

***Islamic Law Review On The Legal Status Of Children Born
By A Surrogate Mother***

**Tinjauan Hukum Islam terhadap Status Hukum Anak yang Lahir
melalui Ibu Pengganti (*Surrogate Mother*)**

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Abstract: *This article examines the legal status of children born through surrogate motherhood in Islamic law and Indonesian positive law. It asks how Islamic legal reasoning determines nasab and legal parentage when genetic motherhood, gestational motherhood, and intended parenthood are separated by assisted reproductive technology, and how Indonesian law should protect the child without validating a prohibited reproductive arrangement. The article uses doctrinal legal research, comparative fiqh analysis, maqasid-based reasoning, and normative juridical analysis. Primary sources consist of the Qur'an, hadith, classical and contemporary fiqh, fatwas of Islamic legal institutions, Indonesian statutes and regulations, the Compilation of Islamic Law, and Constitutional Court jurisprudence. Secondary sources include recent scholarship on Islamic bioethics, assisted reproduction, child protection, and surrogacy. The article argues that the dominant Sunni and Indonesian Islamic legal approach rejects surrogacy because it disrupts hifz al-nasl, creates uncertainty over nasab, and introduces a third party into reproduction that should remain within a valid marriage. Indonesian health law also restricts assisted reproduction to a lawful husband and wife and to implantation in the wife from whom the ovum originates. The article contributes a prohibition-protection model. Surrogacy as a contract and medical practice should*

not be legalized, but the child born from it must not be penalized. Courts and public authorities should protect the child's identity, birth registration, maintenance, custody, and civil interests through child-protection mechanisms, adoption or kafalah-like care, and limited bequest where relevant, while keeping nasab, guardianship, and Islamic inheritance consistent with Islamic legal principles.

Keywords: *Legal Status of Children, Surrogate Mother, Review of Islamic Law.*

Abstrak: Artikel ini mengkaji status hukum anak yang lahir melalui ibu pengganti dalam hukum Islam dan hukum positif Indonesia. Artikel ini membahas bagaimana penalaran hukum Islam menentukan nasab dan hubungan orang tua secara hukum ketika ibu genetik, ibu kandung, dan orang tua yang dimaksud dipisahkan oleh teknologi reproduksi berbantuan, serta bagaimana hukum Indonesia seharusnya melindungi anak tanpa melegitimasi pengaturan reproduksi yang dilarang. Artikel ini menggunakan penelitian hukum doktrinal, analisis fiqh komparatif, penalaran berbasis maqasid, dan analisis yuridis normatif. Sumber primer terdiri dari Al-Qur'an, hadis, fiqh klasik dan kontemporer, fatwa lembaga hukum Islam, undang-undang dan peraturan Indonesia, Kitab Undang-Undang Syariat Islam, serta yurisprudensi Mahkamah Konstitusi. Sumber sekunder mencakup karya ilmiah terkini mengenai bioetika Islam, reproduksi bantu, perlindungan anak, dan surrogasi. Artikel ini berargumen bahwa pendekatan hukum Islam Sunni dan Indonesia yang dominan menolak surrogasi karena mengganggu hifz al-nasl, menimbulkan ketidakpastian mengenai nasab, dan memperkenalkan pihak ketiga ke dalam proses reproduksi yang seharusnya tetap berada dalam pernikahan yang sah. Hukum kesehatan Indonesia juga membatasi reproduksi bantu pada suami istri yang sah dan implantasi pada istri yang menjadi sumber ovum. Artikel ini mengusulkan model larangan-perlindungan. Surrogasi sebagai kontrak dan praktik medis tidak boleh dilegalkan, tetapi anak yang lahir darinya tidak boleh dikenai sanksi. Pengadilan dan otoritas publik harus melindungi identitas anak, pendaftaran kelahiran, nafkah, hak asuh, dan kepentingan sipilnya melalui mekanisme perlindungan anak, adopsi, atau perawatan serupa kafalah, serta warisan terbatas jika relevan, sambil menjaga nasab, perwalian, dan warisan Islam tetap konsisten dengan prinsip-prinsip hukum Islam.

Kata Kunci: Status Hukum Anak, Ibu Pengganti, Tinjauan Hukum Islam.

A. INTRODUCTION

Surrogate motherhood is no longer only a medical issue. It has become a legal and theological problem because assisted reproductive technology can separate

genetic parenthood, gestational pregnancy, birth, intention to parent, and legal responsibility. Modern reproductive medicine distinguishes artificial insemination, in vitro fertilization, embryo transfer, and surrogacy. A surrogate or gestational carrier is a woman who carries a pregnancy under an agreement that the child will be handed to intended parents after birth.¹ In medical terminology, this is different from genetic engineering. IVF fertilizes gametes outside the body, embryo transfer places the embryo into a uterus, while surrogacy concerns who carries the pregnancy and who will become the social or legal parent after birth.²

This distinction matters in Islamic family law. Classical fiqh did not discuss modern IVF in its present form, but it developed strong doctrines on marriage, nasab, birth, milk kinship, guardianship, inheritance, and the prohibition of mixing lineages. These doctrines create the legal grammar for evaluating new reproductive technologies. The Qur'an does not explicitly regulate surrogacy, yet it affirms family attribution, truthful lineage, maternal pregnancy, and the protection of children.³ The hadith principle *al-walad li-l-firash* connects the legal attribution of a child to the marital bed and has long served as a central rule for determining paternity in Islamic law.⁴

