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Declarative and Enforceable Custody Protection in Indonesia and Malaysia: A Study on the Best Interest of the Child in Islamic Family Law

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Abstract: When it comes to protecting children after a divorce, Islamic family law relies heavily on the best interest of the kid premise. The implementation and juridical ramifications of this concept differ greatly among legal systems, notwithstanding its widespread recognition in statutes and court practices. With a focus on the legal ramifications stemming from variations in their normative and procedural designs, this paper compares and contrasts Islamic family law in Indonesia and Malaysia in regards to the regulation and implementation of the best interest of the child concept. Using a comparative and doctrinal approach to normative legal research, this study examines Islamic family law and child protection statutes, court rulings, and academic works from both jurisdictions. In order to evaluate the connection between the determination of custody and the implementation of court judgements, the analytical framework utilises the ideas of ḥaḍānah and maqāṣid al-sharīʿah. Evidence from both Indonesia and Malaysia shows that Islamic family law uses the best interest of the child as its guiding concept when deciding who gets custody of a kid. Nevertheless, different legal results result from different arrangements of normative and procedural factors. In Indonesia, the majority of child custody protection cases are handled via a process known as declarative justice, where legal rights are established by court rulings but lack effective enforcement measures. By contrast, Islamic family law in Malaysia incorporates custody decisions with enforcement mechanisms and legal penalties for non-compliance, reflecting a paradigm of custody protection as enforced justice. These results highlight how Islamic family law prioritises the involvement of normative recognition in shaping child protection policies, but also how much weight legal systems give to the idea of enforceable institutional structures to back up custody decisions.

Keywords: child custody rights; Islamic family law; Ḥaḍānah; legal systems; Maqāṣid al-Sharī‘ah.

Introduction

In child protection, the best interest of the child concept has become a universal criterion, especially in cases involving divorce and family arrangements after separation (D'Onofrio & Emery, 2019). In all judicial proceedings involving children, this idea places a priority on their psychological, emotional, and physiological health (Rabbit & Siraj, 2020). This principle is not an outside idea in Islamic family law, but rather it is normatively based on the philosophy of ḥaḍānah, which is one of the larger goals of Islamic law (maqāṣid al-sharīʿah). The term maqāṣid al-sharī'ah refers to the goal of shariah law (S. Anwar, 2016). The goal of Sharia is to help people both now and in the future. There is a three-tiered structure of maqāṣid al-sharī'ah, namely dharuriyyat (main), hajiyat (secondary), and tahsiniyyat (tertiary). Protecting one's faith, one's spirit, one's intellect, one's progeny, and one's property are the five primary joints that hold this together (Mera et al., 2024). The main goals of Islamic law and what is considered to be in the child's best interest are congruent from this perspective. According to Sahid et al. (2025), the concept of ḥaḍānah is not only used to regulate custody rights, but it also seeks to ensure that children get sufficient care to safeguard their physical, emotional, and moral well-being. According to Sahid et al. (2025), the need to safeguard a

kid goes beyond mere legal custody arrangements under Islamic family law. Therefore, Islamic law does not support the idea that declarative judicial orders are sufficient to ensure the safety of children. Without mechanisms to implement custody orders, maqāṣid al-sharīʿah's aims may remain only ambitions rather than genuine protections. This theoretical framework provides a solid analytical foundation for studying how Islamic family law systems in Malaysia and Indonesia translate the idea of the child's best interest into concrete legal practice, moving it from a normative commitment to a practical one.

National legal frameworks in Indonesia, particularly Law Number 16 of 2019, which updates Law Number 1 of 1974 governing Marriage, make it clear that the idea of prioritising the best interests of children is endorsed. Idris et al. (2024) provide judicial experience that shows how the enforcement of rights created by court orders, in particular during the implementation of post-divorce child custody, does not always coincide with the normative purpose of child protection. Divorce litigation will account for 77% of the 465,063 cases predicted to be processed within the religious justice system in Indonesia in 2024, according to statistics from the Directorate General of the Religious Justice Agency of the Supreme Court of the Republic of Indonesia. Regulation of women's and children's rights accounted for just around 11.19% of all cases (Yasardin, 2025). Over one million children were affected by parental divorce, according to research done in Australia by the Indonesia Partnership for Justice 2. This influence was most noticeable in relation to the children's social needs and their long-term development (Supreme Court of the Republic of Indonesia, 2022). Traditionally, Article 105 of the Compilation of Islamic Law (KHI) governs the administration of child custody after a divorce within the realm of religious law. According to this regulation, mothers are legally considered the primary carers of children less than twelve years old or who have not yet reached the age of discernment. However, once a kid reaches the age of discernment, he or she is able to choose between living with his or her father or mother. When deciding on a child custody case, the panel of judges looks to this criterion as their main guide. The procedures for carrying out custody decisions are not well addressed under Article 105 of the KHI, especially in cases when the parent or guardian who is not custodial is not prepared to give up the child willingly. To provide advice for judges in religious courts, the Supreme Court of the Republic of Indonesia issued many Supreme Court Circular Letters (SEMA) in response to the passage of textual KHI criteria. According to SEMA Number 1 of 2017, judges are required to consider issues of non-discrimination and children's best interests in addition to the normative requirements of Article 105 of the KHI. Furthermore, according to SEMA Number 5 of 2022, if a child is unwilling or unable to be presented, the enforcement of child custody may be considered unenforceable or delayed. Specifically, SEMA Number 1 of 2025 for the Execution of the Outcomes from the 2025 Plenary Meeting of the Supreme Court Chamber, which modifies the former Legal Formulation of the Religious Chamber number 10, is a feature of the current development.

