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Reconstructing Women's Rights Protection in Surrogacy Practices Based on Living Law: Perspectives of Customary Law, Human Rights, and Islamic Law

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Abstract:
The rapid advancement of assisted reproductive technology has introduced surrogacy as a cross-border reproductive practice that raises complex legal, ethical, and human rights questions. In Indonesia, the absence of comprehensive regulation creates uncertainty over the protection of women's reproductive rights, the legal position of surrogate mothers, and the status of children born through surrogacy. Existing scholarship tends to examine surrogacy from either religious or civil-law perspectives in isolation, leaving limited attention to how customary values, human rights standards, and religious legal reasoning might be read together. This study aims to reconstruct a model of legal protection for women involved in surrogacy by integrating customary law, human rights, and religious legal values through the lens of living law. The research employs normative legal methods, combining statutory, conceptual, comparative, case, and socio-legal approaches, supported by

a review of recent scholarly literature. The findings show that customary values emphasizing kinship, dignity, communal responsibility, and the protection of women and children align closely with international human rights principles and with the higher objectives pursued by religious legal reasoning, particularly the preservation of lineage, life, and honor. Based on this convergence, the study proposes a holistic regulatory framework capable of delivering justice, legal certainty, and comprehensive protection for women and children within Indonesia's pluralistic legal system, while cautioning against the risks of commodification and exploitation inherent in unregulated surrogacy arrangements.

Keywords: Living Law; surrogacy; women's rights; customary law; human rights.

Introduction

Advances in assisted reproductive technology over the past four decades have expanded the options available to individuals and couples confronting infertility, and surrogacy has emerged as one of the most contested applications of that technology. [1] What began as a practice confined to a small number of permissive jurisdictions has grown into a transnational industry in which intended parents travel across borders to obtain gestational services that are unavailable, unaffordable, or prohibited in their home countries.[1] This mobility has generated a correspondingly global set of legal anxieties: the commodification of women's reproductive capacity, the uncertain citizenship and parentage of children born through cross-border arrangements, and the limited capacity of existing human rights instruments to protect surrogates from coercion and exploitation.[2]

In Indonesia, no statute expressly regulates surrogacy, and the practice occupies a genuine rechtsvacuüm. The Health Law confines the transfer of an embryo produced through in-vitro fertilization to the womb of the wife from whose ovum the embryo

[1] Christina Hartman, "A Womb of One's Own: Supporting International Surrogacy Regulation with a Historical Wet Nursing Perspective," Chicago Journal of International Law (2023), 1.

[2]Bríd Ní Ghráinne and Aisling McMahon, "A Public International Law Approach to Safeguard Nationality for Surrogate-Born Children," Legal Studies 37, no. 2 (2017): 324.

originates, so that any arrangement in which an embryo is carried by a woman other than the intended mother finds no lawful basis in positive legislation.[3] Because a surrogacy agreement lacks a lawful cause within the meaning of the Civil Code, such agreements are void from the outset, and the woman who gives birth is recognized as the child's legal mother regardless of genetic origin, following the maxim mater semper certa est.[4] The consequence is a structural vulnerability for three parties at once: the surrogate, whose reproductive labor receives no legal recognition or protection; the intended parents, who acquire no automatic parental status; and the child, whose identity, nationality, and inheritance rights remain undetermined.[5] In practice, the absence of sanctions specifically targeting surrogacy has not eliminated the phenomenon; it has instead pushed it into informal, family-mediated, or online arrangements that operate beyond any regulatory oversight, heightening rather than reducing the risk of exploitation.

A decade of Indonesian legal scholarship on surrogacy shows two dominant, largely separate lines of inquiry. The first is doctrinal and civilistic, examining the validity of surrogacy agreements against the requirements of a lawful contract and the consequences for the child's civil status.[6] Closely related work traces the specific civil-law position of children born through such arrangements, generally concluding that they retain a civil relationship only with the surrogate and her family unless the intended parents pursue formal adoption.[7] The second line is grounded in Islamic legal reasoning and asks whether surrogacy

[3]Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan, Pasal 127 ayat (2).
[4]Dinarjati Puspitasari, "The Legal Status of Surrogate Mothers in Indonesia," Batulis Civil Law Review 3, no. 1 (2022): 19–28.
[5]Wawan Edi Prastiyo and Gde Made Swardhana, "The Opportunities for Surrogacy Legalization Between the Right to Have Children and A Loophole of Trafficking," Padjadjaran Journal of International Law 10, no. 2 (2023).
[6]Dinarjati Puspitasari, "The Legal Status of Surrogate Mothers in Indonesia," Batulis Civil Law Review 3, no. 1 (2022): 19–28.
[7]Titania Hamdani, "Kajian Yuridis Kedudukan Anak yang Dilahirkan dari Sewa Rahim Wanita Lain oleh Pasangan Suami Isteri," Jurnal Ilmiah Mahasiswa Hukum 3, no. 4 (2023): 297–303.

can be reconciled with the preservation of lineage (nasab), typically concluding that in-vitro fertilization is permissible only when the embryo, formed from a lawfully married couple's own gametes, is returned to the wife's own womb, while third-party gestation is treated with far greater caution because of its implications for inheritance and kinship.[8] Comparative and human rights literature, meanwhile, has largely developed outside the Indonesian context, documenting how states that restrict surrogacy domestically inadvertently fuel a transnational industry, [9] how international human rights instruments frame surrogates' reproductive autonomy and vulnerability to exploitation, [10] and how surrogacy might be reconceptualized as reproductive labor deserving of economic-rights protection under instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Labour Organization's Maternity Protection Convention.[11] A comparative study of Iran and several European jurisdictions further illustrates how a single religious legal tradition can generate markedly different regulatory outcomes once it is filtered through distinct national policy choices.[12]

