



Customary Marriage and Child Protection in Islamic Family Law: A Comparative Study of Indonesia and South Africa

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Abstract: Customary marriage functions as a social institution under numerous legal systems; yet, its implementation often poses significant obstacles to the safeguarding of children's rights, especially when performed without official registration or involving minors. This paper investigates the normative boundaries of customary marriage within the context of Islamic family law, emphasizing child protection via a comparative examination of Indonesia and South Africa. This study uses normative legal research methods—integrating legislative, conceptual, and comparative approaches—to analyse customary marital patterns, child protection norms, and judicial reactions in both countries. The findings indicate that Islamic family law acknowledges custom (*'urf*) only under the condition that it aligns with the objectives of Shari'ah (maqāsid al-shari'ah), specifically the safeguarding of progeny (*ḥifz al-nasl*), the mitigation of harm (*dar' al-mafāsid*), and the attainment of justice (*'adl*). The prevalence of unregistered traditional marriages and lenient marriage dispensation norms in Indonesia compromises children's legal identification, parental responsibility, and access to civil rights. Conversely, South Africa enforces more stringent normative regulations via compulsory registration and judicial measures to amend customary behaviors detrimental to children. This paper normatively asserts that child safety is an essential requirement for the legality of customary marriage and illustrates how Islamic family law serves as an internal corrective mechanism within diverse legal systems.

Keywords: customary marriage law; child rights protection; human rights standards; South African Comparative Law

Introduction

Marriage, as defined by the Qur'an and Hadith, originates from the phrases *an-nikhdan azziwaj*, including connotations associated with traveling, advancing, climbing, and participating in sexual intercourse. In contrast, marriage originates from the term *Adh-dhammu*, which signifies to condense, unite, and gather, as well as to exhibit a congenial temperament. Marriage originates from the phrase *aljam'uyang*, which means "to gather or combine." In fiqh terminology, marriage is denoted as (زواج) and (نكاح), both derived from Arabic. In Arabic, marriage signifies two concepts: الوطاء (intercourse) and الضم (constraining). The fundamental connotation of الضم denotes

repression or restraint, but the figurative interpretation of الوطاء means agreement or engagement (Malisi, 2022). Within the framework of the objectives of Sharī'ah (*maqāṣid al-sharī'ah*), marriage is therefore oriented toward safeguarding offspring (*ḥifẓ al-nasl*), upholding human dignity, and ensuring the welfare of children from birth (Fikriya & Tasrif, 2023). This normative perspective indicates that the legitimacy of marriage under Islamic family law is intrinsically linked to its legal ramifications for children.

In several traditional cultures, marriage retains significant societal purposes, such as the maintenance of cultural identity and social cohesion. Legal issues emerge when customary weddings occur without official registration or when customary practices contradict modern child protection regulations. From the standpoint of Islamic family law, these situations exemplify a failure to achieve *ḥifẓ al-nasl*, since the lack of marriage registration immediately compromises the legal standing of children and diminishes the enforcement of parental responsibilities. In this perspective, marriage registration should be seen not just as an administrative obligation, but as a legal mechanism through which Islamic family law enforces parental responsibility and safeguards children's rights within familial relationships (Arif, 2019).

The normative consequences of unregistered marriage are more evident when evaluated in relation to international and state child protection systems. International documents, such as the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), underscore the safeguarding of children's rights to legal identification, care, and non-discrimination. The Indonesian legal system reinforces these principles through constitutional guarantees in Article 28B paragraph (2) of the 1945 Constitution and statutory protections outlined in Law No. 23 of 2002 on Child Protection, Law No. 35 of 2014, and Law No. 16 of 2019, which sets the minimum marriage age at nineteen years.

Despite the existence of these normative frameworks, unregistered marriage practices—such as serial marriages, contract marriages, and customary marriages—persist in Indonesia. As documented by the Indonesian Child Protection Commission (KPAI), these practices have tangible consequences for children, including difficulties in obtaining birth certificates, restricted access to education, lack of legal recognition, and obstacles to inheritance rights (KPAI, 2013). From the standpoint of Islamic family law, this persistence reflects a structural gap between normative commitments and social practice. The failure to register marriages does not merely generate administrative problems, but constitutes a normative breach of *ḥifẓ al-nasl*, as it directly compromises children's legal identity and weakens the legal mechanisms intended to protect their fundamental rights within family relations.

A comparable procedure was observed in Lombok, West Nusa Tenggara, via the tradition of capture marriage (*merariq*), when a lady is "abducted" and then wed under customary law without formal registration (Yi, 2019). Empirical findings indicate that a significant number of customary and religious marriages in regions such as East Lombok remain unregistered, resulting in limited legal protection for children born from these unions. Similar practices are observed within the Sedulur Sikep community in Pati, Central Java, where marriages are conducted exclusively according to customary norms without formal civil registration (*antaranews.com*, 2025). The absence of marriage registration has direct legal consequences for children, particularly in relation to access to birth certificates, formal education, and public services (Njatrijani, 2019). This condition reinforces the vulnerability of minors to unregistered customary and religious marriages and contributes to legal uncertainty affecting women and children. The issue has also been addressed in recent discussions surrounding the Indonesian Criminal Code, reflecting broader legal concerns regarding the social impact of marriages conducted outside the state registration system. From a normative perspective, the discourse on penalising marriages performed solely under religious or customary practices without official registration arises from the need to ensure legal certainty and effective protection for vulnerable groups, especially children (Admin, 2023).

