



# Surrogate Mother In The Family Resilience Bill Human Rights Law Perspectives

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## ABSTRACT

Surrogacy is the result of technological advances in the medical field which is currently developing rapidly not only in Indonesia but also throughout the world. However, it cannot be denied that this results in different views regarding strengths and weaknesses. Surrogate mother, some people even experts argue that it is related to surrogate mother contrary to the law which seems to exploit human organs. This research is a normative legal research, then analyzed qualitatively, and presented descriptively. The results of the study show that the implementation of Surrogate Mother in Indonesia experiences various obstacles, one of which is the absence of a legal umbrella and the other in the article 1320 KUHPer regulating the conditions for the validity of the agreement, related to the surrogate mother, can be said to not meet the elements of the conditions for the validity of the agreement.

**Keywords:** *Surrogate Mother; Marriage; and Human Rights.*

## 1. INTRODUCTION

Based on Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage. Marriage is an external and inner bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Godhead. Forming a family means having children or descendants.[1] But in reality, not all couples can have children. This is caused by various factors, including the presence of diseases that prevent the couple from having children.[2] This causes despair for married couples who want to have children. The desperation of a married couple who cannot give birth to offspring is the background for the husband to practice polygamy in order to obtain a baby from another woman, with the mandatory provision to obtain consent from the wife both in writing and orally as stipulated in the provisions of Article 40 and Article 41 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage. As the times progressed, in the 1970s technological advances in the field of medicine discovered how to preserve sperm and the method of making it outside the uterus or known as In Vitro Fertilization (IVF). Zygote conceived from In Vitro Fertilization (IVF), will be implanted or reimplanted in the woman's uterus (IVF program) or reimplanted in another woman who has no connection at all with the source of the seed. This is done through perjanjian sewa (surrogacy) which is known as surrogate mother).[3]

Since 1909 in the United States and 1940 in Europe, surrogate mothers have caused many legal, moral, and ethical controversies because the contracting parties are human, so the risks have become a subject of debate among scientists, legal authorities, researchers, and the general public. In the concept of surrogate mother, the uterus is likened to an inanimate object that leads to the alienation of the female body as a commodity. Surrogate mother has become a vast business field and makes a huge amount of money. On the one hand, women who become surrogate mothers are at risk of becoming victims of exploitation, especially if they are still young. Biologically, women have the perfect uterus to give birth when they are 25-35 years old. Surrogacy arrangements are dangerous to women's reproductive freedom, because surrogacy cannot simply sign a contract and then give up her rights. Although surrogacy contracts and contractual conditions are based on the principle of contractual autonomy, they are considered not absolute.[4]

Renting a uterus is part of an agreement because in it there are two parties who bind each other. Based on Article 1320 of the Civil Code regarding the legal conditions of the agreement, the uterine lease agreement is invalid, because it does not meet the fourth condition, namely halal reasons. Although the uterus rental meets the first and second conditions. Regarding the third legal condition of the agreement regarding the existence of certain matters, in this case it is the object of the

agreement, the uterus cannot be used as the object of the agreement because it is not an object or goods as referred to in Article 499 KUH Perdata.[5]

Surrogate mother is one of the acts of human trafficking as stipulated in articles (1) and (9) of Law Number 21 of 2007 concerning the Crime of Trafficking in Persons, regarding the elements of human trafficking against surrogacy and corporate accountability as surrogacy actors. In the Family Resilience Bill, article 32 paragraphs (1) and (2) explain that everyone is prohibited from conducting surrogacy to obtain offspring and is prohibited from persuading, facilitating, coercing, and threatening others to perform surrogacy to obtain offspring. The sanctions obtained if this is violated are in the form of imprisonment for a maximum of 7 (years) years and a maximum fine of Rp 500,000,000.00 (five hundred million rupiah), this is stated in the Family Resilience Bill article 142.

## 2. RESEARCH METHODS

The author will use Normative research, normative law research is legal research that lays down the law as a building of a norm system, the norms referred to here are about the principles, norms, rules of laws and regulations, court decisions, agreements and doctrines.[6]

The legal materials used in conducting this research include primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials consist of laws and regulations, jurisprudence or court decisions, and international treaties (treaties).[6] In this study, the primary legal materials in question include:

1. Undang-Undang Dasar 1945
2. Undang-Undang Nomor 16 Tahun 2019 mengenai perubahan atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan
3. Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia
4. Undang-Undang Nomor 21 Tahun 2007 Tentang Tindak Pidana Perdagangan Orang
5. Undang-Undang Nomor. 36 Tahun 2009 tentang Kesehatan
6. Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan
7. Peraturan Menteri Kesehatan Republik Indonesia (Permenkes RI) Nomor 73 / Menkes / PER / II / 1999 Tentang Penyelenggaraan Pelayanan Teknologi Reproduksi Buatan
8. KUH Perdata

Second, secondary materials, namely legal materials that can provide explanations of primary legal materials, which can be in the form of draft laws, research results, textbooks, scientific journals, newspapers, pamphlets, brochures, and minutes.[6] In this study, the materials The secondary law in question includes: books, scientific journals, draft law on external resilience, and research results on surrogate mothers.

