

Examining Islamic Family Law in South Africa and Indonesia via the Lens of Customary Marriage and Child Protection

MARIIA NAUMENKO

¹Ph.D. Scholar

Department of Civil Law and Procedure

Article Info

Received: 29-12-2025 Revised: 08-01-2026 Accepted: 16-01-2026 Published: 26-01-2026

Abstract: Although customary marriage serves a societal purpose in many legal systems, it often creates major hurdles when it comes to protecting children's rights, particularly when it is not officially registered or involves underage participants. By comparing Islamic family law in South Africa and Indonesia, this study seeks to understand the limits of customary marriage from a child protection perspective. Analysing traditional marriage patterns, child protection rules, and court responses in both nations, this study uses normative legal research methodologies that integrate conceptual, legislative, and comparative approaches. The results show that Islamic family law recognises tradition ('urf) but only if it coincides with the goals of Shari'ah (maqāsid al-shari'ah), which are to protect offspring (hifz al-nasl), lessen damage (dar' al-mafāsid), and achieve justice ('adl). Children in Indonesia have challenges with their legal identity, parental responsibility, and access to civil rights due to the widespread practice of unregistered traditional weddings and lax marriage dispensation standards. In contrast, South Africa uses mandatory registration and legal actions to reform traditional practices that harm children. This study argues that customary marriage cannot be legitimate unless it ensures the protection of the children involved, and it shows how Islamic family law acts as a check and balance in different legal systems.

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

Introduction

The Arabic words *an-nikhdan azzijawaj*, which have meanings related to journeying, progressing, ascending, and engaging in sexual relations, are the root of the term "marriage" according to the Qur'an and Hadith. On the other hand, the phrase *Adh-dhammu*—meaning to compress, join, assemble, and display a hospitable temperament—is where the word marriage is derived from. Marriage is derived from the verb *aljam'uyang*, meaning "to gather or combine." The terms "زواج" and "نكاح" are used to describe marriage in *fiqh* terminology, and they are both derived from Arabic. Marriage represents two ideas in Arabic: *الوطة* (conduct) and *الضم* (restraint). An essential meaning of *الضم* is The literal meaning of *الوطة* is repression or restriction, but the metaphorical meaning is agreement or engagement (Malisi, 2022). In accordance with the goals of Shari'ah, marriage is centred on protecting children, promoting human dignity, and making sure they are well taken care of from the moment they are born (*hifz al-nasl*) (Fikriya & Tasrif, 2023). In Islamic family law, the legality of a marriage is closely tied to the legal consequences it has for children, according to this normative viewpoint.

Marriage continues to play an important role in the social fabric of many traditional societies, helping to ensure the continuation of cultural practices and family ties. When traditional marriages don't get registered or when traditional customs run counter to current child protection laws, problems arise from a legal standpoint. According to Islamic family law, these cases show that *hifz al-nasl* has not been achieved since children's legal status is instantly jeopardised and parental duties are less strictly enforced due to the absence of marriage registration. Marriage registration, from this point of view, is more than just a bureaucratic need; it is a legal tool that Islamic family law uses to protect children's rights inside families and to enforce parental accountability (Arif, 2019).

Examining the effects of unregistered marriage on state and international child protection systems makes the normative repercussions of this practice more clear. There is a strong emphasis in international treaties like the CRC, ICCPR, and CEDAW on the need of protecting children's rights to non-discrimination, legal identification, and care. Laws such as Law No. 23 of 2002 on Child Protection, Law No. 35 of 2014, and Law No. 16 of 2019, which establishes a minimum marriage age of nineteen years, as well as constitutional guarantees in Article 28B paragraph (2) of the 1945 Constitution, all serve to uphold these principles in Indonesian law. Indonesia continues to have unrecorded marital practices such contract weddings, traditional marriages, and serial marriages even though these frameworks exist. According to the Indonesian Child Protection Commission (KPAI), these practices have real-life effects on children, such as making it harder for them to get birth certificates, limiting their educational opportunities, not being officially recognised, and making it harder for them to inherit (KPAI, 2013). From the perspective of Islamic family law, this ongoing issue highlights a fundamental disconnect between societal expectations and actual implementation of the law. Not registering weddings not only causes administrative issues, but it also violates *hiḏ al-naḏ* normatively since it impairs the legal procedures meant to safeguard children's basic rights within family connections and directly affects their legal identity.

