



Comparative Normative Study on Child Custody and Guardianship in Islamic Family Law: Lessons from ASEAN and Europe

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Abstract

This study presents a comparative normative analysis of child custody (*ḥaḍānah*) and guardianship (*wilāyah*) within Islamic family law, exploring their formulation in classical Islamic jurisprudence and contemporary codifications, particularly Indonesia's Compilation of Islamic Law (KHI). The research aims to understand the foundational norms, examine their application across selected ASEAN and European countries, and identify normative insights for legal reform. Using a qualitative, literature-based method with doctrinal and comparative approaches, the study analyzes primary Islamic legal texts, national statutes, and international human rights instruments. The findings show that while classical *fiqh* offers structured but patriarchal custody norms, modern codifications like the KHI attempt to balance tradition with child-centered welfare principles. Comparative insights from Malaysia, Singapore, the UK, France, and Germany reveal diverse models of legal pluralism and secular accommodation. A key implication is the possibility of integrating the "best interests of the child" with Islamic legal reasoning, particularly through *maqāṣid al-sharī'ah*, to support child protection and gender equity. This study contributes to the discourse on Islamic legal reform in plural societies and offers pathways for reconstructing custody and guardianship norms in line with universal child welfare standards.

Keywords: Islamic family law, child custody, guardianship, ASEAN, Europe, *maqāṣid al-sharī'ah*

Abstrak

Penelitian ini menyajikan analisis normatif komparatif mengenai hak asuh anak (*ḥaḍānah*) dan perwalian (*wilāyah*) dalam hukum keluarga Islam, dengan mengeksplorasi perumusannya dalam yurisprudensi Islam klasik dan kodifikasi kontemporer, khususnya Kompilasi Hukum Islam (KHI) di Indonesia. Penelitian ini bertujuan untuk memahami norma-norma dasar, mengkaji penerapannya di beberapa negara ASEAN dan Eropa, dan mengidentifikasi wawasan normatif untuk reformasi

hukum. Dengan menggunakan metode kualitatif berbasis literatur dengan pendekatan doktrinal dan komparatif, penelitian ini menganalisis teks-teks hukum Islam primer, undang-undang nasional, dan instrumen hak asasi manusia internasional. Temuan penelitian menunjukkan bahwa fikih klasik menawarkan norma-norma hak asuh yang terstruktur namun bersifat patriarkis, sementara kodifikasi modern seperti KHI berusaha menyeimbangkan antara tradisi dengan prinsip-prinsip kesejahteraan yang berpusat pada anak. Wawasan komparatif dari Malaysia, Singapura, Inggris, Prancis, dan Jerman mengungkapkan beragam model pluralisme hukum dan akomodasi sekuler. Implikasi utamanya adalah kemungkinan untuk mengintegrasikan “kepentingan terbaik bagi anak” dengan penalaran hukum Islam, khususnya melalui *maqāṣid al-sharīʿah*, untuk mendukung perlindungan anak dan kesetaraan gender. Studi ini berkontribusi pada wacana reformasi hukum Islam dalam masyarakat plural dan menawarkan jalan untuk merekonstruksi norma-norma hak asuh dan perwalian yang sejalan dengan standar kesejahteraan anak universal.

Kata kunci: Hukum keluarga Islam, hak asuh anak, perwalian, ASEAN, Eropa, *maqāṣid al-sharīʿah*

Introduction

This report presents a comparative normative study on the legal norms governing child custody and guardianship within Islamic family law. It delves into classical Islamic jurisprudence (*fiqh*), examines the codification efforts in Indonesia through its Compilation of Islamic Law (KHI), and analyzes selected family law practices in European and ASEAN countries. The aim is to understand the evolution and adaptability of Islamic family law in diverse legal environments, particularly concerning child welfare.

Child custody (*ḥaḍānah*) and guardianship (*wilāyah*) are foundational concepts in Islamic family law, with their origins deeply rooted in classical Islamic jurisprudence. Historically, these guidelines for determining custody rights prioritized the welfare of the child, albeit within a prevailing patriarchal structure. However, in contemporary legal landscapes—ranging from Muslim-majority states like Indonesia to Muslim-minority contexts in Europe—these traditional norms are subject to reinterpretation, challenge, and integration within plural legal frameworks.

The diverse approaches observed in ASEAN countries, such as Malaysia and Singapore, and European nations, including the United Kingdom, France, and Germany, offer rich comparative perspectives. These jurisdictions demonstrate varied interactions between Islamic principles, civil law, and human rights frameworks. A normative comparison is therefore essential to grasp the dynamic evolution and

adaptability of Islamic family law as it navigates the complexities of modern, diverse legal environments.

This study explores two central research problems within the domain of Islamic family law. First, it investigates how the concepts of child custody (*ḥaḍānah*) and guardianship (*wilāyah*) have been defined and developed within classical Islamic jurisprudence and how these doctrines are reflected in contemporary Islamic legal codifications, particularly Indonesia's Compilation of Islamic Law (KHI). Second, it examines the normative insights that can be drawn from legal practices in selected ASEAN and European countries regarding the application or accommodation of Islamic principles in matters of child custody and guardianship.

To address these issues, the study sets out three primary objectives. The first is to conduct a thorough examination of classical Islamic legal doctrines relating to child custody and guardianship. The second objective is to carry out a comparative analysis between these classical doctrines and the provisions found in Indonesia's KHI, as well as family law practices in selected European countries—such as the United Kingdom, France, and Germany—and ASEAN countries including Malaysia and Singapore. The third objective is to derive normative conclusions that may contribute to the reform and development of Islamic family law in legally pluralistic societies, with particular attention to ensuring the protection and welfare of the child.

The research is guided by the following core questions: What are the normative foundations of child custody and guardianship in classical Islamic jurisprudence? How are these principles interpreted and implemented in Indonesia's KHI and in the legal systems of European countries that govern Muslim families? What normative lessons can be drawn for the reform of Islamic family law today, especially when viewed through the framework of *Maqāṣid al-sharī'ah* (the higher objectives of Islamic law) and the universally accepted principle of the best interests of the child?

