



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

Constitutional Law and the State's Responsibility in Protecting Women and Children: Constitutional Perspective, Human Rights, and Protection Obligations

Billy Ariza

Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, Indonesia, E-mail: billyariza.std@unissula.ac.id

Abstract. *The protection of women and children is one of the main benchmarks of a modern rule of law. From a constitutional law perspective, the state is not only obliged to establish norms but also to ensure the implementation of protection through effective policies, institutions, and redress mechanisms. This paper discusses how the constitution, the principles of the rule of law, and human rights obligations shape the state's responsibility to prevent violence, discrimination, and neglect against women and children. International frameworks such as CEDAW and the Convention on the Rights of the Child affirm the state's obligation to respect, protect, and fulfill the rights of women and children, including through legislative, administrative, and judicial measures. Using a juridical-normative approach, this paper emphasizes that the protection of women and children is not merely a social policy but a constitutional mandate inherent in the principles of the rule of law and substantive justice.*

Keywords: *Constitutional Law; Children; Human Rights; State Law; State Responsibility Women.*

1. Introduction

Women and children consistently rank among the most vulnerable groups to various forms of violence, discrimination, and social exclusion within global and national societal structures. This vulnerability is not a natural phenomenon, but rather the result of social construction, unequal power relations, and long-entrenched patriarchal norms.¹ Violence experienced by

¹Raewyn Connell, *Gender and Power: Society, the Person and Sexual Politics* (Stanford: Stanford University Press, 1987), p. 92–96.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

women and children is often multidimensional, ranging from physical, psychological, sexual violence, to economic neglect and exploitation.²This condition shows that the inequality of gender relations and the helplessness of children are the main factors that perpetuate their inferior position in social life.³

Within the framework of a state based on the rule of law (*rechtsstaat*), the issue of women's and children's vulnerability can no longer be viewed simply as a communal social problem or a purely domestic matter. This vulnerability demands a binding normative-constitutional response, where the state intervenes through measured, systematic, and accountable interventions.⁴A true state of law places respect for human rights as the main benchmark for the legitimacy of its power.⁵Therefore, failure to protect women and children from discriminatory and violent practices is essentially a deviation from the basic principles of the state which are based on law.

Modern constitutions generally place the protection of human dignity as the highest foundation in the hierarchy of national legal values.⁶This constitutional guarantee requires the state to be present in real terms to ensure that the rights to life, security, freedom from torture and degrading treatment are effectively implemented.⁷In Indonesia, this mandate is explicitly stated in Article 28A to Article 28I of the 1945 Constitution of the Republic of Indonesia. These constitutional provisions demand a transformation from mere rhetoric of legal protection to the manifestation of substantive enforcement of rights for women and children.

However, there is a wide gap between *Das Sollen* (constitutional norms) and *Das Sein* (empirical reality) on the ground. Despite the development of national legal instruments, the incidence of violence against women and children continues to show a worrying trend.⁸The weak reach of law enforcement institutions, social stigma against victims, and limited access to

²National Commission on Violence Against Women, 2023 Annual Report Fact Sheet (CATAHU): Eliminating Violence Against Women in Public and Private Spaces (Jakarta: National Commission on Violence Against Women, 2023), pp. 12–15.

³Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011), p. 31–34.

⁴Jimly Asshiddiqie, *The Idea of a Modern Legal State* (Jakarta: Sinar Grafika, 2011), pp. 48–52.

⁵AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1982), p. 183.

⁶Theodor Meron, *Human Rights and International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), p. 110.

⁷The 1945 Constitution of the Republic of Indonesia, Article 28G paragraph (1) and Article 28I paragraph (4).

⁸Ministry of Women's Empowerment and Child Protection (KPPPA), *PPA Symphony Report 2023* (Jakarta: KPPPA, 2023), pp. 5–8.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

justice exacerbate existing vulnerabilities.⁹This gap indicates that the presence of a law does not automatically guarantee effective legal protection without being balanced by a gender-responsive and child-friendly justice system.

In the context of international law, the state's responsibility (state obligation) for protecting the human rights of women and children is tripartite, namely the obligation to respect, protect, and fulfill.¹⁰The obligation to respect requires states to refrain from actions that violate rights; the obligation to protect requires states to prevent violations by third parties (non-state actors); while the obligation to fulfill requires states to take the legislative, administrative, and judicial steps necessary to fully realize these rights.¹¹This tripartite framework serves as a universal standard for measuring the effectiveness of a country's compliance.

This international obligation is reinforced through the ratification of key human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹²CEDAW emphasizes that discrimination against women must be eliminated in all its forms, both in the public and private spheres, and mandates the implementation of affirmative action to accelerate substantive equality.¹³Through CEDAW, states are burdened with the responsibility to change social and cultural patterns of behavior that are based on ideas of the inferiority or superiority of one sex or another.