What remains largely unexamined is the space between these literatures: the normative resources of customary law, or living law, and its capacity to mediate between religious legal reasoning and international human rights standards. Indonesian legal theory has increasingly revisited living law following its explicit recognition in Article 2 of the new Penal Code, which permits courts to draw upon norms genuinely observed within a community as a basis for

[8]Ahmad Fuzail Sukur, Barzah Latupono, and La Ode Angga, "Hak Waris Anak dari Ibu Pengganti (Surrogate Mother) Ditinjau dari Hukum Islam," Tatohi Jurnal Ilmu Hukum 4, no. 6 (2024): 455–465.
[9]Claudia Flores, "Accounting for the Selfish State," 371.
[10]Barbara Stark, "Transnational Surrogacy and International Human Rights Law," ILSA Journal of International & Comparative Law 18 (2011): 369.
[11]Lauren Danielowski, "Reproduction as Work: Addressing a Gap in Current Economic Rights Discourses," Health and Human Rights Journal 25, no. 2 (2023): 29–42.
[12]Fatemeh Ghodrati, "A Comparative Study of Surrogacy Rights in Iran and European Countries, a Review Article," Ethics, Medicine and Public Health 27, no. 4 (2023): 100–120.

determining unlawfulness.[13] This renewed attention to living law as a formal source of legal legitimacy, distinct from yet complementary to state-enacted positive law, opens an analytical opportunity that the surrogacy literature has not yet taken up: to ask whether the values embedded in Indonesia's plural customary orders, the protective orientation of its kinship systems, and its practices of communal responsibility toward women and children, can supply the connecting normative thread between Islamic legal reasoning and international human rights guarantees. This is the novelty this study pursues. Rather than treating customary law, Islamic law, and human rights as competing frameworks, it treats them as three expressions of a single underlying commitment to human dignity that living law, properly reconstructed, can hold together within a coherent regulatory model.

The urgency of closing this gap is not merely doctrinal. Indonesia's demographic and social diversity means that any surrogacy-born child affected by the present vacuum is simultaneously a subject of state law, of the religious law that governs their family's personal status, and of whatever customary order their community observes; a regulatory model built on state law alone, without engaging the religious and customary orders that actually shape how families and communities respond to such children in practice, is unlikely to achieve either compliance or genuine protection. It is this practical, pluralistic reality, rather than an abstract preference for legal theory, that makes a living-law reconstruction methodologically necessary rather than merely convenient.

On this basis, the study addresses three research questions. First, how does Indonesian positive law presently treat surrogacy, and what specific vulnerabilities does the resulting legal vacuum produce for surrogate mothers and children? Second, in what respects do customary law, human rights principles, and Islamic

[13]Afandono Cahyo Putranto and Irwan Triadi, "Konsep Hukum Pidana Adat Pasca Pemberlakuan Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana Perspektif Living Law," Al-Zayn: Jurnal Ilmu Sosial & Hukum 3, no. 5 (2025): 7317–7338.

legal reasoning converge in their treatment of women's reproductive dignity and the protection of children of uncertain origin? Third, what integrated regulatory model, grounded in living law, can be reconstructed from that convergence to guide future legislative reform in Indonesia's pluralistic legal system?

This research is normative legal research, examining law as a coherent system of norms rather than as a set of empirical social facts.[14] It draws on the statutory approach to examine the relevant provisions of the Civil Code, the Health Law, the Marriage Law, the Child Protection Law, and the new Penal Code; the conceptual approach to elaborate the doctrines of living law, maqāṣid al-sharī'ah, and reproductive human rights; the comparative approach to situate Indonesian regulation against other jurisdictions' treatment of surrogacy; the case approach to examine how Indonesian courts have applied related doctrines of parentage and lineage; and a socio-legal approach to account for the customary and religious norms that operate in practice alongside, and sometimes ahead of, state law. Primary legal materials include national legislation, the 1979 Fatwa of the Majelis Ulama Indonesia on in-vitro fertilization, and relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women. Secondary materials consist of books and peer-reviewed journal articles addressing surrogacy, living law, customary kinship systems, and Islamic family law, analyzed qualitatively through the interpretive lens of legal pluralism and maqāṣid al-sharī'ah.

Dicussion

The Legal Vacuum of Surrogacy under Indonesian Positive Law

Indonesian positive law does not prohibit surrogacy in explicit terms; it simply fails to provide it with any lawful channel. Article 1320 of the Civil Code requires a lawful cause as a condition for a valid agreement, and Article 1337 declares an agreement void where its cause is contrary to law, morality, or public order.[15]

[14]Zainuddin Ali, Metode Penelitian Hukum (Jakarta: Sinar Grafika, 2014), 105.
[15]Dinarjati Puspitasari, "The Legal Status of Surrogate Mothers in Indonesia," 22.

Because the object of a surrogacy arrangement, a woman's gestational capacity, cannot lawfully be treated as an object of a lease or service contract, such agreements are void from their inception (van rechtswege nietig). The Health Law reinforces this position indirectly: assisted reproduction is permitted only for a lawfully married couple, using their own gametes, with the embryo transferred to the wife's own womb,[16] leaving no statutory space for a third-party surrogate.