The contradiction between customary law and child protection is not exclusive to Indonesia; it is also encountered by other nations with heterogeneous legal systems. South Africa serves as a pertinent comparison due to its analogous conflicts between customary marriage practices and child protection, illustrating the judiciary's proactive role in rectifying harmful customary norms affecting children—an approach consistent with the corrective principles of Islamic family law.

Ukuthwala, the practice of men abducting females for marriage, is a similar issue in South Africa. This practice is fraught with controversy because it goes against the South African Constitution and the CRC's principle of the child's best interests. What's more, it often happens without the bride's consent, which brings up questions about the child's age. Traditional ukuthwala and the need to protect children's rights are at odds in South Africa, as shown in the 2015 case of *Asus Jezile v. State*. Kidnapping women for marriage, or ukuthwala, is a part of traditional marital practices for certain Xhosa tribes. To justify forced marriages, particularly those involving children, this practice is often used. The accused, Mr. Jezile, entered into an unlawful marriage and sexual intercourse with a girl who was fourteen years old after abducting her. It was deemed unjustified on customary grounds by the Western Cape High Court since the action violated criminal law restrictions and impacted upon the constitutional rights of children (Mwambene & Mqidlana, 2021).

The ruling indicates that customary practices cannot serve as justification for forced or child marriage, aligning with the principles of Islamic family law that denounce marriages harmful to children and devoid of consent, protection, and benefit. Consequently, the judiciary's position in the ruling embodies a corrective rationale consistent with the norms of Islamic family law aimed at safeguarding the vulnerable. Selain itu, This decision upholds the principle that traditional traditions should not be at odds with the concept of a child's best interests, as stated in Article 28 of the South African Constitution of 1996, which guarantees children's rights to be safeguarded from abuse, humiliating treatment, and harmful practices. The court further noted that, according to the CRC of 1989, it is the duty of the South African government to protect children from dangerous cultural practices. *Jezile v. State* is a landmark decision that proves customary norms cannot legitimise child or forced marriage, which increases the compatibility of customary marriage law with international human rights standards.

The disparity between *das sollen* and *das sein* in child protection not only indicates the inadequacy of positive law enforcement but also highlights the ineffective function of family law, especially Islamic family law, in rectifying customary behaviors that contradict the child's best interests. This research seeks to analyze the interplay of customary law, positive law, and Islamic family law principles in safeguarding the welfare and best interests of children. This research aims to establish the normative boundaries of customary marriage application, ensuring alignment with Islamic family law principles while preserving the cultural identity prevalent in society.

Prior investigations of customary marriage law have mostly concentrated on issues of legal pluralism, inclusive justice, and the interplay between state law and customary law. Himonga (2010) underscores the capacity of customary law to coexist with state law under South Africa's mixed legal framework. While significant in elucidating the mechanics of legal pluralism, the research has not prioritized child safety as a critical element in the assessment of customary marriage practices (Himonga, 2011). Mwambene (2018) analyzes child marriage in South African nations through the lens of customary law and public policy challenges, focusing primarily on structural and institutional impediments, while neglecting to establish a legal framework systematically aligned with the best interests of the child (Mwambene, 2018).

According to the prior study, it can be concluded that while legal pluralism and child marriage have been extensively examined, there is a lack of research that specifically prioritizes child protection in the discourse on customary marriage law from the standpoint of Islamic family law. Current research has not specifically used the concepts of Islamic family law as a framework to evaluate the legitimacy and limitations of customary marriage practices.

From the standpoint of Religious Studies, Islamic family law operates not only as a legal system but also as a normative-ethical framework that regulates religious practice, social conduct, and moral accountability within Muslim countries. This research positions Islamic family law—specifically the *maqāṣid al-sharīʿah* framework—as a theoretical perspective within Religious Studies, where religion is analyzed as a lived normative system that dynamically interacts with cultural practices like customary marriage. This research provides a systematic normative contribution via the formulation of a three-step analytical approach. Initially, Islamic family law—through the concepts of *maqāṣid al-sharīʿah* and *ḥifẓ al-nasl*—is established as the principal evaluative framework rather than an ancillary moral reference. Secondly, traditional marriage practices are evaluated within this framework to ascertain their normative legality and boundaries.

A comparative comparison of Indonesia and South Africa is used to illustrate how distinct legal systems implement remedial procedures for the protection of children. This systematic methodology differentiates the current study from previous research that has analyzed traditional marriage mostly via descriptive or legal pluralism lenses.

South Africa was selected for comparison due to its structural characteristics pertinent to the Indonesian context, specifically the presence of a pluralistic legal system that acknowledges customary law alongside state law, and the prevalence of customary marriage practices that directly affect child protection. Moreover, South Africa has shown significant progress via the judiciary's proactive involvement in rectifying customary practices that conflict with the best interests of the child, as evidenced by the *Jezile v. State* ruling. This corrective approach warrants examination within the Indonesian context, particularly to evaluate the capacity of family law—including Islamic family law—to serve as a normative tool in restructuring customary marital practices for the safeguarding of children. This paper seeks not to provide new empirical case data, but to provide a normative contribution by reinterpreting existing legal materials within the frameworks of Islamic family law and Religious Studies.

This article asserts a definitive normative stance that customary marriage practices should not be acknowledged unconditionally. According to Islamic family law, their legality is solely dependent on adherence to child protection norms, especially the safeguarding of progeny (*ḥifẓ al-nasl*). Thus, customary behaviors that compromise children's legal status, promote child marriage, or circumvent enforced regulations should be deemed normatively unlawful, irrespective of cultural endorsement.

