Surrogate Mothers in a Multidimensional Perspective of Legal Regulations in Indonesia

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Abstrak

Secara praktis, ibu pengganti adalah wanita yang menjalani kehamilan dalam praktik sewa rahim. Jenis penelitian ini hukum doktrinal yang mencakup pada sinkronisasi vertikal dan horizontal aturan hukum positif di Indonesia. Hasil penelitian sebagai beriku: faktor yang melatarbelakangi penggunaan jasa ibu pengganti ada sepuluh, yakni: infertilitas, pasangan sesama jenis, individu lajang, usia, pengobatan, adopsi bukan sebuah alternatif, masalah fisik, trauma masa lalu, tidak dapat membawa dalam jangka waktu yang lama dan keputusan pribadi. Regulasi hukum di Indonesia tentang ibu pengganti diatur secara implisit dan eksplisit serta mencakup pada kesehatan reproduksi, status anak yang lahir dari hasil praktik ibu pengganti, perikatan dan hukum Islam.

Kata Kunci: *Ibu Pengganti, Multidimensi, Regulasi Hukum di Indonesia.*

Abstract

In practical terms, a surrogate mother is a woman who undergoes pregnancy in a womb rental practice. This type of research is doctrinal law which includes vertical and horizontal synchronization of positive legal rules in Indonesia. The research results are as follows: there are ten factors underlying the use of surrogacy services, namely: infertility, same-sex couples, single individuals, age, medication, adoption is not an alternative, physical problems, past trauma, unable to carry for a long time and personal decisions. Legal regulations in Indonesia regarding surrogate motherhood are regulated implicitly and explicitly and cover reproductive health, the status of children born as a result of surrogacy practices, marriage and Islamic law.

Keywords: *Surrogate Mother, Multidimensi, Legal Regulations in Indonesia.*

PENDAHULUAN

One of the implications of marriage is obtaining offspring, namely children. In reality, currently, married couples in Indonesia want to have children immediately after they get married. The goals of the desires of married couples are varied, namely: guidance from religious norms, the impact of local environmental traditions, investments for old age, friends in their old age and so on. The stages in having a child are known not only by the pregnancy of the child's prospective mother. A woman's pregnancy is not the only way for her to have a child, this can be by adopting someone else's child (adospi) or by a surrogate mother.

In practical terms, a surrogate mother is a woman who undergoes pregnancy in the practice of womb rental (Kementerian Pendidikan dan Kebudayaan Republik Indonesia, 2022 2016). Surrogacy is a person's attempt to have a child outside of natural means. There are two types of surrogacy methods, namely renting a uterus with egg cells (Genetic Surrogacy) and renting only a uterus without egg cells (Gestational Surrogacy). Genetic Surrogacy is a method of inserting donor sperm into the genital tract (insemination process), while Gestational Surrogacy is a method of in vitro fertilization (IVF) with eggs and sperm from the tenant's uterus, so that the surrogate mother only plays the role of renting out her uterus (Adrian Ellenbogen, at al, 2021). Apart from the

IVF trend, surrogacy is proof of scientific progress in the field of assisted reproductive technology (TRB).

The practice of surrogacy is widely practiced in various countries and has become a global surrogacy industry. Based on an international CNBC report, the surrogacy industry continues to experience rapid growth to date. In 2022, market research consultant Global Market Insight said that the global surrogacy industry is worth around US$ 14 billion (210 trillion) and the figure will continue to increase. It is possible that someone uses the services of a surrogate mother because of infertility problems, but based on the data from the Global Market Insight report above, there are still many factors behind the practice of surrogacy growing so rapidly that it has become a global surrogacy industry. Some of the countries above are the United States, Ukraine, Mexico, Colombia, Georgia and India. In fact, surrogacy is common in the United States and Ukraine specifically regulates surrogacy in the form of law (CNBC Indonesia, 2023).

