special punishment for particular offenses regulated by the statute."[20]

Additional punishment, as referred to in Article 64 letter b of the Penal Code, is elaborated in the provision of Article 66, Paragraph 1 of the Penal Code, as follows:

(1) Additional punishment, as referred to in Article 64 letter b, consists of: a. confiscation of rights; b. confiscation of particular items and/or bills; c. verdicts; d. compensation payment; e. particular permit revocation, and f. fulfillment of customary responsibilities.[21]

Compensation given as an additional punishment to criminal offenders is acceptable and should be implemented to ensure victims are guaranteed legal certainty and can recover the losses they have suffered. Further provisions regarding the additional punishment of compensation payable to victims by offenders are outlined in Article 94 of the National Penal Code, implying that, under a court verdict, responsibility can be imposed on a defendant to pay the compensation to the victim concerned or his/her heirs. If the victim fails to provide the compensation, fines referred to in Articles 81 to 83 of the National Penal Code, mutatis mutandis, apply, provided that these fines are not paid to the state but

[19] Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana, Badan Pembinaan Hukum Nasional, Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, hlm. 107
[20] See Article 64 of Law Number 1 of 2023 concerning Penal Code
[21] See Article 66 Paragraph 1 of Law Number 1 of 2023 concerning Penal Code

instead to the victim to recover the loss caused. Article 94 of the National Penal Code elaborates that:

(1) Under a court decision, responsibility can be imposed on the defendant to pay the compensation to the victim or his/her heirs as an additional punishment as referred to in Article 66 paragraph (1) letter d.
(2) If the defendant fails to provide the compensation as referred to in Paragraph (1), fines, as referred to in Article 81 to Article 83, mutatis mutandis, apply.[22]

In line with the provisions of Article 94, Paragraph 2, of the National Penal Code as referred to above, failure to provide the compensation will lead to the payment of fines as regulated in Articles 81 to 83, which, mutatis mutandis, should be paid to the victim.

From Article 81 to Article 83 of the National Penal Code, this research concludes that:

1) The confiscation of the defendant's assets or income as a coercive measure, followed by the prosecutors' auction of the assets concerned, is intended to cover the unpaid compensation. However, under the provision referred to in Article 94, Paragraph 2, of the Penal Code, the fines replacing the compensation should be paid to the victim, not the state. The proceeds from the assets auctioned will be used to pay the victim's compensation under the restitution mechanism, not to the state.
2) If the value of the assets fails to cover the fines paid to the victim, imprisonment, supervision, or community service may apply. That is, imprisonment, supervision, or community service may be imposed when the defendant cannot afford to pay restitutio.

Thus, this research highlights two primary issues regarding the provision of additional punishment in the form of compensation under the restitution mechanism, as mentioned above, according to the National Penal Code. An in-depth analysis of this matter will reveal the issues and shortcomings of the relevant provisions of the National Penal Code, particularly regarding the compensation mechanism based on the implementation of fines as punishment, as set out in Articles 81 to 83 of the National Penal Code.

[22] See Article 94 of Law Number 1 of 2023 concerning Penal Code

In terms of justice, victims are entitled to basic rights, including compensation for suffering caused by criminal offenses. This view is relevant to that of Van Boven, believing that victims have the right to know, to justice, and reparation or recovery, including all kinds of reparation, materially or non-materially.[23] If the victims are entitled to reparation or recovery through the mechanism of restitution, the state should guarantee this restitution process with the benefit that the victims can perceive.

The provision of the National Penal Code requiring only physical punishment, as mentioned earlier, will undermine the justice of victims of criminal offenses, as they will have no chance for reparation. As a consequence, the compensation given as an additional punishment under the restitution mechanism is deemed ineffective. According to Howard and Mummers, regulatory drafting should be well planned and monitored to enable effective enforcement of legislation and a better understanding of the case among the public.[24]

