Assessment of the Guardianship System for Persons with Psychosocial Disability in Indonesia

HISYAM IKHTIAR MULIA
ALBERT WIRYA
YOSUA OCTAVIAN
RICKY GUNAWAN
PIERS GOODING
JAMIE WALVISCH

*Author affiliations can be found in the back matter of this article

ABSTRACT

This article examines Indonesia’s guardianship system for persons with psychosocial disabilities (PPDs) following the country’s ratification of the Convention on the Rights of Persons with Disabilities (CRPD). Despite this ratification, Indonesia continues using a substitute decision-making framework, violating CRPD principles. Analyzing 49 court decisions from 2015 to 2018, the study identifies issues such as outdated criteria for guardianship, inappropriate involvement of religious courts, and the use of insufficient evidence during hearings. Focus group discussions with PPDs, caregivers, and experts reveal fears and hardships faced under the current system. The findings indicate most applications are granted without thorough consideration, often based on inadequate evidence. The article calls for legal reforms to align with CRPD mandates, advocating for a supported decision-making framework to protect PPDs’ rights and autonomy. Indonesia must adopt a contemporary understanding of capacity to ensure PPDs retain their legal capacity and receive necessary support.

CORRESPONDING AUTHOR:
Hisyam Ikhtiar Mulia
Head of Research and Education Division, REMISI Foundation, Indonesia
hisyam@remisi.org

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INTRODUCTION

In 2011, Indonesia ratified the Convention on the Rights of Persons with Disabilities (CRPD), which was subsequently incorporated into Law No. 8/2016 on persons with disabilities (Disability Bill). While this ratification signifies progress for disability movements in Indonesia, several laws that do not follow CRPD principles remain in force. One such law is the guardianship provision in the Civil Code (Article 433), which states:

An adult who is in a continuous state of simple-mindedness, insanity or rage, shall be placed under guardianship, notwithstanding that he might have mental capacity from time to time. An adult individual may be placed under conservatorship as a result of improvidence.

The continued existence of this provision is a clear breach of the CRPD, particularly Article 12(2), which requires States Parties to recognize ‘that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. According to the Committee on the Rights of Persons with Disabilities (CRPD Committee 2014: 2) the right to legal capacity is universal and non-derogable. The CRPD Committee has opined that States Parties must replace ‘substitute decision-making regimes’, which remove legal capacity from a person who has been deemed incapable of making their own decisions and allow another person to make decisions for them according to a ‘best interests’ principle, with systems of supported decision-making (CRPD Committee 2014: para 28–29). The guardianship mechanism is an example of such a substituted decision-making regime, the implementation of which can lead to other rights violations, such as violation of the right to physical and mental integrity, the right to liberty and freedom of movement, and the right to the highest attainable standard of healthcare based on the principle of free and informed consent (CRPD Committee 2014: 2).

Given the controversies surrounding substitute decision-making, there is great value in examining the way that guardianship regimes are implemented worldwide. This is particularly relevant for Indonesia, a Global South country and the fourth-most populous nation in the world, which has struggled to fulfill the rights of persons with psychosocial disabilities (PPDs). The concept of PPDs is preferred by the World Network of Users and Survivors of Psychiatry to describe persons whose disabilities result from the interaction between psychological and social/cultural factors (Minkowitz 2007: fn 10; WNUSP 2008: 9), and has become commonplace to human rights debates. The psychological component refers to ways of thinking, processing experiences, and perceiving the world, while the social/cultural component refers to societal and cultural limits on behavior that interact with these psychological differences, as well as the stigma attached to labeling such individuals as disabled. Thus, it is a concept that moves away from viewing disability in terms of individual pathology and profound aberration from the norm; instead, disability, including psychosocial disability, is viewed as one aspect of human diversity around which mainstream laws, policies and programming are re-shaped to accommodate a more realistic account of the human subject (Degener 2016).

To date, only limited academic work has been done on the Indonesian guardianship system. Some Indonesian legal scholars have described the system and have considered its normative underpinnings (see, e.g. Tutik 2008: 92; Windajani 2008: 561). However, there has not been any research that has sought to critically analyze the implementation of guardianship law in practice. This article attempts to shed light on the way guardianship law in Indonesia is applied to PPDs. It examines the process of applying for guardianship, the hearing, and the decisions given by judges, as well as the views of PPDs, caregivers, and experts. It identifies various problems with the current system, highlighting the ways in which the Indonesian government has failed to fulfill its obligations as a state member under the CRPD.

OVERVIEW OF INDONESIA’S APPROACH TO GUARDIANSHIP

The Indonesian guardianship law was inherited from the Dutch colonial era. Indonesia adopted the Dutch concept of curatele, creating a legal framework that allowed the government to take the right to manage affairs from people considered to be suffering from ‘simple-mindedness, insanity or rage’, and to delegate it to other people to exercise for the benefit of the person placed under guardianship (Tutik 2008: 28). After independence, the law surrounding guardianship
was never revised nor challenged in the Constitutional Court, leaving in place a regime that is outdated, and which does not meet the contemporary needs of Indonesian citizens.

