



## *The Comparative Law Perspective Of Surrogation: Indonesia And Several Countries That Legalized Surrogation*

Ni Nyoman Putri Purnama Santhi<sup>1</sup>

<sup>1</sup>Udayana University, Faculty of Law, E-mail: [boldesarsenal@yahoo.co.id](mailto:boldesarsenal@yahoo.co.id)

### **Info Artikel**

Masuk :8 Juli 2019

Diterima :16 Agustus 2019

Terbit : 30 Agustus 2019

#### **Keywords :**

Surrogation; Surrogate

Mother; Comparative Law

#### **Corresponding Author:**

Ni Nyoman Putri Purnama  
Santhi,

E-mail:

[boldesarsenal@yahoo.co.id](mailto:boldesarsenal@yahoo.co.id)

DOI :

10.24843/KP.2019.v41.i02.p01

### **Abstract**

*In Vitro Fertilization (IVF) program is generally used by married couples who find difficult to have progeny that the wife has difficulty getting pregnancy so she cannot raise her fetus in her own womb. The IVF is a method of assisted reproduction in which male sperm and female egg cells are combined in a cup laboratory where fertilization occurs. One of the specific reasons for the IVF program is because a pregnancy cannot be medically possible because of the risk of danger so that it is not acceptable for the wife's health. This causes urgency to need another woman's womb in raising a fetus by providing a number of material rewards or compensation based on an agreement agreed between the intended parent and other women. After giving birth, then the child should be returned to the intended parent but not to the woman who lent her womb. This is referred to as a surrogate mother. This article is a normative legal research examines and analyses legal sources. It aims to identify legal aspects of surrogate mother not only law in Indonesia but also the law of other countries. This research indicates that regulation of surrogate mother specifically has not been regulated in Indonesian positive law. From a comparative legal perspective, it also discovers that some countries that legalize surrogation basically based on civil rights.*

## **1. Introduction**

At present, the development of advances in medical technology is growing very rapidly in the field of human reproduction. This development is external uterine fertilization or artificial reproductive technology known as In Vitro Fertilization (IVF). Artificial reproductive technology is a technique to manipulate oocytes before they are

transferred as oocytes or embryos. This effort is carried out as a last resort for infertile couples because it can cause distress to the partners proposed and in other ways.<sup>1</sup>

After the success of IVF method, the experts found other problems raised by other infertile couples. The problem is what if the wife's womb is not functioning properly because of conditions that do not allow it to contain. It is like the case of uterine cancer that resulted in his wife's womb must be removed. The case is nothing but making medical experts develop a breakthrough or innovation in artificial reproductive technology in solving the case. Innovations in the process of artificial reproduction technology are known as the surrogate mother.

Surrogation is an extension of the IVF method known as a womb lease agreement, which is an agreement between a woman who binds herself through an agreement with another party (intended parent) to become pregnant against the result of conception of the intended parent who is implanted into her womb, and after delivery is required to deliver the baby to the intended parent based on the agreement made.<sup>2</sup>

Furthermore, Van Dunne argued that surrogacy agreement is based on the basis of deeds in which each of the parties bind themselves to the other party, meaning that there was two (2) separate legal act called the offer and acceptance.<sup>3</sup> Then according to Hamid Laonso and Muhammad Jamil, surrogation or rent of the uterus can be interpreted using another woman's womb to contain female seeds (ovum) that have been mixed with male sperm from the intended parent. The fetus was then conceived by surrogate mother until birth, the intended parent who wants to have children will pay a sum of money to the surrogate mother who rents her womb.<sup>4</sup>

Implementation of a surrogate mother first made in 1987 in South Africa. A woman named Edith Jones, gave birth to triplets from the embryos of her daughter Suzanne and her husband. The birth process of artificial insemination was carried out by Suzanne because of an abnormality in her uterus so that she could not conceive. Therefore Suzanne conducted a surrogation process by lending the womb of her mother Edith Jones to contain the embryo of herself and her husband based on the agreement of their family.<sup>5</sup> The presence of methods of pregnancy outside natural methods such as surrogate mother is the answer for infertile couples who really want the presence of a child.

The legislation in Indonesia, ways to conceive regulated in the Act of the Indonesian Republic Number 36/2009 concerning Health (referred to as the Health Act) which is

---

<sup>1</sup> Irianto, K. (2014). *Panduan Lengkap Biologi Reproduksi Manusia*, Bandung: Alfabeta, p. 315.

<sup>2</sup> Ratman, D. (2012). *Surrogate Mother dalam Persepektif Etika dan Hukum: Bolehkah Sewa Rahim di Indonesia?*. Jakarta: PT Gramedia Indonesia. p. 35.

<sup>3</sup> Mulyana, A. (2017). Resensi Buku (Book Review) Sonny Dewi Judiasih, Susilowati Suparto Dajaan, dan Deviana Yuanitasari, *Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia*, Bandung: Refika Aditama.. *Mimbar Justitia Law Review*, 3(2). 249-255. p. 254.

