



## Comparative Legal Determination of Post-Divorce Child Custody in Indonesia and Singapore

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### ABSTRACT

Divorce brings significant legal consequences, one of which is the dispute over child custody, requiring clear and detailed regulations to prioritize the welfare and best interests of children. This study examines the comparison of child custody provisions after divorce under Indonesian and Singaporean Family Law, focusing on identifying gaps and potential improvements for Indonesia. Every individual aspires to build a harmonious family, but marital conflicts can lead to divorce, affecting children and creating new legal challenges. This research uses a qualitative method, analyzing legal documents and relevant literature to explore how both legal systems address child custody. The findings indicate that Indonesia's regulations lack definitive and structured guidelines, often causing ambiguity, while Singapore's laws provide more comprehensive frameworks prioritizing children's welfare. The study suggests that Indonesia can adopt key insights from Singapore's legal system to establish alternative approaches and improve child custody provisions. This research has implications for policymakers in creating robust legal frameworks to ensure children's well-being remains central in custody decisions, providing solutions to minimize post-divorce conflicts and better protect children's rights.

**Keywords:** Comparative Law, Child Custody, Indonesia and Singapore.

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### INTRODUCTION

Child custody is one of the most controversial issues in family law. Indonesia as an archipelago with a population of more than 280 (two hundred and eighty) million people with diverse religions, ethnicities, cultures and customs makes child custody cases complicated (Badan Pusat Statistik Indonesia, 2024). There are 2 (two) main regulations in Indonesia that regulate the provision of child custody after divorce, namely Law Number 1 of 1974 concerning Marriage and for people who follow Islam, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law applies.

Article 1 of Law Number 1 of 1974 concerning Marriage (Marriage Law) states that marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of

forming a happy and eternal family or household based on God Almighty (Asyatama & Ridwan, 2021). Unfortunately, domestic problems that occur repeatedly cause a marriage to end and lead to divorce. Based on a report from Indonesia's Central Bureau of Statistics (BPS), during 2023 there were 408,347 divorce cases in Indonesia (Indonesian Central Bureau of Statistics, 2024). Some of the main factors that cause the high divorce rate include disputes and arguments, economic problems, and domestic violence.

Divorce that occurs has several legal consequences, one of which is related to children. Article 45 of the Marriage Law stipulates that both parents are obliged to maintain and educate their children as well as possible and applies until the child is married or can stand on his own, which obligation continues even though the marriage between the two parents is broken." Although in the Marriage Law both parents are charged with the same obligation in taking care of the child, the norms and concepts of childcare tend to dwell on separate parenting or split parenting and only one party of the family gets custody of the child as seen from the dominance of court decisions that decide child custody falls to one of the parents. This reality has led to a high number of custody disputes where both parents fight over the custody of the child, resulting in a court settlement. As of September 2023, the Indonesian Child Protection Commission received complaints of 1056 cases of special protection of children within the scope of the family environment and alternative care (K. P. A. Indonesia, 2023).

The main factors causing these cases include a lack of communication, awareness, and parental responsibility. In addition, post-divorce custody battles occur because Indonesia only provides sole custody as an option in resolving child custody disputes. The Marriage Law does not regulate joint custody specifically and in detail. The Compilation of Islamic Law as a reference that is often used by judges in making child custody decisions contains provisions that if the child is not yet mumayyiz, the custody is given to the mother, and if the child has mumayyiz or is 12 (twelve) years old, the child can choose to be raised by the mother or father.

The regulation of divorce in each country must vary according to its marriage law. Singapore's family law is regulated in the Women's Charter 1961 and for people who are Muslims, the Administrarion of Muslim Law Act 1966 applies. There are 4 (four) types of child custody in Singapore, namely joint custody order, sole custody order, hybrid order, and split custody order (Wong, 2023). In general, courts in Singapore recommend that post-divorce child custody be joint custody between both parents, but with the mother as the primary child custody holder (Ong, 1999). This is because the presence of both parents has an important role in the growth and development of children, especially in the aspects of education, religion, and health. In determining the type of custody, judges in Singapore prioritize the principle of welfare, the court will prioritize the best interests of the child for an optimal life. Judges also consider how each parent can ensure the overall welfare of the child until adulthood.