The notion that the court may examine matters pertaining to guardianship and child custody is emphasised by SEMA Number 1 of 2025, regardless of whether the parties involved do not explicitly state a claim for ḥaḍānah in a divorce petition or litigation. Without a consent decree from either parent, the court may decide who gets custody of the kids using information presented at trial that's in their best interest. If the parents can't agree, the judge can punish them by transferring the kids to the people named as ḥaḍānah. By establishing the best interests of the children as an essential standard for court discussions, this provision shows how judges might be more actively involved in making custody decisions. But although child custody decisions are only governed by the SEMA, the whole statute remains focused on rights evaluation and adjudication.

guidelines of the general law of civil procedure. There are now no rules in place regarding the involvement of experts, the mental health readiness of children, or the cooperation between different agencies when it comes to carrying out child custody decisions. So, there's a difference between the normative process of deciding custody and the actual process of carrying it out. It is clear from religious jurisprudence that there are obstacles to carrying out child custody agreements. The Tsania Marwa and Atalarik Shah case is an often used illustration of this. Tsania Marwa was granted custody of the two children in 2017 by the Cibinong Religious Court. Legally, the decision stands forever, and socially, it determines who gets to keep the kids. However, there are substantial obstacles to the implementation of the judgement. The father's reluctance and the child's

resistance resulted to the failure of the one execution attempt. After the failure, the court can no longer conduct any further enforcement actions. The court's decision can only address the allocation of rights and not the transfer of physical custody of the child since the legal system does not have the technical grounding to legitimately pursue the rejection.

Decision Number 342/Pdt.G/2020/PA.Mtp. of the Martapura Religious Court presents a similar scenario. The court panel decided that Aulia's mother, Nuraini, should have primary custody of her 10-year-old daughter. The ruling is based on Article 105 of the Compilation of Islamic Law, which considers that the child is traditionally under the supervision of their mother as they have not reached the age of discernment. When the child's father moves the child to an unknown location and refuses to relinquish the child, the implementation of the decision runs into problems. The child has formed strong feelings of attachment to the father's family and is reluctant to live with the mother. The court's efforts to involve police officers in carrying out the ruling were fruitless mainly because of its limited procedural jurisdiction, bureaucratic hurdles, and the absence of a clear system to oversee the enforcement of child custody decrees.

This same situation was also present in case 0498/Pdt.G/2013/PA.JS, which was reviewed by the Supreme Court in Decision 15 PK/Ag/2018. The court's final decision granted the mother the right of ḥaḍānah. Still, the father does not carry out the decision, so the child is physically with him. Because there are no formal legal procedures that regulate the execution of decisions involving immaterial things like children, the execution of custody cannot move forward. The absence of a legislative framework that allows for the technological adoption of children in a way that is both legal and measurable while still being compassionate limits the activities that law enforcement personnel may take.

This series of events shows that in the field of religious justice, the issue of child custody after a divorce goes beyond the assignment of rights by a court decision, facing complex legal obstacles all the way through the implementation of the decision. In cases when the non-prevailing party is hesitant to voluntarily comply with the verdict, physical custody of the child may not necessarily be transferred to the assigned carer, even if the court order has lasting legal validity. We chose to compare Indonesia and Malaysia because they both recognise the best interest of the child as a judicial criteria and employ Islamic family law as the normative basis for child custody arrangements after a divorce. The two nations are similar because they both follow Islamic principles, especially the term ḥaḍānah, which means protecting the well-being of children as part of protecting the soul (ḥifẓ al-nafs) and the offspring (ḥifẓ al-nasl) in Islamic family law. The court's institutional structure, the relationship between substantive standards and procedural law, and the processes for executing custody decisions are three areas where these principles diverge significantly from a practical legal framework. To assess whether the concept of child protection in Islamic family law has been fully realised in terms of rights and practical application, it is essential to examine this disparity. By contrasting the two countries' legal systems, we can see how similar Islamic norms could have different results when applied in different contexts. This is what we see in the case of Indonesia and Malaysia. On the other hand, Islamic family law is an integral part of Malaysian law and controls child custody matters after a divorce. A look into Malaysian law combines Sharia law with common law, giving the Shariah Court's jurisdiction in family affairs unique institutional and normative validity. Article 81 of the Islamic Family Law (Federal Territories) Act 1984 states that while determining child custody, it is necessary to take into account the child's age, gender, and emotional needs (Yusoff et al., 2019). Child custody decisions are also subject to the strict regulations of Islamic family law in Malaysia. The Sharia Court may ask the help of police to carry out the verdict according to Article 121 of the legislation. In addition to Article 122's criminal sanctions for individuals who do not comply with court orders, Article 83's authorisation of mental examination and help from family counsellors further strengthens child protection. The Federal Constitution of Malaysia recognises the integration of Sharia law with national law, which permits the Sharia Court to collaborate with other bodies to carry out its authority (Maryam Talatu Umar & Halima Ibrahim Bature, 2024). An example of this concept in action is the case of Rosmah binti Mohamad v. Abdul Rahman bin Hussein, in which the mother was granted custody by the Shariah Court, and the father was ordered by the court to be put in jail for disobeying the verdict (Ainur Qistina Binti Shamsudin et al., 2019).

In Malaysia, the principle of the kid's best interest is constantly upheld throughout the whole child custody process, as this case shows.

