



Surrogacy in the Absence of National Legal Framework: An Analysis of Child Protection Based on Civil Law and Islamic Law in Indonesia

Surrogasi Dalam Kekosongan Hukum Nasional: Analisis Perlindungan Anak Berdasarkan Hukum Perdata dan Hukum Islam di Indonesia

Cucu Solihah ^{1*}, Anita Kamilah ², Adam Sadam Kahfi M. Yusuf ³,
Hasanah Subahli Adjrun ⁴

^{1,2,3}Universitas Surya Kencana, Indonesia;

⁴ Charles Darwin University, Australia;

*Correspondence: cucusolihah@unsur.ac.id

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Abstract

The practice of surrogacy or surrogacy is a phenomenon of assisted reproduction that is growing globally along with advances in health technology, but has not yet received clear legal regulations in the Indonesian national legal system. The absence of this regulation creates a legal vacuum that impacts the uncertainty of the civil status and protection of children born from surrogacy practices. This study aims to analyze the implications of the surrogacy legal vacuum for child protection from the perspectives of civil and Islamic law in Indonesia. This study uses a normative legal research method with a legislative, conceptual, and comparative approach. Data were obtained through a literature review of relevant primary, secondary, and tertiary legal materials. The results show that Indonesian civil law does not provide a clear mechanism for determining the status of parents, lineage, and civil rights of children in the context of surrogacy, thus potentially ignoring the principle of the best interests of the child. Islamic law normatively does not condone the practice of surrogacy because it contradicts the principle of maintaining lineage as part of the *maqashid al-shariah*, but still emphasizes the obligation to protect children as a trust whose rights and dignity must be protected. An integrative analysis reveals a common ground between civil law and Islamic law in their orientation toward child protection, despite differing normative approaches. This study recommends the need to formulate a national legal policy that does not legitimize the practice of surrogacy but still guarantees comprehensive and equitable legal protection for children born.

Keywords: Legal vacuum; Child protection; Surrogacy.

Abstrak

Praktik *surrogacy* atau ibu pengganti merupakan fenomena reproduksi berbantu yang berkembang secara global seiring kemajuan teknologi kesehatan, namun belum memperoleh pengaturan hukum yang jelas dalam sistem hukum nasional Indonesia. Ketidadaan regulasi tersebut menimbulkan kekosongan hukum yang berdampak pada ketidakpastian status keperdataan dan perlindungan anak yang lahir dari praktik *surrogacy*. Penelitian ini bertujuan untuk menganalisis implikasi kekosongan hukum *surrogacy* terhadap perlindungan anak dalam perspektif hukum perdata dan hukum Islam di Indonesia. Penelitian

ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan komparatif. Data diperoleh melalui studi kepustakaan terhadap bahan hukum primer, sekunder, dan tersier yang relevan. Hasil penelitian menunjukkan bahwa hukum perdata Indonesia belum menyediakan mekanisme yang tegas dalam menentukan status orang tua, nasab, serta hak keperdataan anak dalam konteks *surrogacy*, sehingga berpotensi mengabaikan prinsip kepentingan terbaik bagi anak. Hukum Islam secara normatif tidak membenarkan praktik *surrogacy* karena bertentangan dengan prinsip penjagaan nasab sebagai bagian dari *maqashid al-shariah*, namun tetap menegaskan kewajiban perlindungan terhadap anak sebagai amanah yang harus dijaga hak dan martabatnya. Analisis integratif memperlihatkan adanya titik temu antara hukum perdata dan hukum Islam dalam orientasi perlindungan anak, meskipun berbeda dalam pendekatan normatif. Penelitian ini merekomendasikan perlunya perumusan kebijakan hukum nasional yang tidak melegitimasi praktik *surrogacy*, tetapi tetap menjamin perlindungan hukum yang komprehensif dan berkeadilan bagi anak yang dilahirkan.

Kata Kunci: Kekosongan hukum; Perlindungan anak; *Surrogacy*

1. INTRODUCTION

The development of assisted reproductive technology has brought about various innovations in the field of reproductive health, one of which is the practice of surrogacy (Vasileiou, 2024). This practice allows couples with biological disabilities to conceive through the assistance of another woman who carries and gives birth to the child for them (Flores, 2023). Globally, surrogacy has become a transnational phenomenon, giving rise to a variety of legal approaches, ranging from limited legalization, strict restrictions, to outright prohibition. The complexity of surrogacy regulations extends beyond medical and contractual aspects to ethical, social, and family law dimensions, particularly regarding the status and protection of children born through the practice (Mutavdzic, 2024).

