

## CHILD GUARDIANSHIP IN INDONESIAN LEGISLATION REGULATION

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### Abstract

Every child has the right to protection, which includes having a guardian. If the parents are still available, the guardian is the parents, but if it is not possible for certain reasons, then the court must determine another person or legal entity as the guardian. The provisions on guardianship should be well regulated and the rules are connected between one legislation and other legislation. So that the regulations strengthen each other. This paper will explain the regulation of the age of a child who requires a guardian, the provisions for the appointment of a guardian, and the duties and responsibilities of a guardian according to Indonesian laws and regulations, as well as what aspects need to be strengthened. For this purpose, a statutory approach is used. The data sources are Indonesian laws and regulations that discuss children and guardianship. The results show that the age of the child, which then affects the age limit of the child who needs a guardian, still varies, namely 16, 17, 18, or 19 years. Furthermore, the appointment of a guardian must go through a court decision to obtain legal certainty. The arrangements are not uniform between one regulation and another, and in the process, there have been no affirmative efforts to accelerate the process of determining the guardian, which has an impact on children not being protected from the start. Affirmative efforts can be made through the involvement of village government officials and the Sub-district Office of Religious Affairs for those who are Muslim. Then, regarding the duties and responsibilities of guardians, there are still differences in the focus of the duties and responsibilities of guardians between the fulfillment of physical and spiritual needs or the maintenance of their property. These provisions need to be unified to provide comprehensive protection for children from various aspects.

**Keywords:** *guardianship; children; laws and regulations.*

### Abstrak

Setiap anak berhak atas perlindungan, termasuk memiliki wali. Jika orang tua masih ada, makayang menjadi wali adalah orang tua, namun jika tidak memungkinkan karena alasan tertentu, maka pengadilan harus menetapkan orang lain atau badan hukum sebagai wali. Ketentuan mengenai perwalian harus diatur dengan baik dan aturannya saling berkaitan antara satu peraturan perundang-undangan dengan peraturan perundang-undangan lainnya, sehinggaperaturan tersebut saling menguatkan satu sama

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lain. Artikel ini akan menjelaskan mengenai pengaturan usia anak yang memerlukan wali, ketentuan penunjukan wali, dan tugas dan tanggung jawab wali menurut peraturan perundang-undangan di Indonesia, serta aspek-aspek apa saja yang perlu diperkuat. Untuk itu digunakan pendekatan perundang-undangan. Sumber data yang digunakan adalah peraturan perundang-undangan di Indonesia yang membahas tentang anak dan perwalian. Hasil penelitian menunjukkan bahwa usia anak, yang kemudian berpengaruh pada batas usia anak yang membutuhkan wali, masih bervariasi, yaitu 16, 17, 18, atau 19 tahun. Lebih lanjut, pengangkatan wali harus melalui penetapan pengadilan untuk mendapatkan kepastian hukum. Pengaturan tersebut tidak seragam antara satu peraturan dengan peraturan lainnya, dan dalam prosesnya belum ada upaya afirmatif untuk mempercepat proses penetapan wali, yang berdampak pada tidak terlindunginya anak sejak awal. Upaya afirmatif dapat dilakukan melalui pelibatan aparat pemerintah desa dan Kantor Urusan Agama Kecamatan bagi yang beragama Islam. Kemudian, terkait tugas dan tanggung jawab wali, masih terdapat perbedaan fokus tugas dan tanggung jawab wali antara pemenuhan kebutuhan jasmani dan rohani atau pemeliharaan harta benda. Ketentuan-ketentuan tersebut perlu disatukan untuk memberikan perlindungan yang komprehensif bagi anak dari berbagai aspek.

**Kata Kunci:** perwalian; anak; peraturan perundang-undangan.

### مستخلص

لكل طفل الحق في الحماية، والتي تشمل وجود وصي. فإذا كان الوالدان موجودين فالولي هو الوالدان، أما إذا تعذر ذلك لأسباب معينة، فعلى المحكمة أن تحدد شخصاً آخر أو كياناً قانونياً آخر كولي. يجب أن تكون الأحكام المتعلقة بالوصاية منظمة تنظيمياً جيداً، وأن تكون القواعد مترابطة بين تشريع وتشريع آخر. بحيث تعزز اللوائح بعضها البعض. سوف تشرح هذه الورقة تنظيم سن الطفل الذي يحتاج إلى وصي، وأحكام تعيين الوصي، وواجبات ومسؤوليات الوصي وفقاً للقوانين واللوائح الإندونيسية، وكذلك الجوانب التي تحتاج إلى تعزيز. لهذا الغرض، يتم استخدام نهج قانوني. مصادر البيانات هي القوانين واللوائح الإندونيسية التي تناقش الأطفال والوصاية. وتظهر النتائج أن عمر الطفل، الذي يؤثر بعد ذلك على الحد الأدنى لسن الطفل الذي يحتاج إلى وصي، لا يزال متفاوتاً، وهو 16 أو 17 أو 18 أو 19 عاماً. علاوة على ذلك، يجب أن يمر تعيين الوصي بقرار من المحكمة للحصول على اليقين القانوني. كما أن الترتيبات ليست موحدة بين لائحة وأخرى، ولم تُبذل جهود إيجابية لتسريع عملية تحديد الوصي، مما يؤثر على عدم حماية الأطفال منذ البداية. يمكن بذل جهود إيجابية من خلال إشراك مسؤولي الحكومة القروية ووحدة تنسيق الحضارة الفرعية لمن هم مسلمون. ثم، فيما يتعلق بواجبات ومسؤوليات الأوصياء، لا تزال هناك اختلافات في تركيز واجبات ومسؤوليات الأوصياء بين تلبية الاحتياجات المادية والروحية أو صيانة ممتلكاتهم. يجب توحيد هذه الأحكام لتوفير الحماية الشاملة للأطفال من مختلف الجوانب

**الكلمات الرئيسية:** الوصاية، الأطفال، القوانين والأنظمة

## A. Introduction

This article will explain the guardianship provisions for children contained in the laws and regulations in Indonesia. This discussion is part of efforts to protect children's rights,<sup>1</sup>

<sup>1</sup> Rini Fitriani, 'Peranan Penyelenggara Perlindungan Anak Dalam Melindungi Dan Memenuhi Hak-Hak Anak', *Jurnal Hukum Samudra Keadilan*, 2, (2016), pp. 250–58; Yayan Sopyan et al., "Child Exploitation by Parents in Early Marriage: Case Study in Cianjur West Java, Indonesia," *Samarah* 7, no. 3 (November 1, 2023): 1921–42, <https://doi.org/10.22373/SJHK.V7I3.14804>; Rosdalina Bukido et al., "Reception of Marriage Age Limit in Marriage Law in Indonesia," *Samarah* 7, no. 1 (2023): 146–74, <https://doi.org/10.22373/SJHK.V7I1.15245>; Muljono Damopolii, Muhammad U. Shabir, and Muhammad Alqadri Burga, "The Phenomenon of Punishment at Pesantren in South Sulawesi: An Islamic Law and Islamic Education Approaches," *Samarah* 7, no. 3 (November 1, 2023): 1643–60, <https://doi.org/10.22373/SJHK.V7I3.18207>; Darsul S. Puyu et al., "Mansai in the Marriage

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especially orphans, or parents who are not legally competent. This discussion is very important considering that all children must receive protection. Child protection is all activities to ensure and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with the dignity of humanity, and receive protection from violence and discrimination.

Among children who are vulnerable to not getting proper protection are children who do not have a guardian, either a guardian in the form of their own parents or a guardian other than their parents.<sup>2</sup> Indonesia as a country should be fully present to provide proper protection for all people, including orphans and abandoned children. The form of protection, among others, is to create regulations that favor the interests of children, including children without guardians. Furthermore, these regulations are interrelated with each other, so that they can create more comprehensive protection for children.

