

Legal Reform in Customary Marriage Law in Indonesia and South Africa for Inclusive Justice

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Abstract

Customary law shapes South African and Indonesian culture and society. However, adopting customary marital law into national legal systems is difficult. These include value conflicts between regional traditions and positive law's universal principles, such as recording marriages, protecting children, and ensuring gender equality. Within Indonesia's legal system, customary law practices are not well accommodated. Customary law is acknowledged under South Africa's constitution, however its application is fraught with difficulties. This study aims to (1) comprehend positive law and its correlation with customary marriage law, (2) analyze the difficulties of integrating customary marriage law with positive law in South Africa and Indonesia, and (3) evaluate the future prospects of this domain. The study's findings and suggestions might foster a more equitable society and promote legislation that honors universal ideals and traditional customs. This comparative and qualitative study use normative legal techniques to analyze pertinent literature, legal concepts, and norms. This paper highlights the main barriers to merging positive and customary marriage legislation. Examples are administrative obstacles like marriage registration and customary norms that conflict with human rights. The proposed framework respects traditional values to uphold

human rights and social fairness. Keywords include normative marriage law, positive law, social justice, gender equality, and legal integration.

Keywords

Customary Marriage Legislation, Positive Jurisprudence, Legal Cohesion, Inclusive Justice, Cultural Conservation.

Introduction

Philosophers believe marriage is more than a legal contract between two people; it symbolizes social and spiritual harmony, continuity, and oneness. Marriage symbolizes love, commitment, responsibility, and respect for life together.¹ This perspective aligns with the fundamental role of marriage as a unifying institution that goes beyond mere legal formalities. Marriage is a foundation for social stability and personal growth, ensuring that values such as trust and mutual respect are upheld across generations. In many cultures, marriage is a spiritual ceremony that unites the individual and the society and frequently involves transcendental devotion to the Almighty.² Marriage reflects not only personal commitments but also the shared beliefs and traditions that strengthen community bonds. The spiritual element ensures that marriage is not merely an individual choice but a societal pillar that fosters collective responsibility.

The marital theory emphasizes the equilibrium of rights and responsibilities within husband-wife partnerships, extended families, and society at large. Marriage serves as the foundation for family formation and contributes to social stability while upholding cultural values transmitted over generations.³ This perspective views marriage as a vital part of human existence, encompassing conventions, practices, and values that create a society.

¹ Jennifer L. Jenkins, '13 The Philosophy of Marriage in North by Northwest', in *Hitchcock's Moral Gaze*, ed. R. Barton Palmer, Homer B. Pettey, and Steven M. Sanders (SUNY Press, 2017), 253–69, <https://doi.org/10.1515/9781438463865-016>.

² Lathifah Munawaroh, Bagas Heradhyaksa, and Sadari Sadari, 'CONSTRUCTION OF THE FIVE PILLAR LAW OF MUBADALAH IN THE PERSPECTIVE OF ISLAMIC MARRIAGE PHILOSOPHY', *SMART: Journal of Sharia, Traditon, and Modernity* 2, no. 2 (8 December 2023): 107–26, <https://doi.org/10.24042/smart.v2i2.16043>.

³ Juwaini Saleh et al., 'Marriage Guidance Towards Family Resilience in Aceh: A Study of Islamic Law Philosophy', *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (7 October 2022): 594–613, <https://doi.org/10.22373/sjhk.v6i2.12448>.

Customary marriage legislation reflects community norms and lifestyles. Hundreds of customary groups in Indonesia have their marriage law traditions, which vary in marriage rituals, dowries, and extended family connections.⁴ In the national legal system, these norms are frequently neglected or contradict positive law, which is founded on broad legal concepts that may not allow customary variation. Incorporating customary law into positive law is vital because customary law may enhance and improve national law, making positive law more sensitive to societal variety. Juridically, customary marriage law often conflicts with the principles of national law, particularly regarding legal certainty and marriage registration. Philosophically, customary marriage embodies values and traditions that reflect Indigenous communities' social and moral order, which should be preserved in legal development. From a sociological perspective, customary marriage law is essential for preserving social cohesion and ensuring intergenerational continuity, hence requiring its incorporation into the national legal system.

Positive, centrally formulated legislation ensures legal certainty, regulates citizen interactions, and creates a unified legal system. However, local and flexible customary law frequently offers better answers to indigenous groups.⁵ This disparity makes it difficult to decide which marital standards should take precedence, particularly when customary customs and explicit legal requirements diverge greatly.⁶ The national legal system typically overlooks Indigenous groups' social context and local knowledge when applying positive legislation severely. An integrated strategy is essential to achieving social and legal justice that all sides may accept.

Customary law is acknowledged by the Marriage Law and the 1945 Constitution of Indonesia, however its implementation in positive legislation sometimes encounters difficulties. Modern legal societies have a limited knowledge of customary law, which is oral, unrecorded, and changing. Understanding customary marriage law as part of the national cultural treasure, we may apply appropriate ideas to develop more egalitarian and indigenous-

⁴ Asrizal Saiin et al., 'Examining Malay Customary Marriage Law in the Malay Countries: An 'Urf Perspective', *Al-Qadha : Jurnal Hukum Islam Dan Perundang-Undangan* 10, no. 1 (6 June 2023): 1–18, <https://doi.org/10.32505/qadha.v10i1.4725>.

⁵ Irma Suryani et al., 'Integration of Islamic Law in Regional Development in Indonesia', *JURIS (Jurnal Ilmiah Syariah)* 22, no. 1 (2023): 1–11, <https://www.academia.edu/download/106931111/3308.pdf>.

⁶ Mohamad Abdun Nasir, 'Negotiating Muslim Interfaith Marriage in Indonesia: Integration and Conflict in Islamic Law', *Mazahib Jurnal Pemikiran Hukum Islam* 21, no. 2 (2022): 155–86.

friendly solutions. Thus, integrating customary marriage law into positive legislation enhances national legal policy and respects cultural diversity to honor Indonesian indigenous peoples.⁷

In South Africa, integrating customary law into national legislation poses a significant difficulty, especially for communities with robust customary law traditions. The 1996 South African Constitution recognizes customary law within the legal framework, provided it does not contravene human rights principles such as gender equality and individual rights.⁸ Like Indonesia, South African customary law holds communal and traditional norms that underpin community life, notably marriage. In South African customary law, marriage is a contract between two people and a link between two extended families that promotes unity and cultural continuation.

However, integrating customary law with contemporary national legal systems presents comparable issues. Polygamous marriages are legal under customary law but frequently violate governmental gender equality laws. South Africa enacted the Recognition of Customary weddings Act 1998 to simplify this complication, legalizing customary weddings while mandating registration and safeguarding spouses' rights, particularly those of women.⁹ Customary law is acknowledged by legislation; nonetheless, its implementation poses challenges. The majority of indigenous South Africans saw modern legislation as an infringement upon their traditions. Customary law is fluid and unwritten, complicating its alignment with national laws, which are stringent and codified.

