

## Legal Protection for Child Victims of Sexual Violence Based on Positive Law in Indonesia

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**Abstract.** *The research objectives in this study: 1).to find out how legal protection for child victims of sexual violence is based on positive law in Indonesia today; 2) to find out what are the weaknesses of legal protection for child victims of sexual violence based on positive law in Indonesia today. This study uses a normative legal approach, with a descriptive analytical research method. The data used are primary and secondary data that will be analyzed qualitatively. The research problems are analyzed using the theory of legal objectives and the theory of punishment. The results of the study conclude that: 1) Legal protection for child victims of sexual violence based on positive law in Indonesia today that the context of protection for victims of crime, the existence of preventive and repressive efforts carried out, both by society and the government (through law enforcement officers), such as providing protection/supervision from various threats that can endanger the lives of victims, providing adequate medical and legal assistance, a fair examination and trial process for perpetrators of crimes, is basically one manifestation of human rights protection and a balancing instrument; 2). The weakness of legal protection for child victims of sexual violence based on positive law in Indonesia is that law enforcement officers (police, prosecutors, judges) still treat child victims of sexual violence as objects, not subjects whose legal rights must be heard and respected. They mostly still make child victims of sexual violence a second victim (revictimization) of the cases they experience. Victims are still often blamed and not given the protection they need. The authorities (police, judges, prosecutors) do not have a perspective on child victims of sexual violence.*

**Keywords:** *Legal Protection, Sexual Violence, Children*

### 1. Introduction

The Law on Sexual Violence Crimes regulates restitution for victims of sexual violence crimes. Restitution is the payment of compensation imposed on the perpetrator or a third party based on a legally binding court ruling or decision, for material and/or immaterial losses suffered by the victim or their heirs.

Referring to Article 30 Paragraph (2) of the Law on Sexual Violence Crimes, restitution can be given in 4 forms, namely: compensation for loss of wealth or income; compensation for losses caused by suffering directly related to the crime of sexual violence; reimbursement of medical and/or psychological care costs; and/or compensation for other losses suffered by the victim

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as a result of the crime of sexual violence.

Comparison of legal protection for child victims of sexual violence in various countries, including Japan, Korea, and Yugoslavia. Japan, where moral crimes are regulated in Chapter XXII Book II entitled "Crimes of Indecency, Rape and Bigamy" (Articles 174 to 184). This chapter includes regulations on: 1) Public indecency; 2) Distribution of obscene literature etc.; 3) Indecency through compulsion; 4) Rape; 5) Acts in sub (c) and sub (d) above against people who are unconscious/unable to resist (constructive compulsory indecency and rape); 6) Encouraging/persuading people to engage in illicit sexual intercourse ("inducement to illicit intercourse"); 7) Committing "bigamy". The interesting thing in Japan is that the crime of rape and indecent/lewd acts committed are complaint crimes (Article 180 of the Japanese Criminal Code). And rape in Japan is limited only to sexual intercourse/relationship with violence or intimidation (threats to scare) against women: a) Whose age is not less than 13 (thirteen) years or under 13 (thirteen) years (see Article 177); or b) Those who lose consciousness or are unable to resist (loss of consciousness or inability to resist); see Article 178 of the Japanese Criminal Code. So Japan is very enthusiastic about paying attention to legal protection of sexual violence against children.

The Republic of Korea in the Crime of Morality is regulated in Chapter 22 entitled Crimes Against Morals (Articles 241 to Article 245). In addition, there is Chapter 32 entitled Crimes Concerning Chastity (Crimes related to chastity), Articles 297 to Article 306, which include: 1) Rape (Article 297) with a minimum sentence of 3 (thirteen) years in prison; 2) Indecent act by compulsion (Article 298); 3) Constructive rape and constructive indecent act by means of compulsion, namely rape and indecent acts by means of coercion against women who are unconscious or unable to resist (unconscious or inability to resist); Article 299; 4) Death or injury resulting from rape (Article 301) with a minimum sentence of 5 (five) years in prison; 5) Conducting sexual intercourse or indecent act by deception or 6) Threats of violence against a minor or feeble-minded person (Article 302); 7) Sexual intercourse by abuse of authority, etc. (Article 303); 8) Sexual intercourse under pretext of marriage (Article 304), namely persuading a good woman to have sexual intercourse under the pretext of marriage or by other deceptive means; 9) "Sexual intercourse or an indecent act with a minor" (Article 305), namely against a girl under the age of 13 (thirteen) years. According to Article 305, the perpetrator can be punished under Article "Rape" (197), Article 298 or Article 301. Paying attention to the contents of Chapter 32 above, it can be seen that all of them are related to acts of sexual intercourse and indecent acts. However, it is not mentioned and not included as a moral offense in Chapter 22 (Crimes Against Morals). Similar to Japan, in Korea, rape is a complaint offense (Article 306). We know that Korea also prioritizes protection for child victims of sexual violence in Articles 302 and 305.