Law No. 35 of 2014 on the Amendment to Law No. 23 of 2002 on Child Protection in letter c states that children as buds, potential, and young generation successors of the ideals of the nation's struggle have a strategic role, characteristics, and special characteristics so that they must be protected from all forms of inhumane treatment resulting in human rights violations. This law clearly states that every child must be protected.

What is the form of protection for children? This can be seen in Law No. 23 of 2002 concerning Child Protection, which has been amended into Law No. 35 of 2014. Article 1 Paragraph 2 of this Law states that child protection is all activities to ensure and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination.<sup>3</sup>

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Tradition of the Banggai Ethnic in Central Sulawesi, Indonesia: A Living Sunnah Perspective,” *Samarah* 7, no. 3 (November 1, 2023): 1352–72, <https://doi.org/10.22373/SJHK.V7I3.16510>; Moh Fauzi and Nazar Nurdin, “Inconsistencies in the Hanafi School’s View of Children’s Legal Competence,” *Samarah* 7, no. 3 (November 1, 2023): 1334–51, <https://doi.org/10.22373/SJHK.V7I3.16585>.

<sup>2</sup> Sahadi Humaedi, Budi Wibowo Santoso T, and Raharjo, ‘Kelompok Rentan Dan Kebutuhannya (Sebuah Kajian Hasil Pemetaan Sosial CSR PT Indonesia Power UPJP Kamojang)’, *Share: Social Work Journal*, 10, 1, (2020), pp. 61; Ruslan Sangaji et al., “Tafsir Al-Ahkam’s Analysis of Demoralization in Cases of Sexual Harassment in Educational Institutions in Indonesia,” *Samarah* 7, no. 2 (July 1, 2023): 713–33, <https://doi.org/10.22373/SJHK.V7I2.17028>; Asna Husin, “Falling Out of Love: Divorce of Three Acehese Ubanan Couples in the Islamic Law Perspective,” *Samarah* 7, no. 3 (November 1, 2023): 1868–96, <https://doi.org/10.22373/SJHK.V7I3.19433>; Syufa’at and Muchimah, “The Shifting Meaning of Walimatul ‘Urs in the Era of Society 5.0 in Indonesia: Islamic Law Perspective,” *Samarah* 7, no. 3 (November 1, 2023): 1514–35, <https://doi.org/10.22373/SJHK.V7I3.18765>; Ramdani Wahyu Sururie, Mohammad Athoillah, and Muhammad Iqbal Zia Ulhaq, “Strategies to Prevent Increasing Divorce Rates for Muslim Families in Indonesia,” *Samarah* 7, no. 2 (July 1, 2023): 734–59, <https://doi.org/10.22373/SJHK.V7I2.14819>.

<sup>3</sup> Nurul Fadilla Utami and Septi Indrawati, ‘Perlindungan Hukum Terhadap Anak Dalam Perwalian Dan Tanggung Jawab Seorang Wali’, *Amnesti: Jurnal Hukum*, 4, 1, (2022), pp. 64; Amal Hayati et al., “The Impact of The Minimum Age Limit Regulation for Continuing Child Marriage After the Birth of Law Number 16 Of 2019 on The Child’s Future,” *El-Usrah* 6, no. 1 (2023): 174–82, <https://doi.org/10.22373/UJHK.V6I1.16837>; Edi Darmawijaya and Miss Maslinee Ma’ming, “Settlement of the Fulfillment of Wife and Child Livelihood by the

The above is an explanation of the protection of all children in general. In this regard, it is necessary to explain two things: first, that there are children who still have parents, but there are also many children who no longer have parents or children who are neglected. Secondly, that the state, community, family and parents must be responsible for the implementation of child protection.<sup>4</sup> For children who still have parents, then they are responsible for childcare. Another case with children who no longer have parents or neglected children, then of course they no longer get care from their parents. In Law No. 23 of 2002 concerning Child Protection Article 31 paragraph (3) it is explained that for children who do not have parents or responsible people, the state must take over this responsibility, among the forms is to establish a guardian for the child through the court.<sup>5</sup>

Law No. 23/2002 on Child Protection as mentioned above mentions guardians who will be responsible for children under their guardianship. Unfortunately, this law does not explain who can become a guardian and what the procedure is. The appointment of guardians and matters related to it are regulated in Government Regulation (PP) No. 29 of 2019 concerning Conditions for the Procedure for Appointing Guardians as a mandate of Law No. 23 of 2002. In addition to these two regulations, there are other regulations governing guardianship, such as Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law. The author sees that these existing regulations have several weaknesses, such as the absence of interconnectedness between one regulation and another, so that each regulation runs individually by the relevant government agencies. In addition, there are still other related government institutions that have not been systemically involved, which should be involved, such as the village government and the Sub-district Religious Affairs Office (KUA).

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Islamic Religious Council Southern Patani Region of Thailand,” *El-Usrah* 6, no. 1 (2023): 149–60, <https://doi.org/10.22373/UJHK.V6I1.8701>; Meli Dwi Yuniar and Waluyo Sudarmaji, “The Realization of the Fulfilment of the Children’s Sustenance Post-Divorce In Purworejo Religious Court in 2020–2021,” *El-Usrah* 6, no. 1 (2023): 131–48, <https://doi.org/10.22373/UJHK.V6I1.18244>; Ahmad Faris Hilmi and Muhammad Zawil Kiram, “The Under-Age Marriage during the Pandemic: The Best Interest of the Child Principle,” *El-Usrah* 6, no. 1 (2023): 71–80, <https://doi.org/10.22373/UJHK.V6I1.11303>; Mursyid Djawas et al., “The Alimony Obligation of a Civil Servant and Non-Civil Servant Father towards Children Post-Divorce (The Study on Aceh Syar’iyah Court Decision Study of 2019),” *El-Usrah* 6, no. 1 (2023): 91–113, <https://doi.org/10.22373/UJHK.V6I1.9493>; Satria Juanda, Burhanuddin Abdul Gani, and Syarifah Rahmatillah, “The P2TP2A’s Effort to Cope with the Intensification of Sexual Abuse of Children in Perspective of the Islamic Family Law (A Case Study at the City of Banda Aceh),” *El-Usrah* 6, no. 1 (2023): 115–30, <https://doi.org/10.22373/UJHK.V6I1.11992>; Rifdah Alifiyah and Isa Anshori, “Legal Protection for Children in Cases of Domestic Violence in the Indonesian Households,” *El-Usrah* 6, no. 2 (2023): 348–61, <https://doi.org/10.22373/UJHK.V6I2.19153>; Shella Oetharry Gunawan and Syamsul Bahri, “Impacts of Early Childhood Marriage in Indonesia Viewed from Child Protection Laws Perspectives,” *El-Usrah* 6, no. 2 (2023): 362–80, <https://doi.org/10.22373/UJHK.V6I2.20262>.

<sup>4</sup> Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

<sup>5</sup> Article 31 paragraph (3) of Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

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Based on this situation, it is necessary to further investigate how guardianship is regulated in Indonesian legislation and how ideally the relationship between one regulation and another is, and whether the regulation is adequate for practical needs. This needs to be studied considering that there are still children in the community who have not received adequate protection, especially for children who are cared for by guardians or even children who should have guardians, but they do not have guardians as intended by law. Specifically, a review of the laws and regulations concerning guardians could include who is the appropriate guardian, what are the procedures for appointing a guardian, what are the duties and responsibilities of the guardian, and how is the supervision of the guardian. However, this article only discusses three aspects, namely the provisions on the age of the child, the appointment of the guardian, and the duties and responsibilities of the guardian.

