

# THE SUPERVISION OF THE HERITAGE HALL OF THE CHILDREN'S ASSET UNDER GUARDIANSHIP TOWARDS THE LEGAL SYSTEM OF PANCASILA

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## ABSTRACT

*The parameter of state law is a state that provides a place for protection and respect for human rights to every citizen, especially every child for survival, growth and development and protection from violence and discrimination, including each child under guardianship. In Article 366 of the Civil Code, stated that in every wardship in it, the Heritage Hall assigned as Guardian Supervisor. However, the duties and authorities of guardianship supervisor will depend on the delivery of a copy of the court guardianship stipulation, as referred to Article 369 of the Civil Code. This research examines how the implementation of the supervisory authority of the Heritage Hall toward the assets of minors and find out the concept of supervision, in future. This research is a normative legal by using secondary data as the main data supported by primary data. The results of the research found that the first time in the last ten years of 5104 court stipulation, only 423 stipulations submitted to the Heritage Hall or only 8.29%. It showed that the Civil Code, Article 366 and Article 369 have not implemented, yet. Secondly, there is a perception of the Court that the authority of the Heritage Hall as the Supervisory Guardian as regulated in the Civil Code is only subject to the Chinese. By considering Indonesia has a legal pluralism, it is necessary to make a law renewal concept of minors guardianship based on Pancasila as a legal system of national philosophical values.*

**Keywords:** Supervision, Heritage Hall, Assets, Children under Guardianship, Legal System of Pancasila

## INTRODUCTION

Indonesia as a rule of law is certainly a country that provides a place for the protection of human rights for every citizen. Article 1 of the 1945 Constitution mandates that Indonesia is a unitary state in the form of a republic where the sovereignty is in the hands of the people and is exercised according to the Constitution, this is an affirmation that Indonesia is a state of law. One of the parameters of a rule of law is protection and respect for human rights. Indonesia is very serious about this matter. Evidence of Indonesia's seriousness in assessing the importance of respecting and protecting Human Rights in particular is then regulated through the Second Amendment of 2000 in the Indonesian constitution through Article 28 A to Article 28 J.

Including every child for the survival, growth, and development and protection from violence and discrimination. A child is a gift or a gift that must always be guarded and protected because in a child the dignity, dignity, and rights of a human must be upheld, the child is the successor to the ideals of the nation so that the child has the right to live without coercion,

violence any discrimination or exploitation, in this case, parents are obliged to provide protection as early as possible so that children can live and develop and get education properly to get a better future.

Children are the most valuable property for the family, society, and nation. It is the party where the family, society, and nation depend on hopes, more deeply the child is the party who will determine whether a country is brought towards prosperity or adversity. According to the religious teachings which state that every child who is born into this world is holy, then his parents will make him a Jew, Christian, or wise. Both parents are obliged to maintain and educate their children as well as possible until the child gets married or can take care of himself. Including assets, where parents are not allowed to transfer rights or pawn property, permanent property owned by their children who are not yet 18 years old or have never been married, except if the child's interest so wishes.

However, not all children are fortunate to be able to pass their childhood in the love of their parents until they reach adulthood. The end of the marriage due to the death of the parents gives birth to a legal event of guardianship. Guardianship as regulated in Chapter XI of Law Number 1 of 1974 concerning Marriage (Marriage Law), are as follows:

Article 50 (1) Children who have not reached the age of 18 (eighteen) years or have never been married, who are not under the control of their parents, are under the control of a guardian. Paragraph (2) The guardianship concerns the child's personality as well as his assets.

Article 51 paragraph (1) A guardian can be appointed by one parent who exercises parental powers, before he dies, with a will or orally in the presence of 2 (two) witnesses. Paragraph (2) As far as possible, the guardian can be taken from the child's family or another mature person, has a healthy mind, is fair, is honest, and has good behavior. Paragraph (3) The guardian is obliged to take care of the child under his control and his assets as best as possible, concerning the child's religion and beliefs. Paragraph (4) The guardian is obliged to make a list of the assets of the child which was under his control at the time of starting his position and to record all changes in the assets of the child or children. Paragraph (5) The guardian is responsible for the assets of the child under his/her guardianship as well as the losses incurred due to his mistake or negligence.

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Article 53 paragraph (1) The guardian can be revoked from his power, in the matters mentioned in Article 49 of this Law. Paragraph (2) if a guardian's power is revoked, as referred to in paragraph (1) of this article, the court will appoint another person as guardian.

