

REPOSITION OF CHILD PROTECTION THROUGH THE ENFORCEMENT OF HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS

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Abstract

The number of violations of children's rights in the form of exploitation and violence against children is increasing in Indonesia. The increase is due to the lack of understanding of children's rights from related parties. Repositioning children's rights is needed because children need a specific right and specific protection under a specific human rights framework, so that they do not lose power when establishing relationships with adults; where at this point, children are very vulnerable to treatment discriminatory. The repositioning of children's rights is carried out by making a protection and enforcement of human rights as guaranteed constitutional rights, which is based on the understanding that human rights are human rights *in toto* and not merely as an individual's legal rights in their capacity as legal subjects that are legally listed in the applicable law. The failure of the government to carry out this obligation is *violation by omission*.

Jumlah pelanggaran hak anak dalam bentuk eksploitasi dan kekerasan terhadap anak semakin meningkat di Indonesia. Peningkatan tersebut disebabkan kurangnya pemahaman tentang hak anak dari pihak terkait. Reposisi hak anak diperlukan karena anak membutuhkan hak khusus dan perlindungan khusus di bawah kerangka hak asasi manusia tertentu, sehingga mereka tidak kehilangan kekuatan saat menjalin hubungan dengan orang dewasa; dimana pada saat ini anak sangat rentan terhadap perlakuan diskriminatif. Reposisi hak anak dilakukan dengan menjadikan perlindungan dan penegakan hak asasi manusia

sebagai jaminan hak konstitusional, yang didasarkan pada pemahaman bahwa hak asasi manusia adalah hak asasi manusia in toto, dan bukan semata-mata sebagai hak hukum individu dalam kapasitasnya sebagai subjek hukum yang secara legal tercantum dalam hukum yang berlaku. Kegagalan pemerintah dalam menjalankan kewajiban ini merupakan pelanggaran karena kelalaian.

Keywords: Reposition, Children's Rights, Safeguards, Human Rights, Juvenile Justice, Constitutional Rights

Introduction

Cases of violence against children that occur in Indonesia and other parts of the world, resemble the phenomenon of the iceberg, when a case is revealed, then a series of violent incidents will follow, which apparently, the number keeps increasing. Based on UNICEF data, among 190 countries, there are 1 in 10 girls in the world experiencing sexual harassment; while, 6 out of 10 children who reach 1 billion experience physical violence aged 2-14 years.¹

In Indonesian context, the portrait of cases of violations of children's rights from year to year occurs fluctuatively. The Indonesian Child Protection Commission (KPAI) stated that there were 4,309 cases of complaints filed at KPAI, then in 2016 there were 4,622 cases. Then, in 2017, there were 4,579 cases, and in 2018, there were 4,885 cases.²

The report of "Global Report 2017: Ending Violence in Childhood" notes that 73.7 percent of Indonesian children aged 1 - 14 years old experience physical violence and psychological aggression at home as an effort to discipline (violent discipline). Meanwhile, according to data from the Witness and Victim Protection Agency (LPSK), there were 350 cases of sexual violence against children in 2019.³ From the record of violations of children's rights in 2018, the

¹ UNICEF, *New global data expose acute prevalence of violence against children*, press release, 4 Sept 2014, available on <https://www.unicef.org/mena/press-releases/new-global-data-on-violence-against-children>, accessed 10 Jul 2020.

² Davit Setyawan, "KPAI Sebut Pelanggaran Hak Anak Terus Meningkat", *KPAI* (10 Jan 2019), available on <https://www.kpai.go.id/berita/kpai-sebut-pelanggaran-hak-anak-terus-meningkat>, accessed 10 Jul 2020.

³ Vidyia Pinandhita, "2020 Kekerasan pada anak tak menurun", *Lokadata.id* (10 Jan 2020), available on <https://lokadata.id/artikel/2020-kekerasan-pada-anak-tak-menurun>, accessed 10 Jan 2020. See also Sharyn Graham Davies and Jazz Robson,

Commission found that the two cases that were at the top, namely the case of Children Facing Law (ABH) still ranked first, reaching 1,434 cases, then followed by cases related to family and alternative care reached 857 cases. Furthermore, cases of pornography and cyber reached 679 cases.⁴