The data sources for this research are Indonesian laws and regulations governing children and guardianship. The approach used is the statutory approach. In this case, the author traces the contents of laws and regulations that explain the age of children, the appointment of guardians, and the duties and responsibilities of guardians. Furthermore, it is analyzed using the content analysis method.

### **B. Discussion**

The discussion will begin with an explanation of the definition of a child. Furthermore, it explains what is meant by guardian and guardianship of children, the requirements for guardians, the mechanism for appointing guardians, and the duties and responsibilities of guardians. Regulations that discuss the definition of a child will be different from the subsequent discussion. Because not all regulations that explain the definition of children also discuss guardians and guardianship.

#### ***1. Definition of Child according to Laws and Regulations***

Based on the author's search for 13 laws and regulations that mention the definition of children, namely:

- a. KUHPdn (Kitab Undang-Undang Hukum Pidana)
- b. KUHPdt (Civil Code)
- c. Law Number 1 of 1974 concerning Marriage. As for the amendment, Law No. 1 of 1974 to Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, it no longer discusses the definition of a child.
- d. Law Number 3 of 1997 concerning Juvenile Courts
- e. Law Number 39 of 1999 on Human Rights

- f. Law No. 23 of 2002 on Child Protection, and Law No. 35 of 2014 on the Amendment to Law No. 23 of 2002 on Child Protection.
- g. Law No. 13 of 2003 on Manpower.
- h. Law No. 12/2006 on Citizenship of the Republic of Indonesia.
- i. Law Number 21 of 2007 on the Eradication of the Crime of Trafficking in Persons.
- j. Law Number 44 of 2008 on Pornography.
- k. Law Number 11 of 2012 on the Juvenile Criminal Justice System.
- l. Presidential Instruction of the Republic of Indonesia Number 1 of 1991 on the Compilation of Islamic Law.
- m. Decree of the Minister of Home Affairs Directorate General of Agrarian Affairs Directorate of Land Registration (Cadastre) Number Dpt.7/539/7-77.

In criminal law, an explanation of children is found in the Criminal Code (Law No. 1 of 1946 concerning Criminal Law Regulations). In this law there are several articles that mention the age limit of children, such as in Article 45 which reads:

In case of criminal prosecution of a minor for an act committed before the age of sixteen years, the judge may determine; Order that the offender be returned to his parents, guardian or custodian without any punishment; or Order that the offender be handed over to the custody of the Government without any punishment, if the act constitutes a crime or one of the misdemeanors under Articles 489, 490, 492, 496, 497, 503 - 505, 514, 517 - 519, 526, 531, 532, 536 and 540 and two years have not yet elapsed since he was found guilty of the crime or one of the misdemeanors mentioned above, and the verdict has become final; or impose a sentence on the offender.

In this Article 45, a person said to be a child is a person who is not yet 16 years old. In addition to Article 45, there is another article that explains the age limit of children, namely Article 82 paragraph (4) which reads: The provisions of this article shall not apply to a minor, who at the time of committing the act is not yet 16 years old.

The Juvenile Court Law (Law No. 3 of 1997) in Article 1 number 1 states that a child is a person who in the case of a Juvenile has reached the age of 8 (eight) years but has not reached the age of 18 (eighteen) years and has never been married. Relatively in line with this law is the definition of children mentioned in the Juvenile Criminal Justice System Law (Law No. 11/2012 on the Juvenile Criminal Justice System). This law divides children into three categories, namely children in conflict with the law, children who are victims of criminal acts, and children who are witnesses to criminal acts; these three categories are referred to as children

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in conflict with the law.<sup>6</sup> Children in conflict with the Law, hereinafter referred to as children, are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal offense. Child Victim is a child who is not yet 18 (eighteen) years old who has suffered physical, mental, and/or economic loss caused by a criminal offense. And, Child Witness is a child who is not yet 18 (eighteen) years old who can provide information for the purpose of investigation, prosecution, and examination in court about a criminal case that he/she heard, saw, and/or experienced himself/herself.<sup>7</sup> Law No. 11/2012 clearly states that a child in conflict with the law is someone aged between 12 and 18 years, while a child as a victim and witness is someone who is 18 years old. So it can be concluded that the age limit between immature and adult is 18 years old.

In addition to the two laws above, there are still other laws that set the age limit of a child, namely someone who has not reached the age of 18, namely:

- a. Law No. 23 of 2002 on Child Protection.<sup>8</sup> The definition of a child remains the same in the amended law; Law No. 35 of 2014 on the Amendment to Law No. 23 of 2002 on Child Protection;
- b. Law No. 21 Year 2007 on the Eradication of the Crime of Trafficking in Persons Article 1 Number 5;
- c. Law No. 44 of 2008 on Pornography, Article 1 point 4;
- d. Law No. 12/2006 on Citizenship of the Republic of Indonesia Article 4 letter h;
- e. Law No. 21 Year 2007 on the Eradication of the Crime of Trafficking in Persons, Article 1 point 5;
- f. Law No. 13 of 2003 on Manpower, Article 1 point 26; and
- g. Law No. 39 of 1999 on Human Rights, Article 1 point 5.

Now we look at other regulations. In the KUHPdt, the definition of a child is mentioned in Article 330, which reads: the immature are those who have not reached the age of twenty-one years and have not previously married....”<sup>9</sup> It states that a child is one who is not yet 21 years old. However, Article 1601g states that a minor is not yet 18 years old. The full text of this article is: “A minor is capable of concluding a labor contract as a laborer, if he is authorized to do so by his guardian according to law, either orally or in writing. An oral power of attorney

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<sup>6</sup> Analiansyah and Syarifah Rahmatillah, ‘Perlindungan Terhadap Anak Yang Berhadapan dengan Hukum (Studi Terhadap Undang-Undang Peradilan Anak Indonesia Dan Peradilan Adat Aceh)’, *Gender Equality: Internasional Journal of Child and Gender Studies*, 1 (2015), pp. 54–55.

<sup>7</sup> Article 1 numbers 3, 4, and 5 of Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System.

<sup>8</sup> Article 1 number 1 of Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

<sup>9</sup> Article 330 of the Civil Code.

is only valid to conclude a specific labor agreement. If the minor is not yet 18 years old, the power of attorney must be given in the presence of the employer or his representative. The power of attorney cannot be given conditionally. If the power of attorney is given in writing, the minor must submit the power of attorney to the employer, who shall promptly deliver a signed copy to the minor and, at the termination of the employment relationship, return the power of attorney to the minor or the persons entitled thereto. Unless expressly excluded by certain conditions in the power of attorney granted, the minor, without prejudice to the provisions of the third paragraph of Article 1603f. However, he shall not appear before the Court without the assistance of his statutory guardian, unless it appears to the Court that the guardian is incapable of expressing his will.”

Law No. 25 of 1997 concerning Manpower Article 1 Point 20 reads: a child is a male or female person who is less than 15 years old. Then in Article 1 point 21, it is stated that a young person is a man or woman who is 15 (fifteen) years old or more and less than 18 (eighteen) years old. It is interesting to note that there is a distinction between children and young people. Children are not yet 15 years old while those between 15 and 18 years old are called young people. The term young person is not recognized in other laws and regulations.

