

Marriage Guardianship Law in Iraq Before and After Legislative Amendments

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Abstract

Marriage guardianship is one of the pillars of marriage whose position is debated, because the four Sunni mazhab of thought and the Ja'fari mazhab (Shia Ithna Asyariyah) position it differently. Iraq is an interesting study because since 1959 this country has attempted to unify these doctrinal differences into one law, namely Qanun al-Ahwal al-Syakhsiyyah Number 188, which was drafted during the reign of Abd al-Karim Qasim with the active involvement of the Iraqi women's movement. This study aims to examine the shift in the position and authority of marriage guardianship in Iraq at three legal moments, namely the original law of 1959, the 1963 amendment after the Baath Party coup, and the 2025 amendment that gave the option for Iraqi Moeslems to submit to the codification of family law of the Shia Ithna Asyariyah. Using normative-qualitative methods through legislative analysis and comparative legal studies, this study finds that the 1959 law limits the coercive power (*ijbar*) of guardians and places the validity of marriages under the supervision of state courts, the 1963 amendment restores some of the guardian's authority in marriage matters, while the 2025 amendment introduces a parallel legal pathway that allows guardian/religious figure authority to operate with looser judicial oversight. These shifts are then compared with the regulation of marriage guardianship in Indonesia under Law Number 1 of 1974 as amended by Law Number 16 of 2019 and the Compilation of Islamic Law, to draw lessons on how modern states can codify marriage guardianship without sacrificing legal protection for women.

Kata Kunci: Marriage guardian; Iraq; Legislation

INTRODUCTION

Guardianship in marriage (*wilayat al-tazwij*) is one of the classic topics of *munakahat fiqh* which until now still leaves a gap in views between *fiqh* doctrine and the needs of modern nation-states to codify family law definitively. The Shafi'i and Hanbali *mazhab* of thought place the guardian as an absolute pillar without whose presence the marriage contract is void, while the Hanafi *mazhab* views the guardian as a complement (not a pillar) for adult and sane women, which means that adult women are basically capable of marrying themselves.¹

Such doctrinal tensions become a real problem when a country chooses one of the various *mazhab* of thought to be the positive law applicable to all its citizens, including those of different *mazhab* of thought or sects. Iraq is one of the most instructive examples of this issue. In 1959, the government of the Republic of Iraq under Abd al-Karim Qasim enacted Qanun al-Ahwal al-Syakhsiyyah No. 188 as an attempt to unify family law for all Iraqi Moeslems, Sunni and Shia, into a single codification subject to a single state judicial system.²

¹ Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, Juz IX, Damaskus, *Dar al-Fikr*, 1985, p. 6659-6663.

² American Bar Association Rule of Law Initiative, *Iraq Personal Status Law No. 188 of 1959 and Amendments (Unofficial Translation)*, Washington DC, 2010, p. 1-3.



The provisions regarding marriage guardianship in the law were drafted using an eclectic approach (*talfiq*) drawn up by various *mazhab* of thought, with a tendency to limit the coercive authority (*ijbariyah* area) of guardians and strengthen the legal position of adult women in choosing their own partners. However, the stability of this regulation was short-lived. The 1963 Baath Party coup that overthrew the Qasim government was followed by amendments that, among other things, relaxed restrictions on polygamy, aligned inheritance provisions with a more conservative view of sharia, expanded the authority of male guardians in marriage matters, and raised the age of child custody for mothers.³

The debate regarding the position of guardians and religious authorities in Iraqi family law intensified again after the 2003 reforms, especially after the 2005 Iraqi Constitution included Article 41 which stated that citizens are free to submit to personal status laws according to their respective religions, sects, beliefs, or choices, a provision that has since been repeatedly used as a political basis to weaken the validity of Law Number 188 of 1959.⁴

The culmination of this dynamic occurred on January 21, 2025, when the Iraqi House of Representatives passed an amendment to Article 2 of Law No. 188 of 1959 that gave Moeslems couples the right to choose to have their marriage, divorce, child custody, and inheritance regulated according to the *Shia Ithna Asyariyah* of jurisprudence (*fiqh*) codification, rather than according to the general provisions of the 1959 law. Iraqi civil society groups and women's rights organizations believe this amendment has the potential to further expand the authority of guardians or religious figures in determining the validity of marriages, while also legalizing marriages that are not registered with the courts, although the initial draft that lowered the marriageable age for women to nine years was defeated by public pressure.⁵