Indonesian law adds a second layer of complexity. Law No. 17 of 2023 on Health allows assisted reproduction only for a lawful husband and wife and requires use of their sperm and ovum, with implantation in the wife from whom the ovum originates.⁵ Government Regulation No. 28 of 2024 and Minister of Health Regulation No. 2 of 2025 continue this regulatory approach by placing assisted reproduction within reproductive health services and by linking it to lawful

¹Fernando Zegers-Hochschild et al., "The International Glossary on Infertility and Fertility Care, 2017," *Human Reproduction* 32, no. 9 (2017): 1786-1801, <https://doi.org/10.1093/humrep/dex234>.

²American Society for Reproductive Medicine, "Recommendations for Practices Using Gestational Carriers: A Committee Opinion," *Fertility and Sterility* 118, no. 1 (2022): 65-74, <https://doi.org/10.1016/j.fertnstert.2022.03.022>.

³Qur'an 33:4-5; 58:2; 2:233; 42:49-50.

⁴Muhammad ibn Ismail al-Bukhari, *Sahih al-Bukhari*, Kitab al-Fara'id, hadith on "*al-walad li-l-firash*"; Muslim ibn al-Hajjaj, *Sahih Muslim*, Kitab al-Rada, hadith no. 1457.

⁵Republic of Indonesia, Law No. 17 of 2023 on Health, art. 58.

marriage and medically supervised procedures.⁶ The older Minister of Health Regulation No. 43 of 2015 is no longer the current regulatory basis because it has been revoked by Minister of Health Regulation No. 2 of 2025.⁷

Previous Indonesian studies often state that surrogacy is forbidden or legally invalid, but many of them stop at description. They do not always separate genetic parenthood, gestational motherhood, legal motherhood, nasab, custody, adoption, guardianship, and inheritance. Recent scholarship has begun to address assisted reproduction through maqasid and collective ijihad, including studies on lineage problems arising from egg freezing and judicial interpretation of children outside marriage.⁸ Yet the specific issue of children born through surrogate motherhood still requires a more systematic doctrinal model that connects Islamic legal reasoning, Indonesian legislation, and child protection.⁹

This article fills that gap by asking three questions. First, how does Islamic law determine the legal status of a child born through surrogate motherhood? Second, how does Indonesian positive law frame assisted reproduction, parentage, child status, and civil responsibility in such cases? Third, what protection model can safeguard the child without treating an unlawful surrogacy arrangement as valid? The article argues for a prohibition-protection model. Surrogacy remains impermissible under the dominant Sunni and Indonesian Islamic legal approach because it disrupts *hifz al-nasl* and legal certainty. At the same time, the child is innocent and must receive legal protection. Protection should focus on identity, birth registration, maintenance, custody, education, civil responsibility, and welfare,

⁶Republic of Indonesia, Government Regulation No. 28 of 2024 on Implementing Regulation of Law No. 17 of 2023 on Health; Ministry of Health, Regulation No. 2 of 2025 on the Implementation of Reproductive Health Efforts.

⁷Badan Pemeriksa Keuangan, "Peraturan Menteri Kesehatan Nomor 2 Tahun 2025 tentang Penyelenggaraan Upaya Kesehatan Reproduksi," accessed June 1, 2026, <https://peraturan.bpk.go.id/Details/314518/permenkes-no-2-tahun-2025>.

⁸Edi Susilo, Budi Santoso, and Yessy Eka Ambarwati, "Transformation of Contemporary Fiqh through a Collective Ijtihad Approach in Resolving Lineage Issues Arising from Egg Freezing," *MILRev: Metro Islamic Law Review* 4, no. 2 (2025): 728-760, <https://doi.org/10.32332/milrev.v4i2.10403>.

⁹Jamrud Qomaruz Zaman et al., "Judicial Interpretation Challenges in Implementing Child Protection Rights Outside of Marriage: A Study of the Religious Court of Malang Regency," *Istinbath* 24, no. 1 (2025): 66-82, <https://doi.org/10.20414/ijhi.v24i1.777>.

not on retroactively validating the surrogacy contract or altering the doctrinal structure of nasab.

Thesis research by Filda Ahmad Al Yadaini on "Surrogate Mother Agreement and Its Influence on the Status of Children Born", 2019,¹⁰ which discusses the validity of the agreement between the tenant and the surrogate mother and discusses the status of children born from the womb of the surrogate mother according to the rules of state life. According to this study, the agreement in the rental of the womb is invalid. Because, it is contrary to existing laws and regulations, morality and public order and the status of ownership of the child falls to the surrogate mother and her husband. There is also a thesis research by Nur Azmi Fadillah entitled "Status of Guardianship of Children from Rented Wombs in the View of Islamic Law and Positive Law", 2018.¹¹ This thesis explains the status of guardianship of children from rented wombs and the lineage of the child according to Islamic law and also considerations of its benefits. According to this thesis, in Islamic law and considering its benefits, the practice of renting wombs is not permitted. Meanwhile, the right to be a guardian and lineage is the baby's real mother, but the biological father cannot be the guardian of the child and the child's status becomes the child of the surrogate mother who gave birth to him. In addition, there is also a scientific journal research by Nove Puspasari entitled "Legal Review of the Status of Children Born from Womb Rental Reviewed from Positive Law in Indonesia", 2019.¹² This study explains the position of children from womb rental according to various legal aspects in Indonesia, as well as the consequences of having children in inheritance law. According to him, children born from artificial insemination are not justified because the relationship between the child and the mother is not naturally established. This journal has similarities in the position of children born from the womb of a rented mother and has differences in inheritance rights and the legal review of the journal. In a scientific legal journal research by Nur

