

AN ANALYSIS OF MARRIAGE GUARDIANSHIP PROVISIONS IN SOMALIA AND INDONESIA: A COMPARATIVE STUDY OF SOMALIA FAMILY LAW AND INDONESIAN ISLAMIC LAW

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Abstract

Indonesia and Somalia are both categorized as nations with a predominant Muslim population following to the Shafi'i Madhab (school of thought). However, despite this similarity, there are notable distinctions in the Islamic family law rules and their enforcement between the two countries. An important distinction is in the divergence of marriage guardianship regulations between Indonesia and Somalia. In Indonesia, marriage guardians are mandatory and considered an essential component of the marriage process, whereas in Somalia, the opposite is genuine. In Somalia, a marriage guardian is not mandatory for marriage. This comparative phenomenon is quite distinctive and warrants further in-depth study. Despite both countries are followers of the Shafi'i school of thought in Islam, their respective applications of Islamic Family Law differ significantly. This study employs the library research method, specifically utilizing a Normative Juridical approach. Ultimately, the variations in marriage guardian legislation between these two nations can be attributed to socio-historical disparities and devotion to different schools of belief by their respective populations. In Indonesia, guardianship law follows the Syafii school of thought, which is in line with the beliefs of the majority of the population. Conversely, Somalia's law is based on the Hanafi school of thought, which emphasizes gender equality and justice in all legislation.

Keywords: Reform, Madhab, Marriage Guardians, and Comparative Laws

Introduction

Observers and academics who extensively study Islamic family law are familiar with the fact that it serves as a the centre of Islamic legal principles. This premise is grounded in the empirical observation that among the several compilations of Islamic laws, family law has garnered significantly more focus than other laws, and its implementation remains intact in various Muslim nations. According to Josep Schacht, the sharia doctrine that is most prominently observed in practice pertains to family laws,

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encompassing areas such as marriage, divorce, guardianship, child support, inheritance, and wills.

Muslims inevitably experience shifts and developments over time. Social life in the past has seen substantial transformations. One notable difference in contemporary society is the expectation for all individuals to reside within the boundaries of a nation-state. This is what has led to the codification and even reinterpretation of Islamic family law, especially the law relating to mu'amalah cases, which is very easy to adapt.

Codification is profoundly linked to the process of adjusting to the specific circumstances and societal conditions of a certain nation. It is unsurprising that the normative values included in classical jurisprudence literature are being reinterpreted to enhance their relevance to the social realities of the country. Several Muslim nations have implemented this approach, aiming to ensure equitable benefits for all inhabitants, without favoring specific religions, genders, or races.

Modifications to Islamic Family Law frequently encounter opposition from one faction while simultaneously garnering support from another faction. This rejection typically stems from traditionalists who perceive themselves as guardians of religious principles and actively strive to preserve the purity of Islam. Consequently, they view any modifications to Islamic Family Law as a form of opposition to Islamic legal norms. On the contrary, the supporting circles, known as modernists, argue that the law should be progressive and dynamic. They believe that change is not a form of opposition, but rather a means to preserve the Shari'a in a way that is adaptable to the evolving times. As to the teachings of Ibn Qayyim Al-Jauzi:

تَغَيَّرَ الْأَحْكَامُ بِتَغْيِيرِ الْأَزْمَنِ وَالْأَمَكِنَةِ

Meaning: "Law is subject to modification in response to evolving times and places."

Ibn Qayyim's statement clearly illustrate the potential for modifications in legislation in response to alterations in location and time. This implies that a product that is considered lawful in one location may have different regulations or even conflicting regulations in another place. Furthermore, laws that were applicable in ancient classical times may still hold validity, but they may no longer be relevant in modern times. Therefore, new ijihad is required to formulate laws that are better suited to the current circumstances. It's contemporary. Nevertheless, it is crucial to highlight that not all laws may be altered with such ease, since there exist fundamental issues that will perpetually remain unaltered. Ibn Qoyyim's statement is specifically focused on the domain of interpretive areas (muamalah), such as certain aspects of family law.

