

## CHAPTER II

### LITERATURE REVIEW

This chapter is consists of three types of framework, which is Conceptual Framework, Legal Framework and Theory Framework.

#### A. Conceptual Framework

##### 1. Definition of a Child

A child (noun) or children in plural, is defined as a young human being, be it male or female, below the age of puberty or below the legal age of majority.<sup>7</sup> Meanwhile, the Merriam-Webster dictionary defines child as “*an unborn or recently born person*” or “*a young person especially between infancy and youth.*” The definition from the dictionary does not define the age of an individual that are categorized as children.

The legal age of a child is then set by each state differently in their own laws. Based on the United Nations’ Convention on the Rights of a Child that has been ratified by Indonesia, the definition of a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.<sup>8</sup>

In the matter of national law, Indonesia has many type of legal age for different types of legal action. Using its national law in which specialized in child protection, the child protection law defined a child

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<sup>7</sup> Oxford Dictionaries, “Child | Definition of Child in English by Oxford Dictionaries,” accessed May 13, 2018, <https://en.oxforddictionaries.com/definition/child>.

<sup>8</sup> United Nations. Loc.cit.

as someone who is not yet 18 (eighteen) years old, including a child that is still in the womb.<sup>9</sup> Thus Indonesia's definition of a child is the same as the convention mentioned above.

## 2. A Child's Right

### a. A Child's Right Internationally

Rights are entitlement to/ not to perform certain actions, or to/ not to be in certain states. Rights dominate modern understandings of what actions are permitted and which institutions are right.<sup>10</sup>

The United Nations Human Rights Office of the High Commissioner defines human rights as rights that were given to every single human in this world, regardless of their nationality, sex, origin, race, religion, etc without discrimination. Rights are all interdependent and guaranteed by the law, be it national or internationally, in many types of form. All rights are universal, and should be respected at every corner of the world.<sup>11</sup>

As a child and human, it is natural that a child also has rights. United Nations and United Nations Convention on the Rights of the Child (UNCRC) have universally defined child rights.

<sup>9</sup> "Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak," accessed May 13, 2018, <http://www.kpai.go.id/files/2013/09/uu-nomor-35-tahun-2014-tentang-perubahan-uu-pa.pdf>.

<sup>10</sup> Leif Wenar, "Rights," accessed May 13, 2018, <https://plato.stanford.edu/entries/rights/>.

<sup>11</sup> "OHCHR | What Are Human Rights," accessed February 2, 2019, <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

According to the UNCRC, Child Rights are freedom and entitlements that must be given to all persons under the age of eighteen regardless of their race, color, gender, language, religion, opinions, origins, wealth, birth status or ability and therefore apply to all people everywhere around the world. The United Nations find that these rights are interdependent and indivisible, which means, we cannot sacrifice a right of a person in order to fulfill another right.<sup>12</sup>

With that said, UNCRC has a purpose in which it works to outline the basic human rights that should be provided to children that includes association with both of their parents, human identity, as well as basic needs, criminal laws, etc.

Children's right can be interpreted from allowing children the capacity for autonomous action to the enforcement of protecting the children to be free from physical, mental and emotional abuse, although what is included as abuse is still a matter of debate. These rights are then classified as four main categories. These four main categories range from civil, political, social, economic and cultural rights of every child, which are:<sup>13</sup>

#### 1) Right to Survival

A child has the right to survive even before the child is born. A child's life begins after twenty weeks of conception. The right

<sup>12</sup> United Nations. Loc.cit.

<sup>13</sup> "Child Protection & Child Rights in India by CHILDLINE India Foundation," accessed May 14, 2018, <http://childlineindia.org.in/child-protection-child-rights-india.htm>.

to survival of a child included the child's right to be born, right to minimum standards of food, shelter and clothing, and the right to live with dignity.

#### 2) Right to Protection

A child has the right to be free from neglect, exploitation, and abuse anywhere and must be protected.

#### 3) Right to Participation

A child has the right to participate in any decision making which involve him or her directly or indirectly. There are varying degrees of participation depending the age and maturity of the child.

#### 4) Right to Development

A child the right to be able to develops in all kind of forms, be it emotionally, mentally or physically. Emotional development is fulfilled by proper care and love of a support system, mental development through education and learning and physical development through recreation, play and nutrition.

