

## PROTECTION OF WOMEN AND CHILDREN IN THE PERSPECTIVE OF LEGAL PHILOSOPHY

**Safrudin\***

Prodi Magister Hukum, Sekolah Pascasarjana, Universitas Nasional, Jakarta, Indonesia  
[enolestari84@gmail.com](mailto:enolestari84@gmail.com)

**Rumainur**

Prodi Magister Hukum, Sekolah Pascasarjana, Universitas Nasional, Jakarta, Indonesia  
[rumainur@gmail.com](mailto:rumainur@gmail.com)

### ABSTRACT

*the Indonesian government has established various institutions as an effort to protect human rights and justice for women and children, including the National Commission on Violence Against Women, the National Commission on Human Rights, the Witness and Victim Protection Agency and the Ombudsman. Even though Indonesia has ratified the CEDAW Convention plus strengthened it through various human rights institutions, violence against women and children is still massive in Indonesia. In this writing, the research method used by the author is normative juridical. The results of this study show that violence against women and children will continue to occur if the government is not really serious in making regulations and implementing the protection of women and children. Apart from that, public awareness is needed regarding the nature of being human, that all human beings are equal.*

**Keywords :** *Protection, Women and Children, Perspective of Legal Philosophy*

### ABSTRAK

pemerintah indonesia telah membentuk berbagai institusi sebagai upaya perlindungan HAM dan keadilan terhadap kaum perempuan dan anak, diantaranya Komnas Perempuan, Komnas HAM, Lembaga Perlindungan Saksi dan Korban dan, Ombudsman. Meski indonesia telah meratifikasi Konvensi CEDAW ditambah penguatan melalui berbagai lembaga HAM, kekerasan terhadap perempuan dan anak masih masif terjadi di Negara Indonesia. Dalam penulisan ini, metode penelitian yang digunakan oleh penulis adalah normatif yuridis. Adapun hasil penelitian ini bahwa kekerasan terhadap perempuan dan anak akan terus terjadi apabila pemerintah tidak benar-benar serius dalam membuat regulasi dan implementasi terhadap perlindungan perempuan dan anak, selain daripada itu dibutuhkan kesadaran masyarakat terkait hakikat menjadi manusia bahwa semua manusia itu sama kedudukannya.

**Kata Kunci:** Perlindungan, Perempuan dan Anak, Perspektif Filsafat Hukum

### INTRODUCTION

Indonesia has ratified international conventions as an effort to protect women's human rights (HAM). Among them is the *Convention on the Elimination of All Forms of Discrimination Against Women / CEDAW*. In addition, the Indonesian government has also established various institutions as an effort to protect human rights and justice for women and children, including the National Commission on Violence Against Women, the National Commission on Human Rights, the Witness and Victim Protection Agency and the Ombudsman. Even though Indonesia has ratified the CEDAW Convention plus strengthening through various human rights institutions, in reality in Indonesia there are

violations of women's human rights, especially in the health sector until now (RB Sularto, 2009: 266).

Children are a mandate and a gift from the one and only God in which human dignity and worth are attached and every child born gets their rights. This is in accordance with the provisions of the Convention on the Rights of the Child which was ratified by the Indonesian government through Presidential Decree No. 36 of 1990 which put forward the general principles of child protection, namely non-discrimination, the best interests of the child, survival and development and respect for children's participation. However, until the child protection law was issued and until now, the welfare and fulfillment of children's rights is still far from what was expected.

The implementation of children's rights who are trapped in efforts to protect children has a broad scope to increase considering that child welfare does not only cover social and economic needs, but also in other aspects such as protection in the field of justice, child health, neglected children, children streets, children victims of physical and sexual violence and so on (Rika Saraswati, 2006:1). <sup>This</sup> thinking is indeed in line with the understanding of child protection as referred to in article 1 of Law Number 23 of 2002 concerning Child Protection, which states that child protection is: "All activities to guarantee and protect their rights so that they can live, grow, develop and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination".

Within the framework of protecting human rights in essence, the protection of women and children is the embodiment of the right to life, the right to be free from servitude or slavery. This human right is eternal and universal, which means that it applies to everyone regardless discriminate against origin, gender, religion and age so that each country is obliged to enforce it without exception (Iin Ratna Sumirat, 2016: 21).