Thus, the state has to be involved in providing compensation as the responsibility for its citizens over the losses. The provision of compensation under the restitution mechanism for those who cannot afford to cover the loss is regulated in the provision of Law Number 1 of 2023 concerning the Penal Code. The legal loophole regarding the absence of the involvement of the state in helping cover the compensation for the recovery of the conditions the victims face will certainly damage the value of certainty and justice, especially for the victims of criminal offenses who have been declared under court decisions to receive compensation from defendants. This is contrary to the statutory provision in Witness and Victim Protection Law stating "compensation refers to the redress provided by the state because a defendant is not capable of paying the full amount of the compensation as his/her responsibility".[25] Ulpianus states, "*Justititia est constans et perpetua voluntas ius suum buique tribuere*", meaning justice can be achieved as long as rights are given to every person who deserves them. In other words, justice will not

[23] Rena Yulia, *Viktimologi Perlindungan Hukum Terhadap Korban Kejahatan*, Op.Cit, hlm. 55
[24] Irwan Adi Wijaya, Hari Purwadi, Jurnal : Pemberian Restitusi Sebagai Perlindungan Hukum Korban Tindak Pidana, *Jurnal Hukum dan Pembangunan Ekonomi*, Vol. 6, No. 2, 2018, hlm. 97
[25] Article 1 point 4 of Government Regulation Number 35 of 2020 concerning the Amendment to Government Regulation Number 7 of 2018 concerning Compensation, Restitution, and Aid for Witnesses and Victims

ensue if the National Penal Code only governs vicarious punishment for defendants without giving much attention to the suffering of the victims due to the offenses. Once again, it is clear that Law Number 1 of 2023 concerning the Penal Code still leaves a legal loophole regarding the state's responsibility for the recovery of victims of criminal offenses, as provided in the Penal Code.

The juridical implication of the absence of the regulation concerning the compensation as to replace the restitution paid to the victims of criminal offenses in the Penal Code

As discussed earlier, the loophole in Law Number 1 of 2023 concerning the Penal Code in guaranteeing the compensation paid to the victims will leave significant impacts on the victims concerned since they will not be entitled to legal certainty and justice to get the chance of reparation or recovery of all the losses they suffer from, while victims as the aggrieved parties should be entitled to legal certainty and justice.

The absence of a regulation in the Penal Code regarding compensation to victims implies that the aggrieved parties will have to suffer more, as they will not receive any compensation when it is replaced by vicarious punishment, as mentioned earlier.

Therefore, the juridical implication of the absence of the regulation regarding the mechanism of compensation to replace restitution paid to the victims in the National Penal Code may ruin some values as follows:

1) Failure to achieve justice for the victims of criminal offenses.
2) Failure to reflect the utilitarian values
3) Failure to achieve legal certainty for victims in terms of recovery for the losses caused, while they should still be entitled to the right to recovery.

All these shortcomings arising from the legal loophole in Law Number 1 of 2023 regarding the Penal Code are further elaborated in the following points.

1) The legal consequences of the failure to achieve justice for the victims of criminal offenses

This legal loophole will certainly contribute nothing to the values of justice for the victims, considering that they will not receive any amounts of compensation as

declared under court decisions because the value of the asset owned by the defendants fails to cover all the losses caused.

Considering that one of the objectives of the National Penal Code, through Law Number 1 of 2023 concerning the Penal Code based on the balance principle (*daad-dader strafrecht* and victim) and the formulation that is more oriented to the primary and principal ideas of the balance of the protection and interests between the criminal offenders and the victims, and the balance between legal certainty, flexibility or elasticity, and justice, the value of justice for the victims need to receive more attention and to be upheld to help recover the suffering through compensation provided for the victims. To foster an equal proportion between the rights and obligations of the offenders and the victims, the state also has to be responsible to fulfill the rights of the victims in cases of the condition where the defendants cannot afford to cover the loss due to the limited value of access or income.

The idea of Ulpianus implying that justice will not ensue unless the person is guaranteed to have access to his/her rights is relevant to the adage *Justitia est constans et perpetua voluntas ius suum cuique tribuere*.[26] The concept of the etymology of justice was derived from Arabic as *adl*. According to *Kamus Besar Bahasa Indonesia*, the word justice refers to *adil*-impartial, acting proportionately and not arbitrarily.[27] That is, justice is about fostering equality without unfair treatment that favors only one party.

