

LEGALITY OF SURROGACY IN INDONESIA BASED ON TRANSCENDENTAL VALUES

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Abstract - Surrogacy practice, where a woman gives birth to another woman's child, is one of the most controversial procedures in the field of assisted reproduction. There are various intentions of surrogacy, and it has been practiced around the world for a long time. This paper aims to discover the legality of surrogacy under the law existed and enforced in Indonesia that govern the activities of surrogacy. There are several countries acknowledging the agreement between surrogate mothers and the genetic parents. Accordingly, a law based on transcendental values is needed in Indonesia in an effort to regulate the surrogacy practice which would possibly give rise to issues of nasab (genealogy), guardian and inheritance.

Keywords: *Surrogacy practice, Transcendental values, Human reproduction*

INTRODUCTION

Many women are experiencing fertility problem and difficulty of getting pregnant and some are medically impossible to get pregnant, but if in the past, their chances of getting pregnant are slim, today they will have hopes due to advances in the field of medical science. Ovum of the woman and her husband's sperm can be matched through fertilization techniques in a tube (through in-vitro fertilization). After the fertilization procedure became successful and the embryo has formed, the embryo is implanted into the womb of another woman who is commonly called the surrogate mother. This practice is commonly referred to as uterine rent, because usually the surrogate mother receives a certain reward for the service (Najib Junaidi, 2018).

Surrogacy is the process of planting an ovum from a fertile woman alongside the sperm of her lawful husband to the womb or uterus of another woman with or without monetary compensation due to a variety of reasons (Suryo, 1995). Among the reasons are the womb or uterus of the owner of the ovum is not fit for pregnancy, or the absence of a uterus, or in conjunction with two egg cells or only one fertile egg, or because the owner of the ovum wants to keep her health and beauty, and for some other motives (Partaloan, 2005). Generally, there are various intentions of surrogacy, amongst them are: i) a woman with no chance of getting pregnant because of a disease or disability that prevents her from pregnancy and child birth, ii) a woman who has had a uterus removal surgery, iii) a woman who wanted to have children without having to go through pregnancy, child birth, and breastfeeding, and also wanted to keep the shape of their body, iv) a woman who wanted to have children but already experienced menopause, and v) a woman who wanted to look for income by renting their womb to other people.

Surrogacy practice, where a woman gives birth to another woman's child, is one of the most controversial procedures in the field of assisted reproduction. Media coverage on surrogacy arrangements tend to focus on the negative aspects of surrogacy, such as the case of 'Baby M' in the United States where the surrogate mother refused to relinquish the baby (New Jersey Supreme Court, 1987).

The two types of surrogacy are namely partial (genetic) and full (gestational). For partial surrogacy, the surrogate mother is also the child's genetic mother, and conception usually occurs with artificial

insemination using the father's assigned sperm. Both partial and full surrogacy can employ in-vitro fertilization (IVF), but in partial surrogacy, the intended father fertilizes the surrogate mother's own egg through artificial insemination. Most parties agree that in cases where women choose to become surrogate mother, the compensation is a fair and necessary part of the arrangement because of the toll of carrying a child (Jargilo, 2016).

In full or gestational surrogacy, both the sperm and the egg of the intended parents are implanted in the surrogate mother, severing her biological connection with the child. Full surrogacy uses IVF, a process in which the egg cells are fertilized by the sperm outside the womb. The parties to the arrangement may prefer to utilize the partial surrogacy method since full surrogacy poses greater medical risk to the surrogate mother. Some couples do not have the option to use their own egg if the intended mothers are infertile, and they must choose partial surrogacy instead (Richardson, 2012).

Surrogacy has been practiced around the world for a long time. The business of surrogacy has increased in many Asian and European countries, especially with Indian woman becoming surrogate mothers to couples in the United States. India has become a country of choice in the business of surrogacy (Musbikin, 2010). This is caused by a lower cost of experts, surgery, and health facility compared to the superpower country. As a comparison, the cost of surrogacy in India is only USD 5,000-6,000 or Rp 50-60 million (exchange rate of 10.000/USD) per baby. Whereas for foreign couples from the West, the cost is between USD 15,000 – 20,000 or Rp 150-200 million. This is still much lower than the cost of surrogacy in the United States which reaches as high as USD 100,000 or Rp 1 billion per baby (Delair, 2000). Generally, in Asia, a surrogacy cost less than USD 5,000. In Indonesia, this business has been around since 1970 when the IVF was introduced, also known as test-tube baby (Dezriza, 2012).