This study fills a gap in the literature by comparing and contrasting two countries' approaches to child custody following a divorce. By doing so, it places the best interest of the child principle within the framework of Islamic family law and examines how normative frameworks influence the implementation of this principle in Indonesia and Malaysia.

Literature Review

Reference works on the subject. The Best Interest of the Child demonstrates that this principle has been the cornerstone of child protection systems worldwide for quite some time. To contribute to the child's physical health, this concept also considers their complex emotional and psychological needs, according to Freymond and Cameron. Dissimilar legal systems and basic cultural values, however, often impede the worldwide application of this logic. Source: Cameron and Freymond (2006). According to Ramlah and Rahajeng (2025), Jasser Auda, a well-known person of the time, had a substantial impact on the evolution of the maqāṣid al-sharīʿah theory via the introduction of a systems approach to the interpretation of Islamic law. The conventional maqāṣid technique was criticised by Auda for being too hierarchical and inflexible to handle the complicated humanitarian challenges of today. In Islamic law, the norms, institutions, law enforcement officials, and social conditions all work together as one coherent whole. The establishment of strong institutional and procedural procedures is just as important as the creation of substantive norms when it comes to protecting basic values like life preservation (ḥifẓ al-nafs) and lineage (ḥifẓ al-nasl). From Auda's point of view, the legal system's responsibility to ensure the actual protection of children is expanded upon by ḥaḍānah, which is not limited to just describing custody. As a result, the idea of the child's best interest in Islamic family law can be seen as a contemporary version of maqāṣid al-sharīʿah. It is not just a foreign concept being assimilated, but also a framework for analysing how well the legal system can turn the normative protection of the child into long-lasting legal practice. As an example, this idea often conflicts with the daycare standards of religion and customary law in Indonesia. Aziz agrees and points out that there are still major problems with the concept's application, such as a lack of enforcement and monitoring mechanisms, even though Law No. 16 of 2019 tried to include it (M. Anwar & Wijaya, 2019).

For the state to take the lead in carrying out and upholding child custody orders, the maṣlaḥah mursalah framework provides a normative foundation. Islamic law views the state's participation in the lives of children—whether by execution, the engagement of authority figures, or punishments for noncompliance—not as an invasion of parental rights, but as a way to protect these vulnerable individuals from further damage. In protecting vulnerable groups, especially children, Yusuf al-Qaradawi argued that public maṣlaḥah should take precedence over private interests (Malek et al., 2024). Because it ensures that child protection goes beyond normative rights to real execution, improving the structure for implementing custody judgements is in line with Sharia principles. This framework offers a method for evaluating how well Islamic family law regimes in Malaysia and Indonesia may implement maqāṣid al-sharīʿah in concrete, legally binding ways.
In Islamic law, post-divorce parenting revolves on hadanah, a component of Sharia law. As long as she doesn't lose her eligibility, according to Yusuf Qardhawi, a mother may keep her right to custody under Hashanah until her kid reaches a specified age (Kahar & Zin, 2011). This is a common idea in Malaysia, a country that has more thoroughly integrated Sharia law into its legal system. According to Zainuddin, Malaysia had effectively adopted international best practices in this area. under order to better protect children, Islamic law incorporates stricter safeguards under Articles 81 and 83 of the Federal Territories 1984's Islamic Family Law (Shariff, 2018). Sharia law could or might not help children whose parents are fighting to resolve their differences and meet their emotional and psychological needs.

On the flip side, questions about the logic behind the implementation of court rulings arise in the context of child custody disputes. According to Fuller, a functional legal system relies on well-defined rules and strict enforcement (Quinn, 2015). The absence of a strong system to punish those who disobey child custody orders is the major shortcoming of Indonesia, according to this argument. Thus, the court's ruling is purely declaratory and has no real-world implications. As stated in Article

121 of the Islamic Family Law, Malaysia has adopted more practical methods of carrying out this procedure, with the help of the police.

When comparing and contrasting how different nations apply their laws, comparative law theory provides a useful foundation. Since comparative laws allow for the recognition of best practices and the adaptation of laws to specific circumstances, Zweigert and Kötz argue that national legal systems may benefit from them (Muhtar, 2023). Despite sharing a commitment to what is essentially the same ideal (the Best Interest of the Child), this research finds that Indonesia and Malaysia differ greatly in how laws are put into practice and how punishments are enforced. While Indonesia continues to have difficulties in this area, Malaysia has shown impressive competence in their application of Article 122 of their legislation, which imposes heavy penalties on anyone who do not comply with the verdict.

Most of the previous work on child custody and protection after a divorce has focused on new laws and regulations. The need of clear mandates in laws meant to safeguard children is emphasised by Yuningsih (Yuningsih, 2016). However, there has been a lack of research on how Islamic family law applies the best interest of the child idea, particularly in relation to the interaction between normative regulation and judicial practice, and this is particularly true when looking at Indonesia and Malaysia as a comparison. Child custody should be examined in the framework of Islamic family law and its legal implications in both nations as a result of this difference. A normative-comparative research is also necessary.