Using a normative and comparative literature-based approach, this study contributes not only to the theoretical understanding of Islamic legal norms but also to the evaluative discourse on how Islamic family law can be reconstructed within plural legal frameworks while remaining responsive to contemporary child welfare standards.

Methods

This section outlines the methodological framework employed for this comparative normative study, emphasizing its qualitative and analytical nature.

Research Design

This study adopts a qualitative, normative legal research approach. It is primarily library-based, relying on a comprehensive comparative analysis of legal texts, doctrines, and scholarly interpretations. The research focuses on discerning what the law *ought to be* by examining its underlying principles and objectives, rather than merely describing its empirical application or statistical outcomes. This normative lens allows for a critical assessment of existing legal frameworks and the proposal of pathways for reform.

Sources and Materials

The investigation draws upon a range of authoritative sources:

- a) Primary sources: These include classical *fiqh* manuals, such as *al-Mughnī* and *al-Majmū*³, which provide foundational insights into Islamic jurisprudence. Additionally, the Compilation of Islamic Law (KHI) from Indonesia, relevant fatwas (religious edicts), and statutory texts from the selected jurisdictions form crucial primary data.
- b) Secondary sources: This category encompasses peer-reviewed journal articles, comprehensive legal commentaries, international conventions like the United Nations Convention on the Rights of the Child (UNCRC), and various national family law documents from the chosen ASEAN and European countries.
- c) Selected Countries: The comparative analysis specifically includes Indonesia and Malaysia from the ASEAN region, and the United Kingdom, France, and Germany from Europe, providing a diverse spectrum of legal and cultural contexts.

Analytical Framework

The analysis is structured around a robust framework designed to critically evaluate the legal norms:

- 1) Doctrinal Legal Analysis: This approach is deeply rooted in *usūl al-fiqh* (principles of Islamic jurisprudence) and integrates

comparative legal methods. It involves a meticulous examination of the textual bases of Islamic law, the juristic reasoning employed by classical and contemporary scholars, and the historical development of legal norms concerning child custody and guardianship. By applying *usūl al-fiqh*, the study explores the foundational sources and methodologies used to derive Islamic legal rulings.

- 2) *Maqāṣid al-sharī'ah* (Objectives of Islamic Law) as the Evaluative Lens: A central component of this framework is the application of *Maqāṣid al-sharī'ah*. These higher objectives of Islamic law serve as an evaluative lens, particularly focusing on the protection of lineage (*ḥifẓ al-nasl*) and the welfare of the child (*maṣlahah al-ṭifl*). This allows for a critical assessment of how both classical and contemporary interpretations align with the broader ethical and social objectives that Islamic law seeks to achieve. It ensures that legal analysis is not merely textual but also teleological, considering the ultimate purpose of the law.
- 3) Normative Focus: The study's emphasis remains firmly on the normative values and principles that underpin legal practices, rather than solely on their empirical implementation or statistical outcomes. This approach seeks to identify ideal legal norms and pathways for reform that are consistent with both Islamic ethical principles and modern human rights standards, aiming to contribute to the development of more just and equitable legal systems.

Results and Discussion

This section presents the findings of the comparative normative study, structured to highlight the distinct legal traditions and their complex interactions concerning child custody and guardianship.

Classical *Fiqh* Norms on Child Custody and Guardianship

Classical Islamic jurisprudence provides a detailed framework for child custody (*ḥaḍānah*) and guardianship (*wilāyah*), concepts fundamental to family law.

Definition and Scope of *Ḥaḍānah* (Custody) and *Wilāyah* (Guardianship) in Islamic Law

Ḥaḍānah, literally meaning "to clasp in one's arm, to embrace, or to hug someone," also extends to "to nurse, to bring up, or to raise a child". Terminologically, it signifies the "protection given to those who cannot act for themselves, such as the child or the insane person, and the care given to them such as in looking after their food, drinks, and such like, in order to promote whatever brings benefit to them". It is sometimes interchangeably referred to as *Kafalah* and encompasses the responsibility for a child's physical and emotional needs.

Wilāyah, in contrast, is defined as "a power in accordance with which a person will be able to establish contracts and other legal conducts, execute them and bear the consequences thereof". It involves "guardianship regarding one's self" and "guardianship regarding others," the latter entailing "the carrying through of a decision affecting a third person whether the latter's wishes are taken into consideration or not". This concept is primarily concerned with legal and financial decisions affecting the child's present and future welfare.

A key distinction between these two concepts is their functional orientation. *Ḥaḍānah* is intrinsically linked to the emotional care, nursing, and physical presence with the child, making it predominantly a "female-oriented function".

Wilāyah, conversely, pertains more to legal and financial decision-making and can be exercised remotely, generally being a "male-oriented function". The duty of *ḥaḍānah* is considered a collective obligation (*fardh kifayah*) upon the Muslim community, but it can become a personal obligation (*fardh 'ain*) for mothers, particularly during the initial two years of suckling, or if no other qualified person is available.¹

Eligibility of Caregivers: Maternal Custody Rights, Order of Preference, Gender-Specific Rules, and Age Limitations

Islamic law generally prioritizes the mother for physical custody (*ḥaḍānah*) of a minor child, especially during their early years. This preferential right is supported by Qur'anic verses (e.g., 2:233) and

¹ Mahdi Aahraa and Normi A Malek, "The Concept of Custody in Islamic Law," *Arab LQ* 13 (1998): 155.

Hadith, which acknowledge the mother's natural maternal instincts and patience in nurturing.²

However, the mother's priority is not absolute and is subject to specific conditions. She typically forfeits her right to custody if she remarries. Other disqualifying conditions include mental or physical illness, a criminal record, or addiction that renders her unfit to care for the child.³ Some schools of thought also stipulate that the mother cannot travel a significant distance with the child without the father's consent (e.g., the Maliki school suggests a 72-mile limit) or convert from Islam.