In terms of marriage, Law No. 1/1974 differentiates between men and women. Before Law No. 1 of 1974 was amended, for women, the minimum age allowed for marriage was 16 years old and men 19 years old.<sup>10</sup> As for the amendment of Law No. 1 of 1974 to Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage in article 7 paragraph (1) states: “marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years.” Referring to this provision, it can be said that a person's maturity, especially for marriage, is at the age of 19. At that age, men and women are considered to have reached physical and mental maturity.<sup>11</sup>

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<sup>10</sup> Article 7 of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

<sup>11</sup> Yukhanid Abadiyah, Mohammad Noviani Ardi, and Tali Tulab, ‘Adult Age In Married: Critical Study In Psychological Science And Islamic Law Compilation Usia Dewasa Dalam Menikah: Studi Kritis Dalam Ilmu Psikologis Dan Kompilasi Hukum Islam’, *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial Islam*, 8, 02, (2020), pp. 387; Rizqa Febry Ayu and Khaeruddin Kiramang, ‘The Family’s Roles in the Effects of Working from Home During the Covid-19 Pandemic on Children (A Case Study of Families in Banda Aceh City),’ *El-Usrah* 6, no. 1 (2023): 27–43, <https://doi.org/10.22373/UJHK.V6I1.11959>; Taufiqurohman and Nelli Fauziah, ‘The Evaluation of Maqāṣid Asy-Syarī’ah on Discourses of the Islamic Family Law,’ *El-Usrah* 6, no. 1 (2023): 81–90, <https://doi.org/10.22373/UJHK.V6I1.13035>; Syifa Fachrunisa, Rezki Suci Qamaria, and Nurul Hanani, ‘Judges’ Perspectives on the Determination of the Amount of Mut’ah, Childbirth Costs, and Child Sustenance in Divorce Cases (The Study on the Court’s Decision Number 808/Pdt.G/2021/Pa. Kab. Kdr),’ *El-Usrah* 6, no. 1 (2023): 54–70, <https://doi.org/10.22373/UJHK.V6I1.15537>; Muslim Zainuddin, ‘The Cancellation of The Weddings for Pre-Marriage Pregnancy Women: An Evaluation of Decision 24/Pdt.G/2020/Ms. Ban,’ *El-Usrah* 6, no. 1 (2023): 44–53, <https://doi.org/10.22373/UJHK.V6I1.19859>.



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In other regulations, the age of children is increased to 21 years, which is stated in the Compilation of Islamic Law Article 98 paragraph (1): “the age limit of a child who is able to stand alone or mature is 21 years, as long as the child is not physically or mentally disabled or has never entered into marriage.” We notice here that the Compilation of Islamic Law links a person's maturity with the ability to stand alone.

In contrast to the above provisions, Law Number 4 of 1979 concerning Child Welfare provides a different definition of children. Article 1 point 2 states that a child is someone who has not reached the age of 21 (twenty-one) years and has never been married.<sup>12</sup> What is interesting here is that 21 years old is the age of maturity. The age is different from the provisions issued by the government before 1979 and after 1979. The adult age of 21 years reappeared in the discourse on the minimum age for marriage. Many people are arguing that the minimum age for marriage should be 21 years old.<sup>13</sup> Although later Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage stipulates that the minimum age of marriage for men and women is 19 years.<sup>14</sup>

Decree of the Minister of Home Affairs, Director General of Agrarian Affairs, Directorate of Land Registration (Cadastre) No. Dpt.7/539/7-77, dated 13-7-1977 (“Decree of the Minister of Home Affairs 1977”) regarding the adult category can be divided into:

- a. Political adulthood, for example, is the age limit of 17 years old to be able to participate in General Elections. In addition, the age of 17 requires a person (Indonesian citizens and foreigners) to have an identity card (KTP).<sup>15</sup> and Driver's License (SIM), namely SIM A, SIM C, SIM D, and SIM D1.<sup>16</sup>
- b. Sexual maturity, for example, is the age limit of 18 years for marriage under the new Marriage Law. Since 2019, the age limit for marriage is 19 years old for both men and women.
- c. legal adulthood. Legal adulthood refers to a certain age limit according to the law that can be considered capable of acting in law.

Based on the description above, it is known that there is diversity in determining the age of adulthood. Determining the age limit between children and adults is very important,

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<sup>12</sup> Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare.

<sup>13</sup> Yogarta Awawa Prabaning Arka and Sri Noviyanti Tim Redaksi, ‘21 Tahun Menjadi Batas Usia Minimal Cukup Menikah, Mengapa Demikian?’, *Kompas.Com*, 21 July 2021.

<sup>14</sup> Article 7 paragraph (1) of Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

<sup>15</sup> Article 63 paragraphs (1) and (2) of Law of the Republic of Indonesia Number 23 of 2006 concerning Population Administration.

<sup>16</sup> Regulation of the National Police of the Republic of Indonesia Number 5 of 2021 concerning the Issuance and Marking of Driver's Licenses.

because it is related to a person's ability to act. The clarity of the age of adulthood is also related to the age limit when a person is under the dependency or guardianship of another person, including determining the burden of a person's obligation to support the person who is under his/her dependency/guardianship.

Returning to the age limit of children, based on the description above, it can be stated that according to Indonesian legislation, the variations in the age of children are:

1. 16 years old.
2. 17 years old in the political sphere to be able to exercise the right to vote, including the making of ID cards and driver's licenses.
3. 18 years of age in relation to legal protection and in relation to civil and criminal acts
4. 19 years old in the case of marriage.

The different age limits for children in Indonesia have significant impacts on various legal, educational and social aspects. Here are some of the impacts:

- a. Differences in Legal Protection. The definition of a child according to the Child Protection Law (No. 35 of 2014) is someone who is not yet 18 years old. This means that those under the age of 18 still receive legal protection as children. As for the Labor Law (No. 13 of 2003), the minimum age to work in Indonesia is 15 years old, which means there are differences in legal protection related to work. Children aged 15-17 can work but with strict conditions and restrictions, such as not being involved in heavy or dangerous work. The impact of this difference in age limit creates confusion in the application of the law, especially when children between 15-17 years old can work but are still considered children in the context of child protection.
- b. Impact on Education. In Indonesia, the age of compulsory education is set at 15 years old or equivalent to junior secondary education (SMP). However, this age limit is sometimes different from the labor law which allows 15-year-olds to work. As a result, children under the age of 18 who are already working may drop out of school or find it difficult to continue their formal education. This could potentially affect the quality of the child's education and future development.
- c. Child Marriage. Based on the Marriage Law (No. 16 of 2019), the minimum age of marriage is 19 years old for both men and women. However, previously the age of marriage for women was 16 years old. As a result, before the revision of the law, high rates of child marriage were a problem in Indonesia, with negative impacts on girls' reproductive health, education, and social welfare. The revision of the law aims to

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reduce early marriage, although the practice of dispensation of marriage under the age of 19 is still allowed with court approval.

- d. Social Impact. Differences in age limits in various sectors can lead to social inequalities. Children who work before the age of 18 are often subjected to labor exploitation or even denied full access to children's rights such as education and health.<sup>17</sup>

### 2. *Definition of Guardian and Guardianship*

The term wali is used for various purposes, such as for marriage and the maintenance of children and property. The term guardian here is specifically used for the maintenance of children and their property. This needs to be mentioned because there is a difference in meaning between the two. For example, the definition of guardian for marriage is a person who has the right to marry someone because of a guardianship relationship, either because of kinship (nasab) or guardian of the judge, while for the maintenance of children and their property is in the context of the maintenance of the child, his property, and legal actions on behalf of and for the benefit of the child.

The following is a description of the laws and regulations that are studied, whether or not they mention the term guardian and its explanation. The following are laws and regulations that mention/discuss children, but do not discuss guardians/guardians who are their protectors, namely:

1. Criminal Code.
2. Law No. 39 of 1999 concerning Human Rights.
3. Law No. 12 of 2006 concerning Citizenship of the Republic of Indonesia.
4. Law No. 44 of 2008 concerning Pornography.

The following is a law that does not discuss the meaning of guardian, although it explains the role of guardian, namely:

- a. The Criminal Code regulates the duties and responsibilities of guardians, among others, mentioned in Article 21 which reads: "A woman who is married and does not separate the table and bed, has no place to live other than where her husband lives; children of age follow the residence of one or both of their parents who exercise parental authority over them, or the residence of their guardian; Adults in foster care follow their foster home."

