



## The Best Interest of the Child in Islamic Family Law: Declarative and Enforceable Custody Protection in Indonesia and Malaysia

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**Abstract:** The principle of the best interest of the child constitutes a central normative foundation for post-divorce child custody protection within Islamic family law. Although this principle is widely recognised in statutory regulations and judicial practice, its application and juridical consequences vary considerably across legal systems. This study examines the regulation and application of the best interest of the child principle in Islamic family law in Indonesia and Malaysia, with particular attention to the legal implications arising from differences in their normative and procedural designs. Employing a normative legal research method with comparative and doctrinal approaches, the study analyses legislation, the Compilation of Islamic Law, judicial decisions, and relevant scholarly literature on Islamic family law and child protection in both jurisdictions. The analytical framework draws upon the concepts of *ḥaḍānah* and *maqāṣid al-sharī‘ah* to assess the relationship between custody determination and the execution of court decisions. The findings demonstrate that both Indonesia and Malaysia formally recognise the best interest of the child as the guiding principle in determining child custody under Islamic family law. However, divergent normative and procedural configurations produce distinct juridical outcomes. In Indonesia, child custody protection predominantly operates as custody protection as declarative justice, where judicial decisions establish legal entitlements without being supported by effective enforcement mechanisms. In contrast, Malaysia's Islamic family law system reflects a model of custody protection as enforceable justice, integrating custody determinations with enforcement measures and legal sanctions for non-compliance. These findings underscore that child protection in Islamic family law is shaped not merely by normative recognition, but by the extent to which legal systems connect custody determinations with enforceable institutional mechanisms.

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

### Introduction

The principle of the best interest of the child has evolved as a universal standard in child protection, particularly in the context of divorce and post-separation family arrangements (D'Onofrio & Emery, 2019). This concept emphasises the mental, emotional, and physical well-being of children in all legal processes involving them (Rabbit & Siraj, 2020). Within Islamic family law, this principle is not an external concept, but is normatively rooted in the doctrine of *ḥaḍānah*, which forms part of the broader objectives of Islamic law (*maqāṣid al-sharī‘ah*). *Maqāṣid al-sharī‘ah* literally means the the objective of shariah (S. Anwar, 2016). The objective of Sharia is for the benefit of humans in this world and in the hereafter. There are three hierarchical levels of

*maqāṣid al-sharī'ah*, namely primary (*dharuriyyat*), secondary (*hajiyat*) and tertiary (*tahsiniyyat*). This is summed up in the five main joints, which are protecting religion, soul, intellectual, offspring and protecting the property (Mera et al., 2024).

From this viewpoint, the child's best interest fundamentally coincides with the primary objectives of Islamic law. The notion of *ḥadānah* not only governs custody rights but also aims to guarantee that children have enough care that protects their physical, emotional, and moral well (*maṣlahah*) (Sahid et al., 2025). Islamic family law regards child protection as a comprehensive duty that transcends formal custody arrangements (Sahid et al., 2025). Thus, under Islamic jurisprudence, the safeguarding of children cannot be achieved just by declarative court rulings. In the absence of procedures to enforce custody orders, the goals of *maqāṣid al-sharī'ah* may remain only normative aspirations rather than practical safeguards. This theoretical framework offers the analytical basis for investigating how Islamic family law systems in Indonesia and Malaysia convert the notion of the child's best interest from normative commitment into tangible legal practice.

The endorsement of the notion prioritising the best interests of children is evident in Indonesian national legal frameworks, notably in Law Number 16 of 2019, which amends Law Number 1 of 1974 regarding Marriage. Judicial experience indicates that the execution of post-divorce child custody does not consistently align with the normative objective of child protection, particularly during the enforcement of rights established by court rulings (Idris et al., 2024). According to data from the Directorate General of the Religious Justice Agency of the Supreme Court of the Republic of Indonesia, 2024 is projected to see 465,063 divorce cases handled within the religious justice system, with divorce litigation being 77 percent of this total. Only around 11.19 percent of the overall cases addressed the regulation of children's rights and women's rights (Yasardin, 2025). Research conducted in Australia by the Indonesia Partnership for Justice 2 indicated that over 1,000,000 children were impacted by parental divorce, particularly regarding their social requirements and long-term development (Supreme Court of the Republic of Indonesia, 2022).

In the domain of religious justice, the governance of post-divorce child custody conventionally pertains to Article 105 of the Compilation of Islamic Law (KHI). This rule states that children who have not attained the age of discernment or are under twelve years old are to be in the mother's custody, but children who have achieved the age of discernment are entitled to choose between the father or mother's care. This standard serves as the primary reference for the panel of judges in adjudicating child custody matters. Article 105 of the KHI lacks comprehensive provisions about the processes for executing custody judgements, particularly in instances when the non-custodial party is unwilling to relinquish the kid freely.

In response to the enactment of textual KHI standards, the Supreme Court of the Republic of Indonesia promulgated many Supreme Court Circular Letters (SEMA) to serve as guidance for judges in religious courts. SEMA Number 1 of 2017 underscores that judges must not only adhere to the normative stipulations of Article 105 of the KHI but are also mandated to examine the concept of non-discrimination and the best interests of children. Additionally, SEMA Number 5 of 2022 stipulates that the enforcement of child custody may be deemed unenforceable or deferred if the kid is unwilling or unable to be presented. The recent advancement is characterised by the release of SEMA Number 1 of 2025 for the Execution of the Outcomes from the 2025 Plenary Meeting of the Supreme Court Chamber, which amends the prior Legal Formulation of the Religious Chamber number 10.