In the mother's absence or disqualification, custody typically transfers through a specific order of preference. This usually begins with other female relatives, such as the maternal grandmother, followed by the paternal grandmother.⁴ Different schools of thought, including Hanafi, Maliki, Shafi'i, Hanbali, and Imamiyyah, outline precise orders, generally moving from the mother to her female ascendants, then to the father, then his female ascendants, and then other female and male relatives based on proximity. For instance, the Imamiyyah school prioritizes the mother, then the father, and then the paternal grandfather.⁵

The period of *ḥaḍānah* also varies across schools. It generally concludes at age 7-9 for boys and 9-11 for girls, after which the child may be given the choice to live with either parent. In Shi'a *fiqh*, a mother holds *ḥaḍānah* over sons until age two and daughters until age seven. After these specified ages, custody often transfers to the father.⁶

² Hakeem Ijaiya and Hakeemat Ijaiya, "Child Custody (Hadanah) in Islamic Family Law: An Anatomy of Women's Right in Nigeria and Malaysia," *ICR Journal* 9, no. 1 (2018): 66–75.

³ "The Islamic Perspective on Child Custody | IL," accessed August 3, 2025, <https://www.farooqihusain.com/blog/the-islamic-perspective-on-child-custody>.

⁴ Ijaiya and Ijaiya, "Child Custody (Hadanah) in Islamic Family Law: An Anatomy of Women's Right in Nigeria and Malaysia."

⁵ "Custody (Al-Hidanah)," November 21, 2016, <https://al-islam.org/marriage-according-five-schools-islamic-law-muhammad-jawad-mughniyya/custody-al-hidanah>.

⁶ "Upholding the Best Interests of the Child in Custody and Guardianship," Musawah, 2021, <https://campaignforjustice.musawah.org/wp-content/uploads/2023/05/Musawah-Policy-Brief-6-Upholding-the-Best-Interests-of-the-Child-in-Custody-and-Guardianship-1.pdf>.

Guardianship Roles of Fathers and Male Relatives in Financial and Legal Decisions

Wilāyah (guardianship) almost exclusively rests with the father or another male relative, continuously, both during marriage and after divorce. The father is traditionally considered the natural guardian (*wali*) of the child's person and property.⁷ The scope of paternal *wilāyah* encompasses legal and financial responsibility for the child, including decisions related to education, financial affairs, and movements or travel. In the father's absence, *wilāyah* passes to an appointed guardian or male agnate (*'asabah*) according to a specific order of priority.⁸ Classical *fiqh* further distinguishes between guardianship of upbringing (nurturing care, often by mothers), spiritual guardianship (raising the child in faith, typically the purview of the father or another male relative), and property guardianship (the father's role over the child's property).⁹ A significant point of contention is that a father's right to *wilāyah* is generally never lost, even if he fails to pay child maintenance or maintain regular contact, a stark contrast to how a mother's *ḥaḍānah* rights can be forfeited.¹⁰

Limitations and Critiques of Classical Interpretations in Light of Changing Family Structures

Classical *fiqh* rules, while ostensibly formulated with the child's best interests in mind, are deeply embedded in and reflect fixed gender stereotypes about parental roles and children's needs. This historical context often leads to an automatic assignment of custody or guardianship based on gender, which does not consistently align with the specific needs of a child or the actual capabilities of parents in contemporary settings. The patriarchal values underpinning these interpretations can result in male-biased laws that subordinate

⁷ Ayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (an Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (2014): 267–77.

⁸ Aahraa and Malek, "The Concept of Custody in Islamic Law."

⁹ "The Islamic Perspective on Child Custody | IL."

¹⁰ "Upholding the Best Interests of the Child in Custody and Guardianship."

women.¹¹ This structural arrangement creates an inherent tension between the stated ideal of child welfare and the gender-specific application of rights and duties. The distribution of power, where ultimate legal and financial control rests with male relatives, reflects a societal structure that prioritized male authority, and the historical understanding of "best interests" was filtered through these gendered roles. This framework is now being critically re-evaluated as potentially not serving the child's holistic needs in contemporary contexts.¹²

The strict separation of *ḥadānah* (physical care) and *wilāyah* (legal authority) directly leads to practical disempowerment and administrative hurdles for custodial mothers. A divorced mother, despite providing daily physical care, often lacks the legal authority to make crucial decisions impacting her child's life, such as those concerning schooling, medical care, or travel, because the father retains *wilāyah*.¹³ This division, while perhaps functionally understandable in historical contexts where women's public roles were limited, becomes a significant impediment in modern societies where mothers are frequently both primary caregivers and active participants in all aspects of their children's development. This practical limitation highlights a fundamental flaw in applying classical divisions to contemporary realities.

Furthermore, these classical rules are based on assumptions about children's needs according to their age and gender, which have become fixed doctrines but may not align with current realities. For instance, the concept of *qiwāmah* (male headship) has historically been interpreted hierarchically, making wives vulnerable. There is a growing imperative for its reinterpretation based on human values rather than gender, advocating for wives as "partners" rather than subordinates. This structural issue within the interpretative lens itself means that mere literal application of historical *fiqh* rules is insufficient for addressing the complexities of contemporary family structures and comprehensive child welfare. The critiques strongly suggest that the issue lies not just in the application but in the foundational interpretative lens. This sets

¹¹ Nur Faizah, "The Concept of Marriage Guardian in the Perspective of Islamic Law," *YUDHISTIRA: Jurnal Yurisprudensi, Hukum Dan Peradilan* 1, no. 2 (2023): 1–8.

¹² "Upholding the Best Interests of the Child in Custody and Guardianship."

¹³ "Upholding the Best Interests of the Child in Custody and Guardianship."

the stage for the *Maqāṣid al-sharī‘ah* discussion, as it provides an internal Islamic framework for such reinterpretation, allowing reform to be seen as a legitimate development within Islamic law rather than an external imposition. The right of *ijbar* (guardian's right to choose a partner for a woman) can also be misused to force marriages, conflicting with women's freedom of choice.¹⁴ These laws can shift the focus from the child's needs to the rights and desires of the parents, fostering acrimony in divorce proceedings.¹⁵

Table 1: Key Distinctions in *Ḥaḍānah* and *Wilāyah* Across Classical *Fiqh* Schools

Feature/School	Hanafi	Maliki	Shafi'i	Hanbali	Imamiyyah (Shi'a)
Definition of <i>Ḥaḍānah</i>	Raising, bringing up, nursing; protection and care for those who cannot act for themselves	Caring or protection of children or insane persons; undertaking whatever makes them better	Care of a child for its upbringing and protection for a period	Protection given to those who cannot act for themselves	Care of a child for its upbringing and protection
Definition of <i>Wilāyah</i>	Power to establish contracts and legal conducts, execute them, bear consequences	Power to establish contracts and legal conducts, execute them, bear consequences	Power to establish contracts and legal conducts, execute them, bear consequences	Power to establish contracts and legal conducts, execute them, bear consequences	Power to establish contracts and legal conducts, execute them, bear consequences

¹⁴ Faizah, "The Concept of Marriage Guardian in the Perspective of Islamic Law."