The reason researchers chose Singapore as a comparison is because geographically Indonesia and Singapore are both located in Southeast Asia so that the culture between the two

countries is not much different. In addition, it is also due to differences in the legal system adopted, where Indonesia is a country that adheres to a civil law legal system. Countries with a civil law legal system have codified laws and regulations so that there is legal uniformity among the diversity of laws (Siregar, 2022). Furthermore, in civil law countries the judiciary has an inquisitorial system, where judges are active in the judiciary and have a major role in directing and deciding a case. Meanwhile, Singapore is a country that adheres to the common law legal system. A country with a common law legal system has one of the characteristics where jurisprudence is the main source of law (Sinaga et al., 2024). Furthermore, countries adhering to common law judges are prioritized to follow and/or apply previous court decisions. Therefore, the legal comparison between the two countries will be very interesting to work on.

Based on the above background, the purpose of this study is to analyze the comparative arrangements for post-divorce child custody in Indonesian and Singaporean Family Law, focusing on the differences and similarities in the regulations and their implications for children's welfare. This research aims to provide an overview of the weaknesses in Indonesia's child custody arrangements and offer recommendations for improvement by referring to Singapore's family law approach, particularly regarding the application of joint custody. The benefit of this research is to contribute to the development of family law in Indonesia, particularly in creating clearer and more detailed rules regarding post-divorce child custody. In addition, this research is expected to be a reference for policy makers in drafting regulations that are more comprehensive and based on the principle of the best interests of the child, taking into account the presence of both parents in the child's growth and development.

## RESEARCH METHOD

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The research conducted is doctrinal research. Terry Hutchinson argues that doctrinal legal research is the study of legal rules, principles, concepts or doctrines. The research involves meticulous systematic exposition, analysis, and critical evaluation of legal rules, principles or doctrines, and their inter-relationships (Siregar, 2022).

This research uses secondary data. Secondary data is data obtained through literature study in the form of laws and regulations relevant to the subject matter of the research, in this case related to the legal comparison of post-divorce child custody between Indonesia and Singapore. Secondary data is divided into primary, secondary, and tertiary legal materials. Primary legal materials used in this research are the Marriage Law, Compilation of Islamic Law, Women's Charter 1961, and Administration of Muslim Law Act 1966. Secondary legal materials used are books, journals, scientific articles, and news related to child custody after divorce. The object studied in doctrinal research is the problems faced by the community regarding the determination of post-divorce child custody, so it requires research by comparing with the State of Singapore on the issue.

The research method used to analyze the data in this research is a qualitative method. Analysis through qualitative methods is a way of analyzing data through legal materials based on laws and regulations, theories, concepts, doctrines, and expert opinions, therefore this research conducts qualitative data analysis with the main topic of child custody after divorce.

## RESULTS AND DISCUSSION

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### **Granting Child Custody after Divorce in Indonesia**

#### ***Based on Law Number 1 of 1974 concerning Marriage***

Provisions regarding the authority over children by their parents are contained in the Marriage Law Chapter IX on the Position of Children and Chapter X on the Rights and Obligations of Parents. According to Article 47 of the Marriage Law, children who have not reached the age of 18 (eighteen) years or have never entered into marriage are under the authority of their parents as long as they are not deprived of their authority. The breakdown of a marriage due to divorce does not mean that both parents are released from the obligation to take care of the children born from their marriage. This is regulated in Article 41 letter a of the Marriage Law which states:

*"Either the mother or the father remains obliged to maintain and educate the children, solely based on the interests of the child if there is a dispute over the control of the children, the Court gives its decision."*

Article 45 of the Marriage Law also regulates the obligation of both parents to maintain and educate their children as well as possible, this obligation applies until the child marries or can stand alone and continues even though the marriage between the parents of the child has broken down. Based on the provisions of the Marriage Law, it can be concluded that after a divorce, both parents of a child are still obliged to take care of their child. This obligation is then determined by the court which is hereinafter referred to as child custody. Regarding child maintenance, the father is the main party responsible for all maintenance and education costs required by the child. If the father is unable to fulfill this obligation, the court may determine that the mother shares in the costs.