The practical consequence of this vacuum falls hardest on the child. Indonesian civil law applies the principle that the woman who gives birth is the legal mother, so that a child born through surrogacy is registered, for all legal purposes, as the child of the surrogate and, where she is married, of her husband.[17] The intended parents acquire no automatic legal relationship with the child; establishing one requires a separate adoption process that is neither guaranteed nor straightforward, particularly where the surrogacy arrangement itself is void and therefore evidentially fraught.[18] Under the Marriage Law, a child's legitimacy and inheritance rights depend on birth within, or attributable to, a valid marriage; a surrogacy-born child whose civil registration diverges from genetic and intentional parentage is therefore left in a precarious position with respect to identity, custody, and inheritance alike.

This legal vacuum also creates a structural opening for exploitation. Comparative research on the transnational surrogacy market shows that restrictive or absent domestic regulation does not suppress demand; it redirects it toward jurisdictions, or informal arrangements, with weaker safeguards, disproportionately exposing economically vulnerable women to coercive terms.[19] Because Indonesian law neither criminalizes nor

[16]Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan, Pasal 127 ayat (2).
[17]Dinarjati Puspitasari, "The Legal Status of Surrogate Mothers in Indonesia," 24.
[18]Titania Hamdani, "Kajian Yuridis Kedudukan Anak yang Dilahirkan dari Sewa Rahim Wanita Lain oleh Pasangan Suami Isteri," 300.
[19]Wawan Edi Prastiyo and Gde Made Swardhana, "The Opportunities for Surrogacy Legalization Between the Right to Have Children and A Loophole of Trafficking."

regulates surrogacy as such, arrangements continue to occur through family networks or informal brokers, without independent counselling, medical safeguards, or enforceable terms protecting the surrogate's health, compensation, or capacity to withdraw consent. The absence of regulation is therefore not neutral: it is itself a source of harm, and it is precisely this gap that the remainder of this article seeks to address through a living-law reconstruction that draws on customary, religious, and human rights resources already present within Indonesia's legal culture.

The Child Protection Law adds a further layer to this vacuum, since it guarantees every child the right to identity, including a name and a legally recorded family origin, from the moment of birth.[20] This guarantee is itself an expression of the constitutional right to birth registration and the right to grow and develop free from discrimination guaranteed under Article 28B paragraph (2) of the 1945 Constitution.[21] A surrogacy-born child whose civil registration records the surrogate as mother, while the child is in fact raised from birth by the intended parents, is placed in a position that is difficult to reconcile with either guarantee: the documented identity diverges from the lived family identity, exposing the child to administrative complications in matters ranging from school enrollment to inheritance and, in cross-border arrangements, to unresolved questions of citizenship. Comparative research on the international law of nationality shows that this is not a uniquely Indonesian problem; surrogate-born children across many jurisdictions face a structural risk of statelessness or contested nationality precisely because domestic parentage rules and cross-border reproductive arrangements were never designed with each other in mind.[22] For Indonesia, whose Population Administration framework ties a child's registered status closely to the marital and biological facts recorded at birth, the absence of a

[20]Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak, Pasal 27.
[21]Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 28B ayat (2).
[22]Bríd Ní Ghráinne and Aisling McMahon, "A Public International Law Approach to Safeguard Nationality for Surrogate-Born Children," 328.

specific surrogacy pathway therefore compounds an identity problem into a citizenship and administrative problem as well, reinforcing the case for the express regulatory clarification argued for later in this article.

The vacuum also carries an unresolved criminal-law dimension that compounds the civil uncertainty already described. Because surrogacy arrangements are typically negotiated through informal intermediaries and, at times, cross-border brokers, they sit uncomfortably close to conduct the Child Protection Law and Indonesia's anti-trafficking framework are designed to prevent, particularly where compensation to the surrogate is structured to resemble payment for the child itself rather than for medical and pregnancy-related costs.[23] Without a lawful, regulated channel through which a surrogacy arrangement can be conducted and documented, however, the same absence of regulation that exposes surrogates to exploitation also makes it difficult for law enforcement to distinguish a genuine, consensual, medically necessary arrangement from an exploitative or trafficking-adjacent one, since both occur, from the state's perspective, in the same undocumented space. This is a further, distinct cost of the current legal vacuum, separate from its effects on the surrogate's and child's civil status: it weakens rather than strengthens the state's capacity to detect and prevent the very exploitation that motivates continued caution about surrogacy in the first place.

Customary Law as Living Law: Kinship, Women, and the Protection of Children of Uncertain Origin

The concept of living law originates in Eugen Ehrlich's sociology of law, which distinguishes the norms actually observed and enforced within a community, the "living law," from the rules formally enacted by the state.[24] Indonesian legal scholarship has recently revived this framework in the wake of the new Penal Code,

[23]Wawan Edi Prastiyo and Gde Made Swardhana, "The Opportunities for Surrogacy Legalization Between the Right to Have Children and A Loophole of Trafficking."
[24]Eugen Ehrlich, Fundamental Principles of the Sociology of Law, trans. Walter L. Moll (Cambridge, MA: Harvard University Press, 1936), 493.

which formally recognizes hukum yang hidup dalam masyarakat as a legitimate basis for determining unlawfulness, provided it is consistent with the principles of the unitary state and human rights.[25] This recognition confirms what legal pluralism theory has long argued: that state law and customary law are not sequential stages in a linear modernization narrative, but co-existing, mutually informing normative orders.[26]

