


# Surrogacy in Indonesia: The comparative legality and Islamic perspective



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Reproductive health technology allows married couples who experience infertility to have a child through assisted reproductive technology (ART), such as the in vitro fertilisation (IVF) process. The transfer of the extracted embryo to the woman's womb is called surrogacy technology (gestational surrogacy). The legality of the practice of surrogacy is still questionable, both on a national and international level. This research discussed the legality of surrogacy in some religious countries, focusing on Indonesia. This research used normative juridical research methods or literature review through a comparative religion-legal approach. This study indicated that most do not have a specific legal instrument regarding surrogacy practice. International law also does not have a standard legal instrument regarding the legality of surrogacy. Legality is determined by each religious country's national laws and customs. For example, Indonesian law prohibits this practice implicitly under Law No. 36 of 2009 concerning health. The United Kingdom legalised surrogacy through the Surrogacy Agreement Act 1985, which was amended to the Human Fertilization and Embryology Act 2008, Greece through the Greek Legislation Law 3089/2002 and Law 3305/2005, and India through the 2019 Surrogacy Regulation Bill. Those countries have their limitations and characteristics that rule surrogacy. Surrogacy is indeed a technological advancement in the health sector. However, for countries that are influenced much by religion, technological advances sometimes conflict with the culture and the belief that has long been followed by most of the population. For Indonesia, the largest of Sunni Islam ruled surrogacy against the law. Next, Iran, as a Shia Islam country, ruled that surrogacy is a legal action.

**Contribution:** The research provided information and knowledge regarding the different settings of surrogacy practice. Most religious countries bravely rejected or put strict limits on the practice of surrogacy.

**Keywords:** assisted reproductive technology; gestational surrogacy; surrogate mother; legality; Islam.

## Introduction

The advances of a third revolution in medicine and technology in various fields of life since the 2000s have made it easier for humans to work and fulfil all their needs (Agostoni et al. 2021). The integration between science and technology is fundamental for the legal aspect (Vanhala 2020). One of the technological advances is in reproductive health. Reproductive health technology aims to help married couples who experience infertility to have children. Infertility is a condition in which a married couple has routinely had sexual intercourse without contraceptives but has not had a child within 12 months, which can be caused by abnormalities in the reproductive system of one or both of the marriage partners. This condition encouraged the health sector to create assisted reproductive technology (ART) for assisted pregnancy. Assisted reproductive technology has now generated approximately 8 million infants around the world (Chen et al. 2020). One of the products of ART is an artificial insemination method or *in vitro* fertilisation (IVF). This method was discovered in 1978 and performed by extracting sperm and egg cells from a legal husband and wife and then placing them into a glass tube to transfer the embryos into the woman's womb (Vuong et al. 2018). Although not all the extracted embryos can be transferred into the wife's womb, this mechanism has been used to give birth to a baby for another person or couple.

This study only examines the surrogacy carried out through artificial insemination technology or IVF, which is called gestational surrogacy, not the surrogacy performed directly through sexual intercourse between a couple who rents out the womb (traditional surrogacy). Gestational surrogacy must pass through the eligibility process by comprehensive measures to assess the

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patient's health condition (Gyawali & Kesselheim 2020). The process of the IVF method still faces numerous risks from the genetic aspect, including congenital disabilities. However, it has since proven otherwise (Davies et al. 2012). *In vitro* fertilisation has continued to be one of the preferred reproductive technologies by couples with fertility issues. Some people argue that surrogacy severely violates the human dignity of children and insults the status of women. It is still permissible if there is an agreement between parties (Zimmerman 2015). The pros and cons occur because Indonesia does not have a sufficient legal framework regarding the legality of surrogacy. The international community has different opinions, such as Germany, Spain, Italy and France prohibiting surrogacy practices. At the same time, the United Kingdom (UK), Belgium, Denmark, Ireland, Thailand, India, Ukraine and several states in the United States of America (USA) allow surrogacy (Bala 2014).

