

# The Practice of Surrogate Mothers in Health Law in Indonesia Implicitly according to Health Law No. 36 of 2009

Anissa Marisa<sup>1</sup>, Raikhul Kakam<sup>2</sup>

E-mail: [anisamarisa12@gmail.com](mailto:anisamarisa12@gmail.com) , [penjelajah.keheningan@gmail.com](mailto:penjelajah.keheningan@gmail.com)

<sup>1</sup>Student of Law Magister of Pamulang University, South Tangerang City, Indonesia

<sup>2</sup>Student of Law Magister of Pamulang University, South Tangerang City, Indonesia

## ABSTRACT

*The juridical basis for administering IVF in Indonesia refers to Law Number 36 of 2009 concerning Health. In addition, the implementation of IVF also refers to Government Regulation Number 61 of 2014 concerning Reproductive Health. commercial or altruistic provisions for postnatal adoption for recognition as legal parents, either before or after delivery. Although laws differ between jurisdictions, a possible generalization is that historical law assumes that a woman who bears a child is the legal mother of that child, and the only way for other women to be recognized as mothers is through adoption. Article 40 paragraph (1) what is meant by "infertility" is a condition that occurs in a husband and/or wife who is unable to produce offspring after having regular sexual intercourse for 1 (one) year without contraceptive protection. Article paragraph (2) Assisted Reproduction or Pregnancy Outside the Natural Way is carried out by means of, among others, fertilization outside the human body (in vitro fertilization) or other technologies. In vitro fertilization, technology/fertilization outside the human body is a reproduction by bringing the ovum with sperm cells in the laboratory until fertilization occurs and the results of fertilization (embryo) are returned to the mother's womb to be allowed to develop into a fetus. What is meant by "embryo" is the further development of the result of fertilization of sperm and ovum until a blastocyst is formed.*

**Keywords: Surrogate Mother, Surrogacy, Reproduction.**

## A. Background

A gestational carrier, or better known as a surrogate mother, is a woman who agrees to conceive and deliver a baby for another person. The people who will take care of the baby after it is born are the “parents (intended parents)” and they will be involved in all processes, from the time the baby is still in the womb until the delivery process. The term “gestational surrogate” refers to women who become pregnant after a successful assisted fertilization procedure, also known as in vitro fertilization (IVF). This term is used to distinguish them from women known as “traditional surrogate mothers”, who undergo artificial insemination with sperm from the baby's father or from a sperm donor. The traditional surrogate mother is considered the biological mother of the baby, while the gestational surrogate is simply the “mother who gave birth” and she is not related by blood to the baby. The birth mother of the baby is the woman who gives the egg. Recently, gestational surrogacy has become a more suitable choice because it can provide a genetic link between parents and their babies.

The practice of surrogate mothers is similar but not exactly the same as conventional IVF. In the conventional IVF program, the fertilization process is carried out outside the

uterus but later returned to the woman who has the egg (ovum) or the biological mother. However, in the practice of surrogate mother fertilization is carried out in the womb of another woman who is not the owner of the egg. In other words, the surrogate mother will only 'borrow' her womb in exchange for some money. After giving birth, the baby will be immediately given to the parents who own the sperm and egg cells used for the fertilization process. One of the problems in the health sector is the problem of reproduction, where every citizen has the right of autonomy to regulate his own life as long as it does not conflict with the public interest, therefore there is a rule of law.

In Indonesia, the practice of surrogate mothering is not common. Understandably, the use of a surrogate mother to have children is not legal in this country. In-Law article 127 Number 36 of 2009 concerning health, it has been regulated that attempts at pregnancy outside the natural way can only be carried out by a legal husband and wife pair.<sup>1</sup> Reproductive Health is a state of complete physical, mental and social health, not merely free from disease or disability related to the reproductive system, function, and process. Government Regulation of the Republic of Indonesia Article 40 Number 61 of 2014 concerning Reproductive Health is the implementing rule of Law Number 36 of 2009 concerning Health. The explanation in it also details the results of fertilization of sperm and ovum from a surrogate mother with assisted reproduction or pregnancy outside the natural way.

*From legal matters*, there are many factors that can hinder the success of the process of using a surrogate mother. It is possible that the surrogate mother will resign and decide not to carry the baby, or she may suddenly change her mind and decide not to give up the baby. *Custody*. Possibly, the biggest problem with surrogacy is the legal aspect, which is complicated because the laws in each area regarding surrogacy can vary. In some places, parents still have to go through the adoption process to get custody, while in other areas, parents can go through a simple procedure, namely “declaration of custody” before the baby is born so they don't have to go through the adoption process. Biological parents must understand all the surrogate mother processes and laws in their area so that they can protect their rights as legal parents.