Method

This research utilizes normative legal analysis in the domain of modern Islamic family law, concentrating on customary marital practices that influence child protection. The study combines a normative legal framework with a Religious Studies viewpoint by framing Islamic family law as a system of religious ethics and normative reasoning rather than only as positive legislation. In this context, *maqāṣid al-sharī'ah* is used as an analytical instrument to evaluate whether traditional marriage customs uphold or compromise the safeguarding of children (*ḥifẓ al-nasl*), avert injury (*dar' al-mafāsid*), and guarantee justice (*'adl*).

The statutory method is used to analyze the positive legal norms regulating marriage and the status of children, namely Law No. 1 of 1974 as revised by Law No. 16 of 2019 in Indonesia and the Recognition of Customary Marriages Act 1998 in South Africa. These legislation are not only delineated but also scrutinized to assess the extent to which state law effectively restricts, authorizes, or rectifies traditional marital practices that influence child safety.

The conceptual framework is used to analyze customary marriage as a manifestation of living law, using the ideas of Soetandyo Wignjosoebroto and Satjipto Rahardjo. In this context, concepts of Islamic family law—particularly *ḥifẓ al-nasl* and child welfare—serve as normative standards to evaluate the legitimacy of customary marriage practices and to ascertain whether these practices necessitate restriction or amendment (Hanafiah, 2024).

The comparative technique is used to carefully analyze Indonesia and South Africa as countries with multiple legal systems that acknowledge customary law. The analysis is performed across four evaluative dimensions: (1) marriage registration prerequisites; (2) minimum age and prohibitions on child marriage; (3) legal status and rights of offspring from customary unions; and (4) judicial avenues for addressing detrimental customary practices. This comparison serves to discover normative tendencies and remedial methods pertinent to child safety.

The research depends on secondary legal resources. Primary legal sources include legislation and court rulings, whilst secondary sources comprise academic writings on Islamic family law, customary law, and legal diversity. The materials are examined using a descriptive-analytical method that contrasts normative legal standards (*das sollen*) with prevailing customary practices (*das sein*) to illustrate how regulatory deficiencies exacerbate child vulnerability and how Islamic family law serves as a normative corrective framework.

Results and Discussion

Indonesian Customary Marriage and Child Protection

An integral component of Indonesia's rich cultural history is the country's customary marriage law, which reflects the beliefs and values of specific ethnic groups throughout the country (Febrianty et al., 2023). Traditional marriage law governs the basics, including the wedding ceremony, the dowry, the relationship between families, and the duties and responsibilities of the married couple. The marriage rules of Indonesia's indigenous communities reflect the values held by those communities' members at the time.

Everyone in the community, not just the married couple, is covered by this law. Marriage is seen as a significant occasion that strengthens the social bonds between two large families, and traditional marriage laws emphasize social peace and family honour. Philosophically significant rituals, such as the giving and receiving of presents and the reuniting of families, are a common part of this marriage ceremony. The examples given below demonstrate how customary marriage law serves to preserve cultural identity and social harmony among indigenous groups (Hayati, 2016).

Customary marriage laws not only control communal balance but also act as a social tool. Unity, stronger family relationships, and the preservation of traditions are the goals of the rules. Indigenous peoples' views on the importance of community and solidarity in their social structure are directly related to this idea. As a result, traditional marriage law serves as a guide for the legalisation of marriage as well as a means of enforcing societal norms and expectations within a broader social framework. Taking a step back, we can see that traditional marriage laws have a philosophical component based on distributive and restorative justice ideas. Activities that reflect these values, such as dowry, transfer, and dispute settlement, put an emphasis on amicability and compromise rather than hostility.

Islamic family law acknowledges customary practices (*'urf*) as an ancillary source of normativity, but with restricted acceptance. *'Urf* is permissible only to the extent that it does not abrogate legal accountability, inflict injury, or compromise the safeguarding of vulnerable individuals within the family. The purposes of *Shari'ah* (*maqāsid al-shari'ah*)—specifically the preservation of lineage (*hifz al-nasl*), the mitigation of damage (*dar' al-mafāsīd*), and the advancement of justice (*'adl*)—function as the normative standards for evaluating traditional marital practices (Munir, 2023). Thus, customary marriages lacking legal recognition, which result in the denial of children's civil status or the facilitation of underage marriage, cannot be justified under Islamic family law, as they undermine the fundamental objective of marriage to protect offspring and ensure legal accountability.

Indonesia's positive law framework governing marriage is primarily regulated by Law No. 1 of 1974 on Marriage, as amended, which establishes mandatory requirements concerning marriage registration, minimum marriage age, and the legal rights and obligations of spouses. These statutory norms are designed to ensure legal certainty, gender equality, and the protection of women and children. Nevertheless, in practice, positive law frequently fails to operate effectively within customary marriage contexts.

This failure manifests at several critical points. First, at the stage of marriage formation, customary law is often socially recognised as sufficient to legitimise marital relations, rendering state registration requirements normatively irrelevant within local communities. Second, at the administrative level, weak enforcement mechanisms allow unregistered customary marriages to persist without legal consequences. Third, in the context of child protection, statutory safeguards—such as the minimum marriage age of nineteen years—are frequently undermined by socio-cultural acceptance of early marriage and by procedural mechanisms such as marriage dispensation, which enable customary norms to override legislative intent.