The 20th century witnessed the emergence of numerous movements and initiatives aimed at reforming Islamic family law . This trend initially took root in countries with majority muslim populations, such as Turkey and Egypt, and then expanded to other Muslim-dominated nations. Additionally, Indonesia and Somalia implemented reforms to their family law systems and formally established Islamic family law, although with a significant delay. In 1975, Somalia established a formal set of laws

known as Somalia's Family Law, specifically focused on Islamic family matters. This legislation included a total of 173 articles. In 1974, Indonesia enacted the Marriage Law, which was followed by the implementation guidelines known as Impres in 1991. These guidelines were then compiled into the Compilation of Islamic Law (referred to as KHI). KHI concentrates on legal materials pertaining to Ahwal Syakhshiyah in Indonesia.

Somalia appears among other Muslim countries due to its distinctive approach to family law reform. The codified family law in Somalia places significant importance on ensuring equal rights for both women and men. Notably, several provisions in Somali law deviate slightly from the prevailing opinions of fiqh scholars. A traditional example of equality is the equal distribution of inheritance between men and women, where the distribution ratio is 1:1. In addition, a mother can acquire guardianship rights upon marrying her daughter.

In Somalia, the Marriage Law states that adult women, specifically those who have attained the age of 18, they freely contract marriage. The article implicitly clarifies the concept of freedom in this context by stating that although women who are under 18 years old but have attained the age of 16 are permitted to marry, they are required to have a marital guardian. The concept of independence for women aged 18 entails the ability to enter into marriage without the requirement of a guardian, as guardianship is solely applicable to women who are below the legal age of adulthood. Interestingly, the Somali Family Code does not include any sections that explicitly state the requirement of marriage guardians as essential components.

Unlike Indonesia, where the Compilation of Islamic Law (KHI) specifically mandates that marriage guardians for women who desire to marry are obligatory pillars (Rukn) that must be fulfilled, regardless of age. In addition, the marriage guardian must be male, and it is inherited from the father ancestry. Women, even biological mothers, are prohibited from serving as marital guardians for their daughters.

Indonesia and Somalia are both categorised as countries with a predominant Muslim population, with a majority of Muslims in these countries following the Shafi'i school of thought. However, despite these similarities, there are significant differences in the legal provisions and implementation of Islamic family law in these two countries. Indonesia, where the majority of Muslims follow the Shafii school of thought, is considered appropriate for implementing a codification that regulates marriage guardians as Rukn (essential elements) because it aligns with the Islamic jurisprudence doctrine of the Shafii school. However, Somalia, which also has a majority of adherents to the Shafii school, has enacted guardian provisions that differ from the Shafii doctrine. Specifically, it does not explicitly state that guardians are Rukn, allowing the mother to act as a guardian after the father.

There are likely further variables, beyond the number of followers of the Shafi'i sect of Muslims, that contribute to the variations in the codification of family law in these two countries. This comparative phenomena is highly distinctive and requires further in-depth investigation, particularly about the underlying mechanisms contributing to this comparative occurrence.

An Analysis Of Marriage Guardianship Provisions In Somalia And Indonesia: A Comparative Study Of Somalia Family Law And Indonesian Islamic Law

Several studies have examined the marriage laws in Muslim nations, but there has been limited research on the specific comparison of marriage guardian arrangements among these countries. Thus far, only two studies have been discovered that precisely and comparatively analyse the regulations of marriage guardianship in laws throughout Muslim nations. Nelli Fauziah's research takes the form of a thesis titled "Renewal of Family Law in Indonesia and Morocco: A Comparative Study of the Position of Marriage Guardians".

Miftahul Jannah's research takes the form of a thesis titled "The Position of Guardians in Family Law in the Islamic World (Comparative Study of Indonesian and Moroccan Legislation)". No more research has been discovered that evaluates and compares the regulations of marriage guardianship among Muslim nations, aside from these two studies. This research will significantly enhance the scientific understanding of Islamic Family Law by providing novel and valuable insights. This study focuses on a distinctive phenomena that requires investigation, making it particularly important.

The type of research used here is library research, namely research that focuses on studying library materials from written sources. Literature study does not mean research on books, but rather examines the essence contained in them considering that each individual or group has their own understanding and perspective. This type of research approach is Normative Juridical, namely research that focuses on the study of law itself, such as studying legal principles, legal comparisons, the history of legal formation.