¹⁵ "Upholding the Best Interests of the Child in Custody and Guardianship."

Primary Caregiver (Post-Divorce)	Mother has priority right	Mother has priority right	Mother has priority right	Mother has priority right	Mother has priority right
Typical Age Limits for <i>Ḥaḍānah</i>	Boys: 7 years; Girls: Puberty	Boys: 7 years; Girls: Puberty	No definite period; child chooses at age of discernment	Boys: 7 years; Girls: 9-11 years	Sons: 2 years; Daughters: 7 years
Conditions for Mother Losing <i>Ḥaḍānah</i>	Remarriage, mental/physical illness, criminal record, addiction, travel without consent, apostasy	Remarriage, mental/physical illness, criminal record, addiction, travel without consent, apostasy	Remarriage, mental/physical illness, criminal record, addiction, travel without consent, apostasy	Remarriage, mental/physical illness, criminal record, addiction, travel without consent, apostasy	Remarriage (for sons after 2, daughters after 7), unfitness
Order of Preference (after Mother)	Maternal grandmother, paternal grandmother, full sister, uterine sister, paternal sister, maternal/paternal aunts	Mother's mother, maternal aunt, uterine aunt, mother's maternal aunt, mother's paternal aunt, father's paternal aunt	Mother's mother, father, father's mother, nearest female relatives, nearest male relatives	Mother's mother, father, father's mother, grandfather, grandfather's mother, full sister, uterine sister, paternal sister, maternal aunts	Father, paternal grandfather, then relatives in order of inheritance

Paternal <i>Wilāyah</i> Role	Natural guardian of person and property; financial responsibility; legal decisions (education, travel)	Natural guardian of person and property; financial responsibility; legal decisions (education, travel)	Natural guardian of person and property; financial responsibility; legal decisions (education, travel)	Natural guardian of person and property; financial responsibility; legal decisions (education, travel)	Natural guardian of person and property; financial responsibility; legal decisions (education, travel)
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Child Custody Norms in the Indonesian Compilation of Islamic Law (KHI)

The Compilation of Islamic Law (KHI) in Indonesia represents a significant attempt to codify Islamic family law, aiming to provide clarity and introduce elements of modernization into its legal system.

Legal Codification of Custody Rights in KHI Articles 105–107

The KHI outlines specific provisions for child custody following divorce. Article 105 explicitly states that "the maintenance of a child who is not yet *mumayyiz* or not yet 12 years old is the right of the mother". This provision implicitly grants custody to the mother if the child is under 12 and was living with her prior to the divorce.¹⁶ For children who have reached the age of discernment (*mumayyiz*), typically around 12 years old, KHI Article 105 allows the child to choose between living with their father or mother. However, this 12-year criterion is not an absolute number; it can be influenced by considerations of "benefits or *madarat*" (harm), thereby allowing for a degree of judicial discretion. An illustrative case demonstrates this flexibility, where a 6-year-old child was placed with the father due to concerns about the mother's "behavior and morals".¹⁷ KHI Article 105 also stipulates that the maintenance costs for the child are borne by the

¹⁶ Salma Aulia Farahdina Ariani and Nanik Prasetyoningsih, *Media Of Law And Sharia*, n.d.

¹⁷ Indah Dewi Megasari et al., *Giving Child Custody Right To The Father, In Case The Child Has Not Mumayyiz (Study of Decisions of Religious Court Judges in South Kalimantan)*, n.d.

father.¹⁸ This aligns with the broader 1974 Marriage Law and KHI Article 104(1), which underscore the continuous obligation of both parents to care for and educate their child, with the father specifically responsible for living and educational expenses.¹⁹ Furthermore, the Child Protection Law stipulates that parental authority can be revoked by court order if parents neglect their duties or exhibit bad behavior, and generally, the custody holder must share the same religious affiliation as the child.²⁰

Tensions Between Textual Fidelity and Child-Centered Approaches

The KHI embodies an early effort to codify Islamic family law in Indonesia, seeking to reconcile traditional textual legal principles with contemporary interpretations of child care.²¹ The inclusion of a provision allowing a child's choice at a certain age reflects an attempt to incorporate the child's evolving autonomy and agency. However, as a codified legal instrument, the KHI tends to adopt a "fidelity perspective" in its implementation, meaning it expects faithful adherence to the rules designed by policymakers. This centralized approach, while providing clarity and consistency, can inadvertently create rigidity and entrench specific interpretations. This potentially limits the comprehensive application of a dynamic "child-centered approach" that requires significant judicial flexibility and individualized assessment beyond fixed rules. The success of implementation is often measured by the extent of adherence to the intended policy.²² This suggests that while KHI makes progress, its codified nature could limit judicial flexibility to apply a truly holistic

¹⁸ Mohamad Rizaldi Fitra Abadi et al., "Loss of Child Custody to a Father," *Estudiante Law Journal* 5, no. 3 (2023): 646–59.

¹⁹ Ariani and Prasetyoningsih, *Media Of Law And Sharia*.

²⁰ "Child Custody & Maintenance in Indonesia," accessed August 3, 2025, <https://www.expat.or.id/info/childcustodyinindonesia.html>.

²¹ Muhammad Aljurjani et al., "Reassessing Child Welfare in Islamic Jurisprudence: The Abrogation of Guardianship According to Al-Būfī's Maslahah Theory," *DIKTUM*, Fakultas Syariah dan Hukum Islam Institut Agama Islam Negeri (IAIN) Parepare, 2025, 196–213.