In addition to the obligations of parents towards children, children also have obligations that must be fulfilled to their parents. This is stated in Article 46 of the Marriage Law which states that children are obliged to respect their parents and obey their good wishes. When the child has grown up, he/she is obliged to take care of the parents and family in a straight line up according to his/her ability if they need help from the child. Parents holding child custody rights can lose custody of their children and be transferred to other family parties with the aim of promoting the safety and interests of the child. This is regulated by the provisions of Article 49 of the Marriage Law paragraph (1), which states:

"One or both parents may be deprived of the authority over one or more children for a certain period of time at the request of the other parent, the child's family in a straight line upwards and adult siblings or an authorized official by a court decision in such cases:

- a. She is grossly neglecting her duties towards her child; and/or;
- b. He behaved very badly."

Even though the authority over the child is revoked, the parent still has the obligation to pay for the maintenance of the child and also love the child as when he/she still has custody of the child. Looking at the arrangements regarding child custody in the Marriage Law, there is an implicit message stating that what is prioritized in granting child custody is the interests of the child and the welfare of the child's life for growth and development into the future.

### ***Based on the Compilation of Islamic Law***

In Islamic law, child custody is known as hadhanah. The delegation of child custody after divorce is clearly regulated in Chapter XIV KHI with the hope of perfecting the interests of childcare that were previously regulated in the Marriage Law. Child care and maintenance are both important concepts in family law because they are closely related to the position and rights of children in family ties. According to the language, hadhanah means putting something near the ribs or on the lap (Noor et al., 2023). This is because when a mother breastfeeds her child, she puts her child on her lap, as if she is protecting and nurturing her child. The definition of hadhanah in general is the maintenance of a child who is not yet able to live independently, including education, and everything he needs both in the form of carrying out and in the form of avoiding something that can damage him (Islami, 2019). In hadhanah there are two elements that make up the pillars, namely hadhin or parents who care for and mahdhun or children who are cared for (Asnawi & SHI, 2022).

Article 105 KHI regulates the maintenance of children after the breakdown of parental marital relations, that the maintenance of children who are not yet mumayyiz or have not reached the age of 12 (twelve) years is the right of the mother. (Putri et al., 2023). Furthermore, the maintenance of children who have mumayyiz is left to the child to choose between the mother or father as the holder of the maintenance rights, however, all costs of child maintenance are still borne by the father. The custody of children who are still minors is the right of the mother because she is considered the closest figure to the child, starting from conceiving, giving birth to breastfeeding. Child maintenance also means a parent's responsibility to provide for the needs of a child. The responsibility of maintenance in the form of supervision and service as well as providing for the child is continuous until the child reaches the legal age limit as an adult who is able to stand alone (Islami, 2019).

If the mother of the child has died, therefore Article 156 letter a KHI provides additional provisions that the position of the mother can be replaced by women in a straight line up from the mother; father, women in a straight line up from the father; sister of the child concerned; or women blood relatives according to the side line from the father.

Although the mother is the preferred party regarding the holder of child custody, there are conditions for someone who wants to carry out child maintenance or become a *hadhin*, whether the father or mother, the conditions are set, including *baligh* or adulthood, reasoning, having the ability to educate and take care of children, trustworthy, Muslim, and for the mother should not be remarried.

### **Post-Divorce Child Custody Awards in Singapore**

#### ***Based on the Women's Charter 1961***

Article 65(1) of the Women's Charter defines a child as a person under the age of 21 (twenty-one) years. The regulation stipulates that both parents have the same obligation to take care of the child, whether the custody belongs to one parent or the other, and whether the child is legitimate or illegitimate. The breakdown of a marital relationship does not remove a parent's obligation to care for a child. Both parents are responsible for contributing to the overall maintenance of the child from shelter, clothing, food, to education, this applies without exception as stated in Article 68 of the Women's Charter. If one parent does not take responsibility for their child, then under Article 69(2) of the Women's Charter, the court can issue an order for the parent who neglects their child who has not reached the age of majority to provide for the basic needs of the neglected child on a monthly basis.

Article 69 paragraph (3) of the Women's Charter stipulates that there are several parties who can apply for child maintenance, including the guardian or anyone who has custody of a child; can be done by the child himself if he is 21 (twenty-one) years old; done by his siblings who are 21 (twenty-one) years old if the child is still a minor; or persons appointed by the Minister.