¹⁰Filda, Ahmad. "Perjanjian *Surrogate mother* Dan Pengaruhnya Terhadap Status Anak Yang Di Lahirkan". *Skripsi*. Fakultas Syari'ah Dan Hukum UIN Wali Songo Semarang. 2019.

¹¹Nur, Azmi. "Status Perwalian Anak Hasil Sewa Rahim Dalam Pandangan Hukum Islam Dan Hukum Positif". *Skripsi*. Fakultas Syari'ah Dan Hukum UIN Syarif Hidayatullah Jakarta. 2018.

¹²Nove, Puspasari. "Tinjauan Yuridis Terhadap Status Anak Yang Lahir Dari Sewa Rahim Ditinjau Dari Hukum Positif Di Indonesia". *Jurnal Ilmiah*. Fakultas Hukum Universitas Mataram. 2019.

Ina Az Zahra, Charoline Christy Hutapea, Syarifah Lisa Andriati entitled "Inheritance Rights of Surrogate Mothers from Children Resulting from Uterus Rental Reviewed from Civil Aspects", 2022.¹³ It was also stated that the inheritance rights of children born from surrogate mothers are based on various aspects of civil law, especially the legal status of the child. They stated that uterine rental is not permitted if referring to civil regulations, while regarding the status of the child, the surrogate mother becomes the child's legal parent, therefore, the ones who can inherit each other are the surrogate mother and the child she gave birth to.

B. METODE

This study is doctrinal legal research with a normative juridical approach. It examines legal norms, legal concepts, and legal reasoning rather than collecting field data. The analysis uses four connected approaches. The first is a statutory approach to Indonesian positive law. The second is a conceptual approach to parentage, nasab, legal motherhood, guardianship, custody, adoption, and inheritance. The third is comparative fiqh analysis, especially by comparing restrictive and permissive arguments on assisted reproduction. The fourth is maqasid-based reasoning, with particular attention to *hifz al-nasl*, *hifz al-nafs*, *hifz al-ird*, child welfare, and the prevention of harm.¹⁴

The primary Islamic legal sources are the Qur'an, hadith, classical legal maxims, and fiqh works that discuss lineage, maternity, paternity, guardianship, inheritance, and harm prevention. Contemporary Islamic legal materials include the fatwa of the Indonesian Ulama Council on IVF and artificial insemination, the Ijtima Ulama decision on embryo transfer to a borrowed womb, and contemporary Islamic bioethics literature.¹⁵ The primary Indonesian legal sources are Law No. 1 of 1974 on Marriage as amended by Law No. 16 of 2019, the Compilation of Islamic Law, the Civil Code, Law No. 17 of 2023 on Health, Government Regulation No. 28 of 2024,

¹³Nur „Ina, Charoline Christy Hutapea, Syarifah Lisa Andriati. "Hak Waris *Surrogate mother* Dari Anak Hasil Sewa Rahim Ditinjau Dari Aspek Perdata". *Jurnal Ilmiah Hukum*. Fakultas Hukum Universitas 17 Agustus 1945 Semarang, Universitas Sumut. Vol. 7, No. 1. Oktober 2006.

¹⁴Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana, 2017), 133-136; Muhaemin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 56-59.

¹⁵Indonesian Ulama Council, "Fatwa tentang Bayi Tabung/Inseminasi Buatan," June 13, 1979; Ijtima Ulama Komisi Fatwa se-Indonesia II, "Transfer Embrio ke Rahim Titipan," 2006.

Minister of Health Regulation No. 2 of 2025, and Constitutional Court Decision No. 46/PUU-VIII/2010.

Source selection follows three criteria. First, sources must be authoritative in their own legal field. Qur'anic verses, hadith collections, statutes, regulations, and official fatwas are treated as primary sources. Second, secondary sources must be relevant to assisted reproduction, Islamic legal parentage, nasab, child rights, or Indonesian family law. Third, recent peer-reviewed scholarship from 2020 onward receives priority, while older classical or foundational works are retained only when they remain doctrinally indispensable. This method responds to the need for valid references without treating popular reports or unverified media claims as legal evidence.

The analysis proceeds in five steps. First, the article defines the relevant reproductive technologies and parentage concepts. Second, it reconstructs the Islamic legal arguments for and against surrogacy. Third, it tests those arguments through *maqasid al-shari'ah* and legal maxims, especially *sadd al-dhari'ah* and *dar' al-mafasid muqaddam ala jalb al-masalih*. Fourth, it interprets Indonesian positive law using statutory, systematic, and purposive interpretation. Fifth, it formulates the legal consequences for nasab, guardianship, custody, adoption, maintenance, birth registration, and inheritance.