*Medical and health concerns*, before the process begins, the gestational surrogate mother will undergo a psychological examination to ensure she will be willing to give up the

---

<sup>1</sup><https://motherandbeyond.id/read/12612/menkenal-seluk-beluk-surrogate-mother> , accessed 8/01/2022.

baby she gave birth to, as well as undergo a medical examination to check for certain health risks.<sup>2</sup>

## **B. Research Questions**

Based on the description above, which will be the formulation of the problem in this paper will be formulated as follows:

1. How is a legal practice in the perspective of Law Number 36 the Year 2009?
2. What are the legal aspects of a surrogate mother against Government Regulation Number 61 of 2014?

## **C. Research Methods**

The type of research conducted was normative legal research. Normative legal research is legal research that puts the law as a building system of norms. The system of norms in question is about principles, norms, rules of statutory regulations, court decisions, agreements, and doctrines (teachings).<sup>3</sup> The data sources used are secondary data in the form of primary legal materials such as Law Number 36 the Year 2009 concerning Health and Government Regulation Number 61 the Year 2014 Year Health. This research also uses secondary legal materials in the form of literature and studies that discuss IVF, especially regarding legal practices against surrogate mothers.

Article 127 (1) Efforts to get pregnant outside the natural way can only be carried out by a legally married couple with the following provisions: a. the result of fertilization of the sperm and ovum from the husband and wife concerned is implanted in the womb of the wife from which the ovum originates; b. carried out by health workers who have the expertise and authority to do so; and c. certain health care facilities. (2) Provisions regarding the requirements for pregnancy outside the natural way as referred to in paragraph (1) shall be regulated by a Government Regulation. Reproduction with Assistance or Pregnancy outside the Natural Way as referred to in paragraph (1) must be carried out by health workers who have the competence and authority.

---

<sup>2</sup>Sreenivas, K. and Campo-Engelstein, L. *Cancer Treatment and Research*, 2010; vol 156: pp 135-152.

<sup>3</sup>Mukti Fajar ND and Yulianto Achmand, , *Dualism of Normative and Empirical Legal Research*, Yogyakarta; Student Library, 2013, p. 34

## **D. Finding & Discussion**

Surrogate mothers have become another alternative for some couples who have not or cannot have children through the IVF method, namely renting the womb of another woman who is not his wife. The uterine rental contract itself is an agreement for a woman who associates herself with another party (husband and wife) to become pregnant and after giving birth to give up the child or baby.<sup>4</sup> Indonesia has not specifically regulated the surrogate mother, however, the applicable laws can be interpreted as a way to reject the existence of a surrogate mother and at the same time provide concessions for the application of a surrogate mother. The development of an increasingly advanced medical world makes surrogate mothering easier to do, when medical technology advances rapidly, with the discovery of sperm preservation methods, in 1970 the era of in vitro fertilization, which is still known as the IVF program, began.

The application of artificial reproductive technology is accompanied by complex problems, both from a social, ethical, and legal perspective. The increasing attention to issues that arise, also followed by an increase in the number and diversity of issues that surface, makes surrogate mothers attractive and will provide benefits from a social, ethical and legal perspective. The surrogate mother technique can be interpreted as using another woman's uterus to contain a woman's seed (ovum) which has been fertilized by a man's seed (sperm), and the fetus is conceived by the woman so that it is born. A woman who uses her womb to get pregnant where the fetus she contains belongs to another woman and after the baby is born the right of ownership or custody of the baby is transferred to another woman and the father of the baby. The practice of surrogate mothering or commonly translated into Indonesian with a surrogate mother is classified as a method or attempt to get pregnant outside the natural way.

Anthropological studies of surrogates show that surrogates engage in various distancing techniques throughout pregnancy, to ensure that they do not become emotionally attached to the baby. Many surrogate mothers deliberately try to foster the emotional attachment between the genetic mother and the child. Although surrogates generally reported being satisfied with their experience as a surrogate, there were cases where it was not as expected due to dissatisfaction. Some women feel on some level they feel respected by their partners.

---

<sup>4</sup>Ratman, Desriza 2012, *Surrogate Mother Health Law Series in Ethical and Legal Perspective: Is it permissible to rent a uterus in Indonesia*, Gramedia, Jakarta.