Meanwhile, child protection has gained a strong normative footing through the Convention on the Rights of the Child (CRC).¹⁴This Convention introduces the main principle of "the best interests of the child" as the primary consideration in all policies, judicial decisions and administrative actions relating to children.¹⁵CRC views children not merely as objects of

⁹Mauro Cappelletti and Bryant Garth, *Access to Justice: A World Survey*, Vol. 1 (Aphenandenrijt: Sijthoff and Noordhoff, 1978), p. 6–10.

¹⁰United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23 (1990), par. 1–5.

¹¹Fredman, Sandra, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), p. 67–71.

¹²Ratified through United Nations General Assembly Resolution 34/180 (1979) and ratified by Indonesia through Law Number 7 of 1984.

¹³CEDAW Committee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), par. 8.

¹⁴Ratified through United Nations General Assembly Resolution 44/25 (1989) and ratified by Indonesia through Presidential Decree Number 36 of 1990.

¹⁵UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, UN Doc. CRC/C/GC/14 (2013), par. 4.

Constitutional Law and the State's...
(Billy Ariza)



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

protection, but as independent legal subjects who have civil, political, economic, social and cultural rights that must be protected holistically from the time they grow and develop.

Referring to the CEDAW and CRC instruments, limiting state responsibility to merely creating a legislative response is fundamentally flawed. The creation of laws is only the first step in a broader set of state obligations.¹⁶ Comprehensive state responsibility also includes effective prevention efforts, fair and non-discriminatory law enforcement, holistic victim recovery (restitution, compensation, and rehabilitation), and a commitment to dismantling patriarchal and discriminatory social structures.¹⁷

In practice, structural and cultural barriers often limit the effectiveness of state intervention. Deep-rooted patriarchal culture triggers secondary victimization for victims when confronted with the criminal justice system.¹⁸ Victims of sexual violence, for example, often blame themselves (victim blaming) due to gender stereotypes held by society and law enforcement officials. Therefore, the state's obligation to restructure cultural perspectives is an absolute requirement for legal products with a protective perspective to work optimally.

Based on these normative and empirical dynamics, this research/study is crucial for in-depth analysis of the extent to which the conceptualization of state responsibility has been implemented within the national legal framework. This paper aims to unravel the challenges of legal and policy reconstruction so that state responses are not merely reactive but rather transform into anticipatory, transformative, and substantively just legal protection for women and children.

2. Research Methods

This study employs a normative legal research method to examine the conceptual framework of state responsibility and constitutional guarantees in protecting women and children from violence, discrimination, and social exclusion.¹⁹ The normative juridical approach is chosen to analyze the coherence between constitutional values, statutory regulations, and international human rights norms.

¹⁶Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London: Routledge, 2005), p. 102–105.

¹⁷UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 (2005).

¹⁸Rebecca Campbell, *Emotionally Involved: The Impact of Researching Rape* (New York: Routledge, 2002), p. 45–48.

¹⁹Peter Mahmud Marzuki, *Legal Research* (Jakarta: Kencana Prenada Media Group, 2017), pp. 35–40.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

2.1. Research Approaches

To deliver a comprehensive analysis, this research utilizes four primary approaches:

1. **Statutory Approach:** Examining relevant legal frameworks, including the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), Law No. 7/1984 (CEDAW ratification), Law no. 23/2004 (PKDRT), Law no. 35/2014 (Child Protection), and Law No. 12/2022 (TPKS).²⁰
2. **Conceptual Approach:** Analyzing core concepts such as constitutionalism, state responsibility (tripartite obligations: to respect, protect, fulfill), substantive equality, and the best interests of the child.
3. **Analytical Approach:** Evaluating the structural gaps between formal legal norms (law in books) and practical enforcement (law in action) using legal system theory.²¹

3. Results and Discussion

3.1. Multidimensional Dimensions of State Responsibility within the Framework of Constitutional Law and Human Rights

In the doctrine of Constitutional Law and International Human Rights Law, state responsibility is no longer conceptualized passively merely to limit power (negative rights/negative duties), but rather demands an active role for the state (positive duties) in realizing substantive protection.²²

The state's responsibility to protect women and children from violence, discrimination and social exclusion includes 4 (four) interrelated structural dimensions:

3.1.1. Normative Duty

The state is obliged to establish and harmonize a national legal framework that is gender-sensitive and child-friendly. Normative responsibility extends beyond labeling norms, but also requires the codification of criminal and civil laws that explicitly prohibit all forms of violence—

²⁰Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Bayumedia Publishing, 2006), pp. 300–305.

²¹Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review* (Jakarta: Rajawali Pers, 2015), pp. 13–15.