Indonesia is a source, transit, and destination country for trafficking in persons against women and children, especially for the purpose of prostitution and exploitation of children. Today, the phenomenon of trafficking of people is increasingly diverse and modes. Lots of prostitution both in the brothels area and in places where prostitution is hidden like in cafes, massage parlors, beauty salons plus-plus, hotels and others began to mushroom, both in big cities and in rural areas. Various forms of exploitation of child labor, exacerbated by the inadequacies of State support, both in the formal and informal sectors, have removed the right of children to obtain education, welfare, and enjoy childhood to learn and play.⁵

Child exploitation is a discriminatory attitude or abuse of children and one of the most lucrative crimes in the world.⁶ This is usually done by a person or group of adults by forcing children to do something in the interests of economic, social, or political. Extortion of child labor is certainly done without regard to the rights of children to get protection in accordance with their physical, psychological and social status. In other words, the exploitation of children can also be interpreted as using children unethically for their own benefit, or the common interest.⁷

Some provisions concerning human rights regulated in various international conventions have generally been adopted by the Indonesian government within the 1945 Constitution of the Republic

“Juvenile (In) Justice: Children in Conflict with the Law in Indonesia”, *Asia-Pacific Journal on Human Rights and the Law*, vol. 17, no. 1 (2016), p. 119.

⁴ Davit Setyawan, “KPAI Sebut Pelanggaran Hak Anak...”, accessed 10 Jul 2020.

⁵ Neil Boothby and Lindsay Stark, “Data surveillance in child protection systems development: An Indonesian case study”, *Child abuse & neglect*, vol. 35, no. 12 (2011), p. 993.

⁶ Yvonne Rafferty, “Child Trafficking and Commercial Sexual Exploitation: A Review of Promising Prevention Policies and Programs”, *American Journal of Orthopsychiatry*, vol. 83, no. 4 (2013), p. 559.

⁷ Stark, Lindsay, Carolyn Bancroft, Sofyan Cholid, Amalia Sustikarini, and Adrianus Meliala, “A qualitative study of community-based child protection mechanisms in Aceh, Indonesia”, *Vulnerable children and youth studies*, vol. 7, no. 3 (2012), p. 228.

of Indonesia in Chapter X covering Article 28 A to Article 28J. In relation to the rights of children, it is expressly regulated in Article 28 A of the 1945 Constitution of the Republic of Indonesia which states that, “*everyone has the right to live and has the right to defend his life and life.*” This is more specifically stated in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia that, “*Every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination.*” By regulating human rights in an imperative Constitution, the state has an obligation to protect its citizens, so that when this obligation is not carried out, it means that the state has violated human rights.

It is further regulated through Article 59 of Law No. 23 of 2002 concerning the Protection of Children that:

“The Government and State Institutions have the obligation and responsibility to provide special protection to children in emergency situations, children in conflict with the law, children from minority and isolated groups, children who are economically exploited and/or sexual and trafficked children.”

Special protection for children’s rights is specifically regulated in Article 24 paragraph (1) of the ICCPR (International Covenant on Civil and Political Rights) which states that:⁸

“Every Child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

Article 10 paragraph (3) ICESCR (International Covenant on Economic, Social and Cultural Rights) also states that:⁹

“Special measurement of protection and assistant should be taken on behalf of all children and young persons without any

⁸ UN General Assembly, *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966, available <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, accessed 12 Jul 2020.

⁹ Article 10 paragraph (3) ICESCR (International Covenant on Economic, Social and Cultural Rights)

discrimination for reasons of parentage or others. Children and young persons should be protected from economic and social exploitation. Their employment in work is harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

As demonstrated by the Vienna Declaration adopted at the United Nations Conference on Human Rights in 1993, all human rights are “universal, undivided, interdependent, and interrelated.” Then, the state is essentially obliged to realize all human rights and cannot focus on just one category, while leaving others aside.

There are still many children who have to take the responsibilities beyond their limits, as a result of the reality of life faced, including social life, economic, and cultural values that are less supportive of children in fulfilling their basic rights, a problem for developing countries in general. The poverty faced by parents and surrounding neighbors conditions children to carry out roles that are truly beyond the abilities of children. The values of devotion and obedience to parents are embedded in such a way that children often have to work to earn extra income from their parents’ household.

In addition to welfare issues, one of the causes of exploitation and violence against children in Indonesia is the lack of understanding of parents that the child’s human rights that manifest in the form of children’s rights should not be lost or their implementation influenced by the socioeconomic status inherent in children.¹⁰ Every child during the care of parents, guardians, or any other party responsible for care, is entitled to protection from treatment. One of which is protection from exploitation, both economic and sexual, considering the child has an important social position and role as part of the community.