Yugoslavia is also a country that prioritizes legal protection for child victims of sexual violence. This is contained in the Moral Offense seen in Chapter XVI with the title "Criminal Offences Against the Dignity of the Person and Morals". Article 181 states) sexual intercourse with a child under 14 (fourteen) years old, with the provision that if it is done against a helpless child (a helpless minor) with violence or threats (as in "rape"), is subject to a minimum sentence of 3 (three) years of severe imprisonment.

Another case occurred in the jurisdiction of the Semarang District Attorney's Office. Based on the Letter of Charge No. Reg. Case: PDM- 22 / M.3.42 / Eku.2 / 08/2023. States that the

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Defendant KUSDI alias BERO has been proven legally and convincingly guilty of committing the crime of "committing violence or threats of violence to force a child to have intercourse with him or another person carried out by parents" violating Article 81 Paragraph (3) of the Republic of Indonesia Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to the Republic of Indonesia Law Number 23 of 2002 concerning Child Protection into Law as the First Charge of the Public Prosecutor;

1. Sentencing the Defendant KUSDI alias BERO to 16 (sixteen) years in prison respectively with an order that the defendant remain detained in the detention center and a fine of Rp. 1,000,000,000 (one billion rupiah) subsidiary to 6 (six) months in prison;
2. Imposing an additional penalty in the form of restitution of Rp. 19,136,000,- (Nineteen million one hundred thirty six thousand rupiah) subsidiary to 6 (six) months imprisonment;

However, in reality, the defendant did not want to pay restitution, which is an additional criminal penalty, even though the child victim of sexual violence was greatly harmed.

Based on the description above, the author is interested in conducting research entitled "Legal Protection for Child Victims of Sexual Violence Based on Positive Law in Indonesia".

This study aims to determine how legal protection for child victims of sexual violence is based on positive law in Indonesia today and what are the weaknesses of legal protection for child victims of sexual violence based on positive law in Indonesia today.

## **2. Research Methods**

This study uses a normative legal approach. The type of research used in completing this thesis is a qualitative descriptive research method. The data used are primary and secondary data which will be analyzed qualitatively. Research problems are analyzed using the theory of legal objectives and the theory of punishment.

## **3. Results and Discussion**

### **3.1. Legal Protection for Child Victims of Sexual Violence Based on Positive Law in Indonesia Today**

Legal protection for children or child protection in a legal manner can include legal protection for children in the field of private law, and in the field of public law. Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection in Article 1 number 2 provides the following definition of 'child protection': "Child protection is all activities to guarantee and protect children and 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. In relation to child protection, it is the responsibility and obligation of parents, the general public and institutions authorized by the courts and the central and regional governments, these provisions are regulated in Articles 20 to 26 of Law No. 23 of 2002.

Children need to be protected from various forms of crime that can affect their physical, psychological and spiritual development. Just like adults, children with all their biological and psychological limitations have the same rights in every aspect of life, be it social, cultural, economic, political and legal aspects. But in reality there are still many children whose rights are violated, and become victims of various forms of violence, exploitation, mistreatment,

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discrimination and so on. Violence often occurs against children, which can be damaging, dangerous and frightening. Children who are victims of violence suffer losses, not only material, but also immaterial such as emotional and psychological shocks, which can affect the child's future life. Forms of child violence can be acts of violence, both physical, psychological and sexual.

Based on data, records, and empirical evidence, it is revealed that women and children are groups that are often victims of sexual violence. The rampant sexual violence, most of which is experienced by children and women, has made society anxious, especially parents who are worried that their children will become victims of sexual violence. Sexual violence against children is very worrying, but not all cases of sexual violence against children can be handled and resolved optimally, especially for victims of sexual violence, so far there has been no special handling compared to the perpetrators. Many factors cause violence against women and children, including the patriarchal cultural factor that still occurs in society, which views women as inferior to men. In addition, there are still many misperceptions about violence against women and children, which consider violence to be commonplace and the right of the perpetrator.