Lombok, West Nusa Tenggara, follows a similar pattern in its practice of capture marriage (*merariq*), in which a woman is "abducted" and subsequently wed according to customary law without official registration (Yi, 2019). Children born in unregistered traditional and religious marriages in areas like East Lombok have little legal protection, according to empirical data. The Sedulur Sikep people of Central Java's Pati region follow a similar pattern of conducting weddings only in accordance with traditional customs rather than registering them formally with the government (*antaranews.com*, 2025). Legally, children suffer when parents do not register their marriages, and this is especially true when it comes to matters like as birth certificates, formal schooling, and public services (Njatrijani, 2019). This situation adds to the legal ambiguity that women and children face, making them more susceptible to unrecorded religious and traditional weddings, which may include minors. This reflects wider legal concerns about the societal consequences of weddings that do not occur via the official registration system, and it has also been brought up in recent talks about the Indonesian Criminal Code. The need for normative discussion around the criminalisation of weddings primarily conducted in accordance with religious or customary practices rather than official registration stems from the desire to provide vulnerable populations, particularly children, with legal clarity and adequate protection (Admin, 2023). Other countries with diverse legal systems also have the problem of conflicting customary law and child protection regulations, not only Indonesia. The case of South Africa is instructive because of the similarities between the challenges faced by traditional marriage practices and those faced by child protection agencies. In this case, the judiciary takes the initiative to correct harmful traditional norms that impact children, in line with the corrective principles of Islamic family law.

An analogous problem exists in South Africa with *ukuthwala*, in which men kidnap women for the purpose of marriage. There is a lot of backlash against this policy since it violates both the South African Constitution and the CRC's best interests principle for children. Plus, the bride's permission is typically lacking, which raises concerns about the child's age. Case law from 2015, *Asus Jezile v. State*, demonstrates that traditional *ukuthwala* and the need to safeguard children's rights are incompatible in South Africa. Traditional marriage traditions among certain Xhosa tribes include the abduction of women for the sake of marriage, a practice known as *ukuthwala*. This is a common tactic used to justify child marriage and other forms of forced marriage. Mr. Jezile, the accused, abducted a girl aged fourteen and then had sexual relations with her, including an illicit marriage. Because it went against criminal law prohibitions and affected children's constitutional rights, the Western Cape High Court found it inappropriate on customary grounds (Mwambene & Mqidlana, 2021).

In line with the principles of Islamic family law, which condemn marriages detrimental to minors and lacking permission, protection, and benefit, the verdict shows that customary practices cannot be used as an excuse for forced or underage marriage. Therefore, the judiciary's role in the decision reflects a remedial logic that is in line with Islamic family law standards that strive to protect the most vulnerable. Furthermore, the decision supports the idea that traditional practices should not conflict with what is best for children, as stated in Article 28 of the 1996 South African Constitution,

which protects children from abuse, humiliation, and harmful practices. It is the responsibility of the government of South Africa to shield children from harmful cultural practices, the court said, citing the CRC of 1989. The historic ruling in *Jezile v. State* upholds the incompatibility of customary marriage law with international human rights standards by demonstrating that customary norms do not justify underage or forced marriage.

The difference between "should" and "is" in child protection is a reflection of the shortcomings of positive law enforcement and the failure of family law, particularly Islamic family law, to address cultural norms that go against what's best for children. Examining how Islamic family law principles, positive law, and customary law interact to protect children is the overarching goal of this study. In order to maintain cultural identity while adhering to Islamic family law principles, this study seeks to define the normative limits of customary marriage application.

The majority of previous research on traditional marriage practices has focused on questions of inclusive justice, legal pluralism, and the relationship between traditional and state law. The ability of customary law to exist alongside state law in South Africa's mixed legal system is highlighted by Himonga (2010). Research on customary marriage practices has focused on explaining the mechanics of legal pluralism, but child protection has not been prioritised (Himonga, 2011). By looking at child marriage in South African countries through the prism of public policy and customary law, Mwambene (2018) mainly highlights institutional and structural barriers to ending child marriage, but fails to address the need for a child-centered legal framework (Mwambene, 2018).

While there has been a lot of research on legal pluralism and child marriage, the preceding study found that when discussing customary marriage laws from an Islamic family law perspective, there isn't enough research that focuses on protecting children. To far, studies examining the merits and shortcomings of traditional marriage ceremonies have not concentrated on Islamic family law principles.