Article 433 of the Indonesian Civil Code sets out two main criteria for someone to be put under guardianship. They must be adults (aged 18 years or above) and they must have been found to be ‘in a continuous state of simple-mindedness, insanity or rage’. Only family members are eligible to file a guardianship application, and no procedure exists for a person placed under guardianship to annul the guardianship by themselves. The criteria for placing a person under guardianship are ambiguous by contemporary standards, and no further legal definitions exist. In practice, it is PPDs who are most vulnerable to being put under guardianship, due to the nature of their condition being easily proven by relevant documentation (such as medical documents).

The process of applying for guardianship is quite straightforward. According to the Civil Code, the applicant files a request in the District Court where the person subject to the guardianship application resides. The applicant should provide evidence illustrating the condition of the respondent. In making their determination, judges will consider this evidence. They may also, if they consider it necessary, consider testimony from the respondent that is given in court, or in their residence if they are immobile.

The guardianship process was slightly amended by Law No. 18/2014 on mental health (Mental Health Bill). This law required a mental health examination to be conducted of PPDs who were suspected of having lost their capacity to conduct civil legal activities. This is a similar process to that which exists in other countries for determining the issue of mental capacity (Inamdar, Stein & Bunders 2016: 231; Richardson 2012: 335). However, the Indonesian legal structure does not differentiate between legal and mental capacities. ‘Mental capacity’ can be roughly conceptualized as decision-making ability, whereas ‘legal capacity’ under human rights law refers to recognition of legal personhood and having legal agency to exercise that recognition as a person before the law (McSherry 2012). We discuss the definition of legal capacity later in the paper.

The Mental Health Bill recently became a part of Omnibus Health Law No. 17/2023. In its section on mental health, this law states that persons with mental illnesses have basic rights (clause 76). However, the law still requires PPDs to undergo a mental health examination if they are suspected of having lost their capacity to conduct civil legal activities (clause 82). Additionally, the law provides that a close adult relative (such as a family member or a spouse) should be given the right to consent on behalf of a person under guardianship (clause 293.7).

According to Article 459 of the Indonesian Civil Code, a guardianship order will last at least eight years. There is a lack of consensus on how guardianship orders terminate. According to Tutik (2008: 95), there are three ways that guardianship orders can end: (1) the PPD who was put under guardianship dies; (2) the court rules that the reason for granting guardianship has disappeared; or (3) the guardian dies. Article 459 of the Indonesian Civil Law provides a mechanism for a guardianship order to be annulled by the PPDs’ relatives; however, there is no provision for allowing PPDs who are put under guardianship orders to seek annulment of the order themselves. In this regard, Cahyono (2017) has argued that it is illogical for those under guardianship to request annulment, because they are assumed to be incapable and so all of their acts are considered invalid.

Some insight into the Indonesian cultural context regarding legal capacity and guardianship has been provided by Saluhang (2022), who conducted a qualitative study of attitudes held towards people with mental illnesses. It was found that a commonly held view was that such individuals are ‘disgraceful’ and ‘burdensome’, and so should be separated from society (Fahmi & Dano 2018). The stigmatization of PPDs and poor support systems can lead PPDs to self-stigmatization, such as feeling shameful and having low self-esteem (Wardani & Dewi 2018: 22). This negative effect impacts their quality of life and hinders their recovery. This stigmatization also makes PPDs vulnerable to being treated unequally in legal and non-legal settings.

Research has also found that in Indonesia many people, including family members, fear PPDs and presume they will act violently (Subu et al. 2018: 57). Due to this ongoing stigma, many families and communities install wooden slabs on PPDs’ feet, shackle them, tie them to
trees, and place them in locked sheds – a practice known as pasung (Broch 2001: 287; Puteh, Marthoenis & Minas 2011: 2; Suryani, Lesmana & Tiliopoulos 2011: 142; Yusuf & Tristiana 2017: 305). It is impossible to know the full extent of these practices, as they are not recorded (either officially or unofficially), and they are often hidden due to the stigma attached to being associated with a PPD; however, it is clear that they are common. For example, Santika (2023) reported that there were 4,304 PPDs who were shackled and isolated in mid-2022; and in 2021 the Indonesia Mental Health Association (IMHA) told the media that approximately 12,600 PPDs were living poorly in the infamous asylum-like facilities known as mental rehabilitation centers owned by either the state or privately (Dewi 2021).

METHODS

DATA COLLECTION

In the first stage of the project, the research team collected court decisions on guardianship requests for PPDs from 2015 to 2018. The year 2015 was chosen because the Mental Health Bill, which provided an additional basis for capacity assessment, was expected to take effect that year. The documents were obtained from the Supreme Court’s official website using keywords such as pengampuan (guardianship), gangguan jiwa (mental illness) and disabilitas mental (mental disability). The collected data were categorized into variables describing the administration of the case (e.g. application submission location, hearing date) and the substance of the case (e.g. purpose of applicants, witnesses, evidence).