²² Iskandar Iskandar, "Teachers' Fidelity to Curriculum: An Insight from Teachers' Implementation of the Indonesian EFL Curriculum Policy," *International Journal of Humanities and Innovation (IJHI)* 3, no. 2 (2020): 50–55.

"best interests" standard that goes beyond age or basic physical needs, especially concerning the nuanced psychological welfare of a child, which often requires more flexible and individualized assessment.

Criticism Regarding Gender Bias and Insufficient Protection of Children's Psychological Needs

Despite the explicit maternal custody for young children, the KHI implicitly maintains aspects of paternal *wilāyah* through the father's continuous financial responsibility and the absence of clear provisions for maternal legal guardianship over all aspects of the child's life, such as education or travel.²³ This perpetuates the classical distinction between *ḥadānah* and *wilāyah*, which, as noted in critiques of classical *fiqh*, can restrict custodial mothers in managing their children's affairs.²⁴ This creates a functional gap, mirroring the disempowerment observed in classical *fiqh* critiques.

While the KHI allows for judicial discretion based on "benefits or *madarat*"²⁵ and the Child Protection Law's provision for revoking parental authority due to neglect²⁶, broader critiques of family court systems worldwide highlight "deeply entrenched gender bias" that can dismiss histories of domestic violence and fail to adequately consider the child's perspective or psychological needs.²⁷ Although these are general critiques, they point to systemic issues that KHI, as a national codification, may not fully overcome without specific provisions or judicial training emphasizing a holistic child-centered approach that explicitly includes psychological well-being.²⁸ The KHI's allowance for judicial discretion based on "benefits or *madarat*" and the Child Protection Law's provision for revoking parental authority due to

²³ Abadi et al., "Loss of Child Custody to a Father."

²⁴ "Upholding the Best Interests of the Child in Custody and Guardianship."

²⁵ Megasari et al., *Giving Child Custody Right To The Father, In Case The Child Has Not Mumayyiz (Study of Decisions of Religious Court Judges in South Kalimantan)*.

²⁶ "Child Custody & Maintenance in Indonesia."

²⁷ "Gender Bias in Custody Battles Places Women and Children at Risk," OHCHR, accessed August 3, 2025, <https://www.ohchr.org/en/stories/2023/06/gender-bias-custody-battles-places-women-and-children-risk>.

²⁸ Christiane Brems et al., "Assessment of Fairness in Child Custody Decisions," *Child Abuse & Neglect* 19, no. 3 (1995): 345–53, [https://doi.org/10.1016/S0145-2134\(94\)00135-9](https://doi.org/10.1016/S0145-2134(94)00135-9).

neglect signify a recognition of the "best interests of the child" principle within the Indonesian legal framework. This indicates that the principle is not static but requires continuous re-evaluation and adaptation beyond fixed age limits or gender roles, particularly concerning the psychological and emotional needs of the child. The 12-year rule for child choice, being "not an absolute number" and modifiable based on "benefits or *madarat*", provides a crucial opening for judges to apply a more nuanced "best interests" test that goes beyond rigid age criteria. However, the need to explicitly address the child's psychological and emotional well-being remains an ongoing challenge that requires continuous legal and judicial development.

Comparative Legal Practices: ASEAN and Europe

The approaches to child custody and guardianship vary significantly across different jurisdictions, reflecting diverse legal traditions and societal values.

Malaysia & Singapore: Dual Legal Systems, Limited Jurisdiction of Syariah Courts, and Challenges in Cross-Border Custody Cases

Malaysia operates a distinct dual legal system, with Syariah courts having jurisdiction over family law matters for Muslims and civil courts for non-Muslims. Article 121(1A) of the Malaysian Federal Constitution explicitly bars civil courts from exercising jurisdiction over matters falling within the Syariah courts' purview. Syariah courts possess limited jurisdiction over state Islamic law, primarily concerning family law and religious observance for Muslims.²⁹ This structural arrangement leads to significant challenges, particularly in inter-faith custody battles where one parent converts to Islam. Syariah courts may grant custody to the converted spouse without adequately considering the non-Muslim mother's rights, creating conflicting verdicts and practical dilemmas for law enforcement. The unilateral conversion of children by one parent is also a contentious issue within this dual framework.³⁰

²⁹ "Syariah Court - Wikipedia," accessed August 3, 2025, https://en.wikipedia.org/wiki/Syariah_Court.

³⁰ "Malaysia: Child's Best Interests Subordinated to Religious Manipulation | The Law Office of Jeremy D. Morley," accessed August 3, 2025, https://www.international-divorce.com/malaysia_childs_best_interests.

In contrast, Singapore's Syariah Court, while also part of a dual system, explicitly emphasizes the child's welfare. It actively encourages joint custody, care and control, and access arrangements when parents can cooperate. The court does not automatically favor one parent based on gender but considers what best serves the child's physical, emotional, and religious development. While Islamic law typically grants mothers the right to care for young children, this right is not absolute and can be granted to the father or another suitable guardian if the mother is deemed unfit.³¹ Syariah Court proceedings can exist concurrently with Family Justice Courts (Civil) proceedings.³²

Child custody disputes across borders are further complicated by differing international legal cultures, religious, cultural, and moral considerations.³³ However, there is a consistent emphasis on the "best interests of the child" as a primary consideration in international actions, including the child's right to maintain regular contact with both parents. Islamic legal perspectives on cross-border disputes acknowledge flexibility in interpreting *Shari'ah* for contextualizing fundamental principles, particularly in family law.³⁴ The comparative analysis reveals a global trend of legal systems grappling with religious diversity in family law, but adopting fundamentally divergent structural and philosophical approaches. ASEAN countries often embrace formal dual legal systems, leading to jurisdictional conflicts, especially in inter-faith cases. European nations generally maintain secular legal supremacy, with Islamic law having no official standing, but allowing for varying degrees of "accommodation" or "consideration" in practice. This spectrum, from formal legal pluralism to informal accommodation, demonstrates that while the challenge of religious diversity is universal, the solutions are highly context-dependent, shaped by historical, political, and constitutional differences.