In Indonesia, surrogacy is not a common practice. This is proven by the fact that the practice of surrogacy is not clearly found. A statement from female activist Agnes Widarti in 2010 in her seminar said that the practice of womb renting occurs in Papua secretly. This can be clarified based on the student's research thesis entitled "Implementation of Women's Reproductive Rights in Womb Rentals" (Detik Health, 2010). In the Mimika-Papua region, married couples do not have children due to fertility problems in the wife but eggs are still produced. On the advice of the doctor at the hospital. Soetomo Surabaya, so they did a womb rental where the wife's older sister became a surrogate mother (Desy Rosanti, 2021). In Surakarta, an attempt to rent a womb was carried out illegally by a husband and wife couple who married in 1999 with the wife's initials EY who used the gestational surrogacy method for the pregnancy of their second child who was born in 2017 (Hanan Asyrawi Abrar and Bayu Pratama Putra, 2023).

The statement above indicates the practice of surrogacy in Indonesia. Surrogacy can be studied from ethical, economic, health and legal perspectives. Indonesia as a legal country does not explicitly regulate the legal provisions for renting a womb and the practice of surrogacy. The aim of this research is to inventory the legal regulations in Indonesia that regulate the practice of surrogacy.

METODE

This type of research is normative law based on legal studies of principles, norms and statutory regulations regarding the practice of renting uteruses in Indonesia (Sigit Sapto Nugroho, 2020). This literature research includes vertical and horizontal synchronization in order to find continuity between positive laws in Indonesia regarding legal certainty regarding the practice of surrogacy, so that it does not conflict according to the hierarchy of statutory regulations (Soerjono Soekanto and Sri Mamuji, 1995). The object of this research study is the norm system which includes elements of basic norms, the Code of Laws or statutory regulations, legal doctrine or teachings, court decisions and all forms of documents that are made formally and have binding force. The benefit of this research is to provide legal justification for the practice of surrogacy. Is it wrong, right or better according to Indonesian law.

HASIL DAN PEMBAHASAN

Surrogacy is often a last resort for someone/couple who is infertile. Surrogacy is a method that can alleviate problems but has contradictory impacts such as moral conflicts that have social, ethical, psychological and legal implications. A surrogate mother is a woman who becomes pregnant, carries a fetus in the womb and gives birth to a child on behalf of another person/parent who rents and hands over the child when the child is born.

There are 2 (two) types of surrogacy, namely: holistic surrogacy (gestational surrogacy) and partial surrogacy (genetic surrogacy). Holistic surrogacy occurs when the renting parents have provided gametes. Gametes are sperm/egg cells, especially those that have matured and function in sexual reproduction. Then the embryo is created using in vitro fertilization techniques and then implanted in the uterus of the surrogate mother (who rents the uterus). In this method, the role of the surrogate mother is purely for the pregnancy and the parents who rent the womb are genetically related to the baby (S Nosarka and T F Kruger, 2005).

Partial surrogacy occurs when there is a free egg donor who is used by the surrogate mother and then she undergoes in vitro fertilization techniques using the gametes of the father who rents the uterus. In this case there are 3 (three) women who can be involved, namely: genetic mother, surrogate mother and mother who rents the womb.

In practice settings the surrogate mother can act as anonymous, unknown or unknown to the person who will use the services of her womb. The maximum age of the surrogate mother is 39 years. He has at least 1 child. At the stage of agreeing to rent a uterus, the surrogate mother must be married or divorced and it is highly recommended that she only transfer one good quality embryo. Motivations for surrogate mothers vary, namely: based on a conscience desire to help other people who do not have children, enjoy the period of pregnancy and childbirth, self-fulfillment and financial gain.

There are several factors when someone wants to have a child through the practice of surrogacy. According to the Family Tree Surrogacy Center San Diego, USA, there are 10 reasons why a person/couple chooses to use the services of a surrogate mother (Family Tree Surrogacy Center.LLC, 2024).

1. Infertility

Infertility is the main reason couples choose surrogacy services. Infertility is the inability to produce offspring, a state of being less (not) fertile. Infertility problems include low sperm count/urethral structure/endometriosis factors (a pathological condition of the presence of uterine mucous membrane tissue outside the uterine cavity/pelvic inflammatory disease)/a woman who has previously undergone surgery for an ectopic pregnancy.