In the second stage, qualitative data were gathered through focus group discussions with three groups of 8–10 participants each: 10 PPDs, 10 caregivers, and 8 mental health or disability experts (disabled persons’ organization (DPO) advocates, mental health professionals, and psychiatrists working with communities of people with mental illnesses). The participants with psychosocial disabilities came from three DPOs: Komunitas Peduli Skizofrenia Indonesia (Indonesian Community Care for Schizophrenia), Bipolar Care Indonesia, and Perhimpunan Jiwa Sehat (Indonesia Mental Health Association). Researchers also collaborated with Indonesian Community Care for Schizophrenia and the Indonesia Mental Health Association to find caregiver respondents. The expert participants were selected from the Lembaga Bantuan Hukum Masyarakat (LBHM) list of experts in related issues. At this stage, researchers presented quantitative data from the court document analysis to focus group discussion participants and discussed guardianship provisions and related topics using guiding questions.

DATA ANALYSIS

The court decisions were categorized using Microsoft Excel and IBM Statistical Package for the Social Science (SPSS) 22.0. The data were grouped into several categories, including administrative details about the court, demographics of applicants and respondents, purposes of applications, evidence, judges’ considerations, and court decisions. Researchers also transcribed the focus group discussion participants’ testimonies and organized the information in Excel sheets to further categorize their responses.

RESULTS

This research found 49 court documents of guardianship orders from 2015 to 2018. These orders typically included several parts: administrative information, basis of applications, evidence presented, judges’ considerations, and decisions. To produce more comprehensive results, the research also gathered the opinions and experiences of PPDs, caregivers, and experts.

ADMINISTRATIVE ISSUES

Jurisdiction

Indonesia has two types of courts: general courts and religious courts. Religious courts only have the authority to adjudicate Islamic-based cases, as stated in Article 49 of Law No. 3/2006 on religious courts:
Religious Court on the first level has the authority to investigate, decide, and solve problems amongst Islamic people related to; a) marriage; b) inheritance; c) testament; d) bequest; e) property donation on a religious basis; f) charity on a religious basis; g) sharia economy.

Other matters should be determined by the general courts. This includes guardianship matters, as noted by Article 436 of the Indonesian Civil Code, which provides:

Guardianship applications should be submitted to the District Court in which the one needing guardianship resides.

Despite the clarity of this requirement, six of the cases identified were submitted to religious courts and were determined by those courts. This is clearly against the law: religious courts have no legal authority to determine guardianship cases.

Expertise

Since a guardianship order can significantly affect someone’s life, it requires technical expertise, and a strong academic understanding of mental health issues and the barriers faced by PPDs. Our research found that while some judges had these skills, that was not always the case. For example, a disability law expert who attended a focus group discussion shared his experience talking with judges about guardianship:

Judges’ opinions regarding guardianship vary. Some of them are aware of the position (to protect PPDs’ rights) which makes these judges take careful measures in deciding on guardianship. Some of them even think that it’s better for the guardianship order to be annulled due to its effect on PPDs’ life and how one’s psychological condition should not be the basis to judge one’s own whole life (Damayanti et al. 2019).

A psychiatrist who pioneered the Mental Health Bill in Indonesia expressed concern about how law enforcement and judicial officers tend to ignore health issues in dealing with cases, including guardianship. The expert stated:

Law officers, including the courts, tend to ignore health-related bills (in dealing with cases). It needs to be assessed whether they understand the importance of health or not (Damayanti et al. 2019).

Duration of hearing

Another important aspect of a guardianship hearing is the time the court takes to make its determination. Given the complexities of the issues involved, the hearing should take a considerable amount of time. Researchers calculated the time period between the submission of an application and the court’s decision. The results are shown in Table 1 below:

<table>
<thead>
<tr>
<th>DURATION OF HEARING</th>
<th>FREQUENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 7 days</td>
<td>8</td>
</tr>
<tr>
<td>7–30 days</td>
<td>30</td>
</tr>
<tr>
<td>More than 30 days</td>
<td>9</td>
</tr>
<tr>
<td>Unspecified</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>49</td>
</tr>
</tbody>
</table>

There were eight cases examined in less than seven days. Despite the principles of speedy, simple, and low-cost trials in Indonesian courts, judges should decide each matter carefully and assess all evidence thoroughly (Yasin 2018). Although there is no obligation under civil law for judges to seek experts’ or respondents’ testimonies, Article 30 of the Disability Bill mandates law enforcement agencies to seek consideration from doctors, healthcare workers, psychologists, and social workers during the legal process concerning persons with disabilities.
It is difficult to imagine that such steps have been taken in cases where the matter is decided in less than a week. In such circumstances, it seems likely that inadequate consideration was given to the complexities involved.

**BASIS FOR THE GUARDIANSHIP APPLICATION**

There are various reasons why someone might request guardianship for their family members. The basis for placing someone under guardianship is included in the court decision as one of the factors that judges should consider. Our findings in this regard are presented in Table 2 below.