From a religious studies perspective, Islamic family law serves as a normative-ethical framework that governs social behaviour, moral responsibility, and religious practice in Muslim nations. Islamic family law, and more especially the *maqāṣid al-sharī'ah* framework, is explored in this study from a theoretical standpoint within Religious Studies. In this field, religion is seen as a lived normative system that interacts dynamically with cultural practices such as customary marriage. The development of a three-stage analytical procedure is a methodical normative contribution of this study. Rather than being seen as an additional moral guide, Islamic family law is first set up as the main framework for evaluation via the ideas of *maqāṣid al-sharī'ah* and *ḥifẓ al-nasl*. Secondly, this paradigm is used to assess the normative legitimacy and limits of traditional marital practices.

To demonstrate how different legal systems execute remedial processes for children's protection, a comparison is drawn between South Africa and Indonesia. Previous research has mostly examined traditional marriage via descriptive or legal pluralism perspectives; this study differs from that by using a systematic technique.

The structural similarities between South Africa and the Indonesian context led to its selection as a comparison case. These similarities include a pluralistic legal system that recognises both state law and customary law, as well as the prevalence of customary marriage practices that have an impact on child protection. In addition, the *Jezile v. State* decision demonstrated that South Africa has made great strides in resolving traditional behaviours that go against children's best interests. This remedial strategy deserves investigation in the Indonesian setting, specifically to assess the ability of family law, especially Islamic family law, to function as a normative instrument in reformulating traditional marital behaviours to protect children. By reinterpreting current legal materials within the frames of Islamic family law and Religious Studies, this research aims to provide a normative contribution rather than fresh actual case data.

The article takes the firm normative position that traditional marriage ceremonies should not be universally recognised. They can only be considered legitimate in Islamic family law if they follow the rules on the protection of children, particularly the protection of offspring (*ḥifẓ al-nasl*). Irrespective of cultural support, traditional practices that endanger children's legal status, normalise

child marriage, or evade government control should be considered normatively wrong.

Method

This study applies normative legal analysis to the field of contemporary Islamic family law, specifically looking at traditional marriage customs and how they impact child protection. Framing Islamic family law as a system of religious ethics and normative reasoning, rather than just as positive legislation, the research blends a normative legal framework with a Religious Studies approach. The analytical tool used to determine whether traditional marital traditions protect children (*ḥifẓ al-nasl*), prevent harm (*dar' al-mafāsīd*), and provide justice ('*adl*) is *maqāṣid al-sharī'ah* in this context.

In this study, we utilise the statutory approach to examine two positive legal norms that govern marriage and child status: the Recognition of Customary Marriages Act of 1998 in South Africa and Law No. 1 of 1974 as amended by Law No. 16 of 2019 in Indonesia. By outlining and analysing these laws, we may determine how much state law limits, allows, or fixes conventional marital behaviours that impact child protection.

Using the theories put out by Soetandyo Wignjosoebroto and Satjipto Rahardjo, this conceptual framework examines traditional marriage in Indonesia as an example of a living law. According to Hanafiah (2024), the normative grounds for evaluating the legality of customary marital practices and determining whether they need limitation or alteration are derived from Islamic family law, namely *ḥifẓ al-nasl* and child welfare.

As nations with various legal systems that recognise customary law, South Africa and Indonesia are subjected to a thorough examination using the comparative approach. First, the requirements for marriage registration; second, the minimum age for marriage and the ban of child marriage; third, the legal standing and rights of children born in customary unions; and fourth, the remedies available via the legal system to rectify harmful customary practices. The purpose of this comparison is to identify trends in normative practices and ways to improve child safety. The study is reliant on supplementary legal materials. Laws and judicial decisions are examples of primary legal sources, whereas scholarly works on topics like Islamic family law, customary law, and diversity in the law are examples of secondary sources. In order to demonstrate how regulatory gaps worsen children's vulnerability and how Islamic family law provides a normative framework for correction, the materials are analysed using a descriptive-analytical approach that compares and contrasts normative legal standards (*das sollen*) with prevalent customary practices (*das sein*).