In Indonesia, surrogacy occupies a problematic position within the national legal system. To date, there is no legal regulation that explicitly and comprehensively regulates the practice. The Health Law and its implementing regulations only provide limited coverage for assisted reproductive technology and tend to restrict the practice of surrogacy. However, they do not provide clear norms regarding the legal consequences for children born from such practices (Thalib & Marsal, 2025). This situation creates a legal vacuum that can lead to legal uncertainty, particularly in determining a child's civil status, parent-child relationships, and the fulfillment of children's basic rights (Heriyanto & Gasimzadeh, 2024).

The legal vacuum surrounding surrogacy in Indonesia becomes even more crucial when linked to the principle of child protection. Children are legal subjects with constitutional rights to protection, certainty of legal status, identity, and adequate care. In the context of surrogacy, children are at risk of facing various legal issues, such as unclear parental status, issues of lineage, guardianship, inheritance rights, and potential social stigmatization. Without a clear legal framework, protection for children born from surrogacy is weak and suboptimal.

From a civil law perspective, the issue of surrogacy is closely related to the validity of civil relationships, the status of children, and the legal responsibilities of the parties involved (Suryadi et al., 2025). Meanwhile, from an Islamic legal perspective, surrogacy is viewed through the principle of safeguarding offspring (*hifz al-nasl*), which is part of the *maqasid al-shariah* (Yudha et al., 2025). The differing approaches of civil law and Islamic law to the status of children and kinship relationships add to the complexity of surrogacy regulations in Indonesia, which adheres to a pluralistic legal system (Sujadmiko et al., 2023).

Many studies on surrogacy from a legal perspective have been conducted internationally, particularly regarding the legal status of children and the protection of their rights. Mutavdzic, (2024) highlights the complexity of cross-border surrogacy and asserts that the lack of uniform regulations has the potential to leave children stateless and without clear legal status. This study emphasizes the best interests of the child as a primary principle in regulating surrogacy. On the other hand, Stasi (2017) demonstrated through a comparative study that differences in state approaches to surrogacy, both

legalizing and prohibiting it, create legal uncertainty for children, particularly in determining parentage legally. This study emphasizes the urgency of harmonizing international law to protect children's rights. In the context of Islamic law, Research by Layaida & Zekagh (2025) and Ansari & Saeed (2023) concluded that surrogacy is generally not justified because it violates the principle of maintaining lineage (*hifz al-nasl*). Niazi (2017) study emphasized that child protection in Islam is not solely individual but also closely related to social order and clarity of lineage. In Indonesia, research on surrogacy conducted by Hardika & Mahadewi (2025) and Antari & Asmari (2020), focuses more on the implicit prohibition of surrogacy in the Health Law and on the validity of surrogacy agreements under civil law. However, these studies have not yet thoroughly integrated child protection analysis with an Islamic legal perspective. Based on a review of previous research, it can be concluded that there has been no comprehensive study addressing the legal gap in surrogacy in Indonesia, placing child protection as the primary focus through an integrative approach between civil law and Islamic law. Therefore, this research aims to fill this academic gap.

This study aims to analyze the legal gaps in Indonesia's national legal system regarding surrogacy and their implications for child protection, from the perspectives of civil law and Islamic law. This study also seeks to identify the intersections and differences between these two legal regimes in providing child protection, while also offering a conceptual basis for formulating surrogacy legal policies oriented toward the best interests of children. With this approach, the article is expected to make academic and practical contributions to the development of family law and child protection in Indonesia. Based on these two perspectives, this study also focuses on how civil law and Islamic law meet and differ in providing child protection amidst the legal gaps surrounding surrogacy in Indonesia, and how an integrative approach can be formulated to ensure the best interests of children.