¹⁰ Wilujeng Fitriana Sari and Sri Sularti Dewanti Handayani. “Domestic Violence: Parent’s Perception about Child Abuse”, *Indonesian journal of early childhood education studies*, vol. 5, no. 2 (2016), p. 110. See also, Sophie Dewayani, *Stories of the intersection: Indonesian “street children” negotiating narratives at the intersection of society, childhood, and work*. PhD diss., University of Illinois at Urbana-Champaign, 2011.

Therefore, violations of their rights continuously occurs because of the lack of legal and social mechanisms.¹¹

Children are figures who are unable to stand on their own, and defend themselves when faced with parties who are stronger and dominant, both in terms of social and economic aspects. Children's rights should remain attached to a person's status in his capacity as a child. Ideally, every parent expects good things for their children. However, the perception of parents about the role and future of the child is clearly and strongly influenced by the reality of the problems and challenges faced daily.¹² Children are exploited and experienced violence due to their inability to deal with parties who are in a stronger position.¹³

The constitutional guarantee of human rights which basically proves commitment to a democratic life within the umbrella of the rule of law, has not yet become a fully guaranteed constitutional rights as stipulated in the 1945 Constitution. This is a very sad reality to see the limit of the legal rights where there are many protection Human rights are regulated in various laws and regulations.

This study uses a doctrinal legal approach, namely research on law, with the law conceptualized as the principle of justice in the Moral system according to the doctrine of Natural Law Flow.¹⁴ In this case, the deduction syllogism construction is used, where moral principles or postulates derived from the morality of society and philosophical thinkers that apply universally and are *self-evident* are positioned as the major premise, while cases of behavior that are questioned for normative values seated as the minor premise. Conclusion as the closing

¹¹ Aras Firdaus, "Legal Protection of Children as a Victim Exploitation", In *International Conference of ASEAN Perspective and Policy (ICAP)*, vol. 1, no. 1 (2018), p. 270-

¹² Sharon Bessell, "Indonesian children's views and experiences of work and poverty", *Social Policy and Society*, vol. 8, no. 4 (2009), p. 527. See also, Argyo Demartoto, "Need-based street children management in Surakarta City of Central Java Province of Indonesia", *Asian Social Science*, vol. 8, no. 11 (2012), pp. 107; Sandra L. Stacki and Supriya Baily (Eds.), *Educating adolescent girls around the globe: Challenges and opportunities* (New York: Routledge, 2015).

¹³ Wismayanti, Yanuar Farida, Patrick O'Leary, Clare Tilbury, and Yenny Tjoe, "Child sexual abuse in Indonesia: A systematic review of literature, law and policy", *Child abuse & neglect*, vol. 95 (2019), p. 104034.

¹⁴ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode dan Dinamika Masalabnya* (Jakarta: ELSAM, 2002), hlm148

premise states the legal norms or moral norms for the case of the behavior in question.¹⁵

Children's Rights: Between Legal Rights and Natural Rights

Children's rights are part of human rights., Human rights are universal so that they belong to every human being including children. According to Soetandyo Wignjosoebroto,¹⁶ human rights are fundamental rights that are universally recognized,¹⁷ as rights inherent in humans because of their human nature.¹⁸

Recognition of this statement is marked by international law governing human rights. The International Human Rights Law Instrument recognizes that children, like adults, have human rights. Therefore, children must also be guaranteed to enjoy their human rights, especially rights related to their status as children who need a care and protection in a certain age.

According to Jack Donnelly, "*human Rights are, literally, the rights that one has simply because one is a human being.*"¹⁹ This statement means that besides its validity is maintained in the existence of humanity, there is also a serious obligation to be understood and accounted for.

Human rights are a set of principles that arise from values which later become the rules governing human behavior in relations with fellow human beings. Whatever is interpreted or formulated with human rights, the phenomenon remains a manifestation of values which is then concentered into the rules of living together. This is in accordance

¹⁵ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode...*, p. 150.