Method

utilising a comparative and doctrinal approach, this paper analyses the regulation and implementation of post-divorce child support utilising a normative legal research technique (Ali, 2021). decision-making in the context of Islamic family law in Malaysia and Indonesia. Through the prism of Islamic legal theory and constitutional principles of child protection, the research examines legislative requirements, evaluates their execution, and considers their legal implications. This research utilises a theoretical framework that is grounded on Islamic legal theories, namely maqāṣid al-sharīʿah, with an emphasis on ḥifẓ al-nafs (the safeguarding of the child's life and welfare) and ḥifẓ al-nasl (the safeguarding of the family's legacy and uninterrupted care). Following these guidelines will help you determine whether the kid's best interests are really being prioritised in child custody arrangements that are finalised after a divorce. Islamic family law uses the ideas of ḥaḍānah and wilāyah to examine who has custody and how much responsibility they should have, while maṣlaḥah mursalah is used to evaluate how judges choose to fill legal gaps, particularly when it comes to carrying out custody decisions.

Legislative regulations, Islamic legal canons, and Indonesian and Malaysian court decisions are the main sources of law. Child custody decisions in Indonesia are based on Supreme Court Circular Letters, the Compilation of Islamic Law, and Law Number 16 of 2019. Islamic Family Law (Federal Territories) Act 1984 and relevant Shariah Court decisions are the main sources in Malaysia. Regarding the execution of child custody decisions in particular, judicial judgements are studied as both sources of law and reflections of legal practice.

Islamic family law and child protection secondary legal resources include scholarly articles, peer-reviewed international journals, and comparative law literature. In order to find similarities and differences between the two legal systems, particularly with regard to the connection between the decision of custody and enforcement mechanisms, the data are examined using a descriptive-analytical and evaluative approach.

Islamic family law's normative foundation for child custody, judicial interpretation of the best interest of the child concept, and legal consequences of enforcement or non-compliance with custody arrangements are the three primary elements that organise the comparative analysis. This study compares and contrasts the legal ramifications of child custody protection after a divorce in Malaysia and Indonesia, two countries with quite distinct legal systems.

Results and Discussion

Islamic Family Law for Post-Divorce Child Custody in Indonesia and Malaysia

This section examines the normative frameworks and practices regarding the application of the best interest of the child principle under Islamic family law in Indonesia and Malaysia, particularly with child custody determinations post-divorce. The explanation emphasises the legal structure, the foundation of Islamic law (ḥaḍānah), and the pertinent judicial practices in each nation.

Indonesia

Indonesia has made the Best Interest of the Child its child protection criterion. This theory states that the best interests of the child should always take precedence in any decision-making process, but especially in cases involving child custody following a divorce. (Bakarbessy & Awards, 2018). Several laws and regulations in Indonesia govern this principle. For example, Law 16 of 2019 amends Marriage Law 1 of 1974, Child Protection Law 35 of 2014 amends Law 23 of 2002, and Child Welfare Law 4 of 1979 regulates child welfare. Although these agreements provide a solid normative groundwork, there are still many cultural and legal obstacles to overcome before they can be put into practice.

Child custody after a divorce is governed by Article 41 of Law No. 16 of 2019. The article stresses that, barring specific grounds that render the mother unsuitable, custody of small children is often granted to the mother. Mothers are better equipped to address their children's physical and emotional needs, particularly while they are young, according to this judgment, which shows an attitude that emphasizes child welfare. It is sometimes up to the court to interpret the case since the law does not provide specific rules on how to apply the Best Interest of the Child concept in reality.

Law 35 of 2014, which deals with child protection, further expands the acknowledgment of this idea. Every kid has the right to be safe from abuse, prejudice, exploitation, and violence, according to Article 3 of this legislation. According to Article 9, every kid has the right to be looked after and protected by an adult who is legally obligated to do so. This rule states that when a kid is involved in child care after a divorce, their physical, emotional, and social well-being must be prioritized.

The Best Interest of the Child concept is bolstered by the legislative framework, which includes Law Number 4 of 1979, which deals with child welfare. A child's welfare is defined by this legislation as the provision of necessities, including food, clothes, shelter, education, health care, and safety from hazards that can impair their growth and development. In the context of a divorce, this statute stresses the need to make sure that kids still have one-on-one time with each parent, even after the marriage ends.

The best interest of the child concept has substantial obstacles in its Indonesian application. The absence of reliable enforcement measures to guarantee the execution of custody-related court orders is a major issue. Case number 342/PDT. G/2020/PA. MTP before the Martapura Religious Court included a decision to grant custody of a child to a mother called Nuraini, taking into account what was best for the child. The kid's father resisted turning over his child and even took him to an unknown place; the execution of this decision was a shambles. Court rulings often lose their significance in the absence of sufficient control and enforcement procedures, as seen here.

Furthermore, issues also emerge within the legal standards. Take Law 16 of 2019 as an example; it fails to provide judges with specific instructions on how to find out what's best for children. Judicial disagreements over this provision's meaning are a common source of conflicting rulings. The emotional and psychological requirements of the child are often overshadowed by more formal considerations, such as the parents' financial situation, by the courts. Because of this, there is a chance that the decision-making process may be biased and the child's basic needs will be disregarded.

Malaysia

Among the countries that have demonstrated a firm commitment to applying the Best Interest of the Child standard in divorce-related family law issues, such as child custody determinations, is Malaysia. With its dualistic legal system that incorporates both Common Law and Sharia law, Malaysia offers a unique viewpoint that blends Islamic religious principles with global ideals. The Principal Law Reform (Marriage and Divorce) Act 1976 (LRA) specifies what is best for the child

for non-Muslim couples. The Islamic Family Law (Federal Territories) Act 1984 (IFLA) accomplishes a similar goal for Muslim couples. (Aziz et al., 2019). The rights of children involved in divorce are thoroughly safeguarded by these two statutes.