Research Methods

The literature review method used in this research is a Normative Juridical approach with a focus on Islamic family law in Indonesia and Somalia, two countries that have a majority Muslim population of the Shafii sect but have significant differences in determining marriage guardianship laws. The literature review process was carried out by collecting and researching relevant legal documents, such as laws, fatwas, and Islamic legal literature relating to marital guardianship in the two countries. The selection of literature was carried out carefully to ensure the accuracy and accuracy of the information obtained.

Literature analysis was carried out by comparing the provisions of marriage guardianship law in Indonesia and Somalia, identifying differences in the implementation of Islamic family law, as well as analyzing socio-historical factors and sectarian styles that influence these differences. Through this method, the research aims to provide an in-depth understanding of differences in marriage guardianship laws between two Muslim countries of the Shafi'i school of thought. It is hoped that the results of the literature analysis will reveal key aspects that influence these differences and provide additional insight in understanding the dynamics of Islamic family law in the global context.

Result and Discussion

Overview of the Republic of Indonesia

Indonesia is situated between the continents of Asia and Australia, with the Indian Ocean to the west and the Pacific Ocean to the east. It shares borders with Malaysia, Singapore, and the Philippines to the north, and with Papua New Guinea to the east. Additionally, Australia and Timor Leste are located to the south of Indonesia. Indonesia possesses an oceanic expanse that encompasses two-thirds of its whole landmass, with a grand total of 18,110 islands. The total area of Indonesia is 1,904,569 km². The area of this country is inhabited by quite a large population, Indonesia's population at the end of 2021 was 273,879,750 people with West Java province as the peak with a total of 48,220,094 people.

The basic ideology of Indonesia is Pancasila and the 1945 Constitution as its constitution. This Constitution has been amended 4 (four) times, namely; First, the 1945 Constitution, Second, the 1945 Constitution of the United States of Indonesia, Third, the 1950 Provisional Constitution, then Fourth, returning again to the 1945 Constitution.

Indonesia is renowned for being a nation that upholds the rule of law, a perception that is based on the legal requirements within the country. According to Article 1 paragraph (3) of the 1945 Law of the Republic of Indonesia, Indonesia follows three legal systems: the Civil Law System, the Customary Law System, and the Islamic Law System. The development of Islamic Family Law in Indonesia can be grouped into 3 (three) periods, namely, the first is called the Pre-Colonial Period, then the second is called the Colonial Period, and the third is called the Post-Independence Period. In the pre-colonial period, family law in Indonesia referred directly to the collection of classical Syafii jurisprudence books, after which family law began to be made into law in several kingdoms in Indonesia, such as *Risalah Hukum Kanun* in the Kingdom of Malacca.

Moreover, in the colonial era, the Dutch colonialists acknowledged and upheld Indonesian family law. On the period following independence, several legislative measures were established addressing Islamic family law, including Law No. 1 of 1974 and Presidential Instruction No. 1 of 1991 on the dissemination of the Compilation of Islamic Law (KHI). These rules remain in existence and continue to serve as the primary reference in Indonesia.

Overview of Federal Republic of Somalia

Somalia, officially known as the Federal Republic of Somalia, is situated at the easternmost point of the African continent. Somalia, being a federal nation, is partitioned into 18 states. Mogadishu is the capital of Somalia. Somalia shares its western border with Ethiopia, its northern border with Yemen, and its northwest border with Djibouti. Additionally, it is also bordered by the Gulf of Aden to the north and the Indian Ocean to the east. Somalia has an area of 637,657 square kilometres, predominantly characterised by harsh desert terrain. The estimated population of Somalia in 2021 is projected to be 16.36 million. Somali and Arabic are the designated official languages.

After World War II ended, Somalia gained independence on July 1, 1960, after which Somalia became known as the Somali Republic. Initially, this country was a parliamentary democracy, then it ended in 1960. At that time, power was taken over by the armed forces, which then turned Somalia into a socialist-oriented country.

An Analysis Of Marriage Guardianship Provisions In Somalia And Indonesia: A Comparative Study Of Somalia Family Law And Indonesian Islamic Law

The predominant religious affiliation among Somali citizens is Sunni Islam, with the majority following the Shafi'i school of thought. The prevalence of followers of the Shafi'i madhhab can be evidenced by the founding of a fiqh institution specifically catering to Shafi'i Muslims in Somalia at that period. Somali Muslims are also recognised for their devotion to the Qadariyah and Rifa'iyah sects. In addition, Somalia also employs traditional practices known as Xier when deliberating on a resolution for a legal matter.

