



Dynamics of Regulatory and Policy Changes in Child Custody in Indonesia and Malaysia: A Comparative Analysis in Responding to Modern Family Issues

Muhammad Azhad Al-Bohari*

¹ Universitas Sains Islam Malaysia (USIM), Malaysia

Abstract: This study discusses the dynamics of child custody policies in Indonesia and Malaysia in the face of modern family challenges, such as divorce, mixed marriages, single-parent families, and the increasingly dominant role of women. Both countries have legal system that combine civil law and religious law, which often create tensions in the implementation of child custody rights. The study analyzes the influence of globalization and international human rights standards, particularly the UN Convention on the Rights of the Child, on these policies, as well as the challenges in integrating international principles with domestic law. The research method used is a literature study with a comparative analysis, gathering data from journal, books, policy document, and relevant online sources regarding child custody regulations in Indonesia and Malaysia. The results show that although both countries have ratified the UN Convention on the Rights of the Child, its implementation still faces obstacles due to differences in legal system and social norms. In Indonesia, religious law is more dominant in determining child custody, while in Malaysia, there is a dual legal system between civil and sharia law. However, there are opportunities to strengthen child custody policies that are more inclusive and responsive to modern families by involving courts, social institutions, and the government. The study concludes that to ensure optimal child protection, both countries need to align their policies with international standards and be more sensitive to the social changes occurring within modern families.

Keywords: Child Custody Policy, Indonesia and Malaysia, Legal System, Modern Family.

Abstrak: Penelitian ini membahas dinamika kebijakan hak asuh anak di Indonesia dan Malaysia dalam menghadapi tantangan keluarga modern, seperti perceraian, perkawinan campuran, keluarga dengan orang tua tunggal, serta semakin dominannya peran perempuan. Kedua negara memiliki sistem hukum yang mengombinasikan hukum perdata dan hukum agama, yang dalam praktiknya kerap menimbulkan ketegangan dalam pelaksanaan hak asuh anak. Penelitian ini menganalisis pengaruh globalisasi dan standar hak asasi manusia internasional, khususnya Konvensi Perserikatan Bangsa-Bangsa tentang Hak-Hak Anak, terhadap kebijakan tersebut, serta tantangan dalam mengintegrasikan prinsip-prinsip internasional ke dalam hukum domestik. Metode penelitian yang digunakan adalah studi kepustakaan dengan analisis komparatif, dengan menghimpun data dari jurnal ilmiah, buku, dokumen kebijakan, serta sumber daring yang relevan terkait regulasi hak asuh anak di Indonesia dan Malaysia. Hasil penelitian menunjukkan bahwa meskipun kedua negara telah meratifikasi Konvensi Perserikatan Bangsa-Bangsa tentang Hak-Hak Anak, implementasinya masih menghadapi berbagai kendala akibat perbedaan sistem hukum dan norma sosial. Di Indonesia, hukum agama lebih dominan dalam penentuan hak asuh anak, sementara di Malaysia terdapat sistem hukum ganda antara hukum perdata dan hukum syariah. Namun demikian, terdapat peluang untuk memperkuat kebijakan hak asuh anak yang lebih inklusif dan responsif terhadap realitas keluarga modern melalui keterlibatan pengadilan, lembaga sosial, dan pemerintah. Penelitian ini menyimpulkan bahwa untuk memastikan perlindungan anak yang optimal, kedua negara perlu menyelaraskan kebijakan nasional dengan standar internasional serta lebih peka terhadap perubahan sosial yang terjadi dalam keluarga modern.

Kata Kunci: Indonesia dan Malaysia, Kebijakan Hak Asuh Anak, Keluarga Modern, Sistem Hukum.

Corresponding author:

Correspondence: Muhammad Azhad Al-Buhari*
Email: azhadsampi@gmail.com

Copyright:

© The Author (s). 2025 Open Access
[This is an open access article under the \(CC BY-SA 4.0\) license.](https://doi.org/10.70992/743j3e88)

How to cite this article:

Al-Buhari, M. A. (2025). Dynamics of Regulatory and Policy Changes in Child Custody in Indonesia and Malaysia: A Comparative Analysis in Responding to Modern Family Issues. *Journal of Islamic Mubādalah*, 2 (2). 135-156.
DOI: <https://doi.org/10.70992/743j3e88>

Introduction

Social changes that have occurred over the past few decades have had a significant impact on the structure and dynamics of families around the world, including in Indonesia and Malaysia (Fahrudin et al., 2022). Modern families, with variations such as mixed marriages, single-parent households, and the increasingly dominant role of women, present new challenges for the legal system and state policies (Mustofa, 2008). One issue that has emerged as a consequence of these changes is child custody, which has become increasingly complex and requires special attention in the context of modern families (Setiawati et al., 2023).

In Indonesia, policies and regulations regarding child custody have traditionally been based on national law that refers to religious legal principles, particularly within Muslim communities (Hadaiyatullah et al., 2024). Meanwhile, in Malaysia, which also has a Muslim-majority population, the legal system combines positive law with Islamic law, creating a unique dynamic in determining child custody (Ali & Puspita, 2023). Changes in child custody regulations and policies in both countries are not only influenced by domestic law but also by developments in social, economic, and cultural spheres (Hermanto et al., 2021).

However, both Indonesia and Malaysia continue to face various challenges related to child custody issues (Hamzah, 2018). In Indonesia, one of the main problems is the legal uncertainty in determining custody between divorced couples, particularly regarding conflicts between religious courts and civil courts (Masyhadi & Mahmudi, 2024). Several cases show that despite efforts to prioritize the best interests of the child, court decisions are often driven by subjective factors, such as the dominance of either the mother's or father's rights to make decisions (Azwar et al., 2024). Additionally, disparities in the application of the law to Muslim and non-Muslim families also pose issues that lead to injustice in several child custody cases (Puspitosari, 2014).

In Malaysia, similar issues arise due to the dual legal framework that combines Sharia law and civil law (HM et al., 2023). Incompatibilities between the two legal systems often cause confusion between Sharia court and civil court decisions regarding child custody, especially when one parent is not Muslim or when a couple divorces amicably. Research by Zakri (2024) indicates the existence of ambiguities in determining child custody in divorce cases involving religious differences or mixed marriages (binti Zakri, 2024). On the other hand, among Muslim families, child custody policies based on Islamic law do not always accommodate the needs of children in more complex family situations, such as single-parent households or families with non-traditional parental roles (Abdullah, 2024).

Previous studies have shown that although both countries have legal systems grounded in Islamic teachings, differences appear in their implementation, particularly in child custody cases. For instance, a study conducted by Tanjung (2021) revealed that in Indonesia, child custody policies after divorce are more influenced by decisions of religious courts, with a focus on fulfilling children's rights and protecting mothers as primary caregivers (Tanjung et al., 2021). On the other hand, research by Zakri (2024) on child custody in Malaysia shows a strong influence of the dual legal system a combination of Sharia and civil law which often creates uncertainty in determining child custody within Muslim families.

Despite the growing body of scholarship on child custody in Indonesia and Malaysia, existing studies tend to examine each jurisdiction in isolation or focus primarily on doctrinal legal analysis without sufficiently addressing the dynamic interaction between legal pluralism, policy change, and contemporary family realities. Previous research has highlighted the role of religious courts in Indonesia and the complexities arising from Malaysia's dual legal system; however, it remains limited in explaining how regulatory transformations respond to evolving family structures and how such responses shape judicial reasoning in custody disputes across both contexts. Consequently, a comparative and dynamic analysis that systematically

interrogates policy shifts, institutional practices, and their implications for child welfare remains largely absent. This study seeks to fill that gap by offering a comparative examination of child custody regulations and policy developments in Indonesia and Malaysia, with particular attention to how each legal system negotiates Islamic legal principles within modern socio-legal frameworks. The novelty of this article lies in its integrative approach, which not only compares formal legal norms but also elucidates the underlying policy rationales and their impact on the realization of children's welfare and justice within Muslim family law systems.

Although Indonesia and Malaysia share similarities in cultural and religious aspects, differences in legal systems and policy implementation make both countries interesting subjects for comparison in the context of child custody. A comparative study of child custody regulations and policies in these two countries can provide a deeper understanding of how each nation responds to the demands of modern families and how such responses affect legal decisions in child custody cases. Therefore, this study aims to analyze the dynamics of changes in child custody regulations and policies in Indonesia and Malaysia, as well as to compare the approaches taken by both countries in addressing issues within modern families. By understanding the differences and similarities in child custody policies, this research is expected to contribute to the formulation of better policies to ensure the welfare and justice of children within the family legal systems of both countries.

Method

This study adopts a qualitative research design focusing on the analysis of child custody regulations and policies in Indonesia and Malaysia in response to the dynamics of modern family structures. The qualitative approach was selected to enable an in-depth examination of legal norms, public policies, and implementation practices influenced by social, cultural, and legal factors. Rather than measuring variables statistically, this research aims to identify patterns, trends, and policy rationales within the context of evolving family conditions, including divorce, mixed marriages, and single-parent households.