The lack of regulations in various countries and the absence of standard international legal instruments regarding surrogacy bring people overseas to perform this practice. With its advanced health facilities and adequate regulations in surrogacy practice, India has become one of the most popular destinations in Asia. Surrogacy Centre India (SCI) IVF Hospital, Delhi, has helped over 1200 births world wide through surrogate mother. In addition, the US, especially California, is the leading destination for married couples worldwide to perform surrogacy (Shanti 2019). California has several surrogacy agencies: American Surrogacy, the California Surrogacy Center and the Center for Surrogate Parenting, LLC. These agencies have collaborated with many hospitals in California to perform surrogacy, including San Diego Fertility Center, California IVF Fertility Center and Southern California Center for Reproductive Medicine. In carrying out the practice of surrogacy, these agencies also collaborate with several law firms. The firms, namely the R & S Law Group, LLP; the Law Offices of Sherrie L. Davidson, Inc.; and Master Surrogacy Law assist the biological parents (intended parents) during the trial process in court to get a verdict as legal parents.

Furthermore, the absence of an international legal framework governing surrogacy practices creates several cases. One of the cases was of a married couple from France, Dominique and Sylvie Mennesson. After they had twins from the process of surrogacy, the California court recognised the legal status in the US in 2000. However, the French government does not recognise the decision issued by California. The French court could not issue birth certificates to the Mennesson children (Reznik & Yakushchenko 2020). The Mennesson couple was considered to have violated French national law, which prohibits surrogacy in France. Thus, the case was brought to the European Court of Human Rights (ECHR). On 26 June 2014, Dominique Mennesson and his wife won this case after the court decided that the couple has the right to privacy in the family, based on the ECtHR upholding Article 8 of the European Convention on Human Rights, including the right to have children. The ECtHR also decided that the French

government should compensate Mennesson's child EUR5000 and pay a trial fee of EUR1500. This case shows that surrogacy does not yet have standard international legal rules and only depends on the national laws of each country (Arikhman 2021).

This case proves that international law plays an essential role in regulating the legality of surrogacy to prevent a similar case. The research provided information and knowledge regarding the different settings of surrogacy practice. Most Sunni Islam countries bravely rejected or put strict limits on the practice of surrogacy. Still, as a Shia Islam country, Iran believes that surrogacy is not violating law and religion. Based on the above background, the identified problem in this study focuses on the legality of surrogacy practice in Indonesia and other countries. Next, the study will describe how the Islamic perspective ruled on the legality of surrogacy practice under domestic law and international law.

## Methodology of this research

This research uses normative juridical research methods or literature studies through a comparative approach. Data were obtained from various legal instruments, literature, scientific articles and Internet sites in religious countries. The author limited the scope of the legal instrument to constitutions, acts, government regulations, ministerial regulations and other regulations relating to surrogacy.

## Discussion

### Surrogacy: An overview

Surrogacy is a contract between a woman and the biological parents of the child and/or offspring where the woman agrees to bear and carry the child and hand him or her over to the parents when the child is born (Patel et al. 2018). It is assumed that surrogacy is helpful for a couple without genetic disorders but physically unable to carry a child or offspring. This inability to carry offspring is related to a condition such as congenital uterine agenesis and significant congenital uterine malformation, which leads to infertility. However, surrogacy is still debatable among policymakers, because the issues remain unsolved as a result of legal weaknesses (Piersanti et al. 2021). Additionally, the foreign form of surrogacy leads it to be frowned upon. The common risks in surrogacy are as follows (Cui et al. 2016):

- Surrogacy requires special care, consisting of consultation with professionals from the legal and health sectors. If these aspects are not considered, it will lead to irresponsible surrogacy, such as octuplets (eight offspring delivered at a single birth).
- Financial compensation towards surrogate mothers is essential. However, there is no clear definition of standard payment. If involved parties are not careful, it could lead to unbalanced benefits between the compensation and the possible health risk that the surrogate mothers will go through.

- Problems resulting from the offspring's disease include congenital disabilities, genetic disorders, and other illnesses. In particular, babies who are born preterm are usually prone to heart failure (Mohamed et al. 2021).