Prior to Somalia's attainment of independence, during the period of British governance, family law matters such as marriage, inheritance, and talaq were governed by the 1928 Ordinance. This legislation originated from British Law and was influenced by Italian Law, until it was subsequently substituted by a draft law established by a dedicated committee. In addition, before implementing the 1975 Family Law, Somalia also relied on traditional texts, including classical jurisprudence literature from the Syafii school of thought.

Reform of Islamic Family Law in Indonesia

Prior to the enactment of Law No. 1 of 1974, Indonesia had already implemented regulations and laws to address family matters, including marriage and divorce. One such example is Law No. 22 of 1946. This provision was the initial regulation to govern marriage and divorce. It was also considered the primary attempt at reform, applicable exclusively to citizens residing on the island of Java and/or the island of Madura at that time. Law no. 1 of 1974, which pertains to Marriage, was enacted in 1974 during the New Order era. This law led to the creation of Implementing Regulations, and eventually, in 1991, the Compilation of Islamic Law (KHI) was successfully compiled.

In an article, K. H. Hasan Basry, who occupied the highest position in the MUI at that time, argued that Indonesia required standardised fiqh guidelines equivalent to positive law. He emphasised the necessity for a Compilation of Islamic Law (KHI) to ensure universal compliance and practice among all Indonesian Muslims. The presence of standardised fiqh legal rules is expected to decrease decision-making uncertainty among Religious Court organisations and reduce conflicts arising from several errors in a single fiqh issue.

Before the establishment of legality in family affairs, judges at the Religious Courts relied on various book references (Kutub al-Turath) as sources of information when making decisions in a case. The Bureau of Religious Justice issued Circular No. B/I/75 on February 18, 1958. This circular letter serves as an extension of the PP. No. 45 of 1975, and it specifies that there are a total of 13 book references that judges rely on as references :

Hasyiah Al-Bajuri (حاشية الباجوري)

Fathul Mu'in (فتح المعين)

Hasyiah Al-Syarqawi (حاشية الشرقاوي)

Hasyiah Al-Qalyubi (حاشية القليوبي)

Fathul Wahab (فتح الوهاب)

Tuhfatul Muhtaj (تحفة المحتاج)

Targibul Musytaq (ترغيب المشتاق)

Qawaninus Al- Syar'iyah li Sayyid Usman bin Yahya
Qawaninys Al-Syar'iyah li Sayyid Shadaqah Dakhlan
Syansyuri fil Faraidh (الشمسوري في الفرائض)
Bughyatul Mustarsyidin (بغية المسترشدين)
Al-Fiqh ala Mazhabil Arba'ah (الفقه على المذاهب الأربعة)
Mughnil Muhtaj (مغنى المحتاج)

Nevertheless, it seems that mere references to these texts are insufficient to offer a resolution to the issues of legal clarity and consistency in the Religious Courts. This situation also presents opportunities for disagreement by several parties who perceive themselves as being at a disadvantage due to decisions influenced by certain book references that do not align with their interests. Consequently, they highlight alternative laws within the book that they desire, which are evidently more advantageous to their position. Frequent arguments among the judges arose on the selection of references for these books.

The previously outlined position and conditions of Islamic family law in Indonesia will thereafter necessitate the establishment of a consistent Islamic family law that possesses the authority to enforce compliance among all Indonesian Muslims. This unified law will be referred to as the Compilation of Islamic Law (KHI).

Reform of Islamic Family Law in Somalia

The process of reforming or re-actualizing Family Law in Somalia is deeply connected to the socio-political dynamics that have unfolded in the country since its independence. The important historical event for this transformation occurred when Major General Siyad Berre assumed control as the supreme commander of the army, becoming the highest authority in Somalia at that time.

Islam has been designated as the official religion of Somalia, yet simultaneously Somalia declared itself a socialist nation. Major General Siyad Berre, acting as the supreme commander of the army, executed an uprising and assumed control of the presidency from Shermarke. As the supreme ruler and a socialist figure, Siyad Berre attempted to eradicate religious principles from the socio-political fabric of the Somali population. For instance, he imposed restrictions on mosque activities, confining them solely to religious rituals. Additionally, individuals who wore the hijab, a religious head covering, were subjected to imprisonment. Siyad Berre's animosity for Islam was evident in his disdain for religious figures during that period. During Siyad Berre's regime from 1975 to 1990, numerous religious figures and clerics were subjected to persecution. The Somali people, despite gaining independence from England and Italy, did not experience true freedom as its tyrant leader exerted control and suppressed their liberties.