³¹ Abdul Wahab, "Child Custody in Muslim Divorce: What You Need to Know - A.W. Law LLC," *Https://Awlaw.Com.Sg/*, May 14, 2025, <https://awlaw.com.sg/legal-blog/child-custody-in-muslim-divorce-what-you-need-to-know/>.

³² "File a Guardianship Application," Default, accessed August 3, 2025, <https://www.judiciary.gov.sg/family/guardianship/file-a-guardianship-application>.

³³ Louise Ellen Teitz, "Children Crossing Borders: Internationalizing the Restatement of the Conflict of Laws," *Duke J. Comp. & Int'l L.* 27 (2016): 519.

³⁴ "Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children," HccH, 2014, <https://assets.hcch.net/docs/520777a8-e146-4df6-b3d0-3f52485b3351.pdf>.

United Kingdom: Application of the Children Act 1989, Prioritizing "The Best Interest of the Child"; Muslim Family Tribunals (Sharia Councils) with No Legal Enforceability

The United Kingdom's legal framework for child welfare is primarily governed by the Children Act 1989, a pivotal piece of legislation safeguarding children's rights and welfare. Its core principle, derived from the UN Convention on the Rights of the Child (1989), dictates that the child's welfare is the paramount consideration in all decisions concerning their upbringing or property. Section 1 of the Children Act 1989 provides a "Welfare Checklist" to guide courts in determining the child's best interests. This checklist includes the child's ascertainable wishes and feelings (considered in light of their age and understanding), their physical, emotional, and educational needs, the likely effect of any change in circumstances, their age, sex, and background, any harm suffered or at risk, and the capability of each parent to meet their needs. Courts also consider factors such as the child's age (young children often being deemed better off with mothers), consistency of care, safety, and parental ability to meet needs.³⁵

Muslim family tribunals, commonly known as Sharia councils, in the UK hold no legal status and no legal binding authority under civil law. They possess no legal jurisdiction in England and Wales and cannot make legally binding decisions on child living arrangements, alimony, or visitation rights, as these matters fall exclusively under civil law.³⁶ While these councils can operate under the Arbitration Act 1996 for civil disputes, any family-related agreements they facilitate are not legally binding until approved by civil courts, which rigorously scrutinize them against the Children Act 1989's welfare considerations.³⁷ Misconceptions often arise from these bodies being

³⁵ Inovo Media and Colin Freeman, "Determining the Best Interests of the Child," Freeman Jones Solicitors, July 15, 2022, <https://www.fjsolicitors.co.uk/best-interest-of-the-child/>.

³⁶ "Syariah Court - Wikipedia."

³⁷ Basira, "Evidence on Sharia Councils," UK Parliament Committees, n.d., <https://committees.parliament.uk/writtenevidence/69024/pdf/>.

incorrectly referred to as 'courts' or their members as 'judges'.³⁸ English courts generally require children to reside or be present in England to establish jurisdiction for child matters.³⁹ In secular European contexts, the "best interests of the child" principle, deeply enshrined in civil law, functions as the paramount consideration. This principle effectively overrides or mediates religious considerations when conflicts arise, particularly concerning child welfare, establishing a clear hierarchy where state law takes precedence. The supremacy of secular state law, particularly its child welfare principles, dictates the extent to which religious norms can be recognized or accommodated, ensuring that the child's welfare, as defined by state law, remains the ultimate legal arbiter.

France & Germany: Secular Legal Systems with Rigid Integration Policies; Islamic Law Has No Official Standing but May Be Considered in Mediation or Personal Agreements

France and Germany operate highly secular legal systems where Islamic law holds no official standing. Adoption, for instance, is recognized in French and German law, a stark contrast to its prohibition in many Muslim-majority countries that adhere strictly to Islamic law.

Kafala (Islamic guardianship), while recognized in Muslim countries as an alternative to adoption, is generally not considered equivalent to adoption under French or German law.⁴⁰ In Germany, *Kafala* is assessed as a form of foster care or guardianship, and any transfer of custody rights from *Kafala* to German guardianship requires a court decision. Crucially, this transfer must be compatible with German law's fundamental principles, particularly the welfare of the child. It does not automatically establish a parent-child relationship or confer equal rights for residence or citizenship.⁴¹

³⁸ Mona Siddiqui et al., *The Independent Review into the Application of Sharia Law in England and Wales*, UK Parliament, 2018.

³⁹ "Sharia & Local Law Issues - Expatriate Law," accessed August 3, 2025, <https://expatriatelaw.com/sharia-local-law-issues/>.

⁴⁰ Sabrina Benghazi, "Kafala and Adoption in France: Legal Guidance for Muslim Families," Giambrone Law, accessed August 3, 2025, <https://www.giambronelaw.com/site/news-articles-press/international-articles/kafala-and-adoption-what-legal-support-is-available-in-france>.

⁴¹ "Kafala Recognition in German Family Law: Legal Framework & Foster Care Rights," *Schlun & Elseven*, n.d., accessed August 3, 2025, <https://se-legal.de/schlun->

The German Basic Law guarantees freedom of faith without age limitations. However, children lack the legal capacity to conduct court cases or administrative procedures independently.⁴² This highlights the inherent tension between individual religious rights and the state's authority to regulate child welfare. Despite these rigid secular frameworks, mediation is permitted and encouraged in Germany for various disputes, including family matters, especially where no formal legal requirement for court intervention exists. Mediators are impartial and do not have decision-making power, but agreements reached through mediation can be made legally enforceable with legal assistance.⁴³ There is an emerging recognition of "reasonable accommodation" in Europe, where judges may balance cultural and religious identities with fundamental legal principles in family disputes, particularly to protect vulnerable individuals.⁴⁴ This suggests that while Islamic law lacks formal standing, its ethical principles can inform judicial discretion or personal agreements. Research indicates a positive correlation between secularism and Muslim Family Law (MFL) reform, with former French colonies tending to be more secular and having more "reformed" MFL systems. Muslim-minority countries often prioritize "exit rights," allowing individuals to choose between civil and religion-based family laws, over substantive reform of religious laws, as it is often easier to bring Muslim citizens under existing civil laws.⁴⁵ Despite the general rigidity of secular legal systems, there is an emerging, albeit limited, recognition in some European jurisdictions of

elseven-lawyers/family-law-germany/adoption-in-islamic-family-law-the-legal-status-of-children-in-the-context-of-the-kafala/?lang=en.

