

Legal Certainty for Children Born Through Surrogacy in Indonesia: A Normative Juridical Analysis

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Abstract

Surrogacy presents a regulatory paradox in Indonesia. The current health-law framework permits assisted reproduction only for legally married spouses using their own gametes and requires embryo transfer to the wife from whom the ovum originates. It therefore excludes gestational surrogacy from authorized medical practice. Nevertheless, the same framework does not comprehensively determine the parentage, civil status, registration, and protection of a child who is born through a clandestine domestic arrangement or a cross-border surrogacy arrangement. This study examines that gap through normative juridical research using statutory and conceptual approaches. The analysis covers constitutional child-rights guarantees, marriage and civil law, health legislation, regulations on assisted reproduction, adoption rules, and Constitutional Court Decision No. 46/PUU-VIII/2010. The study finds that a surrogacy agreement is unlikely to be enforceable because its purpose conflicts with mandatory health-law provisions and the lawful-cause requirement of Indonesian contract law. However, the invalidity of the adults' arrangement cannot extinguish the child's independent constitutional rights. Scientific evidence may support a civil relationship with the genetic father under the Constitutional Court's reasoning, but Indonesian positive law still provides no equally clear route for recognizing the genetic intended mother. Adoption can provide interim protection, yet it changes the juridical basis of the relationship and cannot substitute for a specific parentage regime. A progressive-law approach therefore requires a child-centred framework that separates the regulation of adult conduct from the protection of children, guarantees birth registration and identity, enables judicial determination of parentage, allocates parental responsibilities, preserves the right to origins, and addresses cross-border cases.

Keywords:

surrogacy;
legal
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INTRODUCTION

Advances in assisted reproductive technology have expanded the options available to married couples who cannot conceive or carry a pregnancy without medical intervention. One of the most controversial arrangements is gestational surrogacy, in which an embryo created from the gametes of the intended parents, or from donor gametes, is transferred to a woman who agrees to gestate and give birth to the child for the intended parent or parents. In the model examined in this article, the embryo is genetically related to the intended spouses and the gestational carrier does not contribute the ovum. Medical scholarship emphasizes that the genetic constitution of the embryo originates at fertilization, whereas the surrogate provides the gestational environment (Abrar & Putra, 2023, p. 612; Kusmaryanto, 2016, pp. 17-18).

Surrogacy generates intertwined legal, ethical, religious, and social questions. The contractual perspective concerns the validity of the agreement and the consequences of non-performance. The family-law perspective concerns maternity, paternity, birth registration, inheritance, custody, and parental responsibility. The human-rights perspective concerns whether a child may be disadvantaged because adults used a

reproductive method that domestic law does not authorize. These issues are particularly sensitive in Indonesia, where civil law, marriage law, constitutional rights, religious norms, and administrative rules on health services operate simultaneously.

Indonesia does not provide an affirmative legal route for surrogacy. Article 58 of Law No. 17 of 2023 concerning Health limits assisted reproduction to legally married spouses, requires the use of the husband's sperm and the wife's ovum, and requires the resulting embryo to be implanted in the wife from whom the ovum originated. Government Regulation No. 28 of 2024 reinforces that model. Article 111(2) restricts assisted reproductive services to married couples, while Article 112(3)(b) prohibits implantation of the embryo in another woman's uterus. Article 734(1)(c) also recognizes the right of medical personnel to refuse a patient's request to find a surrogate or rent a uterus. Minister of Health Regulation No. 2 of 2025 now governs reproductive health services and similarly confines assisted reproduction to the spouses' gametes and the wife's uterus. Earlier studies frequently cited Minister of Health Regulation No. 43 of 2015, but that regulation was repealed by Minister of Health Regulation No. 2 of 2025 and should no longer be treated as current law.

The central legal gap is therefore not the absence of a rule authorizing surrogacy. The applicable health-law framework effectively excludes it. The more difficult gap concerns legal consequences after a child has already been born through an unauthorized domestic arrangement or through a lawful arrangement completed abroad. Positive law does not provide a coherent, specific mechanism for determining the child's legal mother, establishing parentage with the intended spouses, recording the birth, allocating parental obligations, or resolving conflicts between genetic, gestational, and intentional parenthood. This problem has been described in Indonesian scholarship as uncertainty surrounding the validity of surrogacy agreements and the status of children born from them (Akbar et al., 2024, p. 110; Santosa & Yanti, 2025, p. 362; Nur, 2024, p. 43).