Prior research has investigated the evolution of customary law and the reform of marital law in Indonesia, with a focus on social justice, gender equality, and the alignment of customary law with the national legal framework. The study by Hanim and Noorman (2018) highlights the role of indigenous communities and customary law in developing national law under the Pancasila

⁷ Rosmidah Rosmidah, 'Pengakuan Hukum Terhadap Hak Ulayat Masyarakat Hukum Adat Dan Hambatan Implementasinya', *INOVATIF Jurnal Ilmu Hukum* 2, no. 4 (2010), <https://mail.online-journal.unja.ac.id/jimih/article/view/370>.

⁸ Fatima Osman, 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage', *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 22, no. 1 (2019), <https://www.ajol.info/index.php/pej/article/view/216467>.

⁹ Lea Mwambene and Helen Kruuse, 'Unfulfilled Promises? The Implementation of the Recognition of Customary Marriages Act in South Africa', *International Journal of Law, Policy and the Family* 29, no. 3 (1 December 2015): 237–59, <https://doi.org/10.1093/lawfam/ebv009>.

paradigm. Their research emphasizes that customary law possesses an inherent flexibility that allows it to adapt to societal changes, making its integration into national legal development imperative.¹⁰

Moosa and Abduroaf (2022) investigate the legal obstacles associated with the recognition of Muslim marriages in South Africa. Despite the South African Constitution allowing for the possible legal recognition of religious weddings, there is currently no established legislative framework regulating their status and implications. This topic is especially pertinent in the Indonesian setting, where analogous conflicts arise among customary law, religious law, and the official legal system.¹¹

In the context of marriage law reform in Indonesia, Suryani (2023) examines family law from a criminal law perspective. The report highlights significant deficiencies in the enforcement of current legislation, especially concerning the minimum marriage age and the safeguarding of women's rights within the family law legal framework. The results indicate that rules are in place to protect vulnerable persons; yet, enforcement mechanisms are insufficient, requiring more legal enhancement.¹²

Zainuddin, Jamil, and Sumanto (2022) examine the revision of marriage registration legislation in Indonesia. Their study supports modifications to Article 2 of the Marriage Law, requiring marriage registration and imposing criminal penalties for noncompliance. Their research highlights the significance of marriage registration in providing legal clarity and safeguarding the rights of spouses, especially in matters of divorce, inheritance, and child custody conflicts.¹³

The study by Fahmi, Hasanah, and Yusuf (2023) focuses on the broader legal reforms to achieve gender equality in marriage law. Their study examines

¹⁰ Lathifah Hanim and M. S. Noorman, 'The Role of Indigenous Peoples and Customary Law in the Development of National Law the Paradigm of Pancasila', *The 4th International and Call for Paper* 1, no. 1 (2018), <https://core.ac.uk/download/pdf/236378883.pdf>.

¹¹ Najma Moosa, 'The Implications of Varying Statutory Minimum Age Thresholds for Child Consent in Respect of Minors Granted Majority Status through Civil Marriage in South Africa', *International Survey of Family Law* 2018 (2018): 493, <https://heinonline.org/HOL/Page?handle=hein.journals/intsfal2018&id=511&div=&collection=>.

¹² Suryani Suryani, 'Family Law Reform in Indonesia in the Perspective of Criminal Law', *International Journal of Criminal Justice Science* 18, no. 1 (2023).

¹³ Asriadi Zainuddin, Abdul Jamil, and Dedi Sumanto, 'Marriage Registration Law Reformulation in Indonesia (Studi of Law and Regulations on Marriage)', *SASI* 28, no. 3 (13 October 2022): 492–505, <https://doi.org/10.47268/sasi.v28i3.1033>.

the modifications enacted in Law No. 16 of 2019, which increased the minimum marriage age to 19 years for both genders. This legal reform was enacted to curb child marriage and enhance protections for women, representing a significant step toward aligning Indonesia's marriage laws with international human rights standards. However, their findings indicate that social and cultural resistance to these changes remains a significant challenge despite this progress.¹⁴

This study is urgent due to the ongoing legal inconsistencies and deficiencies at the junction of customary, religious, and national marriage regulations. This study's importance transcends basic legal examination; it aims to provide a legally robust and socially attuned framework. This study seeks to enhance the inclusivity of the legal system by critically analyzing the incorporation of customary law into national legal policy, therefore honoring Indonesia's various socio-legal traditions while maintaining core values of justice and gender equality. This study's originality is in its method of harmonizing conflicts between conventional practices and contemporary legal systems, finally suggesting a legal framework that guarantees legal certainty and cultural sensitivity.

This page will address the following inquiries: (1) What are customary marriage and statutory laws in Indonesia and South Africa? What is the relationship between positive law and customary marriage laws in both nations? What is the complexity of incorporating customary marriage law into formal legislation in Indonesia and South Africa?

Research Methods

This research utilizes a normative legal methodology, examining legal norms, statutory provisions, and pertinent legal theories. The study seeks to incorporate customary marriage law into Indonesia's formal legal framework, ensuring compliance with principles of social justice and human rights. A comparative and qualitative analysis investigates the relationship between customary marriage practices and national law, namely Law No. 1 of 1974 on Marriage and the 1945 Constitution of Indonesia.

The research follows a doctrinal legal research design, which relies on legal interpretation, conceptual analysis, and systematic comparison of statutory provisions and case law. It employs legal positivism as the theoretical framework, which views law as a codified system of rules enforced by state

¹⁴ Chairul Fahmi, Uswatun Hasanah, and Yusriaina Yusuf, 'Marriage Law Reform: Efforts in Achieving Gender Equality. | EBSCOhost', 1 January 2023, <https://doi.org/10.22373/jms.v25i1.16514>.

authorities. Additionally, the study incorporates elements of legal pluralism, recognizing the coexistence of customary, religious, and state law in regulating marriage. The comparative method assesses the similarities and differences between Indonesian and South African marriage laws, particularly concerning customary marriage recognition and integration within the national legal framework. The qualitative method analyzes customary marriage law's philosophical, sociological, and legal dimensions, focusing on how local customs influence national legislation.

This doctrinal and library-based research utilizes primary and secondary legal resources. Primary legal sources include Indonesian legal documents, including Law No. 1 of 1974 on Marriage and the 1945 Constitution, South Africa's Recognition of Customary Marriages Act, along with pertinent constitutional clauses.

Secondary legal sources include legal textbooks, academic journals, and commentaries on Indonesian and South African customary marriage laws, judicial decisions, case law relevant to marriage disputes, and policy papers and government reports addressing customary marriage regulation. The data is evaluated descriptively and analytically to address the research questions and provide a structured legal analysis.

This research is limited to a doctrinal approach and does not include empirical field studies or stakeholder interviews. Instead, it relies on documentary analysis of legal materials and secondary literature. The research largely focuses on Indonesia and South Africa, hence limiting the generalizability of its conclusions to other countries. While the comparative analysis enhances theoretical insights, differences in legal traditions, cultural contexts, and state policies may affect the direct applicability of the recommendations. Despite these limitations, the study contributes to the discourse on customary law integration within national legal systems by providing a structured legal framework for harmonizing indigenous traditions with state law. The findings will inform policy development, judicial interpretation, and future legal reforms regarding customary marriage in Indonesia and beyond.