⁴² Heinrich de Wall, "Religious Freedom of Children in German Law," *Constitutional Law, Société, Droit et Religion* 3, no. 1 (2013): 185–93, <https://doi.org/10.3917/sdr.003.0185>.

⁴³ "Mediation in EU Countries | European E-Justice Portal," accessed August 3, 2025, https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries_en.

⁴⁴ Ulla Liukkunen, *Chinese Context And Complexities — Comparative Law And Private International Law Facing New Normativities In International Commercial Arbitration*, n.d.

⁴⁵ Canopy Forum, "'The Muslim Family Law Reform: Exploring Cross-National and Historical Differences' by Yüksel Sezgin," *Canopy Forum*, October 9, 2024, <https://canopyforum.org/2024/10/09/the-muslim-family-law-reform-exploring-cross-national-and-historical-differences/>.

the need for "reasonable accommodation" and judicial discretion to address cultural and religious identities in family disputes. This indicates a nuanced approach where Islamic legal ethics, though not legally binding, can inform judicial decisions or mediation processes, particularly to protect vulnerable individuals and ensure substantive equality. This implies that while formal legal pluralism might be resisted due to secular principles, informal or semi-formal mechanisms are evolving to manage religious diversity in a practical, culturally sensitive manner, aiming to protect the dignity of different cultural expressions.⁴⁶ This represents a more sophisticated form of legal pluralism than simply having two separate, often conflicting, systems.

Table 2: Comparative Overview of Child Custody and Guardianship Principles in Selected Jurisdictions

Feature/Jurisdiction	Classical <i>Fiqh</i>	KHI Indonesia	Malaysia	Singapore	United Kingdom	France & Germany
Type of Legal System	Doctrinal, diverse schools	Codified Islamic law	Dual (Syariah & Civil)	Dual (Syariah & Civil)	Unitary Civil Law	Unitary Civil Law
Primary Legal Framework/Act	Qur'an, <i>Sunnah</i> , <i>Ijma'</i> , <i>Qiyas</i> , <i>Fiqh</i> manuals	KHI, 1974 Marriage Law, Child Protection Law	State Syariah Enactments, Federal Constitution Art. 121(1A), Law Reform (Marriage & Divorce) Act 1976	Administration of Muslim Law Act, Family Justice Act, Guardianship of Infants Act	Children Act 1989	Civil Code, Basic Law (Germany), Family Code (France)

⁴⁶ Liukkonen, *Chinese Context And Complexities — Comparative Law And Private International Law Facing New Normativities In International Commercial Arbitration*.

Governing Principle for Child Welfare	Child's right, best interests (within patriarchal framework), <i>masalah</i>	Child's welfare (implicit), "benefits or <i>madarat</i> "	"Best interests of the child" (explicit in civil, implicit in Syariah)	"Child's welfare" (explicitly paramount in Syariah)	"Child's welfare paramount consideration" (Children Act 1989)	"Welfare of the child" (paramount consideration)
Recognition/Standing of Islamic Law/Sharia Councils	Foundational legal system	Codified national law for Muslims	Formal jurisdiction for Muslims in specific areas	Formal jurisdiction for Muslims in specific areas	No legal status, no binding authority; advisory only	No official standing; may inform mediation/personal agreements
Key Challenges/Tensions	Gender bias, patriarchal structure, practical disempowerment of mothers	Tension between textual fidelity & child-centered approach, implicit gender bias, insufficient psychological needs consideration	Jurisdictional conflicts (inter-faith cases, unilateral conversion), limited civil court intervention	Cross-border issues, balancing civil/religious principles	Non-binding nature of Sharia councils, public misconceptions, ensuring paramountcy of child's welfare	Secular supremacy, non-recognition of <i>Kafala</i> as adoption, integration policies vs. cultural identity

Normative Lessons and Recommendations

The comparative analysis yields several crucial normative lessons and informs recommendations for the ongoing reform of Islamic family law in diverse global contexts.

The Classical Islamic Legal Tradition Contains Both Flexible and Rigid Elements; Reinterpretation is Necessary for Contemporary Contexts

The *Shari'ah* itself, particularly in matters of *mu'amalat* (interpersonal dealings) like family law, possesses an inherent flexibility in interpretation.⁴⁷ This flexibility allows for the contextualization of fundamental principles to address contemporary challenges and evolving societal needs. However, classical interpretations, often codified from specific juristic opinions, can become rigid and based on outdated assumptions and fixed gender stereotypes.⁴⁸ This includes the hierarchical interpretation of *qiwamah* (male headship), which needs to be reinterpreted based on human values rather than gender to ensure mutual benefit and partnership within family relations.⁴⁹ The tension between adherence to historical texts and evolving societal needs necessitates ongoing *ijtihad* (independent legal reasoning) to ensure Islamic law remains relevant, just, and responsive to modern family structures.

The "Best Interests of the Child" Principle Resonates with *Maqāsid al-sharī'ah* and Can Be Incorporated Within Islamic Legal Reasoning

The objectives of Islamic law (*Maqāsid al-sharī'ah*) fundamentally aim to preserve human life and society, including the protection of lineage (*ḥifẓ al-nasl*) and family structures.⁵⁰ The "best interests of the child" principle is directly linked to the *fiqh* concept of *maslahah* (best interest and protection from harm).⁵¹ This connection is profound because it allows for reforms that address contemporary child welfare needs, such as psychological well-being and gender equality in parenting roles, to be framed as fulfilling the higher objectives of *Shari'ah*. If the ultimate goal of *Shari'ah* is to promote welfare and prevent harm, then interpretations or applications that lead to

⁴⁷ "Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children."

⁴⁸ "Upholding the Best Interests of the Child in Custody and Guardianship."