C. RESULT AND DISCUSSION

1. Conceptual Distinctions in Assisted Reproduction and Parentage

A rigorous analysis must avoid using artificial insemination, IVF, embryo transfer, and surrogacy as interchangeable terms. They differ medically and legally. The following table sets the operational definitions used in this article.

Concept	Operational meaning in this article	Legal relevance
Artificial insemination	Placement of processed sperm into the reproductive tract to attempt pregnancy.	Raises questions of sperm source and marital legitimacy.

IVF	Fertilization of sperm and ovum outside the body, followed by embryo transfer.	Permissibility depends on lawful gametes, marital status, and place of implantation.
Embryo transfer	Placement of an embryo into a uterus.	Central issue is whether the receiving uterus belongs to the lawful wife who owns the ovum.
Gestational surrogacy	A woman carries an embryo created from gametes of intended parents or donors and agrees to surrender the child after birth.	Separates genetic and gestational motherhood.
Traditional surrogacy	The surrogate provides the ovum and carries the pregnancy.	Combines genetic and gestational motherhood in the surrogate.
Genetic parenthood	Parenthood based on sperm or ovum contribution.	May prove biological origin but does not automatically establish nasab in Islamic law.
Gestational motherhood	Motherhood based on pregnancy and childbirth.	Highly significant in Qur'anic language and comparative law.
Legal parenthood	Parenthood recognized by law, court order, marriage presumption, or adoption.	Determines civil responsibility, registration, custody, and inheritance under state law.

Nasab	Islamic legal lineage linking a child to legally recognized parents.	Determines mahram status, wali nasab, inheritance, and family identity.
Hadanah and adoption or kafalah	Care, custody, and child protection without necessarily transferring nasab.	Useful for protecting children when biological or legal parentage is disputed.

The distinction between genetic, gestational, and legal parenthood also appears in comparative law. In the United Kingdom, for example, the woman who gives birth is the legal mother at birth even if she has no genetic relationship with the child, and legal parenthood can later be transferred through a parental order.¹⁶ This comparative point does not determine Islamic law, but it shows that legal systems often distinguish childbirth, genetics, and legal intention. Islamic law must make the same distinction before deciding whether any one of these factors is sufficient to establish nasab.

2. Islamic Legal Analysis of Surrogate Motherhood

a. Governing Texts and Principles

The Qur'an does not mention IVF or surrogacy because these technologies did not exist in the formative period. The absence of an explicit verse does not mean the practice is legally neutral. Islamic legal reasoning derives rules from general texts, effective causes, legal maxims, and the objectives of the shari'ah. The Qur'an connects motherhood with pregnancy and birth when it states that mothers are those who give birth, and it instructs Muslims to attribute children to their fathers truthfully.¹⁷ It also recognizes the hardship of pregnancy and childbirth as part of the moral meaning of motherhood.¹⁸

¹⁶Nuffield Council on Bioethics, *Surrogacy Law in the UK: Ethical Considerations* (London: Nuffield Council on Bioethics, 2023), 8-9; Human Fertilisation and Embryology Authority, "Surrogacy," accessed June 1, 2026, <https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/>.

¹⁷Qur'an 58:2; 33:5.

¹⁸Qur'an 31:14; 46:15.

The hadith al-walad li-l-firash is central to paternity and nasab. It means that a child is attributed to the lawful marital bed, while the adulterer has no claim. This rule prevents arbitrary biological claims from destabilizing the family. It also shows that Islamic law does not reduce parentage to genetics alone. Nasab is created by lawful marriage, childbirth, and legally recognized presumptions, not merely by biological contribution.¹⁹

Maqasid al-shari'ah strengthens this conclusion. Hifz al-nasl protects lineage, family identity, inheritance order, marriage prohibitions, and the child's right to a clear family status. Hifz al-nafs and hifz al-ird protect life, dignity, and honor. A legal arrangement that commodifies pregnancy or obscures parentage must be evaluated not only by the intention to obtain a child, but also by its effects on lineage, dignity, and social order.²⁰

b. Permissive Arguments and Their Limits

Some permissive arguments treat surrogacy as an emergency solution for infertility. They reason by analogy to wet nursing, arguing that if a child may be breastfed by another woman, a fetus may also be carried by another woman. They also invoke *maslahah* because the intended couple wants a genetically related child. This argument appears attractive in cases where the wife cannot carry a pregnancy, but it has two serious weaknesses.

First, the analogy to wet nursing is incomplete. Wet nursing occurs after the child is born and does not transfer pregnancy, birth, nasab, or legal motherhood. It creates a limited milk kinship, not maternity by lineage. Surrogacy takes place before birth and asks another woman to perform pregnancy and childbirth, which Islamic law treats as legally and morally significant. The effective cause is therefore different. A weak *qiyas* cannot override rules designed to protect nasab.