The consequences of this uncertainty are concrete. A surrogate may refuse to relinquish care after birth; intended parents may refuse to accept the child or fulfil financial obligations; the child may face an inconsistent birth certificate; and competing claims may arise regarding custody, inheritance, nationality, or access to information about genetic and gestational origins. Ordinary contract doctrine cannot adequately resolve these disputes because a child cannot be treated as the object of contractual delivery. Even when the agreement is unlawful, the child remains a legal subject whose rights exist independently of the parties' conduct.

The Constitution of the Republic of Indonesia provides the normative foundation for that distinction. Article 28B(2) guarantees every child the right to survival, growth, development, and protection from violence and discrimination. Article 28D(1) guarantees fair legal recognition, protection, and certainty, as well as equal treatment before the law. Constitutional Court Decision No. 46/PUU-VIII/2010 further rejected a rigid rule that deprived a child born outside a legally recognized marriage of a civil relationship with the biological father when that relationship can be proven by science and technology or other lawful evidence. Although the decision did not concern surrogacy, its child-protective reasoning is relevant because it separates a child's civil rights from the legality or formality of the adults' relationship (Kurniawan, 2017, pp. 74-75).

Previous research has examined surrogacy as a possible response to infertility and marital conflict, the validity of surrogacy agreements under civil and Islamic law, and comparative regulation in Indonesia, Switzerland, and the United Kingdom (Fitraya, 2024; Pranatha, 2021). Other studies have discussed the civil relationship between a child born through surrogacy and the biological father, including the possible use of Constitutional Court Decision No. 46/PUU-VIII/2010 (Hariani et al., 2021, pp. 134-135). Those studies provide important foundations, but a further integrated analysis is needed to distinguish four issues that are often conflated: the legality of the reproductive practice, the enforceability of the agreement, the determination of parentage, and the state's independent obligation to protect the child.

This article addresses that need by asking two questions. First, what legal relationships can presently arise between a child born through gestational surrogacy, the surrogate, and the genetic intended parents under Indonesian positive law? Second, how should progressive legal theory be used to construct legal certainty without treating the prohibition of surrogacy as a justification for denying the child's rights? The study's novelty lies in linking contractual non-performance, parentage, adoption, and constitutional child protection within a single normative framework. Its central argument is that the state may regulate or prohibit adult surrogacy conduct while simultaneously creating mandatory rules that protect every child born through the practice.

METHOD

This study employs normative juridical, or doctrinal, legal research. The method is appropriate because the principal problem concerns inconsistency and incompleteness among legal norms rather than the measurement of social behaviour. The analysis uses a statutory approach to examine the hierarchy, coherence, and interaction of constitutional provisions, statutes, government regulations, ministerial regulations, and judicial decisions. In accordance with the statutory approach, each provision is interpreted within the structure of the legal system rather than in isolation (Indrati, 2007, p. 46).

The primary legal materials are the 1945 Constitution; the Indonesian Civil Code; Law No. 1 of 1974 concerning Marriage, as amended; Law No. 17 of 2023 concerning Health; Government Regulation No. 28 of 2024; Minister of Health Regulation No. 2 of 2025; legislation on child protection and adoption; and Constitutional Court Decision No. 46/PUU-VIII/2010. Secondary materials include books, journal articles, and undergraduate theses concerning assisted reproduction, contract law, parentage, DNA evidence, adoption, children's rights, and progressive legal theory.

A conceptual approach is used to clarify the distinctions among genetic parenthood, gestational motherhood, intentional parenthood, contractual obligation, civil status, and the best interests of the child. The materials are analysed qualitatively through grammatical, systematic, and purposive interpretation. The study first identifies the current legal position, then tests its implications for the parties and the child, and finally formulates a child-centred normative response. The analysis does not determine the moral acceptability of surrogacy and does not rely on empirical interviews; its scope is limited to the coherence and reform of Indonesian positive law.

RESULTS AND DISCUSSION

1. Regulatory Status and Enforceability of Surrogacy Agreements

The current legal framework must be read as a coordinated restriction rather than as a complete absence of regulation. Law No. 17 of 2023 establishes the core rule that assisted reproduction is available only to legally married spouses using their own gametes and that the embryo must be transferred to the wife from whom the ovum originated. Government Regulation No. 28 of 2024 and Minister of Health Regulation No. 2 of 2025 operationalize the same closed model. Consequently, a licensed Indonesian health facility cannot lawfully provide gestational surrogacy by transferring the spouses' embryo to another woman.