The dynamics of Iraqi family law are relevant to be studied from the perspective of Indonesia, a country with the largest Moeslems population in the world which has also taken a similar path of eclectic codification through Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, as well as the Compilation of Islamic Law which places the marriage guardian as the marriage partner for the bride. A comparative study of Iraq's experience, both before and after the amendment, can provide important lessons for Indonesia regarding how the stability of family law is vulnerable to being eroded by political shifts and pressure from religious authorities, as well as how the state can ensure that marriage guardian institutions continue to protect, rather than reduce, women's rights in marriage.⁶

Based on the description above, the purpose of this study is to analyze the position and authority of marriage guardians in Iraqi legislation before the amendment (Law Number 188 of 1959 and its amendments in 1963) and after the amendments in 2025, and to draw its relevance to the development of Islamic family law in Indonesia. This study is expected to provide an academic contribution in the form of a comparative mapping of marriage guardian policies in Moeslems countries, as well as a practical contribution in the form of considerations for the reform of Islamic family law in Indonesia so that it remains responsive to the protection of women's rights.

METHOD

This study uses a normative legal research approach with a qualitative descriptive-comparative design. The object of the study is the written legal norms regarding marriage guardians contained in Qanun al-Ahwal al-Syakhsiyyah Number 188 of 1959 and its amendments, specifically the 1963 and 2025 amendments. These are compared with the provisions on marriage guardians in Law Number 1 of

³ Carnegie Endowment for International Peace, *The Politics of Personal Status Law in Egypt and Iraq*, Washington DC, 2025.

⁴ Wilson Center Middle East Program, *Amendment to Personal Status Law: A Blow to Iraqi Women & Society*, Washington DC, 2024.

⁵ Human Rights Watch, *Iraq: Personal Status Law Amendment Sets Back Women's Rights*, New York, March 10, 2025.

⁶ Compilation of Islamic Law, Articles 19 to 23 concerning Marriage Guardians; *Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage*.

1974 in conjunction with Law Number 16 of 2019 concerning Marriage and the Compilation of Islamic Law in Indonesia.

The data used are secondary data sourced from primary legal materials in the form of Iraqi and Indonesian legal regulations, as well as secondary legal materials in the form of journal articles, reports from international institutions and human rights organizations, and comparative *fiqh* literature. Data collection techniques were conducted through library research, examining official documents, official and unofficial translations of Iraqi laws, and recent legislative monitoring reports.

Data analysis was conducted using a statutory approach, a historical approach, and a comparative legal approach. These three approaches were used sequentially: mapping marriage guardianship norms across each legal period in Iraq, identifying shifts in norms between periods, and then comparing them with similar norms in Indonesia to produce evaluative and prescriptive conclusions.

RESULTS AND DISCUSSION

Concept of Marriage Guardians in Comparative Islamic Jurisprudence

Etymologically, a guardian means a person who has closeness or authority to manage the interests of another party. In the terminology of munakahat *fiqh*, wilayah al-nikah is the sharia authority granted to a person to marry or approve the marriage of a woman under his guardianship. Shafi'i and Hanabilah *mazhab* believe that a guardian is an absolutely necessary pillar of marriage, so a marriage contract without a guardian is declared null and void, based on the Prophet's hadith which confirms the invalidity of marriage without a guardian.⁷

In contrast to the views of Shafi'i and Hanabilah *mazhab*, the Hanafi *mazhab* of thought holds that a guardian is not a pillar but rather a perfecting condition (kamal), so that a woman who is mature and sane is basically capable of marrying herself without needing a guardian, except in the case of kafa'ah (equivalence) which can be the basis for the guardian to file for annulment. This Hanafi approach has historically influenced the codification of family law in the former Ottoman Caliphate, including Iraq, albeit with various modifications.⁸

Ja'fari Shia jurisprudence (*Itsna Asyariyah*) differentiates the guardian's authority based on the prospective bride's puberty and virgin/widowhood status. In Ja'fari jurisprudence, a mujbir (father or grandfather) guardian has relatively broader authority over pre-puberty daughters, while women who have reached puberty and are considered capable of acting independently, although some views still require the guardian's permission as a matter of prudence (*ihtiyat*). This difference in emphasis on age and legal capacity has become a crucial sticking point in the Iraqi legislative debate, given that the codification of the *Shia Ithna Asyariyah* of thought proposed in the 2025 amendments directly affects the age limit and authority of guardians.

