Deconstructing the Legal Procedure for Guardianship in Indonesia: An Embodiment Approach to Disability

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Abstract. People with psychosocial disabilities in Indonesia often face barriers to exercise their legal capacity. Although Indonesia ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2011, they still impose the guardianship system, restricting the right to legal identity due to psychosocial and intellectual disability. Article 433 of the Indonesian Civil Code and Article 32 of the Indonesian Disability Act 2016 legitimise this procedure. This article examines the legal procedure of the guardianship system in Indonesia using an embodiment approach to disability. The author conducted a legal literature review to gather the data. This article found that the legal procedure on guardianship in Indonesia is pathologizing the voices and lived experiences of people with psychosocial disabilities. Moreover, this expert-led-assessment practice has been preserved by Article 82 of the New Indonesian Health Act 2023. Finally, this paper suggests using an embodiment approach to disability to construct a new alternative to assistive decision-making procedures in Indonesia.

Keywords: Assistive Decision-Making; Guardianship System; Legal Capacity; Psychosocial Disability; Right to Legal Identity

1 Introduction

People with psychosocial disabilities are among the most marginalised groups worldwide [1] [2]. They often grapple with pervasive stigma, coerced institutionalisation, and grave violations of their human rights [3] [4] [5]. Numerous research studies and data have shed light on the distressing reality that people with psychosocial disabilities are frequently shackled and incarcerated within mental institutions [6] [7] [8]. To compound their challenges, many institutions also degrade their legal identity and legal capacity.

People with psychosocial disabilities frequently encounter substantial barriers when it comes to exercising their legal capacity [9]. One such obstacle is the guardianship system, which employs a substituted decision-making process [10] [11]. Within the framework of guardianship, a legal guardian possesses the authority to make decisions on behalf of people with disabilities, sometimes even wielding the power to overrule their preferences and choices. Regrettably, this system is inherently discriminatory, serving to marginalise and erode the rights and life experiences of disabled people. It is worth noting that, despite its incompatibility with the principles of human rights, this system persists in many countries across the world [9] [10] [2].

Discussions about guardianship and legal capacity for people with psychosocial disabilities consistently revolve around the contentious issue of mental or intellectual capacity [9]. Some professionals argue that mental capacity and legal capacity are unrelated, while others posit

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that mental capacity dictates how people can exercise their legal rights. These diverse perspectives have entrenched the debate in a clash between the medical model and the social model. The medical model tends to emphasise the physiological conditions of the human body [12], frequently reducing people to their medical conditions [13]. In contrast, the social model tends to negate the uniqueness of the disabled body [12], and instead highlights the environmental and societal factors contributing to disability [14] [15] [16]. The human rights-based approach to disability emerges as a potential reconciliation [17], accommodating aspects of both the medical and social models and thus offering a balanced framework for upholding the rights and dignity of people with disabilities.

The adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) marked a pivotal moment in the discourse surrounding disability. Many disability activists around the world contend that the UNCRPD was inspired by the social model of disability [18] and, consequently, reject the medical model. In reality, the UNCRPD incorporates elements from both medical and social models, defining disability as the presence of certain impairments that ‘may' hinder an individual's participation in social life [19]. The use of the word 'may' place more emphasis on impairments than on the societal barriers faced by disabled people. Furthermore, as a rights instrument, the UNCRPD presents a universal set of norms that can be reductive in nature since it is crafted by abstracting the lived experiences of specific groups, sometimes failing to address the unique needs of other groups [20] [21].

In contrast, the embodied approach to disability places a strong emphasis on the lived bodily experiences of disabled people [12]. According to Merleau-Ponty, as cited in [22], human beings understand the world, interact with others, and even define themselves through their bodies and perceptions (embodied perceptions). Consequently, they navigate, comprehend, and shape the social environment with reference to their lived bodies [23] [24]. This perspective underscores the ontological and epistemological significance of the lived body, indicating that disabled people may navigate and interact within the social sphere differently due to the uniqueness of their bodies. As a result, they possess knowledge and agency that is known only to themselves, which includes recognising the limitations imposed upon them by the world [25].

Applying an embodied approach to disability introduces a nuanced perspective to the discourse, leading to a more comprehensive and holistic discussion. This paper seeks to deconstruct the Indonesian guardianship system and its legal procedures concerning people with psychosocial and intellectual disabilities by adopting an embodied approach. This paper commences by elucidating the legal underpinnings of the guardianship system and its implementation in Indonesia. In the discussion section, we advance arguments highlighting the issues inherent in the guardianship system and its legal procedures, advocating for reform, and elucidating how an embodied approach can contribute to this transformation. Finally, we conclude by discussing the practical implications of embracing an embodied approach in future legislation and legal procedures for supporting decision-making.