## b. A Child's Right in Indonesia

In Indonesia, a child's rights is specifically stated in child protection law, in which includes:<sup>14</sup>

- 1) Every child has the right to be able to live, grow, develop, and participate reasonably accordingly with human dignity and protected from violence and discrimination.
- 2) Every child has the right to a name as self-identity and citizenship status.
- 3) Every child has the right to worship according to his religion, thinking, and expressing according to the level intelligence and age under the guidance of Parents or Guardians.
- 4) Every child has the right to know his parents as well as being raised by his own parent. In case for some reason their parents cannot guarantee the growth and development of children, or children are neglected, the child has the right to be cared for or appointed as a foster child or adopted children by other people in accordance with the provisions of the laws and regulations that applies.
- 5) Every child has the right to receive health services and social security as needed be it physical, mental, spiritual and social.
- 6) Every Child has the right to obtain education and teaching in the context of developing his personality and level of

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<sup>14</sup> "Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak."

intelligence in accordance with his interests and talents.

Every Child has the right to get protection in the education unit from sexual crimes and Violence committed by educators, education personnel, fellow students, and / or other party. In addition to the rights of the child as mentioned before, specifically for children with disabilities are also entitled to obtain extraordinary education, while for children who have excellence also entitled to special education.

- 7) Every child has the right to express and be heard, accept, seek and give information in accordance with the level of intelligence and age for the sake of his development in accordance with values of decency and propriety.
- 8) Every child has the right to rest and take advantage of free time, associating with children of the same age, play, recreation, and create according to their interests, talents, and level of intelligence for self-development.
- 9) Every Child with Disabilities has the right to receive rehabilitation, social assistance and maintenance to social welfare level.
- 10) Every child during the care of parents, guardians or any other party that is responsible for the care, is entitled to protection from treatment of: discrimination; exploitation, both economic and sexual; neglect; cruelty, violence and

persecution; injustice; and other mistreatment. In the case of parents, guardians or child caregivers doing any forms of mistreatment as is referred before, the offender is subject to a penalty.

11) Every Child has the right to be cared for by his own parents, unless there are reasons and / or Legitimate legal rules indicate that the separation is in the best interest of the person Child and is the final consideration. In the event of a separation as referred to before, the Child still has the right to: meet in person and have permanent personal relations with both of his Parents; get care, maintenance, education and protection for the process growth of both parents according to ability, talent, and his interest; obtain life funding from both of his parents; and obtaining other Children's Rights.

12) Every Child has the right to obtain protection from: misuse in political activities; involvement in armed disputes; involvement in social unrest; involvement in events that contain elements of violence; involvement in warfare; and sexual crime.

13) Every child is entitled to protection from the target of persecution, torture, or inhuman punishment. Every child is entitled to freedom as provided by the law. Arrest, detention, or imprisonment of a child shall only be made when

appropriate applicable law and can only be done as a last resort.

14) Every child deprived of his freedom has the right to: get humane treatment and his placement is separated from adults; obtain legal assistance or other assistance effectively at every stage of the applicable law; and defend themselves and obtain justice in front of the children court objectively and not siding in a closed session to the public. Every child who is a victim or perpetrator of sexual violence or who is dealing with the law has the right to be kept secret.

15) Every child who is a victim or criminal offender has the right to get legal assistance and other assistance

### 3. Child Protection

The United Nations Children's Fund or shorten as UNICEF has defined child protection system in their UNICEF Global Child Protection Strategy as: *“Set of laws, policies, regulations and services needed across all social sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection related risks. These systems are part of social protection, and extend beyond it. At the level of prevention, their aim includes*

*supporting and strengthening families to reduce social exclusion, and to lower the risk of separation, violence and exploitation.”<sup>15</sup>*

While, Indonesian Child Protection law defines Child Protection as all activities done to ensure and protect children and their rights so they can live, grow, prosper, and participate optimally as their human rights ensured, and also protection from abuse and discrimination.<sup>16</sup>

For the Child Protection itself, there are ten principles amalgamated in the system, which are:<sup>17</sup>

- a. To acknowledge, value and defend every child as a rights holder, with the right to protection as a non-negotiable right. They must be treated with respect, as every child are unique with their own rights, personalities, interest, etc.
- b. Discrimination should not be done to any children. Every children may gain access and to be protected by the national child protection system.
- c. To create prevention system in the child protection system. The prevention system may includes banning any kinds of violence towards children in any form or situation.
- d. Supporting families in their role as primary caregiver. Families hold the utmost position as a child’s caregiver and are supported universally in every stages.