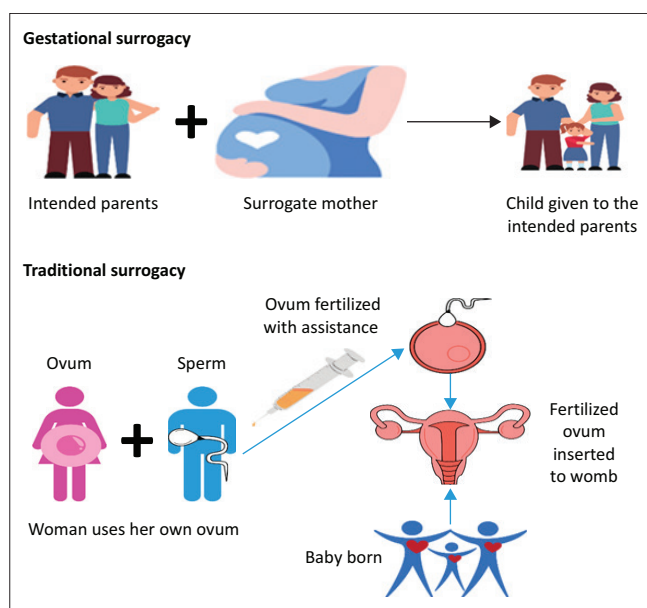
There are two types of surrogacies, which are traditional surrogacy and gestational surrogacy. Traditional surrogacy occurs when a mother carries her own fertilised egg, which is inseminated by the sperm of the intended father. Gestational surrogacy occurs when a mother carries a fertilised egg without a biological or genetic connection. This research focuses on gestational surrogacy (please see Figure 1).

## The legality of surrogacy practices in some countries

International law also does not have a standard legal framework that covers the practice of surrogacy. That is why the practice still raises controversy in many countries (Paβδός 2017). The existing legal rules only rely on the national laws of each country; civilised countries in the world still do not justify this practice. This surrogacy activity is still illegal and prohibited in Indonesia. Most European countries, including France, Norway, Germany and Italy, also prohibit surrogacy because it is considered a form of commercialisation of the human body that violates the value of human rights and the laws of their country (Bala 2014). On the other hand, many countries have legalised and regulated surrogacy in their national laws.

## Surrogacy regulation in India

In India, the interaction between surrogate mothers and parents is limited. It is expected that surrogate mothers in India are paid approximately \$60 000.00 (Vora 2013). Uterine leasing in India has been legalised since 2002, but the country only formed regulations regarding surrogacy in 2005. The



Source: illustrated by authors

FIGURE 1: Images of traditional surrogacy and gestational surrogacy.

regulations of surrogacy are constantly amended from the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics 2005, the ART Regulation Bill 2014, and the Surrogacy Regulation Bill 2016. Currently, surrogacy in India is stated in the Surrogacy Regulation Bill 2019. These provisions regulate the following matters (Kalani 2015):

- A single parent or a married couple can carry out surrogacy.
- Intended parents must pay all costs for the duration of the pregnancy until the baby is born.
- Surrogate mothers are allowed to receive compensation, but no specific amount is stated.
- The name written on the birth certificate is the name of the intended parents, so they are considered legal parents.

## Surrogacy regulation in the United States of America

In the US, one of the motivations for surrogacy is the decline in life expectancy, which is 78.6 years old (Bridges 2019). However, surrogacy experiences a lack of uniform regulation and dependence on surrogacy contracts. If one of the parties, the legal parents or the surrogate mother, does not apply the contract, it would lead to a custody battle (Quinn 2018). However, the legality of surrogacy in the US is under the authority of each state. Some states consider surrogacy illegal, including Washington, DC; New York; Michigan; Louisiana; and Nebraska. Meanwhile, California, Alabama, Pennsylvania, Ohio and Hawaii commercially allow surrogacy, especially gestational surrogacy. Among the states that legalise this, California is the centre implementing surrogacy in the US. It has been ratified through the California Supreme Court, the provisions of which are as follows:

- In the case of gestational surrogacy, the child's rights between the intended parents and the surrogate mother must be settled based on a surrogacy agreement between the parties.
- The surrogacy agreement also determines the position of the baby's parents.
- The intended parents' names are included on the child's birth certificate without going through the adoption procedure.
- The California state legal arrangement provides various procedures, during which is the final ratification of a surrogacy agreement.

## Surrogacy regulation in the United Kingdom

The UK has legalised surrogacy since 1985 through the *United Kingdom Surrogacy Act 1985*, which was later updated to the *Human Fertilisation and Embryology Act 2008*. Although it is legal under these provisions, surrogacy in the UK must meet the following conditions (Fenton & Rees 2010):

- Surrogacy must be implemented through medical considerations.
- Surrogacy must be implemented with the use of health technology.