Indonesia's customary kinship systems, though internally diverse, share a consistent orientation toward the protection of women and children within a framework of communal, rather than purely individual, responsibility. In matrilineal societies such as the Minangkabau, lineage and core family property descend through women, and this structural centrality functions as a form of built-in social protection: a woman's position within her kin group does not depend on her marital status, and her children retain an assured place within the lineage regardless of the circumstances of their birth.[27] The same structuralist reading of Minangkabau kinship shows that categories of relatedness in customary systems are organized around relations of mutual obligation rather than strict biological descent alone, giving customary law an inherent flexibility in absorbing children whose parentage is socially, rather than purely genetically, established.[28]

This flexibility is significant for surrogacy because it demonstrates that Indonesian customary law already possesses doctrinal tools for integrating a child whose biological origin diverges from the family unit that raises them. Customary systems across Indonesia recognize mechanisms of formal child acknowledgment and adoption that confer full membership,

[25]Afandono Cahyo Putranto and Irwan Triadi, "Konsep Hukum Pidana Adat Pasca Pemberlakuan Undang-Undang Nomor 1 Tahun 2023," 7320.
[26]Sofyan Hadi, "Hukum Positif dan The Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat)," DiH Jurnal Ilmu Hukum 13 (2017): 259.
[27]Ellies Sukmawati, "Filosofi Sistem Kekerabatan Matrilineal sebagai Perlindungan Sosial Keluarga pada Masyarakat Minangkabau," Jurnal Ilmu Kesejahteraan Sosial 8, no. 1 (2018): 15.
[28]Misnal Munir, "Sistem Kekerabatan dalam Kebudayaan Minangkabau: Perspektif Aliran Filsafat Strukturalisme Jean Claude Levi-Strauss," Jurnal Filsafat 25, no. 1 (2015): 4.

including inheritance rights, on children who are not the genetic offspring of the parents who raise them, provided that the community and the family formally recognize the relationship.[29] Where state law's rigid application of mater semper certa est leaves a surrogacy-born child in a precarious, sometimes stateless, limbo, customary law's community-oriented logic of recognition offers a normative resource, communal ratification of the intended parents' relationship with the child, that could inform a statutory adoption or parentage-recognition pathway tailored to surrogacy specifically.

Customary law's protective orientation toward women also rests on values of dignity and communal responsibility that extend beyond inheritance rules narrowly conceived. In many adat communities, protecting a woman's honor and physical integrity is treated as a matter of collective, not merely individual, concern, mobilizing the family and the broader kin group to prevent and respond to her exploitation.[30] Village-level customary dispute resolution institutions, whose continuing relevance is affirmed under the Village Law, provide an accessible, community-embedded forum through which such protective norms can be applied and enforced without necessarily displacing formal courts.[31] Understood together, these features of customary law, its non-static, evolving character; its community-based mechanisms of child recognition; and its collective ethic of protecting women's dignity, position living law as a normatively rich and institutionally accessible foundation on which a surrogacy-specific protective framework could be built, rather than as a merely symbolic reference to tradition.

[29]Ellyne Dwi Poespasari, "Kedudukan Anak Luar Kawin dalam Pewarisan Ditinjau dari Sistem Hukum Kekerabatan Adat," Perspektif 19, no. 3 (2014): 212.
[30]Dominikus Rato and Joko Agus Hartanto, Hukum Perkawinan dan Waris Adat: Sistem Kekerabatan, Bentuk Perkawinan dan Pola Pewarisan Adat di Indonesia (Surabaya: Laksbang Yustitia, 2011), 41.
[31]Nurdhin Baroroh, M. Misbahul Mujib, and Iswantoro, "Peradilan Desa Adat sebagai Instrument Integral Pembangunan Hukum Nasional Ditinjau dari Undang-Undang No. 6 2014 Tentang Desa," Jurnal Supremasi Hukum 4, no. 1 (2015): 3.

It is important to stress that this protective orientation is not confined to matrilineal systems. Classical accounts of Indonesian adat law observed that, across patrilineal, matrilineal, and bilateral or parental systems alike, customary law was never conceived as a fixed code but as a body of norms in constant, gradual adjustment through the decisions of community elders and functionaries responding to concrete disputes, a characteristic that gives adat systems generally, and not only matrilineal ones, an inherent capacity to accommodate new social and reproductive realities without abandoning their underlying values.[32] Historical scholarship on pre-colonial Indonesian customary law similarly emphasizes that adat's earliest recorded functions already centered on maintaining communal balance and resolving disputes over status and belonging, functions that map closely onto the contested-parentage problem that surrogacy presents.[33] Even in the bilateral or parental kinship systems found across much of Java, where descent and inheritance run through both maternal and paternal lines with formal equality between sons and daughters, the guiding concern remains the same: kinship status is treated as something a community can confer and recognize, not merely something biology dictates.[34] This cross-cutting feature of Indonesian customary law, its consistent willingness to let formal, ratified recognition establish kinship where biological descent alone is absent, ambiguous, or socially disruptive, is what makes living law a plausible and general, rather than merely localized, foundation for a national surrogacy framework.