The research employs a library-based research approach combined with comparative analysis. This approach facilitates a systematic comparison of child custody policies and legal frameworks in Indonesia and Malaysia two countries characterized by plural legal systems that integrate civil law and religious law. The selection of these countries is based on their shared socio-religious contexts and differing legal institutional arrangements, which allow for a comprehensive examination of how family law adapts to social change in distinct yet comparable settings.

The data sources for this study consist exclusively of secondary data obtained from authoritative written materials. Data collection was conducted through a structured review of peer-reviewed academic journals, legal textbooks, statutory regulations, relevant court decisions, government policy documents, and official publications issued by state institutions and international organizations, particularly those related to the United Nations Convention on the Rights of the Child. These documents were selected based on their normative authority and direct relevance to the formulation and implementation of child custody policies in both jurisdictions.

Data analysis was carried out using a qualitative interpretative technique through several stages, including thematic categorization of legal and policy materials concerning child custody, the interaction between religious and civil law, and the influence of international human rights standards. The data were then analyzed comparatively to identify similarities and differences between Indonesia and Malaysia and interpreted within their respective socio-legal contexts. This analytical process was designed to reveal policy challenges, adaptive strategies, and opportunities for strengthening child protection and parental equity within modern family systems.

Results

Child Custody (*Hadānah*) in the Perspective of Islamic Law

Within the framework of Islamic law, child custody is known as *hadānah*, a term etymologically derived from *haḍn*, meaning to embrace, nurture, and protect in close proximity. Terminologically, *hadānah* refers to the authority and responsibility to care for, nurture, educate, and safeguard a child who is not yet capable of independently managing his or her own affairs, whether physically, mentally, or spiritually. In Islamic jurisprudence, child custody is not understood merely as a parental right but rather as a *sharī'ah* obligation aimed at ensuring the fulfillment of the child's best interests (*maṣlaḥat al-tifl*). Classical jurists (*fuqahā'*) have consistently emphasized that *hadānah* constitutes an integral component of the protection of life (*hifz al-nafs*) and lineage (*hifz al-nasl*) within the framework of *maqāṣid al-syārī'ah*. Accordingly, its orientation is fundamentally protective and child-centered, prioritizing the welfare of the child over parental interests (Al-Zuhaylī, 1989; Al-Syātibī, 2003).

The implementation of child custody in Islam is governed by several fundamental principles. First is the principle of *al-maṣlaḥah al-‘ulyā' lil-tifl*, whereby the child's best interests constitute the primary consideration in determining custodial arrangements. Second is the principle of capacity and suitability (*al-ahliyyah wa al-kifā'ah*), which requires that the custodian possess adequate moral, physical, psychological, and spiritual competence to provide proper care. Third is the principle of compassion (*rahmah*) and protection, emphasizing the necessity of a nurturing, secure, and violence-free caregiving environment. Fourth is the principle of continuity in education and religious upbringing, ensuring balanced development while preserving the child's religious identity. In cases of divorce, the majority of Muslim jurists maintain that mothers hold priority custody rights over children who have not yet reached the stage of *mumayyiz*, provided no *sharī'ah* impediment exists. This position is grounded in the view that mothers tend to possess greater emotional proximity and capacity to meet children's fundamental needs during early developmental stages (Ibn Qudāmah, 1997; Nasution, 2018).

The normative foundations of child custody (*hadānah*) in Islam are firmly rooted in the Qur'an and the Prophetic traditions, both of which underscore parental responsibility for the protection, care, and overall well-being of children. One of the principal Qur'anic references is Qur'an, Sūrat *al-Baqarah* [2]: 233, which delineates parental obligations particularly those of mothers and fathers in the provision of care and the fulfillment of children's needs in a proportionate and balanced manner. This verse articulates a complementary distribution of roles, whereby maternal caregiving is recognized alongside paternal responsibility for material support, thereby affirming that child custody in Islam is a shared obligation grounded in justice, compassion, and responsibility. As such, *hadānah* emerges not merely as a private familial arrangement but as a normative legal institution aimed at safeguarding children's rights and welfare within the broader ethical framework of Islamic law. The Qur'an explicitly articulates the normative foundations of child caregiving and parental responsibility in Sūrat *al-Baqarah* [2]: 233:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُئْمِنَ الرَّضَاعَةً ۝ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ

Means: "Mothers are to breastfeed their children for two complete years, for those who wish to complete the period of nursing; and the father is obliged to provide their sustenance and clothing in an equitable and socially recognized manner."

This provision indicates that child caregiving constitutes a shared parental responsibility grounded in a complementary and proportionate division of roles. Mothers are positioned as primary caregivers during the early stages of a child's life, owing to their biological and emotional proximity, while fathers assume responsibility for financial provision and economic protection. Classical Qur'anic exegetes have argued that this verse extends beyond regulating breastfeeding practices and articulates the foundational principles of *hadānah*, namely the

comprehensive care and nurturing of children to ensure their optimal physical, emotional, and developmental well-being (Al-Tabarī, 2001; Al-Sabūnī, 2007). In addition, Sūrat *al-Tahrim* [66]: 6 constitutes a central normative basis for child protection within Islamic law:

يَا أَيُّهَا الَّذِينَ آمَنُوا قُوْا أَنفُسَكُمْ وَأَهْلِيْكُمْ تَأْرًا

Means: “O you who believe, safeguard yourselves and your families from the Fire.”

It underscores the parental obligation to protect the family, including children, not only from physical harm but also from moral, spiritual, and psychosocial degradation. Within the framework of *ḥadānah*, this verse establishes that child custody encompasses ethical education, religious formation, and sustained psychosocial protection. Importantly, this obligation is continuous in nature and does not cease as a consequence of marital dissolution between parents (Al-Qurtubī, 2006). The Prophetic traditions further reinforce these principles, particularly with regard to the prioritization of maternal custody for children who have not yet reached the stage of *mumayyiz*. The Prophet Muḥammad (peace be upon him) stated to a woman contesting custody of her child:

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تُنْكِحِي

Means: “You have a greater right to custody of the child so long as you do not remarry.”

(Reported by Abū Dāwūd)

This ḥadīth demonstrates that custody rights in Islam are determined primarily by the caregiver’s capacity to secure the child’s best interests, rather than by biological ties alone. Consequently, both the Qur’ān and the Prophetic traditions consistently conceptualize *ḥadānah* as a moral and legal obligation oriented toward the protection of children (*hifz al-nafs wa al-nasl*), thereby providing a normative foundation for the development of Islamic family law that is justice-oriented and explicitly attentive to the welfare of the child.

Emerging Patterns and Key Differences in Child Custody Policy Shifts between Indonesia and Malaysia

The dynamics of regulatory and policy changes regarding child custody in Indonesia and Malaysia are strongly influenced by social and cultural developments that have emerged alongside the rise of modern family structures (Ali & Puspita, 2023). Over the past few decades, both countries have experienced significant changes in family structure driven by globalization, urbanization, and social transformation. Modern family phenomena such as mixed marriages, single-parent households, and shifting gender roles within families have required adjustments in policies and regulations related to child custody (Clara & Wardani, 2020). As the traditionally patriarchal family structure begins to shift, legal systems in both countries must adapt to accommodate more complex social realities.

The first factor driving changes in child custody regulations is the increasing awareness of the protection of children’s rights and the best interests of the child. In Indonesia and Malaysia, there is strong encouragement from society and international institutions such as the United Nations to ensure that policies concerning child custody always prioritize the child’s welfare. This has contributed to a paradigm shift in court decision-making regarding child custody from previously being parent-oriented to focusing more on the needs and interests of the child. In addition, the push to ensure gender equality and women’s rights has also influenced policy changes in determining child custody, with greater recognition of the role of mothers as the primary caregivers (Asnawi & SHI, 2022).

Changes in family structure also significantly affect existing regulations and policies. The rise of single-parent families or families with divorced parents has compelled the legal systems of both countries to regulate child custody in a more flexible context. In Indonesia, the fragmentation of family law between religious law and state law has created challenges in harmonizing child custody policies, especially regarding custody arrangements after divorce (Haryani, 2023). Meanwhile, in Malaysia, the dual legal system that combines Sharia law and civil law has also led to ambiguities in handling child custody, particularly when divorce

involves couples with different religious backgrounds. These developments highlight the need to formulate more inclusive regulations that integrate existing legal principles.

Socioeconomic development also plays an important role in shaping changes to child custody policies. In both countries, economic progress and the increased participation of women in the workforce have transformed the roles and responsibilities of parents in caring for and educating their children. Greater economic demands have resulted in many families in Indonesia and Malaysia relying on dual-income households, directly influencing decisions regarding child custody. In many cases, child custody determinations are influenced not only by emotional or psychological factors but also by practical considerations such as the parents' economic capacity to provide education and welfare for their children (Semman, 2025).

