

# Battle for Blood: Child Custody Conflicts in Divorce – Islamic vs. Customary Law

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## Abstract

Child custody disputes following divorce often become complex legal and emotional battles, especially when religious and customary laws intersect. In many Muslim-majority societies, Islamic law (Sharia) and customary law (*adat*) both influence custody decisions, sometimes complementing each other but often conflicting in practice. Islamic law prioritizes the child's welfare while emphasizing maternal custody during early childhood (*hadanah*) and paternal guardianship (*wilayah*) in later years. However, customary law, deeply rooted in local traditions, can override or modify these principles based on community norms, family ties, and social status. This study explores the legal and cultural dimensions of child custody disputes in divorce cases, analyzing the extent to which Islamic law and customary law shape judicial decisions and parental rights. While Islamic law prescribes clear guidelines, its application varies across jurisdictions, influenced by local customs and judicial interpretations. In many cases, customary norms challenge Islamic legal principles, leading to inconsistencies and gendered biases that may disadvantage mothers or overlook the best interests of the



child. As globalization and legal reforms push for greater adherence to human rights and child protection standards, the tension between religious and customary laws raises critical questions about the future of custody rulings. This paper examines landmark cases, legal frameworks, and the evolving role of Islamic and customary laws in shaping custody outcomes. By comparing these perspectives, it seeks to highlight the need for harmonized legal solutions that prioritize the child's well-being while respecting cultural and religious traditions.

**KEYWORDS:** *Child Custody, Customary Law, Religious Tradition, Child Protection, Islamic Law*

## Introduction

Child custody disputes in divorce cases remain a profoundly complex issue in Muslim-majority societies, where religious doctrine, customary norms, and national laws intersect.<sup>1</sup> In such contexts, custody decisions are not merely technical legal determinations; they are deeply embedded in moral, religious, and cultural worldviews that shape expectations around parenthood, kinship, and authority.<sup>2</sup> When marriages end, the fate of children becomes a battleground where Islamic jurisprudence (*Sharia*) and customary law (*adat*) often offer competing guidance.<sup>3</sup>

In theory, Islamic law provides a structured legal framework for child custody that is rooted in classical jurisprudential concepts. Custody is typically divided into two categories: *hadanah* (physical care and upbringing) and *wilayah* (legal guardianship and decision-making

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<sup>1</sup> Yassari, Nadjma, Lena-Maria Möller, and Imen Gallala-Arndt, eds. *Parental care and the best interests of the child in Muslim countries*. Asser Press, 2017. See also Buckley, Anisa. *Not 'completely' divorced: Muslim women in Australia navigating Muslim family laws*. Melbourne Univ. Publishing, 2019.

<sup>2</sup> Smart, Carol. "The Legal and Moral Ordering of Child Custody." *Journal of Law and Society* 18.4 (1991): 485-500; Van Praagh, Shauna. "Religion, Custody, and a Child's Identities." *Osgoode Hall Law Journal* 35.2 (1997): 309-378.

<sup>3</sup> Büchler, Andrea, and Christina Schlatter. "Marriage age in Islamic and contemporary Muslim family laws. A comparative survey." *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 1.2 (2013): 37-74; Black, E. Ann, Hossein Esmaeili, and Nadirsyah Hosen. *Modern perspectives on Islamic law*. Edward Elgar Publishing, 2013.

authority).<sup>4</sup> According to many interpretations, mothers are entitled to *hadanah* during the child's formative years, whereas fathers are assigned *wilayah* due to their role as the family's legal and financial protector. These principles are intended to ensure the well-being of the child within a religiously coherent family structure.<sup>5</sup>

However, this model is far from universally applied in practice. In countries like Indonesia, where Islamic and customary laws are both recognized within the legal system, the situation is further complicated by *adat*—local customary practices passed down through generations. *Adat* often carries significant normative weight in family and community decision-making, sometimes even superseding Islamic principles in actual custody outcomes.<sup>6</sup>

Customary law tends to emphasize communal belonging, lineage, and local notions of justice, which may lead to practices that diverge from both statutory and Islamic norms. For example, in certain *adat*-based communities, the child may be placed with the extended family or the lineage group, rather than with the mother or father, based on communal consensus rather than legal entitlement. These local customs are rooted in social cohesion and collective responsibility but can sideline the child's best interests and the parents' legal rights.

This leads to a fundamental gap between *das Sollen*—what the law prescribes—and *das Sein*—what occurs in reality. While Islamic law and national legislation may formally stipulate certain custody rights based on the child's age, gender, and parental qualifications, real-world applications are often influenced by informal negotiations, patriarchal norms, and the power dynamics within extended families or village structures. This discrepancy reveals the persistence of legal pluralism in family law and highlights the challenge of ensuring consistency and justice in custody rulings.<sup>7</sup>

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<sup>4</sup> Rafiq, Ayesha. "Child custody in classical Islamic law and laws of contemporary Muslim world (an analysis)." *International Journal of Humanities and Social Science* 4.5 (2014): 267-277.