EMERGING ISSUES IN SURROGACY

The practice of surrogacy had its effect on the laws applicable in Indonesia, in relation to marriage law, inheritance law, and health law. It is undeniable that the impact of surrogacy on women is negative, if the surrogate mothers are seen as machines who bear and develop foetus that do not belong to them. This is especially true for poor and illiterate women in the rural area who are in need of money; they would simply agree with the deals arranged by the middleman. The desire for money becomes the driving force for the majority of women to become surrogate mothers. Sometimes the arrangement for surrogacy was done by former surrogate mothers who had become the agent, who approached new surrogate mothers and helped them attend the clinic. This former surrogate mother usually had delivered their surrogate babies in the same clinic. There would be a contract entered into by the surrogate mother (and her spouse), the commissioning parents, and the fertility physicians.

Since the activity can lead to high exploitation and abuse cases, there should be a specific legislation to regulate the activity and the arrangement involving the surrogate mother and the commissioning parents. There must be international safeguards implemented to protect women from any exploitation of having to provide the services to gain profit. However, due to many controversies surrounding surrogacy, it is unlikely that such an international treaty can be formulated and put into effect in the near future (Suketu V. Shah, 2016).

APPLICABLE LAW OF INDONESIA RELATING TO SURROGACY

Despite the surrogate mother technology being a solution for married couples without children, it gives rise to certain issues in the legal system in Indonesia. Issues of morality and legality that have never been thought of. With regard to the above issue, this paper seeks to discover the legal consequence of surrogacy under the Indonesian Positive Law. Explicitly in the Health Act it is mentioned that it is not permitted to rent the womb of anyone other than the legal wife of the couple (Wulandari, 2019).

Fundamentally, the governance of women's bodies and behaviours in public policy has often been justified in the name of protecting women from harm. In Canada for example, same as elsewhere, sex work, pornography, and assisted reproduction have been regulated in such a way that the legal restrictions against reproductive labour are necessary in order to defend the women's vulnerable bodies against any

potential exploitation (Cattapan, 2014). That surrogate mother is one of the IVF techniques (fertilization in-vitro), where the seeds must come from the husband and wife and then placed in the womb of another woman. After the child is born the woman is obliged to give the child to the married couple who are the parties to the agreement (Al Yadainy, F. A, 2020).

This paper is written with the aim to discover the consequence of surrogacy under the law existed and enforced in Indonesia that govern the activities of surrogacy. Surrogacy definitely will bring big changes in the field of medicine and science, and also changes in the way we look at marriage institution, pregnancy and children. Obviously, this is also included in the order of the Islamic Law and the Positive Law.

In the Indonesian Positive Law, it has been explained clearly that the process of delivering a human being must be through a legitimate marriage. If pregnancy and delivery process take place outside of a legitimate marriage, it will have impact on many aspects of the law especially inheritance (rights and obligations). The action is also considered as a violation of norms and it is a crime. Even if an unnatural pregnancy took place, then the regulations on health must oversee the following conditions: firstly, unnatural pregnancy can be done by husband and wife as their last effort to have children, and secondly, the effort of unnatural pregnancy can only be done by a legitimate married couple with the following provisions: (i) the conception of ovum and sperm from the legitimate husband and wife is implanted in the womb of the wife where the ovum originated, and (ii) the process is carried out by medical personnel with expertise and authority in the field (Septikasari, 2009).

In the Indonesian legal system, the position of the *Kitab Undang-undang Hukum Pidana* (KUHP), the Indonesian Criminal Code can be said to be the main guardian in protecting the rights and obligations of every law subject, and also checking on whoever committed offences under the Code. Unfortunately, to this day, there are no specific regulations concerning surrogacy of human being given in detail. The civil law described the agreement between the surrogate mother and the genetic parents as invalid by law, because one requirement to make a certain agreement valid is a legitimate cause (Article 1320) and this requirement was not fulfilled. Thus, it is impossible for a mother to hand over a baby she had just delivered to another party based on an agreement.