These changes are also shaped by the impact of globalization and modernization, which introduce international values concerning human rights, including children's rights. The adoption of international standards such as the UN Convention on the Rights of the Child has encouraged both countries to update their policies to fulfill their international obligations. This is reflected in Indonesia's and Malaysia's efforts to ensure that child custody policies are more strongly oriented toward the fulfillment of children's rights and to avoid inequalities that may arise as a consequence of shifting family structures. By taking into account these social, cultural, and economic changes, child custody policies in both countries are expected to be more responsive to the increasingly complex challenges of modern families.

Legal pluralism theory is employed to explain that legal systems within society do not operate in singular form. In Indonesia and Malaysia, pluralism manifests not only in the coexistence of religious law, state law, and social norms, but also in the differing institutional configurations governing the adjudication of family matters. Indonesia practices pluralism in terms of legal sources but within a unified judicial system, while Malaysia applies dual pluralism both at the level of legal sources and judicial institutions allowing custody jurisdiction to be divided between two separate courts. Through this theoretical perspective, the comparative analysis becomes explanatory rather than descriptive, demonstrating how the configuration of pluralism shapes arenas of legal contestation, sources of normative legitimacy, decision-making processes, and policy outcomes with direct consequences for families and children.

Family law theory enhances the analysis by clarifying that the core purpose of family regulation is to preserve social order, stabilize household relations, and protect the rights of children. However, family law also reflects the dominant social values embedded within society. Shifts in demographic and social conditions including the rise of single-parent households, increased female economic participation, growing urbanization, and the emergence of new domestic patterns compel legal frameworks to adapt in order to remain relevant. Through this lens, recent transformations in child custody policies in Indonesia and Malaysia can be understood as responses to structural pressures emerging from contemporary family life. When family structures evolve, family law undergoes reinterpretation and reconstruction. This theoretical approach thus explains why similar social transformations can generate distinct legislative trajectories and judicial practices in the two countries despite shared cultural and religious foundations.

The theory of Mubādalalah offers an internal Islamic normative framework that conceptualizes family relations as cooperative, reciprocal, and mutually responsible partnerships between fathers and mothers. Its principles reciprocity, co-equal partnership, and shared parental responsibility assert that custody rulings should not be determined solely by gendered presumptions or traditional patriarchal constructs, but by objective assessments of the child's best interests. Integrating Mubādalalah enables the analysis to remain faithful to Islamic epistemology while simultaneously addressing the realities of contemporary family structures and the demands of international human rights principles. Contrary to the

assumption that Islamic law is inherently at odds with equality and children's rights, Mubādalah demonstrates that Islamic jurisprudence contains interpretive resources capable of supporting family law reform without abandoning religious legitimacy. Thus, this theoretical approach strengthens the argument that reforming custody provisions can be conducted through *ijtihād* anchored in child welfare and equitable family relations rather than through departures from Islamic values.

Social-Legal Factors Influencing the Transformation of Child Custody Policies in Indonesia and Malaysia

The transformation of child custody policies in Indonesia and Malaysia is shaped by a complex interaction between social change, cultural norms, economic developments, and the pluralistic legal structures operating in both countries. These socio-legal elements do not function independently; rather, they collectively influence how regulatory frameworks evolve and how judicial practices interpret *hadhanah* within the changing realities of modern families.

1. The Rise of the Best Interests of the Child Principle and Shifting Social Paradigms

One of the most significant drivers of policy transformation is the growing societal awareness of children's rights and the strengthening of the *best interests of the child* principle. This normative shift appears to be influenced by changing family structures, increasing gender equality, and broader recognition of children as rights-bearing individuals. Contemporary scholarship demonstrates that courts in both Indonesia and Malaysia increasingly apply this principle by prioritizing the child's welfare rather than adhering strictly to parental or gender-based traditions. The expansion of single-parent households, mixed marriages, and dual-income families further necessitates an adaptive legal approach that considers emotional stability, educational continuity, and caregiving capacity as central components of custody determinations.

2. Legal Pluralism and the Structural Complexity of Custody Regulation

Both Indonesia and Malaysia operate within pluralistic legal systems in which Islamic family law interacts with national civil legislation. This duality creates a dynamic legal environment that is responsive to social change while simultaneously presenting potential inconsistencies. In Indonesia, child custody is governed by the Marriage Law and the *Kompilasi Hukum Islam* (Compilation of Islamic Law), whereas Malaysia implements multiple state-level Islamic Family Law enactments alongside federal civil law. Such diversity allows policymakers to adjust custody rules to emerging social needs; however, it also produces differing interpretations of eligibility, age thresholds, and judicial authority across jurisdictions. Consequently, although pluralism allows flexibility, it requires ongoing harmonization to avoid ambiguity in custody decisions, particularly in cases involving mixed-faith or cross-jurisdictional families.

3. Socioeconomic Transformations and Evolving Gender Roles

Rapid socioeconomic changes such as increased female labor participation, urban migration, and the prevalence of dual-income households have reconstructed traditional caregiving arrangements. As economic pressures intensify, courts are increasingly compelled to evaluate the practical ability of each parent to provide financial stability, educational access, and a conducive caregiving environment. Academic studies suggest that custody determinations in both countries tend to weigh parental economic capacity alongside emotional and psychological considerations. This trend indicates a shift from gender-presumptive custody norms toward a more evidence-based evaluation of child welfare grounded in socioeconomic realities.

4. Global Norm Diffusion and International Human Rights Standards

Globalization and the diffusion of international norms particularly those embedded in the United Nations Convention on the Rights of the Child play a central role in shaping

domestic custody reforms. Both Indonesia and Malaysia have incorporated elements of international child protection standards into their national legal frameworks, although the degree of implementation varies. These global norms encourage states to design custody regulations that prevent discrimination, enhance child protection, and recognize children's rights to development, participation, and care. Malaysia exhibits a more consolidated codification of child protection laws, while Indonesia maintains a broader array of statutory instruments. Nonetheless, both countries demonstrate forward-moving efforts to align custody policies with evolving international expectations.

5. Judicial Practice and the Challenges of Policy Implementation

Even where regulatory reforms exist, effective implementation remains a persistent challenge. In Indonesia, judicial decisions sometimes confront obstacles related to enforcement, socioeconomic disparities, or the availability of social support mechanisms for custodial parents. Studies note that custody rulings may be difficult to operationalize when the caregiving parent lacks economic security or adequate institutional support. Malaysia's institutional landscape particularly its syariah courts and child welfare agencies plays a crucial role in determining whether custody decisions translate into meaningful protection for the child. This demonstrates that legal reform alone is insufficient without coordinated enforcement mechanisms, monitoring systems, and administrative capacity.

Table 1. Summary of Social-Legal Factors Influencing Custody Policy Transformation

Socio-Legal Factor	Core Characteristics	Implications for Custody Policy and Judicial Practice
<i>Best Interests of the Child Principle</i>	Increasing emphasis on children's rights and welfare	Encourages child-centered custody rulings and reduces gender-based presumptions
Legal Pluralism (Islamic law & civil law)	Overlapping jurisdictions, varied state-level regulations	Offers flexibility but may create interpretive inconsistencies across courts
Socioeconomic Change	Rise of dual-income families, shifting gender roles	Custody increasingly based on economic capacity and caregiving feasibility
Global Human Rights Norms	Influence of CRC and international child-rights frameworks	Promotes alignment of national laws with non-discriminatory and protection-oriented standards
Judicial Implementation Challenges	Enforcement gaps, institutional capacity, social support	Highlights that policy effectiveness depends on institutional coordination, not regulation alone

Emerging Patterns and Key Differences in Child Custody Policy Shifts between Indonesia and Malaysia

1. Overview: Converging Aims, Diverging Frameworks

Both Indonesia and Malaysia have experienced a discernible shift in custody discourse toward child-centred norms chiefly the *best interests of the child* principle but they pursue these aims within substantially different institutional and statutory frameworks. Indonesia's regulatory landscape for custody is shaped by a mixture of national marriage law, the *Kompilasi Hukum Islam* (KHI) for Muslim families, and various child-protection statutes, whereas Malaysia combines federal civil statutes such as the *Child Act 2001* with state-level Islamic family law in respect of Muslim citizens. Consequently, although both states appear to be oriented toward enhanced child protection, the legal loci for implementing that orientation and the operational pathways differ markedly. ([Source: Muslim Family Law](#))

2. Pattern: increasing rhetorical and legal emphasis on the child's best interests

A prominent emergent pattern in both jurisdictions is the increasing invocation of the *best interests of the child* as a guiding criterion in custody decision-making. In Indonesia and Malaysia this shift reflects normative influence from the UN Convention on the Rights of the Child and scholarly debates that foreground the child's welfare over presumptive parental rights. Courts and policy documents in both countries now more frequently articulate child welfare, continuity of care, and developmental needs as central evaluative factors, even where pre-existing presumptions (e.g. maternal preference for young children) persist in practice (Bagenda and Carbonilla 2024).