<sup>5</sup> Horowitz, Donald L. "The Qur'an and the common law: Islamic law reform and the theory of legal change." *The American Journal of Comparative Law* 42.2 (1994): 233-293.

<sup>6</sup> Lukito, Ratno. *Islamic law and adat encounter: the experience of Indonesia*. McGill University, 2000; Azani, Muhammad. "The Development of Islamic Law in Indonesia Through Traditional Theory and Legal Changes." *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam* 6.2 (2021): 113-128.

<sup>7</sup> See Nurlaelawati, Euis. "The legal fate of Indonesian Muslim women in court: Divorce and child custody." *Religion, Law and Intolerance in Indonesia*. Routledge,

The ideal of protecting the child's welfare, which underpins both Islamic and international human rights law, is thus frequently compromised by the practical dominance of cultural traditions and localized interpretations.<sup>8</sup> Courts and judges may selectively apply religious or customary principles depending on social pressure, ethnic identity, or regional norms, leading to unpredictable and often inequitable custody outcomes.<sup>9</sup> The resulting uncertainty disproportionately affects mothers, who may find themselves without legal recourse despite theoretical entitlements under Islamic or statutory law.

Moreover, gender inequality is embedded in both legal and social practices. While Islamic jurisprudence grants mothers a recognized role in *hadanah*, this right is time-bound and conditional, with paternal guardianship often prevailing in the long term. When customary laws are introduced into the equation, maternal rights may be further diminished—especially in patrilineal societies where inheritance, domicile, and family identity are passed through the male line.

This intersection of gender, law, and custom also raises serious questions regarding compliance with international human rights standards. Instruments such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) call for non-discriminatory, child-centered custody frameworks. Yet, the simultaneous application of Islamic and customary laws—both of which may carry gendered assumptions—creates systemic barriers to harmonizing national laws with these global standards.

In the Indonesian context, this legal and normative pluralism is constitutionally protected. The legal system allows for the coexistence of religious, customary, and statutory law, particularly in personal status matters such as marriage, divorce, and child custody. While this

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2016, pp. 353-368; Rafiq, Ayesha. "Child custody in classical Islamic law and laws of contemporary Muslim world (an analysis)." *International Journal of Humanities and Social Science* 4.5 (2014): 267-277.

<sup>8</sup> Hutchinson, Aisha Jane, et al. "Child protection in Islamic contexts: Identifying cultural and religious appropriate mechanisms and processes using a roundtable methodology." *Child Abuse Review* 24.6 (2015): 395-408.

<sup>9</sup> Maldonado, Solangel. "Bias in the family: Race, ethnicity, and culture in custody disputes." *Family Court Review* 55.2 (2017): 213-242; Donohue, Claire P. "THE UNEXAMINED LIFE: A FRAMEWORK TO ADDRESS JUDICIAL BIAS IN CUSTODY DETERMINATIONS AND BEYOND." *Georgetown Journal of Gender and the Law* 21.3 (2020): 557-615.

recognition is intended to respect cultural and religious diversity, it often results in fragmented legal outcomes. Judicial discretion becomes crucial in deciding which norm prevails, and this discretion is frequently exercised without clear guidelines, leading to inconsistencies and contradictions.

This legal pluralism, while offering cultural sensitivity, can also perpetuate inequality and arbitrariness in the justice system. For instance, two custody cases with similar facts may result in radically different outcomes depending on the local *adat*, the judge's interpretation of Islamic law, or the influence of extended family networks. Such variability undermines the principle of legal certainty and erodes public confidence in the justice system, particularly for women and children.

Existing scholarship has addressed aspects of Islamic custody law and the influence of *adat*, but there remains a significant research gap in understanding how these normative systems operate in practice, particularly in the Indonesian judicial context. Few studies examine how judges reconcile (or fail to reconcile) conflicts between Islamic and customary laws in real custody disputes. Even fewer explore how these legal outcomes align—or misalign—with the stated objectives of child protection and gender equity.

Thus, this paper seeks to fill this gap by critically examining the operational tension between *Sharia* and *adat* in child custody rulings post-divorce. It investigates how legal pluralism produces outcomes that often diverge from the ideals of child-centered justice enshrined in both Islamic and human rights frameworks. By comparing the normative prescriptions of Islamic law (*das Sollen*) with the lived realities of judicial decision-making (*das Sein*), the study aims to highlight the disjuncture between legal theory and legal practice.

The analysis draws upon doctrinal research, statutory review, case law analysis, and contextual interpretation to uncover the underlying legal, cultural, and gender dynamics at play. Special attention is given to Indonesian case studies, where judicial discretion is influenced by the overlapping presence of religion, tradition, and modern law. These examples serve to illustrate the complexity and consequence of plural legal systems in everyday family disputes.

By focusing on child custody, a domain that directly impacts vulnerable populations, this study brings to light the need for legal harmonization that is both context-sensitive and rights-based. The aim is not to homogenize diverse legal traditions, but rather to identify



points of convergence and divergence that can inform fairer and more consistent custody determinations. Reform must begin with a recognition of existing contradictions and a commitment to prioritizing the child's best interests within a pluralist legal environment.