The act of 'renting out' wombs is closely related to the law of agreement or engagement. Article 313 KUHP stated that agreement is defined as an action where one person or more attached themselves to another individual or group of people. This is directly proportional with each individual making the agreement after having engagements, and attaching themselves to the agreement made. Article 1233 KUHP accounted that engagement is affirmed as something that arose because of an agreement or constitution. According to both articles, anything listed or promised is considered a constitution and included as the element of agreement.

In order to conclude whether an agreement is valid or otherwise, the requirements of an agreement must be fulfilled by both parties. Article 1320 declared the requirements for a valid agreement to cover: a) a deal from those who attached themselves; b) skills to establish an agreement; c) a primary issue/problem; and d) a cause that is not prohibited. Desriza (2012) argued that agreement in the practice of surrogacy is considered invalid if it does not qualify any one of the requirements stated above, and one of them is having a legitimate cause. Using the service of a surrogate mother is invalid due to the reasons mentioned above.

There are several countries with civil laws acknowledging the agreement between surrogate mother and the genetic parents. The agreement usually contains the surrogate mother's obligations and not only willingness to receive artificial insemination; use the name the genetic parents have picked out for the baby; hand the baby over to the genetic parents immediately after birth; fully assist in the settlement of the family legal procedure associated with the legal status desired and alteration of the child's family name; keep the baby safe and healthy throughout pregnancy; and accept the baby immediately after birth. At the same time, the reciprocal obligations would be from the genetic parents, to pay for all the expenses

throughout the pregnancy including birth costs and for monetary compensation to the surrogate mother (H.J.J. Leenan, 1996).

Below are several regulations overseeing them. Firstly, the Indonesian Constitution No. 36/2009 on Health, Article 127, clause (1) states, “pregnancy efforts outside the natural manner can only be done by a legitimate married couple under the following provisions: (1) The conception of ovum and sperm from the legitimate husband and wife is implanted in the womb of the wife where the ovum originated; (2) The process is carried out by medical personnel with expertise and authority in the field; and (3) The process took place in a certain health facility.”

Secondly, Permenkes RI No.73/Menkes/PER/II/1999 on the Service of Administering Artificial Reproduction Technology provides that the service of artificial reproduction technology can only be given to a husband and wife under legitimate marriage and as their last effort to acquire children, what more if it is based on medical indication (under Article 4). Infringement of regulations in this Ministerial Regulations will be sanctioned by administrative actions (Article 10), in a form of warning up to revocation of the permit of the reproduction artificial technology service.

Thirdly, SK Dirjen Yan Medik Depkes RI (2000) outlines IVF Service Guidelines in hospitals, which include 10 guidelines, *inter alia*, (i) the service of artificial technology can only be carried out with egg cell and sperm from the married couple; (ii) the artificial technology service is part of the infertility service, meaning the service framework is part of the management of infertility service as a whole; and (iii) it is prohibited to carry out surrogacy in any form. Subsequently, it contradicts with the issue of morality because it is not in accordance with the moral norm and culture of the general population in Indonesia or their environment, and it is contradictory with the beliefs of one particular religion (Islam) because there is one basic element that forbids the practice of surrogacy, which is adultery (Az Zahra, Agustina, & Hartati, 2015).

Due to its contradiction with the public orders, then it will become a rumour in the community which will probably end with the surrogate mother being socially ostracized, especially if the status of the surrogate mother is an unmarried girl or a widow. These points are strengthened by Article 1339 KUHP, which states “agreements will not only bind the matter explicitly stated in it, but also to everything else according to the nature of the agreement, required by decency, habit or the law”. This article emphasized that in determining a valid agreement, both sides must not only accord themselves to what had been agreed in the agreement explicitly, but also denoted by decency, habit and the law.

In religious ethics and morals, this problem still triggers controversy. Until this day, in Indonesian law, there are still no specific rules regarding the practice of 'renting out' wombs/or surrogacy in Indonesia. This must be considered immediately, because given the economic factors in Indonesia, we cannot deny the possibility that the practice of surrogacy will become active in this country and Indonesia must immediately make a clear rule regarding the womb rent.

