

Guardianship Supervisory in Indonesia: A Comparative Analyzes of *Baitul Mal Aceh* and the Heirloom Board

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Abstract

Guardianship supervisory has been a dilemma in the Indonesian legal system. The article assesses the practice of guardianship supervisory in Indonesia by comparing two prominent institutions, *Baitul Mal Aceh* (BMA) and the Heirloom Board (*Balai Harta Peninggalan* or BHP). The article focuses on understanding these organizations' roles and responsibilities in preserving and managing guardianship supervisory. The article uses normative juridical method and comparative method, to examine how *Baitul Mal Aceh* and BHP become guardian supervisors and and to explore their differences and similarities by reading norms, laws, journals, and the like. The article found that *Baitul Mal Aceh* has been unable to carry out its duties because of a lack of operational regulation (i.e., Governor's Regulation) of *Qanun Baitul Mal*, while BHP only focuses on non-Muslim related issues. These two institutions work independently and cannot support each other. Dualism and lack of implementing regulations in guardianship institutions in Indonesia have posed a dilemma for ensuring proper guardianship over the personal and property of children who are not yet mature or not married under court decisions. The article sheds light on the limitations and complexity of guardianship and its surrounding issues in both institutions.

Keywords: *Baitul Mal Aceh*; children; guardianship; Heirloom Board

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Pengawasan perwalian masih menjadi dilema dalam sistem hukum Indonesia. Artikel ini mengkaji praktik pengawasan perwalian di Indonesia dengan membandingkan dua lembaga, Baitul Mal Aceh (BMA) dan Balai Harta Peninggalan (BHP). Artikel ini fokus kepada pemahaman peran dan tanggung jawab lembaga tersebut dalam menjaga dan mengelola pengawasan perwalian. Artikel ini menggunakan metode penelitian hukum normatif dan metode perbandingan, untuk mengkaji bagaimana Baitul Mal Aceh dan BHP menjadi pengawas pewalian, serta mengeksklore perbedaan dan persamaannya berdasarkan kepada norma, undang-undang, jurnal, dan sejenisnya. Artikel ini menemukan bahwa Baitul Mal Aceh tidak dapat menjalankan tugasnya karena tidak adanya regulasi operasional (yaitu Peraturan Gubernur) dari *Qanun Baitul Mal*; sedangkan BHP hanya fokus pada isu-isu pewalian yang berkaitan dengan non-Muslim. Kedua lembaga ini bekerja secara independen dan tidak saling mendukung. Dualisme dan tidak adanya peraturan pelaksanaan dalam lembaga perwalian di Indonesia menimbulkan dilema dalam menjamin hak perwalian yang layak atas harta benda anak-anak yang belum dewasa atau belum menikah berdasarkan putusan pengadilan. Artikel ini menjelaskan keterbatasan dan kompleksitas perwalian serta isu-isu sekitarnya dari kedua lembaga tersebut.

Kata Kunci: Baitul Mal Aceh; anak-anak; perwalian; Balai Harta Peninggalan

Introduction

The 1945 Constitution of the Republic of Indonesia, precisely in Article 28B, Paragraph (2), emphasizes the rights of every child to survival, growth, and protection from violence and discrimination. Child protection is also addressed in the Compilation of Islamic Law, Book I, Chapter XV, specifically in Article 107 to Article 112. Article 107 states that guardianship is applicable to children below the age of 21 who have never been married. The primary focus of guardianship is to ensure the child's well-being and the proper management of their assets. Within the guardianship framework, the role of a guardian supervisor is of utmost importance. The guardian supervisor is responsible for overseeing the proper execution of the guardian's duties and conducting regular checks on the child's assets to prevent any loss or misuse.¹

Internationally, guardianship is also recognized and part of the Convention on the Rights of the Child 1989. In the Convention on the Rights of the Child, children have the right to get a family or a substitute family to fulfill their life properly.² But unfortunately, there is no mention of guardianship supervisory institution. Meanwhile, in the common law system, especially in England, the duty of guardian supervisor is regulated in Children Act 1989. The guardianship supervisory, or supervision orders, is given to local authorities. A supervision order places a duty upon the local authority to give advice, assists, and befriend the supervised child.³

In Indonesia, the institutions responsible for guardianship supervisory are *Baitul Mal Aceh* and the Heirloom Board (*Balai Harta Peninggalan* or BHP). *Baitul Mal Aceh* focuses on managing the guardianship of Muslim children within the Aceh region, while the Heirloom Board oversees the guardianship of non-Muslim children. The duty of guardianship supervisory was assigned to *Baitul Mal Aceh* through Law No. 48 of 2007, which replaced Law No. 2 of 2007. The

¹ Ferry Susanto Limbong and Aisyah Aisyah, "Legal Provisions in Indonesia Submitting a Guardianship Application to the Court after the Birth of Law Number 29 of 2019," *International Journal of Social Science, Education, Communication and Economics (SINOMICS Journal)* 2, no. 3 (2023): 437–44, <https://doi.org/10.54443/sj.v2i3.154>.

² UNICEF, "Convention on the Rights of the Child" (1989), <https://www.unicef.org/child-rights-convention/convention-text>.