Results and Discussion

Indonesian Customary Marriage and Child Protection

The customary marriage law of Indonesia is a reflection of the values and beliefs held by many ethnic groups throughout the nation and an essential part of Indonesia's cultural heritage (Febrianty et al., 2023). Everything from the wedding ceremony and dowry to the couple's legal obligations and the dynamics between their families is regulated by traditional marriage law. Indigenous Indonesian marriage customs mirror the beliefs of the people who lived there in the past. No one in the community is exempt from this legislation; it applies to everyone. Traditional marriage rules place an emphasis on social harmony and familial honour because of the importance of marriage as a social event that deepens the ties between two big families. This marriage ceremony often incorporates philosophically important rites like the exchange of gifts and the reunification of relatives. The following cases illustrate how indigenous communities' customary marriage laws help to maintain social cohesion and cultural identity (Hayati, 2016).

Marriage regulations are both a social tool and a means of maintaining community harmony. Achieving harmony, fortifying bonds within the family, and safeguarding customs are the objectives of the regulations. This concept is closely tied to indigenous peoples' perspectives on the significance of community and solidarity within their social system. So, conventional marriage law is both a framework for cultural expectations and norms and a road map for making marriage lawful in a given society. When we stand back, we can see that distributive and restorative justice principles provide the intellectual basis of conventional marriage laws. Activities that align with these ideals prioritise harmony and cooperation above animosity. Examples include dowry, transfer, and conflict

resolution.

As an additional, if limited, source of normativity, Islamic family law recognises customary practices ('urf). "Urf" can only be lawful if it doesn't eliminate responsibility for one's actions, hurt someone, or jeopardise the protection of vulnerable family members. Traditional marriage behaviours are evaluated according to the normative principles set by Shari'ah, which include the preservation of lineage, the mitigation of harm, and the promotion of justice (hifz al-nasl, dar' al-mafāsīd, 'adl) (Munir, 2023). The basic goal of marriage is to safeguard progeny and assure legal responsibility; consequently, Islamic family law does not permit customary marriages that do not have legal recognition, which lead to the denial of children's civil status or the facilitation of underage marriage. The main legislation that governs marriage in Indonesia is legislation No. 1 of 1974 on Marriage, as modified. This law specifies the legal rights and responsibilities of spouses, the minimum age to be married, and the conditions for marriage registration. The goal of these legislative standards is to safeguard women and children, promote gender equality, and provide clear legal standards. But in actuality, positive law doesn't always work well in situations where marriage is customary. At many crucial junctures, this breakdown becomes apparent. First, in many societies, customary law is seen as enough to legitimise marriage connections throughout the formation period, therefore state registration requirements are seen normatively unnecessary. Secondly, customary weddings that are not registered might continue to exist without facing legal repercussions due to ineffective enforcement measures at the administrative level. Third, in the field of child protection, statutory protections, like a minimum marriage age of nineteen, are often overridden by procedural mechanisms, like marriage dispensation, that allow customary norms to take precedence over legislative intent, and by socio-cultural acceptance of early marriage. These structural problems are shown by empirical instances. Children in Lombok lack legal identification since the merariq custom allows for weddings to take place without official registration, which puts young females at risk of being married off at a young age (Jayadi et al., 2023). Children of the Sedulur Sikep and AKUR communities in Central Java do not have birth certificates and have trouble getting public services and attending school since weddings are primarily performed according to traditional rituals (Hartanto, 2017). The Mandailing Natal region In a similar vein, marlojong practices value traditional legitimacy more than official registration (Siregar, 2022). Because of the long-term effects of being legally invisible, these behaviours show that children suffer the most from unregistered customary weddings. It is not the presence of custom that is problematic in customary marriage, as seen in Indonesia, but rather the lack of effective normative constraints that regulate its practice. The goals of Islamic family law, which include safeguarding lineage (hifz al-nasl) and preventing injury (dar' al-mafāsīd), are not achieved when customary authority is permitted to operate without necessary registration, enforced age limitations, or judicial correction. Because of this, children are structurally vulnerable; rather than being based on legally binding standards, their future well-being is dependent on societal acceptability. To assess the feasibility of recognising traditional marriage within this analytical framework without compromising the paramount need to safeguard children, a comparable reference is required.