- Surrogacy for commercial purposes is prohibited.
- The intended parents must pay for medical costs and provide compensation to surrogate mothers during the delivery process.
- After the baby is born, the surrogate mother must look after him or her until the intended parents have received a court order certifying and recognising them as legal parents.

### Surrogacy regulation in Uruguay

The Uruguayan government has legalised surrogacy through a parliamentary decision listed in Key 19.67/2013 in 2013. The regulation regulates the Uruguayan Public Health Care System and ART, including gestational surrogacy, with the following conditions (Stifani & Lopez 2018):

- The implementation of surrogacy in this country is only allowed if the wife has a disease or disorder in the uterus which prevents her from conceiving and giving birth.
- An agreement must precede the implementation of surrogacy in this country.
- Surrogacy should be engaged in voluntarily.
- The names of intended parents may appear on the child's birth certificate without requiring a court decision.

### Surrogacy regulation in Ukraine

Surrogacy in Ukraine is legal and has become very popular in this decade. The Ukrainian government has legalised surrogacy through the Civil Code of Ukraine 2004, the Family Code of Ukraine 2003 and Order of the Ministry of Health No. 787 on the Approval of the Application of Assisted Reproductive Technologies in Ukraine 2013 (Kirshner 2015). Based on the above legal instruments, the provisions regarding surrogacy in Ukraine are as follows (Kirshner 2015):

- Surrogacy may be engaged in commercially or voluntarily.
- It can only be performed by married couples experiencing infertility.
- The surrogate mother has no relationship with the child after the child is born.
- The parents' names written on the child's birth certificate are the intended parents' names.
- Ukrainian courts do not recognise the legal status of children born from surrogacy between Ukrainian women and foreign citizens.

### Surrogacy regulation in Thailand

Thailand is one of the destination countries for illegal surrogacy in Southeast Asia (Cohen 2015). However, Thailand did not have a specific law regulating surrogacy and prohibiting commercial surrogacy until 2014. It only refers to the Medical Council Regulations nos. 1/2540 and 21/2545 in its practice (Caamano 2016). Finally, on Feb 1, 19 2015, the Thai Minister of Health, Rajata Rajatanavin, passed the *Protection for Children Born Through Assisted Reproductive Technologies Act, BE 2558*, which aimed to regulate child

protection, prohibit commercial surrogacy and impose prohibition of trade in human sperm. These provisions contain the following (Stasi 2017):

- Create an honest relationship between intended parents and the child.
- Provide provisions regarding the rights and obligations of the parties involved in a surrogacy agreement.
- Supervise ethics, techniques and use of ART.
- Prohibit commercial surrogacy and prevent foreign nationals from having children by leasing a uterus to Thai women.
- Married couples can only engage in surrogacy in Thailand if one of them is a Thai citizen and has
- been married for at least three years.
- Surrogacy is not allowed for same-sex partners or single parents.

### Surrogacy regulation in Greece

Greece is one of the countries in Europe, apart from the UK, that has legalised the practice of surrogacy (Piersanti et al. 2021). The legal provisions regarding surrogacy are regulated in Greek national law through Greek Legislation Law 3089/2002 and Law 3305/2005. The matters stipulated in the provisions mentioned above are as follows (Chortara 2016):

- Surrogacy may only be performed if the intended mother is entirely unable to conceive and this has been medically proven.
- The age of the intended mother should not be more than 50 years.
- Surrogacy may be performed if the surrogate mother has been declared medically healthy to become pregnant, ensuring the mother's safety and that of the baby she is carrying.
- A surrogate mother is at least 25 years old and not more than 45 years old.
- Surrogate mothers have given birth to their children at least once and have not been the subject of a caesarean delivery operation more than twice.
- A gestational agreement between the intended parent and the surrogate mother must be made in writing and signed by the court.
- Surrogacy can be implemented if the surrogate mother and intended parent are permanently domiciled in Greece, whether they are citizens of Greece or foreign citizens.
- Surrogacy must be carried out by ensuring the child's best interests through ART methods.

## The legality and Islamic perspectives in Indonesia

The following section examines surrogacy in Indonesia from a legal and contractual standpoint. The 1945 Constitution of the Republic of Indonesia has ensured sustainable public health to increase human resources and competitiveness for the nation's development (Diani 2020). Therefore, Indonesia's medical journey has constantly balanced the development of

science and technology. The condition; align the technology with the applicable regulation, including surrogacy (Zuhri & Basri 2016). However, Indonesian regulation still does not have a specific legal instrument regulating surrogacy practice as ART (Ambarwati 2019). Several Indonesian legal instruments implicitly state that surrogacy practices are prohibited. They refer to several legal provisions.