The Islamic Family Law (Federal Territories) Act 1984, which is based on Muslim family law, explicitly addresses the child's best interest. Article 81 of this statute states that Sharia courts have the authority to determine the custody of a child by considering the child's best interests. This provision mandates that the court consider the child's age, gender, and emotional and psychological needs, among other things. In addition, according to Article 83, the court must ensure that the child lives in a safe and protected environment. In cases involving minor children, the mother is typically granted custody unless there are strong moral or legal reasons to believe she is unfit. (Moustafa, 2018).

In addition, the law lays out a clear process for execution, as mentioned in Articles 121 and 122. If one of the parties to a custody order refuses to follow the court's orders, the judge may order the police to use force. Also, individuals who don't play by the rules could face fines or even jail time from the court. For example, if a court orders a father to give up custody of his child to his ex-wife, he could spend up to a year in prison and pay a fine of up to RM5,000 if he refuses. This approach demonstrates Malaysia's dedication to ensuring that child custody decisions are both declaratory and practical.

When it comes to non-Muslim spouses, the Best Interest of the Child concept is governed by the Law Reform (Marriage and Divorce) Act 1976 (LRA). The needs and welfare of the child, as well as the child's desires (if they may be expressed), must be considered by the court while determining child custody, as stated in Article 88 of this Act. The greatest interest of the child should guide the determination of who has custody, whether that's one parent or both through joint custody, as mentioned in the article. In order to aid in the examination of the child's requirements, the court may appoint a psychologist or family counsellor.

Implementation Seeking What's Best for the Child A stronger system of law provides further stability to Malaysia, setting it apart from many other emerging nations. The Department of Social Welfare (Jabatan Kebajikan Masyarakat) and similar organizations play a crucial role in assisting the court and seeing to it that judgments about child custody are carried out in a way that is best for the kid. An important part of these organizations' social reporting is looking at how a child's living situation, parent-child interaction, and environmental factors affect the child's growth and development. The court will use this report as a basis for its decision. (Zin et al., 2019).

Despite the seemingly more methodical nature of Malaysia's legislative framework, the principle's application, Seeking What's Best for the Child There will be obstacles. When one parent is Muslim and the other is not, a problem that often develops is the clash between Sharia law and Common Law. Sharia courts and civil courts do not have the same level of authority, which may make child custody cases like these very complex. Conflicts between federal law and Sharia courts arise often in Muslim family matters, even though the Malaysian Constitution establishes federal law as supreme (Harisudin & Choriri, 2021).

The general public's unfamiliarity with the Best Interest of the Child premise is another obstacle. A parent's right to custody, rather than their duty to provide for their kid, persists in some jurisdictions. This viewpoint often causes parents to argue for lengthy periods after a divorce, which is bad for the kid. To raise awareness about the significance of this concept, Malaysia has started implementing education and family mediation initiatives to tackle this problem.

Global comparisons show that Malaysia's Best Interest of the Child approach is among the most systematic in Southeast Asia. A solid framework for protecting children's rights is laid out by laws that are clear, have severe consequences, and incorporate both national and Sharia law principles. We can yet do more, especially to get this idea more widely recognised for its importance and to end the problem of jurisdictional conflicts that occur when Sharia courts and civil courts cannot agree on who has the last word.

At long last, Malaysian law has more consistently and firmly embraced the best interest of the kid. Children in divorce proceedings are better protected by the current legal system than in a number of other countries, notwithstanding certain hurdles. Malaysia has the potential to set a precedent for other countries on the appropriate application of the Best Interest of the Child principle if it persists in improving its implementation mechanism and increases public awareness. Not only will this improve the lives of Malaysian children, but it will also strengthen the global commitment to safeguarding children's rights.

Conversely, the Malaysian legal system has a cohesive concept of child custody protection, in which the Best Interest of the Child principle extends beyond adjudication to encompass enforcement. The connection between custody decisions, statutory enforcement mechanisms, and forceful legal repercussions—such as police intervention and penalties for non-compliance—transforms child welfare from a moral-judicial issue into a legally binding responsibility. This integration illustrates the operationalization of maqāṣid al-sharīʿah, namely ḥifẓ al-nafs and ḥifẓ al-nasl, via positive legislation, so guaranteeing that child protection is achieved both normatively and institutionally.

Regulation and Application of the Principle of the Best Interests of Children

The Best Interest of the Child is a globally acknowledged principle that regulates legal issues pertaining to children, particularly custody battles following divorce. The enactment of laws by both Malaysia and Indonesia to safeguard children from abuse demonstrates the gravity with which both nations regard this issue. The interpretation and implementation of this idea are shaped by the distinct cultural, religious, and legal frameworks of each nation.

This principle is implemented in several Indonesian statutes, including Law 4 of 1979, Law 35 of 2014, and Law 16 of 2019. The mother is usually awarded primary custody if deemed the superior parent for the kid, barring exceptional circumstances that negate her eligibility. The execution is obstructed by the insufficient framework for decision-making and the lack of sanctions for non-compliant entities. This split frequently inflicts harm on youngsters, who ought to be safeguarded.

Conversely, Malaysia's dual legal system incorporates this concept within the Islamic Family Law Act for Muslim spouses and the Law Reform Act for non-Muslim couples. More stringent procedures, including the involvement of law enforcement in the enforcement of decisions and the imposition of penalties for non-compliant entities, facilitate implementation in Malaysia. The Department of Community Welfare and several social organisations play a crucial role in ensuring that the psychological and emotional needs of children are addressed in court decisions.

