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“WHICH REGULATION TO USE?”: ISLAMIC LAW VS WESTERN LAW IN THE SUPERVISION OF THE ASSETS OF CHILDREN UNDER GUARDIANSHIP IN INDONESIA

Taufik H. Simatupang¹, Insan Firdaus², Trisapto Wahyudi Agung Nugroho³, Ahmad Jazuli⁴, Firdaus⁵, Okky Chahyo Nugroho⁶, Oksimana Darmawan⁷, Sri Humana Lagustiani⁸, Soeryaniati Koesoemo⁹

¹Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia; Faculty of Law, Pakuan University (UNPAK), Bogor, Indonesia; Faculty of Law, Ibn Khaldun University (UIKA), Bogor, Indonesia. th_tupang@yahoo.co.id, <https://orcid.org/0000-0002-9996-2722>

²Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. insa003@brin.go.id, <https://orcid.org/0009-0007-7671-9651>

³Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. tris019@brin.go.id, <https://orcid.org/0000-0001-9235-9376>

⁴Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. ahma106@brin.go.id, <https://orcid.org/0000-0002-0927-0707>

⁵Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. fird006@brin.go.id, <https://orcid.org/0009-0001-4498-2240>

⁶Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. okky002@brin.go.id, <https://orcid.org/0009-0003-1748-7118>

⁷Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. oksi002@brin.go.id, <https://orcid.org/0009-0003-8059-0441>

⁸Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. srihumana@yahoo.com, <https://orcid.org/0009-0002-4759-2632>

⁹Research Center for Law, Institute of Social Science and Humanities, National Research and Innovation Agency (BRIN), Jakarta, Indonesia. suryaniati.kusuma@yahoo.com, <https://orcid.org/0008-9380-2155>

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Corresponding Author: Taufik H. Simatupang
(th_tupang@yahoo.co.id)

ABSTRACT

Still fresh in memory, the incessant news of the struggle for guardianship rights over Gala Sky, a child who was abandoned by both parents due to an accident. Grandfathers and grandmothers from both sides argued that their party was the most appropriate to obtain guardianship rights over the child. However, from the many reports on television and online media, not a single piece of news mentions the Balai Harta Peninggalan. The purpose of this study is first to see how far the presence of the state is as a form of protection of human rights in the supervision of children's assets under guardianship, and secondly to analyze conflicting norms and determine which provisions must be used in supervising child guardianship. The method used in this study

is a normative juridical law research method with a statutory regulation approach and literature studies. The results of the study concluded that firstly the presence of the state as a form of protection of human rights has not been maximally implemented, this is due to the occurrence of guardianship law and guardianship supervision regulated in 4 laws and regulations which are not in sync with each other, and secondly, the legal provisions for temporary guardianship supervision before a court decision, the Child Protection Law can be used based on legal principles, special provisions override general provisions, while for guardianship supervision after a court decision, the Civil Code can be used based on Article 66 of the Marriage Law.

KEYWORDS: State, Human Rights, Supervision, Children Under Guardianship.

1. INTRODUCTION

Discussions about the importance of state involvement in supervising legal guardianship matters, in order to legally protect the assets of children outside the control of their parents, have led to discussions and debates about which law should be used: Islamic Law (Marriage Law) or Western Law (Civil Code).

The state is essentially a collection of people within a society. Society consists of humans, both as individuals and groups, who come together for various purposes and goals. The elements of the community in carrying out their lives interact with one another based on needs and dependencies. One form of relationship between individuals in society is the relationship between a woman and a man who is married. As one of the interaction relations between individuals in society in a country, such a relationship must be given strict regulation by the state through the applicable positive law. (Sonny Dewi Judiasih, 2019)

This is as mandated by Article 28B paragraph (1) of the 1945 Constitution that everyone has the right to form a family and continue offspring through a legal marriage. The Republic of Indonesia is a state based on Belief in the One and Only God which is guaranteed by Article 29 of the 1945 Constitution. Everyone within the household scope in exercising their rights and obligations must be based on religion. To realize the integrity and harmony of the household is very dependent on the level of quality of behavior and self-control of each person. (Khurul Abror, 2020)

Marriage is not for a moment but for a lifetime because marriage contains noble values. The inner and outer bond between a man and a woman that is built on sacred values must be based on Belief in One Almighty God as a reflection of the First Precepts of Pancasila. Marriage is not enough with birth bonds or inner ties, but both of them must be, the establishment of physical and spiritual bonds is the foundation in forming a happy and eternal family. (Sonny Dewi Judiasih, 2018)

Domestic life is the beginning of the formation of a family. Family is a group of people by ties of marriage, blood, or adoption. The family consists of one head of the household, interacting and communicating with each other in the roles of husband and wife who respect each other, mother and father, sons and daughters, brothers and sisters, and create and maintain their culture. Family is a social group that is lasting based on marriage and blood relations. Family is the first place for children, the first environment that provides shelter for them,

where children will feel safe. (Jon Iskandar Bahari, 2018)

Children are sustenance, entrusted, and gifts from God Almighty who must be loved and loved, (Anna Syahra, 2018) as well as the next generation of the ideals of the nation's struggle and future resources that will become the nation's capital for sustainable development. (Syamsul Kurniawan, 2019) Children are also the most valuable treasure for families, communities and nations. He is the party on which the family, society and nation depend on hopes, more deeply children are the party that will determine whether a country is brought towards prosperity or towards a downturn. According to religious teachings which state that every child born into this world is pure (fitrah).