³ Judith Harwin et al., "The Contribution of Supervision Orders and Special Guardianship to Children's Lives and Family Justice," *Nuffield Family Justice Observatory* (London, 2019), <https://www.nuffieldfjo.org.uk/resource/the-contribution-of-supervision-orders-and-special-guardianship-to-children-s-lives-and-family-justice>.

latter law was enacted to address the legal issues arising from the reconstruction and rehabilitation operations and the social life of the communities affected by the 2004 Tsunami in Aceh and Nias, North Sumatra province. One of the legal consequences of this disaster was the need to address guardianship matters.⁴

According to Law No. 48 of 2007 in lieu of the Law No. 2 of 2007 on handling the law issues of the reconstruction and rehabilitation operation and social life of society in Aceh and Nias in North Sumatra province to become law, in Article 1 point 6 stipulate that *Baitul Mal* is an Islamic religious institution in Aceh province which has the authority to guard, maintain, develop, and manage religious assets and give a benefit to people and being a guardian supervisor based on Islamic law. *Baitul Mal* has their regulation, named *Qanun* No. 10 of 2018, mentioning guardianship and guardian supervisor in Chapter XIII Article 145 up to 149. Until now, there are still a request for determining guardianship of an immature and unmarried child to take care of everything.⁵

In addition to *Baitul Mal*, the institution that becomes guardian supervisor in child guardianship in Indonesia is the Heirloom Board based on Article 366 of the Civil Code. Supervision of child guardianship is an activity to present the state through BHP to protect the child's self and assets before he becomes an adult. In state administrative law, supervision is defined as "a process of activity that compares what is carried out, carried out, or carried out with what is wanted, planned, or ordered."⁶ Heirloom Board is an institution that manages a person's inheritance related to guardianship, *curatele*, absence, unmanaged inheritance, inheritance registration, and inheritance certificate. In addition, the heirloom board is more proper than *Baitul Mal* as in regulation but still lacks some part.⁷

⁴ Taufik Hidayat Simatupang et al., "Paradox of State Authority in Supervision of Child Trust Assets in Indonesia," *Cogent Social Sciences* 9, no. 1 (2023), <https://doi.org/10.1080/23311886.2023.2209992>.

⁵ R.E.C. Ellermeijer et al., "A Systematic Review of the Literature on Community-level Child Protection in Low- and Middle-Income Countries," *Vulnerable Children and Youth Studies* 18, no. 3 (2023): 309–29, <https://doi.org/10.1080/13548506.2023.2230889>.

⁶ Taufik Hidayat Simatupang et al., "The Supervision of the Heritage Hall of the Children's Asset Under Guardianship towards the Legal System of Pancasila," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 1s (2021), <https://www.abacademies.org/articles/the-supervision-of-the-heritage-hall-of-the-childrens-asset-under-guardianship-towards-the-legal-system-of-pancasila-10317.html>.

⁷ Lindsay Stark et al., "A Qualitative Study of Community-based Child Protection Mechanisms in Aceh, Indonesia," *Vulnerable Children and Youth Studies* 7, no. 3 (2012): 228–36, <https://doi.org/10.1080/17450128.2012.663947>.

Several studies have been found talking about guardianship. Some of them have been talking about guardian supervisor as an institution to protect child's property from an abusive guardian, such as Nurhidayah A. Hambali's thesis in 2017 that focused on the concept of guardianship. The Heirloom Board has complied with existing laws and in accordance with the standard of the Compilation of Islamic Law and ensures that there is no loss and misuse of the child's property.⁸ Furthermore, Ridho Wibowo's thesis in 2015 explains the existence of a heirloom board as guardian supervisor and temporary guardian supervisor, also, on of the function is to open closed 'olographic wills' and more often explain about heirloom board Makassar.⁹ These two seem still focus on guardianship rather than deep analyzes on the institution.

However, no research has ever been conducted on *Baitul Mal* as the object of the research, specifically *Baitul Mal* as a guardian supervisor. Moreover, there is no research discussing similarities and differences between *Baitul Mal* and Heirloom Board, which is the novelty of this research. This research will deeply analyze the institutions rather than guardianship. A big problem has been going on regarding the guardian supervisor, namely about the existence and the use of these two institutions that are unpopular in society. In addition, these two institutions have different guideline regulations. Heirloom board guidelines can be found in the Civil Code that only focuses on non-Muslims. Meanwhile, *Baitul Mal* still do not have a proper guideline known as Governor regulation to explain more about *Qanun Baitul Mal* and guardianship is not the main focus of this institution, even though many regulations, including the new regulation of *Baitul Mal* that *Baitul Mal* is guardianship supervisory institution.¹⁰

This article uses normative juridical method and comparative method. The source used in this method is a secondary data source consisting of primary legal materials and secondary legal materials. Primary legal materials will be collected

⁸ Nurhidayah A. Hambali, "Eksistensi Balai Harta Peninggalan dalam Penanganan Kasus Kewarisan Anak (Studi Kasus Nomor 501/Pdt.P/2-16/PA Mks)," [Undergraduate Thesis] (Universitas Islam Negeri Alauddin Makassar, 2017).

⁹ Ridho Wibowo, "Eksistensi Balai Harta Peninggalan dalam Penanganan Kasus Kewarisan Anak (Studi Kasus Balai Harta Peninggalan Makassar)," [Undergraduate Thesis] (Universitas Islam Negeri Alauddin Makassar, 2015).

¹⁰ Ananda Farhan Nizzar and Siti Malikhatus Badriyah, "Determination of Child Guardianship as a Requirement for Taking Guarantee of Property Rights Certificates," *Gema Wiralodra* 14, no. 2 (2023): 995–1002, <https://doi.org/10.31943/gw.v14i2.418>.

from all regulations binding this issue, such as the 1945 constitution of the Republic of Indonesia, the Civil Code, the Compilation of Islamic Law, marital law, child protection, and *Qanūn Baitul Mal Aceh*. Secondary legal materials explain the primary legal materials. This study collected secondary legal materials from research results, books, research reports, some thesis, and legal expert opinions. All the material will be analyzed through qualitative analyzes.¹¹ Following, the research question was formulated: 1) How has the implementation of *Baitul Mal Aceh* as a guardian supervisor for child guardianship been appointed in Law No. 48 of 2007 after the tsunami and until now? 2) How is the differences and similarities of these two institutions (*Baitul Mal Aceh* and Heirloom Board) support each other, especially in guardian supervisor?