Islamic Legal Perspective: Maqāṣid al-Sharī'ah and the Boundaries of Permissible Reproductive Assistance

Islamic legal reasoning approaches surrogacy through the higher objectives of Islamic law, maqāṣid al-sharī'ah, which classical

[32]B. Ter Haar, Adat Law in Indonesia, trans. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), 20.
[33]Dewi Wulansari, Hukum Adat Indonesia Sebelum Penjajahan (Jakarta: Refika Aditama, 2009), 33.
[34]Setiawan Lo Utomo, Hukum Adat, 2nd ed. (Jakarta: Rajawali Pers, 2017), 64.

and contemporary jurists identify as the preservation of religion, life, intellect, lineage, and property.[35] Among these objectives, the preservation of lineage (hifẓ al-nasl) carries particular weight in the assessment of assisted reproductive technologies, because Islamic family law ties inheritance, guardianship, and the prohibition of marriage between close relatives (maḥram) directly to a clearly established, verifiable lineage.[36] Any technology that obscures the identity of a child's biological mother or introduces ambiguity into the marital relationship underlying a pregnancy is, for this reason, treated with considerable caution.

The authoritative Indonesian religious opinion on the matter, issued by the Majelis Ulama Indonesia in 1979, reflects this reasoning with some precision. It holds that in-vitro fertilization using the sperm and ovum of a lawfully married couple, with the resulting embryo transferred to the wife's own womb, is permissible (mubah), as it constitutes a legitimate medical effort (ikhtiar) consistent with religious principles.[37] The same fatwa, however, declares it unlawful (haram) for the embryo of a married couple to be transferred to and carried by another woman, invoking the principle of sadd al-dharī'ah, blocking a lawful means where it is likely to produce unlawful ends, on the ground that such an arrangement would generate serious complications for inheritance and the certainty of lineage.[38] Later jurists, notably Yusuf al-Qaradhawi, have reached broadly similar conclusions, treating third-party gestational surrogacy as incompatible with the protection of nasab even where the underlying medical intention is benign.[39]

Where a surrogacy-born child's parentage cannot be reconciled with these lineage rules, contemporary Islamic

[35]Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach (London: The International Institute of Islamic Thought, 2008), 4.
[36]Amir Syarifuddin, Ushul Fiqh (Jakarta: Kencana Prenada Media Group, 2007), 217.
[37]Majelis Ulama Indonesia, Fatwa tentang Bayi Tabung/Inseminasi Buatan, Jakarta, 13 Juni 1979.
[38]Majelis Ulama Indonesia, Fatwa tentang Bayi Tabung/Inseminasi Buatan.
[39]Yusuf al-Qardhawi, Fatwa-Fatwa Kontemporer, 3rd ed. (Jakarta: Gema Insani, 2017), 210.

jurisprudence in Indonesia has approached the child's status by analogy to the classical category of laqīṭ, a foundling of unknown parentage, whose inheritance rights depend on formal acknowledgment by those who claim a relationship with the child rather than on an automatic, unrebuttable presumption of descent.[40] This analogy is significant for the present argument because it shows that Islamic legal reasoning, no less than customary law, possesses an internal mechanism, formal acknowledgment, for incorporating a child of uncertain biological origin into a stable legal and inheritance relationship. It is a mechanism grounded not in indifference to biological truth but in the same underlying concern that animates hifẓ al-nasl: certainty, stability, and the child's protection from being left without an identifiable family.

It is important, in this context, not to read Islamic legal reasoning on surrogacy as static or exhausted by a single fatwa. Contemporary Islamic legal theory treats maṣlaḥah, the identification and pursuit of genuine public benefit, as a legitimate basis for ijtihad on matters, such as reproductive biotechnology, on which the classical jurists could not have ruled directly.[41] A maṣlaḥah-based reading of surrogacy does not necessarily overturn the caution expressed in the 1979 fatwa regarding third-party gestation, but it does open space for distinguishing between surrogacy conducted as an unregulated, potentially exploitative transaction and surrogacy conducted, hypothetically, within a tightly regulated, altruistic, and transparent framework that safeguards lineage certainty through documentation and formal acknowledgment. The maqāṣid framework, read this way, converges with customary law's own logic of communal recognition: both traditions treat the clarity and social ratification of a child's status, rather than genetic origin alone, as the operative concern, and both permit formal acknowledgment as a legitimate

[40]Ahmad Fuzail Sukur, Barzah Latupono, and La Ode Angga, "Hak Waris Anak dari Ibu Pengganti (Surrogate Mother) Ditinjau dari Hukum Islam," 460.
[41]Husni Thamrin, Aspek Hukum Bayi Tabung (Yogyakarta: Aswaja Pressindo, 2014), 58.

route to establishing a stable parent–child relationship where biological certainty is unavailable or contested.

This concern for lineage certainty should not be mistaken for indifference to women's welfare within Islamic legal reasoning; the two concerns are, in fact, closely connected. Contemporary scholarship on gender and Islamic family law argues that many of the protections classical fiqh affords to women, including maintenance, dower, and inheritance, depend on the clear, undisputed establishment of family relationships, so that ambiguity in lineage or parentage tends, in practice, to weaken rather than strengthen women's legal claims within the family.[42] Read this way, the caution Islamic legal reasoning expresses toward third-party gestational surrogacy is not simply a restriction on reproductive technology; it is also, from within the tradition's own logic, a protective measure aimed at preventing the kind of unresolved parentage that has historically left women and children without secure legal standing. Comparative studies of how Shari'a courts in practice adjudicate contested family-status claims confirm that courts consistently prioritize documented, formally established relationships over informal or merely biological claims precisely because documentation is what allows a woman or child to enforce rights against a reluctant family member.[43] This is the same institutional logic that underlies the laqīṭ-based formal-acknowledgment approach discussed above, and it reinforces, from within Islamic legal method itself, the case for building any surrogacy framework around clear, documented, formally ratified parentage rather than around informal arrangement or silence.