In Article 45 paragraph (1) and paragraph (2) of Law Number 1 of 1974 concerning Marriage (Marriage Law) it is stated that both parents are obliged to care for and educate their children as well as possible until the child gets married or is able to take care of herself. Furthermore, in Article 48 of the Marriage Law it is also stated that parents are not allowed to transfer rights assets or pawn fixed assets owned by children who are not yet 18 (eighteen) years old or have never been married, unless the interests of the child require it.

In fact, not all children are fortunate to be able to pass through their childhood in the love of their parents until they grow up. The end of the marriage gave birth to the event of guardianship law. An immature child who is not under the authority of his parents certainly needs adult supervision, especially the management of assets left by his parents. Supervision and management of children's assets is basically to finance the life and education of the child. This condition places the importance of the existence of the Balai Harta Peninggalan (BHP) within its authority to supervise child guardianship.

Several legal facts show how important the position of BHP is in the legal event of guardianship supervision. Firstly, in 2018 there was a murder incident that caused a child named Kinara to lose his parents and siblings. Kinara's grandfather did not submit a request for guardianship to the court. (Shela Natasha, 2019) The second in 2016 was the case where a guardian who was none other than his own uncle, Mustafa Lasulika (older brother of his late father) was determined to sell the inheritance of his son Novry Satryo Nugroho Lasulika, namely a plot of land covering an area of 88 M2 which is located on Jalan Perintis Kemerdekaan, Kec. Tamalanrea, Kel. Tamalanrea Indah Makassar. (Nurhidayah A. Hambali dan Subehan Khalik, 2019) Third, in 2014

BHP Surabaya received consultations from children who were previously under guardianship but the guardianship was never reported to BHP. Hasil wawancara secara tertulis melalui media email dan watshaap dengan Ibu Nia Anggota Teknis Hukum Balai Harta Peninggalan Surabaya pada tanggal 14 Juli 2020. Finally, what has received attention and discussion on various television and online media is the struggle for guardianship rights over Gala Sky's child. The struggle for guardianship took place after the child's parents Vanessa Angel and Aunt Ardiansyah died as a result of a car accident in November 2021. Various issues color the struggle for guardianship rights, one of which is the problem of inheritance.

<https://Hot.Liputan6.Com/Read/4870827/6-Kasus-Perebutan-Hak-Asuh-Anak-Selebriti-Gala-Sky-Bikin-Heboh-Publik>, diakses tanggal 17 Januari 2022.

2. LITERATURE REVIEW

2.1. *History of Human Rights and Children's Rights*

One of the parameters of a rule of law is respect for human rights. Historically, the emergence of the concept of human rights was inseparable from the reaction to absolute power which in the end gave rise to a constitutional system and the concept of a rule of law state, both the *rechtstaat* and the rule of law, as stated by Louis XIV with the expression *L'etat'est Moi* or the State is me. (Retno Kusniati, Sejarah Perlindungan Hak Hak Asasi Manusia Dalam Kaitannya Dengan Konsepsi Negara Hukum (Makalah), Disampaikan Dalam Bimbingan Teknis Kantor Wilayah Kementerian Hukum Dan HAM RI Jambi, Hotel Ceria Jambi Tanggal 24 Mei 2011, 2011) Power concentrated in one hand creates arbitrariness, as indicated by Lord Acton: power tends to corrupt, absolute power corrupts absolutely. According to Philip M. Hadjon as quoted by Masda El-Muhtaj. (Majda El Muhtaj, 2005) The concept of *rechtstaat* was born from a struggle against absolutism so that it is revolutionary in nature. On the other hand, the concept of the rule of law develops in an evolutionary manner. This can be seen both from the contents and criteria of the *rechtstaat* and the rule of law itself. The first concept rests on the Continental European legal system which is commonly called civil law. While the latter concept rests on the common law or Anglo Saxon legal system.

The desire to carry out juridical restrictions on power is basically due to power politics which tend to be corrupt. It is feared that it will distance the

function and role of the state in the life of individuals and society. On that basis, there is a great desire to carry out a normative-juridical limitation of power to avoid authoritarian rulers. This is where the constitution becomes important for people's lives. The constitution is used as the embodiment of the highest law that must be obeyed by the state and government officials. (Miriam Budihardjo, 1983)

Human rights are rights that humans have solely because of humans. Humans have it not because it is given by society or based on positive law, but solely based on their dignity as human beings. (Jack Donnelly, 2003) The origin of the idea of human rights stems from the theory of natural rights (natural rights theory). In its development against power, a reform movement (Renaissance) emerged which hoped that Greek and Roman culture would return to respect for individuals. The renewal movement was continued by the flow of natural law pioneered by Thomas Aquinas and Grotius which emphasized that every person in life is determined by God, but everyone regardless of their status is subject to God's authority. That is, not only the power of the King is limited by divine rules but all human beings are endowed with a unique individual identity, separate from the state in which he has a natural right which states that each individual is an autonomous being. (Rhona K Smith et al, 2009)

