Challenges in Enforcing Surrogate Agreements and Surrogate Mothers in Indonesia

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Abstract
This study discusses the legal challenges in the practice of surrogacy in Indonesia from the perspective of positive law and maqāṣid syarīʻah. The background to the issue stems from the increasing need of infertile couples for alternative reproductive technologies, while regulations in Indonesia still prohibit and have not comprehensively regulated this practice. Surrogacy is considered socially taboo and contrary to religious values, thereby creating a legal vacuum that poses risks to all parties, especially the child and the surrogate mother. The methodology used is a legal-normative and sociological approach, with the main theories being contract law, the principle of ijarah, and maqāṣid syarīʻah. A comparison is made with Iran's legal system, which regulates surrogacy through state-recognized contractual mechanisms, unlike Indonesia, which remains restrictive. The research findings indicate that the absence of explicit regulations in Indonesia creates legal uncertainty, opens the door to exploitation, and fails to guarantee the rights of children and surrogate mothers. Conversely, Iran has established strict yet clear legal and religious requirements, thereby providing legal certainty and better protection. The discussion addresses five research questions and demonstrates that the ban on surrogacy in Indonesia contradicts medical realities and societal needs. This study recommends a contract model based on maqāṣid syarīʻah and the principle of ijarah, which is non-commercial in nature, to bridge the gap between positive legal requirements, religious values, and technological developments. In conclusion, Indonesia needs responsive, ethical, and religiously-based surrogacy regulations to prevent exploitation and ensure justice for all parties involved.

INTRODUCTION

The development of modern reproductive technology, especially the practice of *surrogacy* or womb rental, has created new dynamics and challenges in the Indonesian legal system. Although medically *surrogacy* is considered an alternative solution for couples who cannot have children biologically, this practice still raises high sensitivity in the context of law, culture, and religion (Aksa et al., 2025, pp. 52–53) , legal obstacles in Indonesia arise because there is no comprehensive, consistent, and adaptive regulation for the development of reproductive technology.

Law No. 23 of 1992 concerning Health and Law No. 17 of 2023 expressly prohibit the practice of *surrogacy* . However, this prohibition has not been accompanied by a holistic regulatory system, including in the aspects of supervision, legal protection for children born, to civil contracts between couples who entrust the seeds (*intended parents*) and surrogate mothers (*surrogate mothers*). As a result, there is no legal clarity regarding the status of children born through this method, both in terms of lineage, custody, citizenship status, and inheritance rights (Ruswandi & Frans, 2024, pp. 395–406) .

The absence of a clear legal framework also opens up the risk of exploitation of women who become surrogate mothers, both in terms of health, social, and economic. Moreover, in Indonesia's predominantly Muslim society, this practice also intersects with Islamic jurisprudence values regarding the protection of descendants (*hifz al-nasl*), which emphasize the importance of clear lineage and parental responsibility for the child born (Pratama et al., 2024, pp. 66–70) .

The complexity of the problem increases because there is a discrepancy between positive law that prohibits this practice, and the potential for ijtihad in Islamic law which in certain conditions can open up space for permissibility with certain conditions based on *the maqashid sharia* . In this context, the law must not only accommodate the principle of legality, but must also be responsive to social needs and religious values that live in society.

Unfortunately, the role of the state, in this case the government and legal institutions, has not been fully active in drafting regulations or providing space for public discussion on *surrogacy practices* . This ambiguity puts parties who want to undergo *surrogacy practices* , both domestic and foreign couples, in a vulnerable position, without clear legal protection.

Therefore, it is important to have a comprehensive, fair regulatory reform that is based on law, morals, and religious values. The regulation must be able to guarantee the protection of children's rights, the safety of surrogate mothers, and guarantee legal certainty for couples who need

surrogacy services . In Muslim society, this must also be formulated in accordance with sharia principles in order to maintain the noble value of protecting offspring and avoiding social damage (*mafsadat*) that can arise from legal uncertainty.

LITERATURE REVIEW

Research on the practice of *surrogacy* in Indonesia has become a major concern in legal studies, both from the positive law and Islamic law aspects. Previous literature shows various approaches to this issue, starting from the perspective of the legality of the agreement to its impact on the legal status of the child and the surrogate mother.