Ultimately, this paper contributes to broader debates on legal pluralism, judicial practice, and gender justice in Muslim-majority societies. It argues that custody law reform must navigate the delicate balance between cultural legitimacy and legal universality. In doing so, it underscores the urgent need to bridge the normative ideals of Islamic law and human rights with the complex social realities of divorce, family, and child protection in plural legal systems like Indonesia's.

## Islamic Law and Child Custody

### 1. *Principles of Islamic Custody Law*

Islamic law on child custody is deeply embedded in the concepts of *hadanah* (maternal custody) and *wilayah* (paternal guardianship). These principles are derived from both the Qur'an and Hadith, which form the foundation of Islamic jurisprudence (*fiqh*). In classical interpretations, *hadanah* refers to the care and upbringing of young children, emphasizing the importance of maternal care during early childhood. Islamic scholars agree that a mother is best suited to provide nurturing care for her children, particularly when they are under the age of seven or nine, depending on the jurisprudential school.<sup>10</sup>

The role of *wilayah*, on the other hand, involves paternal guardianship, which encompasses the responsibility to provide for the child's financial needs, legal decisions, and overall protection. Paternal *wilayah* typically becomes more prominent as the child ages, with fathers assuming greater authority over the child's religious and educational upbringing.<sup>11</sup> These principles are reflected in the *fiqh* rulings, which balance the mother's role in nurturing and the father's role in protecting and educating the child. However, the clear division of responsibilities between the mother and father may sometimes create

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<sup>10</sup> See Kamali, Mohammad Hashim. *Shari'ah Law: An Introduction*. Oxford: Oneworld Publications, 2008.

<sup>11</sup> For further cases, see also Nurhayani, Nurhayani. "Fathering Styles Of Muslim Families Perceived From Personality Types In North Sumatera." *Islam Realitas: Journal of Islamic and Social Studies* 5.1 (2019): 52-70; Lestari, Lenni. "'Fatherman' On the Move: Social Transformation Strategy in Indonesian Family Education." *Muslim Education Review* 2.2 (2023): 351-383.

legal complexities, particularly in divorce cases, when determining how custody should be allocated in the best interest of the child.

It is important to note that Islamic law does not view custody solely as a matter of parental rights but primarily as a means to safeguard the well-being and moral upbringing of the child. As such, the law generally aims to ensure that the child's best interests are respected, though this goal is sometimes obscured by gendered assumptions inherent in classical legal interpretations. The mother's role is clearly recognized in *hadanah*, but the father's authority remains paramount in terms of long-term decision-making and guardianship, reflecting traditional gender roles in the family unit.

## 2. *Focus on the Child's Welfare*

Islamic law consistently emphasizes the welfare of the child, ensuring that decisions surrounding custody and guardianship are made with the child's physical, emotional, and spiritual needs in mind.<sup>12</sup> The Qur'an stresses the importance of treating children with kindness, fairness, and love, and encourages parents to fulfill their responsibilities toward the child's development. Custody, therefore, is not just about maintaining parental rights, but about providing a stable and nurturing environment that supports the child's overall well-being.

In the case of maternal custody, Islamic law prioritizes the child's need for the nurturing care typically provided by the mother during the early years of life.<sup>13</sup> The child's emotional and physical attachment to the mother is given paramount importance during the early stages, particularly in terms of breastfeeding, affection, and psychological bonding. After this period, however, Islamic law shifts its focus toward paternal guardianship (*wilayah*), viewing the father as responsible for providing the child with an appropriate religious education, social status, and economic protection.

This shift from *hadanah* to *wilayah* reflects the belief that fathers are better suited to manage the child's affairs as they grow older, especially in terms of financial support, education, and maintaining a

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<sup>12</sup> Zahraa, Mahdi, and Normi A. Malek. "The Concept of Custody in Islamic Law." *Arab Law Quarterly* (1998): 155-177.

<sup>13</sup> Banu az-Zubair, M. Kabir. "Who is a parent? Parenthood in Islamic ethics." *Journal of Medical Ethics* 33.10 (2007): 605-609; Madyawati, Lilis, Nurjannah Nurjannah, and Mazlina Che Mustafa. "Integration between the western and islamic parenting models: content analysis in a literature review." *Jurnal Tarbiyatuna* 14.2 (2023): 192-214.

family structure conducive to Islamic values. Nonetheless, this transition is not without its complications, especially in divorce situations, where both parents often claim a right to custody based on different interpretations of the child's needs. In contemporary settings, this approach has been challenged, with critics arguing that the child's welfare may be better served by a more flexible, child-centered approach rather than strict adherence to gendered roles that prioritize paternal authority and maternal nurturing.

