

# Guardianship Model for People with Disabilities in Indonesia

Hanny Amelia

{hanny.amelia99@gmail.com}

{Universitas Padjadjaran, Bandung, Indonesia}

**Abstract.** Indonesia's constitution contains number of articles strictly regulate human rights including for disabilities people. Article 32 Law 8/2016 concerning Person with Disabilities (PwD) states PwD may be declare incompetent based on the declaration of the court and should be under guardianship. This law not yet accommodating guardianship arrangements which the court declaration does not guaranteed their rights and necessary interest legally protected. Research result in several guardianship cases, PwD experienced discrimination in both criminal and civil rights especially in making agreements. This is library research using various literatures of related laws and regulations with human rights approach by examining protection elements both in national and international convention of PwD. This research found and concluded that Indonesia needs guardianship institution with the main task of being the authority to appoint guardians through court declaration regulated by law as a form of the equality before the law principle.

**Keywords:** Guardianship, Person with Disabilities, Legal Protection, Equality Before the Law, Human Rights

## 1 Introduction

The state regulates the subject of law is every citizen in the country, without any distinguishing including disabilities people. They are known to have limitation in physically, mentally, intellectually and sensory as regulated in Civil Code and Law 8/2016 concerning Person with Disabilities (PwD). However, this regulation cannot be used as permanent and ideal guidelines which often detrimental and does not provide legal protection for PwD. This law is a form of ratification by government of the UN Convention on The Rights of Persons with Disabilities (CRPD). There are still several legal issues that are discrimination towards the legal rights of PwD. World Health Organization date shares approximate 27.3 million PwD in Indonesia. Meanwhile national data Badan Pusat Statistic on 2020 shows the number of PwD was 22.5 million and National Economic Survey showed 28.05 million people.[1] This research discusses person with psychosocial Disabilities (PDP) meaning disabilities with mental health condition that hinder routine activities for a long period of time. However, this does not rule out the possibility of being applied to people with other disabilities generally. It should be noted this type of disability is not caused by psychological and physiological conditions, but also by social and cultural barriers.[2] Regarding PDP, currently there has been a shift in the meaning of disability, from medical terms to social terms as a cause of mental disorder in adulthood. This is more closely related to the limitations of Human Rights because the CRPD views disability as a human condition that cannot be separated from diversity and humanity.[3]

Guardianship consists of two parties: the guardian and PDP. A guardian is legally entitled to care for/look after a person/baby's property under court declaration for someone who has an

intellectual disability or someone who is legally unable to carry out legal actions such as making agreement [4]. However, the implementation of guardianship in Indonesia does not yet provide strict guidelines. The result of the research shows the cause apart from ignorance of the family as guardian, is also caused by statutory regulation regarding guardianship often cause confusion in practice. Abuse of authority as a guardian also occurs especially in terms of making legal decision which often harm PDP. In CRPD, the conceptual framework used is equality before the law principle. This means including the treatment of PDP as a legal subject. Meanwhile the conceptual framework in Indonesia in the form of full power covering all aspects that position the PDP as a weak party. This is stated in Law number 8/2016 which does not regulate guardianship procedures in a complete and balance guardianship model.

## **2 Scope of Problems**

The problems are limited as follows:

1. How is the current implementation of PDP guardianship mechanism in Indonesia?
2. What is the ideal model of guardianship for PDP in Indonesia?

## **3 Research Methods**

This writing type is using normative legal research. Legal materials collected through library research study [5] Problem approach of research was carried out using an approach laws and conceptual approaches and case approach consider using a statutory approach was studied the correctional institution which are regulated in the Civil Code and Law Number 8/2016 regarding PwD.

## **4 Discussion**

### **4.1 Definition and Categories of Persons with Disabilities**

According to article 12 CRPD, every person regardless of their ability to make decisions, has legal capacity[6]. Legal capacity is defined as the ability of an individual to hold legal rights through valid legal actions, including all civil rights. Based on the law in force so far, this ability is greatly influenced by intellectual capacity and certain mental capacities which then become the basis for determining guardianship for PwD especially mental and intellectual disabilities (PDP) [7]. For example, in Indonesian Civil Law discourse seems to emphasize that mental/ psychosocial disabilities cause a person's legal capacity to be lost, even though the opposite is true, this capacity is removed by court order[8] through guardianship. Even though a medical diagnosis can indicate the presence of mental disorder or cognitive disorder a person's ability to make decision depend on the specific situation and conditions. [9] Therefore, a mere diagnosis of a mental problem should not be enough to determine whether someone needs to receive guardianship. This is the same as intellectual disability which cannot be a sufficient basis for ignoring a person's legal capacity and appointing a guardian over him.