3. Pattern: Plural Legal Authorities Produce Differentiated Practice

A second pattern is that legal pluralism manifest as the interaction between Islamic family law and civil/state law yields differentiated custody doctrines and practices within and across the two countries. In Indonesia, the KHI (and decisions of religious courts) continues to exert substantial influence over custody outcomes for Muslim litigants, while civil law governs non-Muslim cases; analogous dualism exists in Malaysia where state Islamic enactments coexist with federal child protection laws, producing jurisdictional complexity. This pluralism often enables policy adaptation to local socio-religious norms but also generates inter-jurisdictional inconsistencies and legal uncertainty in mixed-faith and cross-border cases (Adi 2023).

4. Pattern: movement from gender-presumptive norms toward multidimensional assessment

Historically, both systems have contained gender-presumptive elements such as defaulting young children's care to mothers but an emergent trend is the gradual attenuation of such presumptions in favour of multidimensional assessments that incorporate parental capacity, economic resources, child attachment and stability. Empirical and doctrinal studies indicate that courts increasingly consider socioeconomic capacity and caregiving feasibility alongside traditional criteria, although the pace and consistency of this shift vary by forum and case type (Rohman and Putri 2022).

5. Difference: Statutory Consolidation And Institutional Supports (Malaysia) Versus Dispersed Normative Sources (Indonesia)

A key difference lies in statutory consolidation and the presence of ancillary institutional mechanisms. Malaysia's *Child Act 2001* (Act 611) and accompanying national child-protection policies constitute a relatively consolidated statutory and administrative framework for child welfare, including procedures for protective interventions and family support services. Indonesia's child-protection regime, by contrast, is dispersed across multiple instruments (Law on Child Protection, Marriage Law, KHI) and relies heavily on court discretion in religious courts for Muslim families; this can create gaps in enforcement and heterogeneity in practice. As a result, Malaysia may demonstrate comparatively stronger statutory mechanisms (Yuniansa et al. 2024) for case management and post-judgment support, whereas Indonesia frequently relies on judicial discretion and ad hoc institutional remedies.

6. Difference: Jurisdictional Complexity In Interfaith And Apostasy Cases

Another salient difference concerns cases that implicate faith status or interjurisdictional elements (for example, apostasy, conversion, or mixed-faith marriages). Indonesian case law and scholarly commentary show that changes in a parent's religion may critically affect custody rights under religious court reasoning, whereas in Malaysia the co-existence of state Islamic enactments and federal civil instruments may complicate but also provide more procedural mechanisms for resolving such tensions. Thus, the legal outcome in interfaith or conversion cases tends to be more variable and more sensitive to forum selection, procedural posture, and local doctrine in Indonesia than in Malaysia .

7. Pattern: Policy Diffusion from International Norms Interacts With Local Culture and Institutions

Both countries exhibit signs of normative diffusion from international child-rights instruments; however, the degree to which international standards translate into domestic legal practice is mediated by local religious norms, judicial attitudes and administrative capacity. International obligations (such as those under the CRC) appear to have encouraged legislative reforms and policy statements, yet practical implementation still frequently encounters local resistance or capacity constraints. This mediation explains why formal legal commitments do not always result in uniform on-the-ground outcomes.

8. Policy and Practice Implications

The observed patterns and differences suggest several implications for policy and practice. First, harmonisation efforts whether through clearer allocation of jurisdiction, procedural coordination between civil and religious courts, or statutory clarification would likely reduce uncertainty in mixed-jurisdiction cases. Second, strengthening institutional supports (child protection teams, enforcement units for maintenance and visitation, family counselling services) is necessary to ensure that custody determinations produce sustainable welfare outcomes. Third, the continued incorporation of multidimensional assessment tools (psychosocial evaluation, economic assessment, child-centric interviews where appropriate) would permit more consistent application of the *best interests* principle. These implications are corroborated by comparative policy analyses that recommend enforcement units and harmonised procedures to improve outcomes for children (Fauza Qadriah 2025).

Table 2: Emerging Patterns and Key Differences

Dimension	Emerging Pattern (Both Countries)	Key Difference (Indonesia vs Malaysia)	Representative Open- Access Source
Normative orientation	Increasing emphasis on <i>best interests of the child</i>	—	UN/CRC materials; national analyses (Bagenda and Carbonilla 2024).
Legal architecture	Legal pluralism shapes custody outcomes	Indonesia: KHI and religious courts dominant for Muslims; Malaysia: state Islamic enactments co-exist with federal <i>Child Act 2001</i> producing distinct implementation pathways.	Indonesia: KHI discussion; Malaysia: Child Act 2001 (Adi 2023).
Presumptive norms	Shift from maternal presumption toward multidimensional assessment	Implementation uneven: Indonesia shows stronger residual maternal presumptions in some religious court practice; Malaysia's statutory framework supports procedural safeguards.	Judicial/comparative studies (Rohman and Putri 2022).
Institutional capacity	Greater attention to enforcement and	Malaysia: more consolidated child protection instruments	Child Act analysis; Indonesian reviews (Yoki Pradikta,

	child protection services	and administrative supports; Indonesia: fragmented legal instruments and reliance on judicial discretion.	Budianto, and Asnawi 2024).
Inter-faith/apostasy cases	Cases friction between religious and civil norms	Indonesia: apostasy cases can lead to loss/transfer of custodial rights under religious court logic; Malaysia: jurisdictional complexity but procedural mechanisms exist across forums.	Case studies & doctrinal articles (Yuniansa et al. 2024).
International norm diffusion	CRC and global norms influence reform agendas	Translation into practice mediated by local culture and institutional capacity; variation between countries.	UN reports; comparative papers.

Discussion

Differences and Similarities in Legal Approaches to Child Custody in Indonesia and Malaysia in the Context of Modern Family Issues

The differences and similarities in legal approaches to child custody in Indonesia and Malaysia, particularly in relation to modern family issues such as mixed marriages, single-parent families, and the evolving role of women within the household, are significantly influenced by the legal systems applied in each country. In Indonesia, the family law system is governed by national positive law, yet it is also strongly influenced by religious law, especially Islamic law for Muslim communities (Setiawan, 2014). Meanwhile, in Malaysia, although its legal system also refers to Islamic principles, the dual legal structure separating the application of civil law and Sharia law results in differing child custody procedures between Muslim and non-Muslim communities (Rosyadi & SH, 2022). In cases involving modern families such as mixed marriages or single-parent households both countries encounter challenges in aligning their legal systems with contemporary social realities.

In Indonesia, child custody after divorce is regulated under marriage law and religious court provisions for Muslim couples (Islami, 2019). In such cases, the religious court holds primary authority in determining child custody for Muslim families, prioritizing the best interests of the child and the mother's role as the primary caregiver, unless specific reasons justify granting custody to the father (Suryantoro, 2024). For non-Muslim families, child custody regulations are based on applicable civil law. Conversely, Malaysia employs a more complex legal system due to the jurisdictional division between Sharia courts and civil courts (Hasibuan et al., 2023). For Muslim couples, child custody decisions fall under the authority of Sharia courts, guided by Islamic legal principles. However, in cases involving mixed marriages or when one spouse is non-Muslim, custody may fall under the jurisdiction of civil courts, potentially creating ambiguity in determining child custody.

Differences in the application of positive law and religious (Islamic) law in determining child custody are clearly evident in both countries. In Indonesia, although Islamic law forms the basis of custody regulations for Muslim families, positive law particularly Law No. 16 of 2019 on Marriage and related regulations provides more flexible limitations in addressing

custody arrangements (Muizzudin & Anwar, 2023). These provisions enable courts to consider social and economic factors, as well as shifts in norms within modern families. In contrast, Malaysia's distinction between Sharia and civil courts becomes more pronounced in determining child custody, especially when religious differences arise in divorce cases (Purkon, n.d.). Islamic law emphasizes the father's obligation to provide maintenance and protection for the child, while the mother is generally considered the more suitable custodian for young children. However, this system often encounters tension in cases of interfaith or mixed marriages (Syahputra & Zuhdi, 2024).

Despite the differences in implementing religious law and positive law, Indonesia and Malaysia share similar overarching goals in their child custody policies namely, safeguarding the best interests of the child. Both countries strive to adapt existing regulations to meet the needs and realities of increasingly diverse modern family structures. In Indonesia, for instance, policy changes related to child custody have placed greater emphasis on the protection of children's rights and fairness for parents, with increased attention to the needs of children in single-parent or divorced households (Firdawaty et al., 2023). In Malaysia, despite challenges posed by the dual application of Sharia and civil law, the principle of the best interests of the child remains the primary reference in child custody decisions.

In responding to the realities of modern families, both Indonesia and Malaysia continue to update and refine their legal frameworks to ensure that child custody decisions remain fair and responsive to socio-economic developments. With the rising number of mixed marriages, single-parent households, and increasingly prominent roles of women within families, both countries must continuously adjust their legal approaches to become more inclusive and to ensure maximum protection for children.