2. METHOD

This research is a normative legal study that examines legal gaps in Indonesia's national legal system regarding surrogacy practices and their implications for child protection. The approaches used include a statutory approach, a conceptual approach, and a comparative approach, specifically comparing the perspectives of civil law and Islamic law. The Research data sources consisted of primary, secondary, and tertiary legal materials. Primary legal materials included laws and regulations on health, family law, and child protection, as well as Islamic legal provisions, such as the Compilation of Islamic Law and related fatwas. Secondary legal materials included textbooks, scientific journal articles, previous Research results, and international documents relevant to surrogacy and children's rights. Tertiary legal materials were used to support conceptual and terminological understanding. The legal materials were analyzed qualitatively using descriptive-analytical methods. The collected legal materials were systematically analyzed to identify legal gaps, normative implications for child protection, and the appropriateness and differences in approaches between civil law and Islamic law. The analysis results were used to formulate conclusions and prescriptive recommendations to protect children's best interests.

3. RESULT AND DISCUSSION

3.1. The Concept and Practice of Surrogacy in a Global Perspective

Surrogacy is a form of assisted reproductive technology (assisted reproductive technology) that involves a woman conceiving and giving birth to a child for another party based on an agreement (Sisminarnohadi et al., 2024). In global practice, surrogacy is not only understood as a medical phenomenon but also as a complex social and legal construct because it involves contractual aspects, family relationships, and the rights and interests of the child (Ismayilova, 2023). Conceptually, surrogacy can be divided into two main forms: traditional surrogacy and gestational surrogacy. Traditional surrogacy occurs when the surrogate mother donates her own ovum, thus having a genetic relationship with the child (Ding, 2016). Meanwhile, gestational surrogacy is carried out by implanting an embryo resulting from in vitro fertilization from a specific couple or donor into the surrogate mother's uterus, so that the surrogate mother has no genetic relationship with the child. Furthermore, surrogacy is also classified by motive: altruistic surrogacy, performed without commercial reward, and commercial surrogacy, which involves financial compensation (Hrekov et al., 2019).

Globally, legal regulations governing surrogacy vary widely across countries. Some countries, such as the United Kingdom and Canada, permit altruistic surrogacy with strict oversight. In contrast,

commercial surrogacy is prohibited to prevent the exploitation of women and the commodification of the human body (Kastrati, 2019). Other countries, such as the United States, adopt different approaches from state to state, with some regions legalizing surrogacy through legally recognized contracts (Pérez & Rincón, 2025). Conversely, several countries, such as France, Germany, and Japan, explicitly prohibit the practice of surrogacy, citing ethical, moral, and family protection concerns (Marinelli et al., 2024). These differing approaches demonstrate that surrogacy is a highly contextual legal issue influenced by the social and cultural values and legal systems of each country (Hanifah & Prawira, 2025). However, one relatively consistent issue across jurisdictions is the impact of surrogacy on the legal status of children. Children born through surrogacy, particularly in cross-border surrogacy contexts, often face uncertainty regarding their parental status, citizenship, and legal identity. In some cases, children even risk becoming stateless due to legal conflicts between the biological parents' country of origin and the country of birth (Andeso, 2024).

The international community, through various human rights instruments, places child protection as a primary principle in responding to the practice of surrogacy. The principle of the best interests of the child serves as a normative foundation requiring states to ensure that every child, regardless of their mode of birth, receives adequate legal protection. However, to date, there is no international legal instrument that specifically and bindingly regulates surrogacy, so regulations remain highly dependent on each country's national policies (Wojtan, 2025).

In this context, Indonesia falls within the spectrum of countries lacking explicit regulations regarding surrogacy. Indonesia tends to implicitly position surrogacy as an unjustified practice, without providing legal clarity regarding the consequences, particularly for children (Priyatama et al., 2022). When compared to global practice, this situation indicates that Indonesia faces similar challenges to other countries that prohibit surrogacy but have not yet fully established legal protection mechanisms for children born from the practice. Therefore, understanding the concept and practice of surrogacy from a global perspective is crucial as a basis for further analysis of the gaps in national law and their implications for child protection.

3.2. The Legal Void Of Surrogacy In The Indonesian National Legal System

The practice of surrogacy is one of the implications of the development of assisted reproductive technology that has not been fully addressed by the Indonesian national legal system (Heriyanto & Gasimzadeh, 2024). To date, there are no legal regulations that explicitly define, govern, or specify the mechanisms and legal consequences of surrogacy. This lack of regulation places surrogacy in a legal vacuum, resulting in legal uncertainty and weak protection for the parties involved, especially children born from the practice (Suryadi et al., 2025).