¹⁶ Soetandyo Wignjosoebroto, "Hak – Hak Asasi Manusia: Konsep Dasar dan Pengertiannya yang Klasik pada Masa – Masa Awal Perkembangannya", in *Toleransi dan Keragaman: Visi untuk Abad ke-21 Kumpulan Tulisan tentang Hak Asasi Manusia* (Surabaya: Pusat Studi Hak Asasi Manusia Universitas Surabaya dan The Asia Foundation, 2002), p. 4.

¹⁷ The rights are said *universal* because these rights are expressed as part of the humanity of every human being, regardless of skin color, gender, age, cultural background, religion or belief.

¹⁸ The rights are said to be *inherent* because these rights are owned by every human being solely because of their existence as a human being and are not due to a gift from any power organization, so that these rights cannot be taken away or revoked.

¹⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), p. 10.

with the statement of Rhona K.M. Smith who stated that, “*Indeed, human rights represents the modern interpretation (and an expansion of) traditional concept of the rule of law.*”²⁰

In The Cambridge Dictionary of Philosophy, it is emphasized that rights constitute:

“Rights, advantages positions conferred on some process by law, morals, rules, or other norms. There is no agreement on the sense in which rights are advantages. Will theories hold that rights favor the will of the possessor over the conflicting will some other party; interest theories maintain that rights serve to protect or promote the interest of the high holder.”²¹

This statement confirms that law, morals, regulations or other norms can give someone rights. In other words, an advantageous position for the rights holders can be tolerated through the rules that apply in society, but in its application there are differences due to different stressing points.

Based on the Will Theory, what is held is that the rights prioritize the wishes of the right owner from various desires that are different from other parties.²² Meanwhile, according to the Interest Theory, it emphasizes more that rights play a role to protect or develop the interests of the right owner. Both of these great theories were born as a product of historical thinking of human civilization, and reflect different treatments as manifestations of interactions between humans.²³

According to Satjipto Rahardjo, an interest is a target of rights, not only because it is protected by law, but also because of recognition.²⁴ This recognition is important as a *raison d'être* joint attitude that something inherent to its owner is understood and realized can produce regularities. In connection with this, Audi revealed that besides legal

²⁰ Rhona K. M. Smith, *TextBook on International Human Rights* (Oxford: Oxford University Press, 2005), p. 5.

²¹ Majda El Muhtaj, *Dimensi-Dimensi HAM, Mengurai Hak Ekonomi, Sosial, dan Budaya* (Medan: Penerbit Rajawali Pers, 2008).

²² Paul Graham, “The will theory of rights: A defence”, *Law and Philosophy*, vol. 15, no. 3 (1996), p. 257.

²³ Robert Audi, “I—Robert Audi: Moral Perception and Moral Knowledge”, *Aristotelian Society Supplementary Volume*, vol. 84, no. 1 (2010), pp. 79–97, Oxford: Oxford University Press.

²⁴ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Alumni, 1986), p. 94.

rights, there were also natural rights, as stated that, “*Just as positive law posited by human law makers confers legal rights, so the natural law confers natural rights.*”²⁵

Legal rights are the rights of a person in the capacity as a legal subject that is legally listed in applicable law; whereas, natural rights are human rights *in toto*. Referring to the natural rights, human rights are rights owned by all humans at all times and places based on their destiny as humans. In other words, human rights are rights that belong to all human beings at all times and in all places by virtue of being born as human beings.²⁶ In this case, legal rights can be withdrawn or transferred in accordance with the provisions of the law maker or referred to as *advantages positions under the law of a society*, while natural rights are inherent and enduring to their owners. This natural right cannot be abandoned, inalienable rights, whether by the king or the State or referred to as *the most fundamental rights*.²⁷

Thus, legal rights emphasize the formal legal side, while natural rights emphasize the side of naturally human being and constitute rights inseparable from the dimension of humanity.²⁸ Although these two types of rights are different, they do not mean that they are separate. Natural rights require formal legality to be able to apply concretely in life, and vice versa, legal rights must have a fundamental framework in the form of philosophical values in the natural frame of human beings that are strung together in natural rights.²⁹ Therefore, human rights do not lose their moral strength simply because they are not recognized by the authorities. It is a formal recognition which guarantee the integrity of human beings.

Based on the explanation above, so that natural rights can be upheld. It requires a legal rule that contains obligations and sanctions in

²⁵ Robert Audi, “I—Robert Audi: Moral Perception...”, p. 90.