1. Previous Research

Several studies have discussed the legality of *surrogate agreements* and the status of children born through this method. For example:

a. **Erwien Adisiswanto et al.** found that from a civil and Islamic law perspective, a womb rental agreement is invalid and does not provide legal status to the child born. (Adisiswanto et al., 2023, p. 51) .

b. **Sri Rahayu Gorda et al.** stated that the surrogacy agreement does not meet the objective requirements as stipulated in Article 1320 of the Civil Code, because it violates morality and legal norms (Gorda et al., 2019, p. 471) .

c. **Sonny Dewi Judiasih and Susilowati** concluded that there are no specific legal regulations regarding *surrogacy* in Indonesia, and in the context of marriage law the child is considered the child of the surrogate mother (Judiasih & Dajaan, 2017, p. 227) .

These findings indicate a significant legal gap in Indonesia's legal regulatory framework.

2. Aspects of Islamic Law and Maqāṣid Syarīʿah

Studies from an Islamic perspective place greater emphasis on the protection of descendants (*ḥifẓ al-nasl*) and the importance of clarifying the nasab. The principle of " *al-walad lil firāsh* " (the child is attributed to the owner of the bed) is used to reject nasab claims against children from *surrogacy* carried out outside of legal marriage (Isa et al., 2024, p. 99) .

However, the new approach offered by this study is the dynamic use of the *maqāṣid sharīʿah theory, as developed by Jasser Auda, to reformulate the structure of the surrogacy contract* in accordance with Islamic principles (Rohman, 2019, pp. 41–43) , while also paying attention to social realities and reproductive technology.

3. Positive Legal Aspects

In the context of Indonesian positive law, Articles 1337 and 1332 of the Civil Code prohibit agreements that are contrary to morality and make human organs the object of the agreement (Ariyani, 2013, p. 8) . Law No. 36 of 2009 concerning Health also only allows artificial pregnancy to be carried out by legally married couples, with no room for surrogate mother practices (Pralampita, 2023, p. vi) .

Studies such as by Valentia Ayu Febrianti and Budiarsih suggest the need for human rights-based policies to avoid legal vacuums (Febrianti & Budiarsih, 2022, p. 870) . R. Febrina Zaharnika emphasizes that without fulfilling the requirements for a valid agreement, *surrogacy* cannot be legally enforced (Zaharnika, 2021, p. 105) .

4. Ethical and Social Challenges

Ethical issues related to the exploitation of surrogate mothers and the commodification of women's bodies are major concerns. This is in line with Fred Ameln's study which states that even though the surrogate mother does not play a role in genetics, legally she can be considered a legitimate mother (Ameln, 1991, p. 125) .

In addition, research by Jutharat Attawet in Thailand shows that without clear regulations, *surrogacy practices* are vulnerable to abuse, especially in a cross-border context (Attawet, 2021, pp. 163–170) .

5. Research Novelty

This research offers a new approach by:

a. Developing the concept of *ijarah* (rental contract) in a transformative way for *surrogacy practices* ,
b. Integrating agreement theory, the principle of *ijarah* , and maqāṣid syarīʿah as an ethical and legal framework,
c. Formulate a tripartite contract structure (partner, surrogate mother, health institution) with the principle of maqāṣid justice.

This model bridges the gap between positive law and the needs of Muslim society for ethical and humane reproductive technologies.

METHODS

This study aims to understand the challenges in enforcing the law on *surrogate agreements and Surrogate Mother* practices in Indonesia by using multiple legal approaches, namely normative juridical, empirical, and sociological.

The normative legal approach aims to study and evaluate legal rules, legal principles, and legal doctrines that are relevant to the practice of *surrogacy* . (Efendi & Rijadi, 2022, p. 124) In this context, researchers analyze legal texts, laws and regulations, and court decisions relating to surrogacy, in order to provide a clear picture of the legal basis governing the practice.

surrogacy practitioners in the field, such as biological parents, surrogate mothers, service providers, and legal practitioners. This approach provides a concrete and real perspective on how the law is implemented and the challenges that arise in daily practice.

The sociological approach complements the research by looking at the social and cultural aspects that influence the practice of *surrogacy* in Indonesia. This approach helps understand the social dynamics, societal norms , and cultural factors that help determine how the law is applied and understood by society.

This study uses a case study approach *to* capture the complexity of *surrogacy practices* as a whole in the social and legal context in Indonesia. Case studies are chosen because they are able to provide an in-depth understanding of the phenomenon being studied without requiring experiments or rearranging conditions.

The research was conducted as field research, where data was collected directly from the location and primary sources involved in the practice of *surrogacy* . This approach provides accurate and relevant information to real conditions in the field, so that analysis can be carried out holistically.

With this multi-approach, the research does not only focus on the normative aspects of law, but also considers empirical realities and interrelated socio-cultural contexts. This allows researchers to obtain a comprehensive and holistic picture of the challenges in enforcing the law on surrogate agreements in Indonesia.