The legal aspect of surrogate mothering depends on the provisions of a country, whether it is done commercially or altruistically with postnatal adoption provisions for recognition as legal parents, either before or after giving birth. Although laws differ between jurisdictions, a possible generalization is that historical law assumes that a woman who bears a child is the legal mother of that child, and the only way for other women to be recognized as mothers is through adoption. Even in jurisdictions that do not recognize surrogate mother arrangements, if the genetic parents and birth mother are consistent, it may be possible to achieve benefits.<sup>5</sup>

Indonesian law does not allow the practice of surrogacy implicitly. In article 127 of Law Number 36 of 2009 concerning Health, it is regulated that attempts at pregnancy outside the natural way can only be carried out by legally married couples with provisions. So, what is allowed by Indonesian law, is the method of fertilization of sperm and ovum from a legal husband and wife, which is implanted in the uterus of the wife from which the ovum comes, this method is known as the IVF method. Methods or attempts at pregnancy outside the natural way other than those regulated in the article, including surrogate mothers or leasing/custodial care, cannot legally be carried out in Indonesia. The practice of surrogacy or renting a womb has not been regulated in Indonesia. Therefore, there is no legal protection for the perpetrators of the surrogate mother agreement or the rental of the womb.

The status of the child resulting from artificial insemination with the method has no genetic relationship from the two parents, is not legal according to Islamic law, and has the same status as a child resulting from prostitution or adultery. The practice of renting a womb or surrogate mother unconsciously has destroyed the future of human life. How could a mother have the heart to give the baby she was carrying and born to someone else, even though she had risked her own life. From several indications of the practice of renting a womb, it is the economic background that strongly underlies the practice of renting a womb, so that to enter into an agreement it does not take into account the consequences that may be experienced, both for himself and for the baby that will be born in the future. Surrogacy has a series of violations of children's human rights, these rights can be classified into several violations in the form of neglect, namely the child loses love, the child born to the rented mother does not get love from her own biological mother, the child does not know his parents, is raised and cared for. by their own parents, the origin of the child is obscured, and the child is separated from his biological mother. As well as in the form of mistreatment,

---

<sup>5</sup>Ameln, Fred 1991, *Capita Selecta of Medical Law*, Graphicatama Jaya, Jakarta.

namely children have the right to get legal protection, including not being born outside of legal marriage, both according to religion and state, children being exploited economically, and children carrying a heavy psychological burden.

This means that methods or pregnancy outside the natural way other than those regulated in Article 127 of the Health Law, including surrogate mothers, cannot legally be carried out in Indonesia. The surrogate mother process is quite promising in dealing with several cases of married couples who do not have children. Surrogate Mother is mostly carried out by countries whose legal system allows the donation of gametes, namely sperm cells, and ovum cells. Several countries that allow for Surrogate Mother engagements, namely England, United States of America, Austria, Australia, Germany, Denmark, Finland, Israel, Japan, Norway, Singapore (sperm cell donation) while ovum cell donation countries include the United States, United Kingdom, Austria, Israel.<sup>6</sup>

The regulation of uterine rental in various countries raises pros and cons, whether there are those who reject or prohibit surrogate mothers and countries that accept this concept as comparison material. A surrogate mother in India, that surrogacy is nothing new, commercial surrogacy or "Uterus for rent," is a growing business in India. In the case of surrogacy in India, it is difficult to say whether these women exercised their own personal rights or whether they were forced to become surrogate mothers because of the wishes of their husbands and mothers-in-law for financial reasons.

Opponents of surrogacy argue that this practice is tantamount to prostitution and based on that equality, it should be annulled on moral grounds. So in India, the implementation of the Surrogate Mother is a strategy to save oneself from poverty and therefore moral issues are ruled out. Until now, India is a destination for mothers to perform Surrogacy commercially. India was the first country to develop a commercial Surrogacy industry on a national and transnational level. Whereas in Israel, a surrogacy agreement must be approved by a designated State Committee, the committee will evaluate the compatibility of all parties with the process and oversee the agreement. Before the State Committee approves a surrogacy arrangement, they must be sure of the inability of the commissioning mother to conceive, and the compatibility of all parties with the surrogacy process, and have received adequate counseling. In addition, a mediator must be appointed to resolve any disputes that may arise as a result of the surrogacy agreement. Likewise, with the State of South Africa, children's laws requiring surrogacy agreements to be confirmed by the Court of Appeal, which must

---

<sup>6</sup>Fred Ameln, 1991, *Capita Selecta of Medical Law*, Graphicatama Jaya, Jakarta, p.124.

certify on the basis of available evidence that they make adequate contact, care, care, and general welfare with respect to the child. To ensure that the surrogate candidate is not exploited, he or she does not have to use surrogacy as a source of income, and the court will require a psychological and medical expert's report, payment specifics, and details of the surrogate's financial background.