The emergence of human rights law which originates from natural law was also stated by Thomas Van Aquino and several other legal experts. According to Aquino, natural law originates from Divine law (Divinity), which is universal and does not change in time and space. In contrast to that, according to Grotius stated, that natural law comes to the surface and rests on human reason, regardless of any religious views. In his writings, he stated that this would not apply if God did not exist. (Lili Rasjidi dan Ira Rasjidi, 2001) Natural law is a national law that controls all relations between human beings, regardless of their race or social status. Even kings must submit to laws or natural laws that are fundamental, universal, lasting, sustainable and unchanging which flow from the. (Emeritus John Glissen, 2007)

On the other hand, John Locke, a supporter of natural law, holds that: all individuals are naturally endowed with inherent rights to life, freedom and property which are theirs and cannot be revoked by the state. Through a social contract the use of their inalienable rights is left to the authorities, if the authorities break the social contract by violating the natural rights of individuals, the people can replace them with rulers who are able to respect these rights.

In its development, individual rights have found their place in:

1. Magna Carta (1215) which contains a compromise on the division of power between King John and his nobility and contains the idea of human rights which guarantees the protection of the people from arrest, detention and exile unless there is a valid court decision;
2. Habeas Corpus (1679) in England which required that someone who was arrested be examined in a short time;
3. The Glorious Revolution in England in 1688 was followed by the Bill of Rights (1689) which contained the rights of the people and emphasized that the power of the King was subject to Parliament;
4. The 1788 Declaration of Independence compiled by Thomas Jefferson stated that humans by nature are free and independent and have rights that cannot be separated or deprived by their human nature in the form of; the right to life, the right to belong, the right to pursue happiness and security;

The essence of human rights itself is an effort to maintain the safety of human existence as a whole through balancing actions between individual interests and public interests. Likewise, efforts to respect, protect and uphold human rights are a joint obligation and responsibility between individuals, the government (both civil and military government apparatus), and the state. Based on the formulation of human rights, it can be concluded that the essence of human rights is:

1. Human rights do not need to be given, purchased or inherited, human rights are part of humans automatically;
2. Human rights apply to all people regardless of gender, race, religion, ethnicity, political views or social origin, and nation;
3. Human rights cannot be violated, no one has the right to limit or violate the rights of others. People still have human rights even if a country makes laws that do not protect or violate human rights. (Aminullah, 2018)

Children are one of the parties who are vulnerable to experiencing objects of violation of human rights. The definition of a vulnerable group is not explicitly formulated in laws and regulations, as stated in Article 5 paragraph (3) of Law Number 39 of 1999 which states that everyone who belongs to a vulnerable group of people has the right to receive more treatment and protection with respect to their particularities. . In the Elucidation of the article it is stated that what is meant by vulnerable groups in

society are, among other things, the elderly, children, the poor, pregnant women and people with disabilities. Meanwhile, according to the Human Rights Reference, it is stated that those belonging to the vulnerable group are: Refugees, Internally Displaced Persons (IDPs), National Minorities, Migrant Workers, Indigenous Peoples, Children, and Women. (Syamsul Kurniawan, 2019)

Recognition of the existence of children as human rights subjects who are *sui generis* (rights holders as *sui generis*) has essentially been agreed through the ratification of the Convention on the Rights of the Child (Convention on the Rights of the Child) to provide protection for children and uphold children's rights throughout the world in November 20, 1989 and entered into force on September 2, 1990. This convention has been ratified by all countries in the world, except Somalia and the United States of America. Indonesia has ratified the Convention on the Rights of the Child by Presidential Decree Number 36 of 1996. As a manifestation of the government's commitment to ratifying the Convention on the Rights of the Child, the Government of Indonesia has also ratified Law Number 23 of 2002 concerning Child Protection (UU Protection of Children) on the 22nd October 2002 which as a whole, the main material in the law contains the provisions and principles of the Convention on the Rights of the Child. Even before the Convention on the Rights of the Child was ratified, the Government passed Law Number 4 of 1979 concerning Child Welfare. The Child Protection Law has expanded the meaning of a child, namely not only someone under the age of 18, as stated in the Convention on the Rights of the Child, but also including children who are still in the womb. After ratifying the Convention on the Rights of the Child, the state has the following consequences:

1. Socializing the Convention on the Rights of the Child to children;
2. Make national legal rules regarding children's rights;
3. Make periodic reports on the implementation of the Convention on the Rights of the Child every 5 years.

Children's rights according to the Convention on the Rights of the Child are grouped into four categories, namely:

1. The Right to Survival, the right to preserve and defend life and the right to obtain the highest standard of health and the best possible care;
2. The Right to Protection, protection from discrimination, exploitation, violence and neglect;

3. The right to growth and development, the right to get an education and the right to achieve a standard of living that is appropriate for physical, mental, spiritual, moral and social development;
4. Right to Participate, the right to express opinions in all matters affecting children.

The mandate of Article 28B paragraph (2) of the 1945 Constitution that every child has the right to survival, growth and development and is entitled to protection from violence and discrimination is a form of the commitment and seriousness of the state to provide protection for every child. The protection of human rights for children is of course not only for children under the age of 18 and/or in the womb, but also for children who are not under the authority of their parents. A child who is under guardianship must legally receive protection for his human rights to grow and develop until he is 18 years old, like a child who is under the authority of his biological parents.