Human Rights Framework: Reproductive Autonomy and Protection from Exploitation

[42]Nasr Abu-Zayd, "The Status of Women between the Qur'an and Fiqh," in Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition, ed. Ziba Mir-Hosseini, Library of Islamic Law 5 (New York: I.B. Tauris, 2013), 155.

[43]Nahda Younis Shehada, Applied Family Law in Islamic Courts: Shari'a Courts in Gaza (New York: Routledge, 2018), 87.

International human rights law approaches surrogacy through the intersecting lenses of reproductive autonomy and protection from exploitation, neither of which fully resolves the practice's ethical difficulty on its own. Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women affirms women's right to decide freely and responsibly on the number and spacing of their children and to access the information and means to do so, while Article 12 obliges states to ensure access to appropriate health services in connection with pregnancy.[44] Read on their own, these provisions support an account of surrogacy as an exercise of reproductive self-determination on the part of both the intended mother and the surrogate.[45]

Yet the same body of research documents how, in practice, that autonomy is frequently compromised. Where economic precarity, limited bargaining power, or intermediary brokers structure the arrangement, a surrogate's consent may be procured under conditions that fall well short of the free and informed standard that reproductive rights instruments presuppose, and surrogates report inadequate medical information, restrictions on movement, and limited control over the conditions of their own pregnancy.[46] The Committee on the Elimination of Discrimination against Women has, since 2019, begun to articulate this concern directly, calling on states to protect surrogates against exploitation, discrimination, and violence rather than treating the practice as either wholly prohibited or wholly unregulated.[47]

A further strand of human rights scholarship reframes surrogacy as a form of reproductive labor, arguing that the surrogate's contribution should be assessed through the lens of

[44]Convention on the Elimination of All Forms of Discrimination against Women, Arts. 12, 16.
[45]Barbara Stark, "Transnational Surrogacy and International Human Rights Law," 372.
[46]International Human Rights Clinic, University of Chicago Law School, "Human Rights Implications of Global Surrogacy" (Chicago: University of Chicago Law School, 2019), 3.
[47]Women Deliver, "Joint Submission to the Special Rapporteur on Violence against Women and Girls' Call for Inputs on the Report, 'Surrogacy and Violence against Women'" (2025), 2.

economic and labor rights, including the right to fair compensation, safe working conditions, and maternal health protection under instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Labour Organization's Maternity Protection Convention No. 183.[48] This labor-oriented framing usefully shifts attention away from a binary choice between prohibition and unregulated permission, and toward the design of protective standards, informed consent procedures, independent legal counsel, guaranteed medical care, and enforceable compensation, that could apply regardless of whether a state ultimately chooses to permit, restrict, or prohibit surrogacy outright. It is precisely this design question, rather than the abstract legality of surrogacy as such, that the reconstruction proposed in this article seeks to address.

The comparative literature also cautions against treating reproductive autonomy and protection from exploitation as though they necessarily point toward opposite regulatory conclusions. The Iran–Europe comparison shows that jurisdictions sharing a broadly similar religious and cultural starting point have nonetheless produced markedly different surrogacy regimes once distinct policy choices about oversight, compensation, and eligibility were layered onto that shared foundation, indicating that the outcome is a function of regulatory design choices rather than of any single tradition's values in isolation.[49] Jurisdictions with the most permissive, least regulated surrogacy markets have tended, on the available evidence, to become net importers of demand precisely because their absence of safeguards, rather than any inherent feature of surrogacy itself, is what intended parents from more restrictive jurisdictions are seeking to exploit.[50] This pattern strengthens rather than weakens the case for a protective, rights-respecting regulatory model of the kind reconstructed below, since

[48]Lauren Danielowski, "Reproduction as Work: Addressing a Gap in Current Economic Rights Discourses," 34.
[49]Fatemeh Ghodrati, "A Comparative Study of Surrogacy Rights in Iran and European Countries," 105.
[50]Claudia Flores, "Accounting for the Selfish State," 380.

it suggests that the central policy variable determining exploitation is the presence or absence of enforceable safeguards, not the legality of surrogacy as such.

This human rights analysis converges, in turn, with the child-centered principle that international children's rights law treats as paramount in matters affecting a child's identity and family relationships: that the child's best interests must be a primary consideration, and that every child has, so far as possible, the right to know and be cared for by their parents and to preserve their identity, including nationality and family relations.[51] A regulatory model that leaves a surrogacy-born child's identity and family status permanently unresolved, as the current Indonesian vacuum does, is difficult to reconcile with this principle regardless of how the underlying dispute between the surrogate and the intended parents is ultimately resolved. This is a further respect in which the human rights framework converges with, rather than competes against, the customary and religious resources examined above: all three traditions, from different starting points, treat the prompt, formal resolution of a child's status as a protective imperative in its own right, independent of how the adults' competing claims are eventually settled.

