



The Legal Status of Surrogate Mothers in Indonesia

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Abstract

The practice of surrogate mother is widely applied abroad, but in Indonesia there is a lot of opposition from the community. In Indonesia, this practice has not received a clear legal force. This is related to the clarity of the legal status of the child being born as well as the legal status of the rent of the womb of another person who has not been regulated. The purpose of this study is to determine the legal position of surrogate mother and its implementation based on ethics and religion in Indonesia. This study uses a normative juridical approach. The results of this study indicate that surrogate mother in Indonesia is null and void because it is contrary to Article 1320 of the criminal code; in addition, from the side of criminal law is also contrary to Article 284 of the Criminal Code. Even surrogate mother declared not in accordance with the norms of decency in Indonesia.

1. Introduction

Science and technology are growing in every area of human life. Agriculture, plantation, animal husbandry, transportation, environment, industry, tourism, telecommunications, health, medicine and other areas of life require science and technology to increase and produce the amount of production. The increasing number of population growth is also increasing the quality of human resources, making science and technology develop in accordance with the development of time. The invention of various products based on the results of the latest science and technology is growing from time to time, in order to meet the needs of humans. In this case it can be said that to support human activities in meeting their needs will not be separated from science and technology. Moreover, health development in Indonesia is carried out on the basis of humanity, empowerment and independence, fair and equitable and prioritizing benefits.

In this case, the field of Medicine also requires the latest science and technology to cure the patient's disease. The latest discoveries in the field of Medicine are increasingly to improve the degree of human health. New scientific and technological discoveries are aimed not only at human health, but also at animals and plants.

Various species and varieties of superior animals and plants are also present based on new discoveries from science and technology.

Likewise, science and technology in the field of health intended for humans. Starting from the discovery of various types of vaccinations for Disease Prevention, the discovery of the latest drugs, the more sophisticated medical tools used to treat patients as well as a variety of genetically modified products. Genetic engineering products in the field of medicine include cloning, IVF, surrogate mother has been widely developed in the community. The purpose of the development of Science and technology in order to improve the quality of health both physical and non-physical. Although there are still many who argue the pros and cons of this matter.

Cloning was first tested on an animal. In 1962, John Gurdon became the first scientist to make a healthy tadpole from a frog egg with DNA from the gut cells of another tadpole. Decades later, in 1996, the first cloned mammalia from the DNA of an adult sheep was born at the Scottish Roslin Institute. The sheep was named Dolly, who died at the age of 6. In the last decade, BGI-a livestock company conducted pig cloning that was applied in mass production. The company can produce 500 cloned pigs a year (Kristanti, 2014). Cloning technology has also been performed on humans. The first human genetic cloning was born in Hollywood in 2002. Clonaid is linked to the fanatic Raelians-a group that believes cloning can extend human life by hundreds of years. The cloned baby was named Eve. Eve is the result of a genetic reproduction of her own mother, An American woman. Eve was born without physical disabilities by caesarean section and weighed 3.2 kilograms (Liputan6, 2002). The fundamental issue related to cloning is the controversy in society in the form of creation interventions carried out by humans. In this regard, based on religion and belief that the one who created man is God.

The IVF process is a new technological invention in the field of Medicine by taking eggs from women and sperm from men who are accommodated in a tube for a certain period of time with a certain degree of heat as in the mother's womb. In the process of IVF meeting sperm cells with eggs sometimes needed human help. This process is called artificial fertilization, in vitro fertilization or IVF fertilization. Although called IVF in practice the baby is not raised in the tube, but the sperm and egg cells are reunited in a tube and after fertilization occurs, the cells will be returned to the uterus of the woman, who is the mother of the future baby. Sometimes the woman of the future mother is not able to conceive the baby because of various obstacles. In this situation, it can be replaced by a woman who wants to undergo the womb process until the time comes for the baby to be born (Ramli, n.d.). Related to this raises legal issues regarding the legal position of children born to mothers who have eggs with mothers who replace the process of the womb until the baby is born. In Indonesia, the practice of pregnancy attempts outside the natural way is allowed only IVF whose sperm and ovum come from a legitimate married couple and implanted in the wife of the husband in question.