Table 1 summarizes the provisions most directly relevant to the legal analysis.

Legal instrument	Relevant provision	Legal implication
Law No. 17 of 2023 concerning Health	Article 58	Assisted reproduction is limited to legally married spouses, their own gametes, and transfer to the wife from whom the ovum originates.
Government Regulation No. 28 of 2024	Articles 111(2), 112(3)(b), and 734(1)(c)	The regulation restricts access to married couples, prohibits embryo implantation in another woman, and permits medical personnel to refuse requests to locate a surrogate or rent a uterus.
Minister of Health Regulation No. 2 of 2025	Articles 44-45 and repeal provisions	The regulation governs current reproductive health services and replaces Minister of Health Regulation No. 43 of 2015.
Civil Code	Articles 1320, 1335, and 1337	A contract requires a lawful cause; a prohibited or unlawful cause prevents enforceability.
1945 Constitution	Articles 28B(2) and 28D(1)	The child retains rights to protection, non-discrimination, recognition, and legal certainty regardless of the adults' conduct.

Table 1. Principal Indonesian legal provisions relevant to surrogacy and child protection.

Within Indonesian contract law, freedom of contract is not absolute. Article 1320 of the Civil Code requires a lawful cause, while Articles 1335 and 1337 deny legal effect to agreements founded on a prohibited cause or a cause contrary to law, morality, or public order. A surrogacy agreement is therefore not merely an unnamed contract that can be validated by the parties' consent. Its central performance - transferring an embryo to a third woman for gestation - conflicts with mandatory health-law provisions. Scholarly analyses that treat the arrangement exclusively through Article 1338 on freedom of contract consequently overlook the prior requirement that the contractual purpose be lawful (Akbar et al., 2024, p. 110; Santosa & Yanti, 2025, p. 362).

The legal consequence is that the parties cannot safely rely on ordinary contractual remedies to compel performance. An intended parent should not be able to obtain an order forcing a woman to undergo or continue medical procedures, and a surrogate cannot be treated as contractually obliged to deliver a child as though the child were property. Conversely, the invalidity of the agreement does not automatically answer questions concerning reimbursement, medical expenses, harm, or responsibility for a child already conceived. Those consequences require separate rules grounded in tort, restitution, family law, and child protection, not an attempt to enforce the prohibited core transaction.

This distinction is essential. The state may impose administrative, professional, or other sanctions on adults and health facilities that participate in unauthorized procedures. It may also maintain a policy against commercial surrogacy, exploitation, or the commodification of reproductive capacity. However, a sanction directed at adult conduct cannot be transformed into a civil disability imposed on the child. The legal system must prevent the child from becoming the indirect bearer of the penalty.

2. Parentage and the Civil Status of the Child

Gestational surrogacy separates genetic motherhood from gestational motherhood. From a biological perspective, the intended woman who contributes the ovum is the genetic mother, while the surrogate carries and gives birth to the child. Fertilization establishes the embryo's genome, and gestation does not replace the genetic contribution of the intended parents (Kusmaryanto, 2016, pp. 17-18). DNA analysis can therefore provide highly probative evidence of a genetic relationship when samples are properly collected, tested, and interpreted (Muladno, 2002, p. 18; Patanra & Haris, 2020, pp. 213-214). Nevertheless, genetic evidence proves biological relatedness; it does not, by itself, determine legal parentage. Parentage is a juridical status created by the interaction of biology, birth, marriage, recognition, and judicial determination.

Indonesian marriage and civil law were designed around conventional pregnancy. Article 42 of the Marriage Law defines a legitimate child as a child born in or as a result of a valid marriage. Article 43, as constitutionally interpreted, governs the civil relationships of a child born outside marriage. Article 55 provides that a child's origin is ordinarily proven by an authentic birth certificate and, when such a certificate is unavailable, may be determined by a court. Article 250 of the Civil Code also contains a marital presumption concerning the husband of the woman who gives birth. These rules do not contemplate a situation in which the woman who gives birth is not the genetic mother and another married couple intentionally initiated the conception.