Singapore law divides child custody into 4 (four) types, including:

#### **1. Joint Custody**

Joint Custody is the granting of child custody that provides an opportunity for both divorced parents to determine major decisions regarding the child (Damayanti et al., 2024). Both parents can discuss and their opinions have equal standing. Joint custody is the type of child custody that is most often determined by the court, this is because the presence of both parents in the child's life has a great influence on the child's growth and development process even though they have divorced.

#### **2. Sole Custody**

Sole Custody means that only one parent has custody of the child and is the sole decision maker in terms of the child's interests. In general, sole custody is only granted by the court if the relationship between the two parents is in a very bad condition. If the relationship between the parents is so unhealthy that there is hostility, as well as constant fighting, then this can make it impossible for them to communicate about issues or decisions relating to the child. In some cases, one parent may voluntarily choose to give up custody of the child to the other parent.

#### **2. Hybrid Order**

A Hybrid Order is a court order conditionally awarding custody of a child to only one parent. (Advice, 2022). One parent with custody must first consult with the other parent on specific matters relating to the welfare of the child, such as determining the religion of the child or the decision to move to another country.

### 3. Split Custody Order

If there are more than one child involved in the divorce, then there is a possibility that the court may grant a split custody order to the divorcing parents. For example, the mother has child custody of the first child and the father has child custody of the second child. In practice, this is rare and difficult to apply as it would involve separate living arrangements for children who are siblings. If a split custody order is indeed the middle ground chosen by the divorcing parents, it will require the submission of an affidavit explaining that this type of child custody is the best decision for the interests and welfare of the children.

In addition to custody, child custody provisions in Singapore also provide for care and control and access rights decided by the Family Justice Courts. Care and control is given to one parent who lives with the child and is responsible for day-to-day care activities. Generally, if the child has not reached the age of majority, the mother will have care and control, while the father will be granted access rights. Access rights are the rights given to one parent to visit and interact with the child based on a mutually agreed schedule or a schedule set by the court.

Provision for children after divorce remains an obligation of both parents even if custody is only given to one of the parties. The court considers the amount of maintenance based on the income and financial capacity of each parent, the needs of the child such as education, health, housing, and other basic needs, and the child's standard of living before the divorce. Maintenance can be awarded on a monthly basis or in one large payment.

The court does order a child to be in the care, custody, control, and access of both parents of the child, but in certain circumstances it may also be awarded to one parent only, another relative of the child, an organization concerned with the welfare of the child, or even any other appropriate person as essentially the award of custody of a child is determined based on the best interest of the child. Under Article 126(3) of the Women's Charter 1961, there is also a prohibition for the custodial parent to take the child out of Singapore without the consent of the other parent or the court. This is stipulated to prevent the occurrence or abduction of children by their own parents, especially overseas, which may violate the rights of the other parent. Where a custodial parent breaches this provision, he or she is liable to a fine of up to \$5,000 and imprisonment for a term not exceeding 12 (twelve months), or both. In addition to criminal penalties, such actions also affect the custody rights held. There are several factors that cause one parent to be denied custody or care and control of their child, namely committing acts of violence against the child both physically and psychologically, having mental health problems, trying to keep the child away from the other parent, and not having a commitment to carry out their responsibilities as a parent.

***Under the Administration of Muslim Law Act 1966***

A child of both spouses in Article 2(1) of the Administration of Muslim Law Act is defined as any child of the parties to a marriage (including a marriage deemed annulled), and includes any child legally adopted. In the same article of the Administration of Muslim Law Act it is stated that arrangements for the welfare of any child are the responsibility of both parents, this relates to custody, care and control, as well as access to the child in the child's education and other responsibilities towards the child. The Syariah Court or Religious Court in Singapore follows Islamic Law in determining the custody of children after their parents divorce, namely *hadhanah* (Haryati, 2020). One of these rules is that children under the age of 7 (seven) years will generally be placed in the care of their mother, while older children can choose which parent they want to live with after divorce. Another rule states that a mother can lose her parental rights if she remarries. Several types of factors influence the determination of child custody in divorce cases in the Muslim community in Singapore, including age; gender; the ability of the parents to meet the physical, mental and educational needs of the child; the desire of the child to be cared for by the mother or father; and the condition of the parents.