2.2. Urgency of Child Protection

The original thoughts of the founders of the nation inspired the main foundation of the Indonesian state (state fundamental norm), namely the 1945 Constitution. The initial foundation of the concept of the Indonesian welfare state was contained in the Preamble to the 1945 Constitution, namely "to protect the entire Indonesian nation and all of Indonesia's bloodshed and to promote public welfare, educating the life of the nation, and participating in carrying out world order based on freedom, eternal peace and social justice based on Belief in One Almighty God, just and civilized humanity, Indonesian unity, and democracy led by wisdom in representative deliberations as well as by realizing social justice for all Indonesian people. (Agus Riswanto, 2017)

One of the concrete manifestations of this welfare is the creation of legal protection. According to Fitzgerald's view as quoted by Satjipto Raharjo, the beginning of the emergence of the theory of legal protection stems from the theory of natural law or the school of natural law. This flow was pioneered by Plato, Aristotle (a student of Plato), and Zeno (founder of the Stoic school). According to the school of natural law, law originates from God, who is universal and eternal, and law and morals cannot be separated. The adherents of this school view that law and morals are a reflection and regulation internally and externally of human life which is manifested through law and morals. (Satjipto Raharjo, 2000) This includes, of course, legal protection for every child.

Child protection is the responsibility of parents,

family, community, government and the state which is a series of activities that are carried out continuously for the protection of children's rights. Extra supervision of children both personally and as part of society, needs to be done. This is intended to protect children's rights and prevent the entry of negative external influences that can interfere with children's development. (Ahmad Kamil dan Fauzan, 2008)

Child protection is all efforts made to create conditions so that every child can exercise his rights and obligations for the proper development and growth of children physically, mentally and socially. Child protection is a manifestation of the existence of justice in a society, thus child protection is sought in various fields of state and social life. Child protection activities have legal consequences, both in terms of written law and unwritten law. The law is a guarantee for child protection activities. (Rini Fitriani, 2016)

Child protection efforts need to be implemented as early as possible, from the time the fetus is in the womb until the child is eighteen years old. Based on the concept of child protection that is complete, comprehensive and comprehensive, the law has placed the obligation to provide protection to children based on the principles of non-discrimination, the principle of the best interests of the child, the principle of the right to life, survival and development. as well as the principle of respect for the views and opinions of children. Child protection can be divided into 2 (two) parts, namely:

1. Legal protection of children, which includes: protection in the field of public law and in the field of civil law;
2. Non-juridical protection of children, including: protection in the social, health and education sectors.

The true meaning of "every child" must be understood in the context of the child regardless of the conditions and circumstances, including children who are no longer under the authority of their parents (guardianship). Guardianship of children who are within the scope of civil law must be able to ensure that it runs according to the objectives for the best interests of a child. Guardianship of children must be legally protected and it is in realizing this protection that the state has a role. The state, through its executive branch ex officio institutions that are given the task and authority to do so, is obliged to ensure that guardianship activities do not cause children to suffer.

2.3. Theory of Norm Conflict

Formation of good laws and regulations as referred to in Article 5 of Law Number 12 of 2011 concerning Formation of Legislation, includes the principles of: clarity of purpose; proper forming institutions or officials; suitability between types, hierarchies, and payload materials; can be implemented; usability and effectiveness; clarity of formulation; and openness. Furthermore, in Article 6 paragraph (1) it is also stated that the contents of laws and regulations must reflect the principles of: protection; humanity; nationality; kinship; archipelago; Unity in Diversity; justice; equal position in law and government; law order and certainty; and/or balance, harmony, and alignment.

In practice, the conflict of norms between one law and another is unavoidable. According to the principle of conflict rules (Jaap C. Hage, 1997), the rules of collision (Andrzej Malec, 2001), or the principle of derogation (Henry Prakken & Giovanni Sartor, 1997) often discussed in the world of law, both national law and international law. These principles are used to determine which rules should be used and override other rules, based on hierarchical, chronological and specific criteria. Referring to these three criteria, one of which is what is known as *lex specialis derogat legi generali* (the more specific rule prevails over the less specific). (Jerzy Stelmach & Bartosz Brożek, 2006)

The principle of *lex specialis derogat legi generali* is the principle of designating which law takes precedence as the basis used to settle a legal event. According to Purnadi Purbacaraka and Soerjono Soekanto, the intent of the principle of *lex specialis derogat legi generali* is that for special events it is obligatory to apply a law that mentions that event,

although for these special events a law can also be applied that mentions a broader or more general event. that may include those special events. Eddy OS Hiariej is of the view that in the political context of criminal law, the principle of *lex specialis derogat legi generali* is a legal principle used to determine criminal laws and regulations that have been violated against concrete events (*ius operatum*) through the law enforcement process, so that the principle of *lex specialis derogat legi* This generality becomes important when law enforcers want to apply criminal laws and regulations to the criminal cases they handle. (Shinta Agustina, 2015)

3. METHODS

This research began with the processing and interpretation of data from three sources: first, Supreme Court rulings from 2011-2020 regarding child guardianship. Second, respondents were 28 members of the Anggota Teknis Hukum of the BHP in Medan, Jakarta, Semarang, Surabaya, and Makassar, as depicted in Table 1. Third, informants were 13 judges from the District Court and Religious Court. The next step was to analyze and interpret these three data sources individually. However, when integrated, these three data points actually share a common trend, indicating that legal events regarding guardianship and guardianship supervision have not been implemented optimally. Finally, these three data points were analyzed by correlating them with Islamic Law (Marriage Law and Child Protection Law) and Western Law (Civil Code) to determine which regulations are more favorable to child protection, particularly in the supervision of child guardianship.