Empirical examples illustrate these structural weaknesses. In Lombok, the *merariq* tradition continues to legitimise marriages without formal registration, exposing young girls to early marriage and leaving children without legal identity (Jayadi et al., 2023). Similar conditions are found among the Sedulur Sikep community in Central Java and the AKUR community, where marriages are conducted solely through customary rites, resulting in children lacking birth certificates and facing obstacles in accessing education and public services (Hartanto, 2017). In Mandailing Natal,

marlojong practices similarly prioritise customary legitimacy over legal registration (Siregar, 2022). These practices demonstrate that children are the most disadvantaged parties within unregistered customary marriages, as they bear the long-term consequences of legal invisibility.

The Indonesian experience demonstrates that the problem of customary marriage is not rooted in the existence of custom itself, but in the absence of effective normative boundaries to govern its operation. When customary authority is allowed to function without mandatory registration, enforceable age limits, or judicial correction, the objectives of Islamic family law—particularly the protection of lineage (*hifz al-nasl*) and the prevention of harm (*dar' al-mafāsīd*)—fail to materialise in practice. This condition places children in a position of structural vulnerability, where their legal identity, civil status, and future welfare depend not on enforceable norms, but on social acceptance. It is within this analytical context that a comparative reference becomes necessary to evaluate how customary marriage may be recognised without sacrificing the non-negotiable requirement of child protection.

South African Customary Marriage and Child Protection

South Africa's diverse cultural practices, legal framework, and historical precedents are well-known. The country's legal system incorporates both explicit laws mandated by the constitution and customary law. In order to promote inclusive social justice in a community that is culturally and linguistically varied, it is crucial to recognise customary law (Ngozi, 2017). South Africa's marital law system formally recognises customary law via national legislation, while still protecting essential notions like gender equality and human rights.

Legal precedent, statutes (such as the 1998 Recognition of Customary Marriages Act), and the constitution all provide strong support for customary law in South Africa. This page gives a brief history of South African customary marriage law, explains how it fits within the country's legal framework, and looks at the pros and cons of merging the two systems (De, 2013).

The traditional values shared by indigenous people in South Africa are reflected in their marriage laws. Being loyal to one's family, one's community, and societal norms are all examples of these ideals in action. A customary law marriage is more than just a civil union; it also brings together two families. Part of the ceremony is receiving family consent, paying the lobola, and performing traditional marital ceremonies. Within indigenous communities, customary law developed as a system of law that could adapt to changing social norms. However, conflicts between formal laws that represent opposing concepts and customary law may be problematic. There may be tension between modern ideas, especially those about gender equality, and long-established traditions, such as polygamy, which are nevertheless widely recognised today (Weeks, 2021).

South Africa's legal system is characterised by its plurality, which simultaneously recognises state law, religious law, and customary law. The Constitution of 1996 provides the primary framework for the inclusion of customary law into the South African legal system. Courts must recognise customary law to the degree that it is consistent with the Constitution, and the government must protect and promote the preservation of traditional institutions and customary law (Article 211 of the Constitution) (Sheik, 2014). As long as they do not conflict with the basic rights protected by the Constitution—such as non-discrimination, gender equality, and preservation of human rights—this article maintains that positive law and customary law are equally valid.

This paper analyzes South Africa not as a religious comparator, but as a jurisdiction that provides a systematic framework for normative regulation of customary marriage. While not adhering to Islamic law, South Africa exemplifies the official recognition of customary practices, which are concurrently constrained by constitutional constraints and judicial oversight, especially in matters concerning children. This methodology offers a significant comparative framework that aligns with Islamic legal thinking, which similarly mandates that custom (*'urf*) be acknowledged only to the extent that it does not inflict injury or compromise the safeguarding of vulnerable individuals.

The Recognition of Traditional Marriages Act (RCMA) of 1998 officially recognised traditional marriages. If these statutes are to meet the needs of indigenous communities, they must first ensure that existing customary practices are consistent with constitutional principles. Among the many vital functions of the RCMA are the registration of traditional marriages, the promotion of gender equality, and the control of polygamy. A traditional marriage is considered lawful if it has

been properly registered and in line with customary law (Mwambene & Kruuse, 2015). The freedom to divorce and property ownership are two of the many rights that this statute protects for women in conventional marriages. For polygamy to be legalised under the RCMA, it is required to have the permission of current wives and to have documented arrangements for the division of property. The RCMA is an essential tool in the fight to adopt customary law as domestic law while protecting its distinctive features (Raphalalani, 2016).

Lobola is a distinctive feature of South African traditional marriage law. The groom's family shows their respect and love to the bride's family by giving them a dowry. Lobola negotiations involve both parties' extended families. Although not specifically controlled under positive law, lobola is acknowledged as an essential part of acceptable customary tradition and is therefore a viable requirement for marriage under customary law. Marriage in traditional cultures requires not only the approval of the spouses but also their extended families (Parker, 2015). This shows how important it is for indigenous communities in South Africa to have strong bonds with one another. The practice is recognised by positive law so long as it does not infringe upon basic values, such as the right to marry.

Customary law recognises polygamy, and the RCMA specifically regulates it. Provisions that safeguard women's rights form the basis of this arrangement. These include the need to govern the equal division of property and the condition of permission from current spouses. The formal recording of marriages is an essential component of positive law. In the event of a divorce or property partition, this is an attempt to provide legal safeguards for spouses, particularly women. Because many indigenous communities fail to appreciate customary law's place in national law, the paperwork involved in implementing it is a major roadblock.