The Civil Code regulates two types of subjects who have the right to guardianship, namely blood relatives in a straight line and those in the sideline up to the fourth degree. [10] What is meant by blood family in a straight line is descendants of others, this can be interpreted as biological children, biological mothers, or biological fathers. Sideline family includes brothers/sisters who

share the same father, biological brothers/sisters, uncles and nephews, uncles and grandnephews and grandnephews or vice versa. Apart from these two categories, there are also *semenda* or families that are recognized through marriage ties. Article 434 shows that pardon in Indonesia is different from other countries, namely that it only allows pardon by the family, except for those who do not have a family. From this discussion, guardians in Indonesia are guardians of the family. The positive side of this is that caregivers are expected to be able to protect the caregivers from the risk of human rights violations by government officials or other institutions outside the family, which often occurs in large-scale institutionalization practices for people with disabilities who are formally cared for by the administrators of these institutions. The negative side of this is the possibility of the family becoming a perpetrator in human rights violations. What often happens is shackling or exile of PDP from the social environment. In other countries pardon can be requested by groups outside the family. In fact, these external guardians are the majority in many guardianship cases. English and Welsh law, for example, permits pardons by organizations or persons appointed by the court[11]. This appointment is valid for a period of six months and can be extended for a further six months. In addition, a PDP can appoint another person whom he trusts to protect him in the future as a recipient of a long-term power of attorney (Lasting Power of Attorney). In England and Wales, the concept of 'regent' is not used because they prefer to use the concept of 'deputy'[12]. Another example is the state of South Australia which also has a guardianship system that allows guardians not only to come from family, but also medical personnel, volunteers, professional service providers, the community and even friends whom the prospective guardian trusts. South Australia also has a guardianship system which provides special institutions that are formed professionally to handle guardianship/representation [13].

#### **4.2 Implementation of Guardianship in Indonesia**

Indonesia's guardianship legal framework views disability solely from a physical and psychological approach. In other words, this framework views disability as something inherent in a person. This contrasts with the CRPD which also incorporates social and cultural barriers that contribute to a person's disability.[14] Indonesia determines a person to be a guardian through an application as an applicant for forgiveness which is addressed to the District Court according to the legal domicile of the person who will be supervised (the respondent). The applicant must bring evidence that describes the condition of the respondent. The applicant must bring evidence that describes the condition of the respondent. Then the applicant must notify the respondent of the trial time. This trial is open to the public. Next, the District Court will examine the request for pardon, the evidence, and the witnesses presented at the trial. The District Court also has the right to examine the information of blood or related relatives, examine the respondent, and the most important thing is the existence of a certificate from a psychiatrist. Mental health examinations are required in Law Number 18 of 2014 concerning Mental Health (Mental Health Law), within the framework of protecting the human rights of PDP. From historical perspective, guardianship comes from the Dutch word *Curatelle* or in English it is called Custodian.

#### **4.2 The Ideal Model of Guardianship for Indonesia**

In the first model based on 8/2016, the system adopted is the flow of requests from the family to the court accompanied by the results of mental health examinations based on 18/2014. The court issued an order to the applicant from the family as his guardian. See figure .1. Meanwhile, the ideal model for overcoming guardianship problems in Indonesia can be seen in the next chart based on 8/2016, the system adopted is the flow of requests from the family to the court

accompanied by the results of mental health examinations based on 18/2014. The court issued an order to the institution out of the family as the guardian for PDP. See figure 2

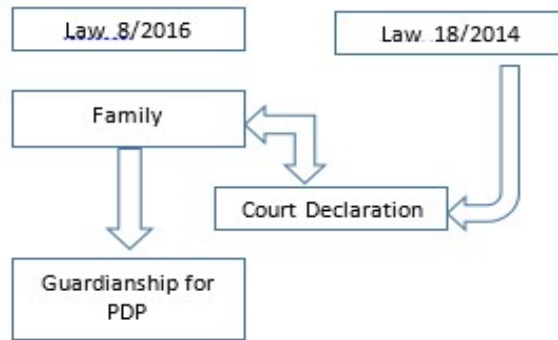


Fig. 1. Model system of guardianship in Indonesia. Originally Author's property

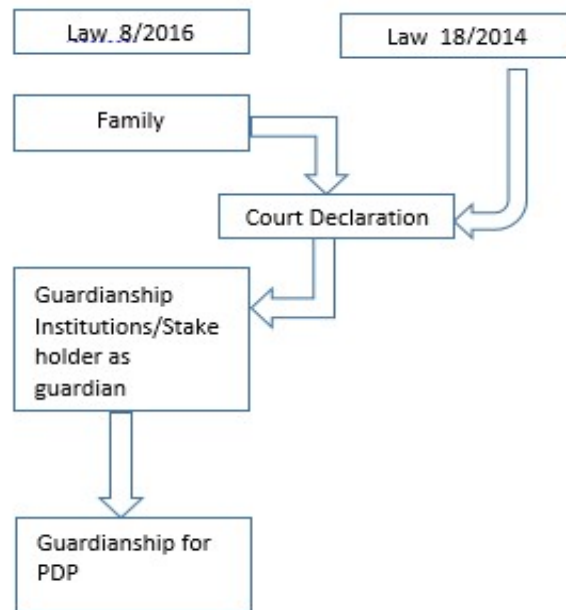


Fig. 2. Ideal Model system of guardianship for Indonesia. Originally Author's property