Analysis and Discussion

Universally, Islam acknowledges the relationship between husband and wife through marriage as a basis in creating a society regulated under the guidance of Allah s.w.t. Children born from a legitimate marriage carry genetic components from both of their parents, and these genetic components are what their identities are made up from. This is what worries the Muslims, that the practice of surrogacy will have negative impact on the relationship between husband and wife and also the relationship between parents and their children, and will lead to the destruction of the Islamic family institution. Furthermore, the increase of surrogacy practice will sever children from their ancestral roots, giving rise to inheritance issue.

The conclusion given is that the practice of surrogacy in human is incompatible with the purpose of religion in maintaining the soul, mind, genealogy, and wealth. There are religious leaders and scientists who expressed their concern on the purpose of religion. According to *Imam al-Syatibi*, the purpose of religion includes preserving faith, soul, mind, genealogy and wealth. This is the exact reason why we must

determine whether the practice of surrogacy is appropriate and does not contradict to the religious purpose. If the practice is appropriate, then there will be no objection on the practice of cloning, but if it is not aligned with the purpose of *syara*, of course it must be prevented so that it will not create an issue in the society.

Transcendental value-based law is a law which rely on the process of establishing law through religious doctrines that has been recognized constitutionally in Indonesia. Transcendental law (Absori, 2017) in the development of legal studies emphasizes the integration between legal study and religion that stands in the world of science according to the post-modernism *madzhab*. Therefore, we can understand that the transcendental law is the form of regulations that always add the spiritual aspect as a part of the mentioned legal basis. In other words, there is always the “participation” of God in every regulation made by human, that is the attempt to combine religious norms with the law, which eventually established morality in accordance with religious rules. Post-modernism started to lift values with irrational natures (emotions, feelings, intuitions, personal experiences, and speculations), moral and spiritual as an integral part in understanding scientific studies. Legal thinking is considered not satisfactory (critical not rebellious) against the paradigm of modern law that is liberal and established what is categorized as post-modernism reasoning (Absori, 2015).

The growth of the practice of surrogacy which falls under the term ‘artificial reproduction’ in all parts of the world has impacted the society as mentioned above. Hence, it is necessary for Indonesia to have a legal framework in the form of constitution that oversees the practice of surrogacy in great detail. Legal framework on surrogacy that is applicable in Indonesia has minor details on ‘artificial reproduction’. Keeping in mind that Indonesia is a country with dense cultural and religious values, a rule of law based on transcendental values can actually be established for ‘artificial reproduction’ cases, such as the practice of surrogacy, so that the construction of the artificial reproduction law is a blend of positive law and transcendental values (Absori, 2017); which is based on the faith in Allah s.w.t. and with the Prophetic knowledge in the form of humanization (*ta’muruna bilma’ruf*), liberation (*tanhauna ‘anil munkar*) and transcendence (*tu’minuna billah*).

The transcendence factor must be the basic factor in the development of human science and civilization. Religious leaders and scientists expressed the purpose of religion according to Imam al-Syatibi, in which there are five things to maintain, religion, soul, mind, descendant, and wealth (Syahmuharnis & Shidarta, 2006). This is the exact reason why we must determine whether the practice of surrogacy is compatible or otherwise, with the religious purpose. If compatible, then there will be no objections on the practice of surrogacy, but if it is incompatible with the purpose of *syara*, of course it must be prevented so that it will not cause chaos in the society.

CONCLUSION

The law based on transcendental values is needed in Indonesia in an effort to regulate the activity of surrogacy practice which would possibly give rise to issues of *nasab* (genealogy), guardian and inheritance since the growth of the practice of surrogacy which falls under the term ‘artificial reproduction’ in all parts of the world has impacted the society as mentioned above. Hence, it is necessary for Indonesia to have a legal framework in the form of constitution that oversees the practice of surrogacy in great detail. Legal framework on surrogacy that is applicable in Indonesia has minor details on ‘artificial reproduction’. Keeping in mind that Indonesia is a country with dense cultural and religious values, a rule of law based on transcendental values can actually be established for ‘artificial reproduction’ cases, such as the practice of surrogacy, so that the construction of the artificial reproduction law is a blend of positive law and transcendental values (Absori, 2017); which is based on the faith in Allah s.w.t. and with the Prophetic knowledge in the form of humanization (*ta’muruna bilma’ruf*), liberation (*tanhauna ‘anil munkar*) and transcendence (*tu’minuna billah*).

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