<table>
<thead>
<tr>
<th>BASIS FOR THE APPLICATION</th>
<th>FREQUENCY</th>
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<tbody>
<tr>
<td>Asset sale/purchase</td>
<td>14</td>
</tr>
<tr>
<td>Inheritance</td>
<td>11</td>
</tr>
<tr>
<td>To collect wages</td>
<td>10</td>
</tr>
<tr>
<td>To enter into legal action</td>
<td>9</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>49</strong></td>
</tr>
</tbody>
</table>

The findings demonstrate that most applications were related to financial or economic motives. These included asset sale/purchase (14), inheritance (11), and collecting wages (10). Additionally, nine applications vaguely mentioned the objective of entering into legal actions on behalf of PPDs, without specifying particular legal actions. If granted, these nine cases would give the guardian boundless authority to take legal action on behalf of PPDs.

The basis of these applications is supported by other articles in the Indonesian Civil Code. Article 1320 states that the capacity to make contracts is a requirement for making a binding agreement. Article 1330 further states that people who have been placed under guardianship cannot make contracts or agreements. It can be assumed that applicants are aware of these provisions when submitting their applications to the court.

In addition to these findings, during one of our focus group discussions, only one out of ten caregivers testified that the PPDs they took care of had their own bank accounts and managed their own finances (Ahmad et al. 2019). It therefore seems that PPDs may not only have the right to manage their own finances removed by formal legal decisions, but also via more informal mechanisms.

**EVIDENCE PROVIDED DURING HEARINGS**

According to Indonesia’s civil procedure law, *Herzien Inlandsch Reglement* (HIR), there are five kinds of legitimate evidence in civil lawsuits (Indonesian Government 1941). However, only two of them—written evidence and witness testimonies—can be extracted from the court decision documents.

Applicants presented various types of written evidence, as shown in Table 3 below. Applicants can present more than one piece of evidence in a case.

<table>
<thead>
<tr>
<th>TYPE OF EVIDENCE</th>
<th>FREQUENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental health check-up document</td>
<td>35</td>
</tr>
<tr>
<td>Patient card</td>
<td>5</td>
</tr>
<tr>
<td>Psychological assessment letter</td>
<td>2</td>
</tr>
<tr>
<td>Medical record</td>
<td>3</td>
</tr>
<tr>
<td>Medicine prescription</td>
<td>2</td>
</tr>
<tr>
<td>Referral letter</td>
<td>1</td>
</tr>
<tr>
<td>Unspecified</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>52</strong></td>
</tr>
</tbody>
</table>
Some forms of the written evidence provided are not sufficiently credible to properly assess the fluctuating mental condition of PPDs. Documents such as patient cards, referral letters, and medicine prescriptions are unlikely to provide an adequate basis for assessing a PPDs' functional skills. In addition, in some cases unspecified letters were provided by private rehabilitation centers without detailed information about what they describe.

The use of patient cards, medicine prescriptions, medical records and referral letters provides an insufficient basis for making a guardianship order. Patient cards mostly serve administrative purposes, indicating whether patients have consulted with doctors in a healthcare facility or have been admitted to such a facility. While medical records show patients’ conditions over time, and medicine prescriptions show which medications patients should take, neither provides a comprehensive description of one’s mental health condition and its impact on decision-making capabilities, which is needed in guardianship determinations.

Even psychological assessment letters are arguably insufficient as a basis for guardianship. Although a psychological assessment letter could describe one’s psychological condition, it is uncertain whether this condition determines one’s overall capabilities. In the focus group discussion with experts, one forensic psychiatrist expressed her concern in this regard:

In Indonesia, a psychological assessment letter does not differentiate between one purpose and another. Letters for administrative purposes, condition diagnosis, and assessments of one’s capability to do something are all named psychological assessment letters despite their different assessment techniques. However, the assessment of one’s capability is regulated in the Ministry of Health’s regulation Psychological Assessment for Legal Purposes, which states that the assessment should be done by a team consisting of several professionals including clinical psychologists (Damayanti et al. 2019).

Unfortunately, the court documents collected in this research do not provide further details on the content of the psychological assessment letters.

Moreover, even though the most common evidence (35) is Mental Health Check-up Documents (MHCD), these often lack currency. For example, during a hearing in 2016, an applicant presented an MHCD made in 2012, assuming that the PPDs’ mental health condition remained the same for at least three years. Using old MHCDs as a basis for making guardianship determinations is questionable due to their potential inaccuracy in determining the respondent’s current condition. As that condition is likely to change over time, the MHCD can give incorrect information.

Researchers also gathered information about the witnesses who provided evidence in guardianship hearings, as summarized in Table 4 below.