In 1972, under the reign of Siyad Berre, a panel was established to explicitly address and analyse proposed reforms to family law. The legislation was finalised in 1975 and took effect on January 11, 1975, titled The Family Law 1975. The Somali Muslim community did not react favourably to this rule at the time since many of the conditions

of the regulation departed significantly from the teachings of the Syafii school of thought, which was extensively followed by Somali Muslims, particularly religious leaders.

The Somali Family Law 1975 Act comprises 173 articles and is organised into several chapters, namely the Marriage and Divorce Chapter, the Children and Support Chapter, the Guardianship and Representatives Chapter, and the Wills and Inheritance Chapter. The entirety of this article is founded upon the principle of gender equality. This distinction sets it off significantly from the Syafii school of jurisprudence, and even diverges from Fiqh Muktabar. An evident illustration may be seen in the inheritance regulations outlined in Somali Family Law, where both men and women are entitled to receive an equal share of one unit. This diverges from classic Islamic law, which mandates that women receive half of the share allocated to men, as stipulated in An-Nisa verse 11 of the Quran

The reform of family law in Somalia may appear intricate due to the country's Muslim majority and adherence to the Shafi'i school of thought. However, the existing family laws outlined in the 1975 Family Law do not align with the principles of the Shafi'i school of thought followed by the community. Consequently, the practical aspects of marriage and divorce procedures are governed by unwritten communal norms that are influenced by the Syafii school of thought. The law pertaining to guardianship is formulated in such a manner, but, it has not been implemented due to its contentious nature and widespread disapproval from religious and community authorities. The legal materials contained in Somalia's 1975 Family Law are influenced by multiple causes.

First, the Reformation was executed by a leadership that adopted state socialism as the prevailing ideology and aligned itself with the Soviet Union in order to secure military assistance. Furthermore, the ruling government during that period was characterised by a militaristic and authoritarian regime, where those who voiced dissent towards state policies or choices would face fatal consequences. The primary aim of enacting the 1975 Somali Family Law was to eliminate outdated rules in Islamic law that were seen incompatible with the new state policy.

In addition, Somalia has included an international agreement known as International Human Rights into its constitution, ensuring that there is no distinction between the rights afforded to men and women. The implementation of this global accord undeniably impacted Somalia's production of its lawful resources.

Indonesian Marriage Guardian Regulations

In the Compilation of Islamic Law in Indonesia, the guardian is a vital element whose position is very important in the marriage contract, because Islam itself places it as Rukn which, if its existence is not fulfilled, will result in the invalidity of the marriage contract.

The requirement for a guardian is based on the Qur'an, Al-Baqarah verse 232, where Allah says:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَلَبِغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَمْ آزْكَى لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ ٢٣٢

Meaning: " When you divorce women and they have reached the end of their waiting period, do not 'let the guardians' prevent them from re-marrying their ex-husbands if they come to an honorable agreement. This is enjoined on whoever has faith in Allah and the Last Day. This is purer and more dignifying for you. Allah knows and you don't know."

Apart from Al-Quran verses, there are also foundations for marriage guardians in hadith, one of which is the hadith narrated by Abu Burdah Ibn Abu Musa by Imam Ahmad, Ibn Hibban and also At-Tarmizi which says:

عَنْ أَبِي بُرْدَةَ بْنِ أَبِي مُوسَى عَنْ أَبِيهِ رَضِيَ اللَّهُ عَنْهُ تَعَالَى عَنْهُمَا قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا نِكَاحَ إِلَّا بِوَالِي

Meaning "According to Abu Burdah bin Abu Musa, who heard it from his father, Rasulullah Saw. said that a marriage is only considered genuine if there is a guardian present."

The two Nash mentioned above adhere to the requirements outlined in Article 14 of the Compilation of Islamic Law. According to this article, a marriage contract must fulfill five conditions in order to be considered valid. These conditions include: the presence of a prospective husband, a prospective wife, a marriage guardian, two witnesses, and mutual consent. Furthermore, Article 19 reiterates that the inclusion of a guardian in a marriage contract is an essential requirement that must be met.