2 Guardianship: A legal foundation and its practices in Indonesia

In Indonesia, the legal basis for the guardianship system can be traced back to Article 433 of the Indonesian Civil Code, a legal document with colonial origins [26] [27]. This civil code, somewhat problematically, groups psychosocial and intellectual disabilities together without acknowledging that these represent distinct concepts with differing needs. This misconception underscores the importance of distinguishing between the two. Furthermore, the guardianship process is also enshrined in Article 32 of the Indonesian Disability Act of 2016, despite this Act being informed by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Both the Indonesian Civil Code and the Indonesian Disability Act of 2016 mandate that guardians secure a statutory declaration from the district court as part of the guardianship process.

According to [27], district courts throughout Indonesia issued a total of 49 guardianship declarations related to people with psychosocial and intellectual disabilities between 2015 and 2018. The concerning aspect of this practice is that all these declarations were primarily grounded in medical considerations. In essence, a diagnosis from a psychiatrist or even a prescription for mental health medications constituted sufficient evidence for a judge to impose guardianship upon people with disabilities. This practice has been perpetuated through the recently enacted Health Act of 2023. Article 82 of this new health legislation mandates that "for civil purposes, all people suspected of having mental illnesses and having lost their legal capacity must undergo a mental health assessment." This provision effectively grants healthcare professionals significant authority to assess an individual's mental capacity and, in certain cases, strip them of their legal capacity.

In response to these legal challenges, a disabled people's organisation and legal activists have taken the matter to the Indonesian Constitutional Court. Their objective is to eliminate the guardianship system in Indonesia, as it runs counter to the human rights principles enshrined in the Indonesian Constitution of 1945. This is especially pertinent because the practice violates the principles of equality before the law and equitable access for marginalised groups. However, the Indonesian Constitutional Court, in its Decision number 93/PUU-XX/2022, only partially accepted this plea. They changed the word "must be put under guardianship" to "can be put under guardianship." The constitutional judges argued that some people with psychosocial disabilities still require the guardianship system for their protection and legal certainty. Additionally, the constitutional court asserted that all guardianship declarations issued by district courts must consider the input of professionals and include mental assessments.

This legal framework governing the guardianship system in Indonesia perpetuates a troubling dynamic whereby the voices of people with psychosocial disabilities are consistently pathologized through the lens of professional opinions. This system relegates people with psychosocial disabilities to the status of objects rather than recognising them as active subjects. Their inherent value as human beings are diminished due to their mental conditions, thus further entrenching the stigmatisation of people with psychosocial disabilities within the legal framework.

3 Discussion: Problems and opportunities

The guardianship procedure in Indonesia, as currently practiced, presents a disheartening disregard for the lived experiences of people with psychosocial disabilities. In accordance with Articles 436-446 of the Indonesian Civil Code and Article 33 of the Indonesian Disability Act, the process for initiating a guardianship application is initiated by a potential guardian through a district court. The applicant is required to submit evidence to be considered by a single judge during a brief procedure. The judge then issues a prescription, which holds legal authority, and people with psychosocial or intellectual disabilities are not afforded the opportunity to engage in plea bargaining. More disconcertingly, they are neither informed about nor invited to participate in the proceedings.

The glaring absence of an obligation to involve people with psychosocial disabilities in this process, along with the absence of plea bargaining, underscores the reduction of these people into legal and biological objects. They are left without the opportunity to challenge the application or the resulting prescription. An example that illustrates this concern is the case of R, an individual with intellectual and psychosocial disabilities in Jambi, Indonesia, who only became aware that his brother-in-law had been appointed as his guardian after the district court concluded and issued the prescription [27]. Consequently, R finds himself without the ability to contest this prescription during or after the legal process due to the loss of legal capacity and standing. This legal procedure clearly disregards the rights of people with disabilities to be treated as equals. Regrettably, it reduces psychosocial disability to a mere commodity within the confines of the courtroom [28], placing them under the overbearing control of judges, medical documents, and guardians [29] [30].