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<sup>17</sup> For comparison see: Moh Bagus, Ahmad Khubby Ali Rohmat, and Helga Nurmila Sari, 'Derivasi Konsep Hak Asasi Manusia Terhadap Penyetaraan Posisi Anak Melalui Pendekatan Affirmative Action', *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam*, 24, 1 (2021), pp. 73.

- b. Law No. 1 of 1974 on Marriage explains the role of guardians in terms of granting permission to marry girls who are under their guardianship when their parents have died, as mentioned in Article 6 paragraph (4).
- c. Law No. 3 of 1997 concerning the Children's Court explains that among the roles of guardians in the process of resolving children's cases that can still be fostered is fostering the child. This is done if the investigator sees that the child as a perpetrator can still be fostered. Article 5 paragraph (2) explains that if the child can still be fostered by his parents, or foster parents, then the investigator returns the child to his parents, guardians or foster parents.
- d. Law No. 25 of 1997 concerning Manpower explains that the role of guardians is to sign an employment agreement for children under their guardianship, as explained in Article 12 Paragraph (1) Letter b.
- e. Law No. 13 of 2003 concerning Manpower in Article 69: (2) explains that employers who employ children in light jobs must meet the requirements, including obtaining written permission from parents or guardians and employment agreements between employers and parents or guardians. Furthermore, Article 71 paragraph (2) explains that employers who employ children must meet the requirements, including being under the direct supervision of parents or guardians;
- f. Law No. 21 of 2007 concerning the Eradication of Trafficking in Persons (article 39 paragraph 2) explains that the role of guardians is to provide assistance to children who undergo examinations. Assistance to children is carried out by parents, guardians, foster parents, advocates, or other companions.

The following are the laws and regulations that provide the definition of guardian, which are as follows:

- a. Law Number 4 of 1979 concerning Child Welfare. A guardian is a person or entity that in reality exercises custody power as a parent to a child.<sup>18</sup> The definition in Law No. 4 of 1979 is editorially followed entirely by:
- b. Law No. 23 of 2002 concerning Child Protection and its amendment Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection; and
- c. Law No. 11 of 2012 concerning the Juvenile Criminal Justice System.
- d. Compilation of Islamic Law in Article 1 letter h. Guardianship is the authority given to a person to do a legal act as a representative for the interests and on behalf of a child

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<sup>18</sup> Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare.

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who does not have both parents, a parent who is still alive is incapable of performing a legal act.

There are, at least, four keywords that need to be underlined in the definition of guardian, namely:

1. Person or body. In terms of trust, guardianship is not only limited to people, but can also be allowed by an entity. In Indonesia, there are entities that have legal entities and some that do not have legal entities.<sup>19</sup> Can the body here be interpreted as both? Article 33 paragraph (1) of Law No. 35 of 2014 explains that the body here is a legal entity that meets the requirements.<sup>20</sup> Thus, the meaning of body in the definition above must be interpreted as a legal entity that meets the specified requirements, not a body that does not have a legal entity. Today, an example of a legal entity that often acts as a guardian for orphans is the Orphanage Foundation.<sup>21</sup> The foundation can become the guardian of orphans with the note that their AD/ART (Articles of Association and Bylaws) have been mentioned. This provision is regulated in the Civil Code Article 365 paragraph (1). Article 365 paragraph (1) explains that in all cases if the judge has to appoint a guardian, the guardianship can be "ordered" and "handed over" to a legal entity association or foundation, or also a charitable institution domiciled in Indonesia. The word "ordered" can of course be interpreted as the judge assigning guardianship to the subject of the law. While the word "handed over" can be interpreted without the need for a judge's determination but the guardianship is handed over to the legal entity that carries out the guardianship function which is known through its articles of association, deed of establishment, or regulations that contain rules that indeed aim to maintain or nurture immature children for a long time. Foundations / legal entities like this must certainly be registered with state institutions so that their operations get legality from the state.<sup>22</sup> In the study of Islamic law, especially in the study of Ushul Fiqh, basically the subject of the law is a personal person. However, nowadays along with the development of the times, in legislation, legal entities have been introduced as legal subjects.<sup>23</sup>

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<sup>19</sup> Suparji, Transformation of Legal Entities in Indonesia, 1st edn (Al Azhar University Indonesia, 2014), pp. 3.

<sup>20</sup> Article 33 paragraph (1) of Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.

<sup>21</sup> Della G. Palar, 'Kedudukan Hukum Yayasan Sebagai Wali Atas Anak-Anak Panti Asuhan', *Lex Privatum*, VI, 10 (2018), pp. 57.

<sup>22</sup> Law of the Republic of Indonesia No. 16 of 2001 concerning Foundations as amended by Law No. 28 of 2004 concerning Amendments to Law No. 16 of 2001 concerning Foundations.

<sup>23</sup> Analiansyah, 'Pengembangan Subjek Hukum Dalam Islam Dan Pengaruhnya Terhadap Perkembangan Fikih: Kajian Terhadap Peraturan Perundang- Undangan Islam Di Indonesia', in *Ar-Raniry International Conference on Islamic Studies*, 2016, pp. 194–208.

2. In fact, that is, a person or legal entity that in reality takes care of orphans. This law does not explain the meaning of "which in reality." What it means according to the Great Dictionary of Indonesian Language (KBBI) is: real things; things that really exist; proven.<sup>24</sup>
3. Exercising custody as a parent to a child. Furthermore, this will be explained in the duties and responsibilities of guardians in the next discussion.
4. Child, which is a person who has not reached the age of majority, with the age limit as described above in the definition of child section.

### **3. *Appointment and Requirements of Guardians***

Basically, the person who has the right to be a guardian is the father or mother who lives the longest, according to Article 345 of the Civil Code. However, when the father or mother is no longer there (dies) or for some reason, such as being incapable and not knowing where he lives, another guardian is needed. Well, the determination of a guardian cannot be done haphazardly, because the guardian will be fully responsible for the child, both himself and his property. The wrong guardian designation will of course be detrimental to the interests of the child.

As mentioned above, a guardian is a person or entity. In this context, not all people or bodies can be designated and referred to as guardians. A person or entity can be referred to as a guardian after fulfilling the specified requirements, as mentioned in Article 33 of Law No. 23 of 2002 in paragraph (1). The key point here is to "meet the requirements." The purpose of fulfilling this condition is of course to ensure that a person or legal entity can carry out their duties and responsibilities as guardians properly.

The following will describe the provisions for the appointment and requirements of guardians according to the laws and regulations in Indonesia. According to Law No. 1 of 1974, Law No. 23 of 2002, and the Compilation of Islamic Law, there are three conditions that must be met, which are as follows:

- a. Guardians are taken from the family of children, siblings, or other adults who, as far as possible, are healthy-minded, fair, honest, and well-behaved.<sup>25</sup>
- b. The guardian appointed must be the same religion as the child's religion.<sup>26</sup>

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<sup>24</sup> "The "reality" comes from the root word "real" and among its changes to "the reality". Kamus Besar Bahasa Indonesia (KBBI).

<sup>25</sup> Article 51 paragraph (2) of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage; Article 107 paragraph (4) Compilation of Islamic Law

<sup>26</sup> Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

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- c. Guardians in the form of legal entities appointed as Guardians consist of technical implementation units of ministries/institutions, technical implementation units of regional apparatus, and children's social welfare institutions. The legal entity must meet the conditions specified by law, namely Article 365 paragraph (1) of the Civil Code which stipulates that in all cases if the judge must appoint a guardian, the guardianship can be ordered and handed over to a legal entity association or foundation, or also a charitable institution domiciled in Indonesia. This means that the orphanage foundation can be the guardian of its foster children where it also depends on its articles of association, deed of establishment, or regulations that contain rules that are intended to maintain or nurture minor children for a long time.