Legal protection for children who are victims of sexual violence is the main foundation in the legal state system, because every citizen has the right to be protected and the state has an obligation to provide such protection. These principles are reflected in various laws, including in Article 76D of Law Number 35 of 2014 which regulates the amendment to Law Number 23 of 2002 concerning Child Protection. The article expressly states the prohibition of acts of sexual violence against children, affirming the commitment to protect children from all forms of exploitation and abuse.<sup>1</sup>

When discussing the eradication of sexual violence against children through the legal system, a comprehensive approach is needed. One of them is by imposing additional penalties on the perpetrators of the crime. Legally, additional penalties have been regulated in Article 10 of the Criminal Code (KUHP) in the form of revocation of certain rights, confiscation of certain items and announcement of the judge's decision. However, the provisions in the Criminal Code are still universal. So as a form of the government's seriousness in overcoming the epidemic of sexual violence against children and providing aggravating efforts for perpetrators of the crime, additional penalties are specifically regulated for perpetrators of sexual violence against children as a strategic tactical step to eradicate the crime of sexual violence against children. Additional penalties for perpetrators of sexual violence against children are regulated in Article 81 Paragraph (6) and Article 81 Paragraph (7) of Law Number 17 of 2016 concerning Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2003 concerning Child Protection. Article 81 Paragraph (6) reads: "in addition to being subject to criminal penalties as referred to in paragraph (1), paragraph (3), paragraph (4) and paragraph (5), the perpetrator may be subject to additional penalties in the form of announcing the perpetrator's identity."

Child protection is a form of justice in a society, both in direct implementation and in the laws and regulations of a country. According to Arif Gosita, legal certainty contained in a regulation

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<sup>1</sup>Mulyana W. Kusuma, 1981, Various Problems in the Scope of Criminology, Bandung: Alumni, p.109

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is very important to prevent abuses that have negative impacts on children. Child protection is a very selective protection. This is because child protection should not be done excessively or vice versa. Children in their growth and development have various innovations that must be considered, so that when child protection is done excessively, it will kill the child's initiative and creativity.<sup>2</sup>

Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection has regulated criminal sanctions for perpetrators of sexual violence against children, but the imposition of these criminal penalties has not provided a deterrent effect and has not been able to comprehensively prevent the occurrence of sexual violence against children. To overcome the phenomenon of sexual violence against children, provide a deterrent effect on perpetrators, and prevent the occurrence of sexual violence against children, the Government needs to add principal penalties in the form of the death penalty and life imprisonment, as well as additional penalties in the form of announcing the perpetrator's identity. In addition, it is necessary to add provisions regarding actions in the form of chemical castration, installation of electronic detection devices, and rehabilitation.<sup>3</sup>

The preamble to the UN Declaration implies that humanity is obliged to provide the best for children. All parties agree that the role of the child is the hope for the future. The provisions of the Law on legal protection are contained in Article 34 of the 1945 Constitution, this provision is emphasized by the issuance of Law No. 4 of 1979 concerning Child Welfare and Law No. 23 of 2002 concerning Child Protection which has been updated by Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection and most recently the Government issued Government in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. The concept of child protection can be divided into two parts. First, child protection which is of a legal nature includes protection in the fields of public law and civil law. Second, non-legal child protection, namely protection in the social, health and education sectors.

Given the importance of safeguarding and protecting children, on November 20, 1989, the United Nations (UN) General Assembly approved the Convention on the Rights of the Child. The considerations of the convention contain the main ideas, recognition of the inherent dignity and equal and inalienable rights of members of the human family. This is the foundation of freedom, justice and peace throughout the world. Forms of legal protection for child victims of sexual violence implemented by law enforcement officers and related agencies, laws and regulations also regulate special protection for child victims of sexual crimes, which are regulated in the provisions of Article 69A of Law Number 35 of 2014 concerning Child Protection

Furthermore, in articles 289 to 296 of the Criminal Code, sexual violence is explained. However, the Criminal Code does not use the term sexual violence but uses the term indecent acts. The term indecent acts is explained as acts that prohibit morality or other vile acts and all in the realm of lust. For example, groping body parts. Article 289 of the Criminal Code

