



Juridical Review of the Legal Status of Children Born Through Womb Renting in Indonesia

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ARTICLE INFO

Keywords: Legal Status of Children, Agreement, Womb Rental

Received : 20 December 2024

Revised : 09 January 2025

Accepted: 11 February 2025

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ABSTRACT

Womb rental is a method of obtaining offspring by using another woman's womb to contain an embryo derived from the egg and sperm of a married couple. After the child is born, it will be handed back to the married couple who owns the embryo. The implementation of uterine leasing is prohibited in Indonesia because it is contrary to applicable laws and regulations and contrary to religious norms. This study aims to determine the legal status of children born through uterine leasing based on positive law in Indonesia. This research uses normative legal research. Based on the results of the study, if the status of the surrogate mother is a girl or widow, then the child is an unmarried child, where children born outside of marriage only have a civil relationship with their mother and their mother's family. If the status of the surrogate mother is bound by a legal marriage (has a husband), then the child born is the legitimate child of the surrogate mother and her husband.

INTRODUCTION

Humans are created by God as social beings and cannot live alone; they require the presence of others to fulfill their needs. Therefore, every individual has the right to form a family and continue their lineage through a legitimate marriage. This is stated in Article 28B Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. However, in marriage, various challenges often arise concerning the desire to have children.

One of the most common challenges faced by married couples is infertility. Infertility is a condition where a couple is unable to conceive despite engaging in sexual intercourse 2-3 times per week for one year without using any form of contraception.

Various efforts are made to help them have biological offspring, including the use of assisted reproductive technology. Assisted reproductive technology refers to methods involving the handling of gamete cells (ova, sperm) and the resulting conception (embryos) to achieve pregnancy outside natural means. Several methods fall under assisted reproductive technology, including:

1. In Vitro Fertilization (IVF)

In Vitro Fertilization (IVF), commonly known as the test-tube baby technique, is a method of achieving pregnancy by combining sperm and egg cells in a specialized container without sexual intercourse. An example of a couple who has undergone the IVF program is Denny Sumargo and Olivia Sumargo.



Figure 1. Example of a Married Couple Undergoing an IVF Program

2. Surrogate Mother

The term "**Surrogate Mother**" is literally equated with the concept of a "replacement mother." This refers to a woman who is willing to carry a pregnancy to term, with the embryo (sperm and ovum) originating from another couple (husband and wife). Once the child is born, they are handed over to the biological parents.

The practice of surrogacy in Indonesia gained public attention in January 2009 when actress **Zarima Mirafsur** was reported to have rented out her womb for an IVF baby belonging to a business couple. Zarima Mirafsur reportedly

received **50 million rupiahs and a car** as compensation for her surrogacy services.



Figure 2. Surrogate Mother

The implementation of surrogacy agreements is prohibited in Indonesia as it contradicts Article 58 letter (a) of Law Number 17 of 2023 concerning Health. Although the parties, namely the married couple and the surrogate mother, have reached an agreement and are legally competent to enter into a contract, the agreement does not meet the objective element of a valid contract, namely a lawful cause, as it contradicts Article 58 of Law Number 17 of 2023 concerning Health. This renders the surrogacy agreement invalid.

Failure to fulfill the legal requirements related to the object of the agreement (lawful cause) can result in the following consequences:

1. It may serve as a basis or reason for one of the parties to demand the nullification of the agreement by law, as the agreement does not meet the requirement of a lawful cause or legal basis.
2. There is no legal foundation for the intended parents to sue the surrogate mother if she refuses to hand over the baby carried in her womb.

If this occurs, the legal status of the child born through surrogacy will become problematic, particularly regarding the right to identity as recorded in the birth certificate. This is regulated under Article 27 of Law Number 35 of 2014 concerning Child Protection.

Based on previous studies, two important references have been identified as key sources for this research:

1. A journal written by Ariyanti in 2022, titled "**Surrogate Mother (Ibu Pengganti) in the Legal Perspective in Indonesia.**" This research focuses on the validity of the surrogacy program, also known as surrogate motherhood, from the perspective of Indonesian positive law.
2. A journal written by Rudi Adi in 2022, titled "**Protection of Children's Rights from Surrogate Mother Perspectives of Positive Law and Islamic Law.**" This study examines the legal protection and rights of children born through surrogacy.