Methodologically, this maṣlaḥah-based openness is not a departure from classical Islamic legal method but an application of its established tools for reasoning about cases the primary texts do not address directly. Uṣūl al-fiqh recognizes qiyās, reasoning by analogy from a settled case to a new one sharing its underlying rationale ('illah), and maṣlaḥah mursalah, unregulated public interest, as legitimate instruments for extending settled principles to novel circumstances such as reproductive biotechnology, provided the resulting ruling remains anchored in the maqāṣid the tradition already recognizes.[52] Applied to surrogacy, this method supports exactly the qualified, protection-oriented position developed here: the 1979 fatwa's caution about third-party

[51]Convention on the Rights of the Child, 1989, Arts. 3, 7–8.
[52]Amir Syarifuddin, Ushul Fiqh, 233.

gestation remains the operative starting point, but it does not foreclose a future, more specific ijtihad addressing surrogacy conducted within a regulated, altruistic, and lineage-documenting framework, since such a framework would respond to the same underlying concern, the preservation of nasab and family stability, through different institutional means than were available or contemplated in 1979.

Reconstructing an Integrated Model: Living Law as a Bridge between Customary, Religious, and Human Rights Norms

The preceding sections show that customary law, Islamic legal reasoning, and international human rights standards, despite their distinct vocabularies and institutional histories, converge on three shared concerns relevant to surrogacy: the protection of women's dignity and bodily autonomy against exploitation; the imperative of resolving, rather than ignoring, the uncertain status of the child; and a preference for formal, community- or state-ratified acknowledgment over silence or informal arrangement wherever biological certainty is unavailable. Living law, understood as the norms a society actually observes and is prepared to enforce,[53] offers the conceptual bridge through which this convergence can be translated into positive regulation, because it is precisely the space in which customary and religious norms already operate as functioning sources of legal legitimacy within Indonesian society, now reinforced by their explicit statutory recognition in the new Penal Code.[54]

On this basis, an integrated model of protection can be reconstructed around four pillars. The first is a clear, express statutory position on surrogacy, replacing the current vacuum with either a carefully bounded regulatory pathway or an explicit prohibition accompanied by protective, non-punitive treatment of surrogates and children, since the present ambiguity, as shown

[53]Eugen Ehrlich, Fundamental Principles of the Sociology of Law, 493.
[54]Afandono Cahyo Putranto and Irwan Triadi, "Konsep Hukum Pidana Adat Pasca Pemberlakuan Undang-Undang Nomor 1 Tahun 2023," 7325.

above, harms precisely the parties it should protect. The second pillar is a formal-acknowledgment mechanism for parentage, modeled on the structurally similar solutions already present in both customary law's community-ratified child recognition and Islamic law's laqīṭ-based approach to children of uncertain lineage, allowing the intended parents' relationship with a surrogacy-born child to be formally and swiftly established through documented consent and community or judicial ratification rather than through prolonged, adversarial adoption proceedings.[55]

The third pillar consists of enforceable protective standards for the surrogate herself, drawing on the reproductive-labor framing developed in international human rights scholarship: independent legal counsel and counselling prior to any agreement, guaranteed medical care throughout pregnancy and postpartum recovery, a defined and revocable consent process, and fair compensation structured to avoid the coercive dynamics associated with informal or purely commercial arrangements.[56] The fourth pillar is institutional: the deliberate use of existing customary dispute-resolution and community-recognition institutions at the village level, alongside religious counsel where the parties are Muslim, as accessible first-instance mechanisms for oversight and dispute resolution, reserving formal courts for contested or high-risk cases.[57] Together, these four pillars translate the shared normative commitments identified across customary law, Islamic legal reasoning, and human rights standards into a workable regulatory architecture, one that neither imports a foreign commercial-surrogacy model wholesale nor leaves the present vacuum, and the harms it enables, unaddressed.

This four-pillar reconstruction is not without implementation challenges, and intellectual honesty requires acknowledging them rather than assuming them away. Indonesian

[55]Ellyne Dwi Poespasari, "Kedudukan Anak Luar Kawin dalam Pewarisan Ditinjau dari Sistem Hukum Kekerabatan Adat," 215.
[56]Lauren Danielowski, "Reproduction as Work," 38.
[57]Nurdhin Baroroh, M. Misbahul Mujib, and Iswantoro, "Peradilan Desa Adat sebagai Instrument Integral Pembangunan Hukum Nasional," 5.

legal scholarship on the new Penal Code's own living-law provision has warned that opening formal legal space to community norms risks inconsistent outcomes across regions with different adat traditions, and risks vesting excessive interpretive discretion in local decision-makers unless clear procedural criteria constrain how living law is identified and applied.[58] The same risk applies with equal force to a living-law-based surrogacy framework: without clear national minimum standards, for example, a mandatory floor of consent, health, and compensation protections, applicable uniformly regardless of which regional adat institution is involved, the formal-acknowledgment and community-oversight pillars proposed here could produce uneven protection rather than the coherent national framework the study seeks to reconstruct. Sofyan Hadi's account of the tension between positive law and living law is instructive here: living law strengthens rather than undermines legal certainty only when it operates within, rather than outside, a clearly bounded statutory framework that specifies its scope, its evidentiary basis, and its limits.[59] Any legislative reform building on the model proposed here would therefore need to pair its four substantive pillars with a fifth, procedural safeguard: a national minimum-standards regulation issued at the statutory or ministerial level, within which regional customary and religious institutions would operate as implementing, rather than freely discretionary, authorities.