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<sup>2</sup>Maidin Gultom, 2008, Legal Protection for Children in the Indonesian Juvenile Criminal Justice System Bandung: PT Rifka Aditama, p. 33

<sup>3</sup>Didi Sukardi, Legal Protection for Child Victims of Sexual Crimes in the Perspective of Positive and Islamic Law, MK: Journal of Islamic Law Studies 116 Vol.2, No.1, June 2017 E ISSN: 2502-6593



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states the following: "Anyone who with violence or the threat of violence forces someone to commit or allow indecent acts to be committed, is threatened for committing acts that attack the honor of morality, with a maximum imprisonment of 9 years."<sup>4</sup>, while for cases of sexual violence with the same sex is explained in Article 292 of the Criminal Code as follows: "Adults who commit indecent acts with other people of the same sex, who are known or should be suspected to be minors, are threatened with a maximum imprisonment of 5 (five) years." So the form of legal protection provided by the Criminal Code for children against sexual violence is criminal responsibility for the fulfillment of *maslahah* and against the perpetrator, not responsibility for the victim's losses/suffering directly and concretely, but more focused on personal/individual responsibility.<sup>5</sup>

Child protection law as written or unwritten law that guarantees that children can truly exercise their rights and obligations. In 1979, Law Number 4 of 1979 concerning Child Welfare was issued, to implement and achieve the protection of children as referred to in Law Number 23 of 2002 concerning Child Protection, institutional cooperation is required between the government and society, therefore in order to implement the provisions of Article 75 paragraph (4) of Law Number 23 of 2002 concerning Child Protection, it is deemed necessary to form an Indonesian Child Protection Commission.

The crime of sexual violence against children is one form of violence against children which is an example of the vulnerability of children's position, especially to the sexual interests of men. The sexual image of girls who have been placed as sexual objects of men, turns out to have far-reaching implications for the child's life, so that she is forced to always face violence, coercion and physical and psychological torture. Attention and protection of the interests of victims of sexual violence, both through the criminal justice process and through certain social care facilities, are an absolute part that needs to be considered in criminal law policies and social policies, both by executive, legislative and judicial institutions and by existing social institutions. All components of the criminal justice system, including courts and correctional institutions, are responsible for carrying out the task of combating crime or controlling the occurrence of crime. However, considering their respective duties and authorities, the task of preventing crime is specifically more related to the Police subsystem. The task of resolving crimes that occur is closely related to the tasks of two components of the system, namely the Police and Prosecutors (at the pre-judicial stage) and the Courts (at the judicial stage). The relationship between the Police and Prosecutors themselves is mainly related to the task of investigating a crime.

Society needs to be more observant and sensitive to the environment. It needs to be realized that crime can be committed by anyone and against anyone. Everyone can be a target of crime, both adults and minors.

The perpetrators of the crime feel that children can be one of the targets to channel their sexual desires. This is influenced by the opinion that children are not capable enough to understand that the act is a crime or children do not have the courage to reject the perpetrator's wishes. Cases of sexual violence against children cause the most difficulties in resolving them both at the investigation stage, prosecution, and at the verdict stage. In

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<sup>4</sup>Article 289 of the Criminal Code

<sup>5</sup>Barda Nawawi In Anastasia Hana Sitompul, Legal Study on Sexual Violence Against Children in Indonesia, *Lex Crimen* Vol. Iv/No. Iv/No. 1/Jan-Mar/2015, p. 48

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addition to the difficulties in the above limitations, there are also difficulties in proving, for example rape or indecent acts which are generally carried out without the presence of other people.<sup>6</sup>

Sexual violence committed against minors will certainly have an impact on the psychology and other developments of the child. The psychological impact on children will give rise to prolonged trauma which can then give rise to unhealthy attitudes, such as inferiority, excessive fear, disturbed mental development, and ultimately result in mental retardation. This situation could possibly become a bad memory for the child victim of the molestation. The active role of law enforcement officers in overcoming crimes against morality is very much needed.