Normatively, the regulation most relevant to surrogacy is Law Number 36 of 2009 on Health. This law regulates the implementation of assisted reproductive technology with strict restrictions: it can only be performed by legally married couples and uses the couple's own reproductive cells, which are implanted into the wife's uterus (Zaharnika et al., 2025). This provision implicitly closes the door to surrogacy, particularly the use of another woman's uterus as a means of pregnancy. However, these norms are not accompanied by further regulations regarding the legal consequences if surrogacy practices continue, whether clandestinely within the country or through cross-border surrogacy.

The absence of explicit norms regarding surrogacy is also reflected in national civil and family law. The Civil Code only regulates the status of children based on marital relations and natural birth, without anticipating the development of modern reproductive technology (Priyatama et al., 2022). The concepts of legitimate and illegitimate children in the Civil Code do not provide clarity regarding the status of children born through surrogacy, especially when there is a distinction between biological parents, gestational parents, and parents who socially care for the child (Hardika & Mahadewi, 2025). This indicates a legal lag between technological developments and normative regulations.

Furthermore, Law Number 35 of 2014 concerning Child Protection affirms that every child has the right to identity, citizenship, care, and protection from all forms of discrimination (Thalib & Marsal, 2025). Although this norm is universal and upholds the principle of the best interests of the child, the law does not specifically regulate child protection in the context of surrogacy. Consequently, in practice, guarantees of protection for children born through surrogacy are highly dependent on the interpretations of law enforcement officials and administrative policies, which can vary.

The legal vacuum surrounding surrogacy also creates conflicting norms and multiple interpretations in its application. On the one hand, health norms emphasize restrictions on assisted

reproductive practices to maintain morality and social order. On the other hand, child protection norms require the state to continue to provide legal protection to every child without discrimination. Without specific norms governing surrogacy, these two interests often clash in practice, creating a legal dilemma between prohibiting the practice and protecting against its consequences.

The most significant impact of this legal vacuum is felt by children born through surrogacy. Children face potential uncertainty regarding their parents' legal status, particularly in determining their civil relationship with biological parents or surrogate mothers. This uncertainty can make it difficult to register births and obtain birth certificates, which are fundamental rights for children and a gateway to fulfilling other rights. In the long term, this uncertainty also impacts inheritance rights, guardianship, and parenting responsibilities.

Furthermore, the legal vacuum surrounding surrogacy opens up opportunities for practices that are potentially detrimental and exploitative of women and children. Without clear regulations, surrogacy practices can be conducted clandestinely and without state oversight, increasing the risk of human rights violations. In a cross-border context, Indonesian citizens who engage in surrogacy abroad also face potential legal challenges upon returning to Indonesia, particularly regarding the legal recognition of the child's and parents' status (Sisminarnohadi et al., 2024).

This legal vacuum also impacts the role of the judiciary. In the absence of specific norms, judges are forced to make legal discoveries (*rechtsvinding*) based on general legal principles and a sense of justice. While this allows for case-by-case protection for children, it can lead to inconsistent decisions and legal uncertainty. This situation demonstrates that the legal vacuum regarding surrogacy cannot persist without a clear regulatory framework.

From the perspective of a pluralistic national legal system, the legal vacuum regarding surrogacy also implies disharmony between positive law and prevailing socio-religious values within society. The absence of clear regulations leaves surrogacy in a gray area, where state law is not fully present, while religious and social norms strongly influence assessments of its legitimacy. This situation has the potential to give rise to value conflicts and legal protection uncertainty.

The legal vacuum regarding surrogacy in Indonesia's national legal system is not merely the absence of written norms; it reflects the urgent need for an adaptive legal response to technological developments and global dynamics. Child-protection-oriented surrogacy regulations are crucial to guarantee legal certainty, prevent exploitative practices, and ensure that every child, regardless of their mode of birth, receives equal legal protection. This section provides an important foundation for further analysis of the construction of child protection from the perspective of civil law and Islamic law.

3.3. Child Protection From A Civil Law Perspective

Child protection from a civil law perspective positions children as legal subjects with rights and interests that the state and society must guarantee. In the context of surrogacy practices, the civil law perspective is crucial because it directly relates to determining a child's legal status, the civil relationship between the child and the parents, and the legal responsibilities of the parties involved. While surrogacy practices are not explicitly regulated in the Indonesian national legal system, civil law serves as a normative instrument for interpreting and filling legal gaps to ensure child protection (Sujadmiko et al., 2023).