A relatively very detailed provision that states the conditions for the appointment of guardians is Government Regulation No. 29 of 2019. Article 3 states that in order to be appointed as a guardian because the parents are absent, the parents are not known, or for some reason the parents are unable to carry out their obligations and responsibilities, a person who comes from the child's family, siblings, other people, or legal entities, must meet the requirements for the appointment of a guardian and through a court determination. A person who is appointed as a guardian is prioritized by the child's family. In the event that the child's family does not exist, is unwilling, or does not meet the requirements, a relative can be appointed. In the event that the family of the child and sibling does not exist, is not willing, whose whereabouts are unknown, or does not meet the requirements, another person or legal entity may be appointed.<sup>27</sup>

For more details, the following are quoted from articles 4 to 7, which are as follows:

### Article 4

(1) The Family of the Child appointed as a Guardian must be eligible:

- a. Indonesia citizens who are permanently domiciled in Indonesia;
- b. at least 30 (thirty) years old;
- c. physical and mental health;
- d. behave well;
- e. economically capable;
- f. religion is the same as the religion that the child adheres to;
- g. obtain written consent from the husband/wife, for those who are married;
- h. willing to be the Guardian stated in the statement;
- i. make a written statement never and will never do:
  1. violence, exploitation, neglect, and mistreatment of children; or
  2. the application of corporal punishment for any reason, including for the enforcement of discipline against children;
- j. prioritize the Family of the nearest child; and

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<sup>27</sup> Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

- k. obtain written consent from the Parents if:
  - 1. exist;
  - 2. its existence is known; and
  - 3. capable of performing legal acts.

(2) Guardians appointed from the Child's Family are prioritized to have closeness to the Child.  
Article 5

(1) Brothers appointed as Guardians must be eligible:

- a. Indonesia citizens who are permanently domiciled in Indonesia;
- b. at least 21 (twenty-one) years old;
- c. physical and mental health;
- d. behave well;
- e. economically capable;
- f. religion is the same as the religion that the child adheres to;
- g. obtain written consent from the husband/wife, for those who are married;
- h. willing to be the Guardian stated in the statement;
- i. make a written statement never and will never do:
  - 1. violence, exploitation, neglect, and mistreatment of children; or
  - 2. the application of corporal punishment for any reason, including for the enforcement of discipline against children;
- j. obtain written consent from Parents if:
  - 1. exist;
  - 2. its existence is known; and
  - 3. Capable of performing legal acts.

(2) Brothers who meet the requirements as intended in paragraph (1) may be appointed as Wali with the provision:

- 1. preferably having closeness with the child;
- 2. obtain consent from the Child; and
- 3. In the event that the Child is unable to give his or her consent directly, the Child's statement is facilitated by an expert or appointed institution in accordance with the provisions of laws and regulations.

Article 6

(1) Other persons appointed as Guardians must be eligible:

- a. Indonesia citizens who are permanently domiciled in Indonesia;
- b. at least 30 (thirty) years old;
- c. physical and mental health;
- d. behave well;
- e. economically capable;
- f. religion is the same as the religion that the child adheres to;
- g. obtain written consent from the husband/wife, for those who are married;
- h. willing to become a Guardian, as stated in the statement;
- i. make a written statement never and will never do:
  - 1. violence, exploitation, neglect, and mistreatment of children; and
  - 2. the application of corporal punishment for any reason, including for the enforcement of discipline against children;
- j. obtain written consent from Parents if:
  - 1. exist;
  - 2. its existence is known; and
  - 3. capable of performing legal acts.

(2) Other persons who meet the requirements as intended in paragraph (1) may be appointed as Guardians with the provision that:



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- a. preferably having closeness with the child; b. obtain consent from the Child; and
- b. In the event that the Child is unable to give his or her consent directly, the Child's statement is facilitated by an expert or appointed institution in accordance with the provisions of laws and regulations and.

### Article 7

- (1) The legal entity appointed as the Wali consists of the technical implementation unit of the ministry/institution, the technical implementation unit of the regional apparatus, and the Children's social welfare institution.
- (2) The technical implementation unit of the ministry/institution and the technical implementation unit of the regional apparatus as intended in paragraph (1) must meet the requirements:
  1. formed based on the provisions of laws and regulations ; and
  2. carry out the duties and functions of childcare.
- (3) Children's social welfare institutions as referred to in paragraph (1) must meet the requirements:
  1. legal entity in the form of a foundation and accredited;
  2. willing to become a guardian stated in a statement letter from the administrator appointed on behalf of the Children's social welfare institution;
  3. received recommendations from the agency that organizes government affairs in the social sector;
  4. make a written statement that it has never and will not discriminate in protecting the rights of children;
  5. for social welfare institutions for religious children, the social welfare institutions for religious children must be of the same religion as the religion that the child adheres to; and
  6. have written consent from the Parents, if;
    1. still exists;
    2. its existence is known; and
    3. capable of performing legal acts.
- (4) Legal entities appointed as Guardians must not differentiate between ethnicity, race, class, gender, ethnicity, culture, language, birth order, physical condition, and/or mental condition of the child.

Furthermore, the appointment or appointment of a guardian is carried out based on the request or will of the parents. The trick is that there is an application submitted by a person or legal entity as a prospective guardian to the court.<sup>28</sup> Thus, it can be clearly understood that the determination of guardians must be carried out by the court, both guardians appointed based on wills or not, including guardians in the form of persons and legal entities. There are things that need to be considered, namely the submission of a person or legal entity as a guardian. During this time, it has been relatively difficult for people, outside of legal entities, to deal with the courts, unless there is an urgent need. In addition, the level of proficiency of people in Indonesia to contact the courts is not yet relatively high. Many people are reluctant to deal with the courts.

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<sup>28</sup> Articles 8, 9, and 10 of Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

People who go to court are considered people who have problems. Based on this situation, *affirmative action is needed*, such as the obligation of village government officials to take care of guardianship for children who do not have guardians. In this case, the government needs to be encouraged to be actively involved in handling this trust. In addition, for Muslims, the process of managing guardians can take advantage of the Office of Religious Affairs, considering that the court only exists in the district city, while in each district there is a village that is far from the district capital. This circumstance will of course hinder the determination of the guardian of a child who no longer has parents, or parents who are not legally capable, and so on.

Prior to the birth of Government Regulation No. 29 of 2019, the provisions for the appointment of guardians were as follows:

- a. appointed by one parent exercising parental authority, before he dies, by will or orally in the presence of 2 (two) witnesses,<sup>29</sup> whether the will is addressed to a person or a legal entity that applies after the death of the parent.<sup>30</sup> Paragraph (1) of Law No. 1 of 1974 shows that a guardian can be appointed by the parents or one of the surviving parents, either through a will or orally in the presence of two witnesses.
- b. carried out through a court determination. This is taken in the event that the child's parents are not capable of performing legal acts, or their residence or whereabouts are unknown, then a person or legal entity that meets the requirements can be appointed as the guardian of the child concerned.<sup>31</sup>

The provisions stipulated in Government Regulation No. 29 of 2019 are good, namely whoever is the guardian of the child other than his parents must get a court determination. This provision has improved when compared to before 2019. This means that after 2019, guardians have legal certainty, namely the existence of a court determination. Thus, it is no longer adequate for the existence of a guardian to be based only on a will or orally, but must be registered and obtained a court determination.<sup>32</sup>

According to the author, the above provisions need to be strengthened with *affirmative action* (affirmation policy).<sup>33</sup> The form can be done in several ways, such as involving village government officials to file it with the court or registering it through the Sub-District Religious

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<sup>29</sup> Article 51 Paragraph (1) of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

<sup>30</sup> Article 108 Compilation of Islamic Law.