Scientific and technological developments in medicine include not only cloning and IVF, but also surrogate mothers. In fact, the IVF program aims to help legitimate

couples who are infertile (less fertile conditions in their womb) in order to have offspring. The problem that arises next is if the wife has abnormalities in her uterus that resulted in unable to give birth, then the embryo is implanted in the womb of another woman (surrogate mother) which of course is contrary to positive law and most religions in Indonesia such as Islam, Protestant Christianity, Catholic Christianity, Hinduism and Buddhism (Kurniawati & Basuki, 2011).

In Indonesia, the practice of surrogate mother is better known as *sewa rahim*. What is meant by borrowing the uterus or the so-called surrogate mother (surrogate mother) is a woman who enters into an agreement with a married couple where the other woman is willing to contain the seeds of the infertile married couple in exchange for certain (Putri, 2013). Surrogate mother or mother who rents her womb implies a woman carrying a child whose seed comes from another partner and after the woman gives birth, the woman will give the child to the partner from whom the seed came (Judiasih & Dajaan, 2017). The practice of surrogate mother in Indonesia is indeed a lot of people, but in fact there is no firmness about the rule of law. The rule of law that has been in force regarding medical biotechnology is only about IVF, which has been regulated in Article 127 of Law No. 36 of 2009 on health.

Although the practice of surrogate mother is widely applied abroad, but in Indonesia there is a lot of opposition from the community. In Indonesia, this practice has not received a clear legal force. This is related to the clarity of the legal status of the child being born as well as the legal status of the rent of the womb of another person who has not been regulated.

Based on this, the author will raise the problems in this paper related to the legal position of surrogate mother practice in Indonesia, 1). What is the legal status of Surrogate mothers in Indonesia?, and How is the adoption of Surrogate Mother based on ethics and religion in Indonesia?.

2. Methods

This research on surrogate mother uses normative juridical approach. Sources of data and information are secondary and come from the study of documentation and literature. The data and information obtained is content that is verified and analyzed for research purposes.

3. Results And Discussion

The development of science and technology in the field of health is increasingly sophisticated along with population growth and the advancement of human resources. Increasing human resources make technologically advanced products aimed at the welfare, benefit and health of mankind in various areas of life. Article 42 paragraph (1) of Law No. 36 of 2009 states that "technology and health technology products are held, researched, circulated, developed, and utilized for public health." As for Article 42 paragraph (2) of Law No. 36 of 2009 it is stated that "health technology as meant in Paragraph (1) includes all methods and tools used to prevent

the occurrence of disease, detect the presence of disease, alleviate suffering due to disease, cure, minimize complications and restore health after illness.”

In the explanation of Article 42 of Act Number 36 year 2009, it has explained that research and development of Health Science and technology is intended to produce Health Information, Technology, Technology products and health information technology (it) to support health development. The meaning of Health Technology in the law is the way, method, process or product resulting from the application and use of scientific disciplines in the field of Health that generate value for the fulfillment of needs, continuity and improvement of the quality of human life.

Health technology includes all methods and tools used to prevent disease, detect disease, alleviate suffering from disease, cure, minimize complications, and restore health after illness. Health technology is held, researched, circulated, developed and utilized for Public Health and must comply with laws and regulations.

In developing Health Technology conducted trials of technological products on humans or animals. The test of the technology is carried out with the certainty of not harming humans who are used as material for the experiment. Likewise, the trial of this health technology is carried out by an authorized person and with the consent of the person who is being tested. Everyone is prohibited from developing technology and/or technological products that can have an effect and carry a bad risk to public health (Notoatmojo, 2010: 60-61).

The development of health technology is increasingly advanced for the benefit, welfare and human health in general. Examples of these technological developments include X-X-rays, ultrasound (ultrasonography), citiscan, heart records and many more health technologies that are used to examine and see abnormalities in the functioning of organs in the body, in order to immediately find indications of the disease and its treatment system. In addition, health biotechnology is also growing with the advent of cloning technology and IVF.

The technique of surrogate mother or surrogate mother is defined as the use of another woman's uterus to contain the female seed (ovum) that has been fertilized by the male seed (sperm) and the fetus is conceived by the woman until it is born. According to the Blacks Law Dictionary, Surrogate mothers are: 1. A woman who carries a child to term on behalf of another woman and then assigns her parental rights to that woman and then assigns her parental rights to that woman and the father. 2. A person who carries out the role of a mother (Black, 1999). The definition is defined as a woman who uses her uterus to conceive where the unborn child belongs to another woman and after the baby is born the right of ownership or custody of the baby is left to the other woman and the father of the baby. The practice of surrogate mother or surrogate mother is an attempt at pregnancy outside the natural way.