<table>
<thead>
<tr>
<th>CATEGORY OF WITNESS</th>
<th>FREQUENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant’s neighbor</td>
<td>24</td>
</tr>
<tr>
<td>Other family relative</td>
<td>14</td>
</tr>
<tr>
<td>Applicant’s sibling</td>
<td>11</td>
</tr>
<tr>
<td>Applicant’s child</td>
<td>11</td>
</tr>
<tr>
<td>Applicant’s in-law</td>
<td>10</td>
</tr>
<tr>
<td>Unspecified</td>
<td>10</td>
</tr>
<tr>
<td>Applicant’s cousin</td>
<td>8</td>
</tr>
<tr>
<td>Applicant’s partner</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>99</strong></td>
</tr>
</tbody>
</table>

Out of 99 witnesses, most (24) were the applicant’s neighbors, while the rest were from the applicant’s family. These witnesses typically described the daily condition of the respondent.
based on their observations, such as how they behaved every day. Although the selection of these witnesses complies with Articles 437–438 of the Indonesian Civil Code, their accounts could be biased and based on discriminatory presumptions.

Additionally, Article 7 of the Indonesian Doctor’s Ethical Code and its Implementing Guideline states that only doctors can provide written evidence explaining one’s mental health condition (Indonesian Medical Association 2002). This means that statements about the respondent’s mental illness or impairment, including their diagnosis, should only come from a doctor. However, out of the 49 hearings analyzed, 44 cases included witness testimonies related to mental health, 43 confirmed that PPDs have mental illnesses, and 21 described respondents’ symptoms. These statements, coming from people with unconfirmed backgrounds in mental health, could potentially threaten PPDs’ rights due to their arbitrary judgments.

The selection of witnesses also indicated that judges handling guardianship hearings may not be informed about recent laws, such as the Mental Health Bill and the Disability Bill, which require more rigorous evidence for legal processes. The Mental Health Bill states that a mental health check-up should be done by a team consisting of mental health specialized doctors. The Disability Bill states that judicial officers must seek consideration from doctors, psychologists, or social workers before assessing people with disabilities. However, findings show that these health professionals did not appear at all in the guardianship hearings.

RESULT OF THE HEARINGS

The final matter to consider in relation to guardianship hearings is the judge’s determination. This is a particularly important matter, as the judge’s decision can significantly impact the respondent’s life for a long period of time. The results of the hearings are presented in Table 5 below.

<table>
<thead>
<tr>
<th>JUDGE’S DECISION</th>
<th>FREQUENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accepted</td>
<td>46</td>
</tr>
<tr>
<td>Rejected</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
</tr>
</tbody>
</table>

Out of the 48 applications with complete documents, 46 were accepted and 2 were rejected. In other words, most of the applications (93.8%) were granted by the court.

The Indonesian Civil Code does not differentiate between plenary guardianship (where the guardian is given full authority over all of a PPDs’ decision-making) and partial guardianship (where the guardian is only given authority in a specific regard). However, it is possible for the court to order either. In the cases analyzed, 28 guardians were given plenary authority and 18 were granted partial authority (with the court specifying which decisions the guardians could make on behalf of the respondent, such as collecting their wages or managing their assets).

PERSPECTIVES OF PERSONS WITH PSYCHOSOCIAL DISABILITIES, CAREGIVERS AND EXPERTS ON GUARDIANSHIP

In addition to analyzing the court documents, we spoke to PPDs, caregivers, and experts about their views of the guardianship system. Some expressed fears regarding the prospect of guardianship orders being imposed on them. Although none had ever been formally placed under guardianship, one of them spoke of how her life was controlled by her relatives. She stated:

My part of the inheritance was controlled by my sibling, although my name was mentioned in the will. It was even difficult to hang out with my friends or form new friendships because I needed my sibling’s permission to go out. I was afraid that my sibling would punish me if he ever heard me telling such stories (Rahardian et al. 2019).

This kind of experience relates to the treatment experienced by PPDs in real life. One participant said:
Someone forcefully carried me to a rehabilitation center because my family perceived me as abnormal, notwithstanding the absence of a guardianship order. I experienced this twice (Rahardian et al. 2019).

Although both comments have a different context, they show that PPDs who live under someone else’s control experience hardship in exercising their rights.

In addition, it is also important to highlight caregivers’ perspectives since they are relatively close to PPDs on a daily basis. According to caregivers, they tend to experience hardship in assisting PPDs to take care of themselves and socialize with others, especially during periods of relapse. One caregiver stated:

> We often need to stay overnight in order to accompany PPDs during their relapse condition (Ahmad et al. 2019).

Another caregiver said:

> There was once when I moved to a new place without telling the neighbors about my child’s condition of schizophrenia. One night, my child relapsed and then shouted at some neighbors which made them upset. My other children tried to tell them: ‘My sibling is mentally ill’, but they did not believe her since my child was fine at noon. They almost acted violently toward my kid. Fortunately, I shouted ‘he’s insane’, and then the neighbors stopped (Ahmad et al. 2019).

These difficulties in caring for PPDs result in some being supportive of the guardianship mechanism. During our focus group discussion with experts, a representative of a DPO stated his concern about how PPDs, especially people with schizophrenia, spend their money. He said:

> There are cases where people with schizophrenia spend their money uncontrollably, and even take a huge amount of loans. This issue might become troubling for PPDs and their family to pay the loan bills. Therefore, we view guardianship as a means to protect PPDs’ belongings and acts (Damayanti et al. 2019).