²²Fredman, Sandra, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), p. 112–115.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

physical, psychological, sexual, economic, and even cyber gender-based violence.²³ Constitutional legal norms must guarantee the principle of non-discrimination and integrate the concept of substantive equality as mandated by Article 2 of CEDAW, so that laws and regulations do not create indirect discrimination against women and children.²⁴

3.1.2. Institutional Responsibility (Institutional Duty)

Constitutional guarantees will become a naked norm without the support of a state institutional architecture that is capable and sensitive to vulnerable groups.²⁵ Institutional responsibility requires the state to: Establish and strengthen law enforcement agencies that have special victim-oriented units (such as the Women and Children Protection Unit in the police). Provide independent protection institutions (such as the National Commission on Violence Against Women and the Indonesian Child Protection Commission). Build integrated service infrastructure, including Safehouses and juvenile justice mechanisms that prioritize restorative justice.²⁶

3.1.3. Preventive Duty

Based on the principle of due diligence standards in international law, a state is considered responsible for human rights violations committed by non-state actors if the state fails to take adequate preventive measures.²⁷ This preventive responsibility requires the state to undertake structural interventions through: Public education and educational curricula that erode patriarchal culture and gender bias. Strict monitoring of areas vulnerable to exploitation and human trafficking. Provision of data-driven policies and social risk analysis to intercept potential violence before it occurs.²⁸

²³UN Women, Handbook for Legislation on Violence Against Women (New York: UN Women, 2012), p. 24–28.

²⁴Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention, UN Doc. CEDAW/C/GC/28 (2010), par. 9–13.

²⁵Jimly Asshiddiqie, Introduction to Constitutional Law (Jakarta: Rajawali Pers, 2015), pp. 320–324.

²⁶Barda Nawawi Arief, Problems of Law Enforcement and Criminal Law Policy in Crime Prevention (Jakarta: Kencana, 2010), p. 105.

²⁷Rebecca J. Cook, Human Rights of Women: National and International Perspectives (Philadelphia: University of Pennsylvania Press, 1994), p. 145–148.

²⁸Office of the High Commissioner for Human Rights (OHCHR), Women's Rights are Human Rights (New York & Geneva: United Nations, 2014), p. 62–67.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

3.1.4. Remedial Duty

Remedial responsibility is the state's obligation to provide effective and comprehensive remedies for victims.²⁹ This recovery framework should not stop at imposing corporal punishment on the perpetrator, but should be oriented towards restoring the victim's condition through: Restitution: Compensation paid by the perpetrator. Compensation: Fiscal assistance from the state if the perpetrator is unable to pay. Rehabilitation: Ongoing medical, psychological, and psychosocial services. Guarantees of non-repetition: Institutional reforms to prevent similar crimes from happening again.³⁰

3.2 Constitutional Anchoring and Harmonization of International Instruments (CEDAW & CRC)

The protection of women and children has a very strong legal basis in Indonesian constitutional law through constitutional anchoring in the 1945 Constitution of the Republic of Indonesia. The Constitution places the protection of human dignity as a core value in the Indonesian Rechtsstaat.

This principle is firmly internalized in several constitutional provisions:

- a. Article 28B paragraph (2): Guarantees the rights of every child to survival, growth and development as well as the right to protection from violence and discrimination.
- b. Article 28G paragraph (1): Guarantees the right of every person to protection of themselves, their family, their honor, their dignity and a sense of security from the threat of fear.
- c. Article 28I paragraph (2): Guarantees the right to be free from discriminatory treatment on any basis.
- d. Article 28I paragraph (4): Affirms that the protection, advancement, enforcement and fulfillment of human rights is the responsibility of the state, especially the government.

²⁹UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, UN Doc. A/RES/60/147 (2005), Annex.

³⁰Theo van Boven, Victims' Rights to a Remedy and Reparation: The Work of the United Nations International Human Rights Norms (Dordrecht: Martinus Nijhoff Publishers, 2010), p. 88.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

In operationalizing these constitutional guarantees, Indonesian Constitutional Law adopts an integrative approach by ratifying the main international legal instruments, namely CEDAW (through Law No. 7 of 1984) and CRC (through Presidential Decree No. 36 of 1990).³¹

This harmonization between constitutional norms and international instruments creates a constitutional obligation for lawmakers (the House of Representatives and the President) to always use gender perspectives and the best interests of children as limitations and guidelines in creating organic legal products.³²

3.3 Implementation Gap (Law in Books vs. Law in Action) and Structural-Cultural Barriers

Although Indonesia has a relatively advanced normative legal regime-such as Law No. 23 of 2004 concerning Domestic Violence, Law No. 35 of 2014 concerning Child Protection, and Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence (TPKS)-there is a very real gap between the law on the books and the law in action.³³

This gap is caused by three main layers of obstacles in the legal system (legal system theory):³⁴

3.3.1. Legal Substance Obstacles

Inconsistencies between laws and regulations continue to be found. For example, there is a conflict between the minimum age for marriage in the Marriage Law (post-revision of Law No. 16 of 2019) and the practice of marriage dispensations, which are still relatively easily granted by religious courts.³⁵ In addition, derivative regulations or implementing regulations of key laws (such as Presidential Regulations and Government Regulations of the TPKS Law) often experience delays in ratification, which paralyzes the operationalization of the law at the regional level.