Differences in child custody policies between Indonesia and Malaysia are not merely normative, but rather the result of historical, political, and institutional divergences within each legal system. Indonesia adopts a unified legal hierarchy in which national legislation functions as the highest source of law, and although religious courts exercise primary authority in Muslim custody cases, they operate within a single integrated judicial system. This configuration tends to produce relatively consistent decisions, although in practice rulings may still reflect interpretative biases stemming from classical Islamic jurisprudence that positions mothers as the preferred custodians of younger children, thereby shaping the judicial understanding of the "best interests of the child" through cultural and religious lenses. Malaysia, by contrast, retains a dualistic legal model inherited from British colonial administration, maintaining separate jurisdictions between Shariah Courts and Civil Courts. Consequently, jurisdictional conflict is far more probable, particularly in cases involving conversion, interfaith divorce, or mixed marriages. This dualism creates legal uncertainty, prolongs the process of child protection, and produces rulings that are not always mutually compatible. Thus, the causal mechanism underlying the divergence between the two systems can be summarized as: legal structure determines institutional logic, and institutional logic produces differing levels of child protection in substantive practice.

The Impact of Child Custody Regulations and Policies on Child Well-Being in Modern Families in Indonesia and Malaysia

Child custody regulations and policies in Indonesia and Malaysia have a significant impact on child well-being, particularly within the increasingly diverse context of modern families. Changes in family structure such as rising divorce rates, mixed marriages, and the increasing role of women in the household have created new challenges within the legal and policy frameworks governing child custody. Both countries have attempted to adjust existing regulations to address these social developments, yet the policies implemented often produce varying social and psychological effects on children. In Indonesia, for instance, policies that prioritize the mother's rights as the primary caregiver after divorce may provide emotional

stability for children separated from their father (Ritonga & SH, 2024). However, in some cases, tension between divorced parents can create conflictual environments that negatively influence children's psychological well-being. Similar conditions can also be found in Malaysia, particularly in divorce cases involving Muslim and non-Muslim couples, where both Sharia and civil legal considerations come into play.

The social and psychological implications of child custody policies are closely tied to how these regulations are practiced in daily life. More flexible policies, such as those in Indonesia which allow courts to consider the best interests of the child by taking into account the socio-economic conditions of the parents may help create a more stable environment for children. However, implementation remains challenging due to prevailing social and cultural norms, which may risk creating inequities, particularly in non-traditional families or families with unconventional parental roles. In Malaysia, reliance on a dual legal system civil law and Sharia law in determining child custody may also produce uncertainty, especially for families with differing religious backgrounds. This ambiguity can heighten feelings of marginalization or confusion among children facing parental divorce or separation.

Although child custody policies in both countries increasingly emphasize the principle of "the best interests of the child," the implementation of this principle remains constrained within non-conventional family structures. In Indonesia, despite efforts to prioritize children's needs, policies that favor the mother as the primary caregiver often do not fully account for changing gender roles or the specific needs of children in more flexible family arrangements, such as single-parent households or shared custody families (Rustina & Suharnis, 2022). In Malaysia, the best interests of the child are also frequently influenced by religious law, where custody decisions often favor the parent who holds greater authority or obligations under Islamic law (Lukito, 2015). This may disadvantage children who might benefit more emotionally or materially from living with the parent who is better equipped to provide adequate care.

Nevertheless, both Indonesia and Malaysia have demonstrated a commitment to continually improving their child custody policies by taking into account the dynamics of modern family life (Dharmayani et al., 2024). These policies increasingly aim to adapt to the needs of children within more diverse family structures, although substantial challenges remain in practical implementation. A stronger focus on the social and psychological well-being of children within child custody regulations in both countries is essential to ensuring that court decisions or government policies do not solely benefit one parent, but truly support the child's right to grow in a stable and nurturing environment. With regulatory changes that are more responsive to modern family realities, it is hoped that children's well-being will be more effectively safeguarded by allowing them to thrive in safe, supportive, and loving surroundings.

The differing impacts of child custody dispute resolution in Indonesia and Malaysia can be explained by the distinct institutional mechanisms through which each country's legal system operates. Indonesia adopts a unified judicial structure for *hadhanah* cases among Muslim families, where all proceedings fall under the jurisdiction of the Religious Courts within a single national hierarchy. This structure produces a high degree of procedural consistency, as judges rely on the same legal guidelines and interpretive frameworks across the system. However, such institutional homogeneity also allows the dominance of classical Islamic jurisprudential interpretations, which often position mothers as the natural and primary caregivers. Consequently, the assessment of the "best interests of the child" may be influenced by traditional gender norms rather than an objective evaluation of parental capacity and the child's developmental needs. Thus, while Indonesia's system ensures institutional coherence, it also exposes the adjudication process to structural gender bias.

Malaysia, by contrast, operates under a dual legal system in which both the Civil Courts and the *Shariah* Courts hold legitimate jurisdiction over family law matters, including child custody. This dualism generates a structural mechanism that makes jurisdictional conflicts highly possible. Civil Courts apply national statutory law, whereas *Shariah* Courts operate on Islamic legal principles administered at the state level. In cases involving interfaith marriages, conversion, or religiously mixed households, both court systems may issue separate rulings without a formal hierarchical instrument to determine which judgment prevails. As a result, families can receive two legally valid yet contradictory decisions, thereby complicating enforcement and creating legal uncertainty for the child. These conditions illustrate how Malaysia's legal pluralism allows for interpretive flexibility but compromises consistency and the effectiveness of child protection in practice.

Accordingly, Indonesia's judicial structure promotes institutional consistency but risks reinforcing normative and gender-based bias, whereas Malaysia's legal pluralism provides doctrinal flexibility but results in uncertainty of execution and the weakening of legal protection for children. These contrasting mechanisms explain why two countries with similar cultural and religious foundations exhibit significantly different outcomes in the resolution of child custody disputes.

Legal pluralism theory explains that jurisdictional conflicts in Malaysia's child custody system are a direct consequence of the coexistence of two parallel legal bodies civil courts and *Shariah* courts operating without a hierarchical mechanism capable of harmonizing divergent rulings, making such conflicts not merely administrative issues but structural outcomes of competing norms and constitutionally recognized institutions. Family law theory further posits that law reflects the social structure in which it operates; therefore, social changes such as the rise of single parent households, the increasing economic role of women, and the emergence of non-traditional family models require a shift in custody norms from gender-based assumptions toward capacity based assessments that emphasize a parent's actual ability to provide stability, security, and child well-being.

In evaluating judicial decisions, the United Nations Convention on the Rights of the Child (UNCRC) offers an objective framework to measure whether court rulings meet the "best interests of the child" standard through indicators such as non-discrimination, the incorporation of the child's views, and comprehensive protection of the child's psychological, emotional, physical, and social development. Moreover, *Mubādalah* theory provides an Islamic theological foundation that conceptualizes caregiving not as an attribute tied to gender but as a form of equitable partnership in which parental responsibility is determined by the capacity to deliver optimal benefit and protection to the child; thus, this perspective supports an interpretation of Islamic family law that is more responsive to the realities of modern families and consistent with child rights principles.

One of the clearest examples of jurisdictional conflict in Malaysia can be seen in the case of *S. Shamala v. Jeyaganesh*, in which a father who converted to Islam sought custody through the *Shariah* Court and obtained a favorable ruling, while the non-Muslim mother secured a different ruling from the Civil Court. Because the Malaysian legal system does not provide a hierarchical mechanism to determine which judgment should prevail, both decisions remained legally valid but unenforceable, leaving the child in a situation of legal uncertainty. This illustrates that Malaysia's dual legal structure structurally enables conflicting court outcomes and implementation challenges. In contrast, Indonesia has produced several Religious Court decisions that demonstrate gender-norm bias, such as the common trend of automatically awarding custody of children under twelve to the mother based on the argument of women's "natural caregiving disposition," without a comprehensive assessment of the father's psychological, economic, or environmental capacity. This shows that although Indonesia's adjudication process is institutionally consistent, the application of the "best

interests of the child" principle is still frequently filtered through traditional cultural assumptions that position mothers as the default caregivers.

Comparatively, the two countries exhibit distinct systemic patterns. Indonesia demonstrates high institutional consistency because custody cases involving Muslim families are resolved within a single, integrated judicial system; however, normative bias remains strong, as many decisions reflect classical *fiqh* traditions and gendered expectations. Conversely, Malaysia exhibits greater interpretive flexibility due to the coexistence of two legal systems that parties can access, yet coherence and legal certainty are weaker because no procedural mechanism determines priority when conflicting judgments arise. Both countries also face an implementation gap between their ratification of the United Nations Convention on the Rights of the Child (*UNCRC*) and the realities of judicial practice. To close this gap, Indonesia needs to reform judicial guidelines so that the assessment of a child's best interests relies on objective indicators rather than normative assumptions. Malaysia, meanwhile, requires stronger institutional harmonization through legislation, interpretive jurisprudence, or jurisdictional hierarchy to prevent contradictory rulings from undermining enforceability. At the national level, both countries should strengthen judicial training, adopt *UNCRC*-based child welfare assessments, and ensure that children's rights are not subordinated to parental interests or cultural norms that are no longer aligned with modern child protection standards.