2. Same-sex Couples

In reality, same-sex couples cannot have children naturally and end up often asking for help from surrogate mothers to realize their desire to become parents. In recent years, surrogacy has become increasingly popular in the LGBT community as a great way to create a family. One of the actors who contributed and shared positive experiences regarding surrogacy services was Elthon John and Ricky Martin.

3. Single Individual

A single woman is unable to conceive for a long time and needs the role of a surrogate mother. Likewise for single men who need a surrogate mother to have children.

4. Age

Age plays a big role in a woman's ability to conceive and give birth to a child. At the age of 40, pregnancy will decrease significantly although it is still possible to occur. Some women can get pregnant with various fertility treatments or not. However, some other women require the services of a surrogate mother.

5. Treatment

While someone is pregnant, there is a long list of drugs that are prohibited to take and certain treatments that are prohibited from being carried out. While it is believed that it is understandable to do this for a period of nine months, some people cannot handle it when it comes to chronic illnesses.

6. Adoption is not an Alternative

Some people choose to try to have blood-related children. In addition, although the surrogacy process is quite long, it is faster than the adoption process.

7. Physical Problems

Hysterectomy (surgical removal of the uterus) which makes it impossible for a woman to get pregnant and give birth. In this case, the woman usually does not know about her uterine abnormality until she tries to get pregnant for some time but is unsuccessful. Pregnancy during a hysterectomy is impossible, so at this point a woman chooses to use a uterus rental service.

8. Past Trauma

Some women experience many things during pregnancy and childbirth, giving rise to post-traumatic stress disorder. For a woman, pregnancy is something that can shake her emotionally and cause fear of doing it again. Some other women are unable to get pregnant again because of physical problems resulting from previous pregnancies and childbirth.

9. Cannot be carried for long periods of time

Couples face quite long stages from conception to birth. Fertilization may occur quickly and frequently, but the fetus may not develop beyond a certain point. In this case, some can be treated, while those who cannot be treated choose the alternative of surrogate motherhood to give birth to their child.

10. Personal Decision

Some women choose not to bear their own children in order to continue their career or maintain their physic.

A number of factors lie behind a person/couple wanting to have non-natural children. Examining the ten reasons above shows that everyone has a main reason for using surrogacy services. The reasons above include reasons on the scale of urgency to be carried out up to the independence of the problem. The reasons for people to undertake surrogacy are not only related to infertility, but also to the development of knowledge such as LGBT and defense of one's career and physical condition. Basically, the ten factors that motivate someone to use the services of a surrogate mother above do not fully represent the cases that occur regarding the use of surrogate mothers in Indonesia. This is based on differences in basic norms that are firmly adhered to, cultures and practices

that are still applied, religious doctrines that are believed in, the roles that figures adhere to and the legal rules that govern Indonesian society.

For example, in Indonesia, in certain areas there is still a culture and practice where every married woman is expected to immediately have children. Another example is about LGBT. In Indonesia, LGBT is a social deviant behavior that is not in accordance with the norms, morals, ethics, religion and values held by society (Willa Wahyuni, 2022). So if there is information about the use of surrogacy services by one of the LGBT communities it will have an impact on a more urgent polemic in Indonesia, both from civilians and the government.

From a legal perspective, the practice of surrogacy is regulated in several aspects, namely health, status and legal protection of children, agreements and Islamic Efforts to conceive outside of natural means can only be carried out by legally married couples with the following provisions:in question are:

Law Number 36 of 2009 concerning Health

Article 127:

1) Efforts to conceive outside of natural means can only be carried out by legally married couples with the following provisions:
   a. the fertilization results of sperm and ovum from the husband and wife concerned are implanted in the wife's womb from which the ovum originates;
   b. carried out by health workers who have the expertise and authority to do so; And
   c. at certain health service facilities.
2) Provisions regarding requirements for pregnancy outside of natural means as intended in paragraph (1) are regulated by Government Regulation.

Government Regulation (PP) Number 61 of 2014 concerning Reproductive Health Article 1 number 10, article 40, article 43.

Article 1 (10):

Assisted reproduction or pregnancy outside of natural methods is an attempt to obtain pregnancy outside of natural methods without going through the process of sexual intercourse between husband and wife if natural methods do not produce results.