³¹Bagir Manan, *Development of Thought and Regulation of Human Rights in Indonesia* (Bandung: Alumni, 2006), pp. 75–79.

³²UN Committee on the Rights of the Child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (2003), par. 18–22.

³³Sulistyowati Irianto, *Law in Motion: A Review of Legal Anthropology* (Jakarta: Yayasan Obor Indonesia, 2009), pp. 142–146.

³⁴Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), p. 11–16.

³⁵Rumah Kitab, *Marriage Dispensation and the Threat of Child Marriage in Indonesia* (Jakarta: Rumah Kitab, 2021), pp. 33–37.



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

3.3.2. Legal Structure Obstacles

The capacity and culture of law enforcement officials (police, prosecutors, and judiciary) are often not fully free from gender bias. Victims of sexual violence frequently experience secondary victimization during the investigation process, such as negative questioning, trauma-informed demands for evidence, and minimal use of victims' rights to restitution.³⁶ Limited access to justice is worsening in remote areas due to minimal budget allocation (gender-responsive budgeting) for safe house facilities and free legal aid.

3.3.3. Barriers to Legal Culture

Society is still dominated by patriarchal norms and a culture of victim blaming. Domestic violence is often perceived as a domestic/private issue that does not deserve to be addressed by public law.³⁷ In the case of children, the strong view that children are the "property" of their parents means that disciplinary actions disguised as physical violence or forced child marriage are often justified by custom and textual religious understanding.

Therefore, from a Constitutional Law perspective, failure to close this gap constitutes state failure in fulfilling its constitutional obligations. The state cannot hide behind written norms but must undertake comprehensive constitutional law reform, encompassing institutional structure reform, adequate budgeting, and a massive transformation of legal culture.³⁸

4. Conclusion

Based on the results of the normative-constructive analysis of Constitutional Law and the state's responsibility in protecting women and children, several main conclusions can be drawn as follows: 1. Conceptual Transformation of State Responsibility: Within the framework of a modern constitutional state (Rechtsstaat), protection of women and children is not merely a communal social issue or a reactive and voluntary government policy, but rather a binding constitutional duty. State responsibility is transformed from a passive obligation approach (negative duties) to an active obligation (positive duties) that includes four integrated structural dimensions: normative, institutional, preventive, and remedial responsibilities. 2. Integrative Legal Basis (Constitution and International Human Rights): Protection of women and children has a very strong normative anchorage in the 1945 Constitution of the Republic of

³⁶National Commission on Violence Against Women, Annual Report Fact Sheet (CATAHU) 2023: Eliminating Violence Against Women in Public and Private Spaces (Jakarta: National Commission on Violence Against Women, 2023), pp. 40–45.

³⁷Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London: Routledge, 2005), p. 118–122.

³⁸Philipus M. Hadjon, *Legal Protection for the People in Indonesia* (Surabaya: Bina Ilmu, 1987), pp. 89–92.

Constitutional Law and the State's...
(Billy Ariza)



LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

Indonesia (especially Article 28B paragraph (2), Article 28G paragraph (1), and Article 28I paragraph (4)). This anchorage is strengthened in an integrative manner through the harmonization of the international instruments CEDAW and CRC. This norm integration mandates that all organic laws and state policies must prioritize the principles of substantive equality and the best interests of the child. 3. Addressing Structural-Cultural Gaps (Law on Books vs. Law in Action): The primary obstacle to protection in Indonesia no longer lies in the absence of norms (law on books), but rather in the gap in implementation (law in action). This obstacle stems from three layers of legal system problems: the lack of synchronization of derivative regulations (legal substance), the suboptimal gender sensitivity and limited budget and services of law enforcement officers (legal structure), and the continued strong roots of patriarchal norms and a culture of victim blaming in society (legal culture). Failure to address these gaps constitutes a state failure in carrying out its constitutional obligations. Therefore, in order to realize anticipatory, transformative, and substantively just legal protection, the state is required to undertake holistic legal reform. These steps must include accelerating the ratification of implementing regulations for legislative protection products, strengthening the capacity of victim-friendly law enforcement institutions, allocating gender-responsive budgets, and a consistent political-legal commitment to dismantling discriminatory social structures.

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Constitutional Law and the State's...
(Billy Ariza)



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Constitutional Law and the State's...
(Billy Ariza)



LICS 2026

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