Both studies analyze the validity of surrogacy and legal protection for children resulting from surrogacy. A normative legal research method was used to examine the existing legal framework and formulate clearer regulatory recommendations.

The difference between this study and the previous two studies is that this research focuses more on the legal status or position of children born through surrogacy under Indonesian positive law. Based on the discussion above, the author is interested in conducting a study in the form of a journal titled "**A Juridical Review of the Legal Status of Children Born Through Surrogacy in Indonesia.**"

LITERATURE REVIEW

General Overview of Agreements

An agreement is an act carried out by one or more individuals to bind themselves to others. This is regulated in Article 1313 of the Indonesian Civil Code (KUHPer). Article 1320 of the Civil Code states four (4) essential conditions for a valid agreement:

1. The consent of the parties;
2. Legal capacity to enter into a contract;
3. A specific subject matter;
4. A lawful cause or legal basis.

In civil law, there are five (5) fundamental principles of contracts:

1. Freedom of Contract

This principle grants the parties the freedom to:

- Enter into or not enter into a contract;
 - Enter into an agreement with any party;
 - Determine the content, execution, and conditions of the agreement;
 - Choose the form of the contract, whether written or oral.
- Any individual is free to make a contract as long as it meets the legal requirements and does not violate the law, morality, or public order.

2. Principle of Consensualism

This principle is stated in Article 1320 paragraph (1) of the Civil Code. It requires mutual agreement between the parties. An agreement is formed as soon as consensus is reached and becomes binding once declared or expressed. No formalities are necessary unless the law explicitly requires a written form.

3. Principle of Legal Certainty (Pacta Sunt Servanda)

According to Article 1338 paragraph (1) of the Civil Code: "*All legally executed agreements shall have the force of law for those who have made them.*" If a dispute arises regarding the implementation of the contract, the court may compel the breaching party to fulfill their rights and obligations as stipulated in the agreement. The court may also require compensation. This principle ensures legal protection and certainty for contractual rights and obligations.

4. Principle of Good Faith

This principle is stated in Article 1338 paragraph (3) of the Civil Code: "*Agreements must be performed in good faith.*" Both creditor and debtor must execute the contract with honesty, transparency, and mutual trust. The intention behind forming and executing the contract should not involve deception or concealment of material facts.

5. Principle of Personality

The principle of personality means that a contract only binds the contracting parties and does not impose obligations on third parties. A person can only represent another in a contract if authorized to do so.

General Overview of Surrogacy

Surrogacy is a method used to obtain offspring by utilizing another woman's womb to carry an embryo derived from the egg and sperm of a married couple. After birth, the child is handed over to the intended parents (the biological parents of the embryo). Surrogacy is commonly pursued by couples who face difficulties conceiving due to reproductive health issues, such as uterine disorders, hysterectomy, or cancer, making pregnancy impossible.

There are two (2) types of surrogacy:

1. Gestational Surrogacy

The embryo, typically created from the husband's sperm and wife's egg via IVF technology, is implanted into the surrogate mother's womb.

2. Genetic Surrogacy

In this type, the surrogate mother also contributes her egg, while the sperm comes from the intended father. Although the surrogate mother is genetically related to the child, she must surrender the baby to the intended parents. The fertilization process may occur through artificial insemination or even sexual intercourse between the intended father and the surrogate mother.

METHODOLOGY

The research method used in this study is the normative legal research method. This method is conducted by examining library materials or secondary data, such as legislation, literature, reports, and scientific studies. This study utilizes secondary data derived from primary, secondary, and tertiary legal materials. Data collection in this study is carried out through library research, using library facilities to gather data and information. Subsequently, the analysis results will be linked to the issues in this study to produce an objective assessment aimed at addressing the research problem.

RESULTS AND DISCUSSION

The Legal Status of Children Born Through Surrogacy Under Indonesian Positive Law

1. The Legality of Surrogacy Under Indonesian Positive Law

Surrogacy is the process of obtaining offspring using another woman's womb to carry the fertilized egg and sperm (embryo) of a married couple until the child is born. After birth, the child is returned to the married couple whose embryo was used, so they can care for and raise the child. The woman who agrees

to rent her womb to give birth to a child is called a surrogate mother. The agreement executed by the involved parties is referred to as a surrogacy contract.