In the Indonesian civil law system, the status of children is normatively regulated through the concepts of legitimate children and illegitimate children. Legitimate children are, in principle, children born in or as a result of a legal marriage, thus automatically having a civil relationship with both parents. Meanwhile, illegitimate children have a limited civil relationship, traditionally recognized only with the mother and the mother's family, although developments in jurisprudence and legislation have expanded this recognition (Heriyanto & Gasimzadeh, 2024). In the context of surrogacy, this categorization becomes problematic because the pregnancy and birth process do not always align with conventional civil law.

The main issue in surrogacy is determining who is legally considered a parent. In surrogacy practice, three potential parents can emerge: the biological parents (who donate sperm and ovum), the gestational mother (the woman who carries the child and gives birth), and the parents who socially care for and are responsible for the child (Riski & Saini, 2025). Indonesian civil law does not yet provide clear guidelines for determining priority among these three entities. As a result, the legal status of

children born through surrogacy can potentially be a gray area, especially when disputes or differing interests arise.

Within the civil law framework, the relationship between parents and children gives rise to reciprocal rights and obligations, including obligations of care, custody, and protection. The unclear status of parents in surrogacy directly impacts the certainty of fulfilling these obligations. Children are at risk of not receiving optimal care if there is no clear legal recognition of the party responsible for their care (Syahmanda et al., 2024). In such circumstances, child protection becomes highly dependent on the good faith of the parties, which cannot always be guaranteed.

Another important aspect of child protection under civil law is the right to identity and birth registration. A birth certificate is a fundamental legal document that confirms a child's status as a legal subject and serves as the basis for fulfilling other rights, such as education, health, and social protection (Dickenson & van Beers, 2020). In cases of surrogacy, birth registration often faces administrative challenges due to unclear parental identification. This uncertainty can hinder children's access to public services and weaken their legal standing in the future (Shanbe Zehi et al., 2025).

Furthermore, child protection from a civil law perspective also encompasses inheritance rights. A child's inheritance rights are highly dependent on the recognition of their civil relationship with their parents. If the parents' status is unclear or not legally recognized, children born through surrogacy may lose their inheritance rights, both to their biological parents and to their foster parents (Farendra & Mahadewi, 2025). This situation contradicts the principles of justice and child protection that the civil law system should guarantee.

The issue of surrogacy also relates to the validity of the agreement. In global practice, surrogacy is often based on an agreement between a surrogate mother and the intended parents (Amarteifio et al., 2025). Under Indonesian civil law, an agreement must meet certain legal requirements, including a lawful cause. Given that surrogacy is unregulated and often viewed as contrary to moral norms and public order, the validity of surrogacy agreements is highly questionable. The invalidity of such agreements further weakens children's legal position, as there is no contractual instrument to provide protection.

In addressing the legal vacuum of surrogacy, Indonesian civil law does possess general principles that can be used to protect children. The principle of the best interests of the child, although more often associated with international law and family law, is also relevant in the context of civil law. This principle requires that all interpretation and application of the law prioritize the interests of the child over those of the adult parties involved in the surrogacy.

Furthermore, developments in civil law jurisprudence and doctrine indicate a trend toward providing broader protection for children, regardless of their birth background. This approach aligns with the spirit of non-discrimination and human rights protection. In the context of surrogacy, this approach can serve as a basis for recognizing children's legal status and fulfilling their rights, even though the practice of surrogacy itself lacks a clear legal basis (Alloero et al., 2025).

Child protection from a civil law perspective faces serious challenges amidst the legal vacuum surrounding surrogacy in Indonesia. The absence of specific regulations creates uncertainty about children's legal status and potentially undermines their civil rights. Therefore, efforts are needed to strengthen the civil law framework through progressive interpretation and regulatory reforms oriented toward the best interests of children. This discussion provides an important basis for comparing and integrating civil law perspectives with Islamic law in formulating comprehensive child protection within surrogacy practices in Indonesia.