Table 1: Number of Respondents: Anggota Teknis Hukum Balai Harta Peninggalan.

No.	Regional Office	Location	Working Area	
1.	Sumatera Utara	Medan	Provinsi Sumatera Utara, Provinsi Nangroe Aceh Darussalam, Provinsi Sumatera Barat, Provinsi Bengkulu, Provinsi Riau, and Provinsi Kepulauan Riau	Respondent 28
2.	Daerah Khusus Ibukota Jakarta	Jakarta	Provinsi Daerah Khusus Ibukota Jakarta, Provinsi Jawa Barat, Provinsi Banten, Sumatera Selatan, Provinsi Lampung, dan Provinsi Jambi, Provinsi Bangka Belitung and Provinsi Kalimantan Barat	
3.	Jawa Tengah	Semarang	Provinsi Jawa Tengah and Provinsi Daerah Istimewa Yogyakarta	
4.	Jawa Timur	Surabaya	Provinsi Jawa Timur,	

			Provinsi Kalimantan Tengah, Provinsi Kalimantan Selatan, Provinsi Kalimantan Timur, and Provinsi Kalimantan Utara	
5.	Sulawesi Selatan	Makassar	Provinsi Sulawesi Selatan, Provinsi Sulawesi Utara, Provinsi Sulawesi Tengah, Provinsi Sulawesi Barat, Provinsi Sulawesi Tenggara, Provinsi Gorontalo, Provinsi Bali, Provinsi Nusa Tenggara Barat, Provinsi Nusa Tenggara Timur, Provinsi Maluku, Provinsi Maluku Utara, Provinsi Papua, and Provinsi Papua Barat	

4. RESULTS

4.1. The Presence of the State Through the BHP in Child Guardianship Supervision

The importance of the position of children in a country has been explicitly formulated in the constitution. Based on Article 28B paragraph (2) that every child has the right to survival, growth and development as well as protection from violence and discrimination. Protection of children's rights is a consequence of Guardianship law is a part of family law that aims to provide legal protection for children. In certain circumstances not all children are in the power of parents. Facing this situation, it is necessary to replace parental authority over children who have not reached a certain age or are not yet married. An institution that replaces parental authority is known as a trusteeship. Trusteeship is an institution that replaces parental authority over minor children. Guardianship powers include power over the person and property of the child. The exercise of guardianship powers by the guardian is expected to benefit the child and also his assets. Likewise, if this power ends, it will not cause any loss to the child's personality and/or assets in the future. (Ishak, 2017)

Guardianship legal events are legal events of

supervision of children who are not under the authority of their parents. This is referred to in Article 50 paragraph (1) of the Marriage Law that children who have not reached the age of 18 (eighteen) years or have never been married, who are not under the authority of their parents, are under the authority of a guardian. Furthermore, in paragraph (2) it is also stated that guardianship concerns the person of the child concerned and his property.

Supervision of trusteeship carried out by BHP is based on Article 366 of the Civil Code which states that in every trust ordered therein, BHP is assigned as a supervising trustee. Furthermore, in Article 369 it is also stated that in all cases, if the guardianship is ordered by a Judge, the Registrar of the District Court concerned must immediately notify in writing the existence of said appointment to the BHP, with a statement, whether the appointment took place in the presence of the guardian, or if the guardianship it was ordered to associations, foundations or social institutions, with information, whether it happened at the request or own ability.

Based on the Regulation of the Minister of Law and Human Rights Number 7 of 2021 concerning the Organization and Working Procedures of the Probate Court, until now BHP has the following work areas:

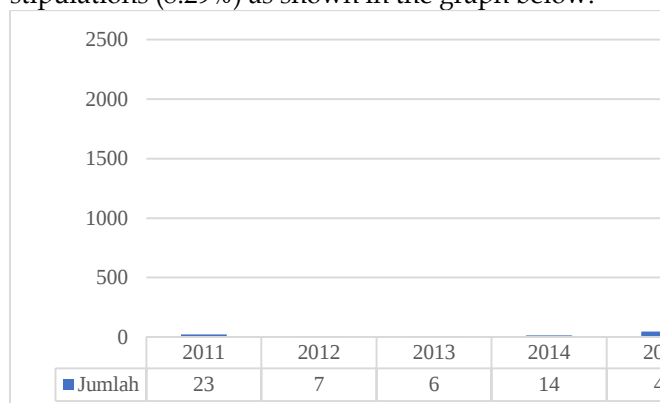
Table 2: Working Area of the Balai Harta Peninggalan Kementerian Hukum dan HAM RI.