<sup>31</sup> Article 33 paragraphs (1) and (2) of Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

<sup>32</sup> Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

<sup>33</sup> Affirmative Action (Affirmative Action) is special and temporary actions to encourage and accelerate certain community groups or certain groups of citizens to pursue progress so that it reaches the same level of development and is equivalent to most community groups that are much more advanced. See Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis*, Cet Ke-1 (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), pp. 35.

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Affairs Office (KUA) and the Sub-District Office of Religious Affairs is the one who forwards it to the court. It can even give additional tasks to the Sub-District Office of Religious Affairs to provide assistance to the court.

If this affirmative effort is not carried out, then still many children who need guardians do not get guardians who have legality from the court. In Indonesia and even in the world, many affirmative efforts have been made, such as the involvement of at least 30% percent of women in the management of political parties and in legislative institutions.<sup>34</sup> The presence of Law No. 8 of 2012 concerning the General Election of Members of the House of Representatives, Regional Representative Councils, and Regional People's Representative Councils has been a breath of fresh air for women to be able to be involved and compete in the field of practical politics.<sup>35</sup> In addition to this, there are still other affirmation policies, such as equality and equal distribution of education starting from elementary school to higher education,<sup>36</sup> and includes child protection.

Affirmation efforts in the field of guardianship need to continue to be carried out to maintain and protect the interests of children. Thus, children's human rights can continue to be maintained and protected, including from aspects of violence and discrimination. The 1945 Constitution in Article 28 B paragraph (2) mandates: *Every child has the right to survival, growth and development and the right to protection from violence and discrimination.*<sup>37</sup> To realize this mandate, for children who need guardians, it must be pursued through affirmation efforts, through the path as described above, namely involving parties who are strongly suspected of being able to realize the presence of guardians for children who do not have parents, or have parents who are not legally capable. Affirmation efforts can accelerate the resolution of the problem of children who do not have parental guardians. Children who do not have guardians become vulnerable to child exploitation and are far from protecting children.

In the process of determining guardians, there are provisions that according to the author are counterproductive to affirmation efforts, namely in paragraphs 11 and 12 (1) and (2). In more detail, these two articles read:

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<sup>34</sup> Articles 8 and 58 of Law of the Republic of Indonesia Number 8 of 2012 concerning General Election of Members of the House of Representatives, Regional Representative Councils, and Regional House of Representatives.

<sup>35</sup> SH.MH Herma Yanti and Muhammad Siddik Prabowo, 'Implementasi Kebijakan Afirmasi (Affirmative Action) Kuota Tiga Puluh Persen Keterwakilan Perempuan Dalam Pemilu Legislatif (Dprd) Kota Jambi', *Jurnal Lex Specialis*, 22 (2017), pp. 43–57.

<sup>36</sup> An example of a regulation that regulates it is 'Permendikbudristek No. 32 of 2022 concerning Technical Standards for Minimum Education Services'.

<sup>37</sup> Moh Bagus, Ahmad Khubby Ali Rohmat, and Helga Nurmila Sari, "Derivasi Konsep Hak Asasi Manusia terhadap Penyetaraan Posisi Anak Melalui Pendekatan Affirmative Action," *Jurnal Al-Qanun* Vol. 24, No. 1, Juni 2021, pp. 62

Article 11: The person or legal entity to be appointed as the Guardian must attach a recommendation from the agency that organizes government affairs in the social field of the local district/city when carrying out the process of determining the Court.

Article 12:

- (1) Recommendations from the agency that organizes government affairs in the social sector of the local district/city are considered in determining the Wali or revoking the guardianship.
- (2) The agency that organizes government affairs in the social field of the district/city in providing recommendations as intended in paragraph (1):
  - a. assigning professional social workers to conduct assessments to persons or legal entities to be appointed as Guardians; and
  - b. assisted by the guardian appointment consideration team.<sup>38</sup>

According to the author, even if the provisions of articles 11 and 12 above are applied, the place must be looked at again. For people who still have strong/high social ties, such as in rural areas, this provision deserves to be considered not to be strictly enforced, but it is necessary to give a large space to village officials to assess the guardianship of the guardians who come from within their villages. Furthermore, it also gives a big role to the Office of Religious Affairs District. to conduct feasibility tests and control over the performance of the guardians. The provisions of articles 11 and 12 above, according to the author, are suitable for application in urban areas, where social ties are lacking.

So far, Indonesia has an example of how village officials play an important role in determining policies in the areas under their government, namely in determining prospective recipients of social assistance from their respective villages. Often the Social Service submits the policy of determining prospective recipients of assistance to village officials. Assuming that they better understand and understand the condition of their citizens.<sup>39</sup> In addition, the village government is given the authority to resolve disputes or disputes at the village level with applicable customary law.<sup>40</sup>

Based on the description above, the appointment of guardians needs to be affirmative so that the process of determining guardians for children can be relatively fast. So, the child is always under the protection of the guardian. The form of affirmation efforts that the author offers is to involve village government officials and officers of the District Religious Affairs

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<sup>38</sup> Articles 11 and 12 of Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

<sup>39</sup> Muhamad Awiet Wiedanto Prasetyo, Devi Yunita Saputri, and Afilda Trisetya Riziana, 'Penentuan Penerima Bantuan Sosial Dana Desa Dengan Sistem Pendukung Keputusan Menggunakan Simple Additive Weighting Method', *Jurnal Politeknik Caltex Riau*, 8.2 (2022), pp. 296–306.

<sup>40</sup> I Putu Prana Suta Arsadi, Ketut Sudiarmaka, and Ratna Artha Windari, 'Peran Desa Pakraman Dalam Menyelesaikan Sengketa Tanah Adat Di Desa Bungkulan, Kabupaten Buleleng', *E-Journal Komunitas Yustitia Universitas Pendidikan Ganesha Jurusan Ilmu Hukum*, 1, 1, (2018), pp. 27.

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Office to take care of it. In daily life, village officials are relatively very close to their citizens compared to social service officers as mandated by law, especially for rural communities. In addition, the Sub-District Office of Religious Affairs is considered to have good access to the village because the Office of Religious Affairs is in each sub-district.

Indeed, it must be admitted that the involvement of the village government in determining the eligibility of a person as a prospective guardian of a child can bring several potential challenges, such as: first, limited resources and capacity. Village governments often have limitations in terms of human resources and expertise. They may not have staff who have the competence or special training to conduct an in-depth assessment of the eligibility of prospective guardians, both in terms of legal, psychological, and social. Second, the potential for conflict of interest. At the village level, close personal and social relationships between residents can lead to potential conflicts of interest. Third, villages often do not have strict standards and procedures. This can have an impact on the process of assessing the eligibility of prospective guardians can be subjective.

Fourth, vulnerability to social or political pressure. Village officials may come under pressure from certain groups, such as the family of a prospective guardian or community leader, to make decisions that are not entirely objective or in the best interests of the child. Fifth, difficulties in assessing non-material aspects. Important aspects of the eligibility of a prospective guardian, such as psychological and moral conditions, are often difficult for village governments to assess appropriately because they require special expertise from psychologists or social workers. In order for the process of assessing the eligibility of prospective guardians at the village level to run better, there needs to be training, clear guidelines, and a transparent and accountable supervision mechanism.

#### ***4. Duties and Responsibilities of the Guardian***

The law has regulated the types of duties and responsibilities of guardians. The following is explained the form of these duties and responsibilities. The laws that regulate the duties and responsibilities of guardians are Law No. 1 of 1974, the Compilation of Islamic Law, and Government Regulation No. 29/2019. Below it is mentioned according to Law No. 1 of 1974, Compilation of Islamic Law, and then according to Government Regulation No. 29 of 2019 to see the differences that exist. This difference deserves attention because there are very important differences, although ideally the content of the rules is the same. To make it easier to see the following guardian duties and responsibilities are shown in the table.