In contrast to France, surrogacy is contrary to the principle that does not allow the commercialization of the human body, which is emphasized in the Civil Code that “*Only things of a commercial nature can be the object of conventions*”. In Switzerland, surrogacy is expressly prohibited based on the federal act on medically assisted reproduction. Likewise with Italy, prohibiting the practice of surrogate mothers, it can be seen from the legal provisions in 2004 which stated that “*All Surrogate Mother contracts which require the Surrogate Mother to consent to third party adoption of the child following birth and to facilitate the transfer of child custody, are null under the Italian civil code because the law views them as being against public policy*”.

Indonesian law regulates human reproductive technology to the extent of trying to conceive outside the natural way, with sperm and eggs originating from a husband and wife pair and implanted in the wife's womb. Thus, IVF technology in which sperm and egg cells come from a husband and wife and are implanted in the wife's womb is allowed in Indonesia, while the surrogate mother technique is not permitted. The surrogate mother cannot be applied in Indonesia because it does not yet have a complete legal protection and it clashes with the ethical, social, traditional, and belief aspects of the Indonesian people. Surrogate mothers have the potential to cause problems both from the community side, surrogate parents and biological parents, and most importantly from the child's side, where children can lose their basic rights.<sup>7</sup>

## **E. Conclusion**

The more technology develops, the more ways that married couples can have children. One of them is through a surrogate mother or commonly called a surrogate mother. The term in-vitro fertilization, which means the fertilization of an egg cell by a sperm cell in a Petri tube carried out by medical personnel and then implanted into the uterus. This process is also known as the IVF method.

---

<sup>7</sup>Husni Thamrin, Legal Aspects of IVF and uterine rental, Aswaja Pressindo, Yogyakarta, 2014

The development of bioethics provides a solution for married couples who experience reproductive problems. The development of the science of bioethics gave birth to a method of sperm storage which was followed by a method of pregnancy outside the uterus known as the IVF program (in vitro fertilization). One method of IVF program in which the wife cannot conceive, but the eggs are still good, so there is one solution offered by the latest medical technology, namely by means of fertilization outside the womb of the husband and wife implanted into the womb of another woman, with an agreement which the woman must be willing to conceive, give birth and give back her baby in exchange for a number of materials. This is what is known as a Surrogate Mother or a gestational agreement.

The juridical basis for administering IVF in Indonesia refers to Law Number 36 of 2009 concerning Health. In addition, the implementation of IVF also refers to Government Regulation Number 61 of 2014 concerning Reproductive Health. In these two regulations, there is no definition of a surrogate mother. Article 1 number 10 Government Regulation Number 61 of 2014, only explained the definition of assisted reproduction or pregnancy outside the natural way is an effort to get a pregnancy outside the natural way without going through the process of sexual intercourse between husband and wife if the natural way does not get results. Included in the category of assisted reproduction is the IVF program.

In-Law Number 36 of 2009 concerning health, article 74, it is explained that the implementation of assisted reproduction (including the IVF program) may be carried out as long as it does not conflict with religious values and statutory provisions.

## **References / Bibliography :**

### **Books**

- Fred Ameln, 1991, *Capita Selecta of Medical Law*, Graphicatama Jaya, Jakarta, p.124.
- Sreenivas, K. and Campo-Engelstein, L. *Cancer Treatment and Research*, 2010; vol 156: pp 135-152.
- Ratman, Desriza 2012, *Surrogate Mother Health Law Series in Ethical and Legal Perspective: Is it permissible to rent a uterus in Indonesia*, Gramedia, Jakarta.
- Mukti Fajar ND and Yulianto Achmand, *Dualism of Normative and Empirical Legal Research*, Yogyakarta; Student Library, 2013, p. 34.
- Husni Thamrin, *Legal Aspects of IVF and uterine rental*, Aswaja Pressindo, Yogyakarta, 2014.



## Legislative and Normative Documents

Law No. 36 of 2009 concerning Health;

Government Regulation Number 61 of 2014 on Reproductive Health.

## Website

(2022, January 8). *Get to know Surrogate Mother, a surrogate mother to conceive a fetus in the womb.* <https://motherandbeyond.id/read/12612/menkenal-seluk-beluk-surrogate-mother>.

## Author Bio

**Anisa Marisa, S.H., MCP** is a Master of Law Student who is taking a Double Degree in Two Universities (the University of Groningen, The Netherlands, and Pamulang University, South Tangerang). Job position as Legal Recruiter and Legal Compliance Specialist at Telecommunication Company in Vienna, Austria working remotely.

**Raikhul Kakam, S.Tr.AK** is a Master of Law Student at Pamulang University, South Tangerang. Job position as Health Analyst at a Private Health Laboratory Company in Jakarta.