Table 1 shows that Indonesia's national law has not regulated gestational surrogacy. The thought determining surrogacy's regulation obscurity in Indonesia is seen from three perspectives, namely health, civil, and criminal:

- Law Number 36 of 2009 concerning health and Government Regulation Number 61 of 2014 concerning Reproductive Health are the legal provisions regarding the health perspective (Sari 2017). The Minister of Health Regulation Number 039/Menkes/SK/I/2010 concerning the Implementation of ART Services only acknowledges traditional surrogacy, which concerns sperm cells and ova from a legally married couple; otherwise, gestational surrogacy is illegal (Komalawati & Hakim 2019).
- In the civil perspective, surrogacy is merely seen as an agreement or contract between the intended parents and the surrogate mother (Wiguna & Suartha 2017). The surrogate mother accepts carrying the child and handing it over to the intended parents once it is born. Therefore, surrogacy is unregulated in Indonesia's civil law.
- Lastly, the criminal perspective of surrogacy in Indonesia views surrogacy as an act of exploitation that violates Law No. 21 of 2007 concerning the Crime of Trafficking in Persons (Columb 2017). Therefore, surrogacy is unregulated in Indonesia's criminal law.

Indonesia has the world's largest Muslim population, and Pancasila, Indonesia's philosophical foundation, requires its citizens to 'believe in the one and only God'. As a state law, Indonesia must consider all the factors, including religion, culture, technology, and legal perspective (Judiasih & Dajaan 2017). Does Islamic law allow surrogacy? The question is easy to answer. The only legitimate pregnancy in Islam results from the union of the gametes of a legally married couple within the frame of marital legitimacy. Thus, a child in the womb of a surrogate mother, the third party of marriage, is the product of an illegitimate relationship. The main argument against surrogacy is based on verses 49 and 50 of chapter 42 of the Qur'an, in which

children are a gift from Allah. Thus, some who do not receive this gift (pregnancy or children) must trust Allah.

The Islamic perspective on surrogacy begins with the Islamic concept of motherhood. A mother is a woman who bears a fertilised egg, gives birth to a child and then raises the child to maturity, according to the Qur'an. The Qur'an states in chapter 58, verse 2, that the status of motherhood can only be obtained by giving birth. Another type of motherhood recognised by Islam is 'adoptive motherhood', which is achieved by breastfeeding an infant. The former is attained through pregnancy, birth and breastfeeding, whereas the latter is attained through only breastfeeding. The question arises as to whether or not surrogate motherhood is an acceptable method of motherhood in Islam, juxtaposed with the breastfeeding method. The answer is no; it cannot be matched, because in surrogate motherhood, both the intended mother who supplies the egg and the surrogate mother who delivers the fertilised egg play an essential role in forming the ensuing child. Whether the surrogate mother or the owner of the fertilised embryo can be called a biological mother is a matter of debate. This consideration is due to the genetic mixing of blood from the surrogate mother, even though the initial embryo comes from the genetics of another married couple.

Is there any acceptable conditional situation? The issue of surrogacy was first addressed at the seventh session of the Muslim World League's Islamic Fiqh Council meeting in 1404 AH (1985). In the following year, the Council came up with the rule that these modern technologies were to be used to 'only offer lawful treatment to a husband and wife who wish to have a legitimate child and establish a family' and thus, banned the use of surrogate motherhood. Similarly, the Fiqh Council of the Organization of Islamic Conference (OIC) in 1986 concluded that surrogacy could be permissible only between married couples and that too under certain conditions.