Guardianship in Indonesia

Every child has rights that must be fulfilled; this is the obligation of the parents or guardian to fulfill the child's rights. Article (2) of the 1945 Constitution of the Republic of Indonesia stipulates that every child has the right to live, grow, develop, and be protected from violence and discrimination. However, parental authority over children can sometimes be revoked because both parents neglect duty, so guardianship arises.¹²

Guardianship etymologically comes from the word "*wālī*" and "*awliyā*" the plural. Guardianship, in terminology, is the authority given to a person to carry out a legal action as a representative for the benefit and on behalf of a child who does not have both parents or both parents are still alive but not capable of carrying out legal actions.¹³ In addition, guardianship is a power that replaces parental authority over children and their property. Guardianship happens because both parents cannot take legal action or have passed away.¹⁴

¹¹ A. Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Pers, 2018), 119; See also P. Ishwara Bhat, "Introduction: Legal Research Methodology, Purposes, and Footsteps," in *Idea and Methods of Legal Research*, ed. P. Ishwara Bhat (Oxford: Oxford University Press, 2020), 3–31, <https://doi.org/10.1093/oso/9780199493098.003.0001>.

¹² Iman Jauhari, "A Comparison of Child Protection Law between Indonesia and Malaysia," *Indonesian Journal of International Law* 12, no. 1 (2014): 84–106, <https://doi.org/10.17304/ijil.vol12.1.593>.

¹³ Nurhotia Harahap, "Perwalian Anak dalam Tinjauan Kompilasi Hukum Islam," *Jurnal El-Qanuniy: Jurnal Ilmu-Ilmu Kesyariahan dan Pranata Sosial* 4, no. 1 (2018): 116–29, <https://doi.org/10.24952/el-qonuniy.v4i1.1831>.

¹⁴ Ishak Ishak, "Perwalian menurut Konsep Hukum Tertulis di Indonesia," *Kanun: Jurnal Ilmu Hukum* 19, no. 3 (2017): 571–90, <https://jurnal.usk.ac.id/kanun/article/view/6875>.

Furthermore, it can be concluded that guardianship is the supervision and management of an immature, unmarried, and legally incapable child and the management of the child's property. It happens because the child is not under the parent's control due to death, legal incapacity, and revocation of parental authority. Guardianship should be carried out through a court order to obtain permanent legal force.

Indonesia is one of the countries that has ratified the Convention on the Rights of the Child through Presidential Decree No. 36 of 1990. It means that Indonesia also complies with Article 19 Paragraph (1) Convention on the Rights of the Child 1989, which states that If parents, guardian, and other responsible for the child commits all forms of physical or mental violence, injury, or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, means that the states who sign this Convention shall take all appropriate legislative, administrative, social, and educational measure to protect the child.

Guardianship in Indonesia has not yet been specifically regulated. However, in Indonesia, positive law, and regulations regarding guardianship can be found in the Civil Code, the Compilation of Islamic Law, Law No. 1 of 1974 concerning Marriage, Law No. 35 of 2014 on amendments to Law No. 23 of 2002 on child protection, and Government Regulation No. 29 of 2019 on terms and procedures for appointing guardians. In the Province of Aceh, guardianship arrangements can be found in *Qanun* No. 11 of 2008 on child protection and *Qanun* No. 10 of 2018 on *Baitul Mal*.

According to the Civil Code, there are several types of guardians. Article 345 stipulates that the parents of the child who lives the longest will automatically become the child's guardian. Article 355 stipulates that when parents are still alive, the child's parents have appointed a guardian as stated in a will or notarial deed made solely for guardianship purposes. Article 359 stipulates that guardianship happens by a judge in court; if an immature child is not under the control of his parents, then the court will legally summon their relatives.¹⁵

No article in the Civil Code explicitly regulates children's rights under guardianship. In Article 383, Article 385, and Article 409, the rights of children are rights to get maintenance/care, rights to get an education, the rights to be

¹⁵ R. Subekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata: Burgelijk Wetboek* (Jakarta: Pradnya Paramita, 2006), 109–14.

represented for their legal interest outside and before the court, rights to management of his wealth, rights to be indemnified against property due to the fault of the guardian, and the rights to receive all the child's assets when the child reaches 21 years of age or married.

Guardianship is regulated in the Compilation of Islamic Law, book I chapter XV starting from Article 107 to Article 112. In Article 107, guardianship only applies to a child who has not reached the age of 21 years and or has never been married, and guardianship only focuses on guardianship of themselves and their wealth. In Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 Concerning Child Protection, Chapter VII Article 33 up to Article 36. According to child protection law, a guardian appointed by a court order may represent the child to carry out legal actions inside and outside the court for the child's best interests.

In appointing a guardian, based on Government Regulation No. 29 of 2019 Article 3 Paragraph (1) comes from the child's family, relatives, other people, and legal entities. The Marriage Law and the Compilation of Islamic Law adhere to the same principle: the guardian appointed should be taken from the child's family as much as possible. The requirement for a person to be appointed as a guardian in Article 107 Paragraph (4), guardian should be taken from the child's family or other people who are mature, healthy-minded, fair, honest, and good behavior or it can be a legal entity. In this case, the guardian is the family and not the parents. It is clear in the regulation that the parents who lives the longest automatically become the child's guardian.

The appointment of a guardian is made based on the parent's request or will. Government Regulation No. 29 of 2019 concerning the terms and procedures for appointing a guardian in Article 9 Paragraph (4) stated that a person or legal entity is declared a guardian after a court decision. It is in line with Article 33 Paragraph (2) of the child protection law that becoming a child's guardian must be through a court order. However, the application for guardianship determination is one type of voluntary case. In general, voluntary courts aim to provide a form of legal certainty and protection to the parties and are themselves valuable as authentic deeds.¹⁶

¹⁶ Firman Wahyudi, "Penerapan Prinsip Prudential dalam Perkara Perwalian Anak," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 31, no. 3 (2019): 368-83, <https://doi.org/10.22146/jmh.44398>.