Second, infertility alone does not automatically create a *darurah* that permits a prohibited means. *Darurah* in Islamic law requires necessity, lack of lawful alternatives, proportionality, and the prevention of greater harm. A strong desire for

¹⁹Al-Bukhari, *Sahih al-Bukhari*, Kitab al-Fara'id; Muslim, *Sahih Muslim*, Kitab al-Rada, hadith no. 1457.

²⁰Abu Ishaq al-Shatibi, *Al-Muwafaqat fi Usul al-Shari'ah*, ed. Abdullah Draz, vol. 2 (Cairo: Dar al-Hadith, 2006), 8-12; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 268-274.

a child is understandable and morally significant, but Islamic law does not treat every hardship as a necessity that may suspend lineage rules. Lawful alternatives include treatment, IVF within the lawful marital framework, adoption or kafalah-like care, and acceptance of childlessness as part of divine decree. The maqasid test must consider the child's long-term identity and the rights of all parties, not only the couple's reproductive desire.²¹

c. Prohibitive Arguments in Sunni and Indonesian Islamic Law

The dominant Sunni position permits assisted reproduction only when sperm and ovum come from a lawful husband and wife and the embryo is returned to the wife's own womb during the marriage. The introduction of a third-party sperm donor, ovum donor, or womb is generally rejected because it introduces a non-marital element into reproduction and produces uncertainty in nasab.²² Contemporary Islamic bioethics literature also identifies nasab, maternal identity, inheritance, and marital sanctity as the main areas of legal risk in surrogacy.²³

The Indonesian Ulama Council adopted this restrictive pattern. Its 1979 fatwa permits IVF when sperm and ovum belong to a lawful husband and wife. It forbids the use of another wife's womb, even within a polygamous household, on the basis of sadd al-dhari'ah because it can create serious problems of inheritance and lineage.²⁴ The 2006 Ijtima Ulama decision on embryo transfer to a borrowed womb further rejects embryo transfer to another woman's womb because the practice produces confusion over motherhood, fatherhood, lineage, and inheritance.²⁵

Yusuf al-Qaradawi also rejects surrogacy because it creates an unresolved question over who the mother is. Is the mother the owner of the ovum or the woman who carried the pregnancy and gave birth? For al-Qaradawi, this uncertainty is not

²¹Abd al-Wahhab Khallaf, *Ilm Usul al-Fiqh* (Cairo: Maktabah al-Da'wah al-Islamiyyah, 1968), 207-211; Al-Shatibi, *Al-Muwafaqat*, 2:10-12.

²²Marcia C. Inhorn, "Making Muslim Babies: IVF and Gamete Donation in Sunni versus Shi'a Islam," *Culture, Medicine and Psychiatry* 30, no. 4 (2006): 427-450, <https://doi.org/10.1007/s11013-006-9027-x>.

²³Faisal A. Hussein, "Maqasid al-Shari'ah and the Ethics of Surrogacy: A Critical Appraisal of Lineage and Legal Certainty in Contemporary Islamic Law," *Mazahibuna: Jurnal Perbandingan Mazhab* 7, no. 1 (2025): 1-22.

²⁴Indonesian Ulama Council, "Bayi Tabung/Inseminasi Buatan," June 13, 1979.

²⁵Ijtima Ulama Komisi Fatwa se-Indonesia II, "Transfer Embrio ke Rahim Titipan," Gontor, May 26, 2006.

a minor technical issue. It touches the structure of family law, maternity, and inheritance.²⁶ Wahbah al-Zuhayli takes a similar approach by grounding nasab in lawful marriage and rejecting reproductive methods that create lineage confusion.²⁷

The stronger doctrinal position is therefore as follows. IVF is permissible only within a valid marriage, using the husband's sperm and the wife's ovum, and the embryo must be transferred to the same wife's womb while the marriage continues. Surrogacy is impermissible because it separates genetic, gestational, and legal motherhood in a way that Islamic nasab doctrine does not recognize. The child born from the practice must be protected, but the practice itself should not be treated as lawful.

d. Motherhood, Nasab, and the Child's Status

Islamic legal analysis must distinguish moral blame, legal invalidity, and the child's protection. A child born through surrogacy is not morally responsible for the acts of adults. The child's dignity, life, care, and identity remain protected. However, protection of the child does not require legalizing the surrogacy contract or ignoring the rules of nasab.

For maternity, the dominant Sunni argument gives decisive legal weight to the woman who gives birth. This does not mean genetic origin is irrelevant in all contexts. Genetic evidence may support factual knowledge of origin, medical history, civil responsibility, or maintenance. Yet in Islamic legal doctrine, nasab and maternal legal status cannot be transferred by contract from the woman who gives birth to the intended mother. A womb-rental agreement cannot convert the intended mother into the legal mother for nasab purposes.

For paternity, genetics also cannot stand alone. The father's nasab is established through a valid marriage, marital presumption, acknowledgment within lawful limits, or other recognized legal proof that does not contradict established lineage rules. In surrogacy, the genetic father's sperm is introduced into the womb of a woman who is not his wife. Under the dominant view, that fact prevents automatic paternal nasab from arising. The genetic father may still bear civil, moral,

²⁶Yusuf al-Qaradawi, *Fatawa Mu'asirah*, vol. 3 (Kuwait: Dar al-Qalam, 2003), 571-575.