SEMA Number 1 of 2025 underscores that in a litigation or divorce petition, even if the parties do not specifically assert a claim for *ḥadānah*, the court has the jurisdiction to investigate facts pertinent to child custody and guardianship. In the absence of an agreement between the parties, the judge may adjudicate child custody based on trial evidence that serves the child's best interests, and may penalise the custodial party by mandating the transfer of the child to the designated holders of *ḥadānah*. This clause illustrates the enhancement of judges' proactive involvement in child custody determinations, while reinforcing the notion of the best interests of children as a foundational criterion for judicial deliberations.

Nonetheless, the whole of SEMA continues to emphasise the assessment and adjudication of rights, whilst the regulation of the execution of child custody judgements is confined to the

parameters of general civil procedural law. No operational regulations govern the participation of specialists, the psychological preparedness of children, or inter-agency collaboration in the execution of child custody judgements. Consequently, a disparity exists between normative custody adjudication and real custody execution.

The challenges in executing child custody arrangements are distinctly evident in the practice of religious jurisprudence. A often cited example is the case between Tsania Marwa and Atalarik Shah. In 2017, the Cibinong Religious Court awarded custody of the two children to Tsania Marwa. The ruling has permanent legal authority and normatively establishes the party entitled to child custody. Nonetheless, the execution of the ruling encounters significant challenges throughout implementation. The execution attempt was conducted once and failed owing to the father's refusal and the child's resistance. Subsequent to the failure, no more enforcement measures may be undertaken by the court. The judicial system lacks a technical legal foundation to pursue the rejection lawfully, resulting in the court's judgement being limited to the determination of rights without the transfer of physical possession of the kid.

A comparable situation is present in the Martapura Religious Court Decision Number 342/Pdt.G/2020/PA.Mtp. The panel of judges adjudicated that custody of the 10-year-old kid, Aulia, was awarded to her mother, Nuraini. The decision is grounded on Article 105 of the Compilation of Islamic Law, taking into account that the kid has not attained the age of discernment and is conventionally under the mother's guardianship. The execution of the ruling encounters challenges when the kid's father refuses to surrender the child and relocates the youngster to an undisclosed place. The youngster exhibits a reluctance to reside with the mother due to a developed emotional affinity for the father's family. The court's attempts to engage police officers in executing the verdict failed to yield tangible results, primarily due to restricted procedural authority, bureaucratic obstacles, and the lack of a definitive oversight mechanism for enforcing child custody orders.

A similar circumstance occurred in case number 0498/Pdt.G/2013/PA.JS, which progressed to the review stage with Supreme Court Decision number 15 PK/Ag/2018. The court rendered a definitive ruling granting the right of *ḥadānah* to the mother. Nonetheless, the kid remains in the physical custody of the father, who fails to execute the ruling. The execution of custody cannot proceed owing to the absence of procedural legal mechanisms that explicitly govern the enforcement of judgements concerning non-material entities, such as children. Law enforcement officers are hindered in their actions owing to the lack of a technological regulatory framework that permits legal, quantifiable, and humane child adoption.

This sequence of instances illustrates that in the realm of religious justice, the matter of child custody post-divorce extends beyond the determination of rights by a court ruling, confronting intricate legal challenges throughout the execution of the judgement. A court ruling with enduring legal authority does not inevitably accompany the transfer of physical custody of the child to the appointed caretaker, particularly where the non-prevailing party is unwilling to comply with the judgement freely.

Indonesia and Malaysia were selected for comparison because to their shared reliance on Islamic family law as the normative foundation for post-divorce child custody arrangements, together with their acknowledgment of the child's best interest as a judicial factor. The resemblance between the two countries lies in their adherence to corresponding Islamic values, particularly through the concept of *ḥadānah*, which in Islamic family jurisprudence seeks to safeguard the welfare of children as part of the protection of the soul (*hifż al-nafs*) and the preservation of progeny (*hifż al-nasl*). Nonetheless, the transposition of these ideals into an effective legal framework reveals notable disparities, particularly in the institutional architecture of the court, the interplay between substantive standards and procedural law, and the mechanisms for enforcing custody determinations. Analyzing this discrepancy is crucial to evaluate whether the idea of child protection in Islamic family law is completely actualized, both in the establishment of rights and in the practical implementation of child protection. The comparison between Indonesia and Malaysia serves to examine how identical normative Islamic ideals might yield divergent juridical outcomes when implemented inside disparate legal frameworks and judicial processes.

In contrast, Malaysia governs post-divorce child custody under an Islamic family law framework that is incorporated into the national legal system. The Malaysian legal system

integrates Sharia law with Common Law, hence conferring distinct normative and institutional legitimacy onto the authority of the Shariah Court in family matters. The Islamic Family Law (Federal Territories) Act 1984 specifically mandates that the assessment of child custody must include the child's age, gender, and emotional requirements, as outlined in Article 81 (Yusoff et al., 2019).

Moreover, Malaysian Islamic family law rigorously governs the execution of child custody determinations. Article 121 of the statute empowers the Sharia Court to request the aid of law enforcement personnel in executing the ruling. Child protection is further reinforced by Article 83, which permits psychiatric evaluation and support from family counsellors, and Article 122, which imposes criminal penalties on those who fail to adhere to court rulings. The merger of Sharia law and national law is endorsed by the Federal Constitution of Malaysia, allowing the Sharia Court to exercise its jurisdiction in conjunction with other legal entities (Maryam Talatu Umar & Halima Ibrahim Bature, 2024).

This principle is shown in the case of Rosmah binti Mohamad v. Abdul Rahman bin Hussein, when the Shariah Court awarded custody to the mother and mandated the police to enforce the ruling when the father failed to adhere to the judgement (Ainur Qistina Binti Shamsudin et al., 2019). This case demonstrates that the notion of the child's best interest in Malaysia is consistently implemented from the decision to the execution of child custody.