Aceh province is one of Indonesia's special provinces with its own regulations regarding children and guardianship. In 2008, the Aceh Government ratified *Qanun* No. 11 of 2008 concerning child protection; Article 12 states that a guardian is a person or entity that exercises parental power over a child or a person who has no parents anymore or a parent who is incapable of carrying out legal actions, both for personal interests and their assets. *Qanun* No. 11 of 2008 on child protection in Article 19 Paragraph (1), the requirements for a guardian are to be Muslim for children whose parents are Muslim, mature and sensible, never convicted of abuse of authority as a guardian, never sentenced to 3 years imprisonment or more and trustworthy. Legal entities/institutions can be appointed guardians if they meet the requirements set out in Article 19 Paragraph (2), namely being Islamic-based for Muslim children, having a legal entity domiciled in Aceh, and having proper facilities.

The guardian has imposed obligations on the child under his guardianship. According to the Civil Code, that the guardian's obligations are to make sure the child has proper education, represent the child at a court in all civil actions, take care of the child's assets, make a list of the child's assets, hold dependents in the form of mortgage or pawn regarding the child's property, make a brief account of the management of the child's assets to the supervising guardian, compensate for losses to the child's assets due to his mistakes, make closing accountability for the management of the child's assets at the end of the role as guardian and hand over all assets to the child if the child already 21 years or have been married.

Court decisions may revoke guardianship powers. Revocation of guardianship must be done if the guardian commits acts that harm the child and the child's property, neglects their obligations as a guardian, and commits acts that violate the law to the child's detriment. In fact, in the Compilation of Islamic law, guardian can be revoked because of a drunkard, gambler, insane, and neglect of his authority. Nevertheless, guardianship can be ended if the guardian resigns from their duties as a guardian, the death of the guardian or child under guardianship, revocation of guardianship status is based on court decision, or children under guardianship become adults.¹⁷

¹⁷ Akmaluddin Syahputra, *Perwalian Anak dalam Bingkai Hukum* (Bandung: Citapustaka Media Perintis, 2014), 109.

Guardianship Supervisory in Indonesia

Guardians –in carrying out their role as guardians of children– can never be separated from guardian supervisors. Guardianship supervisory is the duty to supervise guardians or orphans who do not carry out their duties and functions properly.¹⁸ While guardianship supervisory based on Article 1 No. 48 of *Qanun Baitul Mal* is the authority to nominate a guardian to the court if the family of the children who should be under guardianship or the family of the person under guardianship does not propose the appointment of a guardian, supervise the performance of guardians, to conduct coaching, offering a change of guardian when the existing guardian is not performing their duties, and become a temporary guardian.

Guardianship supervisory is important so the guardian does not misuse the child's assets under guardianship. Guardianship supervisory also aims to see and ensure that the guardian carries out their duties properly. Based on Article 25 Paragraph (2) of Government Regulation No. 29 of 2019 concerning the terms and procedures for the appointment of a guardian, the purpose of guardianship supervisory is to prevent irregularities or violations in the implementation of a child under guardianship or prevent a child under guardianship that is not accordance with the provisions of laws and regulations., reduce cases of irregularities or violations of child guardianship, and monitor the implementation on child guardianship.

Legal Basis of Guardianship Supervisory

Indonesia is a country that adheres to legal plurality; in this case, the existence of Wester, Islamic law, and customary law is still recognized. The factor that causes pluralism in civil law in Indonesia is the factor of population groups, and religious factors are also involved in civil law pluralism because there are differences in the application of the law for residents of different religions. Meanwhile, customary law is an unwritten rule (unwritten law), not codified, decided by legal functionaries, has sanctioned, has existed for a long time, and is still alive, developing, and obeyed by the community.¹⁹ Until now,

¹⁸ Syahputra, 192.

¹⁹ Teuku Muttaqin Mansur, *Hukum Adat Perkembangan dan Pembaruannya* (Banda Aceh: Syiah Kuala University Press, 2018), 9.

customary law is recognized as unwritten law in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

The history of civil law development in Indonesia is always related to the development of legal history in European countries. Since Indonesia was under Dutch colonialization, the policies that occurred and applied in the Netherlands will also be applied in Indonesia based on the principle of concordance. The primary source of Civil Law is the Civil Code or *Burgelijk Wetboek*.²⁰ The legal basis for the validity of the regulations of the Civil Code or *Burgelijk Wetboek* in Indonesia is Article 1 of the transitional rules of the 1945 constitution, which determines that all regulations are declared to be still valid before new regulations are made, including Dutch civil law applicable in Indonesia.

Until now, the order of the civil law system in Indonesia is still plurality because there are still some rules and regulations left by the colonial period. The *Burgelijk Wetboek*, translated into Indonesia, known as the Civil Code, raises several issues, one of which is still debated regarding the status of Civil law in Indonesia as a law or as a document that only categorizes unwritten law. The status of the Civil Code as a law is based in the *Burgelijk Wetboek* in colonial times was at the level of a law and in the hierarchy of Indonesia laws and regulations, the Civil Code has the status of a law because until now it is still declared valid and there is no new Civil Code. The status of the Civil Code as a document is based on the lack of compatibility of the values contained in the Civil Code with the values of life in Indonesia.²¹

Therefore, some Civil Law articles are revoked due to a new regulation. Article 26 through 432 of the Civil Code regarding marriage have been abolished and replaced with new provisions, namely Law No. 1 of 1974 concerning marriage. The provisions contained the Civil Code are only used as a legal guideline not as laws.²² In fact, the Marriage Law has not been able to regulate all provisions in the field of marriage, so this has caused the provisions of the old law, namely the Civil Code is still applicable. In addition, according to

²⁰ Rika Aryati, Hamzah Vensuri, and M. Febrianto, "Sejarah Berlakunya BW dan KUHPerduta di Indonesia," *Journal of Criminology and Justice* 2, no. 1 (2022): 11-16, <https://journal.fkpt.org/index.php/criminology/article/view/422/>.