No.	Regional Office	Location	Working Area
1.	Sumatera Utara	Medan	Provinsi Sumatera Utara, Provinsi Nangroe Aceh Darussalam, Provinsi Sumatera Barat, Provinsi Bengkulu, Provinsi Riau, and Provinsi Kepulauan Riau
2.	Daerah Khusus Ibukota Jakarta	Jakarta	Provinsi Daerah Khusus Ibukota Jakarta, Provinsi Jawa Barat, Provinsi Banten, Sumatera Selatan, Provinsi Lampung, dan Provinsi Jambi, Provinsi Bangka

			Belitung and Provinsi Kalimantan Barat
3.	Jawa Tengah	Semarang	Provinsi Jawa Tengah and Provinsi Daerah Istimewa Yogyakarta
4.	Jawa Timur	Surabaya	Provinsi Jawa Timur, Provinsi Kalimantan Tengah, Provinsi Kalimantan Selatan, Provinsi Kalimantan Timur, and Provinsi Kalimantan Utara
5.	Sulawesi Selatan	Makassar	Provinsi Sulawesi Selatan, Provinsi Sulawesi Utara, Provinsi Sulawesi Tengah, Provinsi Sulawesi Barat, Provinsi Sulawesi Tenggara, Provinsi Gorontalo, Provinsi Bali, Provinsi Nusa Tenggara Barat, Provinsi Nusa Tenggara Timur, Provinsi Maluku, Provinsi Maluku Utara, Provinsi Papua, and Provinsi Papua Barat

Source: Regulation of the Minister of Law and Human Rights Number 7 of 2021 concerning the Organization and Working Procedures of the Balai Harta Peninggalan.

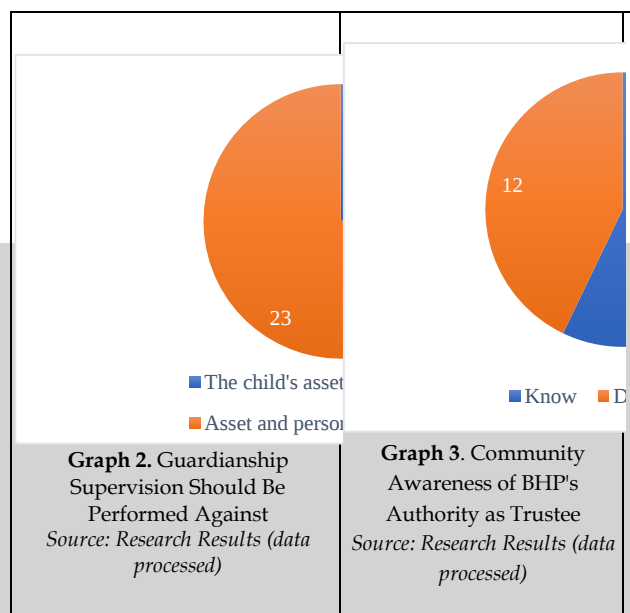
The results of research in 2020, based on the source of the Supreme Court Decision Directory, guardianship determinations in the last 10 (ten) years were as many as 5104 determinations from all courts in Indonesia. Meanwhile, the stipulations submitted to BHP were not more than 10%, namely 423 stipulations (8.29%) as shown in the graph below:



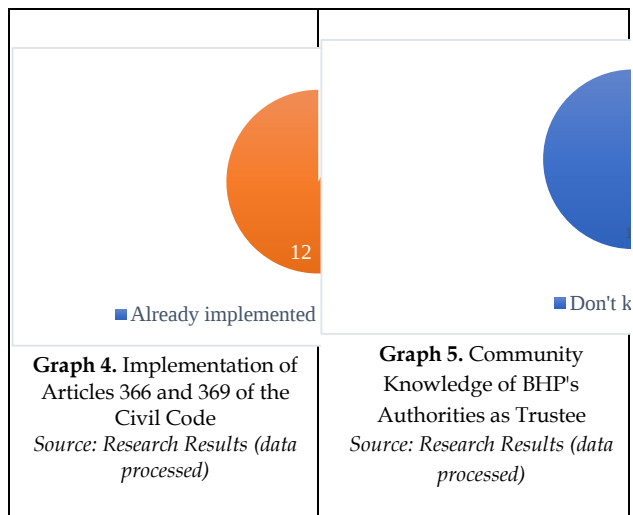
Graph 1: Number of Court Guardianships in the Last 10 Years.

Source: Research Results (data processed).

Data obtained from BHP, in terms of guardianship supervision, the majority of BHP respondents wanted this to be done not only for assets but also for the child's personal self. Public knowledge of the existence of BHP as an agency authorized to supervise guardianship, the majority of respondents answered that they already knew, although not a few answered that they did not know, each respondent's answers can be seen in the graph below:



However, the opposite views and opinions were obtained from the District Court and the Religious Court regarding the implementation of Article 366 and Article 366 of the Civil Code. Of the 13 respondents, the majority answered that they had not implemented it. Public knowledge of the existence of BHP as an agency authorized to supervise trusteeship, the majority of respondents answered they did not know, each respondent's answers can be seen in the graph below.



Data obtained from BHP regarding perceptions of the effectiveness of the implementation of trusteeship supervision based on 4 indicators shows a relatively small number of 68.18 in the category of quite effective. Program objectives as one of the important indicators to measure the level of effectiveness of a program/activity shows the smallest number, namely 45.45 (ineffective), as can be seen in the table below:

Table 3: Effectiveness of the BHP Trust Oversight Activity Program.