The Influence of Globalization and Human Rights Standards on Child Custody Policies in Indonesia and Malaysia

The influence of globalization and international human rights standards such as the United Nations Convention on the Rights of the Child has had a significant impact on the transformation of child custody policies in Indonesia and Malaysia (Kurniaty et al., 2021). As members of the international community, both countries have ratified the UN Convention on the Rights of the Child and are committed to protecting children's rights, including in the determination of child custody. Globalization, with its rapid flow of information and increased cross-national interaction, has introduced broader perspectives on children's rights in the context of modern family structures. In this regard, international standards encourage policy changes that prioritize the best interests of the child, reduce discrimination, and guarantee equal protection for all children regardless of their social status or family background.

International influence particularly from organizations such as the United Nations is recognized and applied within child custody regulations in Indonesia and Malaysia, although the degree of implementation varies. In Indonesia, despite the strong influence of religious law (especially among Muslim communities), the UN Convention on the Rights of the Child has shaped the development of child custody policies, especially through its emphasis on the principle of the best interests of the child. Indonesia's Child Protection Law, for instance, explicitly states that legal decisions involving children must prioritize their welfare and rights, reflecting international standards (Kristyanto, 2018). However, the implementation of these principles is sometimes hindered by diverse interpretations of the best interests of the child within cultural and domestic legal contexts. In Malaysia, the ratification of the Convention on the Rights of the Child has also influenced child custody regulations, yet challenges arise from the dual legal system consisting of civil law and Sharia law. While Sharia law recognizes children's rights within religious contexts, its application in divorce cases may differ from international principles that prioritize children's broader social and economic well-being.

The greatest challenge in integrating international principles into national child custody policies in Indonesia and Malaysia lies in the tension between domestic law, local cultural values, and religious law. In Indonesia, despite adherence to international standards, implementation remains constrained by existing legal pluralism particularly between religious law and state law (Arifin et al., 2018). Conflicts between religious courts and general

courts, especially in determining custody after divorce, frequently create legal uncertainty that results in unequal treatment of children from Muslim and non-Muslim families. In Malaysia, similar challenges arise due to the dualistic legal system, which often produces inconsistencies between Sharia court and civil court decisions, particularly in cases involving interfaith divorces or mixed marriages. Differences in the application of Sharia and civil law in child custody matters often conflict with international principles demanding more equitable and non-discriminatory treatment for all children.

In addition, both countries face cultural and social challenges in integrating international principles into national policy. In societies still strongly influenced by tradition and religious values, policy changes driven by international standards may face resistance. In Indonesia and Malaysia, custody arrangements that are more responsive to children's needs and rights may conflict with existing social norms, particularly those related to gender roles within families and religiously based rules regarding parental custody (Ghofur & Sulistiyo, 2014). Therefore, despite commitments to international principles, fully implementing custody policies grounded in children's rights and best interests requires further adjustment to the social and cultural realities of each country.

Given these challenges, Indonesia and Malaysia must continue working to balance the application of international principles with national policy frameworks, in order to establish a more inclusive and child-centered legal system, and to ensure that child custody decisions are made fairly and without discrimination. Better integration of international principles with national policies on child custody will positively affect the welfare and protection of children's rights in both countries, although significant time and effort will be required to harmonize domestic laws with prevailing international standards.

The children's rights framework, particularly as articulated in the United Nations Convention on the Rights of the Child (UNCRC), is utilized in this article as an evaluative instrument for assessing the degree to which domestic custody decisions align with contemporary standards of child protection. Its three central pillars—the best interests of the child, non-discrimination, and the right of the child to be heard—constitute international benchmarks for determining whether policies and judicial outcomes are truly child-centered. Both Indonesia and Malaysia have ratified the UNCRC, yet implementation remains constrained. In Indonesia, interpretations of the best interests of the child are still strongly influenced by classical jurisprudential assumptions and traditional gender expectations. In Malaysia, implementation is often challenged by divergent interpretations between Civil and Shariah Courts, resulting in an implementation gap between international commitments and national practice. The UNCRC framework thus not only provides a normative backdrop but also functions as a critical analytical tool for mapping the extent to which rulings and policies genuinely reflect child-focused outcomes.

Challenges and Opportunities in Enforcing Child Custody Policies in Indonesia and Malaysia

The challenges and opportunities faced by judicial systems and related institutions in enforcing child custody policies in Indonesia and Malaysia have become increasingly complex as modern family issues continue to evolve, including divorce, single-parent households, mixed marriages, and the growing dominance of women's roles within the family. One of the main challenges lies in the inconsistencies between the positive laws applied in each country and local social and cultural values, which can influence judicial decisions. In Indonesia, the family court system is divided between religious courts for Muslim couples and general courts for non-Muslim families, which sometimes creates unequal treatment of children, particularly regarding custody determinations (Hamzani & Aravik, 2021). Meanwhile, in Malaysia, the dualism between civil law and Sharia law has contributed to tensions in determining child custody, especially among families with different religious backgrounds. Another challenge

involves cultural resistance to change, where traditional norms often conflict with more progressive child custody policies, especially those related to gender roles and women's rights.

However, these challenges also create opportunities for judicial systems and related institutions to improve and strengthen child custody policies. In both countries, the roles of the courts, social institutions, and government agencies are crucial in enforcing fair child custody practices. Courts serve as institutions responsible for assessing and deciding custody cases with careful consideration of the child's best interests, even when faced with difficulties in addressing cases involving religious or cultural differences. Social institutions, such as child protection agencies, play a role in providing psychological and social support for children involved in divorce or structural family changes, while government agencies are responsible for developing policies and regulations that align with the needs of modern families and the protection of children's rights. Opportunities to strengthen these institutions include enhancing inter-agency coordination and increasing public awareness regarding children's rights and the importance of ensuring child welfare within families.

The judicial systems in Indonesia and Malaysia face substantial challenges in resolving conflicts that arise in child custody cases within modern families (Bachri, 2024). In many cases, differing interpretations of the best interests of the child, along with multiple social and psychological factors, become sources of conflict. In Indonesia, although policies generally prioritize the mother as the primary caregiver, courts must consider additional aspects such as economic conditions, parental mental health, and the overall well-being of the child. This requires courts to possess a more holistic understanding of modern family dynamics. In Malaysia, beyond the dualism between civil and Sharia law, courts often handle cases involving mixed marriages, which further complicates child custody determinations. Courts must balance children's welfare with the rights of parents who may hold differing religious and cultural views.

To overcome these conflicts, judicial systems in both countries need to improve access to child custody information and counseling for parents, children, and other parties involved in legal processes. Alternative approaches such as mediation and family counseling—can serve as more constructive solutions for resolving custody disputes without lengthy and adversarial court proceedings. Governments and social institutions must also play a role in providing necessary support, including education about children's rights and psychological assistance for families undergoing divorce or separation. Moreover, improving the quality of judicial training in handling complex family cases can help ensure that decisions are made in alignment with the child's best interests, free from cultural biases or social norms that may disadvantage children.

Given these challenges, the opportunities for improving judicial systems and child custody policies in Indonesia and Malaysia lie in increasing legal awareness, strengthening judicial capacity, and enhancing public policies that prioritize the best interests of the child particularly in addressing issues emerging within modern family structures. Such reforms will help create legal systems that are more equitable, inclusive, and responsive to the ongoing social changes within both societies.

The complexities surrounding the enforcement of child custody policies in Indonesia and Malaysia are closely linked to the structural characteristics of each country's legal system and their resulting implications. In Indonesia, the unification of religious courts under a single national judicial structure creates a relatively consistent and centralized adjudication process in child custody disputes. All cases of hadhanah among Muslim families are resolved within one integrated legal hierarchy, reducing the potential for jurisdictional conflict. However, this centralized arrangement also allows the dominance of traditional fiqh interpretations to influence judicial reasoning, meaning that the principle of the best interests of the child is often understood through a gendered framework that positions mothers as the natural

caregivers. In contrast, Malaysia's dual legal system where civil courts and Shariah courts coexist with equal institutional legitimacy frequently leads to conflicting legal interpretations and competing jurisdictional claims. When such courts apply different normative and doctrinal perspectives, custody decisions may diverge, extend litigation duration, and diminish legal certainty for children and parents.

These dynamics become clearer when the analysis is anchored within explicit theoretical frameworks. Legal pluralism theory helps explain that jurisdictional clashes in Malaysia are not coincidental but are inherent consequences of running two parallel legal systems without a robust mechanism for harmonization or conflict resolution. Family law theory demonstrates that increasing social transformations such as rising numbers of single-parent households, growing participation of women in formal employment, and shifts in familial responsibility require a reinterpretation of legal norms to ensure continued institutional responsiveness and stability. Meanwhile, the children's rights framework offers a tool to measure the substantive implementation of the UNCRC, especially regarding the principles of non-discrimination, child participation, and prioritization of the child's welfare. The Mubādalah theory further enriches the analysis by showing that within Islamic legal thought, caregiving is not inherently gendered but grounded in the ability to provide benefit, protection, and mutual responsibility. These theoretical lenses together allow a more rigorous interpretation of the legal realities observed in both jurisdictions.