3.4. Child Protection From An Islamic Legal Perspective

Child protection from an Islamic legal perspective stems from the principle that children are a divine trust (*amanah Ilahiyyah*) whose rights, dignity, and future must be protected. Islam places children as subjects of inherent protection from conception to adulthood (Islam et al., 2013). In the context of surrogacy, an Islamic legal approach is highly relevant because this issue is directly related to the protection of offspring (*hifz al-nasl*), clarity of lineage, and the welfare of children as the primary objective of sharia (*maqasid al-shariah*) (Nadeem et al., 2022).

In general, the majority of contemporary scholars view the practice of surrogacy as unjustified under Islamic law. This rejection is based on concerns about mixing lineages and confusing family relationships. In surrogacy, the presence of different biological and gestational mothers is seen as potentially creating unclear lineage, which contradicts the basic principle of Islamic law regarding

clarity of lineage (Ebrahimi & Ghodrati, 2025). Clarity of lineage is a crucial foundation for determining legal rights and obligations, including guardianship, inheritance, and parenting responsibilities.

The principle of *hifz al-nasl*, as one of the primary objectives of sharia, emphasizes protecting offspring from practices that could undermine family structure and legitimate biological relationships (Syahmanda et al., 2024). In this context, surrogacy is seen as potentially diminishing the meaning of motherhood and obscuring the role of the family in Islam. Therefore, Islamic law tends to adopt a preventative approach, rejecting practices that could cause harm, even if they aim to help couples conceive.

Although the practice of surrogacy is generally not permitted, Islamic law still places serious emphasis on the protection of children born from such practices. A fundamental principle of Islamic law states that children should not bear the consequences of adult actions that violate sharia. Children born under any circumstances still have the right to be protected, cared for, and treated fairly. This approach emphasizes that the prohibition of surrogacy should not imply a disregard for children's rights.

From an Islamic legal perspective, determining a child's lineage is a central aspect of legal protection. A child's lineage is generally attributed to the woman who gives birth (*al-walidah*), as emphasized in several classical Islamic jurisprudence views. However, in the context of modern reproductive technology, this view faces conceptual challenges, particularly when the egg originates from another woman (Riski & Saini, 2025). While there are differences of opinion among contemporary scholars, the general trend remains to emphasize caution in establishing lineage to prevent lineage mixing.

Determining lineage directly affects children's inheritance rights and guardianship. Under Islamic law, inheritance rights can only arise from legitimate lineage or marriage. If a child's lineage is not clearly recognized, their inheritance rights are limited. However, Islamic law provides other mechanisms to ensure children's welfare, such as *wajibah* (gifts) and wills, which can be used to protect children's economic interests even if an inheritance relationship cannot be established (Hammad et al., 2025).

Child protection from an Islamic legal perspective is also reflected in the principles of *maslahah* (benefit) and *dar' al-mafasid* (benefit). These principles require that all policies and legal interpretations be directed towards achieving benefits and preventing harm. In the context of surrogacy, although the practice is considered problematic, the welfare of the child who has already been born must be the top priority (Tavakkoli, 2022). Therefore, the state and society are obliged to ensure that children receive adequate care, education, and protection.

The *maqasid al-shariah* approach provides a robust conceptual framework for addressing surrogacy. In addition to *hifz al-nasl* (protection of life) and protection of property (protection of property) are also relevant to child protection. Children have the right to a decent standard of living, health, and economic security, regardless of the legal controversies surrounding their birth (Farooqi, 2022). Therefore, Islamic law is not merely normative prohibitive but also provides solutions to ensure children's well-being (Rana et al., 2024).

In the Indonesian context, Islamic legal views on surrogacy are reflected in various fatwas and the views of Islamic scholars, who tend to reject the practice. However, this approach still emphasizes child protection as part of the moral and legal responsibility of Muslims. The absence of clear positive legal regulations regarding surrogacy requires an active role in Islamic legal values as an ethical and normative source in formulating policies that are just and oriented toward children's interests.

Child protection from an Islamic legal perspective demonstrates a balance between strict norms and flexibility for the benefit of the community. Although surrogacy is considered inconsistent with Sharia principles, the rights of children born from this practice must still be fully protected. This approach emphasizes that the primary goal of Islamic law is to achieve justice and welfare, not merely to enforce formal prohibitions. This discussion provides an important foundation for an integrative analysis of civil law and Islamic law to address the legal vacuum surrounding surrogacy in Indonesia.