No.	Indicator	Target	Realization	Percentage (%)	Effectiveness Program
1.	Target Accuracy	22	15	68,18	Effective enough
2.	Program Outreach	22	17	77,27	Effective enough
3.	Program Objectives	22	10	45,45	Ineffective
4.	Monitoring	22	18	81,81	Very effective
Total		-	-	-	
Average				68,18	Effective enough

Source: Research Results (data processed).

Based on the results of research in 2020 and 2021 it was confirmed that the majority of respondents from the District Court and Religious Courts did not know and had not implemented the mandate of Articles 366 and Article 369 of the Civil Code. The Court's stipulation regarding Trusteeship that is not submitted to BHP, as the obligation mandated in Article 369 of the Civil Code, has resulted in the non-implementation of 3 (three) matters:

1. The BHP cannot take an oath against the guardian that has been determined by the panel of judges;
2. The guardian cannot record the assets of the child left by his parents which must be accounted for by the guardian (calculation of

expenses for the benefit of the child), until the child grows up (18 years old) and is capable of carrying out legal actions;

3. BHP's authority (rights and obligations) cannot be exercised to supervise the said trusteeship.

If the three things above cannot be implemented, then in turn it will also negate the protection of children. The court's decision, as seen by M. Yahya Harahap, is declaratory in nature, not condemnatory, nor is it constitutive. However, by not including the order to deliver the determination and appointment of an oath carried out by the BHP, in the end it has negated the presence of the state to provide legal protection for every citizen, especially children under guardianship. A guardianship stipulation issued by a court even though it is not a decision adjudicating a dispute must create legal certainty. Legal certainty in the implementation of Articles 366 and Article 369 of the Civil Code, which provide authoritative solutions, comply with laws and regulations and provide a sense of security for the child until he reaches adulthood.

4.2. Conflict of Norms and Determination of Applicable Legal Rules

Based on the results of the research, shows that guardianship legal events are regulated in several laws and regulations, such as the Civil Code, Law Number 1 of 1974 concerning Marriage, Law Number 23 of 2002 concerning Child Protection and Presidential Instruction Number 1 of 1991 concerning Compilation of Laws. Islam. Referring to these laws and regulations, not all of them regulate guardianship oversight. Supervision of guardianship itself, which explicitly mentions the position of BHP, is regulated in the Civil Code and Law Number 32 of 2002 concerning Child Protection, as can be seen in the table below:

Table 4: Provisions for Guardianship and Guardianship Supervision in.

No.	Legal Provision	Types of Guardianship	Guardianship Supervision
1.	Covil Code	1. Guardianship according to law	Regulated
		2. Guardianship due to paren't will	
		3. Guardianship is appointed a judge	
2.	Law Number 1 of 1974	1. Oral guardianship or by will	Not regulated
		2. Guardianship is appointed by a judge	
3.	Law Number 32 of 2002	1. Guardianship because of appointment	Regulated

		2.	Guardianship because of the judge's determination	
4.	Presidential Instruction Number 1 of 1991	1.	Guardianship of children under 21 years of age	Not regulated
		2.	Guardianship of self and children's assets	

Source: Research Results (processed data).

Guardianship arrangements and guardianship supervision regulated in various laws and regulations, not only cause legal disharmony, more than that it has created injustice and negates justice for every child under guardianship. Facts on the ground show that the guardianship oversight arrangements as mandated in Article 366 and Article 369 of the Civil Code cannot be implemented optimally. Other facts also show that Article 35 paragraph (1), (2) and (3) of Law Number 23 of 2002 concerning Child Protection, which is expected to "replace" the existence of Article 366 and Article 369 of the Civil Code, as national legal products in fact, it has not been implemented optimally. The implementation of guardianship oversight by BHP is legally based on decisions issued by the District Court and the Religious Courts. The District Court and the Religious Court did not explicitly stipulate in their stipulation that the guardian reports and takes an oath to the BHP. Another injustice can also be pointed out that the number of judges at the District Court does not know the importance of this guardianship oversight institution, even the Religious Courts rarely accept applications for guardianship assignments and there is an assumption that applications for guardianship assignments only apply to non-Muslim citizens, considering that Islamic law itself does not Get to know trusteeship and trusteeship institutions.

5. DISCUSSION

The application of the *lex specialis derogat legi generali* principle is not an easy task because it concerns what is the measuring instrument for determining that a specific rule can be used while at the same time overriding general provisions. However, it is also not impossible to find a rational answer through a rational and systematic approach to legal logic. (Nurfaqih Irfani, 2020)

According to Bagir Manan's view, there are 3 (three) things that can be used as guidelines in the application of the *lex specialis derogat legi generali* principle, namely:

1. The provisions stipulated in the general legal rules remain in force, except for those

specifically stipulated in the special legal rules.

2. The provisions of the *lex specialis* must be equal to the provisions of the *lex generalis* (for example, a statute with a statute).
3. The provisions of the *lex specialis* must be in the same legal environment (regime) as the *lex generalis*, for example: The Commercial Code (KUH Dagang) is a *lex specialis* from the Civil Code (KUH Perdata) because it is in the same legal environment, namely the civil law environment.