However, these hardships do not necessarily translate into support for the guardianship scheme, as many caregivers remain uncertain about the benefits of using a legal mechanism.

Lastly, several problems with the guardianship system were highlighted by various experts. An expert from a DPO stated:

> Indonesia has a weak acknowledgment regarding consent, especially for PPDs, which results in PPDs’ rights violations. Thus, guardianship orders are often imposed informally (without hearings) on PPDs, such as when they underwent mental health treatment or rehabilitation without their consent, which is a kind of deprivation of liberty (Damayanti et al. 2019).

This was corroborated by a comment from a psychiatrist during the focus group discussions:

> Mental health assessment documents such as clinical records or letters that recommend patients to be hospitalized are usually misused for guardianship orders (Damayanti et al. 2019).

During the expert discussion, concerns about Indonesia’s legal framework were also raised. Indonesia has ratified the CRPD, which purposefully preserves PPDs’ rights, including the right to legal capacity. In line with this ratification, the state is responsible for establishing a disability support system that is person-centered, self-directed, and maximizes PPDs’ independence and participation (Damayanti et al. 2019). Such a system is not currently in place.

**DISCUSSION**

The results of our study reveal several problems with Indonesia’s current guardianship system, including non-compliance with the CRPD; inadequate understanding of legal and mental capacity; lack of clear definitions; the unlawful and inappropriate use of religious courts; a problematic hearing process; inadequate consideration given to the resolution of complex
matters; an inappropriately broad approach to guardianship orders; and a confusing system. These issues are discussed in turn below.

NON-COMPLIANCE WITH THE CRPD

Indonesia’s guardianship system preserves a substitute decision-making legal framework, despite Indonesia having ratified the CRPD which prohibits such a framework. In other words, it is evident that Indonesia has yet to adopt the CRPD as a moral compass to create regulations or measure appropriate actions for existing laws. This is also apparent in the Disability Act of 2016, which states that persons with disabilities can be deemed incapable (clause 32). Although there is no further explanation of the term ‘incapable’, clause 33 states that the determination of a person’s incapability must be decided through the guardianship process.

One contributing factor to this situation is the use of unclear, undefined terms in much Indonesian legislation. For example, although the Civil Code provides that ‘no person can be deprived of their civil rights’ (Article 3), this principle is not clarified, undermining its utility. In this regard, a recently concluded challenge in the Constitutional Court to Article 433 of the Civil Code (the Article which sets out the criteria for guardianship) involved arguments about whether this Article deprived PPDs of their civil rights. While the representatives of the government and parliament agreed that Article 3 prevented people from having their civil rights removed, they argued that Article 433 did not do so. In their view, people under a guardianship order still have their civil rights; however, they need to have a guardian exercise those rights for them. The parliament representative further stated that there was nothing wrong with the current guardianship system, because guardianship appointments are determined in a court hearing (case number 93/PUU-XX/2022).

These two arguments neglect the principle of equality before the law set out in Article 12 of the CRPD. This Article explicitly provides that a state party States Parties must recognize the legal capacity of a PPD and provide the assistance necessary for them to exercise that legal capacity, and to stand equally with others as a subject of law. Additionally, the CRPD Committee’s General Comment 1 of 2014 regarding Article 12 explains that legal capacity is a combination of two components: legal agency and legal standing (CRPD Committee 2014: para 13). Thus, legal capacity should not be interpreted merely as having civil rights. It should be viewed holistically as both having such rights and being enabled to exercise them personally (without them being given to others to exercise on their behalf) (CRPD Committee 2014: para 13).

INADEQUATE UNDERSTANDING OF LEGAL AND MENTAL CAPACITY

Many problems with the Indonesian guardianship system might be traced back to the lack of consensus on what constitutes mental capacity and legal capacity, or the criteria for someone losing capacity. Quinn (2010) has criticized the use of rationality to value capacity, noting that human decisions are often a mix of rationality and raw preferences. Similarly, Series (2015) posits that feminist writings on relational autonomy were influential in CRPD negotiations and challenge dominant liberal notions of autonomy that are strictly conceived in terms of self-sufficiency, rationality, and independence from others’ influence. Without a more contemporary understanding of legal capacity, the court risks placing everyone with mental health conditions under guardianship schemes without providing the types of supports to exercise legal capacity required by PPDs and their families under the CRPD, in combination with other measures that promote their rights, such as the right to the highest attainable physical and mental healthcare on an equal basis with others.