Result and Discussion

In Indonesia, customary marriage law is a vital aspect of a culturally diverse legacy, embodying the values and beliefs of specific community

groups within the area and nation.¹⁵ Customary marriage law governs marriage processes, dowries, inter-family interactions, and husband-wife duties. Indigenous Indonesian marriage customs reflect societal norms, culture, and morality.

This legislation applies to married couples and their extended families. Weddings are personal, but traditional marriage law promotes societal peace and respect for the family since they unite two extended families. In each step of this marital tradition, presents and family reunion rites have philosophical value. These elements suggest that customary marriage law helps indigenous societies retain social equilibrium and cultural identity.¹⁶

Customary marriage legislation controls communal balance and is a social instrument. The guidelines promote peace, develop family connections, and preserve tradition. Indigenous peoples base their social structure on community and solidarity, similar to this idea. Thus, customary marriage law serves as a guide for marriage and a tool for social order and individual duties and obligations. Philosophically, customary marriage law is based on distributive and restorative justice. Dowries present, and conflict resolution that prioritizes harmony over conflict represents these ideals.

Indonesia's legal system is founded on positive law, which consists of norms formulated and sanctioned by the state, ensuring legal certainty. The examination of customary marriage law in Indonesia and South Africa should be contextualized within three principal legal objectives: juridical, philosophical, and sociological.

The legal acknowledgment of customary weddings in national legislation is crucial for ensuring legal clarity and mitigating conflicts. In Indonesia, Marriage Law No. 1 of 1974 requires the registration of weddings for official legal acknowledgment. Nonetheless, some customary marriages remain unregistered, resulting in legal

¹⁵ Yenny Febrianty, Joko Sriwidodo, and Priyaldi Priyaldi, 'Establishing Regional Regulations for the Protection of Local Wisdom', *Fiat Justisia: Jurnal Ilmu Hukum* 17, no. 3 (22 September 2023): 189–216, <https://doi.org/10.25041/fiatjustisia.v17no3.2708>.

¹⁶ Nur Hayati, 'Peralihan Hak dalam Jual Beli Hak Atas Tanah (suatu Tinjauan terhadap Perjanjian Jual Beli dalam Konsep Hukum Barat dan Hukum Adat dalam Kerangka Hukum Tanah Nasional)', *Lex Jurnalica* 13, no. 3 (2016): 147934.

complications concerning inheritance, child legitimacy, and divorce entitlements. The Recognition of Customary weddings Act (RCMA) of 1998 in South Africa seeks to legitimize customary weddings but has practical enforcement issues, especially in rural regions where traditional dispute settlement methods prevail.

Philosophically, integrating customary marriage law into national legal systems raises complex debates about balancing traditional values with modern legal principles. Customary marriage laws are fundamentally based on ancestral traditions, familial structures, and community responsibilities, sometimes at odds with modern legal principles of gender equality and human rights. The notion of legal pluralism posits that legal systems should reconcile customary practices with universal legal principles.

This tension is visible in both Indonesia and South Africa, where polygamy and dowry practices are recognized in customary law but are often challenged under national legal frameworks that emphasize equality and non-discrimination.

Sociologically, customary marriage laws play a vital role in preserving social cohesion and cultural continuity. Many indigenous communities view marriage as a contract between two individuals and an alliance between extended families. The requirement for state registration of marriages is often seen as an imposition of bureaucratic control rather than a means of protecting marital rights. In Indonesia, adat leaders (traditional leaders) play a significant role in resolving marriage-related disputes, while in South Africa, customary courts continue to operate alongside state judicial institutions. The sociological challenge is ensuring that modernization does not erode customary law while aligning with contemporary legal frameworks. Therefore, legal reforms must be inclusive and culturally sensitive, engaging customary leaders, legal scholars, and policymakers to create a system that protects cultural heritage and individual rights.

Law Number 1 of 1974 about Marriage emphasizes equitable rights for spouses, establishes the minimum marriage age, and outlines administrative procedures before to and after marriage. This legislation applies nationwide in Indonesia and emphasizes fairness and equal rights for everyone. For instance, the Marriage Law stipulates a minimum marriage age to safeguard women and children and provide equal rights

for husbands and wives. This positive rule reflects current social and cultural human rights and autonomy ideas. Positive law stresses personal rights, whereas customary law promotes community.

Their virtues and shortcomings exist in both legal systems. Flexible, community customary law suits indigenous cultures well. Due to its unwritten character and regional variances, customary law is difficult to incorporate into a codified and strict national legal system.¹⁷ Customary law based on traditional beliefs may collide with positive law human rights concepts.¹⁸ In certain indigenous societies, men and women have separate roles in marriage, which contradicts the positive law's gender equality premise. Positive legislation that is centrally formed has legal clarity and uniform application, but it typically overlooks local social and cultural contexts. Therefore, it may not meet indigenous groups' needs. Thus, integrating customary marital law and positive law is crucial to creating an inclusive and culturally sensitive legal structure.¹⁹

The 1945 Constitution of Indonesia and Marriage Law Number 1 of 1974 acknowledge customary law. However, the contemporary legal community's ignorance of oral, undocumented, and dynamic customary law makes its adoption in positive legislation difficult. However, positive law contains formal and written requirements that are hard to modify, making it hard to adapt to customary culture. Customary marriage law as part of national culture is crucial to creating a more inclusive legal system and respecting indigenous rights.²⁰ Studies on merging customary marriage law into positive legislation must include social leaders and

¹⁷ Sardjana Orba Manullang, 'Understanding the Sociology of Customary Law in the Reformation Era: Complexity and Diversity of Society in Indonesia', *Linguistics and Culture Review*, 18 July 2021, 16–26, <https://doi.org/10.21744/lingcure.v5nS3.1352>.

¹⁸ AAIAA Dewi et al., 'The Role of Human Rights and Customary Law to Prevent Early Childhood Marriage in Indonesia. Sriwijaya Law Review, 6 (2), 268–285', *Sriwijaya Law Review* 6, no. 2 (2022).

¹⁹ Ahmad Tahali, 'Hukum Adat di Nusantara Indonesia', *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah dan Hukum* 5, no. 1 (8 June 2018): 27–46, <https://doi.org/10.24252/jurisprudentie.v5i2.5398>.

²⁰ M. Syamsudin, 'Reorientation of Approaches in Indonesian Customary Law Studies', *Journal of Indonesian Adat Law* 1, no. 1 (2017), <https://jial-apha.or.id/journals/article/view/Reorientation-indonesian-customary-law-studies>.

conflict resolution mechanisms. Customary leaders know local values that society accepts but seldom records. They may link positive and customary laws.