### 3. *Gendered Implications*

The gendered implications of Islamic law on child custody are evident in the division of roles between *hadanah* and *wilayah*. In Islamic legal theory, the maternal role is defined primarily in terms of care and nurturing, while the paternal role is associated with authority and protection. These roles are not only gender-specific but also time-bound. A mother's right to custody is seen as strongest during the child's formative years, but it diminishes as the child grows older and enters the stage where *wilayah* becomes more prominent. The implicit assumption is that mothers are naturally suited for the nurturing role, while fathers are more capable of fulfilling the legal and financial responsibilities associated with guardianship.

This gendered division reflects broader patriarchal structures embedded within Islamic family law, where men are viewed as the primary protectors and decision-makers in the family. While mothers are granted custody, their role is still framed within the confines of traditional motherhood, which excludes them from broader decision-making authority regarding the child's upbringing. In a divorce situation, this can lead to mothers losing custody of their children once they reach the age at which paternal guardianship takes precedence.

Critics of this system argue that such gendered roles fail to consider the evolving dynamics of modern families, where both mothers and fathers may be equally capable of providing care, protection, and financial support. In many contemporary societies, gender equality and shared parenting have become increasingly recognized as critical components of child welfare, yet Islamic law's traditional framework continues to constrain women's authority in custody matters.<sup>14</sup> This

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<sup>14</sup> Kapoor, Isha Kapoor. "From Shah Bano to Shayara Bano: Developing the Rights of Muslim Women." *Journal of Family & Adoption Law* 1.1 (2018): 18-30; Ahmed, Nausheen. "Family Law in Pakistan: Using the secular to influence the religious." *Adjudicating Family Law in Muslim Courts*. Routledge, 2013, pp. 70-86.



disparity highlights the tension between religious principles rooted in historical contexts and modern principles of gender equality.

#### 4. *Case Studies*

To better understand the application of Islamic law in child custody disputes, it is useful to examine case studies from jurisdictions where both Islamic law and national legal systems are in play. In Indonesia, a country with a significant Muslim population, Islamic law is applied in matters of personal status, including marriage and divorce, alongside customary law and state law. Indonesian courts often have to navigate the tension between *Sharia* and local *adat* practices when making custody decisions.

One landmark case involved a divorced couple contesting custody of their young child. The mother, who was entitled to *hadanah* according to Islamic law, sought to retain custody after the child turned five. However, the father claimed his right to the child under *wilayah*, citing both his parental authority under Islamic law and his ability to provide a stable home for the child. The court, in this case, opted to grant the father custody, despite the mother's strong legal claim to *hadanah*. The ruling was influenced by local *adat* norms that prioritized paternal authority in child custody matters. This case illustrates the conflicting legal principles at play, as Islamic law's focus on maternal care was overridden by local customs that favored paternal guardianship.

Another case highlighted the complex role of maternal custody in divorce proceedings.<sup>15</sup> In this instance, the mother, a working professional, was unable to provide full-time care for the child, leading to questions about her ability to uphold the ideals of *hadanah*. Despite her legal right to custody, the court ruled that the child would be better placed with the father, who had more time and resources to devote to the child's upbringing. The ruling emphasized the child's welfare but also implicitly challenged the maternal custodial ideal by shifting the responsibility to the father, based on his perceived greater ability to provide for the child's needs.

These case studies underscore the practical challenges in applying Islamic law's principles of custody in the modern context. While

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<sup>15</sup> Luepnitz, Deborah Anna. "A comparison of maternal, paternal, and joint custody: Understanding the varieties of post-divorce family life." *Journal of Divorce* 9.3 (1986): 1-12; Fox, Greer Litton, and Robert F. Kelly. "Determinants of child custody arrangements at divorce." *Journal of Marriage and the Family* (1995): 693-708.

*hadanah* is the established norm, the application of *wilayah* and local customs often complicate the determination of the child's best interests. The results are not always aligned with the intentions of Islamic law, which seeks to protect the child's welfare while ensuring fairness between parents.

## Customary Law and Child Custody

### 1. Role of Customary Law (*Adat*) in Child Custody

Customary law (*adat*) plays a significant role in family law decisions in many Muslim-majority societies, particularly in Southeast Asia and parts of Africa, where indigenous cultural practices are still deeply entrenched.<sup>16</sup> Unlike formal Islamic law, *adat* is not codified but is passed down through generations, often rooted in community traditions, moral codes, and ancestral customs. In countries like Indonesia, where both Islamic law and *adat* hold legal weight, *adat* influences custodial decisions by adding a layer of cultural practice that prioritizes family ties, community cohesion, and social status.