The disparity in the regulation and application of the concept of the best interest of the child between Indonesian and Malaysian Islamic family law reveals distinct juridical ramifications for the execution of post-divorce child custody. Indonesia has shown normative enhancement in the determination of rights via the recent KHI and SEMA, but Malaysia has exhibited integration between the determination and execution of custody within a unified Islamic family law framework. This research is novel due to its comparative analysis that situates the principle of the best interest of the child within the context of Islamic family law, investigating the correlation between normative frameworks and the execution of post-divorce child custody in Indonesia and Malaysia, a topic insufficiently addressed in prior studies.

The issues addressed in this research are: (1) In what manner does the regulation and implementation of the concept of the best interest of the child in Islamic family law relate to the safeguarding of post-divorce child custody in Indonesia and Malaysia? What are the consequences of the disparities in the legislation and application of the concept of the best interest of the child for the implementation of post-divorce child custody in Indonesia and Malaysia?

## Literature Review

Books concerning the ideas. This idea has long served as the primary framework for child protection across the world, as shown in *The Best Interest of the Child*. This notion takes into account the child's complicated emotional and psychological demands in addition to their physical health, say Freymond and Cameron. But when applied internationally, this idea is often thwarted by disparities in legal systems and fundamental cultural norms. (Cameron & Freymond, 2006).

Jasser Auda, a prominent contemporaneous figure, significantly contributed to the development of the *maqāṣid al-sharī‘ah* theory by introducing a systems approach to the interpretation of Islamic law (Ramlah & Rahajeng, 2025). Auda condemned the traditional *maqāṣid* method for its rigidity and hierarchical structure, arguing that it fails to address the complexities of contemporary humanitarian issues. Islamic law is seen as a cohesive entity that systematically encompasses the interplay of norms, institutions, law enforcement agents, and social circumstances. In this context, safeguarding fundamental values—such as the preservation of life (*hifz al-nafs*) and lineage (*hifz al-nasl*)—requires not only the formulation of substantive rules but also the implementation of robust institutional and procedural processes. Auda's perspective broadens the interpretation of *ḥadānah* beyond just defining custody to the legal system's duty to provide genuine child safety. Consequently, the principle of the child's best interest in Islamic family law can be perceived as a modern embodiment of *maqāṣid al-sharī‘ah*, not merely as an assimilation of an external concept, but also as an analytical framework to evaluate the capacity of the legal system to convert the normative safeguarding of the child into enduring juridical practice. For example, this notion often clashes with the childcare norms of

religious and customary law in Indonesia. This view is shared by Aziz, who highlighted that although Law No. 16 of 2019 has made an effort to include the concept, there are still significant hurdles to its implementation, including a lack of enforcement and supervision procedures (M. Anwar & Wijaya, 2019).

The *maṣlahah mursalah* framework offers a normative basis for the state's proactive role in executing and enforcing child custody rulings. According to Islamic law, state intervention through execution mechanisms, authority involvement, or sanctions for non-compliance is not perceived as an infringement of parental rights, but rather as a means to avert greater harm to children, who are considered vulnerable parties. Yusuf al-Qaradawi asserted that public *maṣlahah* may supersede private interests in safeguarding vulnerable populations, particularly children (Malek et al., 2024). Therefore, enhancing the framework for executing custody judgments aligns with Sharia principles, since it guarantees that child protection extends beyond normative rights to practical implementation. This paradigm provides an analytical foundation for evaluating the capacity of Islamic family law systems in Indonesia and Malaysia to translate *maqāṣid al-shari‘ah* into tangible, enforceable legal practices.

*Hadalah*, an element of Sharia law, is essential to post-divorce parenting within Islamic jurisprudence. Yusuf Qardhawi asserts that a mother maintains her right to custody of her child under Hashanah until the child attains a certain age, provided she does not forfeit her eligibility (Kahar & Zin, 2011). Malaysia, a nation with a more systematic incorporation of Sharia law into its legal framework, often use this concept. Zainuddin said that Malaysia had successfully assimilated global concepts in this domain. Articles 81 and 83 of the Islamic Family Law of the Federal Territories 1984 integrate Islamic law with more rigorous provisions to safeguard the child's best interest (Shariff, 2018). In instances when parents are in conflict, Sharia law may or may not effectively settle the issue and fulfil the emotional and psychological needs of the child.

Conversely, child custody disputes pose significant enquiries into the theory behind the execution of court decisions. Fuller asserts that the clarity of regulations and the effectiveness of enforcement are essential to a healthy legal system (Quinn, 2015). This thesis posits that Indonesia has a significant deficiency: a lack of a robust mechanism to penalise individuals who violate child custody decrees. The outcome is that the court's decision is only declarative and without practical consequence. According to Article 121 of the Islamic Family Law, Malaysia has implemented more pragmatic approaches for executing this process, including police assistance.

Comparative law theory offers a valuable framework for assessing and understanding differences in the implementation of laws between countries. Zweigert and Kötz assert that national legal systems may gain from comparative laws, since they facilitate the recognition of best practices and the customisation of laws to particular settings (Muhtar, 2023). This study contrasts Indonesia and Malaysia, revealing that although both countries uphold the same fundamental principle—the Best Interest of the Child—significant discrepancies exist in the implementation of legislation and the enforcement of sanctions. According to Article 122 of their law, Malaysia has shown remarkable proficiency in enforcing severe penalties on parties who do not adhere to the ruling, although Indonesia persists in encountering challenges in this domain.