²⁶ Todung Mulya Lubis, ‘In search of human rights: legal-political dilemmas of Indonesia's new order, 1966–1990’, *Juris Scientiae* doctoral thesis, University of California at Berkeley, 1990, pp. 14-25

²⁷ William K. Frankena, “Natural and inalienable rights”, *The Philosophical Review*, vol. 64, no. 2 (1955), p. 212.

²⁸ Robert Audi, “I—Robert Audi: Moral Perception...”, p. 11.

²⁹ David Boucher, *The limits of ethics in international relations: natural law, natural rights, and human rights in transition*, Oxford: Oxford University Press, 2009. See also, Jeremy A. Rabkin, *Law without nations?: why constitutional government requires sovereign states* (New Jersey: Princeton University Press, 2005).

the event of a violation of the obligation to respect and enforce these natural rights. The existence of formal provisions in reality does not necessarily make the enforcement of natural rights easy. This is due to the fact that natural rights are fundamental and universally applicable. The development of ownership of those rights is in fact experiencing differences, which are caused by the element of status, as stated by Audi that:

“...thus, rights are also classified by status. Civil rights are those one possesses as a citizen; human rights are possessed by virtue of being human. Presumably women’s rights, children’s rights, parent’s rights, and the rights of blacks as such analogous.”³⁰

According to G.W. Paton, there are 4 (four) elements that absolutely must be fulfilled in legal rights, that is;³¹ First, The Holder of the Rights; Second, the act of forbearance to which the right relates; third, the res concerned (the object of the right); Fourth, The person bound by the duty. Every rights, therefore, is a relationship between two or more legal persons, and only legal persons can be found by duties or be the holders of legal rights. Rights and duties are correlatives that is we cannot have a right without corresponding duty are a duty without a corresponding right.

With reference to the explanation above, according to the theory of natural rights, children’s rights is part of human rights inherent to it because its nature. Its natural antecedent, as human beings, cannot be deprived or revoked. The breadth of the rights of citizens in their existence as creatures who are committed and dignified as human beings is often still questioned, referring to the concept of universal humanism or non-particular national. In connection with this question, the UN world conference on human rights,³² Vienna, June 1993 stated that:

“Although recognized by local social and cultural diversity, all must continue to work towards the universality of human rights and their efforts - enforcement efforts.”

³⁰ Robert Audi, “I—Robert Audi: Moral Perception...”, pp. 142-145.

³¹ George Whitecross Paton, *A-Text Book of Jurisprudence* (Oxford: Clarendon Press, 1951), p. 218.

³² Patricia Feeny, “The UN world conference on human rights, Vienna, June 1993”, *Development in Practice*, vol. 3, no. 3 (1993), p. 218.

Thus, human rights remain universal in nature, while diversity in terms of understanding should not interfere with their normative essence. Differences in particular traditions of each ethnicity and nation must not preclude the recognition that in principle human rights are natural and universal.

In the Indonesian context, the Indonesian Government initially wanted to prioritize particularistic understanding, namely that the concept of human rights is a concept that is essentially relative and culturally and politically bound. However, in its development, there is a willingness to recognize the universalism concept of human rights. Indonesia has long been no longer a traditional society, so it is not the conception of human rights that dismantles traditional social structures in Indonesia, but the process of modernization itself that unravels it.

According to Muladi, the attitude of the Indonesian people was clear, that what people are following is a particularistic-relative perspective which views human rights issues as a universal problems as well as the national problems of each nation. The validity of international documents must be harmonized and balanced, and must obtain support and be embedded in the nation's culture.³³

In its implementation, in accordance with the principles of universalism, children must be recognized as bearers of rights; however, in practice and in accordance with cultural norms in developing countries, children must still be devoted to their parents by helping people parents work. Even if necessary, they have to leave formal education. Likewise, in the perspective of religion, there is not one major religion in the world that denies human rights to live, work and control property for the sake of its safety in this world and the hereafter. However, it cannot be denied that claiming the truth from religious teachings justifies the application of the principle of cultural relativism which discriminates between roles and rights among population groups. As a result, anyone who is included in the minority group or the weak will be marginalized and discriminated against, which will end in the increasingly lengthy practice of discrimination, even criminalization in various parts of the world.³⁴

³³ Bagir Manan (Ed.), 1996, *Kedaulatan Rakyat, Hak Asasi Manusia dan Negara Hukum* (Jakarta: Gaya Media Pratama, 1996), p. 115.