Article 40:

1) Assisted reproduction or pregnancy outside of natural means can only be carried out by married couples who are legally married and experiencing infertility or infertility to obtain offspring.
2) Assisted reproduction or pregnancy outside of natural means as intended in paragraph (1) is carried out using the fertilization results of sperm and ovum originating from the husband and wife concerned and implanted in the wife's womb from which the ovum originates.

3) Assisted reproduction or non-natural pregnancy as intended in paragraph (1) is carried out in accordance with developments in science and technology and does not conflict with religious norms.
4) Assisted reproduction or non-natural pregnancy as intended in paragraph (1) must be carried out by health workers who have competence and authority.

Article 43:

1) Excess embryos resulting from fertilization outside the human body (in vitro fertilization) that are not implanted in the uterus must be stored until the birth of a baby resulting from assisted reproduction or non-natural pregnancy.
2) Storage of excess embryos as intended in paragraph (1) can be extended every 1 (one) year at the request of the husband and wife for the benefit of the next pregnancy.
3) Excess embryos as intended in paragraph (2) are prohibited from being implanted in:
   a. the mother's womb if the embryo's father dies or divorces; or
   b. another woman's womb.
4) In the event that the husband and wife who own it do not extend the storage period of excess embryos, the health service facility providing Assisted Reproduction or Pregnancy outside Natural Methods must destroy the excess embryos.

Regulation of the Minister of Health Number 43 of 2015 concerning the Implementation of Assisted Reproduction Services or Pregnancy Outside of Natural Methods

Article 1(1):

Assisted Reproduction Services or Pregnancy Outside of Natural Methods, hereinafter referred to as Assisted Reproductive Technology Services, are efforts to obtain pregnancy outside of natural methods without going through the process of husband and wife intercourse (copulation) if the natural method does not produce results, by bringing together the husband's spermatozoa with the wife's egg cells. in the tube.

Article 13:

1) Assisted Reproductive Technology Services are provided by:
   a. conventional; And
   b. Intra Cytoplasmic Sperm Injection (ICSI).
2) Assisted Reproductive Technology services using the conventional method as intended in paragraph (1) letter a are carried out by bringing together the husband's normal spermatozoa and the wife's oocytes in a tube, then the embryos formed are transferred into the wife's uterus.
3) Assisted Reproductive Technology services by means of Intra Cytoplasmic Sperm Injection (ICSI) as referred to in paragraph (1) letter b are carried out by directly injecting the husband's spermatozoa into the wife's oocytes.

Law Number 1 of 1974 concerning Marriage in Article 42

A legitimate child is a child born in or as a result of a valid marriage.

Presidential Instruction Number 1 of 1991. Compilation of Islamic Law in article 99.

Legitimate children are:

a. Children born in or as a result of a valid marriage.
b. The result of a legal husband and wife's fertilization outside the womb and birthed by the wife.

Law Number 35 of 2014 concerning Child Protection

Article 27:

1) Each child's identity must be given from birth.
2) The identity as intended in paragraph (1) is stated in the birth certificate.
3) Making a birth certificate is based on a statement from the person who witnessed and/or assisted in the birth process.
4) In the case of a child whose birth process is unknown and whose whereabouts are unknown, the birth certificate for the child is made based on the information of the person who found him and is accompanied by a police investigation report.

Civil Code

Article 1338: All agreements made in accordance with law apply as law to those who make them. This consent cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. Agreements must be carried out in good faith.

Article 1320:

In order for a valid agreement to occur, four conditions need to be met:

1) their agreement that binds them;
1) the ability to create an agreement;
2) a particular subject matter;
3) a cause that is not prohibited.

Article 1321: No agreement has any force if it is given by mistake or obtained by force or fraud.

Article 1330: Those who are not competent to make an agreement are:

1) Children who are not yet adults;
1) People who are placed under guardianship;
2) Women who are married in cases found by law and in general all people who are prohibited by law from making certain agreements.

Article 1234: An agreement is intended to give something, to do something, or not to do something.

Article 1337: a cause is prohibited if the cause is prohibited by law or if the cause is contrary to morality or public order.