Concrete judicial experiences also illustrate how these structural and theoretical issues manifest in practice. In Malaysia, cases have emerged where Shariah courts granted custody to a converted father while the civil courts issued rulings in favor of the non-Muslim mother, resulting in two final decisions that could not be reconciled in execution, ultimately creating a legal limbo for the child involved. In Indonesia, religious courts have issued custody decisions favoring mothers based solely on normative assumptions regarding maternal responsibility, without rigorous evaluation of the father's psychological capacity, financial stability, or the child's safety. Such examples demonstrate that, despite legal frameworks referencing the best interests of the child, the application of this principle is often influenced by institutional culture, doctrinal preferences, and inherited gender assumptions, rather than objective assessments of child welfare.

These challenges indicate the need for broader policy implications and structural reform in both jurisdictions. Indonesia must strengthen the objectivity of judicial reasoning in custody cases by revising judicial guidelines so that decisions are based on measurable indicators of child welfare rather than traditional gender presumptions embedded in classical fiqh. Malaysia, on the other hand, requires institutional harmonization, whether through hierarchical clarification or formal mechanisms for resolving conflicts between civil and Shariah courts, to ensure that custody rulings do not undermine enforceability or legal certainty. Both countries also need to align national practices with their commitments under the UNCRC to reduce the implementation gap that occurs when ratified human rights instruments are not fully reflected in judicial outcomes. Without such improvements, both systems risk weakening their credibility in the international child rights arena.

Viewed more broadly, the legal developments in both countries cannot be separated from evolving modern social dynamics. The increasing prevalence of dual-income families, intensified public awareness of gender equality, rising transnational marriages, and the growing number of households led by single parents challenge traditional legal concepts of custody rooted in patriarchal or role-based assumptions. Family law theory recognizes that legal institutions reflect the social structure of their environment; thus, shifts in family organization should logically stimulate normative evolution within legal systems. The Mubādalah perspective reinforces this by arguing that caregiving in the Islamic tradition is fundamentally based on mutual responsibility, reciprocity, and shared partnership rather

than biologically or culturally predetermined gender roles. Consequently, both legal systems must not merely preserve historical norms but adapt in a way that places the child's actual welfare, emotional stability, and development at the center of legal decision-making.

Conclusion

The conclusion drawn from the discussion on child custody regulations and policies in Indonesia and Malaysia indicates that significant dynamics have emerged in line with changes in family structures and the challenges arising from modern family conditions. In both countries, the prevailing legal systems whether based on positive law or religious law play an important role in determining child custody, although they often face divergent applications, particularly when cases involve mixed marriages or single-parent households. Existing policies increasingly emphasize the principle of the "best interests of the child," yet their implementation continues to be shaped by cultural, religious, and gender norms embedded within society. Globalization and international human rights standards, such as the United Nations Convention on the Rights of the Child, have also influenced policy changes by promoting more comprehensive and inclusive protections for children's rights. However, the main challenge lies in integrating these international principles with diverse domestic legal frameworks that often conflict with traditional norms and religious laws in each country. Despite these obstacles, there are significant opportunities to improve coordination among relevant institutions such as courts, social agencies, and government bodies in order to develop child custody policies that are more equitable and responsive to the realities of modern families.

Overall, Indonesia and Malaysia must continue to develop policies that are sensitive to evolving social and family dynamics, ensuring that decisions related to child custody remain centered on the welfare of the child while taking into account ongoing societal changes.

References

Abdullah. (2024). Fulfillment of The Living Rights of Children the Victims of Divorce in the Muslim Community of Lombok, Indonesia. *EL-Usrah: Jurnal Hukum Keluarga*. Vol. 7 No. 1. <https://doi.org/10.22373/ujhk.v7i1.22281>

Adi, M. F. (2023). Hadhonah Rights of Children (Not Mumayyis) Based on Compilation of Islamic Law and Child Protection Act. *NUSANTARA: Journal Of Law Studies*, 2(1), 9–22. <https://doi.org/10.5281/zenodo.17388734>

Al-Sabūnī, M. A. (2007). *Rawā'i' al-Bayān fī Tafsīr Āyāt al-Ahkām*. Beirut: Dār al-Kutub al-'Ilmiyyah. <https://archive.org/details/rawaialbayan>

Al-Syātibī, A. I. (2003). *Al-Muwāfaqāt fī Uṣūl al-Shārī'ah*. Beirut: Dār al-Ma'rifah. <https://archive.org/details/almuwafaqat>

Al-Zuhaylī, W. (1989). *Al-Fiqh al-Islāmī wa Adillatuhu*. Damascus: Dār al-Fikr. <https://archive.org/details/fiqhislamii>

Ali, Z. Z., & Puspita, M. (2023). *Pembaharuan Hukum Keluarga di Asia Tenggara: Dari Negara Mayoritas Sampai Minoritas Muslim*-Jejak Pustaka. Jejak Pustaka. <https://jejakpustaka.com/product/pembaharuan-hukum-keluarga-di-asia-tenggara-dari-negara-majoritas-sampai-minoritas-muslim/>

Arifin, R., Rasdi, R., & Alkadri, R. (2018). Tinjauan Atas Permasalahan Penegakan Hukum dan Pemenuhan Hak dalam Konteks Universalisme dan Relativisme Hak Asasi Manusia di Indonesia. *Legality: Jurnal Ilmiah Hukum*, 26(1), 17–39. <https://ejournal.umm.ac.id/index.php/legality/article/view/6612>

Asnawi, M. N., & SHI, M. H. (2022). *Hukum Hak Asuh Anak: Penerapan Hukum Dalam Upaya Menlindungi Kepentingan Terbaik Anak*. Prenada Media.

Azwar, Zainal, Mhd. Ilham Armi, Zulfan Zulfan, Ahmad Bakhtiar bin Jelani, and Ahmad Luthfy Nasri. 2024. "Child Filiation and Its Implications on Maintenance and Inheritance Rights: A Comparative Study of Regulations and Judicial Practices in Indonesia, Malaysia, and Turkey". *Journal of Islamic Law* 5 (1):62-85. <https://doi.org/10.24260/jil.v5i1.2326>.

Bachri, F. D. (2024). *Pemenuhan Hak Anak Hasil Pernikahan Campuran Yang Dilakukan Secara Sirri Antara Warga Negara Indonesia Dengan Warga Negara Malaysia*. Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta. <https://repository.uinjkt.ac.id/dspace/handle/123456789/80505>

Bagenda, C., & Carbonilla, C. H. (2024). The Principle of the Best Interest of the Child in Granting Child Custody Related to Divorce. *Pena Justisia: Media Komunikasi Dan Kajian Hukum*, 23(2), 1-10. <https://doi.org/10.31941/pj.v23i2.4675>

Binti Zakri, N. A. (2024). *Pelaksanaan Hak Hadanah Bagi Orang Tua Yang Mualaf Menurut Hukum Keluarga Di Malaysia (Studi Kasus Terhadap Putusan Mahkamah Persekutuan Nomor: 02-19-2007 (W))*. UIN Ar-Raniry Fakultas Syariah dan Hukum. <https://repository.ar-raniry.ac.id/id/eprint/37498/>

Clara, E., & Wardani, A. A. D. (2020). *Sosiologi keluarga*. Unj Press.

Dharmayani, D., Hendriyadi, H., Bunyamin, M., & Santoso, R. (2024). Efektivitas Program Konseling Pra-Nikah dalam Mengurangi Konflik Rumah Tangga: Studi Perbandingan di Indonesia dan Malaysia. *Tebuireng: Journal of Islamic Studies and Society*, 5(2), 186-201. <https://doi.org/10.33752/tjiss.v5i2.8446>

Fahrudin, A., Huraerah, A., Ishak, A. S., bin Awang Daud, A. I., Susilowati, E., Mas'ud, F., Zaini, F., Yusuf, H., Hindarsah, I., & Andriyani, L. (2022). *Dinamika Gender & Perubahan Sosial*. Penerbit Widina.