1. Research Form:

   This study uses a case study *to* capture the complexity of the surrogacy phenomenon as a whole in the social and legal context in Indonesia. Case studies allow for an in-depth understanding of real events and the dynamics that influence them . (Rofiah, 2023, p. 16)

2. Types of research:

This study is ***a research study*** that uses a combination of normative legal, empirical legal, and sociological legal approaches to provide a comprehensive understanding of surrogacy practices in Indonesia and the challenges in enforcing the law.

surrogacy cases , such as biological parents, surrogate mothers, service providers, and legal practitioners. This approach provides empirical insights into surrogacy practices in the field, including the social and legal dynamics that accompany them. The data obtained provides a concrete perspective and is relevant to real conditions in society.

3. Research Approach:

   The legal research approach used is a multi-approach, namely:

   a. Normative juridical, which focuses on the analysis of laws and regulations, legal rules, principles and doctrines that govern surrogacy practices and assesses how these legal norms should be applied.
   b. Empirical juridical, which examines the implementation of surrogacy law in the field based on primary data from interviews, observations, and case studies.
   c. Sociological, which analyzes the socio-cultural context in which surrogacy practices take place, including social norms , cultural values, and societal perceptions of surrogacy.

   The combination of these three approaches allows the research to cover the legal, social, and cultural dimensions comprehensively. This approach also opens up space for a broader understanding of the challenges of law enforcement in *surrogacy practices* in Indonesia, as well as its social and cultural impacts.

4. Nature of Research:

   This research is descriptive-analytical, aims to explain and analyze the legal aspects related to surrogacy practices in Indonesia, and describes how the law is implemented and has an impact on real practice.

By using multiple normative, empirical, and sociological legal approaches, this study seeks to identify the legal challenges faced, analyze the social dynamics that influence the application of the law, and provide realistic and contextual legal recommendations to increase legal certainty and protection for all parties involved in surrogacy practices .

RESULT AND DISCUSSION

Legalization of Surrogacy from the Perspective of Islam and Positive Law

The practice of *surrogate agreements* or womb rental is a new phenomenon in the world of reproductive medicine, where a woman (*surrogate mother*) is willing to conceive and give birth to a child for another couple who are unable to have children naturally (Kulsum, 2023, pp. 13–14) . This agreement often causes polemics in society, especially in terms of law, religion, and ethics. In Indonesia, this practice has not received legal recognition and tends to be considered contrary to religious norms and civil law.

From a national legal perspective, *surrogacy* is contrary to various applicable regulations. Law Number 1 of 1974 concerning Marriage expressly states that a legitimate child is a child born in or as a result of a legitimate marriage (Law No. 1 of 1974 concerning Marriage, 1974) . In addition, Article 127 paragraph (1) of the Health Law states that artificial pregnancy efforts are only permitted with sperm and ovum cells from a legitimate husband and wife and must be implanted in the wife's uterus (Law of the Republic of Indonesia Number 36 of 2009, 2009) . This indirectly rejects the concept of using another woman's uterus in the pregnancy process. In civil law, *surrogacy agreements* also do not fulfill the elements of a legitimate object of agreement because human uteruses cannot be bought and sold, as regulated in Articles 1332 and 499 of the Civil Code (Sudjono et al., 2025, p. 6) . Therefore, within the framework of positive Indonesian law, the practice *of surrogacy* is declared invalid and cannot be legally enforced.

In the practice of *surrogate motherhood* , fertilization occurs between sperm cells and ovum from a married couple which are then implanted into the uterus of another woman (Putri & Kadir, 2023, p. 261) . Based on the Islamic view, if the woman is not the legal wife of the man (the owner of the sperm), then the child born is an illegitimate child. In fact, in some opinions, the child is categorized as a child of adultery even though the fertilization process is carried out medically without direct biological relations. This is because the main element of adultery according to Islamic law is the entry of sperm into the uterus of a woman without a legal marriage bond.

Law Number 35 of 2014 concerning Child Protection in Article 7 paragraph (1) states that *"Every child has the right to know his/her parents, to be raised and cared for by his/her own parents* (Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, 2014) ." However, in the case of *surrogacy* , the child does not automatically have a legal relationship with his/her biological father, unless proven by blood relations through science and technology.

The Constitutional Court (MK) Decision No. 46/PUU-VIII/2010 brought important changes

to the provisions in Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage. The decision states that *"A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man who can be scientifically proven to be his biological father, including a relationship with his father's family."* (Decision Number 46/PUU-VIII/2010, 2010) . The Constitutional Court is of the opinion that pregnancy is only possible through the meeting of the ovum and sperm, either through sexual intercourse or reproductive technology. Therefore, it is considered unfair if only the mother bears the legal consequences of the presence of the child.