According to Article 1313 of the Indonesian Civil Code (KUH Perdata), a contract is an act performed by one or more individuals to bind themselves to others. Meanwhile, Article 1548 of the Civil Code defines lease agreements as agreements in which one party commits to providing the enjoyment of an item to another party for a certain period.

In civil law, particularly contract law, Article 1338 of the Civil Code regulates the principle of freedom of contract, allowing parties to freely create agreements with any content and form. The article states: "All legally executed agreements shall have the force of law for those who have made them." However, this freedom of contract must not violate the legal requirements stipulated in Article 1320 of the Civil Code, which outlines four essential conditions for a valid contract:

1. Mutual consent of the parties;
2. Legal capacity to enter into a contract;
3. A specific subject matter;
4. A lawful cause or legal basis.

Although the parties involved in a surrogacy contract—namely, the married couple and the surrogate mother—may have reached an agreement and possess the legal capacity to enter into a contract, the contract fails to meet the objective requirement of a lawful cause. Consequently, the surrogacy contract is deemed invalid. Article 1337 of the Civil Code states that a cause is unlawful if it is prohibited by law, contrary to morality, or against public order.

The execution of surrogacy contracts is prohibited in Indonesia as it contradicts Article 58(a) of Law Number 17 of 2023 on Health. Article 58(a) stipulates that assisted reproduction may only be performed by legally married couples, with the fertilized sperm and ovum implanted into the uterus of the wife from whom the ovum originated. In other words, artificial reproduction is permitted only if the embryo is implanted into the womb of the legal wife, not another woman. This provision under Law Number 17 of 2023 on Health explicitly prohibits surrogacy in Indonesia, making surrogacy agreements fail to meet the requirement of a lawful cause.

Similarly, Government Regulation of the Republic of Indonesia Number 28 of 2024 on the Implementation of Law Number 17 of 2023 on Health also regulates assisted reproduction, particularly in Article 111, which states:

1. Assisted reproductive health services, as referred to in Article 10(c), are provided to legally married couples who, based on medical examinations, suffer from infertility or reproductive disorders that prevent conception.
2. Assisted reproduction, as referred to in paragraph (1), is carried out using the fertilized sperm and ovum of the legally married couple and must be implanted into the uterus of the wife from whom the ovum originated.
3. Assisted reproduction, as referred to in paragraph (1), must comply with advancements in science and technology and must not contradict religious norms.

Additionally, the implementation of surrogacy is also prohibited by the MUI (Indonesian Ulema Council) Fatwa No: KRP-952/MUI/XI/1990. The term "fatwa" etymologically derives from "al-fatwa," meaning an advisory opinion, guidance, or response to legal questions in Islamic law. According to MUI Fatwa No: KRP-952/MUI/XI/1990 (issued by the Fatwa Commission on June 13, 1979), the Indonesian Ulema Council ruled as follows:

1. In-vitro fertilization (IVF) using sperm and ova from a legally married couple is permissible (*mubah*), as it aligns with religious principles.
2. IVF involving a surrogate mother (e.g., an embryo from a second wife implanted into the first wife's womb) is prohibited (*haram*) based on the principle of *Sadd az-zari'ah*, as it may lead to legal complications regarding inheritance and lineage.
3. IVF using frozen sperm from a deceased husband is prohibited (*haram*) under *Sadd az-zari'ah* principles due to potential legal and inheritance issues.
4. IVF involving sperm and ovum from parties outside a legal marriage is prohibited (*haram*), as it equates to extramarital relations (*zina*), which must be prevented according to *Sadd az-zari'ah*.

Based on the above regulations, it can be concluded that surrogacy is not permitted in Indonesia.

2. Legal Status of Children Born Through Surrogacy

According to Article 1(1) of Law Number 35 of 2014 on Child Protection, a child is defined as a person under the age of 18, including those still in the womb. In family law, a child's legal status falls into several categories, including:

1. **Legitimate Child** A legitimate child is one born within or as a result of a legal marriage. This is regulated under Article 42 of Law Number 16 of 2016, amending Law Number 1 of 1974 on Marriage.
2. **Illegitimate Child** An illegitimate child is one born outside of marriage and has a civil relationship only with the mother and her family. This is stipulated in Article 43 of Law Number 16 of 2016, amending Law Number 1 of 1974 on Marriage.
3. **Adopted Child** An adopted child is one whose rights are transferred from the legal parents or guardians to adoptive parents based on a court ruling. This is regulated under Article 1(9) of Law Number 35 of 2014 on Child Protection.