²¹ Gerhard Mangara and Tazqia Aulia al-Djufri, "Urgensi Pembaharuan Kitab Undang-Undang Hukum Perdata di Indonesia," *Jurnal Hukum Lex Generalis* 3, no. 4 (2022): 269-90, <https://doi.org/10.56370/jhlgv3i4.248>.

²² Eva Cahyana Dewi, "Tinjauan Yuridis mengenai Perwalian Anak Yatim Piatu yang Masih di bawah Umur," *Perspektif Hukum* 20, no. 2 (2020): 328-46, <https://doi.org/10.30649/ph.v20i2.83>.

the circular of Supreme Court 1975 at point IV, it is clearly stated that property in marriage, the position of children, the rights and obligations of parents and children, as well as guardianship, are apparently not regulated in the Government Regulation because they cannot be treated effectively and automatically for these matters the provisions of the old laws and regulations are still treated. In this case, the old regulations (Civil Code) are still used, especially in guardianship. It also clarifies that the guardianship supervisory, which is not mentioned in Marriage Law or in any regulation such as Compilation of Islamic Law, still refers to the Civil Code. The authority to be a guardian supervisor is Heirloom Board based on Article 366.

Meanwhile, the Government of Aceh recognizes a form of local regulation known as *Qanun*. *Qanun* is legislation on the rule of law that applies in a region (in this case Aceh).²³ According to Law No. 11 of 2006 on the Government of Aceh, *Qanun* is provincial regulation that regulates government administration and the lives of the people of Aceh. Therefore, one of *Qanun* still applicable in Aceh is *Qanun Baitul Mal*. *Qanun Baitul Mal*, Article 149 states that *Baitul Mal* is a supervisory institution of guardianship. This *Qanun* does not contain operational standards and supervision mechanisms that can be used as a reference.²⁴ This causes a major legal vacuum in the realm of guardianship supervisory in the *Baitul Mal* institution. The lack of a strong legal basis has caused several guardianship issues in Aceh not to be resolved perfectly. Not to mention that many Acehnese people still do not make court decisions on guardianship, making it more difficult to supervise because it is not well recorded.

Obligation of the Guardianship Supervisory

According to the Civil Code, the guardianship supervisory is given to the Heirloom Board institution, as stated in Article 366. Regarding the obligations or duties that must be carried out by the guardianship supervisory in supervising the guardianship are scattered in many articles in the Civil Code, namely, swear the guardian and make an oath report (Article 362 of the Civil

²³ Aidil Fan, "Kedudukan Qanun dalam Pandangan Undang-Undang No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan," *Politica: Jurnal Hukum Tata Negara dan Politik Islam* 6, no. 2 (2019): 19–42, <https://doi.org/10.32505/politica.v6i2.2733>.

²⁴ Soraya Devy, *Sistem Perwalian di Aceh: Pergumulan antara Hukum Islam, Hukum Positif, dan Praktek Masyarakat*, ed. K. Khairuddin (Banda Aceh: Sahifah, 2018), 182.

Code), organizing the registration of property in which the minor has an interest (Article 127 of the Civil Code), after that ordering the guardian to make an account of the management of the property (Article 1036 of the Civil Code), ordering the guardian to make a statement of acceptance of limited inheritance at the register of the local district court (Article 401 of the Civil Code), attend the implementation of the division of inheritance and if deemed necessary, correct of the concept of the division of inheritance (Article 1072 of the Civil Code), observing whether the guardian is performing their duties properly and advising the guardian to perform their duties properly, representing the interest of the minor, if these interest conflict with the interests of the guardian (Article 370 Paragraph (1) of the Civil Code), obliged to provide sufficient guarantees (Article 371 of the Civil Code), every year, the guardian must provide a summarized calculation and accountability and show securities belonging to the child (Article 372 of the Civil Code), demand dismissal if the institution in a summary judgment finds signs of fraud or gross negligence (Article 373 of the Civil Code) 57, appointing a new guardian (Article 374 of the Civil Code), demand that the powers of the guardian be revoked and given to the Heirloom Board of the property until the guardian provides adequate security (Article 338 of the Civil Code), provide information to the judge about whether the sale of goods in which the minor is interested is beneficial (Article 393 of the Civil Code), representing a minor in entering into a lease agreement if the tenant is his own guardian (Article 400 of the Civil Code), authorize the guardian to act as plaintiff or defendant in civil case for the benefit of the minor (Article 403 of the Civil Code), attending the separation and division of property in which the minor has an interest (Article 406 of the Civil Code).

The appointment of a guardian supervisor must always occur in every guardianship. The guardian is obliged to maintain the existence of the guardian supervisor; if the guardian does not notify the heirloom board of the occurrence of guardianship, then the guardian can be dismissed.²⁵ It is reinforced by Article 368 of the Civil Code.

²⁵ Yulita Dwi Pratiwi, "Harmonisasi Perlindungan Harta Kekayaan Anak dalam Perwalian melalui Penguatan Peran Wali Pengawas," *Jurnal Suara Hukum* 1, no. 1 (2019): 61-90, <https://doi.org/10.26740/jsh.v1n1.p61-90>; See also Endang Heriyani and Prihati Yuniarlin, "Fungsi BHP sebagai Wali Pengawas terhadap Anak di bawah Perwalian dalam Rangka Perlindungan Anak (Studi Kasus di BHP Semarang)," *Jurnal Media Hukum* 22, no. 2 (2015): 218-31, <https://doi.org/10.18196/jmh.2015.0057.218-231>.