Article 54 A guardian who has caused damage to the property of the child under his control, at the claim of the child or the child's family with the Court concerned, can be obliged to compensate for the loss.

Guardianship as a form of supervision of minors who are not under the control of their parents, basically aims to provide legal protection for the best interests of the child, both for himself and his property.

Child protection is all activities to guarantee and protect children and their rights to live, grow, develop and participate, optimally by human dignity and protection from violence and discrimination. Implementation of child protection is based on Pancasila and is based on The 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child include:

1. Non-discrimination;
2. The best interests of the child;
3. The right to life, survival and development; and
4. Respect for children's opinions.

In Article 366 of the Civil Code (KUHPPerdata) it is stated that in every trust ordered therein, the Heritage Hall is assigned as the Supervisory Guardian. However, the duties and powers depend on the delivery of a copy of the Court Trustee Decree, as referred to in Article 369 of the Civil Code. This paper intends to analyze how the implementation of the supervisory authority of the Balai Harta Peninggalan (BHP) on the assets of minors and the concept of future guardianship supervision.

## METHODS

The writing of this paper uses normative juridical legal research on legal systems within the scope of the main understanding of legal events for guardianship supervision which wants to know how the implementation of Article 366 and Article 369 of the Civil Code. The nature of the research is a descriptive analysis that aims to describe and fully analyze the nature, circumstances, symptoms of the legal events of guardianship supervision. Secondary data is used as the main data collected and analyzed through document studies and literature studies, both obtained from primary legal materials, secondary legal materials, and tertiary legal materials. Primary data as supporting data were obtained from BHP Jakarta, Surabaya, Semarang, Medan, and Makassar. The research data were analyzed using the qualitative juridical analysis to assess the harmonization, certainty, and effectiveness of the legal rules governing BHP's authority to carry out guardianship supervision in Indonesia.

## RESULT AND DISCUSSION

### **Guardianship Arrangement and Guardianship Supervision in Indonesia**

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." The results of this monitoring should be able to show the extent to which there are matches and mismatches and find the causes of the mismatches that arise. In the context of building public government management characterized by good governance, supervision is an important aspect to keep government functions running properly. In this context, supervision becomes as important as the implementation of good governance itself.

Therefore, the guardianship supervision carried out by BHP is part of the state administrative-legal activities. Theoretically, state administrative law is a state and government phenomenon whose existence is as old as the concept of a rule of law or coincides with the exercise of state and government power based on certain legal rules. State administrative law is a

set of regulations that enable state administration to carry out its functions, which at the same time protects citizens against the attitudes of state administration actions, and protects the state administration itself (Ridwan, 2002).

The results show that the legal events of guardianship are regulated in many laws and regulations. However, the issue of guardianship supervision is only regulated in the Civil Code and Law Number 32 of 2002 concerning Child Protection, as can be seen in the table below:

No.	The Law	The Type of Guardianship	Guardianship Supervision	The Concept of Guardianship Supervision Towards the Pancasila Legal System
1	Civil Code	1	Guardianship according to law.	To present the state through guardianship supervision and to provide legal protection for minors and to consider legal pluralism in Indonesia, there is a need for a renewal concept of guardianship supervision in Indonesia. based on the Pancasila legal system as the nation's philosophical values
		2	Guardianship because of the parents' will.	
		3	The judge appointed guardianship	
2	The Law Number 1 of 1974 concerning Marriage	1	Oral guardianship or with a will.	
		2	The judge appointed guardianship.	
3	The Law Number 32 of 2002 concerning Child Protection	1	Guardianship because of appointment.	Regulated
		2	Guardianship due to judge ruling.	
4	The Compilation Of Islam Law	1	Guardianship of children under 21 years of age.	Not Regulated
		2	Guardianship of the child's self and property.	

### **Supervisory Authority of BHP against Assets of Minors**

Until now, BHP has not been widely known by people, even though its duties and functions are very much needed in terms of a person's civil rights. Historically, BHP was a state body which was originally formed by the Dutch and most of its regulations came from the Civil Code, BHP was originally to meet the needs of the Vereenigde Oostindische Compagnie (VOC) people who took care of the assets left by them for the benefit of their heirs who were in the Netherlands, orphaned children and so on.