Fatwa of the Indonesian Ulema Council II of 2006 Transfer of Embryos to the Womb Entrusted (Majelis Ulama Indonesia**)**

Womb rental is prohibited because the result will be complicated inheritance complications, especially between children born to mothers who have ovum and mothers who conceive and then give birth, and vice versa.

a. The transfer of embryos resulting from artificial insemination between the husband's sperm and the wife's ovum placed in another woman's uterus is not permitted (haram).
b. The transfer of embryos resulting from artificial insemination between a husband's sperm and a wife's ovum placed in another wife's womb is prohibited (haram).
c. The transfer of embryos resulting from artificial insemination between the husband's sperm and the wife's ovum which is placed in another woman's uterus because the husband and/or wife do not want the pregnancy is haram.
d. The status of children born from the forbidden results in points 1, 2 and 3 above is laqith children.

Interpretation of the above legal regulations is as follows:

In the health aspect, based on Law no. 36 of 2009 concerning health, trying to get pregnant outside the method is only allowed for married couples where the embryo is implanted in the wife's womb from the ovum it originates from and not in the womb of another woman. Legal provisions related to the prohibition of surrogacy are also regulated in PP No. 61 of 2014 concerning Reproductive Health. The provisions in this rule state that trying to get pregnant outside of natural means must be carried out in accordance with religious norms. Excess embryos from married couples can have their storage period extended for up to 1 year, however, if they do not wish to extend the storage period, the provider must destroy the excess embryos. Excess embryos from married couples are prohibited from being implanted in the mother's womb if the embryo's father dies/divorces and in the womb of another woman.

In the aspect of legal status and protection for children, based on an understanding of Law no. 1 of 1974 concerning Marriage and Presidential Instruction no. 1 of 1991 KHI that a child resulting from an attempt to conceive outside of natural means within the birth limits of a surrogate mother is considered not. The logical consequence of a legal rule is that children born from the practice of surrogacy can lose appropriate legal protection, such as aspects of lineage, inheritance and certain administrative requirements.

In the contractual aspect, there are several articles in the Civil Code that implicitly regulate surrogacy in analogy to an agreement. A valid agreement includes 4 aspects, namely the agreement between the people who are binding themselves, the ability to make an agreement, an agreement regarding a certain subject matter and a subject matter that is not prohibited. The provisions on the practice of surrogacy can be categorized as an agreement that can be carried out if each party mutually agrees and has the capacity to act, however there is one point that cannot be resolved in the surrogacy case, namely regarding prohibitions. Basically, the

practice of surrogacy is clearly prohibited by the Health Law, so that based on this interpretation, surrogacy is prohibited according to the Civil Code.
In the aspect of Islamic law, based on the 2006 MUI fatwa, the practice of surrogate motherhood is comprehensively prohibited/forbidden, namely: the transfer of embryos resulting from artificial insemination between husband and wife is prohibited from being placed in another woman's womb, another wife's womb, another woman's womb for the husband/wife's reasons. Wife does not want pregnancy. Meanwhile, children born from the practice of surrogacy are called laqith children.

SIMPULAN

Surrogate motherhood is a person's attempt to have a child outside of natural means. There are two types of surrogacy methods, namely renting a uterus with egg cells (Genetic Surrogacy) and renting only a uterus without egg cells (Gestational Surrogacy). Factors underlying the use of surrogacy services are infertility, same-sex couples, single individuals, age, medication, adoption is not an alternative, physical problems, past trauma, not being able to carry for a long time and personal decisions. Legal regulations regulate surrogacy implicitly and explicitly. These regulations are: Health Law, PP on Reproductive Health, PMA for Providing Assisted Reproductive Services or Pregnancy Outside of Natural Methods, Marriage Law, Child Protection Law, Civil Code, KHI and MUI Fatwa. Overall, the hierarchy of legal regulations in Indonesia prohibits the practice of surrogate motherhood by taking into consideration the reproductive health of the surrogate mother, the status and legal protection of children born to the surrogate mother and the agreement between the renter and the womb rental service provider. There are many factors that cause someone to use uterus rental services, even if it is for infertility reasons. Human rights can be upheld but not waived without considering aspects of the benefit of the Indonesian people.

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