Child protection should not be done excessively and should pay attention to its impact on the environment and the child itself, because children are an inseparable part of human survival and the sustainability of a nation and state so that they can be responsible in the future. Every child needs to get the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. For this reason, protection efforts need to be made to realize child welfare by providing guarantees for the fulfillment of their rights without discriminatory treatment. The concept of child protection covers a broad scope in the sense that child protection is not only about protecting all rights and interests that can guarantee their growth and development properly, both spiritually, physically and socially, and child protection also concerns the younger generation.<sup>7</sup>

The implementation of child protection and welfare requires support from institutions and laws and regulations that can guarantee the implementation of child protection and welfare. Everyone is prohibited from placing, allowing, doing, ordering or participating in sexual exploitation of children, in accordance with Article 76C (Chapter XI A. Prohibitions) of Law No. 35 of 2014 concerning Child Protection. The state upholds human rights including children's human rights which are marked by the guarantee of protection and fulfillment of Children's Rights in the 1945 Constitution of the Republic of Indonesia and several provisions of laws and regulations, both national and international. This guarantee is strengthened through the ratification of the international convention on the Rights of the Child, namely the ratification of the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child. The State, Government, Regional Government, Community, Family and Parents are obliged to provide protection and guarantee the fulfillment of children's human rights according to their duties and responsibilities. Protection of children that has been carried out so far has not provided a guarantee for children to receive treatment and opportunities that are in accordance with their needs in various areas of life, so that in implementing efforts to protect children's rights by the Government, it must be based on the principles of human rights, namely respect, fulfillment, and protection of Children's Rights.

### **3.2. Weakness in Legal Protection for Child Victims of Sexual Violence Based on Positive Law in Indonesia**

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<sup>6</sup>Leden Marpaung, *Crimes Against Morality and the Problem of Prevention*, Jakarta, Sinar Grafika, 1996, p. 81

<sup>7</sup>Nursariani Simatupang & Faisal, *Child Protection Law*, Pustaka Prima, Medan, 2018, p.24

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Sexual violence has existed since ancient times, and is one of the major crimes that has an impact on the destruction of the social order of the Indonesian nation. Sexual violence is an act that deviates from the cultural and social values of humanity. Therefore, religious leaders, intellectuals, and academics, state that sexual violence must be eradicated, because this crime damages the humanitarian side of women and children. Moral offenses and sexual harassment are two forms of violations of morality that are not only a national legal problem of a country but are already a legal problem of all countries in the world or are global problems.<sup>8</sup>

The perpetrators of crimes against morality and sexual violence are not dominated by those from the middle or lower economic classes, let alone those with little or no education at all, but rather the perpetrators have penetrated all social strata from the lowest to the highest. Various sensitive issues affect the lives of women, including crimes of sexual violence and sexual harassment. Currently, there is a lot of sexual harassment and exploitation, which affects adult women, and also children, which is carried out by people known to the victim, such as: fathers, uncles, teachers, neighbors. Sexual crimes can occur in families, offices, companies, or in certain places that provide opportunities for people of the opposite sex to communicate with each other.

Handling of sexual crimes against children in the Indonesian criminal law system still tends to highlight crimes from the perspective of the perpetrator. Of course this is less balanced if the perspective of the child as a victim is ignored. After all, the elements that cause crime will not occur if there is no victim.<sup>9</sup>Victims and perpetrators are two elements of a crime. Therefore, protection for children as victims of sexual violence is very important. Children as victims are less noticed, who so far have only been represented by the state as recipients of suffering, who will retaliate against the perpetrators implemented with criminal sanctions that have been regulated by law. Punishing perpetrators of sexual crimes does not necessarily provide a sense of security for children as victims.

Many victims have not received justice and the return of victims to society due to trauma. There needs to be a law that can provide justice for victims for what the perpetrators of the crime have done. So it is not enough to apply the revenge system needed to resolve the case. Abdul Hakim Garuda Nusantara said: "The problem of legal protection for children is one side of the approach to protecting Indonesian children. The problem cannot be approached legally, but requires a broader approach, namely economic, social, cultural".<sup>10</sup>

Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) states that "Indonesia is a country of law". As a country of law, the state guarantees the legal rights of its citizens by providing legal protection. As quoted by Satjipto Raharjo, Fitzgerald stated: the beginning of the emergence of the theory of legal protection originated from the theory of natural law or the natural law school. The school pioneered by Plato, Aristotle (Plato's student), and Zeno (founder of the Stoic school), states that law originates from God who is universal and eternal, and that law and morals cannot be separated. The adherents of this school view that law and

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<sup>8</sup>Romli Atmasasmita, *Selected Chapters on Criminal Law and Criminology*, Mandar Maju, Bandung, 1995, p. 103.