Customary courts in South Africa are the only bodies authorised to hear and decide cases involving marriage that are based on traditional practices. The court follows the community's traditional values and is established under the Constitution. However, judgments made by customary courts must be in accordance with the Constitution, and they may be contested in formal courts if people believe they violate their rights. Traditional courts are often preferred by indigenous communities since they are believed to have a better grasp of local values and may facilitate more amicable settlements. However, some believe that conventional courts have an inherent bias against women, especially in cases involving women's rights (Mwambene, 2017).

In South Africa, there is a similar dilemma with the long-standing practice of ukuthwala. In many Xhosa cultures, a marriage ceremony involves abducting a woman to marry her. These days, it's not uncommon for adults to utilise this tradition to marry off girls against their will. As seen in the 2015 case of *Jezile v. State*, this approach flagrantly disregards children's rights. The accused married and sexually enslaved a girl who was only fourteen years old. The Western Cape High Court rejected the customary claim because it breached Article 28 of the 1996 South African Constitution, which protects children from harsh and unjust treatment (Mgidlana & Mwambene, 2021). This decision is a watershed moment when tradition can no longer be used to justify the violation of children's basic rights. According to the Recognition of Customary Marriages Act 1998 (RCMA), a customary marriage cannot be accepted legally in South Africa unless it is registered. Within the context of marriage, the RCMA guarantees legal protections for women and children and promotes gender equality.

While South Africa does not adhere to an Islamic legal framework, its remedial stance on customary marriage provides a comparative normative insight that aligns with Islamic family law. The judicial dismissal of detrimental customs in *Jezile v. State* embodies a principle akin to Islamic jurisprudence, wherein cultural practices are acceptable only to the extent that they do not inflict harm (*lā ḍarar wa lā ḍirār*) or contravene fundamental protections for vulnerable individuals, especially children. In this regard, constitutional adjudication in South Africa serves a role analogous to Islamic legal correction (*taṣhīḥ al-ʿurf*), emphasizing that customary marriage must work within strict normative boundaries where the welfare of children is concerned.

In addition, the Constitution supports the principle of prioritising children's best interests; therefore, conventional wisdom must make way for protections for children's rights. The execution, meanwhile, remains fraught with difficulties. Polygamy and early marriage are practices that certain indigenous societies continue to employ today. For various reasons, such as a lack of public awareness or difficult administrative access, traditional marriages are not always recorded. Like

children in Indonesia, those born into unrecorded traditional marriages have a difficult life: minimal protection and little legal standing (Mbaku, 2019).

This comment highlights the fact that both Indonesia and South Africa are grappling with the issue of how to protect traditional values while also protecting children's rights. Both recognise the incorporation of customary law into their own legal systems and have ratified important international human rights accords, including the CRC, ICCPR, and CEDAW. Marriage registration is also mandated by law in each of these jurisdictions. On the other hand, there are significant distinctions when it comes to execution. The absence of documentation of many traditional weddings in Indonesia means that many children do not have the opportunity to attend school or get a birth certificate. Conversely, South Africa's 1998 Recognition of Customary Marriages Act offers a defined framework, and progressive court rulings such as *Jezile v. State* (2015) have also reinforced this framework by mandating that customs comply with child protection requirements. Unlike South Africa, which has taken a more progressive stance in addressing cultural practices that violate human rights standards, Indonesia has failed to adequately implement and enforce legislation meant to safeguard children.

The South African example offers distinct normative insights for the Indonesian situation. The Recognition of Customary Marriages Act 1998 stipulates that the legal acknowledgment of customary marriage requires compulsory registration and significant constitutional protections. Constitutional adjudication in instances like *Jezile v. State* affirms that customary practices may be judicially corrected where they contradict the child's best interests. This method demonstrates that legal pluralism functions conditionally and cannot validate behaviors that infringe upon children's rights. Conversely, Indonesia does not possess an efficient constitutional or legal framework to systematically evaluate and rectify traditional marriage practices. The South African model serves as a normative baseline for Indonesia, demonstrating that child protection needs both legislative acknowledgment and enforceable judicial control to uphold constitutional and human rights values above detrimental traditional practices.

In the context of Religious Studies, Islamic family law functions not only as a collection of legal regulations but also as a normative-ethical framework that governs religious observance and social conduct. In this context, *maqāṣid al-sharī'ah* serves as an analytical instrument to assess whether customary marriage practices achieve their intended ethical and legal objectives. Customary marriage that leads to the erosion of a child's legal status, facilitates child marriage, or diminishes parental responsibility is a normative failure according to the concept of *ḥifẓ al-nasl*. This demonstrates that Islamic family law offers an internal theoretical framework to evaluate, restrict, and rectify customary behaviors, rather than just depicting their cultural presence.

Utilizing this theoretical framework, Table 1 consolidates the comparative results and elucidates the distinct functioning of these normative criteria in Indonesia and South Africa concerning child safety in customary marriage.