This comparative research demonstrates that the disparity between Indonesia and Malaysia is not just institutional, but also intellectual. Indonesia has a rights-determination framework whereby the Best Interest of the Child is mostly used during court declarations, distinguishing the assessment of custody rights from their implementation. In contrast, Malaysia exemplifies an enforcement-centric system, whereby the same concept is systematically embedded throughout procedural legislation and enforcement procedures, directly associating custody decision with coercive legal repercussions. This systematic divergence illustrates that the legal interpretation of the Best Interest of the Child concept is influenced not just by normative acknowledgment, but by the manner in which legal systems integrate adjudication, enforcement, and governmental power.

Table 1
Comparison of Child Custody Protection Legal Systems in Indonesia and Malaysia Based on *the Principle of The Best Interest of the Child*

Aspects	Indonesia	Malaysia
Main Legal Basis	- Law No. 16 of 2019 (Amendment of the Marriage Law)	- Islamic Family Law Act (Federal Territories) 1984 (Muslim)
	- Law No. 35 of 2014 (Amendment of Child Protection Law)	- Law Reform (Marriage and Divorce) Act 1976 (Non-Muslim)
	- Law No. 4 of 1979 (Child Welfare)	

Position of the Best Interest of the Child Principle	Acknowledged as a fundamental criterion in adjudicating child custody, especially through the legal responsibilities of parents post-divorce.	Clearly designated as the foremost factor in custody decisions for both Muslim and non-Muslim partners.
Custody Determination Framework	Custody of young children is often awarded to the mother unless particular legal justifications suggest otherwise. Judicial discretion is crucial owing to the lack of comprehensive statutory guidelines.	Custody is adjudicated based on the child's age, gender, emotional requirements, psychological health, and overall stability, as mandated by law.

Aspects	Indonesia	Malaysia
Integration with Islamic Family Law (Ḥaḍānah)	Religious courts has the jurisdiction to adjudicate custody matters; nevertheless, their primary function is adjudicative rather than enforcement-oriented.	Shariah courts have the jurisdiction to adjudicate custody matters and to enforce compliance with custody decrees.
Judicial Authority in Custody Matters	Religious courts has the jurisdiction to decide custody matters; nonetheless, their function is chiefly centred on adjudication rather than enforcement.	Shariah courts have the jurisdiction to adjudicate custody matters and to enforce compliance with custody decrees.
Execution of Custody Judgments	There is no defined procedural framework for implementing custody judgements; execution frequently relies on the voluntary compliance of the parties involved.	Custody orders are enforceable by statutory processes, including police intervention (Article 121 IFLA).
Sanctions for Non-Compliance	No specific penalties are prescribed for noncompliance with custody orders in the statutory law.	Legal penalties are imposed, including fines and incarceration for non-compliance (Article 122 IFLA).
Role of Social Institutions	Restricted formal engagement of social institutions in custodial adjudication or execution.	The Department of Social Welfare actively contributes by furnishing social reports and assisting in judicial decision-making.
Influence of Religion and Culture	Islamic legal concepts coexist with robust customary norms that may highlight the father's position as the primary provider.	Islamic values are aligned with Common Law, although jurisdictional conflicts may occur in interfaith matters.

Illustrative Judicial Practice	Custody determinations may encounter implementation challenges, as evidenced in cases such as 342/Pdt.G/2020/PA.Mtp.	Effective implementation was evidenced in cases like Rosmah v. Abdul Rahman, where enforcement tools were utilised.

Comparisons between Indonesia and Malaysia demonstrate considerable disparities in the regulation and application of the best interest of the child principle in the protection of post-divorce child custody. The disparities are evident in the legislative framework, the extent of judicial power, the processes for executing decisions, and the participation of ancillary organisations in safeguarding children's interests. In Indonesia, the notion of prioritising children's best interests is normatively acknowledged by Law Number 16 of 2019, Law Number 35 of 2014, and Law Number 4 of 1979, which designates children as legal persons requiring protection in all post-divorce decision-making processes.

Nonetheless, the application of this principle in judicial practice continues to exhibit difficulties, particularly during the execution of child custody decisions. Religious court decisions have typically prioritised the child's best interests in custody determinations; nevertheless, the procedural legal framework lacks a mechanism to ensure the enforcement of these orders. This situation is exemplified by the Decision of the Martapura Religious Court Number 342/Pdt.G/2020/PA. Mtp, which awarded custody to the mother in consideration of the child's best interests; however, the execution of this decision is obstructed by the father's refusal and a lack of sufficient institutional support. The ambiguity of normative boundaries in laws and regulations results in extensive judicial discretion, leading to formal considerations frequently overshadowing a comprehensive evaluation of children's emotional and psychological needs.

Unlike Indonesia, Malaysia's family law system demonstrates a more explicit integration of normative frameworks and the implementation of the best interest of the child premise. The Islamic Family Law (Federal Territories) Act 1984 for Muslim couples and the Law Reform (Marriage and Divorce) Act 1976 for non-Muslim couples unequivocally establish the best interests of the child as the principal criterion for custody determinations. The rule delineates the requirements for establishing rights and associates them with the court's jurisdiction to enforce judgements using existing legal mechanisms, including the engagement of law enforcement personnel and the application of penalties for non-compliance.

Nonetheless, the implementation of the idea of the best interests of children in Malaysia is not devoid of obstacles, particularly in instances of religious disparities between parents, which may lead to jurisdictional conflicts between sharia courts and civil courts (Mehmood, 2016). This indicates that legal diversity also affects the practical application of this principle in both Indonesia and Malaysia.