<sup>4</sup> Laonso, H. dan Jamil M. (2005). *Hukum Islam Alternatif Solusi Terhadap Masalah Fiqih Kontemporer*, Jakarta: Restu Ilahi. p. 41.

<sup>5</sup> Luthfi, A & Syaokani. 1998. *Politik, HAM, dan Isu-Isu Teknologi dalam Fikih Kontemporer*. Jakarta: Pustaka Hidayah, p. 158.

divided by two (2) ways: a pregnancy naturally and pregnancy outside the natural way. Pregnancy outside the natural means referred to is pregnancy with the IVF method. Pregnancy outside of other natural methods, namely the surrogate mother method is not explicitly regulated in the Health Act. Lack of regulation regarding surrogate mother will create legal uncertainty. The arrangement regarding surrogate mother certainly needs to be considered in Indonesian law and regulations because the practice of surrogate mother has been carried out in Indonesia in several case issues. A benchmark law in Indonesia which indicates prohibition of surrogate mother's practice can be seen in Article 127 paragraph (1) Act 36/2009 which will then be discussed in the description of result and discussion on this research.

The IVF program is conducted by a legitimate intended parent where the results of fertilization outside the uterus (zygote) will be returned to the biological mother who has an egg (ovum). Intended Parent is a married couple who wants to have children through IVF. This Intended Parent can be heterosexual couples, same-sex couples (gay or lesbian), or a single parent who craves a baby.<sup>6</sup>

Intended parents may carry out a surrogate arrangement when pregnancy is not medically possible or the risk of pregnancy can pose an unacceptable danger to the health of the mother from the intended parent. In addition to adoption, surrogation can also be an option or choice of ways preferred by same-sex couples to have children. This is usually done in countries that have legalized same-sex marriage.

Compensation in the form of money or materials, in particular, are involved in these settings or might not be. If the surrogate mother concerned receives compensation for conducting a survey, this is called commercial surrogation. Conversely, if the surrogate mother does not receive compensation or compensation other than the replacement of medical expenses and other costs that are reasonable then it is referred to as altruistic surrogation. Legal instrument of surrogacy should also provide financial support for substitute children if the intended parent assigned dies before childbirth, or divorce between the intended parent and the next will not be there to take delivery of the child so as to avoid injustice to the child. The surrogate mother may not have parental rights to a child and certificate of birth must include the name of parent as the parent to avoid legal complications. Guidelines relating to the legitimate child of married or unmarried, or single parent with all rights to parent, support, and inheritance.<sup>7</sup> In addition, there are 2 (two) types of surrogate mother methods which are:

- a. Gestational Surrogacy, surrogacy based on where the embryos came from the husband's sperm and the egg come from the wife (the intended parents) are brought together through the technology of In Vitro Fertilization, implanted in the womb of a surrogate mother (surrogate mother);

---

<sup>6</sup> Norwitz, E. R. & Schorge. 2007. *At A Glance Obstetri dan Ginekologi (Alih Bahasa oleh Diba Artsiyanti)*. Surabaya: Erlangga. p. 52.

<sup>7</sup> Saxena, P., Mishra, A., & Malik, S. (2012). Surrogacy ; Ethical and Legal Issues. *Indian Journal of Community Medicine*,(37)4. 211-213. Doi:10.4103/0970-0218.103466. p. 212.

- b. Genetic Surrogacy, this survey is carried out where the egg comes from a surrogate mother and is met with sperm from the husband (intended parent) which is then planted in the surrogate mother's womb.

Based on the results of the description above, it can be understood that surrogation is a method that can be said to address the issue of a couple of infertile intended parents who are eager to have children with genetics that still come from them. Surrogation is an answer gap in overcoming certain forms of infertility of a married woman who has little hope of being able to get pregnant and have children.<sup>8</sup> The present research aims to discuss and analyse causes the surrogation requires more critical legal review to be discussed by legal experts in various parts of the world. This is because surrogation is becoming one of an international legal issue that still being debated in various parts of the country.

## **2. Research Method**

This research uses normative legal research which in this method examines the legal terms of the internal perspective of the legal norms (vacuum, vagueness, and conflict) as objects of research. The vacuum of norms in research is based on whether or not there has been a regulation of surrogate mother in the laws and regulations in Indonesia, especially the Health Act as an umbrella act, which will create legal uncertainty. The approach in this research consists of a statute approach, conceptual approach, and comparative approach.

The statute approach is used to review and analyze various legal regulations relating to surrogation or leasing of the womb and IVF while the conceptual approach is used to examine the views or doctrines of experts relating to research material so that they will find both understanding, concepts, and relevant legal principles. The comparative approach is used to examine, analyze, and compare positive laws from one country to another, in this case positive law in Indonesia with the laws of the countries that legalize surrogation.