Based on the aforementioned regulations, it may be inferred that marriage guardians are obligatory in Indonesian marriages. Neglecting this need may result in the invalidation of the marital union.

There are multiple requirements for an individual to officially become the guardian of the marriage of the woman they desire to wed. This provision was established by Fuqaha in the distant past and has been documented in traditional literature on Fiqh. Nevertheless, there is a specific need that requires further investigation, specifically the stipulation that a marital guardian must be of the male gender. The Compilation of Islamic Law explicitly includes this provision in Article 20, paragraph 1, which states that the role of a marriage guardian is reserved for males. Men who fulfil the criteria of Islamic law are considered to be Muslim, possessing both mental capacity (aqil) and having reached the age of maturity (baligh). Article 21 further clarifies that the guardian must be a male relative and cannot be a mother's relative, as discussed in detail.

The specific regulations regarding the role of marriage guardians may be found in the Compilation of Islamic Law, specifically in Article 21 of the first paragraph. This article provides a comprehensive breakdown of marriage guardians into four distinct groups, with the highest-ranking group holding the most significant authority. In the first group, the father takes the lead, followed by the grandfather from the father's side. The second group consists of biological brothers or brothers from the father's lineage. The

third group includes uncles and brothers from the father's lineage. Lastly, the last group comprises the grandfather's biological brothers.

The specific regulations regarding the role of marriage guardians can be found in Article 21 of the Compilation of Islamic Law. This article provides a comprehensive breakdown of marriage guardians into four distinct categories, with the highest-ranking position holding the utmost significance. In the first group, the father takes precedence, followed by the grandfather from the father's side. The second group consists of biological brothers or brothers from the father's lineage. The third group includes uncles and brothers from the father's lineage. Lastly, the last group comprises the grandfather's biological brothers.

Somali Marriage Guardian Regulations

The 1975 Somali Family Law, which governs matters related to family law in Somalia, is in force to this day. As per a report issued by the Norwegian Independent Immigration Agency. According to Article 16 of the 1975 Family Law, A person may freely contract marriage at the attainment of his/her 18th years of age. A woman who has attained the age of 16 years, but not 18, may contract marriage with the consent of her guardian. Subsequently, Article 17 stipulates that if the guardian refuses to give his consent to the marriage of his ward who has reached 16 years of age but not 18, the judge or the person authorized by the Ministry of Justice and Religious Affairs shall assume the guardianship upon himself and shall perform the marriage according to her wishes.

Article 19, paragraph 1, states that if a woman who wants to marry is not yet of legal age, she must have a marriage guardian. The father is the preferred guardian, but if he is absent due to death or disappearance, the mother assumes the role. If both parents are absent, the grandfather becomes the guardian, followed by the older brother, and finally the uncle.

According to paragraph 3 of the article, if the individuals mentioned earlier are unavailable or unwilling to serve as marriage guardians for the woman, or if they are located more than 100 kilometers away from the contract location, then the Court or the authorities, specifically authorized by the Ministry of Justice and Religion Affairs, must assume guardianship responsibilities.

In the previous version of Article 19, paragraph 2, it was mentioned that a need for becoming a marital guardian was being of legal age. However, the particular age threshold was not clarified. This provision pertains to the customary practices (Urf) in that specific region. Additionally, according to Article 20, in cases if there are more than one relatives of the same degree, guardianship is entrusted to the relative chosen by the girl. and if the girl does not choose her guardian, the Court shall appoint a guardian.

The marital guardian requirements outlined in the articles of the 1975 Family Law in Somalia are derived from the viewpoints of many classical Fiqh, particularly those belonging to the Hanafi School. The Qur'an contains a minimum of three verses that serve as the foundation:

حَتَّىٰ تَنْكِحَ زَوْجًا غَيْرَهُ (البقرة 230)
فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ (البقرة 232)

فَلَا جُنَاحَ عَلَيْكُمْ فِيمَا فَعَلْنَ فِي أَنْفُسِهِنَّ بِالْمَعْرُوفِ (البقرة 234)

The three verses above appear to use a Verb (fiil) (تتكح – ينكحن – فعلن) whose subject (fa'il) is women, this is quite strong evidence that women marry themselves.