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<sup>16</sup> Customary law (*adat*) plays a significant role in family law decisions in many Muslim-majority societies, particularly in Southeast Asia and parts of Africa, where indigenous cultural practices remain deeply embedded. In these regions, Islamic law often intersects with customary laws, creating a hybrid legal system that influences areas such as marriage, divorce, inheritance, and child custody. For instance, in countries like Indonesia and Malaysia, *adat* traditions may govern marriage rituals or influence inheritance rights, sometimes diverging from Islamic principles like the fixed share of inheritance or child custody rules. While *adat* emphasizes community norms and continuity, it can often create conflicts with Islamic law, particularly regarding gender equality and the protection of women's rights. A common challenge arises in divorce cases where *adat* may grant certain privileges to the male, conflicting with Islamic principles of fairness and equality in divorce proceedings. Additionally, the varying interpretations of *adat* across different ethnic groups, such as the Minangkabau in Indonesia or Somalis in Africa, further complicate the legal landscape, making it difficult for courts to establish uniform rulings. The coexistence of these legal systems often leads to legal pluralism, where conflicting customary practices and Islamic laws may result in inconsistent rulings, particularly when local customs are not in harmony with Islamic teachings. This presents problems for legal clarity, gender equality, and children's rights, especially when *adat* practices favor one gender or group over another, undermining the protection of individual rights and complicating legal reform efforts. See Sezgin, Yüksel. "Muslim Family Law Reform: Understanding the Difference between Muslim-Majority and Muslim-Minority Jurisdictions." *Journal of Law, Religion and State* 10.2-3 (2023): 218-251.

In the case of child custody, *adat* law often reflects the community's perception of what is "best" for the child, typically focusing on maintaining familial honor and the child's place within the extended family network. *Adat* custodial decisions may sometimes override or adapt Islamic law's framework. For instance, certain *adat* customs in Indonesia allow for a child to be placed with the maternal or paternal grandparents, or with other extended family members, based on the perceived ability of the family to provide for the child's needs. While Islamic law assigns clear rights to maternal and paternal custody, *adat* views custody as a collective familial responsibility, often disregarding the legal entitlements of one or both parents.

The fusion of *adat* and Islamic law in determining custody outcomes can lead to inconsistencies, as judges may favor *adat* practices over Islamic legal principles if these traditions hold significant weight in local society. This tension between the two systems often leaves families, especially mothers, in precarious positions where their rights as defined by Islamic law may be overlooked in favor of community-based decisions that reflect local traditions and the social status of the family.<sup>17</sup>

## ***2. Social and Cultural Factors in Custody Decisions***

Custody decisions under *adat* are profoundly influenced by social and cultural factors, such as familial ties, gender roles, and the social status of the parents involved. These factors can dramatically shape the outcome of a child custody case, often leading to decisions that do not align with the child's best interests from a purely legal or child welfare perspective.

For instance, *adat* law may prioritize the child's placement with the father or the paternal family if they are seen as the more financially stable or socially prominent party, even if the mother is more capable of providing emotional or day-to-day care. In some communities, there is a strong preference for upholding the father's status within the family hierarchy, which could result in a mother losing custody despite her legal entitlement to *hadanah* under Islamic law.<sup>18</sup>

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<sup>17</sup> Lukito, Ratno. "SHARIAH AND THE POLITICS OF PLURALISM IN INDONESIA." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* 4.1 (2019): 1-18; Wahyudi, Achmad, et al. "Synchronising Adat and Sharia in Marriage: A Case Study in Indonesia." *VRISPRAAK: International Journal of Law* 7.2 (2023): 77-85.

<sup>18</sup> See Thomson, Larry Kenneth. *The effect of the Dayak worldview, customs, traditions, and customary law (adat-istiadat) on the interpretation of the Gospel in*

The extended family plays a crucial role in *adat* practices, where a child is not only seen as the responsibility of the immediate parents but also of the larger family unit. This can lead to decisions that reflect communal values over individual parental rights. In many cases, the child's well-being is closely tied to the family's honor, and custody disputes may be resolved in a way that maintains the family's reputation or adheres to community norms, sometimes at the expense of the child's emotional or physical needs.

Thus, *adat* custody decisions are far from neutral; they are deeply informed by social status, familial power dynamics, and gender roles, which can disadvantage women, particularly if they are viewed as less capable of providing for the child due to social norms surrounding gender.

### **3. Contradictions with Islamic Law**

While *adat* law aims to reflect the cultural and social realities of a given community, it often directly contradicts the principles outlined in Islamic law. For example, Islamic law assigns the primary responsibility for the early nurturing of a child to the mother under *hadanah*, but *adat* may overrule this by granting custody to the father or the paternal family, based on factors such as the father's economic status or the community's perception of the paternal lineage's social importance. This practice often places mothers at a disadvantage, as their legal right to custody under *hadanah* may be disregarded.<sup>19</sup>

Another significant contradiction arises with the role of *wilayah*, or paternal guardianship, which is typically exercised by the father in Islamic law. While Islamic law permits the father to exercise authority over the child as the primary legal guardian, *adat* law can sometimes extend this authority to the entire paternal extended family, diluting the father's individual guardianship role and further complicating the determination of the child's best interests.

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*West Kalimantan, Indonesian Borneo*. Diss. Acadia University, 2000; Karim, Wazir Jahan. "Bilateralism and Gender in Southeast Asia 1." *Male and Female in Developing South-East Asia*. Routledge, 2021, pp. 35-74.