Surrogacy research increases yearly because it becomes more accessible as medical technology improves. The complex issue of surrogacy is increasingly due to several factors, including the level of infertility, massive commercial, the differences in national legal policy, ethical-cultural conflicts, and social aspects. The foundations are different, and the Islamic perspective on this has not changed. The research conducted by Hathout Maher in 1989 already pays attention

**TABLE 1:** Regulation related to surrogacy according to Indonesian law.

No.	Instrument	Regulation	Status
1.	Law Number 36 of 2009 Concerning Health	A legally married couple performs surrogacy.	Traditional surrogacy is legal. Gestational surrogacy is illegal.
2.	Government Regulation Number 61 of 2014 concerning Reproductive Health	A legally married couple performs surrogacy.	Traditional surrogacy is legal. Gestational surrogacy is illegal.
3.	The Regulation of the Minister of Health Number 039/Menkes/SK/I/2010 concerning the Implementation of Assisted Reproductive Technology Service	A legally married couple performs surrogacy.	Traditional surrogacy is legal. Gestational surrogacy is illegal.
4.	The Arrangement of the Surrogacy Agreement according to the perspective of Indonesian Civil Law	Surrogacy is highlighted in the essence of the contract between the surrogate mother and the intended parents.	Surrogacy is unregulated.
5.	Arrangement of the Surrogacy Agreement according to the perspective of the National Criminal Law	Surrogacy fulfils indicators of exploitation.	Surrogacy is unregulated.

to the phenomenon of new techniques of implantation of the fertilised ovum, grown *in vitro*, which has been advanced as a method for 'alternative reproduction', and concludes that surrogate mothers are not permitted. However, it is acceptable in limited circumstances.

Because Islam places a high value on marriage and family life, there should be no objections to artificial insemination. Modern Sunni Muslim jurists have addressed IVF methods considering the Shari'a ruling that it is permissible if the sperm and ovum are from a legally married man and woman, and fertilisation occurs during their marriage. These opinions state that IVF is legal if the fertilised ovum placed in the woman's womb is an egg taken from her ovaries, implying that no surrogate mother is used. It is illegal when a husband and wife provide sperm and ovum but 'hire' the surrogate's womb, and the embryo is implanted in the womb of a surrogate mother. Donor sperm pregnancies are strictly forbidden in all Islamic law schools, such as giving the embryo to another woman to carry the pregnancy in her womb. Involving a third party in surrogacy can be considered adultery (Zina).

After reviewing all the research on IVF and consulting experts in the field, the Islamic Fiqh Council concluded that five types of IVF are prohibited, and two are legal under Islamic law. The following are the five procedures that are entirely illegal because they confuse parentage:

- Fertilisation produced by a husband's sperm and the ovum of a woman other than his wife (egg donorship).
- Fertilisation of a woman's ovum by sperm from a man other than her husband (sperm donorship).
- Fertilisation of a husband's sperm and his wife's ovum, where the embryo is implanted in the uterus of a surrogate mother.
- Fertilisation produced by the sperm and ovum of two people other than the couple attempting to conceive a child. The embryo is implanted in the wife's uterus, also known as egg and sperm donorship.
- Fertilisation results from a man's sperm and the ovum of one of his wives, with the embryo implanted in the uterus of the other wife.

Meanwhile, the two types of legal IVF procedures are as follows:

- Fertilisation is achieved outside the body using the husband's sperm and the wife's ovum, with the embryo implanted in the wife's uterus.
- Fertilisation is caused by the husband's sperm being mechanically inserted into his wife's uterus, allowing fertilisation inside her body.

Surrogacy has been a contentious issue from a shari'a standpoint since the mid-eighties and continues to be so. Most Muslim scholars consider surrogacy a form of unlawful sexual intercourse known as *zina*. Some also cite various verses and traditions to demonstrate that such an act contradicts the Lawgiver's intention and the Almighty's

determined laws of nature. How do the two major branches of Islam, Sunni and Shia, see this? Most Sunni Muslims worldwide share the fatwa that surrogacy is not permitted in any form.

Nevertheless, there are some controversies concerning issues such as kinship and inheritance. The main ethical concern of Iran's experience with gestational surrogacy is the financial relationship between the intended couple and the surrogate mother. While monetary remuneration is practised in Iran and allowed by religious authorities, it seems to suffer from ethical problems. Contrary to popular belief, the constitution implemented surrogacy as a legal method in Iran in 2003. If the court has proved a couple's infertility, they can seek medication and help from authorised clinics. Following canonical laws and regulations, these clinics can combine the couple's sperm and eggs outside the uterus and transfer the embryo to another uterus. These infertility treatment centres must have written consent from both parties. According to the Iranian constitution, if a married couple wants to have a baby through surrogacy, they must prepare their application and submit it to the court. The judge will allow them to have children through surrogacy if the couple's eligibility is verified. In this method, sperm and eggs are combined via IVF, and the fertilised egg is transferred to another woman's uterus. The surrogate mother and the intended father have no sexual relationship. This procedure is often performed when one of the following problems occurs:

- The intended woman does not have a uterus as a result of medical or congenital problems.
- The uterine cavities are blocked because of tuberculosis.
- The intended mother has diabetes, hypertension, heart disease or thalassaemia, which makes pregnancy dangerous.
- The intended mother's uterus is small, preventing successful implantation.
- The intended mother has experienced frequent miscarriages in the past.