The role of BHP in the Indonesian civil law system is manifested in its duties and functions which are guided by the Decree of the Minister of Justice of the Republic of Indonesia dated 19 June 1980 Number M.01.PR.07.01-80 of 1980 concerning the Organization and Work Procedure of the Heritage Hall. The BHP in effect in Indonesia is a Technical Implementation Unit within the Ministry of Law and Human Rights, technically responsible directly to the Director General of Public Legal Administration through the Director of Civil Affairs. To date, there are five BHP offices in Indonesia, namely in Jakarta, Semarang, Surabaya, Medan, and Ujung Pandang.

BHP duties can be divided into 4 classifications, namely:

1. Pengampu for those who are unable to act in the area of property rights;
2. A third party money manager because the owner is not known;
3. Field of inheritance rights;
4. Field of bankruptcy.

Based on these main tasks, BHP has many functions, namely in the fields of Trusteeship, Suspension, Execution of Closed/Confidential Will and Registration of General Wills, Management of Unmanaged Assets, Management of Absence, Curator in Bankruptcy, Liquidation, Making Certificate of Rights Inheritance for Indonesian citizens of foreign Eastern descent, collectors of funds in case of unknown originators and recipients, and collectors of old age security funds from BPJS if the workforce does not have an inheritance and will.

Specifically, the authority of BHP in implementing guardianship supervision as referred to in Article 366 of the Civil Code has not been fully implemented. This is due to the family's ignorance of the existence of BHP as the guardianship of minors and the lack of socialization from the BHP itself. In practice, the family only became aware of the existence of BHP after problems occurred later when there were indications that the guardian had sold assets that were not intended for the child's interest.

This condition is confirmed by almost all BHP offices throughout Indonesia:

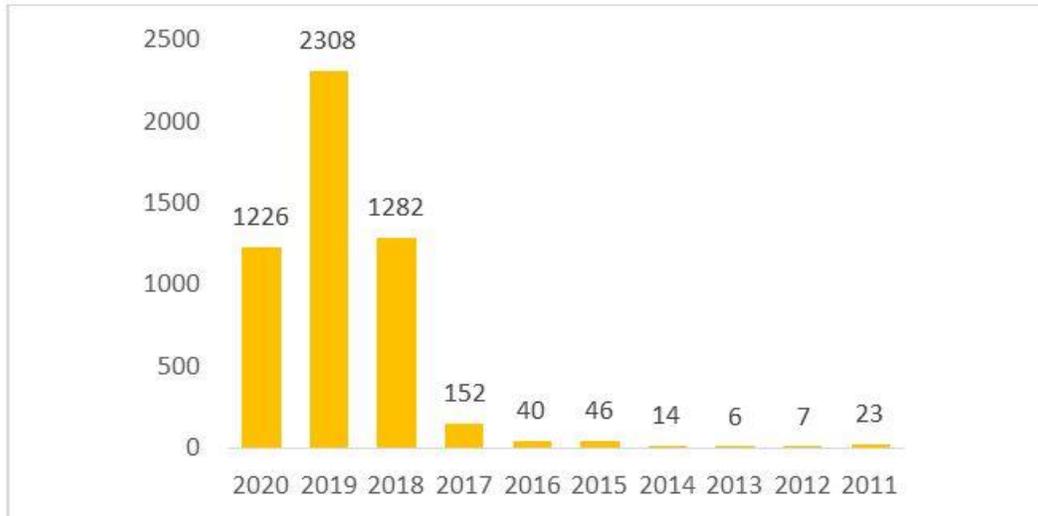
In Medan in 2018, a murder took place which caused a child named Kinara to lose his parents and siblings. At first, BHP Medan was not involved because the family did not understand the concept of guardianship, then BHP advised to apply for a guardianship. The Religious Court which examined the guardianship application of Kinara finally issued a Decree No. 2/Pdt.P/2018/PA. Mdn who granted the application for the appointment of a guardian and appointed Wagiman bin Dulsamat (Grandfather Kinara) to be the guardian of Kinara Arifah Binti Arianto (Natasha, 2019).

In Makassar in 2016, the case of a guardian who is his uncle, Mustafa Lasulika, sold the inheritance of his son, Novy Satryo Nugroho Lasulika, in the form of a plot of land measuring 88 M2. Merry Trivita Sutarto (the brother of the late mother of the child) objected because he knew that the guardian of his nephew had sold the inheritance of his nephew which was not intended for the child's needs, then reported it to BHP, the verdict was finally won by Bibi of the child and by the Makassar Religious Court. To appoint BHP Makassar as a temporary guardian before the child's guardian is appointed, the assets that have been sold by the child's guardian must be returned (Nurhidayah, 2019).