This diversity of *mazhab* of thought places each modern Moeslems state in the position of choosing (*talfiq/tarjih*) a particular approach when codifying family law into positive law. Studies of family law reform in the Moeslems world note that countries such as Egypt (1920, 1929), Jordan (1951), Syria (1953), Tunisia (1956), Morocco (1958), Iraq (1959), and Pakistan (1961) pursued this kind of eclectic codification path, with varying degrees of boldness in reform, including in terms of limiting the guardian's authority.⁹

Position of Marriage Guardian in Law Number 188 of 1959 (Before Amendment)

Law No. 188 of 1959 was enacted a year after the military coup that toppled the British-backed Iraqi monarchy. Under the rule of Abd al-Karim Qasim, this law was drafted by legal experts and religious *mazhab* with the aim of unifying family law for all Iraqi Moeslems, both *Sunni* and *Shia*, into

⁷ Muhammad Jawad Mughniyah, *Fiqh Lima Mazhab*, Trans. Masykur A.B. et al., Jakarta, Lentera, 2008, p. 345-347.

⁸ Muhammad Abu Zahrah, al-Ahwal al-Syakhsiyyah, Kairo, *Dar al-Fikr al-'Arabi*, 1957, p. 111-114.

⁹ Ahmad Bunyan Wahib, Reformasi Hukum Keluarga di Dunia Muslim, *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, 2014, 14, 1, 1-19.

a single state judicial system. Naziha al-Dilaymi, the first female cabinet member in the Arab world, who also led the Iraqi League for the Defense of Women's Rights, played an active role in drafting this law.¹⁰

The substance of this law was generally progressive for its time. Article 8 set the minimum age for marriage at eighteen, limited polygamy to a judge's permission after considering the husband's economic capabilities and legitimate interests, prohibited unilateral divorce without a court order, and strengthened women's legal position in matters of guardianship and inheritance compared to previous practices.¹¹

The approach chosen by the legislators regarding guardianship tends to follow the broad outlines of the Hanafi *mazhab* of thought, which does not place guardianship as an absolute pillar for adult women, thus significantly limiting the guardian's coercive authority (*ijbariyah* area). The provisions regarding guardianship and marriage requirements contained in Article 9 of this law have even undergone changes since the second amendment, indicating that the issue of guardianship authority has consistently been the most frequently revised subject throughout the history of this law.¹²

Another distinctive feature of the 1959 legal regime was the requirement that all marriages be solemnized before a judge within the state's judicial system, and marriages performed outside of court were declared criminal offenses. This provision indirectly restricted the authority of guardians or religious leaders to marry couples without state oversight, making the courts the primary oversight mechanism for the validity of marriages, including ensuring that age requirements and consent of both prospective bride and groom were met.¹³

The consistency of this legal regime was later disrupted by political change. The 1963 Baath Party coup that toppled Qasim's government was followed by amendments that relaxed some of these progressive restrictions, including relaxing the requirements for polygamy, adjusting inheritance laws to be more in line with conservative sharia views, reinforcing the authority of male guardians in marriage matters, and raising the age limit for maternal custody to fifteen. These 1963 amendments can be seen as a political compromise between the secular spirit of the new government and pressure from religious conservatives, and set a precedent that the position of guardians in marriage in Iraq remains open to revision with changes in power.¹⁴

Marriage Guardians After the 2025 Amendment

The debate regarding religious authority in Iraqi family law has intensified again after the post-2003 political reforms. The 2005 Iraqi Constitution contains Article 41 which states that citizens are free to determine their personal status law based on their religion, sect, belief, or individual choice, a formulation that some conservative clerics interpret as a constitutional basis for replacing Law Number 188 of 1959 with sharia law according to each *mazhab* of thought.¹⁵