Apart from that, Imam Abu Hanifa also based this opinion on the Hadith narrated by Ibn Abbas:

عَنْ ابْنِ عَبَّاسٍ : أَنَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ : التَّيِّبُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا وَالْبِكْرُ تُسْتَأْمَرُ وَإِذْنُهَا سَكْرَتُهَا

Meaning: "From Ibn Abbas that Rasulullah SAW. Said: A widow has more rights to herself than her guardian, whereas a woman who is still a virgin is asked for permission from him, and his consent is his silence."

This hadith also makes it clear that a widow has more right to marry herself than her guardian, even a woman who is still a virgin but is an adult, according to Imam Abu Hanifa, can marry herself. Sayyid Sabiq in his book called *fiqh al-Sunnah* comments on this issue and states that a guardian is obliged to first ask permission from the prospective bride before carrying out the marriage contract and ask for her pleasure in the marriage. The practice of forced marriage is a practice that is never justified because a marriage full of love between partners will not be realized if it is based on compulsion. After stating this, Sayyid Sabiq included the above hadith as the basis for his statement.

According to Abu Hanifah and Zufar, guardianship at marriage of women who are mature, sensible and independent, whether they are virgins or widows, is only a matter of sunnah (mandub) to respect local customs and customs or maintain ethics towards family and parents, because in reality a woman carries out her marriage contract themselves based on their choice and willingness. Meanwhile, guardianship for immature and insane women is a form of protection so that their rights are maintained due to their inability and weakness to maintain these things.

Abu Hanifah himself drew a parallel that if a woman is of legal age and has demonstrated mental maturity, she should not be considered intellectually weak and can therefore enter into a marriage contract. This is in contrast to immature and mentally unstable women, who, for their own well-being, must have a guardian present. Adult women without guardians possess the autonomy to make judgements based on their developed intellect and are capable of discerning what is advantageous for themselves. It is evident that the marriage guardianship laws in Somalia align with the beliefs of the Hanafi School, despite the fact that the bulk of the people follows the Shafi'i school of thought. This is a component of the reform initiatives in Islamic Family Law, employing the reform methodology called *Takhayyur*.

Takhayyur is a method that involves renewing Islamic Family Law by drawing from conventional jurisprudence of *fiqh* but not restricting itself to a single school of thought. It goes beyond the four major schools of thought, namely Hanafi, Maliki, Syafii, and Hambali, and also considers the opinions of other Imams such as Daud Adz-Dzahiri and Ibn Qoyyim Al-Jauzi. The selection of a viewpoint is determined by the robustness of the argument or the veracity of the facts, as well as its pertinence to the surrounding

An Analysis Of Marriage Guardianship Provisions In Somalia And Indonesia: A Comparative Study Of Somalia Family Law And Indonesian Islamic Law

circumstances. The following is a comparison table between Indonesia and Somalia regarding the provisions of marriage guardians that apply to each law in force in their respective countries:

Table1. Comparison of the Table

No.	Indonesia	Somalia
1.	Adheres to 3 (three) legal systems: Civil Law, Customary Law and Islamic Law.	Similar to Indonesia, there are three main legal systems in place: Civil Law, Customary Law, and Islamic Law.
2.	The majority are Muslim and follow the Shafi'i madhhab.	The majority are Muslim and follow the Shafi'i madhhab.
3.	The Marriage Law was enacted in 1974 (29 years from independence).	Family Law was enacted in 1975. (15 Years from independence).
4.	The existence of a marriage guardian is a necessity for the marriage to be declared valid. And this rule has been clearly stated in the applicable legislation.	The 1975 Somali Family Law does not state the necessity of having a marriage guardian in a marriage. In fact, in general, both adult men and women can enter into marriage without a guardian, because the guardian provisions apply to underage women.
5.	Absolutely all women who want to get married must fulfill the pillars (<i>Rukn</i>) of marriage guardian.	Girls under the age of 16 who wish to marry must go through a guardian.
6.	The guardian of the marriage must be a man and come from his father's lineage.	There is no requirement that the marriage guardian must be a man, instead it states that the mother can be the marriage guardian and is even second in line after the father (if the father is not there)
7.	The order of marriage guardians must follow the applicable laws and women do not have the right to freely choose the marriage guardian they want from their relatives.	If there is more than one equal relative, guardianship is entrusted to the relative chosen by the woman wishing to marry.
8.	There is no provision for a prospective bride to choose out of selecting her marital guardian, as the legislation explicitly denies women the power to pick their own guardian.	If the prospective bride does not choose or determine who her marriage guardian will be, then the Court will choose and determine her marriage guardian.