Furthermore, Bagir Manan believes that there is often a misleading in understanding the relationship between general and specific laws or regulations. It is as if the specific provisions must have definitely overridden all general provisions, even though this should not be the case. Provisions that are general in nature remain in effect as long as they are not specifically regulated in the relevant special regulations. For example, if you look at the words of Article 1 of the Commercial Code: "The provisions of the Civil Code, as long as they are not specifically regulated in this Code (meaning the Commercial Code) remain in force (applied). The application of provisions that are specific to provisions of a general nature must be carried out partially, so that general legal norms will still apply as a background that provides direction for legal interpretation of these specific norms. The question then is whether Law Number 23 of 2002 concerning Child Protection can be said to be a special norm that can overrule the Civil Code in the context of legal events of guardianship oversight of children's assets that are not under the control of their parents. To answer this, it is necessary to first compare these two provisions and the Marriage Law, as shown in the table below:

Table 5: Comparison of the Civil Code and the Child Protection Law In Matters of Child Guardianship Supervision.

Civil Code	Child Protection Act
Article 366 In each trustee ordered therein, the Probate Court is assigned as the supervising trustee.	Article 35 paragraph (1) In the event that the child has not received a court decision regarding a guardian, then the child's assets can be taken care of by the BHP or other institutions that have the authority to do so.
Article 369 In all cases, if the guardianship is ordered by a judge, the Registrar of the District Court concerned must immediately notify in writing the existence of the appointment to the BHP, with a statement, whether the appointment took place in the presence of the guardian, or if the trusteeship was ordered to an association, foundation or a social institution, with a statement as to whether the incident	Paragraph (2) The BHP or other institutions referred to in paragraph (1) act as supervising guardians

occurred at the request or at one's own discretion.	to represent the interests of the child. Paragraph (3) Management of assets as referred to in paragraph (1) and paragraph (2) must obtain a stipulation
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Source: Research Results (Data processed).

Table 6. Comparison of the Civil Code and the Marriage Law In Matters of Child Guardianship Supervision.

Civil Code	Marriage Law
Article 366 In each trustee ordered therein, the Probate Court is assigned as the supervising trustee. Article 369 In all cases, if the guardianship is ordered by a judge, the Registrar of the District Court concerned must immediately notify in writing the existence of the appointment to the BHP, with a statement, whether the appointment took place in the presence of the guardian, or if the trusteeship was ordered to an association, foundation or a social institution, with a statement as to whether the incident occurred at the request or at one's own discretion.	Article 50 (1) Children who have not reached the age of 18 (eighteen) years or have never been married, who are not under the authority of their parents, are under the authority of a guardian. (2) The guardianship concerns the person of the child concerned and his property. Article 66 For marriage and everything related to marriage based on this Law, with the coming into effect of this Law the provisions regulated in the Civil Code (Burgerlijk Wetboek), the Indonesian Christian Marriage Ordinance (Huwelijks Ordonantie Christen) Indonesiers S.1933 No. 74), Mixed Marriage Regulations (Regeling op de gemengde Huwelijken S. 1898 No. 158), and other regulations governing marriage insofar as they have been regulated in this Law, are declared no longer valid.

Source: Research Results (Data processed).

In Table 5, referring to Bagir Manan's view and looking at the comparison of the two provisions, the normalization of guardianship oversight authority over children (both personal and property) before a court decision, which is carried out by the BHP and/or other institutions has been specifically regulated in Article 35 paragraph (1), (2) and (3) of

Law Number 23 of 2002 concerning Child Protection. Therefore the authority of the BHP in carrying out guardianship supervision as temporary supervising trustees should no longer be based on the Civil Code but must be based on the Child Protection Law, as well as the Child Protection Law in the context of temporary child guardianship supervision can be based on the principle of *lex specialis derogat legi generali* of the Civil Code. Although on the other hand the construction of Article 35 paragraph (1) and paragraph (3) of the Child Protection Law it is still possible to debate the substance of the norms regulated, whether "before" or "after" the court's decision.

Whereas in Table 6, the construction being compared is the Civil Code with the Marriage Law. This is in view of the unclear norm of "before" or "after" the court's decision as referred to in Article 35 paragraph (1) and paragraph (3) of the Child Protection Law, legal events of guardianship are actually legal events born of legal marriage legal events, as regulated in the Marriage Law. In a comparison of the Civil Code with the Marriage Law related to guardianship supervision after a judicial decision cannot use *lex specialis derogat legi generali*, because the Marriage Law as a specific provision does not regulate it, so what must be used is the general provision, namely the Civil Code. This can also be strengthened by Article 66 of the Marriage Law.

5. CONCLUSION

In order for the state to provide legal protection for children, particularly supervision of children under guardianship, it can be concluded that this must still be implemented under Articles 366 and 369 of the Civil Code. This is based on an interpretation of Article 66 of the Marriage Law. However, in the short term, it is necessary to regulate the content related to child guardianship supervision following a court decision in the Child Protection Law. Meanwhile, in the long term, it is necessary to initiate the creation of a Child Guardianship Supervision Law, as has been done in many countries through child guardianship laws.

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