<sup>19</sup> Jayusman, Jayusman, and Nurul Huda. "Perspektif Masalah Terhadap Pertimbangan Hakim Pada Putusan Perkara Nomor: 1376/Pdt. G/2019/Pa. Tnk Tentang Penetapan Hak Hadanah Kepada Ibu Kandung." *Ijtima'iyya: Jurnal Pengembangan Masyarakat Islam* 14.2 (2021): 249-276; Jauhari, Iman. "Kewajiban nafkah hadanah dan rada'ah terhadap anak di Indonesia." *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 46.2 (2012).

The tension between *adat* and Islamic law becomes particularly acute in divorce cases, where the application of *adat* practices can undermine the Islamic principle of maternal custody. In many cases, *adat* law places the child with the father regardless of the mother's right to custody under Islamic principles. This conflict leads to gender inequities and diminishes the protection offered to women under Islamic law, particularly in contexts where women are economically disadvantaged or lack social support.

Several cases from Indonesia, where both Islamic law and *adat* law are integral to legal practice, illustrate the complexities that arise when these legal systems intersect in child custody disputes. In one landmark case, a mother who had sole custody of her child under Islamic law lost her custodial rights when the father, with the support of the paternal family, invoked *adat* law to claim custody. Despite the mother's legal claim under *hadanah*, the court decided that *adat* customs dictated the child should remain with the father, a decision that was based on community norms regarding family authority and the father's financial stability.

In another case, *adat* law allowed the maternal family to assume custody of a child, even though Islamic law would have favored the mother's continued care. The court in this case sided with the maternal family, reflecting the *adat* emphasis on family solidarity and local customs that prioritize the well-being of the extended family over individual parental rights. These cases highlight the difficulties faced by courts when attempting to reconcile Islamic legal principles with *adat* practices, particularly in regard to custody.

Both cases reveal a critical challenge in the application of legal pluralism in child custody: how to navigate conflicting legal frameworks while maintaining the integrity of both systems. The legal outcomes in these cases show how *adat* law often overrides Islamic law in ways that affect gender equality, as mothers are frequently placed at a disadvantage compared to fathers or extended family members, despite their legal entitlements.

## **The Conflict Between Islamic and Customary Laws**

### ***1. Legal and Cultural Tensions***

The intersection of Islamic and customary laws in child custody cases creates a complex legal environment, where both systems



sometimes complement one another but often contradict. Islamic law, with its structured approach to maternal and paternal roles, is designed to ensure the child's well-being by clearly assigning responsibilities to both parents based on their gendered roles. However, in jurisdictions where *adat* law is strongly entrenched, these roles are frequently reinterpreted or altered according to local cultural norms, leading to outcomes that diverge from Islamic legal prescriptions.

In regions where both *adat* and Islamic law hold sway, judges are faced with the task of balancing these conflicting systems. While Islamic law emphasizes maternal care in the early stages of life and paternal guardianship in later years, *adat* practices often introduce a more flexible, family-centered approach that prioritizes community ties over legal norms. This results in inconsistent custody rulings that may undermine the child's best interests, as defined by either legal system, depending on which framework is deemed more applicable by the court.

## ***2. Impact on Gender Equality***

The conflicting systems contribute significantly to gender inequality in child custody disputes. Islamic law, while recognizing the mother's right to custody under *hadanah*, generally limits this right to early childhood, after which paternal guardianship becomes the focal point. In *adat*-influenced jurisdictions, this inequality is further compounded, as fathers are more likely to gain custody under the influence of social expectations that prioritize paternal authority. Women, in many cases, are left without custodial rights, even when Islamic law would otherwise favor their claim. This undermines efforts to ensure gender equality in custody decisions, particularly in cultures where the male head of the family holds disproportionate power.

## ***3. Judicial Interpretation***

Judges who must navigate the legal terrain between *Sharia* and *adat* are often faced with the difficult task of interpreting these laws in a way that respects both religious obligations and local customs. Judicial discretion is central to this process, but its application can be inconsistent and unpredictable. Courts may be more likely to defer to *adat* customs if they align with community expectations or social pressures, even when these customs contradict Islamic principles. This inconsistent application of both legal frameworks often results in contradictory outcomes. In some cases, Islamic law may be upheld when it supports the father's claim to guardianship, while in others, *adat* law

may overshadow Islamic norms, especially when it comes to maternal custody. This highlights the challenge of harmonizing legal pluralism with the child's best interests, as judges may prioritize local customs or familial power structures over more standardized legal approaches.

## Conclusion

### ***1. Summary of Key Findings***

This study has examined the intersection of Islamic law and customary law (*adat*) in child custody disputes, particularly in Muslim-majority societies. Islamic law provides a structured framework for child custody, emphasizing the welfare of the child with a clear distinction between maternal and paternal roles: *hadanah* (maternal custody) for young children and *wilayah* (paternal guardianship) for older children. However, the application of Islamic law is often influenced by regional customs and *adat*, which may override or modify Islamic principles depending on cultural, social, and familial factors. This legal pluralism results in tensions and inconsistencies, particularly when *adat* norms prioritize paternal authority and family ties over the rights granted to mothers under Islamic law.