Fauza Qadriah, N. Y. Mhd. Y. H. (2025). Legal Policies for the Protection of Children's Rights After Divorce: A Comparative Study of Malaysia, Singapore, and Indonesia. *International Journal of Artificial Intelligence Research*, 9(1). <https://doi.org/10.29099/ijair.v9i1.1560>

Firdawaty, L., Mahmudah, S., & Isa, R. (2023). The Implementation of Dwangsom in the Execution of Hadhanah Matters and its Relationship to the Ultra Petita Basis. *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam*, 8(2), 203-214. <https://doi.org/10.25217/jm.v8i2.3648>

Ghofur, A., & Sulistiyo, S. (2014). Eklektisisme dalam Taqnīn Hukum Keluarga di Dunia Islam. *ISLAMICA: Jurnal Studi Keislaman*, 8(2), 261-291. <https://islamica.uinsa.ac.id/index.php/islamica/article/view/182>

Hadaiyatullah, S. S., Fikri, A., Dharmayani, D., Karini, E., & Ismail, H. (2024). Rekontekstualisasi Fikih Keluarga di Era Modern: Studi Perbandingan Indonesia, Tunisia, dan Turki. *Moderasi: Journal of Islamic Studies*, 4(2). <https://doi.org/10.54471/moderasi.v4i2.70>

Hamzani, A. I., & Aravik, H. (2021). *Politik Islam: Sejarah Dan Pemikiran*. Penerbit NEM. <https://books.google.co.id/books?id=digXEAQBAJ>

Haryani, H. (2023). *Perilaku Seksual Pranikah Remaja: Struktur Model*. Penerbit NEM. https://books.google.co.id/books/about/PERILAKU_SEKSUAL_PRANIKAH_REMAJA.html?id=ZvPUEAAAQBAJ&redir_esc=y

Hasibuan, K., Adnani, M. A., & Priyana, Y. (2023). Pemberlakuan Hukum Syariah dalam Sistem Hukum Nasional: Studi Kasus tentang Penegakan Hukum Syariah di Negara Asia. *Jurnal Hukum Dan HAM Wara Sains*, 2(10), 942–951. <https://doi.org/10.58812/jhhws.v2i10.707>

Hermanto, A., Ismail, H., Rahmat, R., & Arsyad, M. (2021). Penerapan Batas Usia Pernikahan Di Dunia Islam: Review Literature. *At-Tahdzib: Jurnal Studi Islam Dan Muamalah*, 9(2), 23–33. <https://ejournal.staiat-tahdzib.ac.id/tahdzib/article/view/257>

HM, M. S., Syafiah, S., & Usman, U. (2023). MENJAGA TRADISI: Dinamika Hukum Adat dalam Perkawinan di Asia Tenggara. *Nusantara; Journal for Southeast Asian Islamic Studies*, 20(2), 128–143. <https://ejournal.uin-suska.ac.id/index.php/nusantara/article/view/34723>

Ibn Qudāmah. (1997). *Al-Mughnī*. Riyadh: Dār 'Ālam al-Kutub. <https://archive.org/details/almughn1>

Islami, I. (2019). Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) Kepada Bapak Pasca Perceraian. *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, 6(2), 181–194. [10.24252/al-qadau.v6i2.10715](https://doi.org/10.24252/al-qadau.v6i2.10715)

Kristyanto, G. H. (2018). Fungsi Kejaksaan Dalam Mewujudkan Restorative Justice Dalam Penanganan Anak Berhadapan Dengan Hukum Di Indonesia. *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum Dan Keadilan*, 5(1), 459–481. <https://doi.org/10.26623/jic.v7i2.5677>

Kurniaty, R., Saraswati, A. A. A. N., & Susanto, F. A. (2021). *Pengantar Hukum HAM Internasional*. Universitas Brawijaya Press.

Lukito, R. (2015). Segitiga hukum internasional, municipal dan Islam: Memahami kompetisi, interaksi dan resolusi hukum di Malaysia. *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum*, 49(1), 161–191. <https://doi.org/10.14421/ajish.v49i1.137>

Masyhadi, A., & Mahmudi, M. A. (2024). Hak Asuh Anak Pasca Perceraian Perspektif Hukum Islam dan Hukum Positif Indonesia. *Al-Faruq: Jurnal Hukum Ekonomi Syariah Dan Hukum Islam*, 3(1), 35–51.

Muizzudin, A. H., & Anwar, M. W. (2023). Tinjauan Yuridis Relevansi Pasal 41 Huruf A Undang-Undang Nomor 1 Tahun 1974 Dan Pasal 105 Kompilasi Hukum Islam Tentang Hak Asuh Anak Pasca Perceraian. *Al-Akmal: Jurnal Studi Islam*, 2(3), 50–62. <https://journal.iaidalampung.ac.id/index.php/al-akmal/article/view/56>

Mustofa, I. (2008). Keluarga sakinah dan tantangan globalisasi. *Al-Mawarid: Jurnal Hukum Islam*, 18. <https://journal.uii.ac.id/JHI/article/view/155>

Nor'asyikin Hamzah. (2018). Child Rights To Be Heard: Practice in Custody Proceeding in the Shariah Court of Federal Territory of Kuala Lumpur. *Journal of Shariah Law Research*. Vol. 3 No. 1. <https://doi.org/10.22452/http://doi.org/10.22452/JSLR.vol3no1.2>

Nurlaelawati, E. (2010). *Modernization, Tradition And Identity: The Kompilasi Hukum Islam And Legal Practice In Indonesian Religious Courts*. Amsterdam: Amsterdam University Press. <https://www.jstor.org/stable/j.ctt46n1c5>

Purkon, A. (n.d.). *Ketentuan Hadhanah Di Indonesia Dan Malaysia*. *Program Studi Hukum Keluarga (Ahwal Syakhshiyah)*. Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta. <https://repository.uinjkt.ac.id/dspace/handle/123456789/74659>

Puspitosari, H. (2014). Penyelesaian Sengketa Pemeliharaan Anak di Bawah Umur Akibat Perceraian oleh Pengadilan Agama Ditinjau dari Perspektif Feminis Yurisprudence. *RECHTSTAAT*, 8(2). <https://www.neliti.com/id/publications/163528/penyelesaian-sengketa-pemeliharaan-anak-di-bawah-umur-akibat-perceraian-oleh-pen#cite>

Rohman, A. N., & Putri, E. (2022). A Progressive Reading of Child Custody in Indonesia Marriage Law from a Gender Justice Perspective (Comparative Study of Law No. 1 of 1974 and The Compilation of Islamic Law). *Jurnal Hukum Dan Peradilan*, 11(1), 43–63. <https://doi.org/10.25216/jhp.11.1.2022.43-63>

Ritonga, A. U., & SH, M. H. (2024). *Hukum Perdata Islam di Negara Muslim*. Publica Indonesia Utama. <https://journal.uii.ac.id/JHI/article/view/155>

Rosyadi, H. I., & SH, M. H. (2022). *Rekonstruksi Epistemologi Hukum Keluarga Islam*. Prenada Media. <https://prenadamedia.com/produk/rekonstruksi-epistemologi-hukum-keluarga-islam/>

Rustina, S. A., & Suharnis, M. P. (2022). *Sosialisasi anak pada keluarga single parents*. Penerbit Adab. <https://repository.uindatokarama.ac.id/id/eprint/2006/>

Semman, M. (2025). Pertimbangan Psikologis Dalam Penentuan Hak Asuh Anak Pasca Perceraian Dalam Hukum Keluarga Islam Di Indonesia. *Multidisipliner Knowledge*, 3(1), 33–44. <https://e-jurnal.stai-almaliki.ac.id/index.php/mk/article/view/210>

Setiawan, E. (2014). Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia. *De Jure: Jurnal Hukum Dan Syar'iah*, 6(2). <https://doi.org/10.18860/j-fsh.v6i2.3207>

Setiawati, L., Ismail, H., Muhklishin, A., & Arsyad, M. (2023). Penguasaan Kakek pada Hak Asuh Anak di Bawah Umur dalam Perspektif Maqashid Syariah. *At-Tahdzib: Jurnal Studi Islam Dan Muamalah*, 11(2), 44–51. <https://doi.org/10.61181/at-tahdzib.v11i2.312>

Suryantoro, D. D. (2024). Hak Asuh Anak Pasca Perceraian Menurut Kompilasi Hukum Islam: Analisis Yuridis dan Konseptual. *Legal Studies Journal*, 4(1), 1–11. <https://doi.org/10.33650/lsj.v4i1.9444>

Syahputra, D. Y., & Zuhdi, S. (2024). Comparison of the Legal Construction of Hadhanah Rights in Saudi Arabia, Turkey and Indonesia. *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam*, 9(1), 131–148. <https://doi.org/10.25217/jm.v9i1.4753>

Tanjung, D., Harahap, M. Y., & Fuadi, F. (2021). Penyelesaian Sengketa Hak Asuh Anak Melalui Putusan Pengadilan Agama Medan (Studi Analisis terhadap Kompilasi Hukum Islam). *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial*, 9(02). <https://doi.org/10.30868/am.v9i02.2060>

Yoki Pradikta, H., Budianto, A., & Asnawi, H. S. (2024). History of Development and Reform of Family Law in Indonesia and Malaysia. *KnE Social Sciences*, 2024(4). <https://doi.org/10.18502/kss.v9i12.15863>

Yuniansa, R., Firmansyah, F., Indra, G. L., & Nayan, M. M. (2024). The Transition of Child Custody Due to Apostasy: An Approach Based on Children's Rights and the Objectives of Shariah. *El-Izdiwaj: Indonesian Journal of Civil and Islamic Family Law*, 5(2), 169–187. <https://doi.org/10.24042/el-izdiwaj.v5i2.25666>