In Surabaya in 2014, BHP Surabaya received consultation from a child who was previously in a trust but never reported to BHP. The consultation asked about the inheritance of his parents, whether it was kept in BHP or not. This is related to disputes over parental inheritance which was transferred when the child was in guardianship. When the child is an adult and legally has passed, he feels aggrieved and does not know what to do with the parents inheritance. The guardianship of the child has never been recorded in the trust register that supports BHP Surabaya and there is no inheritance in the name of the parent or the child, therefore BHP at that time was unable to carry out its role in supervising the trust.

In Nangroe Aceh Darussalam in 2014, the number of guardianship orders filed in the court was very small compared to the number of children requiring legal guardianship due to the loss of their parents after the tsunami. It is reasonable to suspect that the tendency to legalize guardianship is not to provide protection, but rather because of a motive to control the child's property (Fatimahsyam, 2018).

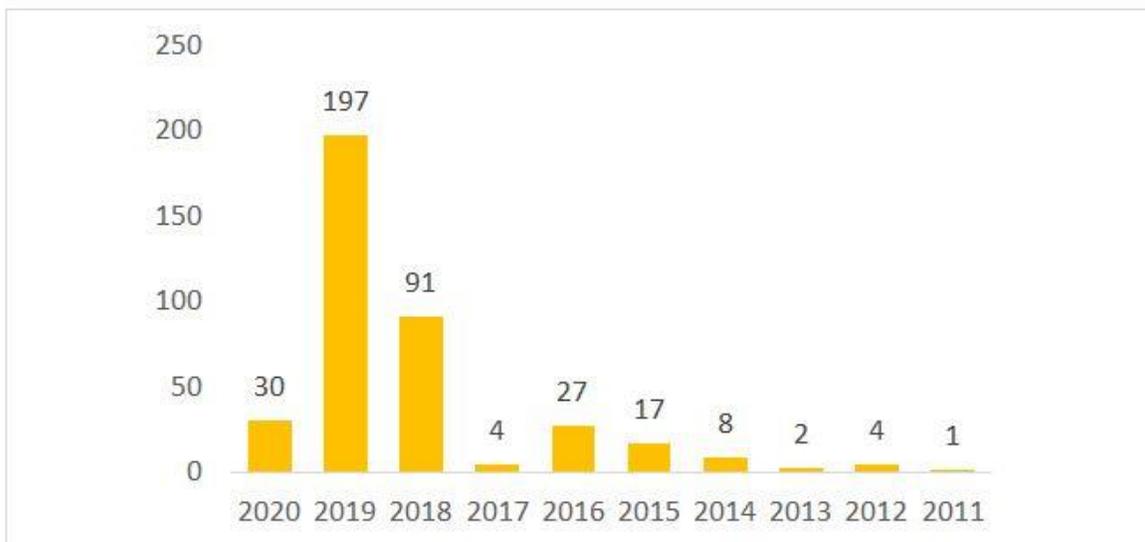
The results of the study, based on the source of the Directory of Supreme Court Decisions, show that in the last 10 years there were 5104 Trusteeship Orders from all Courts in Indonesia, the distribution of data in each year can be seen in the graph below:



**GRAPH 1**

**NUMBER OF GUARDIANSHIP STIPULATION IN THE LAST 10 YEARS**

However, only 423 (8.29%) of Court Orders throughout Indonesia were submitted to BHP as the basis for exercising its authority in guardianship supervision, as can be seen in the graph below:



**GRAPH 2****NUMBER OF GUARDIANSHIP STIPULATION SUBMITTED TO BHP**

Furthermore, as a comparison between the number of court guardianship stipulation and the number of guardianship stipulation submitted to BHP, it can be seen in the table below:

<b>No.</b>	<b>Y e a r</b>	<b>Guardianship Stipulation</b>	<b>Guardianship Stipulation Submitted to BHP</b>
1	2020	1226	30
2	2019	2308	197
3	2018	1282	91
4	2017	152	4
5	2016	40	27
6	2015	46	17
7	2014	14	8
8	2013	6	2
9	2012	7	4
10	2011	23	1
<b>T o t a l</b>		<b>5104</b>	<b>423</b>