Prior research on child custody and post-divorce protection has mostly concentrated on legislative advancements and policy modifications. Yuningsih underscores the significance of explicit requirements in child protection legislation (Yuningsih, 2016). Nevertheless, the current literature has inadequately explored the application of the best interest of the child concept within Islamic family law, specifically regarding the interplay between normative regulation and judicial practice, especially in a comparative analysis of Indonesia and Malaysia. This difference highlights the need of a normative-comparative study that contextualises child custody within Islamic family law while assessing its legal ramifications in both countries.

## Method

This study utilizes a normative legal research methodology (Ali, 2021), using a comparative and doctrinal approach to analyze the regulation and implementation of post-divorce child

custody under Islamic family law in Indonesia and Malaysia. The study not only analyzes legislative standards but also assesses their implementation and legal ramifications through the lens of Islamic legal theory and constitutional principles of child protection.

The study employs a theoretical framework based on Islamic legal theories, namely *maqāṣid al-sharī‘ah*, focusing on *hifz al-nafs* (protection of the child's life and well-being) and *hifz al-nasl* (protection of lineage and continuation of care). These principles serve as normative standards to evaluate whether post-divorce child custody agreements and their implementation really prioritise the child's best interest. The concepts of *ḥadānah* and *wilāyah* are employed to analyze the allocation of custodial authority and responsibility within Islamic family law, whereas *maṣlahah mursalah* is utilized to assess judicial discretion in addressing legal voids, especially in the implementation of custody rulings.

Primary legal texts include legislative rules, collections of Islamic law, and court rulings from Indonesia and Malaysia. The study in Indonesia centers on Law Number 16 of 2019, the Compilation of Islamic Law, and Supreme Court Circular Letters pertaining to child custody. The principal sources in Malaysia are the Islamic Family Law (Federal Territories) Act 1984 and pertinent Shariah Court rulings. Judicial judgments are examined not just as legal sources but also as reflections of legal practice, particularly with the enforcement of child custody decrees.

Secondary legal resources include academic publications, peer-reviewed international journals, and comparative law literature pertaining to Islamic family law and child protection. The data are analyzed using a descriptive-analytical and evaluative method, facilitating the discovery of parallels and variations between the two legal systems, especially concerning the link between custody determination and enforcement mechanisms.

The comparative study is organized into three main dimensions: (1) the normative framework of child custody under Islamic family law; (2) judicial interpretation of the best interest of the child principle; and (3) the legal ramifications of custody enforcement or non-compliance. This research evaluates how varying legal frameworks provide different juridical consequences for post-divorce child custody protection in Indonesia and Malaysia.

## 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 (*ḥadānah*), 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.

*Hadahah* is the cornerstone of Islamic law and the basis for the Best Interest of the Child principle. In Islam, women are often granted the right and duty of childcare, known as *Hadahah*, until their child reaches a certain age, as long as the mother continues to fulfil the qualifying requirements. According to the hadith of the Prophet Muhammad (peace be upon him) that was passed down by Abu Dawud:

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرِو، أَنَّ امْرَأَةً قَالَتْ: يَا رَسُولَ اللَّهِ إِنَّ ابْنِي هَذَا كَانَ بَطْنِي لَهُ وَعَاءً، وَثَدِّي لَهُ سِقَاءً، وَحَجْرِي لَهُ حِوَاءً، وَإِنَّ أَبَاهُ طَلَقِي وَأَرَادَ أَنْ يَنْتَزِعَهُ مِنِّي، فَقَالَ لَهَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي

Translation: From Abdullah bin Amr, a woman said, "O Messenger of Allah, this child of mine used to be in my belly as his dwelling, the milk in my chest became his drink, and my lap became his refuge. However, his father divorced me and wanted to take it from me." The Prophet PBUH said, "You have more rights to it as long as you are not married again." (HR. Abu Dawud, No. 2276).

In addition, the Qur'an also provides important guidance on child protection. Surah Al-Baqarah Verse 233

وَالْوَالِدَاتُ يُرْضِعْنَ أُولَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ إِنْ أَرَادَ أَنْ يُتَمَّ الرَّضَاعَةُ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ  
وَكِسْنُوْنَهُنَّ بِالْمَعْرُوفِ لَا تُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةُ بِوَلْدِهَا وَلَا مَوْلُودُ لَهُ بِوَلْدِهِ وَعَلَى  
الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضِيْمِهِمَا وَتَشَاؤِرِ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ  
تَسْتَرْضِعُوا أُولَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَمْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا  
تَعْمَلُونَ بَصِيرٌ

It means: "Mothers should breastfeed their children for two full years, that is, for those who

want to perfect breastfeeding. And fathers must feed and clothe mothers properly. A person is not burdened, but according to their level of ability. Let not a mother suffer misery for her child, and a father for her child, and the heirs are obliged to do so. If the two want to wean by agreement and consultation between the two, then there is no sin on either. And if you want your child to be breastfed by someone else, then there is no sin for you if you give the payment you deserve. Fear Allah and know that Allah is Seeing what you are doing."(Surah Al-Baqarah Verse 233, n.d.)

#### Surah An-Nisa Verse 9

"وَلِيَحْسَنَ الَّذِينَ لَوْ تَرَكُوا مِنْ خَلْفِهِمْ ذُرِّيَّةٌ ضِعَافًا خَافُوا عَلَيْهِمْ فَلَيَقُولُوا قَوْلًا سَدِيدًا"

It means: "And fear Allah those who should leave behind them weak children, whom they fear for their (welfare). Therefore, let them fear Allah and let them speak the right words."(Surah An-Nisa' Verse 9, n.d.)