By referring to the concept of justice introduced by Ulpianus, once again, justice will take place as long as the rights of the person are fulfilled. Moreover, when this matter is linked to the loophole reflected in the National Penal Code in the process of guaranteeing and providing compensation for the victims, the concept of justice as introduced by Ulpianus will not ensue, considering that the defendants do not have enough assets to cover the losses caused. When this is the case, imprisonment, supervision, or community service may apply to replace the unpaid compensation. This vicarious punishment will not contribute to the recovery of the

[26] Nindyo Pramono dan Sularto, *Hukum Kepailitan dan Keadilan Pancasila Kajian Filsafat Hukum atas Kepailitan Badan Hukum Perseroan Terbatas di Indonesia*, ANDI, Yogyakarta, 2017, hlm. 2
[27] Bahder Johan Nasution, Jurnal : Kajian filosofis Tentang Konsep Keadilan Dari Pemikiran Klasik Sampai Pemikiran Modern, *Yustisia* 3 (2) Mei-Agustus 2014, hlm. 123

victims concerned simply because their rights are not fulfilled as they should be in accordance with what is outlined in court decisions. In this case, the court fails to position the victims as the party that deserves protection and legal certainty to help implement the process of compensation for the suffering caused.

Furthermore, with justice, this research also refers to the perspective of Hans Kelsen in his book entitled General Theory of Law and State, describing that law as a social structure is deemed to be just if this law is capable of regulating its citizens satisfactorily and guaranteeing happiness for all.[28]

In other words, according to this perspective, the legislative products made by the government must, in reality, be able to render the citizens satisfied for the sake of happiness for all.

Moreover, from the perspective of Hans Kelsen, if the regulation made fails to manifest satisfaction for its people, it will also fail to fulfill the values of happiness for the people. The absence of the regulation regulating the compensation in the context of this research in terms of the defendants incapable to pay the restitution will not satisfy the victims of the criminal offenses since they are forced to come to terms with the suffering. On one hand, finding that the defendants are declared liable for the compensation as the additional vicarious punishment may be good news for the victims. On the other hand, finding that the defendants have no assets to confiscate is disadvantageous to the victims, considering that there is uncertainty in whether the victims can get the compensation to cover the losses as delivered as verdicts in courts.

Hans Kelsen also argues that justice, from the perspective of legality, ensues if regulation is enforced accordingly. On the contrary, the regulation can be deemed to be unfair when it applies only to one case but not to another similar case.[29]

When this legality perspective is linked to sexual violence in the condition where an offender does not have assets to fulfill the restitution as regulated in Article 35 of Law Number 12 of 2022 concerning Sexual Violence, such a provision can apply to the National Penal Code in a more general scope (*Lex Generalis*). Therefore, if the compensation covered by the state when defendants cannot afford

[28] Hans Kelsen, *General Theory of Law and State*, terjemahan oleh Rasisul Muttaqien, Nusa Media, Bandung, 2011, hlm. 7
[29] Marlina dan Azmiati, *Op.Cit*, hlm. 34

to pay is regulated under the provision of Sexual Violence Law as the public criminal law and the provision of this compensation is not governed by the National Penal Code that is principally similar in terms of the measures taken to provide the compensation for the victim through restitution and the confiscation of assets owned by the defendant, then it fails to present the value of justice within the scope of legality as viewed by Hans Kelsen.

2) The legal consequences of the failure to reflect the utilitarian values

The legal loophole in the regulation concerning the provision of compensation in the National Penal Code given as the responsibility of the state to the victims in fulfilling the compensation when the offenders do not have enough assets to cover the losses will not only injure the justice of the victim concerned, but it also ruins the utilitarian values for people especially victims of criminal offenses.

The utilitarian values within the legal paradigm are inextricable from utilitarianism theory introduced by Jeremy Bentham, implying that utilitarianism serves as a philosophical fundamental to study the approach of the legal system and justice oriented to maximize the happiness for the majority of the people. That is, the main objective of this law and legislation is nothing but to serve happiness for the greatest number of people.[30] Since this theory is mostly linked to happiness, this theory focuses more on the greatest benefit for the greatest number of people.[31] In other words, the law should give benefits that all people can perceive.