South African Traditional Marriage and the Safeguarding of Children
It is well-known that South Africa has a diversified legal framework, historical antecedents, and cultural customs. Both constitutionally required statutes and long-established traditions of law make up the framework of the country's legal system. It is essential to acknowledge customary law in order to advance inclusive social justice in a society that is culturally and linguistically diverse (Ngozi, 2017). The marital law system in South Africa upholds fundamental principles like as human rights and gender equality while legally acknowledging customary law via national legislation. The constitution, legislation (such the 1998 Recognition of Customary Marriages Act), and legal precedents all provide South African customary law a solid foundation. The article provides a concise overview of customary marriage law in South Africa, its place within the country's legal system, and an analysis of the benefits and drawbacks of combining the two systems (De, 2013). In South Africa, indigenous peoples' marriage rules reflect their traditional traditions. A person who lives by these principles is devoted to their loved ones, their community, and the standards of society. In a customary law marriage, the couple's families are united in more ways than one. Traditional marriage rites, such as getting approval from family members and paying the lobola, are a part of the ceremony. Customary law evolved throughout indigenous cultures as a flexible legal framework that

could accommodate shifting social mores. Problems may arise, nevertheless, when formal laws representing competing notions clash with customary law. Even while long-established practices like polygamy are still generally acknowledged today, there may be friction with contemporary beliefs, particularly those regarding gender equality (Weeks, 2021).

State law, religion law, and customary law are all acknowledged in South Africa's legal system at the same time, which is distinguished by its pluralism. The fundamental basis for the incorporation of customary law into South African law may be found in the Constitution of 1996. To the extent that it is compatible with the Constitution, courts must acknowledge customary law. The government, according to Article 211 of the Constitution, shall safeguard and encourage the maintenance of traditional institutions and customary law (Sheikh, 2014). There is no difference between positive law and customary law according to this article, provided that they do not infringe upon the fundamental rights guaranteed by the Constitution, such as non-discrimination, gender equality, and the protection of human rights.

Rather than seeing South Africa as a case study in religious tolerance, this article examines the country because of the comprehensive framework it offers for the normative regulation of traditional marriage. South Africa is an example of a country that does not follow Islamic law but does formalise the acknowledgement of customary practices while also being restrained by constitutional restrictions and judicial supervision, particularly when it comes to issues involving children. This approach provides a substantial comparative framework that is in line with Islamic legal theory, which similarly requires that tradition ('urf) be recognised only to the degree that it does not cause harm or jeopardise the protection of vulnerable people.

Official recognition of traditional weddings was bestowed upon them in 1998 by the Recognition of Traditional Weddings Act (RCMA). The first step in ensuring that these legislations address indigenous communities' needs is to check that current customary practices do not conflict with constitutional principles. The RCMA performs a wide range of important tasks, including recording traditional weddings, advocating for gender equality, and regulating polygamy. For a marriage to be legitimate in the conventional sense, it must have followed established protocols and norms of custom (Mwambene & Kruuse, 2015). For women in traditional marriages, this law safeguards a number of rights, including the right to divorce and the right to possess property. Current wives' consent and written property partition plans are necessary for polygamy to be legalised under the RCMA. According to Raphalalani (2016), the RCMA plays a crucial role in the struggle to incorporate customary law into domestic law while preserving its unique characteristics.

One unique aspect of traditional marital law in South Africa is lobola. A dowry is a token of affection and respect given by the groom's family to the bride's family. In lobola discussions, the extended relatives of both sides are involved. Although not explicitly mandated by positive law, customary law recognises lobola as an important component of acceptable customary tradition and recognises it as a valid prerequisite for marriage. Both the partners' and their extended families' blessings are necessary for a marriage to be valid in traditional societies (Parker, 2015). Because of this, it's clear that the indigenous people of South Africa need to stay connected. Assuming it does not violate fundamental rights like marriage, the practice is accepted by positive law. Both the RCMA and customary law acknowledge polygamy. This arrangement is built around provisions that protect the rights of women. The need to control the equitable distribution of assets and the prerequisite of consent from present spouses are two such examples. An important part of positive law is the official documentation of weddings. This is an effort to provide legal protections for couples, especially women, in the case of a property division or divorce. A big hurdle in establishing customary law is the documentation necessary, which many indigenous groups do not understand or respect.

When it comes to traditional marriage traditions in South Africa, only customary courts have the authority to hear and rule on such issues. The court is based on constitutional principles and upholds the community's long-standing norms. Nevertheless, customary court rulings must be constitutional, and those who feel their rights have been violated may challenge them in official courts. Indigenous groups often choose traditional courts over modern ones because of the widespread belief that the

former better understands local values and can help bring about peaceful resolutions. Conventional courts, according to some, are fundamentally biased against women, particularly when it comes to matters of women's rights (Mwambene, 2017).