The proposed amendments, submitted in late July 2024, initially contained highly controversial provisions, including the possibility of lowering the minimum age for marriage for girls to nine years if they were to follow the *Shia Ithna Asyariyah* of thought. These provisions sparked widespread opposition from Iraqi civil society organizations and women's rights groups, resulting in the final draft, which passed, removing the nine-year age limit.¹⁶

On January 21, 2025, the Iraqi House of Representatives finally passed an amendment to Article 2 of Law No. 188 of 1959. This amendment grants every legally competent Iraqi Moslems man and woman the right to choose to have their marriage, divorce, child custody, and inheritance regulated according to the *Shia Ithna Asyariyah* of jurisprudence codified by the Shia Council of Endowments, rather than according to the general provisions of Law No. 188 of 1959. This option is also open to

¹⁰ Carnegie Endowment for International Peace. *Ibid.*

¹¹ Wilson Center Middle East Program. *Ibid.*

¹² American Bar Association Rule of Law Initiative, *Ibid.*, p. 4-6.

¹³ Wilson Center Middle East Program. *Ibid.*

¹⁴ Carnegie Endowment for International Peace. *Ibid.*

¹⁵ Wilson Center Middle East Program. *Ibid.*

¹⁶ Human Rights Watch, *Iraq: Personal Status Law Amendment Sets Back Women's Rights. Ibid.*

couples whose marriages were registered before the amendment came into effect, but once the choice is made, the parties cannot change it.¹⁷

The final draft of the amendments maintained the age of marriage at eighteen, or fifteen with the permission of a judge after considering the child's maturity and physical capacity, as a compromise on the much lower initial proposal, and the law emphasized that the new codification of the *Shia Ithna Asyariyah* of thought should not conflict with the eighteen-year age limit stipulated in Article 8 of Law Number 188 of 1959.¹⁸

The aspect of the amendments most relevant to the issue of guardianship is the re-legalization of unregistered marriages, which were previously considered a criminal offense under the 1959 regime. This provision allows religious figures or guardians to marry couples without the verification of age and equal rights by a judge, thereby significantly reducing the state's oversight function, which was previously a hallmark of Iraqi family law. The amendments also allow a husband to unilaterally transfer his marriage to the Ja'fari legal regime without the wife's consent or knowledge, as reflected in the case of a request for transfer of marital legal status filed unilaterally by an ex-husband to revoke his ex-wife's custody of his child.¹⁹

Some believe that this amendment creates two distinct family law regimes for the same citizen, potentially violating the principle of equality before the law guaranteed by Article 14 of the Iraqi Constitution. From the perspective of the status of marriage guardians, the 2025 amendment substantially restores the religious-traditional authority previously restricted by Law No. 188 of 1959, although formally the minimum age of marriage of eighteen remains the general norm.²⁰

CONCLUSION

The position of guardians in Iraqi law has undergone three significant shifts. Law No. 188 of 1959 established a unified family law regime that limited the coercive power of guardians and made state courts the sole guardians of marital validity. A 1963 amendment following the Baath Party coup restored some of the guardians' authority and conservative sharia to the law, while a 2025 amendment introduced a dual legal regime that allowed Moeslems couples to choose the codification of the *Shia Ithna Asyariyah* of thought, legalized unregistered marriages, and substantially weakened the courts' oversight of guardians and religious leaders. Although the minimum age of marriage of eighteen was formally maintained after a proposal to lower it to nine years was defeated by public pressure.

Compared with Indonesia, which consistently places guardianship as a pillar of marriage within the framework of state oversight through the Office of Religious Affairs and the Religious Courts, Iraq's experience demonstrates the real risks when the guardianship of marriage becomes the object of political and sectarian bargaining. The implications of these findings for Indonesia are the need to maintain the consistency of the court's function as the sole institution that validates marriages and to be wary of any proposed reforms to family law that have the potential to weaken protections regarding age and marital consent for women.

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¹⁷ Library of Congress, Global Legal Monitor, *Iraq: House of Representatives Approves Amendments to Law on Personal Status*, Washington DC, February 14, 2025.

¹⁸ Human Rights Watch, *Iraq: Personal Status Law Amendment Sets Back Women's Rights*. *Ibid*.

¹⁹ Human Rights Watch, *Iraq: New Personal Status Code Makes Women Second Class*, New York, October 15, 2025.

²⁰ *Ibid*.

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