<sup>9</sup>Arif Gosita, *Problems of Crime Victims*, First Edition, Akademika Presindo, Jakarta, 1983, p. 87

<sup>10</sup>Abdul Hakim Garuda, "Child Protection Process", *Seminar on Protection of Children's Rights*, Jakarta, p.22



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morals are reflections and rules internally and externally of human life which are manifested through law and morals.<sup>11</sup>

The concept of legal protection for the people is based on the concepts of recognition and protection of human rights and the concepts of *rechtsstaat* and the rule of law. The concept of recognition of protection of human rights provides the content, while *rechtsstaat* and the rule of law create the means, thus the recognition and protection of human rights will flourish in the container of "*rechtsstaat*" and "the rule of law".<sup>12</sup>

The definition of legal protection according to Barda Nawawi Arief can be seen from two meanings, namely:

- a. "legal protection to avoid becoming a victim of a crime" (meaning protection of human rights or a person's legal interests);
- b. "protection to obtain legal guarantees for the suffering/loss of people who are victims of criminal acts", (so it is identical to "victim support"). The form of support can be in the form of restoring a good name (rehabilitation), restoring inner balance (including through utilization), providing compensation (restitution, compensation, social welfare guarantees/benefits), and so on.<sup>13</sup>

The 1985 UN Congress in Milan on The Prevention of Crime and the Moment of Offenders, stated: victims' rights should be seen as an integral part of the entire criminal justice system,<sup>14</sup>This means that between human philosophy, humans always seek protection from the imbalance they encounter, both in terms of their rights and through rules so that a harmonious life is achieved for life. Criminal law, according to Isran, is one effort to balance these things.<sup>15</sup>

Article 1 point 6 of Law Number 31 of 2014 concerning Protection of Witnesses and Victims, states that "Protection is all efforts to fulfill rights and provide assistance to provide a sense of security to Witnesses and/or Victims which must be implemented by the Witness and Victim Protection Agency (hereinafter abbreviated as LPSK) or other institutions in accordance with the provisions of this Law". Legal protection for the Indonesian people is an implementation of the principle of recognition and protection of human dignity and honor based on Pancasila and the principle of the Rule of Law based on Pancasila. Therefore, the State must provide legal protection to child victims of sexual crimes through various laws and regulations. Legal protection for children is one way to protect the nation's future, because children are part of society who have physical and mental limitations. Therefore, children need special protection and care.<sup>16</sup>

There are several articles that can be charged against forms of sexual violence against minors, be it rape or molestation. In the Child Protection Law, the articles charged are usually Article 76 D in conjunction with Article 81 paragraph (1), Article 76 D in conjunction with Article 81

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<sup>11</sup>Satjipto Raharjo, *Legal Science*, PT. Citra Aditya Bakti, Bandung, 2000, p.53

<sup>12</sup>Ibid

<sup>13</sup>Barda Nawawi Arief, *Problems of Law Enforcement and Criminal Law Policy in Combating Crime*, Kencana, Jakarta, 2007, p.61

<sup>14</sup>Barda Nawawi Arief, *Several Aspects of Criminal Law Enforcement and Development Policy*, PT Citra Aditya Bakti, Bandung, 1998, p.53.

<sup>15</sup>Koespamono Isran, *Victims of Banking Crimes*, Second Edition, Bayumedia Publishing, Malang, 1995, p.81.

<sup>16</sup>Rika Saraswati. *Child Protection Law in Indonesia*. Citra Aditya Bakti. Bandung, 2009. Page 23

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(2), and Article 76 E in conjunction with Article 82 (1). The existence of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection is a legal instrument that can protect children in various criminal acts, especially sexual violence. This law states that sexual violence against children is a criminal act so that the perpetrator can be brought to the police with the assistance of the relevant party. What is meant by a Child according to Article 1 Number 1 of the Law is: a person who is not yet 18 (eighteen) years old, including a child who is still in the womb. Children as victims of sexual crimes are also mentioned in Law Number 23 of 2004 concerning the Elimination of Domestic Violence. Domestic violence is any act against a person, especially women, that results in physical, sexual, psychological misery or suffering, and/or neglect of the household including threats to commit acts, coercion, or unlawful deprivation of liberty within the scope of the household. Article 5 of the Law on the Elimination of Domestic Violence states that, "everyone is prohibited from committing domestic violence against people within the scope of their household". It is possible that the victims of exploitation are children.