While *adat* law often complements Islamic law in certain respects, it can also directly contradict Islamic legal principles, especially in relation to the rights of mothers. In many cases, *adat* law places more weight on the father's authority or social status, thereby marginalizing mothers despite their legal right to custody. This imbalance exacerbates gender inequality, with maternal custody rights being minimized or even ignored in favor of paternal claims. These findings underscore the legal and cultural complexities that arise when two legal systems intersect, especially in matters as sensitive and critical as child custody.

### ***2. Implications for Child Welfare***

The conflict between Islamic law and *adat* has significant implications for the well-being of children in divorce cases. Ideally, child custody decisions should prioritize the child's best interests, ensuring their emotional, physical, and psychological needs are met. However, when *adat* law overrides Islamic principles, the child's welfare may take a back seat to family and community expectations, which often perpetuate traditional gender roles and social hierarchies.

In many instances, children are placed with the parent who is deemed to be the most socially or financially stable, according to *adat*

customs, rather than the parent who is best equipped to provide nurturing care, as prescribed by Islamic law. This can lead to situations where children are removed from a nurturing and protective environment simply because of cultural biases or familial power dynamics. In some cases, children's rights to personal autonomy and emotional well-being may be compromised due to inconsistent legal practices that fail to adequately consider their needs.

Additionally, the lack of consistency between the two legal systems can create confusion and uncertainty for parents involved in custody disputes, often leaving them uncertain about their legal rights. Such unpredictability can further destabilize children's lives during an already emotionally turbulent time.

### ***3. Recommendations for Legal Reform***

To address the challenges presented by the intersection of Islamic and customary laws, it is essential to consider legal reforms that harmonize both legal systems while maintaining a focus on the child's best interests. A child-centered approach to custody decisions should be at the heart of any legal reforms, ensuring that both the child's emotional well-being and the parental rights are balanced fairly. A more integrative framework that respects both Islamic traditions and *adat* customs can provide a more consistent and predictable system for parents and children alike.

Firstly, judges and legal practitioners must be trained to better navigate the tensions between Islamic and *adat* laws, ensuring that they are able to apply both systems in ways that prioritize the welfare of the child, rather than simply deferring to social or cultural norms. Legal reforms could include clearer guidelines on how to balance these two systems, with specific emphasis on ensuring maternal rights are respected, in line with Islamic law's prioritization of the mother's role in early childhood.

Furthermore, there is a need to establish clearer legal criteria that allow for more equitable and transparent decision-making processes, particularly in cases where conflicting legal systems might produce inconsistent outcomes. This would not only reduce the gender bias present in many decisions but also help safeguard the child's well-being by providing a more consistent approach to custody rulings.

### ***4. Future Research Directions***

As the legal landscape surrounding child custody continues to evolve in Muslim-majority societies, there remains a need for further academic research into the intersection of religious and customary laws, particularly as it pertains to gender equality and children's rights. Future research should investigate how these conflicting legal systems affect the broader societal perceptions of gender roles, particularly in relation to maternal and paternal responsibilities. Additionally, further studies could examine the impact of globalization, migration, and international human rights standards on the local application of both Islamic and *adat* laws, especially as these influences continue to shape legal reform efforts.

Furthermore, research into comparative legal systems that examine child custody laws in other countries, especially those with multiple legal traditions (e.g., secular, religious, and customary), could offer valuable insights for countries like Indonesia, where legal pluralism is prevalent. Finally, scholars should explore the role of local religious leaders and community-based mediators in shaping family law decisions, as these actors often play a significant role in the custody process, sometimes more so than formal judicial authorities.

Through these avenues of future research, it may be possible to further refine legal frameworks in Muslim-majority societies, ensuring that child custody decisions are made in a way that fully respects the rights and well-being of children, while also upholding cultural and religious traditions in a balanced manner.

## References

- Ahmed, Nausheen. "Family Law in Pakistan: Using the secular to influence the religious." *Adjudicating Family Law in Muslim Courts*. Routledge, 2013, pp. 70-86.
- Azani, Muhammad. "The Development of Islamic Law in Indonesia Through Traditional Theory and Legal Changes." *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam* 6.2 (2021): 113-128.
- Banu az-Zubair, M. Kabir. "Who is a parent? Parenthood in Islamic ethics." *Journal of Medical Ethics* 33.10 (2007): 605-609.
- Black, E. Ann, Hossein Esmaeili, and Nadirsyah Hosen. *Modern perspectives on Islamic law*. Edward Elgar Publishing, 2013.
- Büchler, Andrea, and Christina Schlatter. "Marriage age in Islamic and contemporary Muslim family laws. A comparative