De Bhailis and Flynn (2017) further explain the distinction between legal capacity and mental capacity, emphasizing that legal capacity is the right to be recognized as a person before the law and to have one’s decisions legally recognized. This involves having the power to create, modify, or end legal relationships. On the other hand, mental capacity refers to a combination of cognitive ability, impairment, and a person’s understanding of the consequences of their actions. This distinction is crucial to calls for ‘universal support’ to exercise legal capacity (CRPD Committee 2014) because it helps turn attention from the point at which a person lacks mental capacity, to the kinds of support (and safeguards) required for a person to have the power to create, modify, or end legal relationships. This power might include appointing people to support a person to make decisions, or may—at the more intensive end—invoke
‘representatives’ being appointed to help make decisions based on the ‘best interpretation of will and preference’ and the person’s rights (CRPD Committee 2014: para 21).

**LACK OF CLEAR DEFINITIONS**

From the discussion above, it should be clear that part of the problem of guardianship in the Indonesian context lies in the lack of clear legal definitions regarding ‘simplemindedness’, ‘insanity’, and ‘rage’. These terms suggest a static and persistent definition of a person’s mental health condition, while it is clear that mental health conditions are dynamic. Despite this fact, a person can be placed under a guardianship order with just a patient card as evidence. Such occurrences might result from unclear and inadequate definitions of mental capacity, while also conflating legal and mental capacity.

**UNLAWFUL AND INAPPROPRIATE USE OF RELIGIOUS COURTS**

Aside from conceptual problems, the finding that some applications were decided in religious courts indicates poor administrative systems, usually involving administrative/clerical staff and the Head of Court. Despite religious courts having overlapping authorities in civil affairs, such as adjudicating divorce, inheritances, and Sharia economics according to Islamic laws, their authority does not extend to guardianship matters (Idri 2009). Therefore, guardianship hearings held in religious courts are unlawful.

The use of different courts to adjudicate guardianship matters could generate inconsistent legal approaches. For example, a research article by Sharfina and Sukananda (2019) analyzing the protection of civil rights for people under guardianship based on the Bantul Religious Court Document found that a person’s civil rights were considered absolute despite guardianship. This is because such individuals still have property rights: the guardianship order simply means that in exercising those rights, they must be represented by their guardian. However, the CRPD provides that a person’s rights should not be reduced by any means, including appointing someone else to exercise those rights. This system is still part of a prohibited substitute decision-making system, where a person’s legal capacity can be removed and given to someone else who is assumed to act in their ‘best interest’ rather than according to their ‘rights, will and preference’ (CRPD, Article 12(4); CRPD Committee 2014).

**PROBLEMATIC HEARING PROCESS**

The neglect of PPDs’ legal capacity might be driven by the assumption that their psychosocial condition permanently affects their decision-making capacity. However, even if some determination of mental incapacity is retained, it remains the case that not all mental impairments are permanent; some are episodic, meaning there are instances when PPDs can make decisions independently even as they may require support at other times. Such a fact is yet to be acknowledged by the Indonesian guardianship system. Instead of considering the episodic nature of mental impairment, the existing system relies on evidence from uninformed, non-expert parties such as applicants or neighbors. This problematic system allows a party who might have only witnessed a mental impairment episode once or twice to give a witness statement in the hearing that could profoundly affect a PPDs’ entire life.

The extent of a PPDs’ impairment will depend on the nature of their condition as well as the support they are provided with. For example, although a person who experiences schizophrenia will often find it difficult to take care of themselves, caregiver support, including support for the person to take care of themselves, can significantly help improve their condition and achieve recovery (Rahayuningrum et al. 2021). This includes placing the person in a position where they can make reliable decisions like everyone else. However, instead of focusing on how to help or provide appropriate assistance to PPDs so that they can recover and exercise their rights, the current system simply transfers their rights to another person. This is evident from our finding that 46 out of 48 applications for guardianship were accepted (granted).

**INADEQUATE CONSIDERATION OF COMPLEX MATTERS**

Data on the length of guardianship hearings indicates that judges are dedicating insufficient time to resolving highly complex matters. PPDs are generally placed under guardianship orders
after only one or two court sessions. Data shows that there were seven hearings decided in less than seven days. In such cases, there is likely to have been just one hearing, as a hearing is usually held once a week. Even where cases took up to a month to resolve (as was the case in 30 matters), the time taken to resolve the matter is unlikely to have been sufficient to assess the complex issues that frequently arise in guardianship matters.

INAPPROPRIATE SCOPE OF GUARDIANSHIP ORDERS

The widespread provision of plenary guardianship likely means that guardians are expected to perform tasks they are not prepared for. While applicants might know how to apply for guardianship, they might not be ready for the responsibilities that come with it. This approach conflicts with the supported decision-making process recommended by the CRPD Committee (2014: para 28). Such an approach has been adopted in some Australian jurisdictions (Gooding & Carney 2023; Wirya & Muzaki 2021). For example, under the Guardianship and Administration Act 2019 (Vic) ‘supported decision-making’ is included and can arise in two ways. First, the person themselves (the ‘principal’) can designate a ‘supportive guardian’ or ‘supportive administrator’ to have legal authority to assist with decision-making in personal affairs and financial management respectively. Alternatively, the Victorian Civil and Administrative Tribunal (VCAT) can make an appointment (section 87). In either case, it is deemed to be the decision of the principal, grounded in agreement between the principal and the supporter (section 87(2)). These different options have different objectives and are carried out by different people. Unfortunately, such a division of responsibilities is not well-regulated by Indonesia’s Civil Code. This means that the provision of partial, rather than plenary, authority usually occurs at the discretion of the judges and is not common.