Surrogate mother is also known as rent womb because usually married couples who want to have a child will give in return to a surrogate mother who is able to contain their seed, on the condition that the surrogate mother will give up the child

after birth or at a time that has been set according to the agreement. Surrogacy techniques are usually performed when the wife is unable or unable to conceive or give birth. The embryo is raised and born from the womb of another woman not a wife even though the baby belongs to a married couple who wants to have the child. There are several reasons that lead to the rental of the uterus, are (Yendi, 2011):

- 1) A woman has no hope of getting pregnant normally because of an illness or disorder that prevents her from conceiving and giving birth to a child
- 2) The woman's uterus was removed by surgery
- 3) Women want to have children but do not want to undergo the process of pregnancy, childbirth and breastfeeding children as well as the desire to maintain body shape by avoiding the consequences of the process of pregnancy and body condition after childbirth
- 4) Women who want to have children but have gone through menopause
- 5) Women who want to find income by renting out their uterus to others.

The development of increasingly advanced medicine makes it easy for humans to do biotechnology. Advances in medical technology began to grow rapidly in the 1970s, with the discovery of ways of preserving sperm and the beginning of the era of fertilization outside the uterus (in vitro fertilization) known as the IVF program.

IVF Program is conducted by a legal married couple, where the results of fertilization outside the uterus (zygote) will be returned to the woman who has an egg (ovum), namely the biological mother. The IVF Program is experiencing problems if the biological mother has a disorder in her womb (primary infertility) so that she cannot conceive and raise her own fetus in her womb. Therefore, the biological wife-mother requires the womb of another woman to raise the fetus by giving a certain amount of material remuneration under a certain agreement. The agreement requires that if the child conceived by the other woman has already been born, then the child must be returned to the married couple-the father of the biological mother of the born baby. This is known as a surrogate mother or surrogate mother (Putra, 2013).

The practice of surrogate mothers occurs a lot in India. Many couples from the United States leave the fetus in the womb of Indian women. This is done to provide for the families of women in India who are plunged into poverty. The young Indian women are willing to lend their wombs to couples who usually come from wealthy countries to conceive their children. In this case, often these couples have problems with health, or the wife's uterus is unable to conceive a fetus and other health reasons. India is the main choice of many couples from the United States to do surrogate mother, because the services provided to the surrogate mother there is much cheaper than in Western countries. In the United States, childless couples have to spend more than US\$50,000 or about Rp 495 million to do this in their country, while in India only need between US\$10,000-US\$12,000 to practice surrogate mother. The practice of surrogate mother faces a variety of criticism, both from the ethical, cultural, and from the religious side as well. Some people call this practice the commoditization of women or rather the exploitation of the rich against the poor. In India the profession

of Mother the surrogate is considered by some as a form of abuse of the sacred duty of a mother (Putri, 2013).

The practice of surrogate mother is much happening in Indonesia secretly. In Indonesia, the practice of surrogate mother has not been clearly touched by its legal basis. Existing regulations related to the IVF process are regulated in Law No. 36 of 2009 on health. This is of course different from other countries such as Australia and the United States that have allowed surrogate mothers. An example of a surrogate mother policy in Australia is provided for in the Surrogacy Act number 02 year 2010 (Kurniawati & Basuki, 2011).

The practice of surrogate mother was created by Robert G. Edwards and his colleague Patrick Steptoe developed IVF in 1969. Between 1976 and early 1988, in the United States (US) and Europe so many couples rented a surrogate womb. During this period, 600 children were born from womb rentals, despite the fact that at that time the United States Government had not established any standard rules on the issue.

The practice of surrogate mother is in great demand because there is a mutually beneficial relationship between biological married couples and surrogate mothers. On the one hand wants offspring, on the other hand wants certain rewards that bring financial benefits. In Europe, a woman who wants to become a surrogate mother can get paid up to fifty-six thousand six hundred and forty euros (56,640 euros) or about seven hundred and eight million rupiah (Rp708, 000, 000.00). In Asia, rent uterus valued up to twelve thousand dollars (12,000 USD) America or about ninety-nine million rupiah (Rp 99,000,000.00) (Femina.co.id, 2011).