Efforts to protect the law against women and children, one of which is through the health sector for women and children, need to be carried out continuously in order to maintain quality human resources. The quality of protection for women and children should have the same degree or level as protection for adults and men, because everyone has the same position before the law (equality before the law).

Article 13 of Law Number 23 of 2002 concerning Child Protection stipulates that:

- (1) Every child while in the care of parents, guardians or any other party responsible for upbringing, has the right to get protection from treatment:
  - a. Discrimination
  - b. Exploitation, both economic and sexual
  - c. Abandonment
  - d. Cruelty, violence and persecution
  - e. Injustice and
  - f. Other mistreatment
- (2) In the case of parents, guardians or caretakers carrying out all forms of treatment as referred to in paragraph (1) then legal sanctions need to be imposed.

From the background of the problems above, efforts to protect human rights for the health rights of women and children are a necessity that cannot be delayed any longer. Because with the existence of fair and optimal health so as to create healthy mothers who in the end can create golden generations to continue the nation.

## **METHOD**

In this writing the writer uses the type of normative juridical research. The normative juridical approach is an approach based on the main legal material by examining the theories, concepts, legal principles and laws and regulations related to this research. This approach is also known as the library approach, namely by studying books, laws and regulations and other documents related to research.

## **RESULTS AND ANALYSIS**

### **Protection of Women in Indonesia**

To understand the development of human rights law in Indonesia, it is very important to know the pattern of human rights legislation policies at any given time. From a juridical perspective, efforts for equality and justice for women have been listed in :

#### **a. 1945 Constitution**

##### **1. Article 28(A)**

“Everyone has the right and the right to defend life  
and that life”

##### **2. Article 28 paragraph (2)**

"everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against discriminatory treatment"

##### **3. Article 28 H paragraph (1)**

"Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to get a healthy environment and have the right to receive health services"

##### **4. Article 34 paragraph (3)**

"The state is responsible for the provision of proper health care facilities and public services"

#### **b. Law No. 39 of 1999 concerning Human Rights**

##### **1. Article 49 paragraph**

"Women have the right to get special protection in carrying out their work or profession against things that can threaten their safety and or health related to women's reproductive function"

##### **2. Article 49 paragraph**

"Special rights attached to women due to their reproductive function, are guaranteed and protected by law" <sup>7</sup>

#### **c. Law No. 39 of 2009 concerning health**

1. Article 1 paragraph (2)

"Healthy state, both physically, mentally, spiritually and socially which allows everyone to live productively socially and economically"

d. The Criminal Code

1. The right to be free from abuse and ill- treatment related to reproductive health, physical violence, sexual violence, psychological violence. Unfortunately, our current Criminal Code is unable to accommodate non-physical (psychological) violence.
2. The right to freedom of thought and making decisions about their reproductive health: articles 341-349 (R.Susilo, 1985).

State policies, especially in the context of justice and equality in the health sector, are an effort to fulfill optimal and fair health. The state has carried out a lot of legal politics , including ratifying international conventions , including the ratification of the Covenant on Civil and Political Rights ( ICCPR ) . and culture (ICESCR) which later gave birth to Law Number 11 of 2005 concerning ratification International Covenant on Economic, Social and Cultural Rights (Habib Sulton Asnawi, 2011)

With the ratification of several important Covenants, it is important for the Indonesian government to pay attention to the rights guaranteed in the Covenant so that they can be implemented properly so that they can fulfill the obligation to make regulations that protect and respect the human rights of women in Indonesia. especially women's health rights. In addition, protection can also affect the effectiveness of the implementation of pre-existing regulations. In addition to actions in the form of policy formulation, programs or actions are also needed to support the fulfillment of the human rights of every citizen without exception.

### **Efforts and Implementation of Child Protection in Indonesia**

Protection of children is a human right that must be obtained by children. In this regard, Article 27 paragraph (1) of the 1945 Constitution stipulates that every citizen has the same status before law and government and is obliged to uphold this law and government without exception. The statement of the article shows that there is no difference in position in law and government for all citizens , both women, men, adults and children in obtaining legal protection (Maidin Gultom, 2012: 13).