Positive law may benefit from customary marriage law in resolving individual and extended family rights disputes. Customary law may reflect indigenous household values and be more flexible than positive legislation. The integration should balance national law and Indigenous community needs. This integration effort must include each region's customary law and its implications on individual rights, especially women's marital rights. The government must ensure that integration of customary law does not violate gender equality and human rights.²¹

Customary marriage law may resolve individual and extended family rights issues, improving positive law. It may also reflect indigenous family traditions and be more flexible than positive law. This integration should combine indigenous community social demands with national legislation. While integrating, each region's customary law and its effects on individual rights, notably women's marital rights, must be considered. The government must guarantee that customary law integration respects gender equality and human rights.²² To incorporate customary law, one must understand its fundamentals. Communities shape customary law. Respecting customary law's flexibility while maintaining positive law's clarity and justice is necessary. To recognize and develop customary law according to current standards that respect human dignity, this integration must incorporate customary principles that promote human rights, such as respect for women and children.

Integration requires institutional support and law enforcement expertise to understand and uphold customary law. Judges, lawyers, and government officials are required to acquire knowledge of customary law in Indonesia. Customary law complements the legal system.

²¹ Santoso Santoso, 'HAKEKAT PERKAWINAN MENURUT UNDANG-UNDANG PERKAWINAN, HUKUM ISLAM DAN HUKUM ADAT', *YUDISIA : Jurnal Pemikiran Hukum Dan Hukum Islam* 7, no. 2 (2016): 412–34, <https://doi.org/10.21043/yudisia.v7i2.2162>.

²² Mursyid Djawas et al., 'The Integration Between Syara' and Ade' in Marriage Tradition Bugis Bone, South Sulawesi', *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 18, no. 2 (15 October 2023): 342–63, <https://doi.org/10.19105/al-lhkam.v18i2.10373>.

The government should converse with traditional leaders, academics, lawyers, and the community to promote a more inclusive legal policy. This collaborative approach aims to enhance indigenous-government ties so traditional marriage law may be incorporated into the national legal system.

The government must also examine social and cultural influences on customary marriage law. Effective integration might enhance indigenous peoples' legal standing and promote awareness of Indonesia's cultural diversity. Harmonizing customary and positive law should promote inclusive justice and fulfill society's diverse needs. The government may assist indigenous peoples in handling marital issues according to their traditions and ensure that laws are clear and protect all parties. Thus, Indonesian marriage law may reflect cultural variety and societal justice. Positive law in Indonesia should evolve with society to reflect its values.

South Africa has different cultures, traditions, and laws. Customary law and positive law are components of the country's legal system. Recognition of customary law promotes social fairness in a varied community.²³ South Africa recognizes customary law in marriage law while upholding gender equality and human rights.

Customary law is incorporated into South African law via the Constitution, the Recognition of Customary Marriages Act 1998, and court decisions. This article examines customary marriage law in South Africa, its function within the legal framework, and the advantages and disadvantages of integrating the two systems.²⁴

South African marriage laws incorporate indigenous principles, including kinship, community agreements, and societal conventions. Customary law considers marriage a family relationship as well as an

²³ Odiaka Ngozi, 'The Face of Violence: Rethinking the Concept of Xenophobia, Immigration Laws and the Rights of Non-Citizens in South Africa', *BRICS Law Journal* 4, no. 2 (2017): 40–70, <https://cyberleninka.ru/article/n/the-face-of-violence-rethinking-the-concept-of-xenophobia-immigration-laws-and-the-rights-of-non-citizens-in-south-africa>.

²⁴ Souza Monica De, 'When Non-Registration Becomes Non-Recognition : Examining the Law and Practice of Customary Marriage Registration in South Africa', *Acta Juridica* 2013, no. 1 (January 2013): 239–72, <https://doi.org/10.10520/EJC148457>.

individual concern. Marriages generally include lobola (traditional bride price), family agreement, and customary rites. Customary law has evolved to adapt to indigenous societal developments. Customary law struggles when it interacts with formal laws with differing principles. Many traditional behaviors may contrast with contemporary principles, such as polygamy, which is still accepted but frequently condemned for gender inequality.²⁵

South African legislation encompasses customary, religious, and statutory law. The 1996 Constitution of South Africa affirms customary law. Section 211 of the Constitution requires courts to acknowledge customary law, if it is lawful, and obligates the government to safeguard and advance it together with traditional institutions.²⁶ This article asserts that customary law is comparable to positive law if it does not contravene Constitutional principles such as gender equality, non-discrimination, and human rights.

The 1998 RCMA also recognizes customary weddings. Indigenous tribes were accommodated, while customary laws remained legitimate under this statute. The RCMA regulates polygamy, gender equality, and customary marriage registration. A customary marriage is legitimate if it fits customary law conditions and is recorded.²⁷ The legislation grants customary marriage women property and divorce rights. Polygamy is permitted under the RCMA, contingent upon the consent of existing spouses, provided the division of property is evident. The RCMA is essential for incorporating customary law into the national legal framework while preserving its own identity.²⁸

²⁵ Sindiso Mnisi Weeks, 'Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: Ramuhovhi, the Proprietary Consequences of Marriage and Land as Property', *Constitutional Court Review* 11, no. 1 (January 2021): 1–41, <https://doi.org/10.2989/CCR.2021.0007>.

²⁶ Nafisa Essop Sheik, 'African Marriage Regulation and the Remaking of Gendered Authority in Colonial Natal, 1843–1875', *African Studies Review* 57, no. 2 (September 2014): 73–92, <https://doi.org/10.1017/asr.2014.48>.

²⁷ Lea Mwambene and Helen Kruuse, 'Unfulfilled Promises? The Implementation of the Recognition of Customary Marriages Act in South Africa', *International Journal of Law, Policy and the Family* 29, no. 3 (1 December 2015): 237–59, <https://doi.org/10.1093/lawfam/ebv009>.

²⁸ Tshinetise David Raphalalani, 'From the African Customary Marriages Law to the Recognition of Customary Marriages Act (Act 120 of 1998) (RCMA): A

Lubola is specific to the customary marital law of South Africa. The dowry signifies the groom's family's esteem and dedication to the bride. Lobola negotiations have significance for the extended families of both sides.

Customary law requires lobola for a legal marriage, although positive law does not restrict it. Traditional marriages include bride, groom, and family approval. In South African Indigenous civilizations, community interactions are important. Positive law recognizes this practice if it does not contradict constitutional rights like marriage.

Polygamy is regulated by custom and RCMA. Women's rights are protected by current spouse consent and equal property allocation. Positive law requires marriage registration to protect spouses, especially women, against divorce and financial division. Many Indigenous peoples don't understand the requirement to register under national law, making customary law implementation problematic.

Custom and RCMA control polygamy. Equal property distribution and spouse consent preserve women's rights. Legal marriage registration is required. To prevent divorce and financial division for couples, particularly women. Indigenous peoples don't grasp national law's registration requirement, making customary law implementation difficult.²⁹

Implementing gender equality in customary and positive law is difficult. Other habits, like lobola payments and polygamy, contravene the South African Constitution's gender equality clause. RCMA marriage registration is required, although many traditional couples don't. Causes include ignorance of registration's importance or administrative obstacles like access to the civil registration office. Customary and modern values might collide, hampering legal unification. Child marriage and rigid gender norms are still practiced in certain traditional countries, violating human rights.