²⁷Wahbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu*, 4th ed., vol. 7 (Damascus: Dar al-Fikr, 1997), 6756-6764.

or maintenance responsibility because the child's welfare must be protected, but this responsibility differs from full nasab.

This conclusion also avoids the inconsistency found in some discussions that first declare surrogacy prohibited, then later assign full nasab to the genetic father without explaining the legal bridge. A coherent model must say clearly that prohibition concerns the validity of the reproductive arrangement, while child protection concerns the rights of the innocent child after birth.

3. Indonesian Positive Law on Assisted Reproduction and Child Status

a. Health Law and Administrative Regulation

Indonesian health law does not expressly use the word “surrogacy” as a full regulatory category, but it effectively excludes surrogate motherhood by defining assisted reproduction within the marriage of the intending couple and the wife's own womb. Law No. 17 of 2023 provides that assisted reproduction may be conducted only by a lawful husband and wife, using their sperm and ovum, and implanted in the wife from whom the ovum originates.²⁸ This formulation leaves no legal space for transferring an embryo into the womb of a third woman.

Government Regulation No. 28 of 2024 implements the Health Law and confirms that reproductive health services include assisted reproduction under regulated medical standards.²⁹ Minister of Health Regulation No. 2 of 2025 replaces the older regulatory framework and regulates reproductive health efforts, including assisted reproductive health services.³⁰ Therefore, a revised article must not rely on Minister of Health Regulation No. 43 of 2015 as the current law without explaining that it has been revoked.

The legal result is clear. Indonesian health regulation permits medically assisted reproduction as infertility treatment for a lawful married couple, but not surrogacy. Medical institutions, doctors, and parties cannot validly transform the practice into a lawful arrangement through private agreement because the

²⁸Republic of Indonesia, Law No. 17 of 2023 on Health, art. 58(1)-(2).

²⁹Republic of Indonesia, Government Regulation No. 28 of 2024 on Implementing Regulation of Law No. 17 of 2023 on Health, art. 111.

³⁰Ministry of Health, Regulation No. 2 of 2025 on the Implementation of Reproductive Health Efforts.

regulatory design places assisted reproduction within a narrow marital and medical framework.

b. Marriage Law, Compilation of Islamic Law, and Child Status

Law No. 1 of 1974 on Marriage states that a legitimate child is a child born in or as a result of a valid marriage.³¹ Article 43 originally provided that a child born outside marriage has a civil relationship only with the mother and her family. Constitutional Court Decision No. 46/PUU-VIII/2010 modified this rule by recognizing a civil relationship with a man who can be proven by science, technology, or other lawful evidence to have a blood relationship as the father.³² The decision protects the child from legal abandonment. It should not be read as a blanket legalization of all reproductive or sexual arrangements outside marriage.

The Compilation of Islamic Law provides more specific Islamic family law norms for Muslims. Article 99 states that a legitimate child includes a child born within or as a result of a valid marriage and a child produced by a lawful husband and wife outside the womb and born by the wife.³³ The phrase “born by the wife” is crucial. It supports lawful IVF within marriage, but it does not support embryo transfer to a surrogate because the child is not born by the wife who owns the ovum. Article 100 states that a child born outside marriage has nasab only with the mother and her family, while Article 186 regulates inheritance through the maternal line for such a child.³⁴

Thus, Indonesian Islamic family law does not provide a doctrinal path for treating a child born by a surrogate as the full legitimate child of the intended parents merely because a contract exists or because the intended father contributed sperm. In Muslim cases, KHI keeps legitimacy, nasab, and inheritance tied to lawful marriage and childbirth by the wife. The child's welfare may still be protected through maintenance, custody, birth registration, civil responsibility, and adoption-related mechanisms.

³¹Republic of Indonesia, Law No. 1 of 1974 on Marriage, art. 42.

³²Constitutional Court of the Republic of Indonesia, Decision No. 46/PUU-VIII/2010, February 17, 2012.

³³Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, art. 99.

³⁴Compilation of Islamic Law, arts. 100 and 186.

c. Civil Code Contract Law and the Invalidity of Surrogacy Agreements

Some arguments try to validate surrogacy through freedom of contract. Article 1320 of the Indonesian Civil Code requires consent, legal capacity, a certain object, and a lawful cause.³⁵ Article 1337 provides that a cause is prohibited if it is forbidden by law, contrary to morality, or contrary to public order.³⁶ A surrogacy agreement in Indonesia fails at the level of lawful cause and object because it conflicts with health regulation, family law, public order, and the non-commercial nature of human reproduction.

Article 1338 cannot save the agreement. It binds parties only when the agreement is legally made. Freedom of contract does not permit a private contract to transfer nasab, sell gestational services, waive the child's identity rights, or override statutory rules on assisted reproduction. The agreement may be evidence of factual intention or financial responsibility, but it cannot become the legal source of Islamic parentage or child legitimacy.

d. Constitutional Court Decision No. 46/PUU-VIII/2010 and Its Limits

Constitutional Court Decision No. 46/PUU-VIII/2010 is important because it protects children born outside marriage from losing civil rights against a proven biological father. The Court emphasized that a child should not suffer legal harm because of adult conduct and that legal protection must follow biological reality when proven by science and lawful evidence.³⁷ However, this decision must be applied carefully in surrogacy. It creates civil responsibility and legal protection. It does not automatically create Islamic nasab, wali nasab, or Islamic inheritance where the doctrinal requirements of lawful marriage and established lineage are absent.