The age-old custom of ukuthwala presents a comparable conundrum in South Africa. The kidnapping of a lady for the sake of marriage is a common part of the Xhosa wedding ritual. Many adults nowadays take advantage of this custom to force girls into marriages against their choice. Jezile v. State (2015) demonstrates how this method blatantly ignores the rights of children. A fourteen-year-old girl was sexually enslaved and wedded by the accused. According to Mgidlana and Mwambene (2021), the customary claim was denied by the Western Cape High Court due to a violation of Article 28 of the 1996 South African Constitution, which safeguards minors from unfair and harsh treatment. Tradition can no longer be used to justify the infringement of children's fundamental rights, as this verdict signifies. Legal acceptance of a customary marriage in South Africa is contingent upon its registration, as per the Recognition of Customary Marriages Act 1998 (RCMA). The RCMA promotes gender equality and ensures legal rights for women and children within the framework of marriage.

Although South Africa does not follow Islamic law, Islamic family law finds common ground with its rehabilitative approach to customary marriage. According to Islamic law, cultural practices can only be upheld if they do not cause harm or violate basic safeguards for vulnerable people, particularly children. In the case of Jezile v. State, the court rejected harmful customs that violated this principle. Accordingly, constitutional adjudication in South Africa plays a function similar to Islamic legal rectification (taṣḥīḥ al-'urf), stressing that traditional marriage must adhere to stringent normative constraints in matters pertaining to the well-being of children.

Furthermore, safeguards for children's rights must take precedence over common wisdom since the Constitution upholds the idea of prioritising children's best interests. Meanwhile, there are still a lot of problems with the execution. Some indigenous communities still use polygamy and early marriage in modern times. Traditional weddings are not often documented for a variety of reasons, including a lack of public awareness or restricted administrative access. Similarly as

There is limited protection and little legal status for children in Indonesia who are born under unregistered traditional marriages (Mbaku, 2019).

This statement brings to light the reality that both South Africa and Indonesia are struggling with the challenge of safeguarding children's rights while also preserving traditional values. Both have ratified significant international human rights treaties, such as the CEDAW, ICCPR, and the CRC, and both acknowledge the inclusion of customary law into their respective legal systems. In all of these countries, marriage registration is also required by law. However, there are notable differences in terms of implementation. Many Indonesian children may not have access to education or a birth certificate because their parents did not record the details of their traditional wedding. In contrast, a well-defined framework is provided under South Africa's 1998 Recognition of Customary Marriages Act. This framework has been further strengthened by progressive court judgements like Jezile v. State (2015), which mandate that customs comply with child protection laws. Indonesia has not done enough to put laws in place to protect children, in contrast to South Africa's more proactive approach to dealing with cultural practices that breach human rights norms.

When applied to the current situation in Indonesia, the South African experience provides clear normative lessons. To be legally recognised, a customary marriage must be registered and subject to strong constitutional safeguards, according to the 1998 Recognition of Customary Marriages Act. Cases such as Jezile v. State confirm, according to constitutional adjudication, that traditional practices may be changed by the courts if they go against what is best for the kid. This approach proves that the validity of actions that violate children's rights cannot be validated by legal pluralism, which operates under certain conditions. On the other side, traditional marital practices in Indonesia lack a constitutional or legal framework that may be used to systematically assess and correct them. By looking to South Africa as an example, Indonesia may see that in order to safeguard children, there must be recognition of the need of legislation as well as enforceable judicial control to prioritise

human rights and constitutional principles above harmful traditional practices.

Within the field of Religious Studies, Islamic family law serves as both a codification of laws and a code of ethics for how members of society should behave in relation to one another and their religious practices. Within this framework, *maqāṣid al-sharī'ah* evaluates the efficacy of traditional marriage ceremonies in meeting their stated ethical and legal goals. Based on the principle of *ḥifẓ al-nasl*, a customary marriage that causes a child's legal standing to be eroded, makes child marriage easier, or reduces parental duty is a normative failure. Rather than just portraying cultural practices, this shows that Islamic family law provides an internal theoretical framework to assess, limit, and correct traditional behaviours.

Table 1 uses this theoretical framework to compile the findings of the comparison and to explain how these normative requirements for child protection in traditional marriage in South Africa and Indonesia operate differently.