3.5. Integrative Analysis: Civil Law and Islamic Law In Child Protection

An integrative analysis of civil law and Islamic law in the protection of children in surrogacy practices is crucial, given the pluralistic nature of the Indonesian legal system and its religious nature. The lack of national law regarding surrogacy not only raises normative issues but also creates tensions between positive law and religious values. Therefore, an integrative approach is needed to formulate a

child protection framework that not only provides legal certainty but also aligns with moral values and substantive justice.

From a civil law perspective, child protection in surrogacy practices focuses on legal status, civil relations, and the fulfillment of children’s rights as legal subjects. The primary focus of civil law is to provide certainty regarding who is legally responsible for the child, including parental rights and obligations, birth registration, and inheritance rights. In the context of the lack of surrogacy law, civil law has the potential to protect the principle of the child’s best interests and a non-discriminatory approach to the child’s birth status (Irinescu, 2025). However, without explicit provisions, this protection tends to be case-specific and dependent on the interpretation of law enforcement officials.

Meanwhile, Islamic law places child protection within the framework of the maqasid al-shariah (Islamic principles), specifically the principle of safeguarding descendants (hifz al-nasl). This perspective emphasizes clarity of lineage as the foundation of legal protection for children, as lineage determines various legal consequences such as guardianship and inheritance. Although Islamic law tends to reject the practice of surrogacy due to the potential for mixed lineages, this approach does not neglect the protection of children who have already been born (Priyatama et al., 2022). Islamic law emphasizes that children should not bear the consequences of actions that violate sharia, so children’s basic rights must still be guaranteed.

The intersection between civil law and Islamic law lies in the goal of child protection. Both legal systems recognize children as parties who must be protected from injustice and discrimination. The principle of the best interests of the child in civil law is substantially aligned with the principle of benefit (maslahah) in Islamic law. Both require that all policies and legal interpretations prioritize the welfare of the child over the interests of the adults involved in the practice of surrogacy.

However, there are fundamental differences in the approaches of the two legal systems. Civil law tends to be pragmatic and adaptive to social and technological developments, making it more open to recognizing the legal status of children, even though the practice of surrogacy is not explicitly regulated. In contrast, Islamic law is normative-preventive, emphasizing prohibitions on practices that could damage family structure and lineage. This difference is often perceived as contradictory, although in reality, the two approaches can complement each other within the framework of child protection.

Integration of civil law and Islamic law in child protection can be achieved by harmonizing their values and fundamental principles. In the context of surrogacy, this harmonization can be achieved by making child protection a central focus of regulation, without necessarily legitimizing the practice itself. The state can adopt a position that does not condone the practice of surrogacy, but still provides clear legal mechanisms to protect children born from the practice, both through recognition of civil status and guarantees of children’s basic rights.

This integrative approach also demands an active role for the state in formulating legal policies responsive to developments in reproductive technology. Surrogacy regulations oriented toward child protection must be able to balance the interests of legal certainty with the religious values entrenched in society. In the Indonesian context, Islamic law can serve as a source of values and ethics in the formation of national law. In contrast, civil law provides a normative framework and operational legal mechanisms.

An integrative analysis shows that the legal vacuum surrounding surrogacy cannot be addressed solely through a sectoral approach. Child protection requires a multidimensional approach that simultaneously considers legal, moral, and social aspects (Ali & Ramadan, 2022). By integrating the principles of civil law and Islamic law, child protection in surrogacy practices can be formulated more comprehensively and equitably. An integrative analysis of civil law and Islamic law confirms that child protection must be a top priority in addressing the legal vacuum surrounding surrogacy in Indonesia. This approach not only strengthens the normative legitimacy of legal policy but also provides a clear direction for national legal reform that is adaptive, equitable, and oriented toward the best interests of children.

Table 1 Integrative Analysis of Child Protection in Surrogacy Practices

Analytical Aspects	Civil Law Perspective	Islamic Legal Perspective	Common Ground or Integration
Basic Approach	Juridical-positive and pragmatic; emphasizes legal certainty and	Normative-theological, based on the maqasid al-shariah; emphasizes the	Child protection as the primary goal, despite the controversy