From the data distribution above, it can be analyzed that there are serious problems with the implementation of Article 366 and Article 369 of the Civil Code. First, the Marriage Law, which is considered a coordinating national marriage law, does not entirely take the content contained in the Civil Code, the Marriage Law does regulate guardianship but does not regulate its supervision. The framework of the Marriage Law seems to want to "harmonize" its concept with the KHI regulation which does not recognize the BHP supervisory agency. This is of course not entirely true because the ratio legis of the Marriage Law is not only for Muslims, as the definition is that a marriage is legal if it is carried out according to their respective religions and beliefs. Second, there is the opinion of some law enforcers (Courts and Disdukcapil) that the position of Article 366 and Article 369 of the Civil Code is only valid and is subject to Chinese ethnic groups. This is also not entirely true because referring to Law Number 12 of 2016 concerning Citizenship, currently in Indonesia only recognizes two nationalities, namely Indonesian citizens and foreign citizens. Third, there are still many community members who do not know about the existence of BHP as a guardianship supervisory agency, including the lack of socialization from the BHP itself.

## **The Concept of Future Trustee Supervision Renewal Towards the Pancasila Legal System**

The principle of the rule of law has long been developed by philosophers from ancient Greece, Plato, for example in his book *the statesman and the law*, stated that the rule of law is the second best form (the second best) to prevent the decline of one's power is governed by law. The concept of a modern legal state in Continental European countries was developed using the German term *rechtsstaat*, among others by Immanuel Kant, Paul Laband, Julius Stahl, Fichte, and others. Meanwhile, in the Anglo American tradition, the concept of a rule of law was developed as the rule of law pioneered by A.V.Dicey (Asshiddiqie, 2005).

The idea of a rule of law, apart from being related to the *rechtsstaat* concept and the rule of law, is also related to the *nomocracy* concept which comes from the words *nomos* and *cratos*. The word *nomocracy* can be compared to *demos* and *cratos* or *kratien* in a democracy. *Nomos* means norm, while *cratos* is power (Asshiddiqie, 2009). According to Julius Stahl, the concept of a rule of law which he mentions with the term *rechtsstaat* includes four important elements, namely: (Asshiddiqie, 2009).

1. Protection of human rights.
2. Distribution of power.
3. Government based on law.
4. State administrative court.

Meanwhile A.V.Dicey, describes three important characteristics in each rule of law state which he refers to as the rule of law, namely: (Asshiddiqie, 2009).

1. Supremacy of law.
2. Equality before the law.
3. Due process of law.

The four *rechtsstaat* principles developed by Julius Stahl can be combined with the three rule of law principles developed by A.V.Dicey to achieve the characteristics of a modern rule of law. Apart from that, by the international commission of jurist, the principles of rule of law also include:

1. The state must comply with the law;
2. The government respects individual rights and;
3. Free and impartial trial.

The principle of a rule of law must ultimately lead to justice. According to John Rawls, there are two objectives of the theory of justice. First, this theory wants to articulate a series of general principles of justice that underlie and explain the various moral decisions that are taken into account in our particular circumstances. "Moral decisions" are a series of moral evaluations that we have made and if led to our social actions. Considerable moral decisions refer to the moral evaluations we make reflexively. Second, Rawls wants to develop a theory of social justice that is superior to the theory of utilitarianism. Rawls refers to it as "average" (average utilitarianism). The point is that social institutions are said to be fair if they can maximize profits and benefits. While utilitarianism on average contains the view that social institutions are said to be fair if they can only maximize the average profit per capita. The main area of justice according to Rawls is the basic structure of society of all social, political, legal, and economic institutions because it has a fundamental influence on the prospects for individual life. There are, of course, several key issues to which the fair and unfair categories can be applied. Not only the legal and socio-political fields but also individual behavior, decisions, and judgments. Thus there are various problems of justice. But Rawls focuses on the main area of justice which, according to him, is the basic fabric of society (De Marcu, 1980).