Legal aid for victims of crime is very necessary, especially for child victims of sexual crimes. Because a child who is dealing with law enforcement such as investigators, prosecutors, or judges will likely be afraid to express everything they have experienced as a victim. Legal aid for victims of crime must be provided, whether requested or not. This is important to do because the level of legal awareness of most victims who suffer violence is still low. The attitude of allowing victims of crime not to receive proper legal aid can result in the condition of victims of crime getting worse.<sup>17</sup>

The Child Protection Law states that not only children as perpetrators of criminal acts are entitled to legal aid, but also children who are victims. Law Number 48 of 2009 concerning Judicial Power emphasizes that everyone involved in a case has the right to legal aid and for those who cannot afford it, the costs are borne by the state.

In Law Number 18 of 2003 concerning Advocates, it is emphasized that advocates are required to provide free legal aid to justice seekers who cannot afford it. Advocates may not refuse to provide legal aid if someone needs it, including children as victims of sexual violence or molestation who are financially unable, and it is even the obligation of legal counsel to accompany them whether asked or not.

Unlike victims whose interests have been represented to the prosecutor, so that in practice victims are rarely accompanied by legal counsel. However, specifically for child victims of crime, they have the right to receive legal assistance, even though their interests have been represented by the prosecutor. It is very rare for child victims of sexual crimes to be accompanied by legal counsel, but all victims during the examination process still receive assistance and the judge leading the trial always asks, both the public prosecutor and the victim, even the judge often postpones the trial if the victim's companion is not present.

Unclear and unclear regulations will open up opportunities for law enforcers to interpret according to their own train of thought, which can open up loopholes for misinterpretation that disrupt the implementation of fair law. Moreover, if the legal rules do not yet exist, law enforcers will look for other legal bases that they think are more appropriate to apply in the

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<sup>17</sup>Dikdik M. Arief Mansur & Elisatris Gultom, *The Urgency of Protecting Crime Victims: Between Norms and Reality*, Raja Grafindo Persada, Jakarta, 2007, p. 47

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incident. In efforts to protect children by law, harmony or coherence is needed between various regulations of different degrees. Incompatibility between legal rules can affect law enforcement. The paradigm that has been built is that the function of the Child Protection Law is still limited to the realm of taking action against perpetrators of sexual violence against children, not in preventive or prevention efforts. The principle is that a legal instrument must function as an engineering tool. Therefore, the Child Protection Law must focus on legal protection efforts, not only limited to taking action in the practical realm but also have a concept that is able to formulate problems fundamentally, how the specific and practical roles of all parties in legal regulations must take action, starting from the smallest unit of the family, the scope of education, Non-Governmental Organizations (NGOs), Regional and Central Governments.

In Article 15 of the Child Protection Law, protection against sexual crimes is included in the last point at point f, meaning that the paradigm of legal protection for children as victims of sexual violence has not become a top priority in legal protection.

The Child Protection Law has formulated quite severe criminal sanctions, both in the form of deprivation of liberty and fines, and cumulative threats to perpetrators of criminal acts, and these criminal threats are accompanied by minimum sentences. In the Child Protection Law, Article 59 paragraph (1) of the article is still abstract and open to multiple interpretations that: "The Government, Regional Governments, and other state institutions are obliged and responsible for providing special protection to children". The term other state institutions, which then cannot be interpreted freely and are not specific, refers to one of the state agencies or institutions that are delegated the authority to be obliged and responsible for providing special protection to children, including in the case of child exploitation as victims of sexual crimes. The Child Protection Law must clearly and firmly mention the Indonesian Child Protection Commission as a representative of the state institution that is functionally authorized and responsible for protecting children.

Implementing regulations that are lower in status or specific in nature such as the Regulation of the Minister of Social Affairs Number 9 of 2015 concerning Guidelines for Social Rehabilitation of Children in Conflict with the Law by Social Welfare Institutions. The Ministerial Regulation also does not specifically mention institutions that are explicitly and functionally given special authority to handle child protection issues. The Child Protection Law does not yet regulate legal sanctions for parties who are negligent or intentionally do not provide legal protection to child victims of crime.