Applied mechanically, the existing framework may direct legal maternity toward the surrogate because she is the woman who gives birth and whose identity appears in the medical record of delivery. If she is married, the marital presumption may also create a *prima facie* relationship with her husband, even though he has no genetic connection to the child. If she is unmarried, Article 43 may establish a civil relationship with the surrogate and her family. Such outcomes show why conventional rules cannot simply be transposed to gestational surrogacy without producing legal fictions that conflict with genetic and intentional parenthood.

The position of the genetic intended father is somewhat more open. Constitutional Court Decision No. 46/PUU-VIII/2010 held that a child born outside a legally recognized marriage may have a civil relationship with the biological father and the father's family when the blood relationship is proven by science and technology or other lawful evidence. The decision was intended to prevent a child from bearing the consequences of the adults' legal status. Its reasoning can support a judicial application for recognition of the genetic father in a surrogacy case, particularly when DNA evidence is clear. Indonesian scholarship has similarly argued that the decision offers a basis for protecting the civil relationship between a child born through surrogacy and the biological father (Hariani et al., 2021, pp. 134-135; Kurniawan, 2017, pp. 74-75).

However, the decision does not automatically resolve surrogacy. It addressed paternal relationships and did not create a general statutory regime for intended parenthood. More importantly, there is no parallel positive-law rule that clearly recognizes the genetic intended mother when another woman has given birth. The intended mother may be able to prove genetic maternity, but the law does not specify whether that evidence displaces the gestational mother, supplements her status, or requires adoption. This asymmetry is the most serious parentage lacuna in the current system.

A constitutionally consistent approach should allow a court to determine parentage through an integrated assessment of genetic evidence, gestational facts, the intention formed before conception, the conduct of the parties after birth, and, above all, the best interests of the child. No single element should operate automatically in every case. Genetic evidence is especially important in the model studied here, but the court must also protect the child from abandonment, trafficking, coercion, or competing claims. The immediate objective is stable legal parentage, not the retrospective validation of the surrogacy contract.

3. Contractual Non-Performance, Adoption, and Interim Protection

Disputes arising from surrogacy are often described as contractual default. Typical examples include a surrogate's refusal to transfer care after birth, intended parents' refusal to accept a child with a disability, non-payment of agreed medical expenses, breach of confidentiality, or disagreement over prenatal medical decisions. Yet the language of default is incomplete because the most important interests belong to a person who was not a contracting party: the child. Any legal response must therefore distinguish financial disputes between adults from questions of custody, parentage, and the child's welfare.

Because the core agreement is likely unenforceable, a court should not order specific performance that treats the child as an object of delivery. The court may still need to address proven expenses, wrongful conduct, or harm under other legal doctrines, but those claims must not determine who becomes the child's parent. Custody and parental responsibility should be decided through family-law standards and the best interests of the child. This prevents the strongest bargaining party from converting private contractual power into control over civil status.

Adoption is frequently proposed as a practical route by which the intended parents may acquire a legally recognized relationship with the child. Indonesian scholarship notes that adoption can secure care, maintenance, education, and other protective obligations when the intended parents cannot otherwise be recorded as parents (Hariani et al., 2021, pp. 134-135). Adoption may therefore function as an interim mechanism, particularly when immediate legal stability is necessary and no specific surrogacy procedure exists.

Nevertheless, adoption is not a complete solution. It changes the legal basis of the relationship from biological or intended parenthood to adoptive parenthood. It may also produce different consequences for lineage, guardianship, and inheritance across the civil, customary, and Islamic legal contexts. Claims that adoption automatically makes every legal consequence identical to biological parentage are therefore too broad. The uncertainty concerning inheritance has already been identified in the surrogacy literature (Nur, 2024, p. 43).

There is also a rule-of-law concern. When adoption is used to conceal a planned surrogacy arrangement, it becomes a form of legal circumvention rather than a transparent child-protection process. The adoption authority may not receive accurate information about the child's origins, the surrogate's consent, payments, or cross-border arrangements. Such concealment can undermine safeguards against trafficking and exploitation. Adoption should therefore remain available only through an open, judicially supervised process that records the child's origins and evaluates consent and welfare. It should not be treated as a substitute for legislation on parentage after surrogacy.

Pending comprehensive reform, courts and administrative authorities should use existing child-protection, civil-registration, adoption, and constitutional norms to prevent statelessness, lack of identity, abandonment, or discriminatory treatment. This interim approach is consistent with the principle that every child is entitled to legal recognition regardless of the circumstances of birth (Sipahutar, 2019, p. 72).