The principles of a rule of law that lead to justice must of course be applied in everyday life. One theory that is relevant and can be used to apply it is the development law theory put

forward by Mochtar Kusumaatmadja. According to Mochtar Kusumaatmadja, the law is the whole rules and principles that not only regulate but also include the institutions and processes needed to bring the law into effect in reality (Kusumaatmadja, 2006). Development is essentially changing (change: Mochtar). By using this meaning, it seems that Mochtar Kusumaatmadja prefers the denotative meaning of development rather than the connotative meaning which has a political tendency. In the political context at that time, development was the political jargon of the New Order which was intended as an antithesis to the Old Order's political orientation which was too ideological but lacking in programs. Development was intended as a political orientation for the New Order, which was full of work programs. Interestingly, even though Mochtar Kusumaatmadja was part of the New Order's power, his figure was still thicker as an academic and legal technocrat than a partisan policymaker, so that the meaning of legal development in Mochtar Kusumaatmadja's hands was relatively more neutral (Latipulhayat, 2014).

For Mochtar Kusumaatmadja, rules and principles are traditional elements of a legal meaning -elements- that must always be present in a legal building. When the law plays a role and plays itself as a means of change (development), elements that have the power to change are needed, namely institutions and processes. In this regard, Mochtar Kusumaatmadja said as follows: "... an adequate definition of law should not only view the law as a set of rules and principles governing human life in society but must also include institutions and processes needed to bring the law into reality " (Kusumaatmadja, 2006).

Regarding the role of law in development, Mochtar Kusumaatmadja further emphasized that the law must ensure that these changes take place regularly. Emphasis on the sentence "running regularly" shows that the achievement of "order" as one of the classic functions of the law is reaffirmed urgency in guarding development. Change which is the essence of development and order or order which is one of the important functions of law is the twin goals of a developing society (Kusumaatmadja, 1975). With the role of law like this, Mochtar Kusumaatmadja wants to build a law that provides orientation as well as correction for the course of development, not law. Which only gives legitimacy to power. Here Mochtar Kusumaatmadja provides a clear formula that power must be subject to the law and at the same time dismisses accusations that Mochtar Kusumaatmadja's concept of legal development is a tool to legitimize the power of the New Order (Rasjidi, 2014).

Based on the universal principles of the rule of law, justice and development law, an offer can be synthesized to revitalize BHP's authority in conducting guardianship supervision that has not been implemented optimally as referred to in Article 366 and Article 369 of the Civil Code. To test whether the material norms of the Dutch legal products have a good purpose or not, it is necessary to look at the perspective of Pancasila values as the source of all sources of law in Indonesia. According to Arief Sidharta<sup>22</sup>, every law formation in Indonesia must be imbued with the Pancasila which requires order and order with inner peace, the pleasure of associating with one another, friendliness, and prosperity that allows for true human interaction. Therefore, the law that is inspired by Pancasila is a law based on the spirit of harmony. Adhering to the principle of harmony is the principle of propriety. This principle is also the principle of how to carry out relations between community members in which members of the community are expected to behave properly by social realities. Another characteristic that characterizes the Pancasila Law is the principle of harmony. This principle requires the implementation of harmony in social life. Then the principle of harmony, the principle of propriety, and the principle of harmony as the characteristic features of the Pancasila Law can be covered with one term, namely the nature of kinship. Therefore, it can be said that the Pancasila Law is a law of

the family spirit. The family spirit refers to the attitude based on which the personality of each member of the community is recognized and protected by the community.

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In essence, the legal event of guardianship against minors is a legal event that is born within the scope of family law, but considering that the best interests of a child who is not yet capable of taking legal actions are also the responsibility of the state, the role of the state through BHP in guardianship supervision becomes a very important thing. To present the state through guardianship supervision and to provide legal protection for minors and to consider legal pluralism in Indonesia, there is a need for a renewal concept of guardianship supervision in Indonesia based on the Pancasila legal system as the nation's philosophical values.

## CONCLUSION

The findings of the research and discussion show that Articles 366 and 369 of the Civil Code have not been fully implemented because the Marriage Law, which is considered to be a coordinating national marriage law, does not regulate guardianship supervision. The framework of the Marriage Law seems to want to "harmonize" its concept with the KHI regulation which does not recognize the BHP supervisory agency. This is of course not entirely true because the Marriage Law is not intended for Muslims only. The assumption that Article 366 and Article 369 of the Civil Code only applies and is subject to the Chinese ethnic group, because based on Law Number 12 of 2016 concerning Citizenship, currently in Indonesia, there are only two nationalities, namely Indonesian citizens and foreign citizens. Therefore in the future, to present the state through guardianship supervision and to provide legal protection for minors and to consider legal pluralism in Indonesia, there needs to be a concept of renewal of guardianship supervision in Indonesia based on the Pancasila legal system as the nation's philosophical values.

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