Ideally, a legal obligation must be accompanied by legal accountability until the legal consequences are received. Technical obstacles when conducting investigations against children as victims of sexual crimes, in the process of collecting evidence, because in cases of sexual violence in general there are no witnesses other than the victim themselves. The existence of psychological burdens, fear, shame, trauma and threats from the perpetrator, so that the victim is not frank in providing information. Victim witnesses sometimes also do not want to be present in the examination process, because the witness's awareness to provide information to investigators is still low and they do not want to be involved in legal problems.

Legal Culture basically includes the values underlying applicable laws, and these values are abstract conceptions of what is considered good, worthy of being obeyed and what is considered bad to be avoided. These cultural values can be described in the rules and views

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in attitudes and actions as a series of final values to create social renewal (law as a tool of social engineering), maintain and defend social control in order to create peace in social interactions. Legal protection for child victims of sexual crimes, repressively by imposing sanctions on perpetrators of sexual crimes. One of the things that has been discussed is castration for perpetrators of sexual crimes. The issue of castration punishment has not been accommodated in legislation, because there are still pros and cons. Based on the investigation, the non-agreement on castration punishment actually came from several figures known as observers of Children and the National Commission on Women. The National Commission on Violence Against Women regrets that castration and the death penalty are still included as forms of punishment for perpetrators of sexual violence, especially when Indonesia has ratified the Convention Against Torture through Law Number 5 of 1998 which prohibits all forms of cruel, inhumane and/or degrading punishment. The death penalty and castration are included in this form of punishment.

External obstacles consist of several types, the first is the difference in understanding. This has been anticipated since the beginning of designing the Program. Introducing the concept of a law enforcement system with a justice perspective, was realized from the beginning that it would not be as easy as turning the palm of the hand. The solution taken was to take a participatory approach in all programs by involving all interested parties. Second, to develop a strategy to align perceptions and assessments of programs that have been carried out by law enforcement institutions. Third, to introduce the concept of a just law enforcement system by exploring the experiences of the parties involved in the Program in handling violence against children. In the process, the experiences were then discussed together. The introduction of the concept of the Integrated Criminal Justice System - Handling Cases of Violence Against Children was slowly carried out and discussed together until a common perception and understanding was achieved. Another obstacle is the bureaucratic obstacle related to not being a priority among policy makers. This is also related to the dynamics of the legal field in the social, economic, and political contexts. The statements from law enforcement officers that the author interviewed were indeed very different from the facts that occurred in the field. However, it is not wise if a stigma or assumption arises that the performance of law enforcement officers in handling cases of sexual violence against children is as written above because not all law enforcement officers act like that. It is just that it is expected that law enforcement officers who handle cases of sexual violence against children are law enforcement officers who have a child perspective so that they can carry out their duties properly in accordance with applicable legal regulations so that they can ensnare the perpetrators according to their actions. Thus law enforcement will be achieved, victims will feel protected and can answer the sense of justice in society.

Handling of sexual violence cases is also too long because it must follow legal procedures that make victims reluctant to face the law, the process of which is very tiring. Therefore, there needs to be legal and policy reform, especially a just law enforcement system. This change/reform is expected to be able to bring an understanding of sensitivity for law enforcement officers to be responsive to the interests of children who are victims of sexual violence that they experience. Talking about just law enforcement reform, it concerns how the existing law enforcement system is able to issue policies that guarantee protection of interests and human rights. Protection in the law enforcement process, starting from the reporting process, examination, investigation, until the trial ends. Based on the three

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elements in the legal system, parameters are compiled which are prerequisites for improvements and efforts that can be made. From changes to the law enforcement system, it is hoped that law enforcement officers can handle cases of violence against children from a perspective of justice so that harmony is created between law enforcement officers and victims.

#### **4. Conclusion**

Legal protection for child victims of sexual violence based on positive law in Indonesia currently that the context of protection for victims of crime, preventive and repressive efforts are carried out, both by society and the government (through law enforcement officers), such as providing protection/supervision from various threats that can endanger the victim's life, providing adequate medical and legal assistance, a fair examination and trial process for perpetrators of crimes, is basically one manifestation of human rights protection and a balancing instrument. The weakness of legal protection for child victims of sexual violence based on positive law in Indonesia is that law enforcement officers (police, prosecutors, judges) sometimes still treat child victims of sexual violence as objects, not subjects whose legal rights must be heard and respected. They mostly still make child victims of sexual violence a second victim (revictimization) of the case they experienced. Victims are still often blamed and not given the protection they need. Officers (police, judges, prosecutors) must have a perspective on child victims of sexual violence.

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