A balanced reading distinguishes civil protection from lineage validation. The genetic father may be ordered to provide maintenance, education costs, health support, and other civil responsibilities when biological connection is proven. Yet this protection should not be converted into a legal endorsement of surrogacy

³⁵Indonesian Civil Code, art. 1320.

³⁶Indonesian Civil Code, art. 1337.

³⁷Constitutional Court Decision No. 46/PUU-VIII/2010.

contracts. The child is protected because the child has rights, not because the surrogacy arrangement is valid.

4. Socio-Legal Implications and Child Protection

Surrogacy raises socio-legal risks beyond doctrinal parentage. It can expose economically vulnerable women to reproductive exploitation. It can also create cross-border problems involving citizenship, birth registration, legal parentage, and access to identity information. International child-rights instruments emphasize that a child has the right to birth registration, name, nationality, and preservation of identity.³⁸ Recent child-rights guidance on surrogacy also stresses the need to record, preserve, and provide access to information about a child's full identity and origins.³⁹

Islamic law and child-rights law can meet at this point. Islamic law rejects lineage confusion, while child-rights law requires identity protection. Both are harmed when surrogacy is handled through private secrecy. A child born through surrogacy needs accurate birth records, access to medical and genetic information where lawful, and protection from statelessness, abandonment, and exploitation. These protections do not require the state to legalize commercial surrogacy. They require the state to respond to the child after birth.

The proposed prohibition-protection model has five elements. First, medical and contractual surrogacy remains prohibited because it conflicts with Islamic legal principles and Indonesian health law. Second, the child receives immediate birth registration and protection from discrimination. Third, factual genetic information may be preserved for health, identity, and civil responsibility. Fourth, custody and care are determined by the child's best interests through court-supervised mechanisms, not by automatic enforcement of the surrogacy contract. Fifth, maintenance and financial responsibility may be imposed on adults who caused the child's birth, especially where biological contribution and intention can be proven.

³⁸United Nations, Convention on the Rights of the Child, arts. 3, 7, and 8.

³⁹UNICEF, Registration of Births of Children Born through Surrogacy Arrangements in Latin America and the Caribbean (Panama City: UNICEF Latin America and Caribbean Regional Office, 2025), 21-22.

This model is more consistent than two extreme alternatives. The first extreme punishes the child by denying identity and protection. The second extreme validates surrogacy by treating intention and contract as sufficient to create nasab. Both are flawed. Islamic law prohibits the unlawful means, while the legal system must still protect the innocent child.

5. Guardianship, Custody, Adoption, and Kafalah-Like Care

Guardianship must be separated from custody. Wali nasab in marriage law depends on recognized paternal lineage. If paternal nasab is not established under Islamic law, a female child cannot have the genetic father automatically serve as wali nasab. In such a case, wali hakim becomes the lawful route when she later marries. This avoids inventing lineage where the legal requirements of nasab are not met.

Custody or hadanah has a different function. It concerns care, protection, daily upbringing, education, and welfare. A child born through surrogacy may be placed with the most suitable caregiver under court supervision. The caregiver may be the woman who gave birth, intended parents through adoption mechanisms, or another qualified guardian. The decision should not depend solely on the surrogacy agreement. It should depend on the child's best interests, capacity of caregivers, absence of coercion, and protection from exploitation.

Adoption in Islamic law and Indonesian Islamic family law does not erase nasab. It transfers care and responsibility, not lineage. This is why adoption or a kafalah-like model is more suitable than forced recognition of intended parentage. The adopting family may provide care, maintenance, education, and emotional support, but the child's lineage record must remain truthful. The Compilation of Islamic Law also recognizes wasiat wajibah between adoptive parents and adopted children, up to one-third of the estate, as a welfare mechanism that does not convert adoption into biological lineage.⁴⁰

6. Inheritance Consequences

a. Islamic Inheritance

Islamic inheritance depends on established legal causes, especially nasab, marriage, and wala. A child does not inherit from a person merely because that

⁴⁰Compilation of Islamic Law, art. 209.

person intended to parent the child. Nor does the child inherit from the genetic father automatically if paternal nasab is not established through lawful marriage and recognized lineage rules. Under the dominant view, the child born through surrogacy has inheritance ties to the mother who gave birth and her legally recognized family, if the legal conditions are satisfied. The genetic or intended parents may provide support during life and may make a bequest within the limits of Islamic inheritance law.

The bequest route is important. Islamic law generally allows a voluntary will of up to one-third of the estate for a non-heir, as long as it does not harm the rights of legal heirs. For adopted children, KHI recognizes wasiat wajibah up to one-third. This mechanism can protect the welfare of a child raised by intended parents without falsely transforming the child into a nasab heir.⁴¹

b. Indonesian Civil Inheritance

Civil inheritance analysis must not be mixed with Islamic inheritance analysis. In non-Muslim or Civil Code cases, inheritance may depend on legal recognition, proof of blood relationship, and the status of children outside marriage under the Civil Code and post-Constitutional Court jurisprudence. In Muslim cases, religious court jurisdiction and KHI are central. Therefore, a revised article should not use Civil Code Articles 832, 863, 864, and 865 as if they automatically govern Islamic inheritance for Muslim litigants.