Institution of Guardianship Supervisory in Indonesia

Baitul Mal Aceh

Baitul Mal Aceh is an institution established by the local government based on the mandate of the legislation. In addition, changes in the government system from centralization to do decentralization provide opportunities for regions to improve the welfare of the people in their regions. Aceh is one of the provinces that has benefited from this and was allowed to implement Islamic Sharia through Law No. 44 of 1999 concerning the implementation of the privileges of the special province of Aceh until it gave birth to local regulation No. 5 of 2000 concerning the implementation of Islamic Sharia. The regulation mandates the establishment of an institution known as *Baitul Mal* and through Governor's Decree No. 18 of 2003, the *Baitul Mal Aceh* was established.²⁶

Since the tsunami in Aceh, guardianship has become one of the most crucial issues. Thousands of people died, leaving many children orphaned due to the loss of their parents, and therefore, guardianship is needed. Law No. 48 of 2007 on the Stipulation of Government Regulation in lieu of Law No. 2 of 2007 on the handling of legal issues in the context of implementing the rehabilitation and reconstruction of territory and community life in the Province of Nanggroe Aceh Darussalam and Nias Island in North Sumatra Province become law, strengthen the duties of *Baitul Mal* in the field of guardianship. In *Qanun Baitul Mal Aceh*, guardianship is regulated in Chapter XII from Article 145 to 149.

The duties of the *Baitul Mal* in guardianship are to take care of the child or person under their care and their property as well as possible, to make a list of the child's assets at the time of starting their position, and to be record all changes and be responsible for any losses incurred as a result of their negligence.²⁷

In addition, the biggest legal vacuum in *Qanun Baitul Mal* is the absence of mechanisms or implementing rules in the field of guardianship. *Qanun Baitul Mal Aceh* basically has not been able to become a legal guide for guardianship

²⁶ Yon Nariawan, "Upaya *Baitul Mal* dalam Mensosialisasikan Wajib Zakat di Kabupaten Simeulue," [Undergraduate Thesis] (Fakultas Dakwah dan Komunikasi, UIN Ar-Raniry Banda Aceh, 2016).

²⁷ Syahputra, *Perwalian Anak dalam Bingkai Hukum*, 167.

issues because there are no implementing rules or mechanisms in the field of guardianship. Although the field of guardianship is the responsibility of *Baitul Mal Gampong* together with *Baitul Mal* Regency, there is still a big legal vacuum between them. *Baitul Mal Gampong* as a temporary guardian and mostly is resolved by custom and *Baitul Mal* Regency as its guardianship supervisory that still not has a proper regulation.

The Heirloom Board

The heirloom board manages a person's inheritance related to guardianship, curatel, absence, unmanaged inheritance, inheritance registration and inheritance certificates.²⁸ Heirloom Board is a Dutch heritage institution that was formed on October 1, 1624. With the development of the Dutch in Indonesia and producing a lot of wealth, there was concern over who would take care of the assets for the benefit of the heirs in the Netherlands if the owner died; therefore, the Wees-en Boedelakmer or Weskamer was formed and known in Indonesia as *Balai Harta Peninggalan* (the Heirloom Board). Until now, there are five heirloom boards in Indonesia: Jakarta, Semarang, Medan, Makassar, and Surabaya. The most significant legal umbrella in the Heirloom Board is the Civil Code, especially regarding guardianship. However, there is a misalignment in other laws and regulations that contain substance on guardianship.²⁹

In the matter of guardianship, the heirloom board refers to Article 366 of the Civil Code, which states that in every guardianship ordered in Indonesia, the heirloom board has an obligation to carry out duties as a guardian supervisor. As a guardian supervisor, the heirloom board has a task to observe whether the guardian is carrying out obligation properly or not and how necessary it is to advise the guardian to carry out an obligation as well as possible.³⁰

The function of the heirloom board is to appoints a legal-technical member to be the guardian supervisor, write a letter to the guardian of the child to come to the heirloom board office to make an official report containing the guardian's statement and the guardian's oath, legal-technical members visit the residence

²⁸ Taufik H. Simatupang, "Eksistensi dan Efektivitas Pelaksanaan Tugas Balai Harta Peninggalan di Indonesia," *Jurnal Penelitian Hukum De Jure* 18, no. 3 (2018): 397-414, <https://doi.org/10.30641/dejure.2018.V18.397-414>.

²⁹ Simatupang.

³⁰ Shela Natasha, "Rekonstruksi Eksistensi Balai Harta Peninggalan sebagai Wali Pengawas melalui Harmonisasi Peraturan Hukum tentang Perwalian," *Majalah Hukum Nasional* 49, no. 2 (2019): 131-60, <https://doi.org/10.33331/mhn.v49i2.34>.

of the guardian of the minor, inventory the amount of the child's property which includes mentioning the type of the child's property, the estimated value of the property, then set out in the minutes of examination of goods, then the legal-technical member informs the guardian of the duties, obligations, and responsibilities of the guardian as well as the duties and functions of the Heirloom Board as guardian supervisor. In addition, advising the guardian that the child's property is the benefit of the child, and the property should not be misused, that the inheritance property should not be sold first, and that the property should be used for the child's benefit, both for education and health. The legal-technical members from the Heirloom Board secure the child's property by blocking it. For fixed objects in the form of land, the blocking is submitted to the BPN (*Badan Pertanahan Nasional*). For assets in the form of savings or deposits, the blocking is submitted to the bank. The blocking is done by sending a letter to the bank where the deposit is kept, so that the deposit cannot be withdrawn without the approval of the custody office.³¹

Based on that, every year, the guardianship supervisory must ask each guardian (except for the father and mother) to calculate responsibility briefly and show all the papers and securities belonging to the minors. Suppose a guardian does not carry out briefly obtaining signs of fraud or great negligence. In that case, the guardian must demand the dismissal of the guardian in accordance with the previous stipulated in the law.³²

The Implementation of *Baitul Mal Aceh* as a Guardianship Supervisory for Children since Appointed in Law No. 48 of 2007 after the Tsunami and Until Now

Law No. 48 of 2007 on the stipulation of government regulation in lieu of Law No. 2 of 2007 on handling legal issues in the context of implementing the rehabilitation and reconstruction of territories and community life in Nanggroe Aceh Darussalam Province and Nias Island of North Sumatra Province become Law and *Qanun Baitul Mal Aceh* explain that the *Baitul Mal Aceh* is guardianship supervisory institution in child guardianship. In carrying

³¹ Heriyani and Yuniarlin, "Fungsi BHP sebagai Wali Pengawas terhadap Anak di bawah Perwalian dalam Rangka Perlindungan Anak (Studi Kasus di BHP Semarang)."