Further complicating matters is the practice of using a diagnosis from a psychiatrist or a prescription for mental health medication as sole evidence for initiating guardianship applications. However, this approach presents a multifaceted set of problems. To begin with, the diagnosis provided by professionals is inherently unreliable, as it assesses psychosocial disabilities through a professional-led assessment model. As posited by [25], professionals, as outsiders, are fundamentally incapable of truly capturing the lived experience of disabled people. Furthermore, this approach underscores that legal proceedings rely on a single source of knowledge to establish a regime of truth. Conversely, legal processes, as [31] highlights, should encompass a multitude of knowledge sources, including religion, culture, economics, politics, and the lived experiences of people with disabilities, in shaping the discourse. This is because law does not exist in isolation but rather interacts with the lived body and other institutions [32] [28]. Therefore, legal procedures should adopt a comprehensive approach that considers all relevant factors and institutions. Focusing solely on the medical perspective in legal procedures can lead to the establishment of a normative standard [13] [33], framing disability as a deviation rather than a lived experience.

In a broader context, it becomes evident that the guardianship system in Indonesia necessitates comprehensive reform. Such reform should encompass an array of factors related to psychosocial disability, including biological, psychological, social, medical, historical, and human rights aspects. For instance, historical factors, such as colonialism, have contributed to the pervasive stigma surrounding psychosocial disabilities by fostering exclusion within institutional settings and the guardianship system [3] [34] [5] [11], which in turn hampers their active involvement in the decision-making process. In the medical realm, advancements have equipped people with psychosocial disabilities with the means to manage their biological and psychological conditions [35] [36] [37], thereby affording them greater opportunities for active participation in decision-making processes. Furthermore, adopting a human rights perspective underscores the value of a supported decision-making procedure as an alternative means of access for people with psychosocial disabilities [38] [9] [39] [40]. In this light, reforming the guardianship system to be more equitable and just should encompass all these factors and opportunities relevant to people with psychosocial disabilities.

Abolishing the guardianship system and its associated procedures is indeed a crucial step towards achieving justice and inclusion. However, we must acknowledge the reality that some people with psychosocial disabilities still require assistance in the decision-making process. To abolish the system without considering this need could inadvertently perpetuate another form of discrimination and injustice, where we fail to embrace diversity and provide access to cater to diverse needs. Therefore, an embodied approach assumes critical significance in this context, as it elucidates the interconnectedness of biological, psychological, and social factors that collectively shape the lived experiences of people with disabilities [25] [24]. This approach, which anchors the lived body as a unique and central aspect of decision-making, needs to be central to devising alternative procedures. The lived body, by its very nature, is distinct, and it should serve as the primary source of knowledge for facilitating access for people with psychosocial disabilities [25]. It positions psychosocial disability as the lived body at its core, actively engaged in developing a support plan. With an embodied approach, we can furnish a comprehensive and appropriate service for everyone, as we rely on their lived experiences.

4 Implications for practice

In the realm of practice, there is a pressing need for the reform of legal procedures to become more adaptable, inclusive, and holistic when it comes to people with psychosocial disabilities. It is crucial for laws and the legal system to recognise people with psychosocial disabilities as active political subjects who are entitled to equal access to justice. It is worth acknowledging that the nature of laws and the legal system is inherently reductive [31], and I concur with this assessment. However, laws also serve as the bedrock and rationale for upholding rights and justice. Therefore, by embracing an embodied approach, we have the potential not only to embrace universal rights and justice but also to construct personalised rights and justice that are grounded in the individual's lived bodily experiences [41] [42].

In a radical departure from the current guardianship system, there is a compelling argument to shift towards a supported decision-making procedure that genuinely values the preferences, perspectives, and lived experiences of people with psychosocial disabilities [38] [43] [44] [45]. This procedure aligns with the principles of an embodied approach, which recognises lived bodily experience as the primary source of knowledge and the foundation of existence [25] [24] [22]. Importantly, this approach does not seek to deny or downplay the limitations experienced by people with psychosocial disabilities [40]. Instead, it acknowledges and embraces these limitations as the basis for providing personalised support. Consequently, people with psychosocial disabilities are placed at the centre and become active subjects in the decision-making process [39] [38] [10].

5 Concluding remark

The adoption of an embodied approach, which considers all the factors contributing to the lived experiences of disabled people, offers a more comprehensive and holistic framework compared to other models of disability. This approach provides valuable insights for the deconstruction of the Indonesian guardianship system and its associated legal procedures, shedding light on how these procedures have objectified disabled people and diminished the significance of their lived bodily experiences. Moreover, the embodied approach encourages us to contemplate the provision of appropriate support for people with psychosocial disabilities throughout the decision-making process. It emphasises the necessity of tailoring support to their specific needs and real challenges. By placing people with psychosocial disabilities at the forefront, recognising them as active political subjects, and valuing their lived bodily experiences, this approach ensures a more just and inclusive discourse. Ultimately, it is imperative that people with psychosocial disabilities occupy the central position in this discourse, with every service and support offered being oriented towards empowering and honouring their agency, experiences, and rights.

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