³⁴ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode...*, p. 145.

In the international context, there are four kinds of recognition by the international community of the rights possessed by children, as stipulated in the Convention on the Rights of the Child, namely: the survival rights, protection rights, development rights; and, participation rights.³⁵

The inclusion of these rights explicitly shows that children have certain life characteristics. This is what makes it a logical basis for protection of their interests. The world community agreed that in order to succeed these steps, all policies must always lead to the best interests of the child. Hence, the best interest of the child shall be the primary consideration.³⁶

The Convention on the Rights of the Child is a source of law that provides material on the making of laws and harmonization of laws about children. The rule of law contained in the Convention on the Rights of the Child is a legal material that provides the contents of the legislation concerning children. Therefore, the Convention on the Rights of the Child becomes an integral part of the law on children.

Repositioning Children's Rights

Normatively, the idea of human rights can be traced to all religious traditions and moral systems, while historically, the philosophical roots that have the most influence on the idea of human rights are the theory of Natural Rights (natural rights theory). According to the theory of Natural Rights, all individuals are endowed with a nature of rights inherent in themselves, and therefore, it cannot be revoked by the state. In this case, the natural rights of all individuals are not born from the political recognition given by the state to them.³⁷

This natural rights theory is closely related to the social contract theory which refers to a social and political agreement that the

³⁵ UNICEF, *The State of the World's Children-Special Edition: Celebrating 20 Years on the Convention on the Rights of the Child: Executive Summary* (New York: UNICEF, 2009). See also, for its discussion, Susan P. Limber and Mølfrid Grude Flekkoy, "The UN Convention on the Rights of the Child: Its relevance for social scientists", *Social Policy Report*, vol. 9, no. 2 (1995), pp. 1-16; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 1999).

³⁶ Article 3 paragraph (2) of the Convention on the Rights of the Child (OHCHR).

³⁷ Harun Pudjiarto, *Hak Asasi Manusia Kajian Filosofis Dan Implementasinya Dalam Hukum Pidana Di Indonesia*, Yogyakarta: Universitas Atmajaya. Yogyakarta, 1999. 1.

protection of individual rights that cannot be revoked is left to the state. If the state authority ignores the social contract by violating the natural rights of the individual, the people in that country will be free to depose the ruler and replace it with a government that is willing to respect those rights.³⁸

The guarantee given by the State for these rights cannot be interpreted as the rights that were born after the State ratified an international convention on human rights, or issued any regulations that guarantee the rights of its citizens, but rather, the State's responsibility in guaranteeing the rights has been owned by each of its citizens by nature and shows the State's respect for these rights. The reason is that the most basic rights are naturally possessed by every human beings together with their birth as an independent individual. Human rights must be interpreted that those rights are found in human nature and for the sake of humanity.³⁹

The Universal Declaration of Human Rights (UDHR) has indicated that children are *entitled to special care and assistance*. This was motivated by a condition that since the designation of the Universal Declaration, the position of vulnerable children, who want special protection by law, has increasingly called attention. Although this text is not legally binding on States, the Declaration indicates that, "*children, because they are not physically and mentally mature, need special security and care, including appropriate legal protection.*"

The repositioning of children's rights is very urgent to be carried out by considering the upholding of children's rights as human beings and as children is still very alarming, where from time to time, children are still exploited in the forms of child laborers, street children, exploitation sexual abuse, kidnapping up to child trafficking and experiencing violence. Children's rights should be understood as the embodiment of justice, which is a condition where every person can carry out their rights and obligations in a balanced manner that develops a whole person who is virtuous. This means that when talking about

³⁸ See for instance, McAfee, Thomas B. "The Bill of Rights, Social Contract Theory, and the Rights Retained by the People", *S. Ill. ULJ*, vol. 16 (1991), p. 267; Richard Tuck, *Natural rights theories: their origin and development*, Cambridge: Cambridge University Press, 1979.

³⁹ Martha C. Nussbaum, "Capabilities and Human Rights", *Fordham Law Review*, vol. 66, no. 2 (1997), p. 273; Amartya Sen, "Human rights and capabilities", *Journal of human development*, vol. 6, no. 2 (2005), p. 151.

children's rights, it is not allowed to mention the obligations of these children. Regarding the implementation of its obligations, this depends on the situation and condition of mental, physical, social. Therefore, the demands on him must be linked to his ability at a certain age.⁴⁰ Thus, although there are still people who for the sake of their well-being affirm their local traditions and national ideology, but for the sake of the rights of children in this increasingly unified world, one must be able to accept the existence of *the third culture of humankind* as a new idiom.