<sup>15</sup> United - Economic and Social Council Nations, “UNICEF Child Protection Strategy,” vol. 15428, n.d.

<sup>16</sup> “Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak.”

<sup>17</sup> European Comission, “10 Principles for Integrated Child Protection Systems,” 2015, 1–2, [ec.europa.eu/newsroom/just/document.cfm?doc\\_id=49906](http://ec.europa.eu/newsroom/just/document.cfm?doc_id=49906).

- e. To be conscious and supportive in the fact that every child has the right to be free from all kinds of violence. Society needs to be aware of the facts and governments also needs to make the effort to inform the society.
- f. Sufficient care must be guaranteed in the child protection system. These includes care must be given by competent and committed professionals, sharing information in certification and training, placing standards, indicators, tools and systems of monitoring and evaluation in the national framework as well as ensuring reporting system and protection policies are in place within the organization that works directly for or with children.
- g. Ensuring trans-national and cross border mechanism are in place in child protection system. These may act to identify children in cases of child trafficking or missing in any form and to ensure communication be it nationally or internationally.
- h. Protection and support are given towards the child. Every child has the right to be supported and protected. It is unacceptable if a child does not receive the right it has.
- i. Training on identification of risk. All sorts of professionals that may work with or for children must be given training in identifying vulnerable children that may be in risk, ensuring to report any sorts of suspected violence against children.

- j. Ensuring the reporting mechanism in place is accessible, safe, well-published and confidential for children in risk, or their representatives or others.

#### 4. Definition of Internet

The word 'online' (adjective) is defined as controlled by or connected to a computer with an activity or service that is available or performed by using the internet or other computer network.<sup>18</sup>

The Internet has started to be developed in the 1960s as a way for US government researchers to share information. Computers in the '60s were large and immobile and in order to make use of information stored in any one computer, one had to either travel to the site of the computer or have magnetic computer tapes sent through the conventional postal system. Another catalyst in the formation of the Internet was the heating up of the Cold War.

The Soviet Union's launch of the Sputnik satellite spurred the U.S. Defense Department to consider ways information could still be disseminated even after a nuclear attack. This eventually led to the formation of the ARPANET (Advanced Research Projects Agency Network), the network that ultimately evolved into what we now know as the Internet.

ARPANET was a great success but membership was limited to certain academic and research organizations who had contracts with

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<sup>18</sup> *Online | Definition of Online in English by Oxford Dictionaries*, accessed May 14, 2018, <https://en.oxforddictionaries.com/definition/online>.

the Defense Department. In response to this, other networks were created to provide information sharing. On January 1, 1983 a new communications protocol was established called Transfer Control Protocol/Internetwork Protocol (TCP/IP). This allowed different kinds of computers on different networks to "talk" to each other. ARPANET and the Defense Data Network have also officially changed to the TCP/IP standard hence the birth of the Internet. All networks could now be connected by a universal language.<sup>19</sup>

With the existence of the internet, there are also consequences born from it. Like many other actions, the occurrence of the internet comes with advantages and disadvantages. Some of the advantages are:<sup>20</sup>

- a. Enabling data transfer and connecting between users
- b. Huge storage with fast capacity
- c. Able to quickly handle and store various amount of works

While some of the most obvious disadvantages are:<sup>21</sup>

- a. Lack of data confidentiality, security of personal data are poor
- b. Creating new types of criminal acts, with difficulty in detecting said criminal activity

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<sup>19</sup> University System of Georgia, "A Brief History of the Internet," accessed May 14, 2018, [https://www.usg.edu/galileo/skills/unit07/internet07\\_02.phtml](https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml).

<sup>20</sup> Mark O Brien, "Information & Communications Technology Law The Internet , Child Pornography and Cloud Computing : The Dark Side of the Web ?" 23, no. August 2015 (2014): 238-55, <https://doi.org/10.1080/13600834.2014.970376>.

<sup>21</sup> Brien. Loc.cit.