Table 1. Comparative Analysis of Indonesia and South African Customary Law

Aspects	Indonesia	South Africa	Implications for child protection
Recognition Status of Traditional Marriage	Socially and culturally acknowledged, however, often unrecognised under statutory law due to a lack of documentation.	It is officially acknowledged by the Recognition of Customary Marriages Act (RCMA) 1998 and is governed by the 1996 Constitution.	In Indonesia, social recognition without legal acknowledgement renders children vulnerable, but conditional legal recognition in South Africa enhances child safety.
Marriage Registration	Socially and culturally acknowledged,	Registration is essential for the legal	The absence of registration

Aspects	Indonesia	South Africa	Implications for child protection
	however, often unrecognised under statutory law due to a lack of documentation.	protection of spouses and children.	requirements in Indonesia directly results in the loss of children's legal identity, but registration mandates in South Africa enhance legal certainty.
Marital Age Limit	The minimum age requirement was established, although it was undermined by the allowance of marriage and social-customary validation.	The court explicitly dismissed the traditional rationale for child marriage (e.g. <i>Jezile v. State</i> , 2015).	Indonesia illustrates the disparity between established standards and actual practices, while South Africa exemplifies the primacy of child safety over traditional rituals.
Rectification System for Traditional Practices	There is no systematic constitutional or legal framework to address harmful traditions affecting children.	Customary practices may be constitutionally and judicially rectified if they infringe upon children's rights.	The lack of judicial oversight in Indonesia permits the ongoing maltreatment of children, while South Africa implements robust normative regulation.

When evaluated within the framework of Islamic family law, the comparative analysis presented in Table 1 indicates that the essential concern is not just the acknowledgment of customary marriage, but the existence of robust normative constraints to protect children. Islamic law recognizes custom (*'urf*) as a source of legal authority; nonetheless, its legitimacy is contingent upon alignment with the aims of *Sharī'ah* (*maqāṣid al-sharī'ah*), especially the safeguarding of lineage (*ḥifẓ al-nasl*) and the protection of children from harm. The South African model demonstrates how customary behaviors may be rectified by enforceable legal processes, a function that aligns with Islamic legal logic in limiting traditions that endanger children's wellbeing. Conversely, Indonesia's inability to implement effective normative regulation permits customary authority to supersede both legal requirements and Islamic ethical mandates for child safety.

While South Africa does not implement Islamic law, its approach to regulating customary marriage provides a significant comparative framework for Islamic legal analysis. The constitutional regulation of customary practices in South Africa—specifically via obligatory marriage registration and judicial amendment of detrimental traditions—exemplifies a rationale that aligns with Islamic jurisprudence, which mandates the rectification of customs (*'urf*) that inflict harm or jeopardize the welfare of offspring. In this regard, South Africa exemplifies the preservation of traditional marriage while upholding the paramount concept of child protection, a tenet that aligns with the aims of *ḥifẓ al-nasl* in Islamic family law.

The author examines customary marriage not as a neutral cultural phenomena, but as a practice that requires normative evaluation in accordance with Islamic family law norms. This paper posits that child safety serves as a critical criterion for assessing the permissibility, restriction, or amendment of customary marriage practices under multiple legal frameworks.

This study's conclusions align with worldwide discussions on child safety, legal diversity,

and the regulation of detrimental traditional behaviors, extending beyond national and comparative settings. Global discussions increasingly assert that cultural and religious practices are not exempt from normative evaluation when they compromise children's rights and well-being. Various legal systems are increasingly aligning to see child protection as an obligatory legal requirement rather than an optional policy decision.

This study offers a unique perspective by illustrating that Islamic family law incorporates an internal normative framework—via *maqāṣid al-sharī'ah* and the principle of *ḥifẓ al-nasl*—that is consistent with and bolsters modern international child protection standards. This research demonstrates that Islamic law may serve as a supplementary normative framework alongside global human rights principles for regulating customary behaviors in pluralistic countries. The experiences of Indonesia and South Africa exemplify a broader worldwide trend whereby the legality of customary marriage is increasingly contingent upon enforced protections for children.

Normative Limits of Customary Marriage Practices: An Islamic Family Law Perspective on Child Protection

In the context of *maqāṣid al-sharī'ah*, a primary objective of Islamic law is the safeguarding of progeny (*ḥifẓ al-nasl*). This idea encompasses not just biological sustainability via a formal marriage contract but also delineates the legal status of children, parental obligations, and assurances of children's care within a dignified family framework. In Islamic family law, marriage (*nikāḥ*) is perceived not merely as a private relationship, social contract, or religious ritual, but as a normative framework that establishes legal obligations, moral accountability, and safeguards for vulnerable family members, particularly children (Hamim, 2021). The principle of *ḥifẓ al-nasl* underpins numerous provisions of Islamic family law, encompassing the stipulations and doctrines of marriage, the prohibition of extramarital relations, the specification of the *'iddah* period, the acknowledgment of *nasab*, and the governance of inheritance rights, all designed to avert ambiguity in the legal status of children and safeguard their rights from birth.

The significance of *ḥifẓ al-nasl* has evolved with societal developments. The safeguarding of offspring should extend beyond the formalities of legitimacy to encompass a holistic protection of children's rights, including the right to legal identity, protection against child marriage and violence, access to education and healthcare, and appropriate social recognition. In this view, children are seen as legal and moral entities that need active protection from the family law system. Consequently, the institution of marriage, including customary marriage, that undermines registration, diminishes the legal status of children, or enables underage marriage is antithetical to the objective of *ḥifẓ al-nasl*, as it repudiates the legal and social obligations intrinsic to marriage.

'Urf (custom) in Islamic law is defined as a behavior that is consistently performed by society and acknowledged by the majority of its members. However, not all customs may be deemed legal *'urf*. Habits that provide no advantages or inflict detrimental effects on society are excluded from the category of *'urf* that may serve as a normative reference. Consequently, the notion of *'urf* functions as a guiding tool for researchers in evaluating the appropriateness of a social practice for adaptation and integration in legal determinations.