As a state of law, Indonesia is based on the belief that state power must be exercised on the basis of good and fair law. There are two elements in understanding the rule of law. Firstly, it is between governance and governing is not based on power, but based on an objective norm that also binds the ruling party. Secondly, the objective norms meet the requirements are not only formally things, but they can also be defended in the face of legal ideas.⁴¹ Thus, the law must be the basis for all actions of the state, and the law itself must be good and fair, that is, in accordance with what is expected of the community from the law, and fair because the basic purpose of all laws is justice.

In the perspective of the state as an institution that serves society, people and society are seen as the first object. Based on this interpretation, the purpose of the state is the implementation of public welfare, namely welfare that supports the achievement of the welfare of community members. Thus, the state is burdened with social responsibility.⁴²

Welfare can be formulated as the whole of the social prerequisites that enable or make it easier for humans to develop all of its values.⁴³ A person's welfare measure can be formulated both negatively and positively. Negatively speaking, man is called prosperous if being free from feelings of hunger, from poverty, from anxiety, from feelings of fear, from oppression, if he does not feel treated unfairly. Positively,

⁴⁰ Arif Gosita, *Masalah Perlindungan Anak* (Jakarta: Akademika Pressindo, 1985).

⁴¹ Franz Magnis-Suseno, *Etika Politik: Prinsip Moral Dasar Kenegaraan Modern* (Jakarta: Kompas Gramedia, 2016), p. 376.

⁴² Alan Dawley, *Struggles for justice: Social responsibility and the liberal state* (Cambridge: Harvard University Press, 1991).

⁴³ Cok Vrooman, *Rules of Relief, Institutions of Social Security, and Their Impact* (The Hague: The Netherlands Institute of Social Research, 2009); Francisco Javier Moreno-Fuentes and Pau Mari-Klose (Eds.), *The Mediterranean Welfare Regime and the Economic Crisis* (New York: Routledge, 2016).

man can be called prosperous if feeling safe, secure, and can live according to his own ideals and values. If he feels free to realize his individual and social life in accordance with his aspirations and with the possibilities that are available to him. In relation to state social responsibility, one of the most fundamental obligations of the state is to seek social justice.

Social justice can be defined as justice whose implementation depends on the structure of economic, political, social, economic, cultural and ideological processes in society.⁴⁴ These structures are structures of power in the main dimensions of community life. Striving for social justice thus means changing as necessary or dismantling economic, political, social, cultural and ideological structures that prevent a group of people from obtaining what is their right.⁴⁵

Human behavior in law will tend to *fall outside the chart* that has been provided, as stated by Van Doorn, that humans as legal agents have a tendency to escape from the laws that apply to them. This is caused by the operation of factors outside the law, such as personality, social origins, level of education, economic and political interests, and outlook on life.⁴⁶ Therefore, seeking change with coercive measures is not wise, because it will cause prejudice for human rights violations.

Referring to Article 27 of the UDHR (Universal Declaration of Human Rights) and Article 15 paragraph 1a of the International Covenant on Economic, Social and Cultural Rights which ensures that everyone has the right to freely take part in the cultural life of his own community. In doing so, changes in recognition of the particularity and reality of culture must still be given. For this reason, law should not only look within itself and rely on *rules and logic*, because it will hamper productive processes in society, but also *social reasonableness*, as stated by Karl Renner that, “*the development of the law gradually works out what is socially reasonable.*”⁴⁷

⁴⁴ John Rawls, *A theory of justice* (Cambridge: Harvard University Press, 1971). See also, Ayelet Banai, Miriam Ronzoni, and Christian Schemmel (Eds.), *Social justice, global dynamics: Theoretical and empirical perspectives* (New York: Routledge, 2011).

⁴⁵ Franz Magnis-Suseno, *Etika Politik: Prinsip Moral...*, p. 427.

⁴⁶ Satjipto Rahardjo, *Hukum dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006), p. 139.

⁴⁷ Karl Renner, *The Institutions of Private Law: and their social functions* (New Jersey: Transaction Publishers, 2009).