3.1 The Position Of Surrogate Mother In The Perspective of Indonesian Civil Law

In Article 127 of Act Number 36 year 2009, the requirements of IVF are explained. It is explained in the law that attempts at pregnancy outside the natural way (IVF) can only be carried out by legal married couples with the provision of:

- 1) The result of fertilization of the sperm and ovum of the husband and wife in question is implanted in the wife's uterus from which the ovum originates
- 2) Conducted by health workers who have the expertise and authority to it
- 3) At certain health care facilities.

So in this case the practice of attempting pregnancy outside the natural way (IVF) is allowed only IVF whose sperm and ovum come from a legitimate married couple and implanted in the wife of the husband in question. Next Is The Ministry Of Health Decree Number 72 / Menkes / Per/II / 1999 on the implementation of artificial reproductive technology contains guidelines for IVF services in hospitals by the Directorate of special and private hospitals, the Ministry of health of the Republic of Indonesia states that:

- 1) The service of artificial reproduction techniques can only be done with the sperm and egg cells of the married couple concerned
- 2) Artificial reproduction services are part of infertility services, so the service framework is part of the overall management of infertility services

- 3) Embryos transferred to the wife's uterus at one time no more than 3 (three) can be transferred 4 (four) embryos in the conditions: the hospital has 3 (three) levels of intensive care for newborns; previous married couples have experienced at least two unsuccessful reproductive technology procedures; wives over 35 years old
- 4) 4. Surrogacy of any kind is prohibited
- 5) It is forbidden to sell and buy spermamatozoa, ovum or embryos
- 6) It is forbidden to produce human embryos solely for research. Research on the Like on human embryos can only be done if the goal has been formulated very clearly
- 7) It is forbidden to conduct research with or on human embryos older than 14 days after fertilization
- 8) Eggs that have been fertilized by human spermatozoa should not be bred in vitro for more than 14 days (excluding frozen storage time)
- 9) It is forbidden to conduct research or experiments on or using ova cells, spermatozoa or embryos without permission from whom ova cells or spermatozoa originate
- 10) Trans-species fertilization is prohibited, unless trans-species fertilization is recognized as a way to treat or diagnose infertility in humans. Any hybrid that occurs due to fertilization Stage 2 cells. Fertilization trans-species must end its growth.

The ethics of artificial reproductive technology has not been explicitly stated in the Indonesian Code of Medical Ethics. But in addendum 1, in the book there is a special explanation of several articles of the Revised Code of Medical Ethics Indonesia results Mukernas Medical Ethics III, April 2002. In cloning explained that essentially reject cloning in humans, because it lowers the degree, dignity and human dignity. Therefore appeal to scientists, especially medicine not to promote cloning in humans and encourage scientists to keep using cloning technology in:

- 1) Cells or tissues in an effort to improve the degree of Health for example for the manufacture of monoclonal antigen substances
- 2) Animal cells or tissues for organ cloning research, this is to see the possibility of organ cloning in oneself.

The practice of surrogacy or renting a uterus has not yet been regulated in Indonesia. Therefore, there is no legal protection for the perpetrators of the surrogate mother agreement or the lease of the uterus. In Article 1338 of the Civil Code, the freedom of contract is regulated, where the parties to the contract are free to conclude an agreement, regardless of its content and form. All legally concluded agreements apply to the law for those who make them.

In the implementation of the principle of freedom of contract may not violate the terms of the validity of the agreement in Article 1320 of the civil code, namely:

- 1) Agreement of the parties
- 2) Proficiency of the parties
- 3) About a certain thing

4) The halal cause.

So one of the conditions for the validity of the agreement is that it must have a lawful cause, that is, it does not contradict the law, decency, or public order (article 1320 of the Civil Code related with article 1337 of the Civil Code). As for the practice of surrogacy, this is not an attempt at pregnancy that can be carried out according to health law. Thus the condition of this lawful cause is not met.

In the context of non-fulfillment of the requirements related to the terms attached to the object of the agreement (because it is lawful) can result, among others:

- 1) Be the basis or reason for one of the parties to demand invalidity for the law of the agreement because the agreement does not meet the requirements for lawful causes or causes
- 2) There is no legal basis for the woman who owns the egg or her husband to sue the surrogate mother in case she does not want to give up the baby deposited in her womb.