In order to conceal the criminal acts done on the internet, the deep net was then born. The deep net itself is a particular web in which connects individuals in a private network where illegal acts were done. To access it, users need to have certain pass and such. This itself enable the offenders to hide from officials.<sup>22</sup>

#### 5. Social Networking Sites

Social networking sites, or more commonly known as social medias, are one of the many kind of internet based services provided for internet users in which allows individuals to create and manage their own personal profile, allowing them to connect with any other users they wanted through a public platform that may provide all kinds of features such as chatting, voice messages, video call, picture/video sharing and many more. Nowadays, social media is a vital part of people's daily life, while most people do gain benefits in using them, some may misuse it to prey on those vulnerable, with children and women as the main victim.<sup>23</sup>

#### 6. Internet Misuses

The number of report about online exploitation experienced by young people are increasing day by day, with individuals using the internet to target children for sexual purposes. Durkin, defines the

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<sup>22</sup> Brien. Loc.cit.

<sup>23</sup> N Khurana, "Mass Communication & Journalism The Impact of Social Networking Sites on the Youth" 5, no. 12 (2015): 10–13, <https://doi.org/10.4172/2165-7912.1000285>.

various ways an individual with a sexual interest towards children may misused the internet.<sup>24</sup>

- a. Exchanging child pornography
- b. Searching for potential victims for sexual abuse
- c. Holding inappropriate sexual communication
- d. Communicating with other individuals with the same sexual interest towards children, be it through social networking sites, discussions, chat rooms, newsgroup or email.

Child sexualization often happens on the internet. Sexualization itself is a term developed from the word sexualize, in which are defined as to make something or someone sexual, or considering them in a sexual way.<sup>25</sup>

Sexualization may happen if even one of these actions takes place.<sup>26</sup>

- a. A person's value is reduced to their sexual attractiveness or behavior
- b. Physical attractiveness is equated with being sexy
- c. A person is represented as an object and not as a person with freedom of action and decision

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<sup>24</sup> Juliane A. Kloess, Anthony R. Beech, and Leigh Harkins, "Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics," *Trauma, Violence, and Abuse* 15, no. 2 (2014): 126–39, <https://doi.org/10.1177/1524838013511543>.

<sup>25</sup> "Sexualize Definition and Meaning | Collins English Dictionary," accessed October 27, 2018, <https://www.collinsdictionary.com/dictionary/english/sexualize>.

<sup>26</sup> Mónica Díaz-Bustamante-Ventisca and Carmen Llovet-Rodríguez, "Empowerment or Impoverishment of Children from Social Networks? Perceptions of Sexualized Images of Girls in Instagram," *El Profesional de La Información* 26, no. 1 (2017): 77, <https://doi.org/10.3145/epi.2017.ene.08>.

d. Sexuality is inappropriately imposed on a person

## 7. Child Pornography

### a. Definition of Pornography

Defining pornography is not easy as what is viewed as pornographic differs between one person to another, from culture to culture, and over the changes of time and generation. Based on dictionary, pornography is defined as materials intended to stimulate sexual excitement, be it in printed or visual form with contents of explicit description or activity or display of sexual organs.<sup>27</sup>

Meanwhile, in article 1 number 1 of Indonesian Law regarding Pornography, has defined pornography as images, sketches, illustrations, photographs, writings, sounds, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication and / or performances in public, which contain obscenity or exploitation sexual violation of moral norms in society.

### b. Types of Pornography

As pornography includes a huge range of materials and has different effects, thus pornography itself may be classified into

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<sup>27</sup> "Pornography | Definition of Pornography in English by Oxford Dictionaries," accessed May 17, 2018, <https://en.oxforddictionaries.com/definition/pornography>.

several kinds. The United States' Attorney General's Commission on Pornography, has classified pornography into:<sup>28</sup>

- 1) Sexually violent material, in which includes violent actions be it simulated or threatened, presented in a sexual way. It may include sadomasochism, unwanted aggression sexually or sexual content portrayed with violence.
- 2) Non-violent but degrading sexual material, in which includes actions of treating someone disrespectfully, be it by degrading, humiliating, dominating or subordinating.
- 3) Sexual material that does not portrays violence or degradation.

#### c. Acts of Child Pornography

Pornography in general is mostly banned by nations, with the fact that child pornography is banned and condemned by most.

Child Pornography itself is a type of pornography, featuring a child or children. Indonesia has banned child pornography in which are detailed in the national law. They have also signed the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child Based by United Nations.