For Muslim parties, the safer approach is to use Islamic inheritance rules, KHI, and child-protection remedies. For non-Muslim or mixed civil contexts, courts may consider Civil Code recognition rules and biological proof, but that analysis remains separate from Islamic nasab. This separation prevents the manuscript from reaching inconsistent conclusions about inheritance.

7. Contemporary Bioethical and Comparative Perspectives

Contemporary debates show that surrogacy is not treated uniformly across the world. Some jurisdictions permit altruistic surrogacy, some permit commercial arrangements, and others prohibit surrogacy entirely. India, for example, moved

⁴¹Compilation of Islamic Law, art. 209; Muhammad Abu Zahrah, *Ahkam al-Tarikat wa al-Mawarith* (Cairo: Dar al-Fikr al-Arabi, 1963), 240-245.

from a permissive surrogacy market to the Surrogacy (Regulation) Act 2021, which prohibits commercial surrogacy and permits only regulated altruistic surrogacy under strict conditions.⁴² The United Kingdom permits surrogacy but keeps the birth mother as the legal mother at birth until a parental order transfers legal parenthood.⁴³

Islamic legal debates are also diverse. Sunni authorities generally reject third-party reproductive involvement, while some Shi'i discussions have developed more flexible approaches under specific conditions. This article does not deny the existence of those debates. It limits its normative conclusion to the dominant Sunni approach and the Indonesian legal context. That limitation matters because Indonesia's health law, MUI fatwas, KHI, and Muslim family law practice align more closely with the restrictive model than with permissive third-party reproduction.

Recent scholarship in Islamic bioethics supports a more careful method. It does not ask only whether technology can overcome infertility. It asks whether the technology preserves lineage, avoids exploitation, protects dignity, and keeps family law coherent. A maqasid analysis that considers only reproductive desire is incomplete. A maqasid analysis that also considers nasab, identity, dignity, and the child's future produces a more balanced legal conclusion.⁴⁴

8. Findings

The analysis produces five findings. First, the legal problem of surrogacy is not only the medical act of embryo transfer. It is the separation of genetic, gestational, intended, and legal parenthood. Second, the dominant Islamic legal position rejects surrogacy because it violates *hifz al-nasl*, creates uncertainty over maternity and paternity, and introduces a third party into reproduction that should remain within lawful marriage. Third, Indonesian health law effectively prohibits surrogacy by limiting assisted reproduction to a lawful husband and wife and requiring implantation in the wife's own womb.

⁴²India, Surrogacy (Regulation) Act, No. 47 of 2021.

⁴³Human Fertilisation and Embryology Authority, "Surrogacy."

⁴⁴Morgan Clarke, *Islam and New Kinship: Reproductive Technology and the Shariah in Lebanon* (New York: Berghahn Books, 2009), 95-130; Budi Sujadmiko et al., "The Comparative Legality and Islamic Perspective of Surrogacy in Religious Countries," *HTS Teologiese Studies/Theological Studies* 79, no. 1 (2023): 1-9, <https://doi.org/10.4102/hts.v79i1.8108>.

Fourth, a surrogacy agreement cannot validly transfer nasab or legal motherhood under Islamic law. Nor can freedom of contract override statutory limitations, public order, and child-protection concerns. Fifth, the child must still be protected. Protection includes birth registration, identity, maintenance, care, education, health, and where appropriate adoption or kafalah-like care and limited testamentary protection. These protections arise from the child's dignity and welfare, not from the validity of the surrogacy contract.

D. CONCLUSION

This revised article concludes that surrogate motherhood is impermissible under the dominant Sunni Islamic legal approach and is not accommodated by Indonesian health law. The reason is not a general hostility toward medical treatment. IVF and assisted reproduction may be lawful when they use the sperm and ovum of a lawful husband and wife and the embryo is returned to the wife's own womb during the marriage. Surrogacy is different because it introduces a third-party womb and separates gestational motherhood from the marital framework that supports nasab.

The legal status of the child must be separated from the invalidity of the adult arrangement. The child is innocent and must not be deprived of identity, care, birth registration, maintenance, education, or legal protection. However, protecting the child does not require recognizing the surrogacy contract as valid or assigning nasab to intended parents by agreement. Under the dominant Islamic view, maternity attaches to the woman who gives birth, while paternal nasab is not automatically established merely through genetic contribution where no valid marital link exists with the birth mother. Civil responsibility may still be imposed to protect the child.

The article therefore proposes a prohibition-protection model. The state should prohibit surrogacy as a reproductive service and contract, enforce medical and administrative rules against the practice, and prevent exploitation. At the same time, courts and administrative bodies should protect children already born through surrogacy by ensuring birth registration, preserving identity information, determining custody through the child's best interests, imposing maintenance where justified, and allowing adoption, kafalah-like care, or wasiat wajibah within

legal limits. This model keeps Islamic nasab doctrine coherent while preventing the child from bearing the harm caused by adults.

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