Customary courts seldom receive government funding or training and may resolve customary law disputes poorly. South African marriage

Descriptive Analysis', *Journal of Sociology and Social Anthropology* 7, no. 4 (October 2016): 267–72, <https://doi.org/10.1080/09766634.2016.11885726>.

²⁹ Lea Mwambene, 'The Essence Vindicated? Courts and Customary Marriages in South Africa', *African Human Rights Law Journal* 17, no. 1 (2017): 35–54, <https://doi.org/10.17159/1996-2096/2017/v17n1a2>.

customs reflect its diverse culture. The Constitution and Recognition of Customary Marriages Act promotes social equity by acknowledging customary law. Challenges persist over traditional vs contemporary ideals, gender equality, and marriage registration.

Indigenous peoples must learn about marriage registration and national law rights to solve these problems. The government must support customary courts and ensure customary laws are constitutional. South Africa's inclusive and culturally sensitive approach to customary and positive law may inspire other countries to face comparable difficulties.

A. The Correlation between Customary Marriage Law and Positive Law in Indonesia and South Africa

1. Indonesia

Indonesian customary marriage law affects people's lives because local communities understand and accept it. Customary marriage law reflects a community's life philosophy, culture, and social conventions, which vary by area.³⁰ Customs govern marriage legislation, from premarital preparations, requirements, and processes to rituals and societal effects. Positive law in Indonesia, encompassing the Civil Code (KUHPerdata), Law Number 16 of 2019 amending Law Number 1 of 1974 on Marriage, and various ancillary regulations, aims to formalize and universalize marriage to guarantee legal certainty and delineate the rights and obligations of the parties involved.³¹

The literature describes a dynamic interaction between Indonesian customary marital law and positive legislation. Anggoro said customary law is part of indigenous cultures' cultural identity and social framework, where marriage joins two people and develops extended family bonds.³²

³⁰ Shofiatul Jannah, Mufidah Cholil, and Suwandi Suwandi, 'Panaik Money of Bugis' Customary Marriage in the Perspective of Islamic Law and Positive Law in Indonesia', *Journal of Transcendental Law* 3, no. 2 (2021): 98–111.

³¹ Jan Michiel Otto, 'Rule of Law, Adat Law and Sharia: 1901, 2001, and Monitoring the Next Phase', *Hague Journal on the Rule of Law* 1, no. 1 (March 2009): 15–20, <https://doi.org/10.1017/S1876404509000153>.

³² Irwan Haryowardani, 'Integration of Customary Law in Marital Disputes in Indonesian Religious Courts', *International Journal of Scientific Engineering and*

Customary law favors community over individualized approaches. Article 2, Paragraph 1 of Law Number 16 of 2019, which amends Law Number 1 of 1974 about Marriage, stipulates that the state acknowledges customary law if it fulfills registration criteria to safeguard the interests of parties, particularly women and children.

However, Hayati noted that positive law emphasizes legal clarity and equality, particularly in marriage registration. Unregistered weddings can result in child custody issues and property split. This registration reduces these concerns.³³ However, Kurniawan emphasized that in many indigenous cultures, a legal marriage according to customary law is still adequate, which might contradict positive legislative rules that value legal formality.³⁴ Maladi said the post-amendment constitution's acknowledgment of customary law reflects the state's commitment to cultural diversity. However, fundamental disparities between flexible and dynamic customary law and rigid and standardized positive law sometimes hinder this integration.³⁵

Indonesian traditional marriage law and statutory law intersect in many ways. For example, customary marriage law emphasizes familial and communal accords. Marriage is a bond between two individuals and their respective extended families; hence, familial and social connections have significant importance. Positive law emphasizes the need of agreements between bride and groom and legal procedures, including the registration of marriage at a religious or civil registration office, as

Science 8, no. 7 (2024), <http://ijses.com/wp-content/uploads/2024/07/140-IJSES-V8N6.pdf>.

³³ Muhammad Aulia Rahman, Roibin Roibin, and Nasrulloh Nasrulloh, 'Dayak Ngaju Customary Fines in Pre-Marriage Agreement to Minimize Divorce in the Perspective of Maslahah Mursalah Ramadhan Al-Buthi', *El-Mashlahah* 13, no. 1 (9 June 2023): 57–75.

³⁴ Vonny Kristanti Kusumo, 'The Relationship Between Adat Law & National Law on Marriage in Indonesia', *Veteran Law Review* 6, no. 2 (28 November 2023): 252–65, <https://doi.org/10.35586/velrev.v6i2.6553>.

³⁵ Jamillah Jamillah, 'The Position of the Marriage Covenant in Positive Law and Islamic Law', *International Asia Of Law and Money Laundering (IAML)* 3, no. 1 (23 March 2024): 23–28, <https://doi.org/10.59712/iaml.v3i1.79>.

prerequisites for a legitimate marriage.³⁶ This registration requirement protects parties, particularly women and children, from the detrimental effects of an unregistered marriage.

Indonesian positive law acknowledges traditional marital law despite their differing goals. Article 2 Paragraph 1 of Law Number 16 of 2019, revising Law Number 1 of 1974 on Marriage, stipulates that marriages are legitimate if they follow each religion's rules. Religious or customary marriages are legal under state law if recorded. This acknowledges customary law and attempts to integrate it into national law. Polygamy without restrictions and underage marriage, which are prohibited in Law Number 16 of 2019 regarding Amendments to Law Number 1 of 1974 about Marriage, nonetheless hinder this synchronization.³⁷

Customary marriage norms also affect the dowry, bride price, and other gifts. In many cultures, the dowry shows respect for the woman's family. This custom does not contradict positive law if the value and amount are agreed upon without coercion or prejudice. Law 16 of 2019, which amended Law 1 of 1974 regarding marriage, does not regulate the dowry or mahar, allowing local practices to take precedence. Exorbitant dowry demands may impose a financial strain on one party, particularly in low-income unions. Positive legislation safeguards couples from traditional norms.

Marriage infidelity and divorce are regulated by custom. Customary law threatens marriage offenders with social or material sanctions and governs family morality. Positive law promotes civil adultery and divorce, including court processes. Justice and marital rights are their goals, but their approaches differ. Customary law prioritizes

³⁶ Sonny Dewi Judiasih and Efa Laela Fakhriah, 'Inheritance Law System: Considering the Pluralism of Customary Law in Indonesia', *Padjadjaran Journal of Law* 5, no. 2 (2018): 315–30.

³⁷ Habib Shulton Asnawi et al., 'The Concept of Maṣlaḥah Family in Lampung Customary Law: A Study of Mak Dijuk Siang and Its Relevance to Indonesian Marriage Law', *Fikri: Jurnal Kajian Agama, Sosial Dan Budaya* 9, no. 1 (7 July 2024): 104–21, <https://doi.org/10.25217/jf.v9i1.4710>.

consent and social harmony, whereas positive law supports human rights and formal procedures.³⁸

Specific traditions permit minor weddings notwithstanding Law Number 16 of 2019, which amends Law Number 1 of 1974 about Marriage. This age restriction safeguards youth and prevents perilous early marriages. The stringent child marriage prohibition safeguards children's physical and mental health. However, certain localities still allow child weddings under cover of custom or religion, resulting in unregistered underage marriages that put early marrying girls at risk of losing their rights in divorce or marital troubles. At this vital moment, the government is raising awareness of marriage registration and the consequences of illegal minor marriages.