By understanding the concept of this utilitarian theory introduced by Jeremy Bentham and departing from the philosophical basis that shows that law and legislation made by the government in a state must bring about happiness and benefits for people, it is clear that the legal loophole left in the National Penal Code concerning compensation given as redress will reduce or even fail to represent the values of the benefits for the victims and the members of the public in general. In this situation, the victims will lose their right to receive the compensation as declared in court decisions when the defendants cannot afford to cover the losses caused. This situation can happen due to the absence of certain regulations

[30] T.J Gunawan, *Konsep Pemidanaan Berbasis Nilai Kerugian Ekonomi***,** Kencana, Jakarta, 2018, hlm. 32
[31] Marlina Asmiati,*Op.Cit*, hlm. 35

concerning compensation paid to the victims when the defendants are not capable of recovering the losses.

3) Legal consequences of failure to achieve legal certainty for victims in terms of recovery for the losses caused, while they should still be entitled to the right to recovery

The loophole regarding the guarantee of the compensation received by the victims in the provision of the Penal Code as the additional punishment as referred to in Article 66 Paragraph 1 letter d of the Penal Code injures and reduces utilitarian values for the victim, and this weakness will ruin legal certainty.

In terms of legal certainty, this matter is often linked to the paradigm built therein, where legal certainty represents the structure of *justitiabelen* protection against unjust treatment requiring a person to get his/her right under certain conditions[32] Strict enforcement of the legislation as the instrument is expected to serve as the guidelines in society. Any loopholes, vagueness of norms, or conflicts of norms will hamper the effectiveness and the value of legal certainty.

Therefore, the loophole in the National Penal Code which does not govern the responsibility of the state to provide the compensation paid to the victims when the offenders have no assets to recover the losses caused will injure legal certainty that should uphold *justitiabelen* protection against unfair treatment that requires a person to get his/he rights under certain conditions. The failure to get the right given as compensation will prolong the suffering the victims have to bear and it will also fail to guarantee the legal certainty regarding the recovery of the losses caused by the criminal offenses.

In terms of the legal loophole, as stated above, the incapability of defendants to cover the losses with compensation that should be paid to the victims will leave the victims with an uncertainty of whether they will receive the amounts given in the compensation, as governed in Article 83 of the Penal Code. Therefore, this legal loophole certainly injures the principle of the compensation given according to

[32] Margono, *Asas Keadilan Kemanfaatan dan Kepastian Hukum Dalam Putusan Hakim*, Sinar Grafika, 2019, hlm. 115

several basic principles, one of which is the principle of balance, that should be implemented.

In terms of the equality principle, the law aims to create a balance in society that may be affected by conduct that contravenes the norms that live in society. Moreover, the task of the law is to restore the situations as they were before. This principle represents one of the principles in compensation paid to the victims and it refers to two essential positions of recovering the rights of the victims.[33]

Therefore, the law concerned serves as an instrument to create a balance between regulation, justice, and equality of law among criminal offenders. This balance is expected to lead society to justice and happiness.

When this matter is linked to the protection of the victims, the balance in justice should be more represented by ensuring happiness and benefits for the aggrieved parties, where legal certainty of getting proportionate compensation can be given. This notion is relevant to Muladi's idea explaining that in the case of protecting the victims of criminal offenses, the first thing to consider is the essence of loss that the victims are suffering from..[34] Law enforcement should not only focus on the value of certainty but it should also take into account the utilitarian and justice values, especially in the context of the protection and recovery for the victims of criminal offenses.

Conclusion

The juridical implication of the absence of the regulation concerning the compensation as the vicarious punishment for the restitution paid to the victims in the National Penal Code as the responsibility of the state for the victims of the criminal offenses when the offenders have no assets to compensate for the losses under restitution mechanism will not give any legal benefits and raise legal injustice and uncertainty in attempts to gain access to the rights that the victims should be entitled to.

[33] Marlina, Azmiati. *Op.Cit*. hlm. 121

[34] Wardatul Fitri, Aspek Hukum Keperdataan Terhadap Pemenuhan Hak Restitusi Dalam Perkara Tindak Pidana**,** *Jurnal Penelitian Pendidikan Indonesia*, 9 (1), 2023, hlm. 92

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