⁴⁹ Faizah, "The Concept of Marriage Guardian in the Perspective of Islamic Law."

⁵⁰ Azmi, "What Is Islamic Jurisprudence? An Introduction to Islamic Fiqh Principles," *American Halal Foundation*, March 12, 2025, <https://halalfoundation.org/what-is-islamic-jurisprudence/>.

⁵¹ "Upholding the Best Interests of the Child in Custody and Guardianship."

disadvantage or disempowerment, such as gender bias or practical limitations for mothers, can be legitimately re-evaluated and reformed from within the Islamic legal tradition itself. This internal justification makes reform efforts more legitimate and palatable for Muslim communities, fostering true adaptation rather than perceived capitulation. This principle is universally paramount in civil law systems like the UK⁵², is a key consideration in Singapore⁵³, and influences German law's assessment of *Kafala*.⁵⁴ Its resonance across diverse legal traditions highlights its universal ethical appeal. Furthermore, the Qur'an (2:233) emphasizes "mutual consent" (*taradi*) and "due consultation" (*tashawur*) between parents regarding child upbringing⁵⁵, suggesting a framework for shared parental responsibility that aligns with modern child-centered approaches, rather than exclusive paternal decision-making.

Reformulation of *Wilāyah* to Include Shared or Maternal Guardianship, Especially in Diaspora Contexts

The traditional, male-exclusive *wilāyah* structure is a direct causal factor for the practical difficulties and disempowerment experienced by custodial mothers. This functional impediment, where mothers are severely restricted in making crucial decisions regarding their children's education, healthcare, and travel, is a primary driver for the growing calls to reform *wilāyah*. The fact that some Muslim-majority countries, such as Egypt, Tunisia, Algeria, and Malaysia, have already introduced administrative rules or legal provisions that grant custodial mothers some guardianship rights, like managing educational affairs or signing documents, demonstrates the feasibility of such reforms within an Islamic legal framework. This shows that the need for reform is not merely academic but is recognized and acted upon in various jurisdictions. Evidence also suggests that fathers are often willing to equally share custody over their children.⁵⁶ Reformulating *wilāyah* to allow for shared parental responsibility or expanded maternal guardianship would better reflect contemporary family

⁵² Media and Freeman, "Determining the Best Interests of the Child."

⁵³ Wahab, "Child Custody in Muslim Divorce."

⁵⁴ "Kafala Recognition in German Family Law."

⁵⁵ "Upholding the Best Interests of the Child in Custody and Guardianship."

⁵⁶ "Upholding the Best Interests of the Child in Custody and Guardianship."

dynamics and ensure both parents can actively participate in all aspects of their child's life.

Encouragement of Integrative Models Where Islamic Legal Ethics Inform State Family Laws While Respecting Constitutional Frameworks

The challenges observed in dual legal systems, such as Malaysia, and the limitations of non-recognition in secular contexts like the UK, France, and Germany, suggest a need for more integrative models. The concept of "exit rights," which allows individuals to choose between civil and religion-based family laws, represents a form of reform in Muslim-minority countries that correlates positively with secularism and MFL reform.⁵⁷ This approach allows for the preservation of religious identity while integrating individuals into the broader state legal framework.

The practice of "reasonable accommodation" by judges in some European jurisdictions⁵⁸, where cultural and religious identities are balanced with fundamental legal principles, offers a promising model. This allows Islamic legal ethics to inform judicial discretion and mediation processes, even without formal legal standing, fostering a more nuanced and inclusive legal pluralism. This moves beyond simple co-existence of legal systems, which can lead to conflict, to a more dynamic interaction. It implies that state law can be enriched by religious ethics, and religious communities can operate within a rights-respecting state framework, leading to more just and sustainable outcomes for children in plural societies. Ultimately, comprehensive reforms within family court systems worldwide are needed to ensure fair and just outcomes, protect vulnerable individuals, and prioritize the well-being of children, moving beyond rigid, gender-biased frameworks.⁵⁹

⁵⁷ Forum, "The Muslim Family Law Reform."

⁵⁸ Liukkonen, *Chinese Context And Complexities — Comparative Law And Private International Law Facing New Normativities In International Commercial Arbitration*.

⁵⁹ OHCHR, "Gender Bias in Custody Battles Places Women and Children at Risk."

Conclusion

Classical Islamic norms on child custody (*ḥaḍānah*) and guardianship (*wilāyah*) are doctrinally rich, providing a foundational framework for family law. However, a critical contextual reinterpretation is necessary to align these historical tenets with contemporary understandings of child welfare and gender equality. The traditional patriarchal structures embedded within classical interpretations, particularly the male-exclusive nature of *wilāyah*, often lead to practical disempowerment for custodial mothers, creating a functional gap that impedes holistic child care in modern contexts.

The Indonesian Compilation of Islamic Law (KHI) represents a significant early attempt at codification, demonstrating efforts to reconcile tradition with modernity through provisions like maternal custody for young children and child's choice at the age of discernment. Yet, its codified nature can inadvertently create rigidity, limiting its full adaptability to comprehensive child-centered approaches and leaving room for implicit gender biases that do not adequately address the psychological needs of children.

European legal systems, despite their predominantly secular frameworks, offer crucial normative insights. Their unwavering commitment to centering the "best interests of the child" as a paramount consideration provides a robust legal principle that can override or mediate religious considerations when conflicts arise. Furthermore, their evolving approaches to integrating multicultural values through mechanisms like "reasonable accommodation" and judicial discretion offer models for how Islamic legal ethics can inform state family laws, even without formal legal standing, fostering a more nuanced and inclusive legal pluralism.

A maqāsid-oriented reconstruction of custody and guardianship norms, grounded in the higher objectives of Islamic law—especially the protection of lineage (*ḥifẓ al-nasl*) and the welfare of the child (*maṣlaḥah al-ṭifl*)—offers a viable and legitimate pathway to bridge the gap between tradition and modernity. This approach can ensure both fidelity to Islamic principles and responsiveness to the holistic welfare of the child in increasingly plural societies, advocating for shared parental responsibilities and equitable legal frameworks that reflect contemporary family dynamics and universal human values.

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