In addition, when a guardian has been appointed, any legal agreement made by a person under guardianship is considered null and void (Civil Code Articles 1320 & 1330). This includes any contracts signed by the person, as well as associated matters such as their ability to possess inheritance, receive wages/pension money or sell or purchase goods. In addition, their ability to enter into legal action can be taken over by the guardian. These provisions go against the CRPD, which mandates that the state ensures that PPDs retain their economic rights and benefits, including the right to manage their transactions or obtain their inheritance rights (CRPD Article 12(5); Epstein 2011). Article 12(3) and (5) of the CRPD makes clear that a person’s disability should not be the basis to deny them access to finance and property, including inheritance, and support should be provided for them to access their legal capacity in financial matters.

There are also insufficient constraints on the length of guardianship orders. No decision we examined limited the period for which the person was placed under guardianship, making the already plenary guardianship limitless. Although Article 459 of Civil Law states that a guardian’s duty lasts for eight years, this provision only applies if the guardian wants to end the guardianship order. There is no provision for the PPD to seek to terminate the guardianship themselves.

Many people have claimed that plenary guardianship can result in a kind of ‘civil death’; a situation where someone cannot hold the ‘right to have rights’ and perform basic liberties in determining their life (Sell 2019: 228). The lack of monitoring and evaluation of limitless plenary guardianship in the Indonesian legal system risks arbitrary treatment given by the guardian to a PPD, especially when the guardian is a close relative or another family member living with them in a closed setting. There is a general sense amongst reformists (rather than those who adopt the wider interpretation of Article 12 adopted by the CRPD Committee) that limited (not plenary) guardianship is appropriate in most cases.

CONFUSING SYSTEM

It has been found that 60.5% of Indonesians with legal problems tend to avoid the formal legal system for resolving issues, preferring informal mechanisms (such as those involving local government or traditional or religious figures) (Wicaksana et al. 2022: 1–14). This is especially likely to be the case in the guardianship context, where many PPDs and caregivers in Indonesia have said that they are unfamiliar with and confused by the guardianship system. This creates a strong impetus for reform, to create a more modern and clear system, such as the supported decision-making system mandated by the CRPD. Reforming the guardianship mechanism
is necessary to find new and innovative methods of communication and support measures between PPDs and their families, allowing PPDs to retain individual autonomy as decision-makers, while receiving sufficient and appropriate supports where needed.

CONCLUSION

The Indonesian guardianship system, which uses the substitute decision-making paradigm, violates the CRPD mandate that Indonesia has ratified. Our findings suggest that guardianship orders are often put in place without adequate and sufficient processes, making them ineffective in protecting the most vulnerable groups in society. This trend violates even the narrower interpretations of what is required by Article 12 of the CRPD, let alone the broader call for ‘universal legal capacity’ proposed by the CRPD Committee. It is also clear that Indonesia has ignored the ways that the CRPD requires a new approach to the legal capacity of persons with disabilities, offering robust means of supporting and safeguarding that legal capacity rather than means of restricting it. Further assessment of the guardianship system and other legal aspects of capacity is needed before implementing law reforms that are more suited to the current Indonesian situation.

ETHICS AND CONSENT

The research for this article was approved ethically by the Atma Jaya Catholic University Ethics Committee under the proposal named ‘Perlindungan Hak Orang dengan Disabilitas Psikososial’. In addition to the ethical clearance, the researchers provided informed consent documents to each person with psychosocial disability invited to attend the focus group discussion in order to ask for their approval of data collection for the research purpose.

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COMPETING INTERESTS

The authors have no competing interests to declare.

AUTHOR CONTRIBUTIONS

• Hisyam Ikhtiar Mulia: Main Author
• Albert Wirya: Co-author
• Yosua Octavian: Co-author and data analyzer
• Ricky Gunawan: Co-author and data gatherer
• Piers Gooding: Co-author
• Jamie Walvisch: Co-author
AUTHOR AFFILIATIONS

Hisyam Ikhtiar Mulia  orcid.org/0000-0003-2189-0236
Head of Research and Education Division, REMIJSI Foundation, Indonesia

Albert Wirya  orcid.org/0000-0002-6970-8555
Director of Lembaga Bantuan Hukum Masyarakat and Lecturer at the Department of Criminology, University of Indonesia, Indonesia

Yosua Octavian
Casework Coordinator, Lembaga Bantuan Hukum Masyarakat, Indonesia

Ricky Gunawan
Independent Consultant, Indonesia

Piers Gooding  orcid.org/0000-0001-5743-5708
Associate Professor, Latrobe University, Melbourne, Australia

Jamie Walvisch  orcid.org/0000-0001-6472-468X
Senior Lecturer, University of Western Australia, Perth, Australia

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