9.	The rules for marriage guardians are stated in detail in the KHI, namely in article 21.	The rules for marriage guardians are simpler, starting from father, mother, grandfather, older brother and finally uncle.
10.	There is no specific mention of the age limit for marriage guardians, it is only stated in KHI in Article 20 that marriage guardians must reach maturity.	The age limit for the marriage guardian is not specifically stated, it only states that the guardian must be of age.

The categorization of legal reform in Islamic countries can be classified into three distinct groups. Firstly, there are countries, like Turkey, that have relinquished Islamic law in favour of European civil law. Secondly, there are countries, such as Saudi Arabia, that have not implemented any legal reforms. Lastly, there are countries that employ a combination of classical jurisprudence and contemporary law simultaneously. Indonesia and Somalia belong to the third category, which encompasses countries that adhere to classical jurisprudence while still implementing certain modern legal systems. When comparing the marriage laws in Indonesia and Somalia, it is evident that Indonesia adheres to the teachings of the Syafii school of jurisprudence. This is because the majority of Muslims in Indonesia strongly uphold the principles of the Syafii jurisprudence. On the other hand, Somalia's Government has shown a willingness to depart from the Syafii school of jurisprudence and adopt the Hanafi school of thought in certain cases. This decision is motivated by considerations of gender equality and justice.

Indonesia is considered a progressive Islamic nation that follows Intra-Doctrinal Reform in its process of renewal. This means that when making laws, Indonesia still adheres to the traditional teachings of jurisprudence and has also codified them into legally enforceable state laws. Subsequently, Somalia also adopted the Intra-Doctrinal Reform paradigm, but it implemented certain legal rules apart from those derived from Islamic jurisprudence. It supports the equal distribution of inheritance between men and women at a 1:1 ratio.

Conclusion

It is emphasized that the guardian has an important position, some schools of thought place it as a Rukn and that a contract is invalid without the existence of the guardian. In line with this, several Muslim countries require a marriage guardian for women wishing to marry so that it can be counted as a valid marriage both religiously and state-wise. On the other hand, there are other schools of jurisprudence that do not make guardians in marriage a Rukn, but only as a matter of sunnah (mandub) to respect local practices and customs, so women can marry themselves or become guardians for other Muslim women.

In relation to this matter, the laws of Indonesia and Somalia have distinct approaches to the provisions regarding marriage guardians. For instance, in Indonesia, the Syafii school follows the belief that marriage guardianship is an essential requirement

that must be fulfilled by a male, thereby prohibiting women from assuming the role of a marriage guardian. In Somalia, women have the authority to act as marriage guardians. This means that a mother can serve as a marriage guardian for her daughter. It is worth noting that the mother's role as a marriage guardian is considered secondary to that of the father. Women are permitted to select their own guardian when they desire to get married, even in specific circumstances.

The differences in marriage guardian regulations between these two countries stem from the socio-historical differences behind them. Indonesia still adheres to the Syafii school of law in the provisions of marriage guardians because the majority of Muslims in it are Muslim individuals who understand Shafi'i jurisprudence, so that the applicable laws and the sectarian style of the population are in harmony to avoid rejection from their own society. However, this provision is not free from some criticism because mothers as parents who are close to their daughters should also be given space to become marriage guardians under certain conditions, considering that this provision is still Islamic jurisprudence accepted by muktabar schools such as Imam Abu Hanifa. Meanwhile, Somalia adopts the provisions of the Hanafi school of thought because it prioritizes gender equality and justice in every law it enacts. Apart from that, there are plans to eliminate provisions in Islamic law which are considered old-fashioned and contrary to the new state policy, so that it is in conflict with the majority of its population which is of Muslims with the Shafi'i school of thought, as a result it is not uncommon to find many of their citizens contradicting these laws and relying more on the Syafi'i jurisprudence that they believe in.

Effective legislation is characterized by its ability to offer effective remedies to issues and its alignment with the prevailing circumstances and contexts. Hence, prudent deliberation is vital while implementing legislation, since it is essential to assess the public's willingness to embrace and implement it, while also taking into account the efficacy of the proposed solutions in addressing each issue.

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