The Best Interest of the Child concept is well-grounded in Islamic law; nonetheless, local customs and cultural norms in Indonesia sometimes conflict with its application. Because of his position as breadwinner, some indigenous tribes immediately grant paternity to the father, regardless of the child's best interests. In such cases, traditional values and contemporary legal standards clash, which is bad for the kid. To some extent, the Best Interest of the Child concept has found a home in Indonesian law, but there are still many roadblocks to putting it into practice. Among these difficulties are voids in the law, insufficient enforcement mechanisms, and the weight of cultural and religious standards, which may run counter to contemporary values.

The Indonesian model illustrates a legislative framework in which the Best Interest of the Child concept primarily operates during the judicial deliberation stage rather than during implementation. Judges frequently reference child welfare and *maqāṣid*-based reasoning in custody decisions; however, the lack of a specific enforcement framework—especially the dependence on general civil procedure law for non-material entities like children—leads to what can be termed as declarative protection. This paradigm dictates that child custody decisions provide legal rights without ensuring physical transfer or adherence. This disparity highlights a structural deficiency in Indonesian Islamic family law, whereby the safeguarding of the kid is normatively robust while procedurally inadequate.

#### 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-sharī'ah*, namely *hifz al-nafs* and *hifz 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
<b>Main Legal Basis</b>	<ul style="list-style-type: none"> <li>- Law No. 16 of 2019 (Amendment of the Marriage Law)</li> <li>- Law No. 35 of 2014 (Amendment of Child Protection Law)</li> <li>- Law No. 4 of 1979 (Child Welfare)</li> </ul>	<ul style="list-style-type: none"> <li>- Islamic Family Law Act (Federal Territories) 1984 (Muslim)</li> <li>- Law Reform (Marriage and Divorce) Act 1976 (Non-Muslim)</li> </ul>
<b>Position of the Best Interest of the Child Principle</b>	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.
<b>Custody Determination Framework</b>	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
<b>Integration with Islamic Family Law (Haqānah)</b>	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.
<b>Judicial Authority in Custody Matters</b>	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.
<b>Execution of Custody Judgments</b>	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).
<b>Sanctions for Non-Compliance</b>	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).
<b>Role of Social Institutions</b>	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.
<b>Influence of Religion and Culture</b>	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.
<b>Illustrative Judicial Practice</b>	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**

In contemporary family law discourse, the idea of the best interest of the child is now seen not only as a normative baseline for judicial deliberation, but as a criterion of fairness that necessitates genuine safeguarding of the child. Numerous studies indicate that the normative acknowledgement of this concept often exceeds the actual protection provided when judicial rulings lack sufficient enforcement measures. The seminal research by Mnookin and Kornhauser illustrates that judicial rulings in familial conflicts often serve as a formal structure that is subsequently renegotiated by the parties involved. Under these conditions, the most vulnerable parties, especially children, are at danger of failing to get adequate protection, despite being legally recognized as objects of primary interest (Mnookin & Kornhauser, 1979).

Within the framework of modern Islamic family law, the notion of the child's best interests is progressively examined via the *maqāṣid al-sharī'ah* perspective. This methodology asserts that child protection is not an external idea derived from Western law, but is instead aligned with the essential tenets of sharia, namely the safeguarding of the soul (*hifz al-nafs*) and the preservation of progeny (*hifz al-nasl*). Jasser Auda asserts that the attainment of *maqāṣid* ideals requires more than only establishing substantive rules, as shown by the systems approach. This protection necessitates the integration of legal norms, judicial institutions, and implementation mechanisms that enable the successful application of sharia principles in practice (Jasser Auda, 2008).

This perspective aligns with the views of Yusuf al-Qaradawi, who regards Islamic law—particularly in the context of *as-siyāsah as-sharī'iyah*—as a dynamic, moderate, and contextual framework for *mu'amalāt*. Al-Qaradawi said that Shari'a was not merely revealed to create ideal ideals, but to regulate human existence in practical terms via the lawful institutions and power of the state. Consequently, the state serves as a crucial mechanism for upholding justice and safeguarding vulnerable populations, particularly children, to ensure advantages and avert societal harm.

al-Qaradawi's idealistic, flexible, and practical approach demonstrates that the adaptability of Islamic law is warranted when aimed at safeguarding and promoting welfare. The concepts of

limiting damage (*taqlīl ash-shar*) and selecting lesser risks (*irtikāb akhaff ad-dararayn*) form the foundation for the legality of state institutional involvement when the interests of vulnerable groups are at risk. In this context, child protection extends beyond the normative establishment of custody; it necessitates the proactive obligation of the state to guarantee that such protection is tangibly implemented via efficient legal and institutional frameworks (Sudarto, 2021).

This paper situates the comparison between Indonesia and Malaysia within the worldwide discourse and theoretical framework of Islamic law, contributing to the academic discussion over the enforcement gap in child custody protection. Indonesia has shown robust normative acknowledgement of the notion of the best interests of children within Islamic family law, as evidenced by its legislation, regulations, and judicial practices. Nonetheless, this acknowledgement has not been thoroughly included in the decision implementation process, resulting in child protection remaining mostly at a declarative level. Conversely, the Islamic family law framework in Malaysia demonstrates a more methodical approach to associating custody decision with the enforcement mechanism and the repercussions of non-compliance. This difference affirms that child protection is not merely contingent upon the acknowledgement of the concept, but rather on the capacity of the legal system to convert the principles of the child's best interests into a legally enforceable procedural framework.