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-mafāsīd*) 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 *maqāṣid of the Shari'a*, namely the safeguarding of children (*ḥifẓ 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 *ḥifẓ 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 (*ḥifẓ al-nasl*) and the avoidance of damage (*dar' al-mafāsid*). 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>hifẓ 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>hifẓ 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 (Jezile v. State, 2015).	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 research proves that, according to Islamic family law, the acceptance of traditional marriages can only be justified normatively if they comply with the goals of *Shari'ah*, specifically safeguarding children (*hifz al-nasl*), avoiding harm (*dar' al-mafāsīd*), and attaining justice (*'adl*). Inadequately regulated customary marriage practices, such as those that allow child marriage or ignore marriage registration, do not meet the ethical and legal requirements of marriage according to Islamic law. This is because they create uncertainty about the legal status of children and diminish parental responsibility.

In addition to restating these ideas, this study offers a fresh normative contribution by defining child protection as a crucial normative criterion for the recognition of customary marriage in Islamic family law. In contrast to previous studies that mainly interpreted customary marriage through the lens of legal pluralism or cultural accommodation, this research shows that Islamic family law includes an internal corrective mechanism (*taṣḥīḥ al-'urf*) to assess, limit, and change customary practices that could harm children.

When looking at South Africa and Indonesia side by side, it becomes clear that legally enforcing normative constraints is more important for child safety than openly rejecting traditional marriage. The South African case shows how harmful customary practices may be addressed by mandatory registration and judicial intervention, whereas the Indonesian situation illustrates the systemic risks caused by the absence of organised mechanisms for remediation. This difference highlights the fact that customary marriage's legitimacy depends on its capacity to legally identify offspring, rather than just on cultural recognition.

safeguarding and health. According to the author, these results show that Islamic family law is an integral part of child protection discussions, not an afterthought. Rather, it offers a relevant and influential normative framework that can add weight to international debates about traditional marriage and the rights of children.

References

- April 29, 2023, admin. The Controversial UU KUHP Pasal: The Perkawinan Secara Agama dan Adat will be Dispelled. ISIF. (2019). Akolokwu, G. O., & Raji, B. A. Pasal Kontroversi UU KuHP Perkawinan Secara Agama dan Adat Akan Dipidanakan. Retrieved from <https://isif.ac.id/>. The Southern African Developing States' Response to Discriminatory Customary Practices Impacting Women's Rights: A Comprehensive Review. Report from the IIUM Law Journal, volume 27, page 89. This is the link to the article by Anas (2025): <https://heinonline.org/HOL/Page?handle=hein.journals/iiumlj27&id=89&div=&collection=>. A New View of the Verses on Polygamy from the Perspective of Ibn 'Āshūr's Maqāṣid al-Sharī'ah Theory. Chapters 93–111 of the journal *Al-'Allāmah: Journal of Scriptures and Ulama Studies*, volume 2, issue 1. Source: Antara News, <https://doi.org/10.70017/al-allmah.v2i1.26>. (26 June 2025). A grassroots movement is taking place in East Lombok to combat child marriage. News from Antara. A group of concerned citizens in East Lombok are taking action against child marriage, according to a report by Arif et al. (2019). Leaks in the Law from a Progressive Legal Perspective. Publication: *Undang: Jurnal Hukum*, 2(1), 169–192. DOI: 10.22437/ujh.2.1.169-192 De, In 2013, S. M. Analysing the South African legal framework and customary marriage registration practices when non-registration turns into non-recognition. The citation is from the 2013(1) volume of *Acta Juridica*, pages 239–272. The following is the DOI for the article "Febrianty et al., 2023": <https://doi.org/10.10520/EJC148457>. LEARNING TO IDENTIFY BUDAYA DAN KEBANGSAAN PERAN KEARIFAN LOKAL. Vol. 7, No. 1, pp. 168–181. "Fikriya, K., & Tasrif, M. (2023)." <https://doi.org/10.31958/jeh.v7i1.10591>. Goals of Marriage in the Quran and Its Relevance to the Childfree Phenomenon (From a Maqāṣidī Expert Perspective). Volume 2, Issue 2, pages 36–55, *JUSMA: Jurnal Studi Islam Dan Masyarakat*. The Importance and Relevance of Hifẓ Al-Lisān as Maqāṣid Al-Sharī'ah Al-Ḍarūriyyah in the Contemporary Era (Hamim, K., 2021). Publication: *Jurnal Hukum Keluarga Dan Hukum Islam*, Volume 5, Issue 1, Pages 317–337. [Hanafiah, N. (2024)] <https://doi.org/10.22373/sjkh.v5i1.9139>. Relevansi Maqashid Syariah dalam Kebijakan Perlindungan Perempuan dan Anak pada Hukum Keluarga di Indonesia. One and a Half Years of Integrated Education, 1, 112–125. In 2017, Hartantio published an essay at <https://barkah-ilmi-fiddunya.my.id/ojs/index.php/iej/article/view/71>. Local Wisdom Of Sedulur Sikep (Samin) Society's Marriage In Kudus: Perspective Of Law Number 1 Year 1974 On Marriage. Publication: *Jurnal Dinamika Hukum*, Volume 17, Issue 2, by 132–138. This is the link to the paper by Hassan and Batool (2024): <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/723>. A Critical Examination of the Islamic Legal Concept of 'urf (Custom) and Its Realisation in Social Issues. *Journal of Islamic Studies*, Mohi Ud Din, 2(I), 1–30. See Hayati (2016) at this link: <https://mjis.miu.edu.pk/index.php/mjis/article/view/57>. Peralihan Hak dalam Jual Beli Hak Atas Tanah (a teaching on the Perjanjian Jual Beli in the Concept of Public and Private Law in the National Law System). Legal Citation: *Lex Jurnalica*, 13(3), 147934.