Various government policies in providing legal protection for children, but their implementation is still far from what was expected. the weak provision of legal protection for children both as victims and as perpetrators of criminal acts, including :

a. Children as perpetrators of crimes

Weak legal protection for children who are in conflict with the law. In a case in 2005-2006 that came to the public's attention, an 8-year-old elementary school child from Langkat, North Sumatra, had to attend multiple trials because he beat his schoolmate. However, the problem is whether it is appropriate for an 8-year-old child to be brought before the court. More than 4000 children in Indonesia are brought to court every year for minor crimes such as theft, children do not get support from lawyers or social services

so that in the end nine out of ten children are sent to prison. As well as the discovery of child detainees in adult detention centers ( Nasir Djamil, 2015: 27).

This condition is of course very concerning because many children have to deal with the judicial process. The presence of children in detention and imprisonment with these adults places them in a situation where they are prone to becoming victims of acts of violence.

Every child who commits a crime who enters the criminal justice system must be treated humanely, namely non-discrimination, the best interests of the child, the right to life, survival and development, and respect for the opinion of the child concerned (Marlina, 2012: 11).

b. Children as victims of crime

There are still many cases of violence against children. This can be seen from the many cases of violence against children, including the Duck Robot Pedophilia Case, the Babe Pedophilia Case, the Pedophilia Case at the Jakarta International School, the Emon Pedophilia Case, the Pedophilia Case at the Al-Quran Education Park, the Samai alias Ropii Pedophilia Case, the Obscene Elementary School Teacher, Rape of 2nd Grade Children, Sexual Business by Biological Fathers, Sexual Violence against Street Children.

From various cases of violence against children, it shows that cases of violence against children are increasingly widespread, especially sexual violence, so that it becomes a public concern. To optimize the protection of children, the government has issued a Government Regulation in Lieu of Law (Perpu) concerning castration for perpetrators of sexual crimes against children and has now been ratified as Law no. 1 of 2016 concerning Child Protection (Ismantoro Dwi Yuyono, 2015: 67-103).

### **Factors Hindering the Fulfillment of Women's Health Rights in Indonesia**

Barriers that impede women's health rights include:

a. Economic Factors

Poverty has an impact on the inability to get treatment, which then results in not protecting women's health rights, especially reproductive rights, especially here is poverty for women. In the economic field, women's ability to obtain employment and business opportunities is still low.

The unemployment rate for women is higher than for men. The amount of wages received by women is lower than that of men. With the same level of education, female workers only receive around 50 percent to 80 percent of the wages that men receive. In addition, many women work in marginal jobs as casual laborers, or family workers without getting paid or at low wages. They do not get legal protection and welfare. In addition to the low economic level, especially women's poverty as above , the lack of a state budget to provide services, especially women's health in the reproductive sector, also results in neglect of women's health rights.

b. Educational factor

The low level of knowledge or education experienced by women has implications for women's lack of knowledge in the information sector, as well as limited information about their rights, namely their reproductive health rights. Without adequate knowledge for women, women will not know how their rights are protected, how to enjoy sex freely without discrimination and coercion.

The high dropout rate, as well as the still high rate of discrimination and the low rate of university graduates among women and the still high rate of illiteracy among Indonesian women, must be reformed immediately. Without it, the important position in national development will not be felt by women. Education is the right of every human being, therefore all kinds of forms that impede the achievement of this right to education, both cultural factors (patriarchism) and others, must be immediately abolished.

The number of girls who do not continue their junior and secondary education is greater than that of boys, so if there is no effort to improve it, the government's efforts to reduce poverty will not be successful. The Indonesian government still needs to make education a priority if this country wants its development to be more successful (Hasbullah, 2017: 34).

### **Protection of Women and Children in the Perspective of Legal Philosophy**

The issue of justice is a problem that has existed since the days of Ancient Greece and Rome. Justice is considered as one of the cardinal virtues (Marzuki, 2016: 27). In fact, according to Aristotle, law is said to have the sole purpose of realizing justice (Machmudin, 2003: 23). The link between law and justice was also explained by John Rawls by stating that even though justice is based on law and is administrative-formal in nature, it is still important. Basically, this exposure provides a minimum guarantee that everyone in the same case must be treated equally (Ujan, 2001: 27)

The emergence of demands for the fulfillment and protection of women's rights is based on conditions of injustice experienced by women themselves. Therefore the issue of equal rights, as an effort to obtain the fulfillment and protection of women's rights cannot be separated from thoughts about justice itself. One of the most influential thoughts on the birth and development of women's rights is feminism. In simple terms, feminism can be interpreted as an understanding, study and social movement that aims to change the subordinate status of women in society that prioritizes the male perspective (Suwastini, 2013: 199). Feminism in its early stages occurred between the 1500-1700s with a focus on fighting patriarchal views regarding the subordinate position of women because they were seen as weaker, more emotional and irrational creatures (Jenainati & Groves, 2007: 9) .