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

Indonesian Islamic family law regulates post-divorce child custody by normatively acknowledging the principle of the child's best interest, as articulated in Law Number 16 of 2019, the Compilation of Islamic Law (KHI), and the directives issued by the Supreme Court via the Supreme Court Circular. Nevertheless, in the execution of religious justice, the application of this concept reveals specific legal ramifications, particularly during the enforcement of child custody decisions. This conclusion stems not from a lack of norms, but from the distinction between the judicial determination of rights and the enforcement of decisions in procedural law practice.

Article 105 of the KHI normatively delineates custody criteria according to the child's age and the notion of *mumayyiz*, subsequently reinforced by SEMA Number 1 of 2017 and SEMA Number 1 of 2025, which underscore the proactive involvement of judges in adjudicating *ḥadānah* in accordance with the principle of the child's best interests, despite the absence of explicit requests from the parties involved. Nevertheless, the regulation emphasises the determination of rights, whilst the execution of the judgement remains governed by the overarching civil procedure legal framework.

The legal ramifications of this concept are evident in the declarative nature of the child custody ruling. A court ruling formally confers custody rights over the kid; nevertheless, the actual transfer of physical custody may not occur if the losing party is unwilling to comply with the judgement freely. Under these circumstances, the legal system lacks an execution mechanism tailored for non-material entities, such as children, rendering the enforcement of the judgement contingent upon the parties' consent.

Diverse religious judicial decisions have a consistent pattern. The 2017 Cibinong Religious Court ruling in the matter of Tsania Marwa and Atalarik Syah granted maternal custody; nevertheless, the implementation occurred just once and failed due to the father's reluctance and the child's opposition. Subsequent to the failure, there exists no legal recourse available to the court to guarantee the enforcement of the judgement. In the Decision of the Martapura Religious Court Number 342/Pdt.G/2020/PA. Mtp and the South Jakarta Religious Court Decision Number 0498/Pdt.G/2013/PA.JS, in conjunction with the Supreme Court Decision Number 15 PK/Ag/2018, the rights of *ḥadānah* have been conferred to the mother; however, the child remains under the physical custody of the father due to the lack of procedural legal mechanisms that facilitate the execution of the judgement in a measured and humane manner.

The inability to enforce child custody rulings in several instances in Indonesia—including the Tsania Marwa case and the Martapura Religious Court Decision Number 342/Pdt.G/2020/PA. Mtp, along with practices in the South Jakarta Religious Court—demonstrates a disparity between the legal adjudication of custody and the actual safeguarding of children in societal contexts. In these verdicts, courts have predominantly prioritized the best interests of the child as the

foundational criterion for determining custody (*ḥadānah*). Nonetheless, when the decision lacks an adequate implementation mechanism, child protection remains at the normative level and fails to translate into tangible protection.

From the standpoint of Islamic jurisprudence, this scenario may be seen via the lens of *maṣlaḥah mursalah*, which prioritizes the mitigation of injury as a fundamental aspect of legal policy. Yusuf al-Qaradawi said that in the domains of *mu‘āmalāt* and *as-siyāsah as-shar‘iyyah*, governmental negligence is not neutral if it facilitates increased detriment to the weak. Accordingly, Jasser Auda's systemic approach to *maqāṣid al-sharī‘ah* demonstrates that safeguarding fundamental sharia values necessitates more than merely establishing substantive norms; it requires integrating norms, institutions, and mechanisms for legal implementation.

This research indicates that child protection under Indonesian Islamic family law primarily functions as custody protection, characterised as declaratory justice, which confines itself to the legality of choices. Unlike the Islamic family law framework in Malaysia, which associates custody decisions with coercive processes and legal repercussions, the Indonesian system depends on the normative authority of judgments without sufficient institutional backing. Consequently, the concept of the child's best interest may be reduced to a mere normative symbol if it lacks an accompanying implementation mechanism that facilitates successful child protection.

SEMA Number 5 of 2022 stipulates that the enforcement of child custody may be deemed unenforceable or non-executable if the child declines or is unable to be presented. This provision indicates that the kid's wishes are a significant consideration in the execution of the decision, while simultaneously highlighting the constraints of procedural law in ensuring the transfer of physical custody of the child. Consequently, the legal meaning that emerges is the distinction between the judicial legitimacy of the ruling and its factual validity.

The disparity in legal ramifications becomes more evident when contrasted with Malaysia. The Islamic Family Law (Federal Territories) Act 1984 in Malaysia's Islamic family law framework governs child custody criteria and associates court rulings with explicit legal repercussions for non-compliance, encompassing state official involvement and criminal penalties. Consequently, child custody determinations within the Malaysian legal framework extend beyond mere declarations, possessing enforceable legal ramifications in instances of non-compliance with the judgement.

The disparities in normative and procedural frameworks result in varying legal implications for the safeguarding of post-divorce child custody. In Indonesia, the principle of the child's best interest serves as the foundation for judicial deliberation regarding rights; however, its application during implementation remains constrained by the nature of civil procedure law, which lacks specific regulations governing the enforcement of child custody. In Malaysia, the convergence of judgement determination and execution under Islamic family law fosters a stronger connection between the premise of the child's best interests and the legal repercussions of non-compliance with court rulings.

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

Aspects	Regulation	Implementation Practices	Juridical Implications
<b>Guidelines Determination of Custody</b>	UU 16/2019, Pasal 105 KHI, 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.
<b>Execution Mechanism</b>	General procedure law	civil Executions frequently remain unfulfilled.	A verdict is definitive in the absence of Sukarel compliance.