To meet the needs of *social reasonableness*, the regulation by law is not only done through articles, but also through the principles of law which will serve to guard and provide life force to the law. The principle of law is a way to incorporate messages and ethical and moral dimensions in law. It has the function to raise the quality of law, so that law is not only a rational work, but also a work that is loaded with moral guidelines for social life. On the other hand, the presence of legal principles is a sign of the need for meaningful understanding of law in the context of ethics and morality.⁴⁸

Referring to the Maastricht Guidelines, it is emphasized that there are State Obligations relating to Human Rights which are divided into two types, namely the obligation of conduct and the obligation to result.⁴⁹ In this case, the state has a duty-bearer to respect, protect and fulfill human rights and individuals who live in its jurisdiction as rights holders.

The state is an organization in which a region can legally impose its authority on all other groups of power and set the goals of that common life. In this case, the state has the duty to control and regulate the social power, which is not contradict each other, so as not to become a dangerous antagonism; and organizing and integrating human activities and groups towards the achievement of the goals of society as a whole. The state determines how the activities of social associations are adjusted to one another and directed towards national goals. This control is carried out based on the legal system and with the mediation of the government and all its equipment.⁵⁰

⁴⁸ Karl Renner, *The Institutions of Private Law...*, p. 20.; Satjipto Rahardjo, *Hukum dalam Jagat Ketertiban...*, p. 140.

⁴⁹ *The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.* Part II Number 7 Maastricht Guidelines. For further discussion, see Victor Dankwa, Cees Flinterman, and Scott Leckie, "Commentary to the Maastricht Guidelines on violations of economic, social and cultural rights", *Human Rights Quarterly*, vol. 20, no. 3 (1998), p. 705; Wouter Vandenhoe, "Beyond Territoriality: The Maastricht Principles on extra-territorial obligations in the area of economic, social and cultural rights", *Netherlands Quarterly of Human Rights*, vol. 29, no. 4 (2011), p. 429; Cees Flinterman, "Appendix II: The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *Netherlands Quarterly of Human Rights*, vol. 15, no. 2 (1997), p. 244.

⁵⁰ Wolfgang Streeck and Philippe C. Schmitter, "Community, market, state-and associations? The prospective contribution of interest governance to social order", *European sociological review*, vol. 1, no. 2 (1985), p. 119.

In connection with these tasks, the state has special characteristics which are manifestations of its sovereignty and which are only found in the state and not in other associations or organizations, namely the nature of coercion, which is attached to the state so that the laws and regulations are obeyed and thus curbing in society is achieved, and the emergence of anarchy is prevented. This coercive nature means that the state has the power to use physical violence legally; the nature of monopoly, where the State is the only holder to set the common goals of society; where laws and regulations apply to everyone without exception.⁵¹

The constitutional guarantee of human rights cannot be ignored, because it is part of neglecting law enforcement. The importance of constitutional guarantees for human rights proves a commitment to a democratic life that is within the legal umbrella element. National law will lose its nature as a protector of the rights of citizens to obtain their freedom when the constitutional principle is removed. Therefore, the Constitution should not only be understood as a statutory provision with positive declarative norms, but must also be understood *ism* as a result expression of a doctrine. The doctrinal essence of constitutionalism includes the doctrine of natural and human rights which must be maintained, as well as the *rule of law* doctrine and become an element of sine qua non for the existence of national law which is not only populist but also humanist.⁵²

Conclusion

Special protection including appropriate legal protection of children's rights must be provided in view of physical and mental immaturity, both before and after birth under a specific human rights framework. This should be done because in the whole community, children usually lose power when establishing relationships with adults; and at this point, children are very vulnerable to discriminatory treatment.

In this case, repositioning of children's rights is absolutely necessary so that children can enjoy their rights since they were in the

⁵¹ Brian Z. Tamanaha, "The rule of law and legal pluralism in development", *Hague Journal on the Rule of Law*, vol. 3, no. 1 (2011), p. 1.

⁵² Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode...*, p. 587.

womb, born, and when they live their lives as children, without discrimination. In accordance with the teachings of natural rights, these rights are inherently intrinsic because they belong to every human being solely because of their existence as humans, and not a gift from any power organization. Therefore, all policies must always lead to the best interests of the child. A state is a party that has a duty and obligation to preserve, protect, and fulfill the human rights and individuals who live in its jurisdiction as rights holders. Therefore, if a State fails to carry out this obligation, the State has been deemed to have committed *violation by omission*.

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