The third tertiary material, namely legal material that can explain both primary and secondary legal materials, in the form of dictionaries, encyclopedias, lexicons, and others.[6]

## 3. ANALYSIS AND DISCUSSION

### A. The Concept of Surrogate Mother Where the Womb Is Likened to an Inanimate Object Which Leads to Alienation of the Female Body as a Commodity

Today's technological advances, it is undeniable that negative things certainly cannot be heeded, one of which is about surrogate mothers. This kind of practice is an alternative for married couples who have not or cannot have children through the IVF method. The Surrogate Mother process is quite promising for overcoming several cases of married couples who do not have children.[7] Surrogacy mainly occurs in countries where the legal system allows the donation of gamete cells, namely sperm and egg cells.[8] Some of the countries that allow the Surrogate Mother alliance to occur are the United Kingdom, the United States, Austria, Australia, Germany, Denmark, Finland, France, Israel, Japan, Norway, Singapore (sperm cell donation) while ovum cell donation countries include the United States, the United Kingdom, Austria, Israel [9] The practice of surrogacy in Indonesia is limited by the legal framework (legislation) that regulates surrogacy, as well as the lack of ethical considerations based on the norms that apply in Indonesia.[10]

Apart from that, one of the problems that arises in the field of health is about the problem of production, in which case every citizen has the right to autonomy to regulate himself as long as it does not conflict with the public interest.[11] Related to this is reproduction as explained above, in article 10 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, which reads "Everyone has the right to form a family and continue the offspring through legal marriage".

Article 127 paragraph (1) of Law Number. 36 of 2009, regulating that pregnancy attempts outside the natural way can only be carried out by legal married couples with the following provisions:[12]

1. The result of fertilization of sperm and ovum from the husband and wife concerned is implanted in the wife's uterus from which the ovum comes from.
2. It is carried out by health workers who have the expertise and authority to do so;
3. At certain health care facilities

Requirements regarding pregnancy outside the natural way are regulated by government regulations. Among them are:

1. Regulation of the Minister of Health of the Republic of Indonesia (Permenkes RI) Number 73 / Menkes / PER / II / 1999 concerning the Implementation of Artificial Reproductive Technology Services. Article 4 of this Regulation of the Minister of Health states that "artificial reproductive technology services are only provided to married couples who are legally married and as a last resort to obtain offspring and based on a medical indication". Violations of this rule can be subject to administrative sanctions (Article 10 paragraph (1) of Permeskes RI)
2. Decree of the Director General of Medical of the Ministry of Health of the Republic of Indonesia in 2000 concerning Guidelines for IVF Services in Hospitals:
  - a. Artificial reproduction technique services can only be carried out with sperm cells and eggs of the couple concerned
  - b. Artificial reproduction services are part of infertility services, so that the service framework is part of the overall management of infertility services
  - c. Conducting surrogacy in any form is prohibited

From the explanation above we can conclude that Indonesian law allows the following methods of fertilization: In this case, the partner's sperm and egg cells are implanted into the wife's uterus, where the egg cells are also collected. This method is usually called in vitro fertilization. The law does not allow methods or attempts at natural pregnancy other than those specified in Article 127 of the Health Law, including surrogacy.[13]

## B. The concept of surrogate mother in the Family Resilience Bill

The Family Resilience Bill regulates the practice of surrogate or uterine rental, which is to find out the extent of the impact of the concept of *surrogate mother* on family resilience in Indonesia in order to avoid the crime of human trafficking that leads to organ exploitation so that it can provide a guarantee of legal justice for all women in Indonesia.

Regarding the Regulation related to the practice of surrogacy or rental of the uterus, it is contained in article 32 which consists of two paragraphs. In the first verse it is stated "Everyone is forbidden to do surrogacy to have offspring". While in the second verse it is stated "Everyone is prohibited from persuading, facilitating, coercing, and/or threatening others to carry out surrogacy to obtain offspring". Therefore, based on the explanation above, it can be concluded that the practice related to surrogacy or renting a uterus to get offspring, whether it is self-desire or even based on persuasion, let alone coercion and threats, is something that is prohibited.

According to Article 1338 of the Civil Code (hereinafter abbreviated to the Civil Code), surrogacy is also part of the Civil Code (contract law). There is regulated freedom of contract, where the parties to a contract are free to enter into a contract, whatever its content or form. "Every valid agreement has binding legal force for the person who entered into it.[14]

However, the principle of freedom of contract must not violate the conditions of the validity of the agreement in article 1320 KUHPer It has four elements contained in it:

1. Agreement of the parties;
2. The competence of the parties;
3. Regarding a certain matter
4. Because it is halal.

The agreement related to the Surrogate Mother does not have clear legal rules, especially the object of the agreement is very unusual, namely the womb, both objects and functions as services.[11] Therefore, looking at article 1320 KUHPer One of the legal conditions for an agreement is that it must have a halal cause. that is, it does not contradict the law, morality, or public order (Provisions of Article 1320 and Article 1337 KUHPer)[15] While Surrogate Mother is not a Pregnancy attempts that are "doable" under Article 127 of the Health Act, including Mother Surrogate, are not allowed by applicable legal rules. Thus, this halal causal condition cannot be met.

#### 4. CONCLUSION

Surrogate mother is an act that can be subject to sanctions, because the act is contrary to the provisions of the applicable laws and regulations in Indonesia. Therefore, in our opinion as the writing team, there is a contra to the concept of surrogate mothers in the Family Resilience Bill, because the act of surrogate mothers not only violates the legal rules that apply in Indonesia, but also the state ideology, namely Pancasila. Therefore, the surrogate mother action cannot be applied in Indonesia.

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