Law No. 1 of 1974	Compilation of Islamic Law	Government Regulation No. 29 of 2019
It is not allowed to transfer the rights or pawn the permanent property owned by the child who is not yet 18 (eighteen) years old or has never been married, unless the child's interests so that he or she. <sup>41</sup>	Obligated to take care of themselves and the property of the person under their guardianship as best as possible and to provide religious guidance, education and other skills for the future of the person under their guardianship.	performing parental custody, including: a. nurturing, nurturing, educating, and protecting Children; b. develop children according to their abilities, talents, and interests and ensure the best interests of children; c. develop children according to their abilities, talents, and interests and ensure the best interests of children d. providing character education and instilling ethical values in children;
It is obligatory to take care of the child under his control and his property as well as possible, by respecting the child's religion and beliefs.	It is forbidden to bind, burden and alienate the property of a person under his guardianship, unless the act is unavoidably beneficial to the person under his guardianship.	guiding children in understanding and practicing religious life well
It is obligatory to make a list of the property of the child under his authority at the time of commencement of his office and to record all changes in the property of the child or children.	be responsible for the property of the person under his guardianship, and compensate for any losses incurred as a result of his or her fault or negligence. <sup>42</sup>	manage the property of the Child for the needs of the Child
Responsible for the property of the child under his or her custody as well as any losses incurred due to his or her fault or negligence. <sup>43</sup>	Obligated to hand over all the assets of the person under his guardianship, if the person concerned has reached the age of 21 years or is married. <sup>44</sup>	represent the Child to perform legal acts in and out of the Court. <sup>45</sup>
	may use the property of persons under his guardianship, as long as it is necessary for his or her interests according to Propriety or <i>bill ma'ruf</i> if guardian is poor. <sup>46</sup>	It is mandatory to register the recording of the appointment of the Wali to the agency that carries out government affairs in the field of population administration and civil registration Propriety or <i>bill ma'ruf</i> if guardian is poor. <sup>47</sup>

There are two things that need to be underlined here, first, the three regulations above are still in effect. Second, *the stressing points* of each regulation have relatively striking differences. The difference lies in whether guardians should focus on character development, education, and child protection or on children's property. This finding is very interesting

<sup>41</sup> Article 52 of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

<sup>42</sup> Article 110 Compilation of Islamic Law.

<sup>43</sup> Provisions number 2 to 4 are regulated in Article 51 paragraphs (3), (4), and (5) of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

<sup>44</sup> Article 111 Compilation of Islamic Law.

<sup>45</sup> Article 14 paragraph (1) of Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

<sup>46</sup> Article 112 Compilation of Islamic Law.

<sup>47</sup> Article 14 paragraph (2) of Government Regulation of the Republic of Indonesia Number 29 of 2019 concerning Terms and Procedures for the Appointment of Guardians.

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because the regulations issued by the government give different attention and focus on the same issue, namely the appointment of guardians. Further details are discussed below.

The number of duties and responsibilities of guardians according to Law No. 1 of 1974 is only four aspects, while according to the Compilation of Islamic Law there are six aspects. There are certain aspects that look the same, but there are differences. For example, Law No. 1 of 1974 states that guardians are obliged to take care of children under their control and their property as best as possible, by respecting the child's religion and beliefs. Meanwhile, the version of the Compilation of Islamic Law reads: Guardians are obliged to take care of themselves and the property of people under their guardianship as best as possible and are obliged to provide religious guidance, education, and other skills for the future of people under their guardianship. What I want to underline here is the statement "respect the child's religion and beliefs." Here guardians are only obliged to respect the child's religion and beliefs. There is not even an order to provide skills education for the child's future. There is also no command to guide children to strengthen their religion, both knowledge and practice of their religion. In the Compilation of Islamic Law, it is expressly stated that guardians should provide religious guidance, education, and skills for the benefit of the child's future. So, guardians are not just concerned about the religion and beliefs of children.

The difference between respecting and on the other hand providing religious education are two different things. Law No. 1 of 1974 should order guardians to provide religious education for children. Moreover, the requirement for guardians is people of the same religion as him. In this case, the guardian must be active, not passive.

Another difference is that the order to make a list of children's assets under their guardianship and the existing changes to children's assets are regulated in Law No. 1 of 1974, while the Compilation of Islamic Law does not regulate them. There are things that are regulated in the Compilation of Islamic Law but not in Law No. 1 of 1974, namely guardians are prohibited from binding, burdening, and alienating the property of people under their guardianship. In Law No. 1 of 1974, this explanation is almost the same as that guardians are not allowed to transfer rights or pawn fixed items owned by their children. Even so, the difference is still felt.

In the details of the duties and responsibilities of the guardian as mentioned above, Law No. 1 of 1974 and the Compilation of Islamic Law as stated above are not given an explanation. This is considered obvious. The author considers the description of duties and responsibilities to be inadequate. It is necessary to have technical aspects of its implementation, such as how to make a list of children's assets under guardianship. Next, where was the list submitted? The

direct impact is that it is difficult to find a guardian who writes a list of children's assets under his guardianship. The next impact is how to control the use of the child's property. The existing rules are also relatively inadequate, for example the explanation of how to use children's property. Because the child has needs that must be met, and whether the guardian has the right to take fees for his own needs which can be considered as a reward for the duties and responsibilities that he has done. Today, according to Law No. 6 of 2014 concerning Villages, villages have an important role in running the wheels of government in the village, including in maintaining the safety and welfare of their citizens, including children, especially children who do not have parents, parents whose whereabouts are unknown, and parents who are not capable of performing legal acts. In the existing regulations, the role of village government officials has not been mentioned.

The duties and responsibilities of guardians in Government Regulation No. 29 of 2019 have different emphasis aspects from Law No. 1 of 1974 and the Compilation of Islamic Law. This emphasis can be seen in the aspect of the obligation to exercise parental custody of children which includes the obligation to nurture, maintain, educate, protect children, develop children according to their abilities, talents, and interests and ensure the best interests of children, prevent marriage at the age of children, and providing character education and instilling ethical values in children. At this point, there is an item that was not mentioned at all before, namely the guardian is responsible for preventing child marriage. This means that guardians are really responsible for creating a good future for children. In addition, it is to guide children to be able to understand their religious teachings and practice them in their daily lives. Furthermore, the guardian represents the child to carry out legal acts, and registers the recording of the appointment of the guardian.

Based on the above description, it can be concluded that the existing rules, especially Law No. 1 of 1974 and the Compilation of Islamic Law, are not sufficient to regulate guardianship. Thus, on the one hand, uniform rules are needed between one regulation and another. Then, further and applicable explanations are needed. So, children who are under guardianship are really protected and can achieve a good future. To realize a good future, these duties and responsibilities must be added with the provisions in Government Regulation No. 29 of 2019. Thus, there is a balanced attention between the fulfillment of spiritual aspects and the preservation of children's property at the same time.



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### C. Conclusion

The formula for the age of children contained in the laws and regulations in Indonesia is diverse. There has not been found to standardize it. This affects the age limit of a person to remain under guardianship as well as their ability to manage their assets.

The legal guardian must be determined by the court, whether the guardian is appointed by the child's parents, the will of the parents or not by following the applicable provisions. However, in the process of implementation, affirmation efforts must be needed to speed up the determination process, especially involving the village government and the District Religious Affairs Office for Muslims, as well as the supervision of guardians.

In terms of the duties and responsibilities of guardians towards children, existing laws and regulations give relatively different emphasis between each other. Some regulations are more focused on the maintenance of children's property, and others are more focused on fulfilling physical and spiritual aspects. Regulations are needed that give balanced attention between the two, so that children are comprehensively protected and get a bright future.

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