<sup>28</sup> "Obscenity and Pornography: Behavioral Aspects - Types Of Pornography For Research - Material, Violent, Commission, and Degrading - JRank Articles," accessed January 31, 2019, <http://law.jrank.org/pages/1611/Obscenity-Pornography-Behavioral-Aspects-Types-pornography-research.html>.

The optional protocol has explained child pornography as any representation of a child's sexual part for sexual purposes or the child engaging in real or simulated explicit sexual activities.<sup>29</sup>

Indonesian Pornography Law, child pornography is defined as all types of pornography involving children or adults acting or posing as a child.<sup>30</sup>

In many journals, the term child exploitation material (CEM) are often used as a replacement term for child pornography as many avoided that term as it may made child pornography seems like an acceptable subgenre of mainstream pornography when it is not. A general agreement in society has been made where most agree that with the existence of the internet, child exploitation materials distribution has dramatically increased through many types of system. Child exploitation materials online mostly consist of pictures or videos involving actual children from infancy to adolescents in partial nudity to sexual sadism, bestiality and torture.<sup>31</sup>

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<sup>29</sup> "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography," *United Nations, Treaty Series* 2171 (2000), [https://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/IV-11-c.en.pdf](https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-c.en.pdf).

<sup>30</sup> "Undang-Undang Republik Indonesia Nomor 44 Tahun 2008 Tentang Pornografi," n.d., [http://www.dpr.go.id/dokjdih/document/uu/UU\\_2008\\_44.pdf](http://www.dpr.go.id/dokjdih/document/uu/UU_2008_44.pdf).

<sup>31</sup> Jeremy Prichard et al., "Young People, Child Pornography, and Subcultural Norms on the Internet," n.d., <https://doi.org/10.1002/asi>.

There are many actions that is related to child pornography that is criminalized by the law, such as:<sup>32</sup>

- 1) Uploading the pictures or videos or sound in which depicts child sexually
- 2) Downloading the pictures or videos or sound in which depicts child sexually
- 3) Sharing the pictures or videos or sound in which depicts child sexually
- 4) Owning the pictures or videos or sound in which depicts child sexually on their computer or smartphone
- 5) Sending the pictures or videos or sound in which depicts child sexually through text messages, emails or online messages.
- 6) Coaxing minors to partake in acts of creating child pornography, mostly via online
- 7) Organizing meetings with a minor, be it online or in real life by travelling to a certain set location

There are many factors that may cause children to be involved in child pornography, such as:<sup>33</sup>

<sup>32</sup> "Types of Child Pornography | Dallas TX Defense," accessed January 31, 2019, <https://www.jmichaelpriest.com/computer-crimes-cyberspace-cases/child-pornography/types/>.

<sup>33</sup> The Modern American, "Beyond Gratification : The Benefits of Pornography and the Demedicalization of Female Sexuality Beyond Gratification : The Benefits of Pornography and the Demedicalization of Female Sexuality" 8, no. 2 (2012): 53–71.

- 1) Children feeling incapable to show their refusal in participating for the act of child pornography
- 2) Children not having the power both physically and mentally in refusing forced participation.
- 3) Children not having the mental capacity needed to process and make decision for sexual activity.
- 4) Children in poverty may feel dependant on the adults who provide food or shelter for them thus falling for their coercion.

## **B. Legal Framework**

1. United Nations Convention on the Rights of the Child – ratified on 5 September 1990
  - a. Article 1

*“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”*

- b. Article 2

(1) *“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

(2) *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*"

c. Article 6

(1) *"States Parties recognize that every child has the inherent right to life.*

(2) *States Parties shall ensure to the maximum extent possible the survival and development of the child."*

d. Article 19

(1) *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

(2) *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral,*

*investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”*

e. Article 34

*“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

*(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*

*(b) The exploitative use of children in prostitution or other unlawful sexual practices;*

*(c) The exploitative use of children in pornographic performances and materials.”*

2. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child – ratified on 24 September 2012

a. Article 1

*“States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.”*

b. Article 2

(c) *“Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”*

c. Article 3

(1) *“Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis:*

a) *In the context of sale of children as defined in Article 2:*

(i) *The offering, delivering or accepting, by whatever means, a child for the purpose of:*

a. *Sexual exploitation of the child;*

b. *Transfer of organs of the child for profit;*

c. *Engagement of the child in forced labour;*

(ii) *Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;*

b) *Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2;*

c) *Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.”*

d. Article 8

(5) *“States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.”*

e. Article 9

(4) *“States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”*

f. Article 10

(1) *“States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and*

*international non-governmental organizations and international organizations.*

(2) *States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.*

(3) *States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.*

(4) *States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.”*

3. The 1945 Constitution of the Republic of Indonesia

a. Article 28B

(2) *“Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination.”*

4. Indonesian Law No. 35 of 2014 on Child Protection

a. Article 1

(1) *“Anak adalah seseorang yang belum berusia 18 (delapan belas) tahun, termasuk anak yang masih dalam kandungan.”*

Translation: Child is someone who is not 18 (eighteen) years old, including a child who is still in the womb.

- (2) *“Perlindungan Anak adalah segala kegiatan untuk menjamin dan melindungi Anak dan hak-haknya agar dapat hidup, tumbuh, berkembang, dan berpartisipasi secara optimal sesuai dengan harkat dan martabat kemanusiaan, serta mendapat perlindungan dari kekerasan dan diskriminasi.”*

Translation: 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 the dignity and human dignity, and get protection from violence and discrimination.

- (12) *“Hak Anak adalah bagian dari hak asasi manusia yang wajib dijamin, dilindungi, dan dipenuhi oleh Orang Tua, Keluarga, masyarakat, negara, pemerintah, dan pemerintah daerah.”*

Translation: Children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, family, community, state, government and local government.

b. Article 13

- (1) *“Setiap anak selama dalam pengasuhan orang tua, wali, atau pihak lain mana pun yang bertanggung jawab atas pengasuhan, berhak mendapat perlindungan dari perlakuan:*

- a. *diskriminasi;*
- b. *eksploitasi, baik ekonomi maupun seksual;*
- c. *penelantaran;*
- d. *kekejaman, kekerasan, dan penganiayaan;*
- e. *ketidakadilan; dan*
- f. *perlakuan salah lainnya.”*

Translation: Every child while in the care of a parent, guardian or any other party responsible for care, is entitled to protection from treatment:

- a. *discrimination;*
- b. *exploitation, both economic and sexual;*
- c. *neglect;*
- d. *cruelty, violence and persecution;*
- e. *injustice; and*
- f. *other mistreatment.*

(2) *“Dalam hal orang tua, wali atau pengasuh anak melakukan segala bentuk perlakuan sebagaimana dimaksud dalam ayat (1), maka pelaku dikenakan pemberatan hukuman.”*

Translation: In the event that the parent, guardian or caregiver of the child carries out all forms of treatment as

referred to in paragraph (1), the offender is subject to a penalty.

c. Article 59

(1) *“Pemerintah, Pemerintah Daerah, dan lembaga negara lainnya berkewajiban dan bertanggung jawab untuk memberikan Perlindungan Khusus kepada Anak”*

Translation: Government, Regional Government and other state institutions are obliged and responsible for providing Special Protection to Children.

(2) *“Perlindungan Khusus kepada Anak sebagaimana dimaksud pada ayat (1) diberikan kepada:*

- a. Anak dalam situasi darurat;*
- b. Anak yang berhadapan dengan hukum;*
- c. Anak dari kelompok minoritas dan terisolasi;*
- d. Anak yang dieksploitasi secara ekonomi dan/atau seksual;*
- e. Anak yang menjadi korban penyalahgunaan narkotika, alkohol, psikotropika, dan zat adiktif lainnya;*
- f. Anak yang menjadi korban pornografi;*
- g. Anak dengan HIV/AIDS;*
- h. Anak korban penculikan, penjualan, dan/atau perdagangan;*
- i. Anak korban Kekerasan fisik dan/atau psikis;*
- j. Anak korban kejahatan seksual;*

- k. Anak korban jaringan terorisme;
- l. Anak Penyandang Disabilitas;
- m. Anak korban perlakuan salah dan penelantaran;
- n. Anak dengan perilaku sosial menyimpang; dan
- o. Anak yang menjadi korban stigmatisasi dari pelabelan terkait dengan kondisi Orang Tuanya.”