Hemonga, C. (2011). *The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa*. By J. Fenrich, P. Galizzi, and friends

Articles 31–57 are from *The Future of African Customary Law*, edited by T. E. Higgins. Press of Cambridge University. This sentence is a citation for a work by Jayadi, S., Ridho, A. R., and Rahmawati, R. (2023). Marriage according to Sasak customary law in Lombok, an ethnic society in eastern Indonesia. period from 1480 to 1486. (June 6, 2013) KPAI. https://doi.org/10.2991/978-2-38476-180-7_151. Child Abuse: What It Is and How It Affects Children. Welfare of Children in Indonesia Commission (KPAI). // www.kpai.go.id/publikasi/tinjauan/perkawinan-tidak-dicatatkan-dampaknya-bagi-anak

In the year 2022, Malisi was the author. *THE PERSON'S ROLE IN Islam*. KUALA LUMPUR: Jurnal Ilmu Sosial, Politik Dan Hukum, 1(1), 22-28. This sentence is a citation for a work by Mbaku, J. M. (2019) in the journal *Seikat*. Three bodies of law: international law, African customary law, and kids' rights protection legislation. *Review of International Law from Michigan State University*, 28, 535.

This sentence is a citation for an article by Mgidlana and Mwambene (2021) from the *Hein Online Journal*. Should the practice of ukuthwala, which results in child and forced marriages, be criminalised in South Africa? This is the link to the article by Munir (2023): <https://uwcscholar.uwc.ac.za/10.17159/1727-3781/2021/v24i0a9423>. An Advanced Islamic Juridical Context: Maqāṣid al-Shar'ah Between the Classical and Postmodern Eras (SSRN Scholarly Paper No. 3994622). Network for Social Science Research. "Mwambene, using the DOI: 10.2139/ssrn.3994622" In 2017, L. The very core upheld? Courts and traditional weddings in South Africa. *Journal of African Human Rights Law*, 17(1), 35–54. [Mwambene,] <https://doi.org/10.17159/1996-2096/2017/v17n1a2>

In the year 2018, L. Child marriage in Southern Africa: a look at recent legal remedies in Zimbabwe, South Africa, and Malawi. Published in the *African Human Rights Law Journal*, volume 18, issue 2, pages 527–550. <http://doi.org/10.17159/1996-2096/2018/v18n2a5>

In 2015, wambene and Kruuse published a paper. Resolved Matters? Ceremony of the Acknowledgement of Traditional Marriages in South Africa. *Journal of International Law, Policy, and the Family*, Volume 29, Issue 3, Pages 237–259. The authors of this work are Mwambene and Mgidlana (2021). The DOI for the article is 10.1093/lawfam/ebv009. Should the practice of Ukuthwala, which results in underage and forced marriages, be criminalised in South Africa? The article is published in the *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, volume 24, issue 1, 2017. Read the article at this link: <https://www.ajol.info/index.php/pelj/article/view/235526>.