³² Desi Yani and Tengku Erwinsyahbana, "Perlindungan Hukum terhadap Harta Warisan Anak melalui Revitalisasi Balai Harta Peninggalan (BHP)," *Jurnal Notarius* 1, no. 1 (2022): 10–20, <https://jurnal.umsu.ac.id/index.php/notarius/article/view/13827>.

out tasks in guardianship, there must be cooperation between *Baitul Mal Gampong* and *Baitul Mal* regency/city. Based on *Qanun Baitul Mal* No. 10 of 2018, *Baitul Mal Gampong* will have a task to list the orphans and their guardians and propose the names of prospective guardians to the regency/city of *Baitul Mal*. Meanwhile, the regency/city of *Baitul Mal* will submit a request for the determination of the guardian and the replacement of the guardian to the court of *Mahkamah Syariah*, as well as advocate and supervise the implementation of guardianship.

However, the establishment of *Baitul Mal Gampong* is not evenly distributed in all places. *Baitul Mal Gampong* is only established in *Gampong*, which is close to the sub-district capital strategically located and has sufficient *zakat* potential. This unevenness is very unfortunate because it minimizes the tasks that have been assigned to the *Baitul Mal Gampong*, not to mention the very minimal activeness, even though *Baitul Mal Gampong* is the *Baitul Mal* that is close to the community, because of its existence in *Gampong*. All life problems start from households, poverty, and others in *Gampong*; therefore, this institution should receive special attention.³³

Baitul Mal can be the guardian supervisor of the children under the guardianship of relatives, but unfortunately, *Qanun Baitul Mal Aceh* does not have a Governor's Regulation in guardianship. According to Bobbi, an employee of *Baitul Mal Aceh*, if the Governor's Regulations have not been realized, then until now, the guardianship field in *Baitul Mal Aceh* has not been the focus. One of the reasons why the Governor's Regulation has not been realized is because guardianship issues must synergize with various other agencies. Therefore, until now, the duties in the field of guardianship imposed on *Baitul Mal Aceh* from the tsunami have not been carried out to fill this void, but *Baitul Mal* has a program to help orphans through reporting.³⁴

Furthermore, according to Bobbi, the *Baitul Mal* institution is very open to reporting opportunities for children who no longer have a guarantor to be assisted by *Baitul Mal*. Reporting can be done directly by the child or through the village head. *Baitul Mal* assists if the child does not have people or relatives

³³ Hendra Saputra, "Pentingnya *Baitul Mal* Gampong dalam Pengelolaan Zakat," *Baitul Mal Aceh*, April 21, 2022, <https://baitulmal.acehprov.go.id/post/pentingnya-baitul-mal-gampong-dalam-pengelolaan-zakat>

³⁴ Bobbi, an employee of *Baitul Mal Aceh*, personal interview by Fatya Pramesta Cahyani, Banda Aceh, 6 March 2023.

who can support. The assistance referred to by *Baitul Mal* can be said to be assistance in the form of the children's living arrangements by providing education and living expenses.³⁵

However, from the view of Yusri, judge of *Mahkamah Syariah* court, *Baitul Mal*'s duties as a guardian supervisor should have already come into effect considering the regulations that have been made (*Qanun Baitul Mal*) for a long time. Ideally, *Baitul Mal* can ask the *Mahkamah Syariah* court about the number of guardianship determinations made by the *Mahkamah Syariah* court annually or monthly. Because in acting as a guardian supervisor, *Baitul Mal* can directly and automatically carry it out or, in other words, act independently. Still, it is better to cooperate with the *Mahkamah Syariah* court³⁶.

The Differences and Similarities between *Baitul Mal Aceh* and the Heirloom Board

The guardianship case is still one of the most interesting to discuss. The ruling issued by the court cannot be said to provide adequate legal protection to children. To avoid this, there is a need for an institution that can supervise and remind guardians of their obligations as guardians of children. This institution must be an official institution that is given the duty and authority to supervise or at least monitor whether the guardian has fulfilled his duties and responsibilities to protect the child and the child's property. Until now, several laws and regulations only mention the Heirloom Board and *Baitul Mal* institutions that are given the task as a guardian supervisor after guardianship determination from the court.

There are differences and similarities between these two institutions in guardianship. The first and most visible difference is the urgency of establishing these two institutions. Heirloom Board was mentioned in the website of Heirloom Board, was established in 1624, known as *Wees En Boedelkamer*. Its establishment was necessary to manage the assets left by the Dutch for the benefit of their heirs in the Netherlands to avoid a legal vacuum. From its formation, the Heirloom Board is engaged in civil matters, especially

³⁵ Bobbi.

³⁶ Drs. H. Yusri M.H, Judge of Mahkamah Syariah Banda Aceh, personal interview by Fatya Pramesta Cahyani, Banda Aceh, 27 February 2023.

in guardianship as a guardian supervisor and the field of inheritance. However, the urgency of its information is different because *Baitul Mal* was formed to empower the people's economy from *zakāt*, *kharj*, *jizyah*, *fa'i*, *ghanimah*, *kaffārāt*, and *waqf*. From this, the initially establishment of *Baitul Mal* was far from the civil sector. However, *Baitul Mal Aceh* added one task to the *Baitul Mal* institution namely in the field of guardianship by becoming a temporary guardian and a guardian supervisor over the guardianship of children. Therefore, Law No. 48 of 2007 was enacted to address these issues and strengthen the position of *Baitul Mal Aceh* as a guardianship institution for Acehese Muslims and Heirloom Board for non-Muslims.