This comparison demonstrates that while both countries acknowledge the notion of the child's best interests in family law, disparities in normative and procedural frameworks lead to discrepancies in the application and enforcement of post-divorce child custody protections. This investigation verifies that a singular principle might yield diverse implications for various activities when implemented within the context of heterogeneous legal, cultural, and institutional frameworks.

Principle of the Best Interests of Children in Global Discourse: Islamic Family

Modern discussions of family law have elevated the concept of the child's best interest to the status of a standard of fairness that requires actual protection for the kid, as well as a normative foundation for judicial discussion. The real protection supplied by court judgements typically falls short of the normative acknowledgement of this idea, according to many research. This is because enforcement methods are often inadequate. Judgement in family disputes often provides a formal framework that the parties later rework, as the groundbreaking work of Mnookin and Kornhauser shows. According to Mnookin and Kornhauser (1979), the most vulnerable individuals, particularly children, are at risk of not receiving sufficient protection in these circumstances, even if they are officially recognised as objects of primary attention.

The concept of the child's best interests is gradually investigated within the context of contemporary Islamic family law from the maqāṣid al-sharīʿah angle. According to this approach, protecting children is not a Western concept, but rather in line with the fundamental principles of sharia, which include protecting the soul (ḥifẓ al-nafs) and preserving offspring (ḥifẓ al-nasl). According to Jasser Auda, the systems approach shows that there is more needed than just setting substantive laws in order to achieve maqāṣid principles. For sharia principles to be effectively put into practice, there must be a system of legal standards, judicial institutions, and implementation mechanisms in place (Jasser Auda, 2008).

This viewpoint is in agreement with Yusuf al-Qaradawi's, who sees Islamic law—especially in relation to as-siyāsah as-sharʿiyyah—as a foundation for muʿāmalāt that is dynamic, moderate, and context-dependent. According to al-Qaradawi, the purpose of the revelation of Shari'a was not just to establish abstract principles, but also to provide a framework for the legitimate state to control and direct human behaviour. Therefore, the state is an essential tool for protecting vulnerable groups, especially children, and ensuring justice so that society may reap benefits while avoiding damage. The pragmatic, idealistic, and adaptable stance of al-Qaradawi shows that Islamic law should be flexible when it comes to protecting and promoting welfare. Ideas about

The basis for the legitimacy of state institutional intervention when vulnerable groups' interests are at stake is minimising harm (taqlīl ash-shar) and choosing smaller risks (irtikāb akhaff ad-ḍararayn). In this setting, safeguarding children goes beyond just establishing legal custody; it requires the state to take the initiative to ensure that these safeguards are effectively put into place via effective institutional and legal systems (Sudarto, 2021).

Contributing to the scholarly conversation on the enforcement gap in child custody protection, this research places the comparison between Malaysia and Indonesia within the global discourse and theoretical framework of Islamic law. The concept of the best interests of children under Islamic family law has been strongly recognised by Indonesia via its laws, regulations, and court procedures. However, child protection is still mostly at a declarative level since this recognition has not been fully integrated into the decision-making process. When it comes to linking custody decisions with enforcement mechanisms and consequences for noncompliance, Malaysia's Islamic family law system is more methodical. The ability of the legal system to transform the principles of the child's best interests into a legally binding procedural framework is more important than just acknowledging the notion when it comes to child protection.

Juridical Implications of Differences in the Regulation and Implementation of Post-Divorce Child Custody in Indonesia

Following a divorce, child custody in Indonesia is governed by Islamic family law, which, according to Law Number 16 of 2019, the Compilation of Islamic Law (KHI), and directions from the Supreme Court via the Supreme Court Circular, recognises the notion of the child's best interest normatively. However, this idea has significant legal implications when applied to religious justice, especially when it comes to enforcing child custody judgements. The divergence between the implementation of judgements in procedural law practice and the judicial assessment of rights leads to this conclusion, rather than a lack of standards.

Article 105 of the KHI establishes the standard for child custody based on the child's age and the concept of mumayyiz. This was later reaffirmed by SEMA Number 1 of 2017 and SEMA Number 1 of 2025, which emphasise that judges should actively decide on ḥaḍānah cases in the best interests of the child, even when no one asks them to do so. The rule places an emphasis on correct determination, but the implementation of the verdict is still controlled by the civil process legal framework.
The concept's clear legal implications are highlighted by the child custody ruling's declarative form. Legally, one parent has custody of the child, but that doesn't mean physical custody will automatically transfer if the other parent refuses to voluntarily comply with the order. The implementation of the ruling is dependent on the parties' permission since the legal system does not

have a mechanism that is designed for non-material things, like children. There is a pattern to the religiously diverse court verdicts. The Cibinong Religious Court awarded maternal custody in the 2017 case of Tsania Marwa and Atalarik Syah; however, the father was reluctant and the kid was opposed, thus the implementation only happened once and failed. After the failure, the court has no legal options to ensure that the verdict may be enforced. The mother has been granted the right to ḥaḍānah in the decisions of the Martapura Religious Court Number 342/Pdt.G/2020/PA. Mtp and the South Jakarta Religious Court Number 0498/Pdt.G/2013/PA.JS, along with the Supreme Court Decision Number 15 PK/Ag/2018. However, the child is still physically with the father because there are no legal procedures in place to help carry out the judgement in a fair and reasonable way.