The acknowledgment of *'urf* is dynamic, since its relevance may shift with changes in time and location. From the standpoint of *fiqh*, changes in social circumstances, context, and temporal factors permit modifications to the legal evaluation of a practice. This leads some researchers to see *'urf* as a robust term, but nevertheless constrained by moral bounds that inhibit its legitimization of social activities harmful to the social order (Hassan & Batool, 2024).

In Ibn 'Āshūr's *maqāṣid al-sharī'ah* paradigm, fairness (*'adl*) and the prevention of injury (*dar' al-mafāsid*) are integral normative grounds for evaluating the legitimacy of legal activities, including family law. According to Ibn 'Āshūr, *Sharī'ah* principles should be understood with a focus on their intended purpose rather than via strict textualism that ignores their primary aim of safeguarding society, especially for marginalized populations. According to the theory of *fiqh al-awlawiyāt* (jurisprudence of prioritization), a legal activity is deemed valid only if its overall societal benefits significantly surpass the damages it causes and if it does not result in structural injustice. In familial relations, justice transcends mere formal legal adherence; it must be embodied

in enforceable legal accountability, robust protection, and the prevention of irrevocable repercussions, such as the disruption of lineage, the forfeiture of children's legal identity, and the establishment of enduring social vulnerability (Anas, 2025). Consequently, societal or customary practices that generate systemic harm—regardless of cultural acceptance—must be rectified, since they contradict the primary *maqāsid of the Shari'a*, namely the safeguarding of children (*hifz al-nasl*) and the promotion of substantive fairness in familial relations.

Substantial obstacles to the safeguarding of children's rights emerge from customary marriage customs when these unions occur without legal registration or involve minors. These activities pose structural hazards to children's legal status, access to public resources, and substantive equality, necessitating normative evaluation rather than just descriptive analysis. In the context of Islamic family law, the assessment of such activities should be based on the aims of *Sharī'ah*, namely *hifz al-nasl*, which necessitates clarity of legal status, parental accountability, and thorough safeguarding of children's rights.

In Indonesia, customary marriage traditions function as socially accepted methods for establishing marriage, often making formal requirements normatively ineffectual in particular groups. Customary practices like as *merariq* in Lombok, weddings among the Sedulur Sikep and AKUR tribes, and *marlojong* in Mandailing Natal exemplify a uniform trend whereby traditional procedures are seen enough to provide marital legitimacy. During the marital formation phase, legal registration requirements under statute law are sometimes overlooked. At the administrative level, inadequate enforcement mechanisms let unregistered weddings to continue without legal repercussions. Consequently, children born from these partnerships are barred from civil registration, inheritance rights, and effective protections against child marriage. These activities demonstrate not discrete cultural occurrences, but a systemic subordination of legal child safety standards to customary authority.

The prevalence of underage and forced marriage underscores the disparity between legal statutes and societal practices. Despite Indonesian marriage legislation mandating a minimum age of nineteen for marriage, socio-cultural, religious, and customary factors persist in legitimizing teenage marriage via procedural avenues like marriage dispensation. The disparity between normative norms (*das sollen*) and social reality (*das sein*) is shown by the rising number of marriage dispensation applications subsequent to the 2019 modification of the Marriage Law. Procedural exclusions under Article 7(2) of the Marriage legislation and PERMA No. 5 of 2019 have, in reality, permitted customary standards to supersede legislative purpose, so undermining the efficacy of positive legislation as a mechanism for child protection (Prasetyo, 2020).

South Africa does not implement Islamic law; yet, its regulatory structure for customary marriage provides a comparative basis that is operationally congruent with Islamic legal principles about the rectification of detrimental habits. The legal system exhibits a systematic normative reaction to harmful customary practices via constitutional oversight and judicial intervention. Customary law is officially acknowledged, but its legitimacy is clearly contingent upon adherence to constitutional principles and enforceable legal criteria.

The Recognition of Customary Marriages Act 1998 mandates the registration of customary marriages and incorporates substantial protections within married relationships. Constitutional adjudication serves as a potent corrective tool when traditional practices clash with child safety standards. The judicial rationale in *Jezile v. State* (2015) rejected the appeal to tradition as a justification for forced and underage marriage, upholding the primacy of constitutional principles and prioritizing the best interests of the child. This doctrine illustrates that customary law may be maintained as a cultural institution while staying subject to legal child safety norms.

This research does not see human rights legislation as the principal normative framework, despite international human rights treaties serving as valuable reference points for child protection. Rather, these tools are seen as supplementary rules that bolster ethical precepts already inherent in Islamic family law. The safeguarding of children's legal identity, the prohibition of child marriage, and the prioritization of children's welfare are not external mandates but fundamental aims of *Sharī'ah*, namely the preservation of lineage (*hifz al-nasl*) and the avoidance of damage (*dar' al-mafāsīd*). Thus, international criteria serve just as auxiliary benchmarks, but Islamic family law is the primary evaluative framework for judging the legality of traditional marital practices. (Akolokwu & Raji, 2019)

The comparative research reveals that the primary difficulty is not the acknowledgment of customary law itself, but rather the existence or lack of efficient remedial procedures. In Indonesia, where customary law functions without constitutional and judicial oversight, statutory child protection requirements are susceptible to being overridden by social practices. In contrast, when customary law is legally regulated and subject to court scrutiny, like in South Africa, children's rights serve as enforceable legal constraints.