After doing research on surrogacy practice for a decade, in 2009, Kiarash Aramesh published a paper exposing that surrogate motherhood is very familiar in Iran, explaining how this is the result of their Shia schism. While most Muslims worldwide are Sunni, most Iranians are Shia. Iran is an Islamic country where surrogate motherhood is legal. The laws and regulations governing subjects such as surrogacy in Iran are based on Shia jurisprudence (fiqh).

Shia scholars regard surrogate mothers as similar to milk mothers or wetnurses and see no harm in the procedure. The convergence of ministerial approval, the needs of infertile couples and the existence of many poor women eager to become surrogate mothers for financial gain have rapidly expanded assisted reproduction facilities in Iran. A draft bill addressing the subject of gestational surrogacy has been created. Still, neither the parliament nor the guardian council has ratified it. As a result, in the absence of legislation, current practice in Iran is based on religious directives.

What about ethical concerns? There are numerous ethical objections to surrogate motherhood. Concerns about the gametes are the source of Islamic ethical and legal concerns about surrogacy. The primary reason for this is that all forms of surrogate motherhood produce confusion regarding family lineage [*nasab*], which violates one of shari'a's fundamental objectives, which is the protection of family lineage. Because surrogate motherhood violates progeny protection, the Islamic Fiqh Academy, part of the Organization of Islamic Countries, concluded that all forms of surrogate motherhood are illegal in Islam.

From the points summarised by Abdurezak Abdulahi Hashi in his research in 2019, he finally concluded that the practice of surrogate motherhood and fatherhood is prohibited in Islam because of the involvement of a third party (Santhi 2019). Because blood link is the essential basis of marriage and inheritance in Islam, any behaviour that may damage family relationships or generate lineage uncertainty is banned. As surrogate motherhood is viewed in the same manner as adultery [*zina*], it is considered a breach of the marriage contract and the honour and dignity of the intended family; thus, it is not permissible. Because surrogate motherhood causes identity uncertainty in the offspring born from surrogacy, Muslim jurists ruled that surrogate motherhood is forbidden.

## Conclusion

In conclusion, Indonesia still does not have a precise legal instrument that regulates surrogacy practice. Indonesia is also influenced by culture and religion in issuing policies such as surrogacy. As the basis of the Indonesian state, Pancasila also provides a view of life placing religion as the basis for activities. Similarly, international law does not have standard legal provisions such as conventions and other sources of international law as a reference. Currently, the legality of surrogacy in the international community only depends on the national laws of each country. Even though some countries have legalised this practice, surrogacy must be performed by ensuring the rights of children and women. This practice should also be carried out using technology or gestational surrogacy to ensure its safety. Most European countries and the US have also legalised the practice of surrogacy, which is based on the constitution and laws. Indonesia and most Middle Eastern countries that have Sunni Islam forbid the practice of surrogacy, based on the law and the Qur'an. Meanwhile, Shia Islamic countries, such as Iran, allow the practice of surrogacy with some fairly strict rules and through a court decision process.

Furthermore, the commercial practice of surrogacy, without medical consideration, should be restricted. The authors suggest that the Indonesian government pay more attention to this issue and provide a specific legal framework for ART, including gestational surrogacy. Still, it must be compatible with the Qur'an and Hadiths. Furthermore, the authors also suggest that international law, particularly officials

of international organisations, can create standard legal provisions in implementing surrogacy.

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The authors have declared that no competing interest exists.

### Authors' contributions

B.S. conceptualised article. N.A. and L.W.M. acted as supervisors for the article content. S.A.R. analysed article. I.F.M. wrote article and assisted with editing and proofreading.

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This article followed all ethical standards for research without direct contact with human or animal subjects.

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Data sharing is not applicable to this article as no new data were created or analysed in this study.

### Disclaimer

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of any affiliated agency of the authors.

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