Aspects	Regulation	Implementation Practices	Juridical Implications
<b>The Role of Children's Will</b>	SEMA 5/2022	Children's refusal → execution cannot proceed	The child's autonomy is a constraint on the execution of the decision.
<b>Involvement of the Apparatus</b>	Not specially set	The authorities failed to take action.	Constraints of procedural authority
<b>Non-Compliance Sanctions</b>	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 study reveals that the implementation of the Best Interest of the Child concept in Islamic family law is not legally neutral; rather, it is significantly influenced by the normative and procedural framework of the surrounding legal system. While Indonesia and Malaysia both acknowledge the idea as foundational for safeguarding post-divorce child custody, our analysis demonstrates that the same principle yields substantially distinct legal outcomes. The distinction is not in the degree of normative acknowledgment, but in the manner in which the law delineates the link between the ascertainment of rights and the execution of the judgment.

In the Indonesian setting, the concept of the Best Interest of the Child mostly functions during custody determinations by the court, without a procedural mechanism explicitly established to guarantee the execution of the judgment. Consequently, custody protection as declarative justice refers to a kind of justice that culminates in formal legal acknowledgment but fails to ensure the real transfer of child custody in instances of non-compliance. This circumstance reveals a stark distinction between the normative legality of the choice and its practical juridical efficacy, resulting in the best interests of the child being safeguarded only at the declaratory level, rather than the operational one.

Conversely, the Islamic family law system in Malaysia has a distinct design. The idea of the Best Interest of the Child serves not only as a foundation for substantive considerations in custody determinations but is also directly incorporated into the mechanisms for executing judgments and legal punishments. Within this framework, child custody protection is defined as enforceable justice, wherein the normative determination of custody is accompanied by legal consequences that can be enforced through court authority, the participation of state officials, and the potential for sanctions against non-compliant parties. The integration bridges the divide between the establishment of rights and the implementation of child protection.

The disparity in construction can be normatively elucidated via *maqāṣid al-sharī‘ah*, specifically the safeguarding of the soul (*hifz al-nafs*) and the preservation of progeny (*hifz al-nasl*), necessitating that the protection of child custody extends beyond normative stipulations and is actualized through a legal framework that ensures the tangible welfare of the child.

## References

Ainur Qistina Binti Shamsudin, Lynnefra Yomin, Nur Syahindah Binti Shamsul Azman, & Nurul A'tikah Binti Rusli. (2019). *Case Review—LAW 605: FAMILY LAW I*. <https://www.studocu.com/my/document/universiti-teknologi-mara/islamic-family-law/family-law-case-review/8608830>

Ali, Z. (2021). *Metode Penelitian Hukum*. Sinar Grafika.

Anwar, M., & Wijaya, M. R. (2019). Fungsionalisasi dan Implikasi Asas Kepentingan Terbaik Bagi Anak yang Berkonflik dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang. *Undang: Jurnal Hukum*, 2(2), Article 2. <https://doi.org/10.22437/ujh.2.2.265-292>

Anwar, S. (2016). FERTILISASI IN VITRO DALAM TINJAUAN MAQĀSID ASY-SYARĪ'AH. *Al-Ahwal: Jurnal Hukum Keluarga Islam*, 9(2), 139–156. <https://doi.org/10.14421/ahwal.2016.09201>

Arnab, A. T., & Siraj, M. S. (2020). Child marriage in Bangladesh: Policy and ethics. *Bangladesh Journal of Bioethics*, 11(1), 24–34.

Aziz, N. A., Ibrahim, I., & Hussin, M. N. M. (2019). HARTA SEPENCARIAN/ASET PERKAHWINAN BAGI PEMBUBARAN PERKAHWINAN DI BAWAH SEKSYEN 51 AKTA MEMBAHARUI UNDANGUNDANG (PERKAHWINAN DAN PERCERAIAN) 1976 SERTA AKTA UNDANG-UNDANG KELUARGA ISLAM (WILAYAH-WILAYAH PERSEKUTUAN) 1984: Matrimonial Asset for Couple to the Dissolution of Marriage Under Section 51 of The Law Refoem Act (Marriage and Divorce) Act 1976 and Islamic Family Law (Federal Teritories) 1984. *Journal of Shariah Law Research*, 4(1), Article 1. <https://doi.org/10.22452/JSLR.vol4no1.1>

Bakarbessy, L., & Anugerah, D. P. (2018). Implementation of the Best Interests of the Child Principles in Intercountry Adoption in Indonesia. *Yuridika*, 33(1), 73–92. <https://doi.org/10.20473/ydk.v33i1.7202>

Cameron, G., & Freymond, N. (2006). *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service, and Community Caring Systems*. University of Toronto Press.

D'Onofrio, B., & Emery, R. (2019). Parental divorce or separation and children's mental health. *World Psychiatry*, 18(1), 100–101. <https://doi.org/10.1002/wps.20590>

Harisudin, M. N., & Choriri, M. (2021). On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 5(1), Article 1. <https://doi.org/10.22373/sjhk.v5i1.9159>

Idris, A. R., Khusaini, M., & Al-Mansyuri, S. A. (2024). Contemporary Islamic Law in Indonesia: The Fulfillment of Child Custody Rights in Divorce Cases Caused by Early Marriage. *MILRev: Metro Islamic Law Review*, 3(1), Article 1. <https://doi.org/10.32332/milrev.v3i1.8907>

Jasser Auda. (2008). *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*. International Institute of Islamic Thought (IIIT). <https://iiit.org/en/book/maqasid-al-shariah-as-philosophy-of-islamic-law-a-systems-approach/>

Kahar, R., & Zin, N. M. (2011). Child related policy and legislative reforms in Malaysia. *International Journal of Social Policy and Society*, 8, 6–36.