Harmony between customary and positive law is challenging owing to their differences. Positive law accepts customary law if it does not conflict with governmental standards. Certain circumstances need the state to accept customary law to guarantee legal stability and prevent societal damage. Customary courts generally resolve marriage, inheritance, and land disputes. Customary law may explain local socio-cultural characteristics that national law cannot.

2. South Africa

South African customary marriage law is complicated. Recognizing customary law shows respect for indigenous beliefs and the problem of constitutional coherence. The 1996 South African Constitution serves as the basis for the acknowledgment of customary law, safeguarding fundamental rights such as gender equality and non-discrimination. Section 211 of the South African Constitution mandates that courts acknowledge customary law, provided it does not conflict with fundamental principles.³⁹ These regulations link local customs with

³⁸ Mehmet Asutay, 'Chapter 4: Islamic Moral Economy as the Foundation of Islamic Finance', 2013, <https://www.elgaronline.com/display/edcoll/9781781002506/9781781002506.00014.xml>.

³⁹ Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Bloomsbury Publishing, 2010).

national legislation, however permit discord where traditional practices collide with universal principles.

Marriage, lobola transactions, and interactions with extended family are regulated by customary law. The 1998 Recognition of Customary Marriages Act (RCMA) safeguards human rights and recognizes customary law. The RCMA mandates all traditional marriages to be registered for legal status, although Indigenous tribes treasure customary ceremonies for social validation and may not grasp this. Polygamy law combines customary marital law with positive legislation. Tradition has recognized polygamy for millennia. Positive law acknowledges RCMA-compliant polygamy. For instance, a husband who desires more wives must get written approval from the present wives and safeguard the new wife and children. This rule balances local customs with women's rights.

Customary courts resolve marriage disputes. Traditional ideas and customs impact judicial rulings. Since these decisions have no legal impact, higher courts often review them. South Africa recognizes customary law and enforces positive law to conform with the Constitution. Formal courts may overturn gender-inequality-violating court judgments.

Customary marital law and positive law defend women's rights. Indigenous societies often delegate less power to women, even in marriage. Lobola is considered respect for the woman's family, yet it may limit her freedom after marriage. The RCMA provides equal property and divorce rights for women in traditional marriage to fight this. Positive legislation respects customs and prevents abuse.

Customary and positive laws affect marriage registration disputes. Administrative hurdles or ignorance of its importance prevent many traditional couples from registering their nuptials. In divorce and property partition, positive law emphasizes registration for legal protection. Customary rites legitimize social standing. Hence, registration is optional in many cultures. South Africa has started a

marriage registration socialization campaign for indigenous people to fix this.⁴⁰

Interpreting gender equality notions might contradict customary and positive legislation. Formal courts may defend women's rights against customary court verdicts. Courts usually prioritize extended family over individual women in divorce cases. Formal courts correct these mistakes using Constitutional and RCMA principles. South African positive marriage laws bring local cultures and global ideas together. While combining these two legal systems is challenging, the RCMA and customary courts demonstrate the South African government's commitment to a multicultural legal system. Indigenous peoples' rights education and customary courts' constitutional compliance must be improved to improve integration. South Africa's customary and positive law integration may encourage other states to address similar difficulties.

B. Challenges in Integrating Customary Marriage Law with Positive Law

According to Soetandyo Wignjosoebroto, customary law evolves depending on society's requirements. Customary law is normative and practical, reflecting a community's social and cultural norms.⁴¹ Positive law is state-created, universal law, as Satjipto Rahardjo defines it as a system that values legal certainty.

The state's recognition of customary law inside national law demonstrates the connection between customary law and positive law. Article 2, Paragraph 1 of Law Number 1 of 1974 concerning Marriage acknowledges local religious and customary weddings that are officially registered. According to Kurniawan, customary law sometimes contradicts positive law's universality, notably with women's and children's rights. In addition, Otto noted that power dynamics in society

⁴⁰ S. F. Joireman, 'The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law', *World Development* 36, no. 7 (1 July 2008): 1233–46, <https://doi.org/10.1016/j.worlddev.2007.06.017>.

⁴¹ Ranissa Sekar Elaies, 'Keterkaitan Sociological Jurisprudence terhadap Keberadaan Hukum Adat dalam Sistem Hukum Positif Di Indonesia', *Jurnal Hukum dan HAM Wara Sains* 2, no. 09 (29 September 2023): 853–859-853~859, <https://doi.org/10.58812/jhhws.v2i09.650>.

impact customary law, which is used to preserve social peace. However, Roscoe Pound's view of law as an instrument of social engineering emphasizes positive law, which emphasizes legality that can be applied equally across cultures.⁴²

Customary marital law and positive law in Indonesia are difficult to integrate owing to their differing techniques, sources of law, and purposes. Many aspects of life are governed by custom, including marriage. Traditional family and community values reflect local ideas. Positive law, or laws, unifies norms for all Indonesians to offer legal clarity, individual rights protection, and legal equality. Each system has distinct underlying notions, making integration challenging. Positive law is codified and applies throughout Indonesia, whereas customary law is flexible, respects local culture, and promotes social harmony.⁴³

The integration of South African customary law into positive law encounters similar issues. The 1996 Constitution of South Africa and the 1998 Recognition of Customary Marriages Act acknowledge customary law. Customary law, including marriage, is permissible if it does not contravene constitutional gender equality and human rights. South African weddings include extended family and lobola (bride price) to demonstrate respect. Good law requires legal registration to protect couples, especially women, in divorce and property division. Another problem is polygamy, which is permitted under customary law but requires prior wife permission under positive law.⁴⁴

The paradigm contrasts between flexible, community-based customary law and formal, standardized positive law frequently hinder implementation despite official recognition. South Africa has

⁴² Nabilah Apriani and Nur Shofa Hanafiah, 'Telaah Eksistensi Hukum Adat pada Hukum Positif Indonesia dalam Perspektif Aliran Sociological Jurisprudence', *Jurnal Hukum Lex Generalis* 3, no. 3 (17 March 2022): 231–46, <https://doi.org/10.56370/jhlg.v3i3.226>.

⁴³ Yanis Maladi, 'Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen', *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 22, no. 3 (2010): 450–64, <https://doi.org/10.22146/jmh.16235>.

⁴⁴ Mattheus E. Nkuna-Mavutane and Juanita Jamneck, 'An Appraisal of the Requirements for the Validity of a Customary Marriage in South Africa, Before and After the Recognition of Customary Marriages Act 120 of 1998', *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 26, no. 1 (2023): 1–30, <https://www.ajol.info/index.php/pelj/article/view/269389>.

empowered traditional courts and engaged Indigenous people in conversation to solve this. This concept shows how customary law recognition may include contemporary elements without compromising local customs.