To determine the legal status of a child born through surrogacy, the marital status of the surrogate mother must first be considered. Referring to Articles 42 and 43 of Law Number 1 of 1974 (as amended by Law Number 19 of 2016 on Marriage), the following conclusions can be drawn:

If the surrogate mother is unmarried (a single woman or widow), the child is classified as an illegitimate child, having a civil relationship only with the surrogate mother and her family. This is regulated in Article 43 of Law Number 1 of 1974 (amended by Law Number 19 of 2016 on Marriage).

If the surrogate mother is legally married, the child is considered the legitimate child of the surrogate mother and her husband. This is stipulated in Article 42 of Law Number 1 of 1974 (amended by Law Number 19 of 2016 on Marriage).

3. Legal Consequences for Doctors Handling Surrogacy Practices in Indonesia

As the main pillar of the healthcare system, a doctor's responsibility is not only limited to clinical services but also includes disease prevention, health education, and empowering communities to maintain and improve their health. In carrying out their duties, doctors often face situations that require them to make high-risk decisions.

In surrogacy practices, it is clear that doctors assisting in surrogacy violate the law, as surrogacy is prohibited in Indonesia. The primary basis for criminal offenses lies in the principle of legality, which stipulates that no act can be considered a crime unless there is a clear legal provision prohibiting it. On the other hand, criminal liability is based on the offender's fault, meaning that a person can only be subject to criminal sanctions if they are proven to have committed an unlawful act, violated existing regulations, and met the elements of fault. Under Indonesian regulations, there are no explicit sanctions against surrogacy practices. This means that doctors or other parties involved in surrogacy agreements cannot be subjected to criminal penalties.

In assisting the implementation of surrogacy practices, a doctor is considered to have violated ethical codes by performing medical actions that do not comply with standard operational procedures. If a doctor breaches their professional ethical code, they may face sanctions such as reprimands, warnings, or even revocation of their medical license by professional organizations such as the Indonesian Medical Association (Ikatan Dokter Indonesia/IDI). Ethical violations are generally handled by the Medical Ethics Honorary Council (Majelis Kehormatan Etik Kedokteran/MKEK), which is responsible for reviewing and deciding cases related to medical ethics violations.

CONCLUSION AND RECOMMENDATION

Based on Indonesia's positive law, referring to Articles 42 and 43 of Law No. 1 of 1974, which was later amended by Law No. 19 of 2016 on Marriage, the legal status of a child born through surrogacy depends on the marital status of the surrogate mother. If the surrogate mother is unmarried or a widow, the child is considered illegitimate and only has a civil relationship with the mother and her family. This is regulated under Article 43 of Law No. 1 of 1974, as amended by Law No. 19 of 2016 on Marriage. However, if the surrogate mother is legally married (has a husband), the child is considered a legitimate child of the surrogate mother and her husband, as stipulated in Article 42 of Law No. 1 of 1974, as amended by Law No. 19 of 2016 on Marriage.

Under Indonesian regulations, there are no clear sanctions against surrogacy practices. As a result, doctors or other parties involved in surrogacy agreements cannot be subjected to criminal penalties. However, a doctor assisting in surrogacy is considered to have violated ethical codes by performing medical procedures that do not comply with standard operational procedures. If

a doctor breaches their professional ethical code, they may face sanctions such as reprimands, warnings, or even revocation of their medical license by professional organizations such as the Indonesian Medical Association (IDI).

ADVANCED RESEARCH

This study covers the "Juridical Review of the Legal Status of Children Born Through Surrogacy in Indonesia." It focuses on presenting knowledge about the legal status of children born through surrogacy and the legal consequences for doctors handling surrogacy practices. Given the limitations of this study, the author suggests further research on surrogacy, such as a comparative analysis with the laws of other countries that regulate surrogacy and an assessment of regulatory implementation if Indonesia begins drafting a law related to surrogacy.

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