This ruling provides a legal loophole for children resulting from *surrogacy* to have a civil relationship with their biological father, as long as it can be proven scientifically and legally. However, in Islamic law, the status of a child still depends on the existence of a marriage contract between the man and the woman who is pregnant. If there is no marriage, then the child is still considered an illegitimate child or a child of adultery. Children resulting from *a surrogate mother* can only be considered legitimate if the surrogate mother is married to the husband who owns the sperm (Baroroh, 2018, p. 48) . If not, then inheritance rights and other civil rights only apply between the child and the biological mother (surrogate mother), not the biological father.

In the Compilation of Islamic Law (KHI), illegitimate children only have a civil relationship with their mother and their mother's family (Compilation of Islamic Law, 1992) . These civil rights include the right to know their origin, the right to maintenance, education, legal representation, management of property, and inheritance rights (R & Lawotjo, 2014) . However, in practice, many illegitimate children do not receive fair legal protection, and often become victims of social stigma and do not receive their full rights.

As an alternative, civil law and the Islamic Law recognize the mechanism *of adoption* . Article 171 of the Islamic Law explains that *"An adopted child is a child whose responsibility for daily living expenses, education costs, and so on is transferred from the original parents to the adoptive parents based on a court decision* (Compilation of Islamic Law, 1992) ." Adoption is a form of legal protection to provide equal rights for illegitimate children, including children from *surrogate mothers* . However, in Islam, adoption does not remove the bloodline relationship with the biological parents and does not make the adopted child an heir except through a gift during life or a will of no more than one-third of the assets.

However, an alternative opinion has emerged from some scholars and academics who try to view this practice through a contemporary fiqh approach. The rules of fiqh state that:

"الأصل في المعاملات الإباحة ما لم يحل حراما أو يحرم حلالا"

"The original law in muamalah is that it is permissible, as long as it does not make lawful what is haram and does not forbid what is halal." (Al-Jawziyyah et al., 2000, p. 344)

Through this principle, some scholars argue that as long as the purpose of surrogacy is to fulfill basic human needs, namely offspring, and does not directly conflict with sharia principles, then this practice can be tolerated. One of the arguments used is the analogy with the concept of a wet nurse in Islam, who also has a physical relationship with the child through the breastfeeding process, but does not change the legal status of the lineage.

In the Qur'an, Surah Al-Baqarah verse 233 states:

وَٱلْوَٰلِدَٰتُ يُرْضِعْنَ أَوْلَٰدَهُنَّ حَوْلَيْنِ كَامِلَيْنِ ۖ لِمَنْ أَرَادَ أَن يُتِمَّ ٱلرَّضَاعَةَ ۚ وَعَلَى ٱلْمَوْلُودِ لَهُۥ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِٱلْمَعْرُوفِ ۚ لَا تُكَلَّفُ ٱلْوَارِثِ مِثْلُ ذَٰلِكَ ۗ فَإِنْ أَرَادَا فِصَالًا عَن تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗ وَإِنْ God willing نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَآرَّ وَٰلِدَةٌۢ بِوَلَدِهَا وَلَا مَوْلُودٌ لَّهُۥ بِوَلَدِهِۦ ۚ وَعَلَى ٱلْوَارِثِ مِثْلُ ذَٰلِكَ ۗ فَإِنْ أَرَادَا فِصَالًا عَن تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗ وَإِنْ أَرَدتُّمْ أَن تَسْتَرْضِعُوٓا۟ أَوْلَٰدَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُم مَّآ ءَاتَيْتُم بِٱلْمَعْرُوفِ ۗ وَٱتَّقُوا۟ ٱللَّهَ وَٱعْلَمُوٓا۟ أَنَّ ٱللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ God bless you

Mothers should breastfeed their children for two full years, that is, for those who want to complete breastfeeding. And it is the father's obligation to feed and clothe the mothers in a virtuous manner . A person is not burdened but according to the level of his ability. Let not a mother suffer misery because of her child and a father because of his child, and the heirs are also obliged to do so. If both of them wish to wean (before two years) with their consent and deliberation, then there is no sin on either of them. And if you want your child to be breastfed by someone else, then there is no sin for you if you pay according to what is appropriate. Fear Allah and know that Allah is All-Seeing of what you do (Department of Religion, 2007) .