The procedure for child custody applications is set out in Section 13C of the Administration of Muslim Law Act 1966 which states that in any application relating to a child, the applicant shall notify the Court in advance of any proceedings relating to the child which may be pending in any court in Singapore or elsewhere. The Court on the application of either party during any stage of the proceedings, may make an interim order regarding custody, care and control, or access to any child of a parent, if the Court is of the opinion that it is in the best interests of the child. Before making such an interim order, the Court must take into account a number of circumstances regarding whether or not there are legal proceedings relating to the child which may be ongoing in a court in Singapore or elsewhere, or which are the subject of a court order in Singapore such as whether the child must appear before the Court during the proceedings or whether a party may take the child out of Singapore during the proceedings.

**Comparative Analysis of Indonesia's Custody Provisions with Singapore's****Table 1. Comparison of Indonesian and Singaporean Custody Provisions**

Comparison	Indonesia	Singapore
Legal Basis	Law Number 1 Year 1974 on Marriage and Compilation of Islamic Law.	<i>Women's Charter</i> 1961 and <i>Administration of Muslim Law Act</i> 1966 (AMLA).
Parental Obligations Toward Children After Divorce	Both parents still have an obligation to educate and maintain their children even if they are divorced.	Both parents are obliged to take care of their children, even if custody rests with the other parent.
Type of custody	Indonesia does not divide the types of child custody. Both parents can co-parent. If there is	Custody rights are divided into 4 (four) types, namely <i>Joint Custody</i> , <i>Sole Custody</i> , <i>Hybrid Order</i> , and <i>Split Custody Order</i> .

Comparison	Indonesia	Singapore
	a dispute, then custody is awarded to one parent.	
Granting custody based on the age of the child	The Marriage Law does not regulate the age of the child as one of the considerations for granting custody to one of the parents, but usually falls to the mother. While in Article 105 KHI the maintenance of children who are not yet <i>mumayyiz</i> or not yet 12 years old is the right of the mother. If the child has <i>mumayyiz</i> , the child can choose the father or mother as the holder of the right of maintenance.	The <i>Women's Charter 1961</i> does not provide for the age of the child as one of the considerations for granting custody of the child to either parent, but is usually given to the mother. Meanwhile, in the AMLA for Muslims, children under the age of 7 are taken care of by their mother, while children over the age of 7 can choose to live with their father or mother.
Provision of maintenance to children	The Marriage Law stipulates that the father is primarily responsible for all maintenance and education costs required by the child. If the father is unable to fulfill this obligation, then the Court can determine that the mother shares in these costs. KHI also stipulates that all child maintenance costs are borne by the father.	The Marriage Law and AMLA stipulate that maintenance for children is the obligation of both parents. The court considers the amount of maintenance based on the income and financial capacity of each parent, the needs of the child such as education, health, housing, and other basic needs, and the standard of living of the child before the divorce.
Time Sharing with Children	The division of time with children is determined by the agreement of both parents.	There are rules regarding <i>Care and Control</i> and <i>Access</i> which will be held by each parent. Time with the child will be decided by the Court for the parent with <i>access</i> .
Revocation of parental rights	In the Marriage Law, custody rights can be revoked if the parents neglect their obligations towards their children and/or they behave very badly. Meanwhile, in KHI custody rights can be revoked if they violate the requirements as a <i>hadhin</i> .	A custodial parent can lose their parental rights if they are violent towards the child, have mental health issues, keep the child away from the other parent, and are not committed to their parental responsibilities.

### Analysis of the Decision of the Gianyar Religious Court Number 2/Pdt.G/2019/PA.Gia

AD (father) as the Plaintiff and OP (mother) as the Defendant were originally a married couple who entered into marriage in 2016. During their marriage, they had a son named N who