Comparative Insight and Policy Recommendations

Comparative experience illustrates both the risks of premature liberalization and the costs of prolonged ambiguity. Jurisdictions that have permitted commercial surrogacy without robust protective standards have, in a number of documented cases, produced markets in which gestational carriers received a disproportionately small share of the total transaction value while

[58]Yustisia Amanda Fajrin and Andhika Fajar Triwijaya, "Arah Pembaharuan Hukum Pidana Indonesia di Tengah Pluralisme Hukum Indonesia," Ekspose: Jurnal Penelitian Hukum dan Pendidikan 18 (2019): 734.
[59]Sofyan Hadi, "Hukum Positif dan The Living Law," 265.

bearing the greatest physical and psychological burden, underscoring the necessity of the protective, rather than purely permissive, orientation proposed here.[60] Conversely, jurisdictions that combine an explicit legal pathway with independent oversight, mandatory counselling, and clearly defined parentage-recognition procedures demonstrate that regulation, properly designed, can reduce rather than increase the exploitation risks associated with unregulated practice.[61]

For Indonesia, this comparative lesson suggests that legal reform should not be framed as a binary choice between wholesale prohibition and unregulated permission. A more promising path is legislative clarification that, first, closes the current rechtsvacuüm by stating expressly how surrogacy arrangements, and the children born from them, are to be treated in law; second, incorporates the formal-acknowledgment mechanism described above as the primary route to establishing intended parentage; third, mandates the protective standards identified in the human rights literature as a condition of any lawful arrangement that may in the future be permitted; and fourth, formally integrates customary and religious deliberative institutions into the oversight structure, consistent with the living-law recognition already embedded in the new Penal Code. Such reform would not require Indonesia to adopt a foreign regulatory template; it would instead give legislative form to normative resources, communal responsibility, formal acknowledgment, and the preservation of dignity and lineage, that are already present, and already authoritative, within Indonesia's own plural legal culture.

Legislators pursuing this path should also anticipate the institutional capacity that a living-law-based framework requires. Village-level customary institutions and religious counselling bodies vary considerably in their current resourcing and familiarity with reproductive-technology issues, and neither adat

[60]Barbara Stark, "Transnational Surrogacy and International Human Rights Law," 378.
[61]Fatemeh Ghodrati, "A Comparative Study of Surrogacy Rights in Iran and European Countries," 112.

functionaries nor religious counsellors can be expected to absorb an oversight role of this kind without dedicated training, clear procedural guidance, and a functioning referral pathway to medical and legal specialists for cases that exceed their competence. Building this capacity is therefore not a peripheral implementation detail but a precondition for the model's protective pillars to function as intended; a formal-acknowledgment mechanism administered by an untrained or under-resourced local institution risks becoming a procedural formality rather than the substantive safeguard the reconstruction proposed here is meant to provide.

Any legislative pathway of this kind should also be sequenced rather than introduced at once. A phased approach, beginning with the formal-acknowledgment mechanism and the mandatory protective standards for existing informal arrangements, followed by a longer evaluation period before any decision is made on whether to permit regulated surrogacy prospectively, would allow policymakers to observe how the customary and religious oversight institutions actually perform before broadening their role. Such a staged approach is also more consistent with the cautious tenor of the maqāṣid-based and adat-based reasoning developed above, both of which favor incremental, evidence-responsive ijtihad and adaptation over abrupt regulatory change.[62] A monitoring framework, built around periodic reporting by the village-level and religious oversight bodies described in the third pillar, would additionally generate the empirical record that Indonesian surrogacy scholarship, dominated to date by doctrinal analysis, has so far lacked.

Placed within the broader discourse this article has reviewed, the reconstruction offered here departs from prior Indonesian scholarship in a specific way: rather than asking whether surrogacy is permissible under civil law or under Islamic law considered separately, it asks what the three normative orders already operating within Indonesian society, state law, customary law, and religious law, share in common, and treats that shared

[62]Husni Thamrin, Aspek Hukum Bayi Tabung, 61.

ground, rather than any single tradition's rules taken in isolation, as the proper foundation for reform. Read together with the comparative and human rights literature on transnational surrogacy, this approach suggests that the central policy failure in Indonesia is not the absence of a single correct answer to the question of surrogacy's legality, but the absence of any mechanism, statutory, customary, or religious, through which a child's status and a surrogate's protection can be promptly and reliably established once an arrangement has already occurred.

Conclusion

This study set out to examine how Indonesia's plural legal order might resolve the protective vacuum surrounding surrogacy by reading customary law, Islamic legal reasoning, and international human rights standards as complementary rather than competing sources of normative guidance, and it finds that the three traditions converge on a shared commitment to women's dignity, the clarity of a child's status, and the priority of formal, community-ratified acknowledgment over silence or informal practice wherever biological certainty is unavailable. Reconstructed through the framework of living law, this convergence yields a coherent model built on four pillars: an express regulatory position replacing the current legal vacuum, a formal-acknowledgment mechanism for establishing parentage, enforceable protective standards safeguarding the surrogate's autonomy, health, and fair compensation, and the deliberate use of customary and religious institutions as accessible sites of oversight and dispute resolution. The implication for policy is that legal reform need not choose between imported commercial models and continued silence; it can instead draw legitimacy and specificity from normative resources already recognized within Indonesian society, offering a path toward regulation that is at once locally grounded, religiously defensible, and consistent with international human rights commitments. Future research might usefully test this model empirically against the lived experience of Indonesian women who have already participated in informal surrogacy

arrangements, whose perspectives remain largely absent from the doctrinal literature this study has reviewed.

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