## 5 Conclusion

Guardianship arrangements in Indonesia are not yet ideal and tend not to be in line with the CRPD. Apart from that, there are still many shortcomings as well as inconsistencies and confusion in the regulation of the guardianship system in Indonesia, especially regarding the decision-making mechanism for PDP. Therefore, in line with the CRPD, Indonesia as a member

country has an obligation to change regulations that are not in accordance with the CRPD principles. For example, Indonesia's current policy on pardons violates the CRPD. CRPD also offers the principle of support, which includes support from trained professionals who can help PDP overcome social obstacles. This support does not mean replacing PDP in making decisions but reaffirming their right to legal capacity and respecting their contribution to social life. The fundamental freedom for PDP to make decisions on an equal basis with others does not relieve the state of the obligation to provide support for people with disabilities. Due to their physical impairments coupled with a combination of disabling factors in society, PDP face accessibility barriers that prevent them from participating equally in society along with non-disabled people. The CRPD requires governments to provide various forms of support, promote assistance and support, and ensuring accessibility for people with disabilities. As previously explained, the CRPD also requires the government to guarantee the legal capacity of people with disabilities on an equal basis with other people. The CRPD requires states to recognize the legal capacity of people with disabilities in all aspects of life and provide support for them to exercise that legal capacity and ensuring accessibility for people with disabilities. As previously explained, the CRPD also requires the government to guarantee the legal capacity of people with disabilities on an equal basis with other people. They demand that the state ensure that all efforts are made to provide comprehensive and effective protection for PDP and people with other disabilities. Apart from that, the CRPD also carries the concept of "*consent*" or agreement, both in matters of marriage as well as taking medical procedures and experiments. In this way, the state has prioritized the consent of people with PDP disabilities as a form of respect for their dignity as human beings and if the state ignores this, it is the same as harming the upholding of human rights.

## References

- [1] Gandawangi Sekar, "Pemberdayaan Penyandang Disabilitas Dimulai Dari Pendataan," Kompas, Jakarta, Jan. 03, 2023. Accessed: Aug. 03, 2024. [Online]. Available: <https://www.kompas.id/baca/humaniora/2023/01/03/pemberdayaan-penyandang-disabilitas-dimulai-dari-pendataan>
- [2] Minkowitz Tina and Kovary Mira, "Implementation Manual for The UN Convention on The Rights of Persons with Disabilities," World Network of Users and Survivors of Psychiatry, Feb. 2008, Accessed: Aug. 03, 2024. [Online]. Available: [https://www.researchgate.net/publication/238691170\\_WNUSP\\_Implementation\\_Manual\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_Persons\\_with\\_Disabilities](https://www.researchgate.net/publication/238691170_WNUSP_Implementation_Manual_for_the_Convention_on_the_Rights_of_Persons_with_Disabilities)
- [3] United Nation, Convention on the Rights of Persons with Disabilities (CRPD) General Principles. <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>, 2006.
- [4] B. Cox, "Guardianship for People with Mental Illness: Social Workers' Perspectives and Decisions," in candidacy for the degree of Ph.D, University of London, London, 1993.
- [5] H. Soemitro, *Methodologi Penelitian Hukum dan Jurimetri*, 4th ed. Ghalia Indonesia, 1990.
- [6] G. Szmukler, "Capacity, Best Interest, Will and Preferences and The UN Convention on the Rights of Persons with Disabilities," *World Psychiatry*, vol. 41, p. 1, 2019.
- [7] K. Sabbata, "Dementia, Treatment Decisions and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems," *Frontier in Psychiatry*. Accessed: Aug. 03, 2024. [Online]. Available: [www.frontiersin.org](http://www.frontiersin.org)
- [8] A. Wirya, "Asesmen Hukum Pengampuan di Indonesia: Perlindungan Hak Orang dengan Disabilitas Psikososial," Lembaga Bantuan Hukum Masyarakat, p. 8, 2020.

- [9] S. Meares, S. McSwigan, and M. Porter, "Decision-making Capacity Evaluation in Adult Guardianship: A System Review," *International Psychogeriatric Association*, vol. 28, no. 3, 2015.
- [10] KUHPerdata, *Kitab Undang-Undang Hukum Perdata pasal 434*.
- [11] Department of Health, *Mental Health Act 1983: Code of Practice*. United Kingdom: [https://assets.publishing.service.gov.uk/media/5a80a774e5274a2e87dbb0f0/MHA\\_Code\\_of\\_Practice.PDF](https://assets.publishing.service.gov.uk/media/5a80a774e5274a2e87dbb0f0/MHA_Code_of_Practice.PDF), 1983.
- [12] UK Public General Act, *Mental Capacity Act 2005*. United Kingdom: <https://www.legislation.gov.uk/ukpga/2005/9/contents>, 2005.
- [13] D. of H. ([www.nhs.uk/easy-mentalhealthact](http://www.nhs.uk/easy-mentalhealthact)) Coventry City Council, "An Easy Read Fact Sheet: People Making Decision for You."
- [14] The National Mental Health Consumer and Career Forum, "Understanding Psychosocial Disability," 2014.