was born in 2017. On March 8, 2018 the Plaintiff filed a divorce petition against the Defendant and a divorce has occurred based on the Decision of the Gianyar Religious Court Number 08/Pdt.G/2018/PA.Gia. The decision stated that the custody of the Plaintiff and Defendant's child fell to the Defendant as the child's biological mother. Since the two separated, the Plaintiff has continued to carry out his obligations and responsibilities as a father to provide alimony and affection to the child every month. Initially, the Plaintiff accepted that the child was being cared for by the Defendant, but then the Plaintiff received news from a relative that the Defendant had converted to the Defendant's original religion and a Hindu ceremony had been performed. The Plaintiff did not believe this information because during the examination of the case file for divorce the Defendant still claimed to be Muslim. The Plaintiff confirmed the truth of the news with local residents and finally believed that the Defendant had indeed converted back to Hinduism. The Defendant and his family also restricted the Plaintiff from meeting and spending time with his child, N. The Plaintiff was given the opportunity to meet with N only inside the Defendant's house and was not allowed to be taken outside or to the Plaintiff's house. This situation caused the Plaintiff to be limited in his ability to express affection and more importantly, the Plaintiff could not freely care for and educate the Plaintiff's child in accordance with the teachings of Islam.

Considering that the marriage between the Plaintiff and the Defendant was conducted in accordance with Islam and the child born was also a Muslim following the religion of his parents, this is in accordance with Article 105 letter a KHI which states "The maintenance of children who are not yet mumayyiz or not yet 12 years old is the right of the mother". Initially there was no problem when N was being cared for and living with the Defendant, the Plaintiff did not object and continued to provide maintenance. The Plaintiff also always visited and asked the Defendant how their child was, and continued to love and care for N even though they no longer lived in the same house. The Plaintiff's attitude and actions are in line with those set out in Article 41 (a) and (b) of the Marriage Law which states that the mother or father is still obliged to maintain and educate the child based on the interests of the child and the Plaintiff as the father is responsible for the costs of maintaining and educating the child. The Defendant also continues to carry out his obligations as the parent of N, in accordance with Article 45 of the Marriage Law, namely to maintain and educate N until N is married or able to stand on his own feet even though the marriage with the Defendant has broken down.

The actions of the Defendant in deliberately keeping the child away from the Plaintiff can be considered a violation, because it is contrary to the basic principles in Article 41 of the Marriage Law and Article 149 letter d of KHI. Custody rights granted to one party does not mean that the other party loses the right to continue to play a role in the child's life, including the right to meet and establish a relationship. If the custodial parent deliberately obstructs or keeps the child away from the other parent, this can be considered a violation of the principle of the best

interests of the child and has the potential to harm the child's right to receive attention from both parents and can have an adverse effect on the child's development.

The respondent as the custodian of N has also changed his religion from Islam to Hinduism. Since birth, N has adhered to Islam and was born from a marriage that was conducted in accordance with Islam. Child custody for minors or hadhanah is given to the mother. There are exceptions if the mother of the child is proven to have embraced a religion other than Islam or apostatized, in Islamic law, one of the conditions for becoming a holder of hadhanah and hadhin rights is that it must be Muslim. This is because someone who is not Muslim cannot have authority over someone who is Muslim, so the Defendant's custody rights over his child, N, are likely to be revoked. In its legal reasoning, the Panel of Judges used the Jurisprudence of the Supreme Court of the Republic of Indonesia Number 210/K/AG/1996 which states that this is also in accordance with the opinion of scholars in the Book of Kifayatul Akhyar Juz II that being Muslim is one of the requirements of a person who carries out hadhanah duties. If one of the conditions is not met, then the hadhanah rights of a hadhin are canceled. Based on this, the child custody rights held by the Defendant were revoked and transferred to the Plaintiff as the biological father of N.

## CONCLUSION

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The conclusion in this study shows a comparison of parenting arrangements between Indonesia and Singapore highlights key differences in legal approaches. While Indonesia's Marriage Act and KHI outline basic principles, their implementation lacks mechanisms to ensure access rights for non-custodial parents, potentially impacting on the welfare of the child. In contrast, Singapore's detailed legal framework under the Women's Charter 1961 and the Muslim Legal Administration Act 1966 provides a clear division of responsibilities, including provisions for care, supervision and guaranteed access rights, so that the child's relationship with both parents is maintained. In addition, Singapore employs mediators or parenting coordinators to reduce disputes and enforce compliance, supported by stricter sanctions. This research discusses the need for Indonesia to adopt similar practices to strengthen its child custody system, with a focus on enforcement and oversight mechanisms that prioritize the best interests of the child. Future research could explore the socio-cultural and legal adaptation of Singapore's child custody provisions in the Indonesian context, providing deeper insights into the harmonization of regional legal systems while preserving local values.

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