The integration of customary marriage law with statutory laws is contentious owing to divergent perspectives on the minimum age for marriage. Traditional or familial child marriage persists in several societies. According to Law Number 16 of 2019, which amends Law Number 1 of 1974 concerning Marriage, the minimum marriage age is regulated to safeguard children's rights and health. Positive marriage laws stipulate a minimum age, but local conventions allow "mature enough" kids to marry. Many child marriages are not legally recognized, which might cause problems for girls in divorce or concerns about children's and spouses' rights.⁴⁵

The issue of South Africa's minimum marriage age involves customary and statutory rules. South African culture allows for marriage at a younger age, particularly for those deemed mature. The Recognition of Customary Marriages Act 1998 and the South African Constitution of 1996 provide stringent regulations to safeguard children's rights and promote gender equality, including a stipulated minimum age for marriage.⁴⁶

Parental and judicial approval is required for minor marriages in South Africa. Practice varies since some customary groups value tradition above the law. Child traditional weddings are often not recognized, which may cause legal issues such as divorce, child custody, and inheritance.

Distinct marriage registrations constitute an additional issue. Family and traditional authorities observe a legal marriage; customary law seldom acknowledges registration. Marriage must be officially recorded at the civil registry or religious affairs office for governmental

⁴⁵ Lalu Hadi Adha, 'Peningkatan Pemahaman UU Nomor 16 tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 tahun 1974 Tentang Perkawinan Di Desa Malaka', *Private Law* 3, no. 1 (2023): 275–87.

⁴⁶ Ewa Batyra and Luca Maria Pesando, 'Trends in Child Marriage and New Evidence on the Selective Impact of Changes in Age-at-Marriage Laws on Early Marriage', *SSM - Population Health* 14 (1 June 2021): 100811, <https://doi.org/10.1016/j.ssmph.2021.100811>.

acknowledgment. Registration protects marriage, inheritance, and other civil law rights. Many indigenous people don't register traditional marriages because they believe it's not important or expensive. Unregistered marriages and their offspring face legal difficulties.⁴⁷

Integrating customary law with positive laws in South Africa is complicated by customary marriage registration. Customary traditions often decide marriage validity without papers via family agreements, ceremonies, and community approval. The Recognition of Customary Marriages Act 1998 requires customary marriages to be registered for national recognition. This registration protects women who are divorced, own property, or face inheritance disputes. Registration guarantees that traditional weddings adhere to South African gender equality and human rights legislation. Field fulfillment of this registration obligation often fails. Many indigenous societies consider marriage registration unnecessary due to customary validity. Lack of registration services, expensive administrative expenses, and ignorance of legality are further obstacles.⁴⁸ Many traditional weddings go unregistered, which may cause legal issues for women and children.

In Indonesian weddings, dowry, panai money, and other gifts signify local culture and society. In establishing a home, the dowry signifies respect and commitment. It has significant cultural value.⁴⁹ Certain cultures see the dowry as an emblem of the groom's dedication to the woman's family and customs. Nevertheless, a substantial dowry imposes a hardship on one party, often the less affluent. Exorbitant dowries may financially ruin the groom or lead to the cancellation of the wedding. This may incite social discord due to the economic disparities

⁴⁷ Soemiyati, *Hukum Perkawinan Islam Dan Undang-Undang Perkawinan (Undang-Undang No. 1, Tahun 1974, Tentang Perkawinan)* (Liberty, 1982).

⁴⁸ Moosa, 'The Implications of Varying Statutory Minimum Age Thresholds for Child Consent in Respect of Minors Granted Majority Status through Civil Marriage in South Africa'.

⁴⁹ Alimuddin Alimuddin et al., 'Contextualization of Uang Panai in Islamic Law (Between Facts and Prestige)', *El -Hekam* 8, no. 1 (7 June 2023): 114–24, <https://doi.org/10.31958/jeh.v8i1.9435>.

among households.⁵⁰ Therefore, conventional dowry rules must choose between tradition and present socioeconomic situations.

Positive law in Indonesia enables spouses to make a fair dowry agreement without regulating its quantity or form. Law Number 1 of 1974 emphasizes marriage formality and legality, such as KUA or Civil Registry Office registration.⁵¹ Positive law respects dowry as a custom but does not officially regulate it. Positive law may accommodate local customs as long as it does not compromise justice and human rights.

Positive law's equality may conflict with customary dowries. Under positive law, social justice emphasizes individual rights, including the freedom to marry without financial responsibilities. A large dowry breaches social justice if it disproportionately burdens one side. Since economic capacity overrides marital honesty and commitment, a significant dowry value may lead to social shame or prejudice.

The lobola bridal payment is fundamental in traditional South African marriage. The groom's family customarily offers lobola to the bride's family. This practice shows respect, acknowledgment, and allegiance to both families. Traditional Indonesian marriage includes lobola. Lobola problems resemble Indonesian dowries. Large lobola sets may stress grooms and families. This might cause injustice and end the marriage, especially for the impoverished. This problem causes conflict in indigenous communities since not everyone has the same financial resources.⁵²

The Recognition of Customary Marriages Act 1998 acknowledges lobola as customary in South Africa, provided it aligns with gender equality and human rights principles. Positive law forbids lobola from violating women's property distribution and household decision-making

⁵⁰ Kasjim Salenda, 'Abuse of Islamic Law and Child Marriage in South-Sulawesi Indonesia', *Al-Jami'ah: Journal of Islamic Studies* 54, no. 1 (25 June 2016): 95–121, <https://doi.org/10.14421/ajis.2016.541.95-121>.

⁵¹ Eko Saputra and Busyro Busyro, 'Kawin Maupah: An Obligation to Get Married After Talak Tiga in the Tradition of Binjai Village in Pasaman District: A Maqasid al-Shari'ah Review', *QIJIS (Qudus International Journal of Islamic Studies)* 6, no. 2 (21 December 2018): 181–220, <https://doi.org/10.21043/qijis.v6i2.3738>.

⁵² Patience Moono et al., 'Bride Price (Lobola) and Gender-Based Violence among Married Women in Lusaka', *Journal of Education, Society and Behavioural Science* 33, no. 8 (3 September 2020): 38–47, <https://doi.org/10.9734/JESBS/2020/v33i830249>.

rights. However, problems persist. Some indigenous societies need lobola for marriage, making official marriages invalid. This may conflict with laws and customs. To address this problem, the South African government teaches Indigenous groups about balancing customs and social justice and encourages engagement between Indigenous communities and legal authorities.⁵³

South Africa and Indonesia struggle to balance customary and positive legislation. Both countries' various traditions enrich culture but complicate law. Customary law communities may exist under Article 18B Paragraph (2) of the 1945 Constitution if they adhere to the principles of the Unitary State of Indonesia. The 1996 Constitution and the Recognition of Customary Marriages Act 1998 recognized customary law in South Africa as integral to the legal system, provided it does not contravene gender equality or human rights.

Both countries struggle to recognize customary law. The lack of marriage registration information among indigenous communities and administrative barriers that make legal services difficult to get limit the implementation of customary law in Indonesia. Indigenous societies often ignore marriage registration, thinking that customary rites and communal recognition have established the union's validity. Many traditional marriages are not recognized, which may disadvantage women and children in legal protection, inheritance rights, and divorce property splits.