In numerous cases in Indonesia, such as the Tsania Marwa case and the Martapura Religious Court Decision Number 342/Pdt.G/2020/PA. Mtp, as well as in the practices of the South Jakarta Religious Court, there has been an inability to enforce child custody rulings. This highlights a gap between the legal adjudication of custody and the actual safeguarding of children in societal contexts. The courts' primary focus in these rulings has been on the child's best interests, as the fundamental standard for deciding who gets custody (ḥaḍānah). But when there isn't a good way to put the decision into action, child protection stays on paper and doesn't amount to anything. One way to look at this situation from an Islamic legal perspective is via the principle of maṣlaḥah mursalah, which states that one of the main goals of law is to prevent harm. According to Yusuf al-Qaradawi, if government indifference leads to greater harm to the vulnerable, it is not neutral in the areas of muʿāmalāt and as-siyāsah as-sharʿiyyah. Thus, Jasser Auda's comprehensive method for maqāṣid al-sharīʿah shows that protecting core sharia principles calls for more than just creating substantive standards; it calls for combining standards, institutions, and processes for enforcing the law.
According to this study, Islamic family law in Indonesia mostly serves as a custody protection system, which is defined as declaratory justice that focuses on the legitimacy of decisions. Indonesia relies on the normative power of judgements without enough institutional support, in contrast to Malaysia's Islamic family law framework, which links custody rulings with coercive procedures and legal consequences. For this reason, without a corresponding system for effective child protection, the idea of the kid's best interest risks becoming little more than a normative symbol. The enforcement of child custody may be considered unenforceable or non-executable if the kid refuses or is unable to be presented, according to SEMA Number 5 of 2022. This clause shows that the child's desires are taken into account when making decisions, and it also shows that there are limitations in procedural law that make it hard to change who has physical possession of the child. As a result, the difference between the ruling's factual validity and its judicial legitimacy becomes apparent in the legal interpretation.

When it comes to child custody in Malaysia, the Islamic Family legislation (Federal Territories) Act 1984 is the legislation that rules the roost. If you don't follow the court's orders, you might face criminal charges and even participation from state officials. Therefore, child custody decisions in Malaysian law are more than just announcements; they have real consequences for those who don't follow the ruling.

Legal ramifications for protecting children after a divorce vary according to different normative and procedural frameworks. Judicial consideration of rights in Indonesia is based on the principle of the child's best interest; however, the absence of particular regulations governing the enforcement of child custody in civil procedure law limits its application during implementation.

Table 2
Mapping the Juridical Implications of the Regulation and Implementation of Post-Divorce Child Custody in Indonesia

Aspects	Regulation	Implementation Practices	Juridical Implications

Guidelines for Determination of Custody	UU 16/2019, Pasal 105 KHI, SEMA 1/2017 & SEMA 1/2025	Custody is adjudicated according to the child's age and welfare.	The establishment of rights is lawful and valid, although it does not ensure the transfer of physical possession of the child.
Execution Mechanism	General civil procedure law	Executions frequently remain unfulfilled.	A verdict is definitive in the absence of Sukarel compliance.

Aspects	Regulation	Implementation Practices	Juridical Implications
The Role of Children's Will	SEMA 5/2022	Children's refusal → execution cannot proceed	The child's autonomy is a constraint on the execution of the decision.
Involvement of the Apparatus	Not specially set	The authorities failed to take action.	Constraints of procedural authority
Non-Compliance Sanctions	Not explicitly set	No legal ramifications	Judicial determination of the loss of coercive authority

The legal implications of the disparity in the regulation and application of the principle of the best interest of the child between Indonesia and Malaysia are as follows: 1. The variance in the relationship between the determination and execution of decisions, 2. The declarative nature of custody rulings in Indonesia, 3. Procedural law constraints in guaranteeing the enforceability of judgements, 4. Divergences in legal repercussions for non-compliance with decisions. No assertion is made that one system is superior; instead, an examination reveals that various legal frameworks provide distinct juridical consequences for the enforcement of post-divorce child custody.

Conclusion

This research shows that Islamic family law's application of the Best Interest of the Child principle is not objective from a legal standpoint, but is heavily impacted by the normative and procedural framework of the local legal system. The premise is fundamental for protecting child custody after a divorce in both Indonesia and Malaysia, but our research shows that the two countries' legal systems apply the same principle in quite different ways. The difference is not in the level of normative recognition but in how the law specifies the connection between determining rights and carrying out the judgement.

There is no specific procedural framework in place to ensure the implementation of custody rulings in Indonesia, although the principle of the Best Interest of the Child is often used throughout these proceedings. So, when people talk about "custody protection as declarative justice," they're referring to a system of justice that ends with a formal legal recognition but doesn't really guarantee the transfer of child custody in cases of non-compliance. In this case, there is a clear difference between the choice's normative legality and its actual juridical effectiveness, which means that the child's best interests are only protected at the declaratory level and not the operational one. On the other hand, Malaysia's Islamic family law system is unique in its architecture. The concept of the Best Interest of the Child is integral to the processes for carrying out judgements and legal sanctions, and it also forms the basis for substantive factors in custody decisions. Legal ramifications that can be enforced through court power, the involvement of state officials, and the possibility of sanctions against non-compliant parties accompany the normative determination of custody within this framework, which defines child custody protection as enforceable justice. The integration connects the two halves of the child protection process, which were previously separate.

The discrepancy in building methods can be explained in a normative way through maqāṣid al-sharīʿah, which focuses on protecting the soul (ḥifẓ al-nafs) and the offspring (ḥifẓ al-nasl). This means that child custody protection goes beyond normative requirements and is implemented through a legal system that guarantees the physical well-being of the child.

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