In the development of legal thought, feminism also influenced the birth of new thoughts about the relationship between law and women's rights, one of which was the Feminist Legal Theory which emerged around the 1970s along with the development of the Critical Legal Studies movement in the United States. . Feminist Legal Theory which is usually also called feminist jurisprudence is a thought that seeks to make a breakthrough on the application of laws against women and discrimination that women get from the

law. Judging from its purpose, Feminist Legal Theory was born to fight for justice for oppressed women, and legal studies should not only apply the principle of certainty but especially the principle of justice (Setiawan, 2018: 127). It can be said that feminist legal theory is a legal philosophy based on gender equality in the political, economic and social fields.

In the end, the various thoughts related to feminism are efforts made to realize gender equality and ensure the principle of equality before the law, namely everyone's position is equal before the law regardless of gender, race, social status of a person, and so on. . Talking about law and equality before the law itself, there must be an assessment or measure of justice for everyone, including children. Someone who treats children arbitrarily must not have a philosophical view, or maybe they have a confusing philosophy , so that it has a negative output, especially regarding child protection (both girls and boys). Evaluation of something according to Muhammad Erwin should always be measured by its use to achieve its essential goals. As human beings who are aware and can use their minds, of course we don't just want to understand, but we want to understand in order to be able to act. From what we do from that understanding can be expected to achieve the goal of nature.

From there we can see that there is a relationship that is as close as possible (which influences and complements the most) between thoughts and will in our souls. Even philosophy in its development has also become an ideology for a nation and state. Philosophy is a *weltanschauung*, a way of life, a state philosophy. This ideology is the basic value in national beliefs, soul and personality of the nation, even as national dignity. As we understand that activity in philosophy is in the form of deep contemplation to get to the point. With the results of our reflections, we can experience a more conscious life as human beings. With this awareness we can know our strengths and weaknesses and their limits (Muhahamad Erwin, 2011: 21). Therefore, legal philosophy is needed as a basic foundation for studying law.

In simple terms, it can be said that legal philosophy is a branch of philosophy, namely the philosophy of behavior or ethics, which studies the nature of law. In other words, legal philosophy is a science that studies law philosophically. So, the object of legal philosophy is law, and this object is studied in depth to its core or basis, which is called nature (Darji Darmodiharjo and Shidarta, 2008: 11-12) , because law is a means to ensure that humans do not just live but also live in prosperity ( *eu zen* ) and be as sublime as possible, and it is such a law that can be considered true as the goal to be achieved by a good archer and understands eternal beauty and neglects everything, be it wealth or some kind that lacks virtue ( *rate* ) (Carl Joachim Friedrich, 2004: 22-23).

In this new era, the philosophy of law is mainly caused by the confrontation of several legal experts in their daily work to deal with social justice issues (Soetiksno, 2004: 7). Of course, this interest includes: a) the interest regarding the protection of peace and order, the protection of health and safety, the protection regarding the existence of security regarding agreements and income (security of transaction acquisitions ); b) security regarding social institutions which includes protection of household relations and protection of political and economic institutions that have long been recognized in legal

regulations to guarantee or protect the family as a social institution; c) the public interest regarding public decency pays attention to the social ethics of society ; d) social interest maintenance of social resources; e) *the social interest in general progress* (Soetiksno, 2008: 76-78). Surely this is all related to protecting the life of children from the time they are in the womb until they reach the age limit of adulthood or when parents feel ready to let go of their child as someone who is considered an adult.

## CONCLUSION

From explanation above, it can be concluded that the protection of women's human rights in Indonesia, especially the protection of women's health rights, is still not in a position of justice and optimal service. Although various legal political efforts have been made, from policies on ratification of international conventions, harmonization of national law to local policies. However, the reality shows that the level of quality of life of women in Indonesia is still in a bad position.

The implementation of child protection in Indonesia is still far from what was expected, there is still a lack of legal protection for children both as victims and as perpetrators of criminal acts. Policies that can be carried out by the government in providing protection for children will come with legal reform efforts in Indonesia, developing the concept of diversion and restorative justice in the implementation of the juvenile justice system in Indonesia, and law enforcement that creates substantive justice.

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