Similar considerations apply to South African *lobola* or traditional bride prices. Lobola is culturally important, although some traditional communities revere it as a symbol of respect and loyalty, burdening the groom. Economic pressure may hamper marriage and generate inequality. The Recognition of Usual Marriages Act acknowledges lobola as a custom, although marriages must be recorded. Many customary communities consider such registration unnecessary. Hence, customary values and formal law may conflict.

Both governments promote indigenous community-legal authority relations. Indigenous villages are recognized under Indonesia's

⁵³ Michael W. Yarbrough, 'Very Long Engagements: The Persistent Authority of Bridewealth in a Post-Apartheid South African Community', *Law & Social Inquiry* 43, no. 3 (July 2018): 647–77, <https://doi.org/10.1111/lsi.12275>.

Villages Law Number 6 of 2014, which may encourage customary law in marriage registration and dowry management.

Traditional courts in South Africa settle marital disputes, although they must respect the constitution. Both countries demonstrate that customary law integration requires comprehensive regulation and social and cultural awareness.

Further research must combine customary law with positive law to maintain local traditions and promote universal principles like social justice and gender equality. Customary law expresses community values and culture. Positive laws better and equitably protect everyone, especially women and children. Thus, integration success depends on strategic activities, including improving legal education, lowering registration fees, and developing customary forums as an early dispute-resolution tool. The government must extensively study customary practices and national laws to generate data-driven, community-focused policy.

In Indonesia and South Africa, customary law was incorporated into positive legislation, demonstrating community dedication to tradition and modernity. Both countries show how cultural diversity is respected without sacrificing human rights and fairness. This careful and inclusive integration improves national legal systems and maintains cultural heritage as a critical asset for egalitarian and sustainable societies.

C. International Debate on Customary Marriage Law Integration

The incorporation of customary marriage law into national legal systems has ignited global discourse on reconciling cultural traditions with essential human rights, particularly gender equality and the safeguarding of marginalized groups. Numerous locations beyond Indonesia and South Africa demonstrate the integration of traditional marital law inside modern legal frameworks.

Indigenous customary weddings in Canada are lawful under Indigenous self-governance if they comply with constitutional norms, including gender equality.⁵⁴ Australia also recognizes Aboriginal

⁵⁴ Chuma Himonga, 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa',

traditional weddings while upholding human rights.⁵⁵ In contrast, Malaysia allows Islamic and customary rules to function inside Syariah courts while retaining legislative control to guarantee uniformity in marriage registration, inheritance rights, and spousal protections.⁵⁶

The incorporation of customary marriage law into state institutions is contentious due to its potential conflict with gender equality. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has consistently expressed apprehensions over patriarchal matrimonial customs. Nigerian customary marriage regulations permit polygamy and male-centric divorce, complicating adherence to CEDAW. Numerous traditional authorities in Kenya resist alterations to polygamous customary marriage, asserting that such changes undermine cultural integrity. The Recognition of Customary Marriages Act of 1998 in South Africa, mandating marriage registration and spousal permission for polygamous relationships, serves as a progressive paradigm. Nonetheless, insufficient knowledge and bureaucratic obstacles impede its execution, akin to Indonesia's challenges in registering weddings inside isolated customary groups.

International human rights organizations assert that the incorporation of customary law must not infringe upon fundamental rights. The African Charter on Human and Peoples' Rights acknowledges customary law while requiring adherence to human rights standards. South African courts have annulled coerced marriages and discriminatory inheritance practices. Indonesia contends with unregistered customary marriages, complicating child marriage and

in *The Future of African Customary Law*, ed. Jeanmarie Fenrich, Paolo Galizzi, and Tracy E. Higgins (Cambridge: Cambridge University Press, 2011), 31–57, <https://doi.org/10.1017/CBO9780511844294.003>.

⁵⁵ T. W. Bennett, 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform', *Emory International Law Review* 25 (2011): 1029, <https://heinonline.org/HOL/Page?handle=hein.journals/emint25&id=1033&div=&collection=>.

⁵⁶ Siti Aminah and Arif Sugitanata, 'Genealogy and Reform of Islamic Family Law: Study of Islamic Marriage Law Products in Malaysia', *Journal of Islamic Law (JIL)* 3 (2022): 94, <https://heinonline.org/HOL/Page?handle=hein.journals/jrnloim3&id=94&div=&collection=>.

inheritance legislation. The 2019 modification of the Marriage Law in Indonesia raised the minimum marriage age for women to align with international human rights obligations.

Integrating customary marriage law involves reconciling flexible community-based regulations with established national frameworks, alleviating conflicts between traditional practices and international human rights standards, and overcoming administrative obstacles to marriage registration in remote regions.

Future legislative changes must include traditional leaders, legal academics, and human rights activists. Canada, Australia, Malaysia, and Kenya show that effective integration involves cultural diversity and legislative safeguards. These foreign viewpoints may help Indonesia and South Africa establish a more inclusive and fair legal system that respects tradition and meets contemporary legal requirements.

Conclusion

This research illustrates that incorporating customary marriage law into Indonesia's positive legal framework has considerable obstacles, especially in reconciling legal clarity, cultural preservation, and human rights values. Indonesia's pluralistic legal structure acknowledges both customary and statutory rules; yet, their interplay is complex. Positive law, which emphasizes individual rights, equality, and formal legal processes, often conflicts with customary marriage law, prioritizing social harmony, family obligations, and traditional values. The most critical challenge is ensuring that incorporating customary marriage law into positive legislation does not compromise gender equality, children's rights, and legal certainty.

The study results suggest that a thorough and organized legal reform is necessary to reconcile these two legal traditions. The legal framework must be flexible enough to respect cultural diversity while ensuring compliance with human rights principles. To achieve this, the government must develop culturally responsive policies that recognize customary marriage practices without conflicting with constitutional protections and international legal standards. Strengthening marriage registration mechanisms, ensuring customary dispute resolution aligns with human rights norms, and establishing legal certainty for women and

children in customary marriages are key areas that require urgent attention.

In practical terms, this study recommends that government institutions, legal practitioners, and customary leaders collaborate in developing an inclusive legal model. Traditional leaders should be involved in legislative discussions to ensure Indigenous values are represented in policy-making. The government must to implement systems that enable customary dispute resolution bodies to operate in conjunction with formal courts, guaranteeing that their rulings adhere to the legal tenets of justice and equality. Additionally, legal education and awareness initiatives should be enhanced to foster a deeper comprehension of marital rights and responsibilities under both customary and statutory law.

Future study need to concentrate on empirical investigations assessing the influence of legal plurality on marital rights, especially within rural and indigenous communities where customary law predominates. Comparative studies with other jurisdictions that have successfully integrated customary and positive marriage laws, such as South Africa, can also provide valuable insights into Indonesia's legal reform efforts. Ultimately, the success of integrating customary marriage law into positive law depends on an inclusive and participatory approach that ensures legal protection while preserving Indonesia's rich cultural heritage.

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