Another important point to note in surrogate mothers is that the rights of children born to surrogate mothers should not be neglected, especially the right of self-identity as outlined in the birth certificate (in Article 27 of Act number 23 year 2002 on Child Protection). If there is a dispute between the mother and the surrogate mother, then the resolution should put forward the principle of interest for the child born (Pramesti, 2018).

In this case, it can be said that the practice of surrogate mother in its implementation will be null and void, because it does not meet the four conditions of the agreement, namely the lawful causa. It is not permissible for a woman to rent a uterus for another woman who is given a certain reward and is carried out by another legal married couple, which is not a lawful cause. Moreover, the practice although there has been agreement in freedom of contract, but contrary to decency and public order.

3.2 The Position Of Surrogate Mother In The Perspective Of Indonesian Criminal Law

The act of surrogate mother is the act of inserting male sperm into the womb of a woman who is not bound by a legal marriage relationship, if constructed into Article 284 of the criminal code using extensive interpretation, categorized as an act of adultery. Article 284 of the Criminal Code affirms that “punishable by criminal punishment for a maximum of nine months; a). a man who has been married to do gendak (overspel), whereas it is known that Article 27 of civil code applies to him; b). a married woman does Wills, whereas it is known that Article 27 of civil code applies to her; c). a man who has committed the act, even though he knows the guilty has married; d). a woman who has married, who participated in the act, when it is known to her that the guilty has married and Article 27 of civil code applies to her.

If constructed through an extensive interpretation of the act of planting male sperm into the uterus that is not tied to a legal marriage, in the sense of not the wife of the man is the same as overspel as provided for in Article 284 of the Criminal Code.

In this regard, the use of an interpretation in a static law on social issues that are not yet clear rules; as in surrogate mother; is part of a criminal law policy. Given the development of increasingly advanced technology is not always balanced rule of law in accordance with the development of the dynamics of society. As noted by Logeman, that every law as part of positive law, is static and cannot keep up with the development of society, which gives rise to empty space (Abidin, 2007: 114).

3.3 Adoption of Surrogate Mother based on ethics and religion in Indonesia

The development of artificial reproductive technology and the growing dynamics of people's thinking about ethics, norms, values, and beliefs. On the one hand the development of technology can not be contained while the devices that regulate ethics and law have not been able to follow. As a result, the judgment is correct or not based only on the side of interest only. The application of surrogate mother will clash with a variety of complex moral, ethical and legal issues that require thoughtful consideration and regulation in order to provide legal protection guarantees to all parties involved in the application of artificial reproductive technology while referring to respect for human dignity and uphold human rights. In Indonesia the practice of surrogate mother is contrary to the norms of decency.

According to Yusuf Qaradawi stated that all Fiqh members do not allow the rental of the womb in various forms. According to him, jurists and experts from the field of Medicine have issued fatwas that allow spouses or one of them to take advantage of scientific advances to help them realize the birth of children. However, they condition that the sperm should belong to the husband and the egg to the wife, there are no third parties between them, for example, IVF. In this case, if the sperm comes from another man, whether known or not (not based on legal marital relations), then this is prohibited. This also happens if the egg comes from another woman, or the egg belongs to the wife, but the uterus belongs to another woman, even this is not allowed. This inability because this way will raise questions about who is the mother of the baby, is it the owner of the egg that carries the hereditary characteristics, or who suffers and bears the pain of pregnancy and childbirth? But the woman who rents the uterus is pregnant and gives birth not of her own accord. In Surah Al-Mujaadilah: 2 it is stated that "those among you who give birth to their wives are not their mothers; their mothers are only women who give birth to them. And verily, they speak falsehood and falsehood. God is forgiving, forgiving (Tobing, 2013)." The practice of transferring embryos to the uterus (not the uterus of the wife who has the egg) has been stated haram by the Indonesian Ulama Council (MUI) on May 26, 2006.

4. Conclusion

The need to be given a clear and firm legal basis for artificial reproductive technology, especially surrogate mother in force in Indonesia. The need to be given strict sanctions both legal, ethical and religious related to the implementation of surrogate mother in Indonesia. The need for early recognition and awareness related to reproductive health for women towards adulthood, in order to avoid immoral practices and diseases of reproductive disorders. The need for socialization from

health and legal institutions for adolescents or men and women towards adulthood in order to understand reproductive health as well as an understanding of ethics and strong religious teachings in order to avoid immoral practices and reproductive disorders.

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