The second difference is in the working area. Based on Appendix II of the Minister of Law and Human Rights Regulation No. 7 of 2021 concerning the Organization and Work Procedures of the Heirloom Board, there are 5 working areas of the Heirloom Board include Jakarta, Medan, Semarang, Surabaya, and Makassar. It is different from *Baitul Mal*, which only has one working area, namely the Province of Aceh, which will later be divided into several district/city of *Baitul Mal* and *Baitul Mal Gampong*.

The third difference is the regulations governing the two institutions. In guardianship, the duty of the Heirloom Board as a guardian supervisor is regulated in Article 366 of the Civil Code, which states that for every guardianship ordered in Indonesia, the Heirloom Board is obliged to perform the duties of guardian supervisor. Meanwhile, from an institutional point of view, it is regulated in Ministerial Regulation No. 7 of 2021 concerning the organization and work procedures of the Heirloom Board. Meanwhile, *Baitul Mal Aceh* is still hampered by the absence of a governor's regulation as a derivative of *Qanun Baitul Mal Aceh* in guardianship. So far, in the field of guardianship there has been no supervision and there has not been any activity, including supervision of children under guardianship or the sustainability of guardianship decisions issued by the *Mahkamah Syariah* court. In fact, until now, there has been no cooperation between *Baitul Mal Aceh* and the *Mahkamah Syariah* court. Unfortunately, it means a large legal vacuum in the community, and many people do not seem to realize this.

These two institutions also have similarities. The first similarity is in terms of the ruling made by the court on the application for the establishment of guardianship, which does not include the guardianship supervisory agency. Unfortunately, the guardian is not obligated to report themselves to the

guardianship supervisory institution. Even in the religious court in imposing guardianship, the ruling only stipulates guardianship of the child.

The lack of balance lies in the child's material rights and the guardian's obligations. The ruling does not stipulate the child's right to obtain money or property managed by the guardian and will be handed over to the child as an adult. It will make it difficult for the guardian to be held legally accountable later.³⁷ As a result of the absence of the guardian supervisor institution in the ruling, the public will be less aware or even unaware of the institution's existence. However, according to the head of the Surabaya religious court, they have sent a copy of the guardianship decision to the Heirloom Board so they can help a guardian supervisor in the future.³⁸ So does several of the Heirloom Board in Indonesia.

The second similarity is related to other institutions related to guardianship. To perform the role of guardian supervisor, the Heirloom Board requires the role of other institutions such as the population and civil registration office, notary, and the district court. Regarding the relationship with the district court, it seems it has begun to run properly through the court clerk. Whenever there is a decision, the court clerk will send a copy to the Heirloom Board. Similarly with *Baitul Mal*, until now, the guardianship that is the duty of *Baitul Mal* has not been correlated with other agencies. It has also resulted in the Governor's Regulation on guardianship not being realized.

The third similarity is in the sanctions section. These two guardian supervisor institutions do not have sanctions that can be imposed on guardians if they abuse their authority. When viewed in the Child Protection, Marriage, and Compilation of Islamic Law, no sanctions will be imposed on guardians if they are negligent and misuse children's property, either prison sanctions or fines.

³⁷ Edi Marsis, "Paradigma Baru Penetapan Perwalian Anak pada Pengadilan Agama Berbasis pada Perlindungan Hak Anak," Dirjen Badan Peradilan Agama, Mahkamah Agung, September 1, 2022, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/paradikma-baru-penetapan-perwalian-anak-pada-pengadilan-agama-berbasis-pada-perlindungan-hak-anak>.

³⁸ Kanwil Kemenkumham Jawa Timur, "Sosialisasikan Peran Balai Harta Peninggalan dalam Memberikan Perlindungan kepada Subjek Hukum," jatim.kemenkumham.go.id, October 3, 2022, <https://jatim.kemenkumham.go.id/pusat-informasi/artikel/19516-sosialisasikan-peran-balai-harta-peninggalan-dalam-memberikan-perlindungan-kepada-subjek-hukum>; BHP Surabaya, "Sosialisasi Peran Balai Harta Peninggalan dalam Memberikan Perlindungan kepada Subjek Hukum Berdasarkan Putusan dan/ Penetapan Pengadilan," 2022, <https://www.youtube.com/watch?v=MiSl-RLpCFQ>.

Conclusion

Law No. 48 of 2007, which replaced Law No. 2 of 2007, was enacted to address the legal matters concerning the reconstruction, rehabilitation, and social life of society in Aceh and Nias in the North Sumatra province. However, it has not been effectively implemented in Aceh. The main reason for this is the non-realization of the Governor's Regulation on guardianship, which was intended to complement the *Qanun Baitul Mal Aceh* issuance. It is important to note that the issue of guardianship cannot be addressed in isolation and requires the involvement of various other institutions. The process of issuing the Governor's Regulation is time-consuming as it needs to consider the interrelationship with these other institutions. To fill the legal vacuum, *Baitul Mal Aceh* has been helping orphans through education and living arrangements, ensuring that children without families to care for them are taken care of.

The institution of guardianship supervisory exhibits both differences and similarities. Heirloom Board, being more up-to-date, has already commenced its role as a guardian supervisor. However, both institutions are not widely recognized within society, and there is a lack of mutual support between them. This can be attributed to the fact that *Baitul Mal Aceh*, one of the institutions, has not fulfilled its responsibilities in guardianship due to the non-realization of the governor's regulation.[a]

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