This research indicates that the regulation of traditional marriage practices in Indonesia should adhere to obligatory normative standards rather than optional accommodations. Customary marriages must undergo mandatory registration to establish children's legal identity and civil status; the legal minimum marriage age must function as a non-negotiable standard; children born from customary marriages must possess equal inheritance rights regardless of their parents' marital status; and customary practices must be subject to effective judicial intervention when they contradict the protection of children. These principles delineate the substantive limits of legal plurality in Islamic family law and assert that child protection is an inviolable normative constraint on the acknowledgment of traditional marital practices.

Table 2 presents a summary of the results, including the highlighted normative issues, principles of Islamic family law, comparative perspectives from South Africa, and their implications for child safety in customary marriage practices.

Table 2.

Normative Limits of Customary Marriage for Child Protection under Islamic Family Law

Aspect	Normative Problem in Indonesia	Islamic Family Law Standard	Comparative Insight from South Africa	Implication for Child Protection
Recognition of Customary Marriage	Customary marriage is socially acknowledged without official registration, depriving offspring of legal identity and civil standing.	Custom (<i>'urf</i>) is legitimate alone if it maintains lineage (<i>hifz al-nasl</i>) and prevents damage (<i>lā ḍarar</i>).	The acknowledgment of customary marriage is contingent upon legal registration and adherence to constitutional requirements.	The legal identification of children is a condition for marital validity.
Marriage Registration	Registration is seen as administrative, allowing unregistered marriages to continue.	Legal clarity is essential to <i>hifz al-nasl</i> and parental accountability.	Registration is a legal requirement under RCMA 1998.	Registration must serve as a significant protection for youngsters.
Minimum Age of Marriage	Marriage dispensation legitimizes the practice of underage marriage.	The prevention of damage (<i>dar' al-mafāsīd</i>) and the prioritization of child care take precedence over social accommodation.	Judicial bodies dismiss cultural rationale for child marriage (<i>Jezile v. State, 2015</i>).	The minimum age should function as a non-derogable standard.
Children's Inheritance Rights	Children born from unregistered marriages lose	Children's rights are autonomous from marital status; their	Discriminatory inheritance regulations annulled	Equitable inheritance rights are crucial for

Aspect	Normative Problem in Indonesia	Islamic Family Law Standard	Comparative Insight from South Africa	Implication for Child Protection
	their inheritance rights.	denial is a violation of justice (<i>'adl</i>).	(Bhe v. Magistrate Khayelitsha, 2004).	substantive justice.
Rectification Process Regarding Custom	Absence of competent judicial scrutiny about detrimental customs.	Detrimental practices must be rectified to conform to <i>Shari'ah</i> aims.	Constitutional and judicial supervision rectifies detrimental practices.	Judicial oversight is crucial for safeguarding children's rights.

The research indicates that the primary issue in the link between customary marriage and child protection is not in the presence of customary law, but in the lack of explicit normative norms regulating its use. Within the framework of Islamic family law, customary practices (*'urf*) may be integrated only to the extent that they safeguard lineage (*hifz al-nasl*), avert damage (*dar' al-mafāsīd*), and promote the welfare of children as vulnerable family members. Practices that lead to the denial of legal identity, the legitimization of underage marriage, or the exclusion from inheritance rights cannot be defended as legitimate practices, since they contravene the ethical and legal principles of marriage in Islam.

The comparative experience of South Africa demonstrates that customary marriage may flourish alongside various legal systems provided its acknowledgment is normatively regulated and subjected to appropriate judicial scrutiny. While South Africa does not implement Islamic law, its remedial stance on detrimental practices aligns with Islamic legal principles that advocate for the correction of traditions that perpetuate injustice. This sub-chapter asserts that in Islamic family law, child protection serves as an inviolable normative constraint on customary marriage practices, thereby establishing children's rights as a fundamental component of marital legitimacy rather than a mere byproduct of social tradition.

Conclusion

This study demonstrates that, within Islamic family law, the recognition of customary marriage is normatively justifiable only insofar as it aligns with the objectives of *Shari'ah* (*maqāsid al-shari'ah*), particularly the protection of offspring (*hifz al-nasl*), the prevention of harm (*dar' al-mafāsīd*), and the realization of justice (*'adl*). Customary marriage practices that lack adequate legal regulation—especially those permitting child marriage or disregarding marriage registration—fail to fulfill the ethical and legal standards of marriage under Islamic law, as they generate ambiguity regarding children's legal status and undermine parental responsibility.

This research not only reaffirms these principles but also provides a novel normative contribution by establishing child protection as an essential normative threshold in the acknowledgment of customary marriage under Islamic family law. This research reveals that Islamic family law incorporates an internal corrective mechanism (*taṣḥīḥ al-'urf*) to evaluate, restrict, and amend customary practices that may be detrimental to children, in contrast to earlier studies that primarily interpret customary marriage through the lens of legal pluralism or cultural accommodation.

The comparative comparison of Indonesia and South Africa indicates that child protection does not need the outright rejection of traditional marriage; instead, it relies on the existence of legally enforced normative limits. The South African example demonstrates how compulsory registration and court involvement serve as corrective measures against detrimental customary practices, while the Indonesian setting highlights the systemic hazards resulting from the lack of organized remedial procedures.

This contrast reveals that the legality of customary marriage is not just contingent upon cultural acknowledgement, but rather on its ability to provide children's legal identification,

protection, and well-being. From the author's viewpoint, these findings confirm that Islamic family law is not peripheral to child protection discourse; rather, it provides an intrinsic normative framework that is pertinent and capable of significantly contributing to global discussions on customary marriage and children's rights.

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