Translation: Special protection for children as referred to in paragraph (1) is given to:

- a. Children in emergency situations;
- b. Children who are faced with the law;
- c. Children from minority groups and isolated;
- d. Children who are exploited economically and / or sexually;
- e. Children who are victims of abuse of narcotics, alcohol, psychotropic substances and other addictive substances;
- f. Children who are victims of pornography;
- g. Children with HIV / AIDS;
- h. Children victims of abduction, sales, and / or trade;
- i. Child victims of physical and / or psychological violence;
- j. Children victims of sexual crimes;
- k. Children victims of terrorism networks;
- l. Children with Disabilities;
- m. Children victims of mistreatment and neglect;

- n. Children with deviant social behavior; and
- o. Children who are victims of stigmatization of labeling are related to the condition of their parents.

d. 67B

(1) *“Perlindungan Khusus bagi Anak yang menjadi korban pornografi sebagaimana dimaksud dalam Pasal 59 ayat (2) huruf f dilaksanakan melalui upaya pembinaan, pendampingan, serta pemulihan sosial, kesehatan fisik dan mental.”*

Translation: Special Protection for Children who are victims of pornography as referred to in Article 59 paragraph (2) letter f is implemented through efforts to guide, assist, and recover social, physical and mental health.

(2) *“Pembinaan, pendampingan, serta pemulihan sosial, kesehatan fisik dan mental sebagaimana dimaksud pada ayat (1) dilaksanakan sesuai dengan ketentuan peraturan perundang-undangan.”*

Translation: Fostering, mentoring, and social recovery, physical and mental health as well referred to in paragraph (1) is carried out in accordance with the provisions of the legislation.

5. Indonesian Law No. 44 of 2008 on Pornography

a. Article 1

1. *“Pornografi adalah gambar, sketsa, ilustrasi, foto, tulisan, suara, bunyi, gambar bergerak, animasi, kartun, percakapan, gerak tubuh, atau bentuk pesan lainnya melalui berbagai bentuk media komunikasi dan/atau pertunjukan di muka umum, yang memuat kecabulan atau eksploitasi seksual yang melanggar norma kesusilaan dalam masyarakat.”*

Pornography is images, sketches, illustrations, photographs, writings, sounds, sounds, moving images, animations, cartoons, conversations, gestures, or other forms of messages through various forms of communication and / or performances in public, which contain obscenity or exploitation sexual violation of moral norms in society.

b. Article 2

*“Pengaturan pornografi berasaskan Ketuhanan Yang Maha Esa, penghormatan terhadap harkat dan martabat kemanusiaan, kebinekaan, kepastian hukum, nondiskriminasi, dan perlindungan terhadap warga negara.”*

The arrangement of pornography is based on the God, respect for human dignity, diversity, legal certainty, non-discrimination, and protection of citizens.

## c. Article 4

(1) “Setiap orang dilarang memproduksi, membuat, memperbanyak, menggandakan, menyebarkan, menyiarkan, mengimpor, mengekspor, menawarkan, memperjualbelikan, menyewakan, atau menyediakan pornografi yang secara eksplisit memuat:

- a. persenggamaan, termasuk persenggamaan yang menyimpang;
- b. kekerasan seksual;
- c. masturbasi atau onani;
- d. ketelanjangan atau tampilan yang mengesankan ketelanjangan;
- e. alat kelamin; atau
- f. pornografi anak”

Everyone is prohibited from producing, making, reproducing, duplicating, distributing, broadcasting, importing, exporting, offering, trading, renting or providing pornography that explicitly contains:

- a. intercourse, including deviant relationships;
- b. sexual violence;
- c. masturbation or masturbation;
- d. nudity or an impressive appearance of nudity;
- e. genitals; or

f. child pornography.

d. Explanation of Article 4

(1) Letter f

*“Pornografi anak adalah segala bentuk pornografi yang melibatkan anak atau yang melibatkan orang dewasa yang berperan atau bersikap seperti anak.”*

Child pornography is all forms of pornography involving children or involving adults who act or act like children.

e. Article 5

*“Setiap orang dilarang meminjamkan atau mengunduh pornografi sebagaimana dimaksud dalam Pasal 4 ayat (1).”*

Everyone is prohibited from lending or downloading pornography as referred to in Article 4 paragraph (1).

f. Article 16

(1) *“Pemerintah, lembaga sosial, lembaga pendidikan, lembaga keagamaan, keluarga, dan/atau masyarakat berkewajiban memberikan pembinaan, pendampingan, serta pemulihan sosial, kesehatan fisik dan mental bagi setiap anak yang menjadi korban atau pelaku pornografi.”*