4. Progressive Law and a Child-Centred Regulatory Framework

Progressive legal theory provides a normative basis for addressing the gap. Satjipto Rahardjo's central proposition is that law exists for human beings, rather than human beings existing for law. Legal rules must therefore be interpreted and developed in a manner that advances substantive justice, especially when formal doctrine fails to protect vulnerable persons (Rahardjo, 2006, p. 265). Progressive law treats the legal system as dynamic and responsive to social reality, while still requiring principled reasoning rather than arbitrary departure from enacted law (Faizal, 2017, p. 22; Tanya et al., 2010, p. 212).

In the context of surrogacy, progressive law does not require the judiciary to legalize a prohibited medical practice. Its more defensible function is to prevent the prohibition from producing injustice for a child. The legality of the adults' conduct and the child's entitlement to recognition are separate normative questions. A progressive approach gives priority to constitutional rights, human dignity, and the best interests of the child when conventional categories of motherhood and contract cannot resolve the case.

A prolonged legal lacuna is particularly dangerous where fundamental rights are involved. Unclear rules allow inconsistent administrative decisions, strategic concealment, and unequal treatment between children whose families have access to legal advice and those who do not. The state's obligation is not satisfied by prohibiting medical personnel from facilitating surrogacy; it must also establish a predictable legal pathway for children who already exist (Hasani, 2013, p. 18; Manullang, 2007, p. 25).

Comprehensive reform should be built on seven elements. First, every child born through surrogacy must be registered promptly and receive proof of identity, regardless of whether the underlying arrangement was lawful. Second, legislation should provide an expedited judicial procedure for determining parentage, using genetic, gestational, and intentional evidence and applying the best-interests principle. Third, the law should allocate parental responsibility, maintenance, health-care costs, and guardianship so that no child can be abandoned by the adults who initiated the conception. Fourth, the child should have a protected right to information about genetic and gestational origins at an age and in a manner consistent with welfare and privacy. Fifth, medical records, informed consent, confidentiality, and protection from coercion must be regulated. Sixth, cross-border cases require rules on recognition of foreign

birth records, nationality, immigration, and public-order review. Seventh, sanctions should focus on exploitative adults, intermediaries, and professionals rather than on the legal status of the child.

The legislature may choose among different policy models, including continued prohibition, tightly regulated altruistic surrogacy, or a limited recognition regime for arrangements completed abroad. Whatever model is selected, transitional provisions are indispensable. Existing children cannot wait for a complete political consensus on surrogacy. The law must immediately provide procedures for identity, parentage, nationality, custody, and support.

This framework also clarifies the role of the judiciary. Courts should not use progressive law as an unrestricted licence to rewrite health legislation. They should use constitutional interpretation to protect the child within the available legal order, make fact-specific parentage determinations, and identify the limits that require legislative action. The final objective is legal certainty that contains substantive justice, not certainty achieved by imposing a rigid category that contradicts the child's biological and social reality.

CONCLUSION

Indonesian health law does not authorize gestational surrogacy. Law No. 17 of 2023, Government Regulation No. 28 of 2024, and Minister of Health Regulation No. 2 of 2025 confine assisted reproduction to legally married spouses, their own gametes, and embryo transfer to the wife from whom the ovum originates. A surrogacy agreement therefore conflicts with mandatory law and is unlikely to satisfy the lawful-cause requirement of the Civil Code. The parties cannot rely on freedom of contract to compel the transfer of a child or the performance of invasive reproductive acts.

The invalidity of the agreement, however, does not extinguish the child's constitutional rights. Existing parentage rules may point toward the gestational mother and, depending on marital status, her husband, even when the intended spouses are the genetic parents. Constitutional Court Decision No. 46/PUU-VIII/2010 may support recognition of the genetic father when biological relatedness is proven, but positive law provides no equally clear route for recognizing the genetic intended mother. Adoption can provide interim care and status, yet it cannot accurately resolve biological parentage or substitute for a specific surrogacy regime.

Progressive legal theory supports a child-centred response that separates sanctions for adult conduct from the protection of children. Indonesia should adopt legislation guaranteeing birth registration and identity, judicial determination of parentage, allocation of parental duties, access to information about origins, medical and consent safeguards, and rules for cross-border recognition. The state may continue to restrict surrogacy, but it cannot permit the resulting regulatory gap to expose a child to discrimination, uncertain parentage, or denial of legal recognition.

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