Mahkamah Agung RI. (2022, July 28). *MAHKAMAH AGUNG DAN FCFCOA GELAR DISKUSI TENTANG HAK PEREMPUAN DAN ANAK PASCA PERCERAIAN*. <https://www.mahkamahagung.go.id/id/berita/5317/mahkamah-agung-dan-fcfcoa-gelar-diskusi-tentang-hak-perempuan-dan-anak-pasca-perceraian>

Malek, M. A.-G. A., Samuri, M. A. A., Ramadhita, R., & Vargholy, M. N. (2024). Child Marriage Discourse According to al-Qaradawi's Fiqh Methodology. *Islamiyyat - The International Journal of Islamic Studies*, 46(1), 3–14. <http://ejournal.ukm.my/islamiyyat/article/view/73165>

Maryam Talatu Umar & Halima Ibrahim Bature. (2024). An Assessment of Women and Modernity: The Predicaments of Muslim Women in Religious and Social Life and their Prospect from Qur'anic Point of View. *IAR Journal of Humanities and Social Science*, 3(2). <https://doi.org/10.47310/iarjhss.2022.v03i02.005>

Mehmood, M. I. (2016). Judicial Separation at the Wife's Initiative: A Study of Redemption (Khul')in Islamic Law and Contemporary Legislation in Pakistan and Malaysia. *Journal of Civil & Legal Sciences*, 05(06). <https://doi.org/10.4172/2169-0170.1000212>

Mera, N., Marzuki, M., B, M. T., Sapruddin, S., & Cahyani, A. I. (2024). Child Custody Rights for Mothers of Different Religions: Maqāṣid al-Shari‘ah Perspective on Islamic Family Law in Indonesia. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 8(3), 1645–1668. <https://doi.org/10.22373/sjhk.v8i3.23809>

Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the Shadow of the Law: The Case of Divorce. *The Yale Law Journal*, 88(5), 950–997. <https://doi.org/10.2307/795824>

Moustafa, T. (2018). *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*. Cambridge University Press.

Muhtar, M. H. (2023). Sistem Pemerintahan Indonesia. *Hukum Tata Negara: Konsep Dan Teori Global Eksekutif Teknologi*.

Quinn, M. (2015). Fuller on Legal Fictions: A Benthamic Perspective. In M. Del Mar & W. Twining (Eds), *Legal Fictions in Theory and Practice* (pp. 55–82). Springer International Publishing. [https://doi.org/10.1007/978-3-319-09232-4\\_4](https://doi.org/10.1007/978-3-319-09232-4_4)

Ramlah, & Rahajeng, C. T. (2025). Studi Analisis Konsep Maqāṣid Al-Syarī‘ah Jasser Auda dan Relevansinya dengan Hukum Islam Kontemporer. *Santara: Journal of Islamic Law and Humanity*, 1(1), 25–37. <https://doi.org/10.59373/santara.v1i1.128>

Sahid, M. M., Hashim, H., Ismail, W. A. F. W., & Hasan, B. M. M. (2025). Harmonization of Local Customs with Maqasid Syariah in the Formation of Islamic Family Law in Malaysia. *International Conference on Islamic Economics (ICIE)*, 2, 77–88. <https://proceeding.uingusdur.ac.id/index.php/icie/article/view/2876>

Shariff, S. H. (2018). *The Application of the Best Interests of the Child Principle as a Criterion for Fulfilling Malaysia's Convention on the Rights of the Child Obligations: A Comparative Study Between Malaysia's Child Act 2001 and the English Children's Act 1989 Including the Common Law and Shari'ah Law Applications in the Respective Jurisdictions* [Phd, University of Kent,]. <https://kar.kent.ac.uk/66815/>

Sudarto, S. (2021). FIKIH BERNEGARA DALAM PEMIKIRAN YUSUF AL-QARADAWI. *Profetika: Jurnal Studi Islam*, 18–39. <https://doi.org/10.23917/profetika.v22i1.14778>

Surat Al-Baqarah Ayat 233: Arab, Latin, Terjemah dan Tafsir Lengkap | Quran NU Online. (n.d.). Retrieved 2 February 2025, from <https://quran.nu.or.id/al-baqarah/233>

Surat An-Nisa' Ayat 9: Arab, Latin, Terjemah dan Tafsir Lengkap | Quran NU Online. (n.d.). Retrieved 2 February 2025, from <https://quran.nu.or.id/an-nisa/9>

Yasardin. (2025, March 19). *Praktik Perlindungan Pemenuhan Nafkah bagi Mantan Istri dan Anak Pasca Perceraian di Indonesia* [Webinar]. Webinar Internasional Mahkamah Agung Republik Indonesia, Mahkamah Syar'iyah Brunei Darussalam, dan Mahkamah Syar'iyah Malaysia.

Yuningsih, D. (2016). The Best Interest of Child Principle for Protection on Rights' Children of Judge Decision in Indonesia Legal System. *Journal of Law, Policy and Globalization*, 54, 87.

Yusoff, R. C. S. @, Afandi, N. H. M. B., Hashim, N. M., & Hak, N. A. (2019). Protecting the Children's Right to Nationality in Malaysia: An Appraisal. *International Journal of Academic Research in Business and Social Sciences*, 9(6), Pages 358-368. <https://doi.org/10.6007/IJARBSS/v9-i6/5956>

Zin, N. M., Jani, H. M., Hamid, A. G., & Hak, N. A. (2019). JURISDICTIONAL CONFLICT IN INTERFAITH CHILD CUSTODY DISPUTES: A LEGAL DISCOURSE IN MALAYSIAN COURTS. *Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilisation (ISTAC)*, 24(1), Article 1. <https://doi.org/10.31436/shajarah.v24i1.851>



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