Governments, social institutions, educational institutions, religious institutions, families, and / or communities are obliged to provide guidance, assistance, and social recovery,

physical and mental health for every child who is a victim or pornography actor.

g. Article 29

*“Setiap orang yang memproduksi, membuat, memperbanyak, mengandakan, menyebarluaskan, menyiarkan, mengimpor, mengekspor, menawarkan, memperjualbelikan, menyewakan atau menyediakan pornografi sebagaimana dimaksud dalam Pasal 4 ayat (1) dipidana dengan pidana penjara paling singkat 6 (enam) bulan dan paling lama 12 (dua belas) tahun dan/atau pidana denda paling sedikit Rp250.000.000,00 (dua ratus lima puluh juta rupiah) dan paling banyak Rp6.000.000.000,00 (enam miliar rupiah).”*

Every person who produces, makes, reproduces, multiplies, distributes, broadcasts, imports, exports, offers, trades, rents or provides pornography as referred to in Article 4 paragraph (1) shall be sentenced to a maximum of 6 (six) months and maximum 12 (twelve) years and / or criminal fine of at least Rp250,000,000.00 (two hundred fifty million rupiahs) and a maximum of Rp.6,000,000,000.00 (six billion rupiahs).

### **C. Theory Framework**

#### **1. Legal Protection Theory**

Legal Protection has the meaning which is a set of rule by the government in order to protect their citizens and emphasizes the fact

that a nation must be able to give legal protection with the purpose of justice, expediency and legal certainty towards its citizens. Legal Protection is defined by several scholars, in which:<sup>34</sup>

a. Satjipto Raharjo defines legal protection as “*memberikan pengayoman kepada hak asasi manusia yang dirugikan orang lain dan perlindungan tersebut diberikan kepada masyarakat agar mereka dapat menikmati semua hak-hak yang diberikan oleh hukum*” which essentially means protection law is giving shelter towards human rights which are being harmed by others and the protection is given for the citizens in order for them to enjoy their rights that has been given by law.

b. Philipus M. Hadjon defines legal protection as “*perlindungan akan harkat dan martabat, serta pengakuan terhadap hak-hak asasi manusia yang dimiliki oleh subyek hukum berdasarkan ketentuan hukum dari kesewenangan*” which means protection for prestige and dignity along with recognition towards human rights owned by legal subjects based on the law.

c. Muktie A. Fadjar defines legal protection as “*penyempitan arti dari perlindungan, dalam hal ini hanya perlindungan oleh hukum saja. Perlindungan yang diberikan oleh hukum, terkait pula dengan adanya hak dan kewajiban, dalam hal ini yang dimiliki oleh manusia sebagai subyek hukum dalam interaksinya dengan sesama*”

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<sup>34</sup> Tesis Hukum, “Pengertian Perlindungan Hukum Menurut Para Ahli | Tesis Hukum,” April 13, 2014, accessed May 16, 2018, <http://tesishukum.com/pengertian-perlindungan-hukum-menurut-para-ahli/>.

*manusia serta lingkungannya. Sebagai subyek hukum manusia memiliki hak dan kewajiban untuk melakukan suatu tindakan hukum*” which means essentially limiting the protection from law only, as human interact with the society, they have their rights and duty in doing legal acts.

In executing and giving protection, it is needed a place to execute it in which is usually called as means of legal protection. To be easier to understand, the means are divided into two, which is:<sup>35</sup>

a. Means of Preventive Law Protection

In preventive law protection, legal subject are given education on a certain matter as to prevent some offences from ever happening. These are done before the government decided on a verdict that is definitive. The purpose is to avoid dispute. Preventive law protection is important for the government as it minimizes the offences made.

b. Means of Repressive Law Protection

Repressive law protection aims to resolve disputes. The handling of law protection by general court and administrative court in Indonesia is included in this category. The principle of law protection towards government’s actions are sourced from the concept of recognition and protection towards human rights because based on the history of the westerners, concepts about

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<sup>35</sup> Tesis Hukum.

recognition and protection towards human rights are born and directed to limitation and laying down the duty of society and government.

The use of this theory is to examine whether Indonesia as a state has already fulfilled the main purpose of this theory or not which is to prevent and protect the subject of law and in this case are the children being exploited online.