- survey." *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 1.2 (2013): 37-74.
- Buckley, Anisa. *Not'completely'divorced: Muslim women in Australia navigating Muslim family laws*. Melbourne Univ. Publishing, 2019.
- Donohue, Claire P. "THE UNEXAMINED LIFE: A FRAMEWORK TO ADDRESS JUDICIAL BIAS IN CUSTODY DETERMINATIONS AND BEYOND." *Georgetown Journal of Gender and the Law* 21.3 (2020): 557-615.
- Fox, Greer Litton, and Robert F. Kelly. "Determinants of child custody arrangements at divorce." *Journal of Marriage and the Family* (1995): 693-708.
- Horowitz, Donald L. "The Qur'an and the common law: Islamic law reform and the theory of legal change." *The American Journal of Comparative Law* 42.2 (1994): 233-293.
- Hutchinson, Aisha Jane, et al. "Child protection in Islamic contexts: Identifying cultural and religious appropriate mechanisms and processes using a roundtable methodology." *Child Abuse Review* 24.6 (2015): 395-408.
- Jauhari, Iman. "Kewajiban nafkah hadanah dan rada'ah terhadap anak di Indonesia." *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum* 46.2 (2012).
- Jayusman, Jayusman, and Nurul Huda. "Perspektif Masalah Terhadap Pertimbangan Hakim Pada Putusan Perkara Nomor: 1376/Pdt. G/2019/Pa. Tnk Tentang Penetapan Hak Hadanah Kepada Ibu Kandung." *Ijtima'iyya: Jurnal Pengembangan Masyarakat Islam* 14.2 (2021): 249-276.
- Kamali, Mohammad Hashim. *Shari'ah Law: An Introduction*. Oxford: Oneworld Publications, 2008.
- Kapoor, Isha Kapoor. "From Shah Bano to Shayara Bano: Developing the Rights of Muslim Women." *Journal of Family & Adoption Law* 1.1 (2018): 18-30.
- Karim, Wazir Jahan. "Bilateralism and Gender in Southeast Asia 1." *Male and Female in Developing South-East Asia*. Routledge, 2021, pp. 35-74.
- Lestari, Lenni. "'Fatherman' On the Move: Social Transformation Strategy in Indonesian Family Education." *Muslim Education Review* 2.2 (2023): 351-383.
- Luepnitz, Deborah Anna. "A comparison of maternal, paternal, and joint custody: Understanding the varieties of post-divorce family life." *Journal of Divorce* 9.3 (1986): 1-12.



- Lukito, Ratno. "SHARIAH AND THE POLITICS OF PLURALISM IN INDONESIA." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* 4.1 (2019): 1-18.
- Lukito, Ratno. *Islamic law and adat encounter: the experience of Indonesia*. McGill University, 2000.
- Madyawati, Lilis, Nurjannah Nurjannah, and Mazlina Che Mustafa. "Integration between the western and islamic parenting models: content analysis in a literature review." *Jurnal Tarbiyatuna* 14.2 (2023): 192-214.
- Maldonado, Solangel. "Bias in the family: Race, ethnicity, and culture in custody disputes." *Family Court Review* 55.2 (2017): 213-242.
- Nurhayani, Nurhayani. "Fathering Styles of Muslim Families Perceived from Personality Types in North Sumatera." *Islam Realitas: Journal of Islamic and Social Studies* 5.1 (2019): 52-70.
- Nurlaelawati, Euis. "The legal fate of Indonesian Muslim women in court: Divorce and child custody." *Religion, Law and Intolerance in Indonesia*. Routledge, 2016, pp. 353-368.
- Rafiq, Ayesha. "Child custody in classical Islamic law and laws of contemporary Muslim world (an analysis)." *International Journal of Humanities and Social Science* 4.5 (2014): 267-277.
- Rafiq, Ayesha. "Child custody in classical Islamic law and laws of contemporary Muslim world (an analysis)." *International Journal of Humanities and Social Science* 4.5 (2014): 267-277.
- Sezgin, Yüksel. "Muslim Family Law Reform: Understanding the Difference between Muslim-Majority and Muslim-Minority Jurisdictions." *Journal of Law, Religion and State* 10.2-3 (2023): 218-251.
- Smart, Carol. "The Legal and Moral Ordering of Child Custody." *Journal of Law and Society* 18.4 (1991): 485-500.
- Thomson, Larry Kenneth. *The effect of the Dayak worldview, customs, traditions, and customary law (adat-istiadat) on the interpretation of the Gospel in West Kalimantan, Indonesian Borneo*. Diss. Acadia University, 2000.
- Van Praagh, Shauna. "Religion, Custody, and a Child's Identities." *Osgoode Hall Law Journal* 35.2 (1997): 309-378.
- Wahyudi, Achmad, et al. "Synchronising Adat and Sharia in Marriage: A Case Study in Indonesia." *VRISPRAAK: International Journal of Law* 7.2 (2023): 77-85.

Yassari, Nadjma, Lena-Maria Möller, and Imen Gallala-Arndt, eds. *Parental care and the best interests of the child in Muslim countries*. Asser Press, 2017.

Zahraa, Mahdi, and Normi A. Malek. "The Concept of Custody in Islamic Law." *Arab Law Quarterly* (1998): 155-177.

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