Analytical Aspects	Civil Law Perspective	Islamic Legal Perspective	Common Ground or Integration
	recognition of children's civil status	preservation of lineage (<i>hifzu an-nasl</i>).	surrounding surrogacy practices
Attitudes Toward Surrogacy Practices	Not explicitly regulated; considered problematic due to the lack of a legal basis	Generally not permitted because it has the potential to confuse lineage.	States may not legitimize the practice, but still protect the child born there
Child Status	Children as legal subjects have the right to identity, care, and legal protection	Children are a trust whose rights and dignity must be protected.	Children should not be harmed by the actions of adults
Determination of Parentage	Unclear: biological, gestational, or social (caregiver)	Emphasis on clarity of lineage; caution in establishing parental relationships.	Legal mechanisms are needed to definitively establish parental responsibility
Lineage and Identity	Not specifically regulated in the context of surrogacy; potentially open to multiple interpretations	Lineage is fundamental; mixing lineage must be avoided.	Child identity must be guaranteed, although lineage determination must be carried out carefully
Children's Rights	Right to a birth certificate, care, protection, and welfare	Right to life, upbringing, education, and protection from discrimination.	Principles of non-discrimination and the best interests of the child
Inheritance Rights	Dependent on recognition of civil relationships	Reliant on legitimate lineage; alternatives through gifts/wills.	Non-inheritance mechanisms can be used to ensure child welfare
Surrogacy Agreements	Legislation is questionable (lawful causes and public order)	Not permitted because it contradicts sharia principles.	Child protection should not depend on the validity of the agreement
Main Principles of Protection	Best interests of the child	Maslahah and dar' al-mafasid.	The substance of the principle is aligned: prioritizing child welfare
Legal Policy Implications	Need for legal certainty and child protection mechanisms	Need for policies that align with sharia values.	National regulations that protect children without legitimizing surrogacy
Direction of Integration	Adaptive to social and technological developments	Maintain moral values and family structure.	Harmonization of values and norms for comprehensive child protection

Source: Compiled by Authors (2026)

Table 1 of this integrative analysis shows that although civil law and Islamic law have different approaches to the practice of surrogacy, both converge on one fundamental goal: child protection. Civil law stems from a positive-juridical approach that emphasizes legal certainty and recognition of the child's civil status as a legal subject with rights to identity, care, and welfare. However, the lack of specific regulations regarding surrogacy creates uncertainty in determining parentage, lineage, and the child's civil rights.

Meanwhile, Islamic law views surrogacy more normatively, emphasizing the preservation of lineage as part of the primary objective of sharia (*maqasid al-shariah*). This practice is generally not

permitted due to its potential to mix lineages and disrupt family structure. Nevertheless, Islamic law maintains that a child born must be treated as a trust whose rights to life, dignity, and well-being must be protected without discrimination.

The integration of these two perspectives confirms that the state does not have to legitimize the practice of surrogacy but remains obligated to provide comprehensive legal protection to children born from it. The principles of the best interests of children in civil law and *maslahah* in Islamic law share a similar substance, so they can serve as a normative basis for formulating national legal policies that are responsive, just, and oriented towards child protection.

4. CONCLUSION

This research shows that surrogacy practice raises complex legal issues in Indonesia's national legal system, particularly due to the lack of explicit, comprehensive regulations. This legal vacuum creates uncertainty regarding the civil status of children, parental determination, lineage relationships, and the fulfillment of the rights of children born through surrogacy practices. In this context, Indonesian positive law does not yet provide a clear mechanism to ensure optimal child protection without giving rise to multiple interpretations and potential normative conflicts. From a civil law perspective, children remain positioned as legal subjects with rights to identity, care, protection, and welfare. The principle of the best interests of the child is the primary foundation requiring the state to provide legal certainty, regardless of the legality of the surrogacy practice itself. However, the lack of specific regulations means this principle has not been effectively implemented in cases involving surrogacy. Meanwhile, Islamic law firmly emphasizes the importance of maintaining lineage as part of the primary objective of *sharia* (*maqasid al-shariah*). The practice of surrogacy is considered problematic because it has the potential to mix lineages and disrupt family order. Nevertheless, Islamic law does not ignore the rights of children born into the world, but rather affirms the moral and legal obligation to protect children as a trust, and to guarantee their right to life, care, and dignity without discrimination. An integrative analysis shows that, despite differences in normative approaches, both civil law and Islamic law share substantial common ground in their orientation toward child protection. Therefore, it is necessary to formulate a national legal policy that does not legitimize the practice of surrogacy, but still guarantees fair, certain, and best-interest legal protection for children as legal subjects whom the state must protect.

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