This verse provides the basis for the permissibility of a third party playing a role in the child's development process, as long as it is done on the basis of an agreement and does not violate the principles of justice. This view is one of the foundations of a country like Iran, which is the only Islamic country that has officially legalized the practice of *surrogacy* , both altruistically and commercially. This legalization was carried out through the support of a fatwa from Shiite scholars and the implementation of a legal contract that clearly regulates the responsibilities of the parties, both medically and ethically.

The legal impact of this practice is very complex, especially regarding the status of the child. In Indonesia, a child born through surrogacy will be considered the child of *the surrogate mother* , not of the couple who entrusted the seed. This means that the child only has a legal relationship with the mother who gave birth to him, so he is not entitled to inheritance rights or protection of

lineage from biological parents. In Islamic law itself, the majority of scholars state that the mother is the woman who conceives and gives birth to the child, as stated in Surah Luqman verse 14 and Surah Al-Ahqaf verse 15.

From a legal enforcement perspective, the state has a responsibility to protect all parties involved, including the child who is born and the woman who becomes a surrogate. Because there is no specific regulation regarding surrogacy in Indonesia, dispute resolution becomes very complicated. When a conflict occurs, such as a refusal to hand over a child by a surrogate mother, the court cannot enforce a surrogacy agreement that is not legally valid. Therefore, a special regulation is needed that is able to regulate this practice comprehensively and protect all rights that arise.

Cases in several countries such as the United States and the United Kingdom show the importance of legal intervention in resolving surrogacy disputes. In some areas of the US, such as California, surrogacy is even protected by state law, provided that the contract is made before pregnancy. In contrast, the United Kingdom and the Netherlands limit surrogacy to altruistic forms and still require court approval.

To answer this moral and legal challenge, a fiqh approach can be a middle way. In maqashid sharia, the principle of *hifz al-nasl* (protecting offspring) is an important basis in considering the permissibility of surrogacy practices. This is supported by several fiqh rules such as:

1. **الأمور بمقاصدها** – "Everything depends on its purpose." If the purpose of surrogacy is for the benefit (mashlahah) of preserving offspring in a legitimate marriage, then it is permissible.
2. **الضرر يزال** – "Harm must be eliminated." The practice of surrogacy must be prevented if it has the potential to exploit women or cause suffering to children.
3. **المشقة تجلب التيسير** – "Difficulty brings ease." If infertility becomes a serious hardship, then the law can provide relief through appropriate sharia solutions (Alawiyah et al., 2024, p. 97) .
4. **العادة محكمة** – "Customs can be made into laws." If in a society the practice of surrogacy has been carried out consistently with ethics and sharia, then it can be considered as legally permissible. (Mishilhi, 2018, p. 17) .

Thus, the practice of surrogacy cannot be assessed only in textual and formal legal terms, but requires a multidimensional approach between positive law, moral values, and sharia principles that uphold justice and protect the rights of all parties.

In conclusion, the practice of surrogacy poses significant legal, moral, and social challenges

in Indonesia. However, if it is carried out with good intentions, within the framework of a legal marriage, and with comprehensive and sharia-based legal regulations, this practice can be considered for legalization. The case study of Iran as an Islamic country that has implemented it can be used as a model for developing policies that are just and oriented towards the welfare.

CONCLUSION

The practice of *surrogate agreements* and *surrogate mothers* or womb rentals is a form of reproductive technology advancement that carries complex legal, religious, and social implications. In the context of positive Indonesian law, this practice has not received legal recognition because it conflicts with the provisions of the Civil Code, the Marriage Law, the Health Law, and the Minister of Health's regulations which explicitly prohibit the use of another woman's womb in the pregnancy process.

However, from the perspective of Islamic jurisprudence, there is room for ijtihad which allows surrogacy to be permitted under certain conditions, as long as it does not cause harm and aims to preserve offspring (*hifz al-nasl*). Several important rules such as " *al-ashlu fil mu'amalat al-ibahah* " (the original law of muamalah is that it is permissible), " *al-umur bi maqasidiha* " (everything depends on the goal), and " *al-dharar yuzal* " (adverse events must be eliminated), become the basis for the argument of permissibility with strict conditions and supervision.

The example of Iran shows that this practice can be carried out within the framework of Islamic law, as long as it is carried out with a fatwa from scholars, a clear legal agreement, and strict medical and ethical supervision. This proves that the legalization of surrogacy in an Islamic country is not impossible if it is based on the maqashid sharia and the protection of the rights of all parties involved.

Therefore, in-depth studies and the establishment of special regulations in Indonesia are needed that can answer the legal, ethical, and sharia challenges related to surrogacy practices. Legalization of surrogacy based on fiqh and maslahat can be an alternative solution for infertile couples, as long as it upholds the values of justice, protection of lineage, and humanity from an Islamic perspective.

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