This research uses 2 (two) legal materials, which are primary legal material and secondary legal material. Primary legal materials are all relevant laws and regulations in Indonesia as it hierarchy based on Article 7 paragraph (1) Act Number 12/2011 concerning Legislation Forming. Primary legal materials in this research involved civil code of Indonesia (as known as Kitab Undang-Undang Hukum Perdata), Health Act, Regulation of Health Minister Number 39/Menkes/SK/I/2010 concerning Organizing Artificial Reproduction Technology Services. Then secondary legal materials in this research involved books, legal writing materials such as law journals and scientific journals, theses, dissertations, and the internet or official sites, whereas secondary legal materials are used to support primary legal materials.

## **3. Result and Discussion**

### **3.1 Regulation of Surrogation Based on Positive Law In Indonesia**

---

<sup>8</sup> Henin, M. H. (2008). *Surrogacy: Is There Room For A New Library Between The French Prohibitive Position And The English Ambivalence*. Law And Bioethic, Britain: Oxford University Press, p. 332.

According to Indonesian national law, regulations regarding regulated IVF are generally regulated in Article 16 Act Number 23/1992 concerning Health and Regulation of Health Minister Number 39/2010. On the Article 127 paragraph (1) Act 36/2009 regulate the provision of criminal sanctions that can be imposed on those who conduct surrogate mother. On the Article 127 paragraph (1) Act 36/2009 provides that:

“Pregnancy efforts outside the natural way can only be done by a legitimate intended parent with the following conditions:

- a. the results of sperm and ovum fertilization from the husband and wife concerned are implanted in the womb of the wife from which the ovum originates;
- b. performed by health workers who have the expertise and authority for that;
- c. at certain health care facilities.”

Furthermore, on Article 2 paragraph (3) Act number 39/2010 stated that: "Artificial reproductive technology services can only be given to married couples who are related to legal marriage and as a last resort to obtain progeny and based on medical indications." Based on both regulations It is understood that the practice of surrogate mother was prohibited from being implemented in Indonesia.

Besides from that related to the aspects of the agreement from a legal point of view, a surrogation agreement could be examined from the Civil Code of Indonesia (referred to as Kitab Undang-Undang Hukum Perdata). Based on Article 1320 of Civil Code of Indonesia, the legal requirements for an agreement to be valid need to be fulfilled 4 (four) conditions such as: 1) their agreement that binds itself, 2) the ability to make an agreement, 3) a particular subject matter, 4) a cause not forbidden. The first and second conditions are subjective conditions, while the third and fourth requirements are objective requirements.

Surrogacy agreement viewed from the subjective element of the legal agreement, namely in the form of a binding agreement, the surrogacy agreement is considered to fulfill the conditions for the existence of a “binding agreement”. However, when viewed from Article 127 paragraph (1) Act 36/2009 above it is associated with the objective conditions of an agreement, namely “a cause that is not prohibited”, where further if it is related to Article 1337 Civil Code of Indonesia explained that “a cause is prohibited if prohibited by law or if contrary to morality and public order. “These two articles are interrelated by explaining the intentions and forms of causes that are not contradictory and prohibited by law and public order.<sup>9</sup> Thus from this explanation, it can be understood that the womb lease agreement in Indonesia is invalid or null and void. Indonesian law only allows IVF methods, while pregnancy efforts outside the natural way as well as those stipulated in Article 127 of the Health Act, in this case the lease agreement for a surrogate or surrogate mother or the safekeeping of another woman's embryo is legally contrary to Indonesian legislation and cannot be done in Indonesia.

### 3.2 Legal Perspective of Several Countries That Legalized Surrogation

---

<sup>9</sup> Sanjaya A. W. (2016). Aspek Hukum Sewa Rahim (Surrogate Mother) dalam Perspektif Hukum Perdata dan Hukum Pidana. *Rechtens Law Review*,5(2). 36-47. p. 41.

Early of the surrogation development of many investigations was carried out abroad such as United States of America, United Kingdom, India, Canada, and so on. The technology growing by leaps and bounds, then today surrogacy has been known by almost all the countries in the entire world, both developed and developing countries as well. In case Indonesia is no exception, if that now Indonesia is familiar with the surrogation process. Many countries have learned surrogacy development due to various reasons.

Initially surrogacy program is considered as a breakthrough in vitro fertilization program in addition to IVF received by the general public, but along its development began to arise various problems where surrogacy began to be contradictory, especially in countries with a strong religious element. This is contrary to the developed countries that received a breakthrough in the sophistication of surrogation. Thus the development of the implementation of the survey program is divided into 2 (two), namely the pro and contra circles. Those who are pro with the survey are mostly just looking at it from the worldview of health which provides solutions to problems for infertile couples. Meanwhile, the ones who oppose surrogacy are derived from religious leaders.<sup>10</sup>

Based on several countries that legalized surrogation, they expressed the view that surrogation in essence babies from eggs and sperm of intended parents and then intended parent embryos were deposit in the womb of the surrogate mother. The development until the baby's birth process is no more a bond of an adopted child with a surrogate mother. The status of the adopted child does not have the right to inherit and be inherited, because adopted children are not biological children. Thus the conclusion of this view assumes the status of children born through the process of surrogation is the same as adopted children.<sup>11</sup>

### **3.2.1 Comparative Law of Several Countries That Legalized Surrogation**

#### **3.2.1.1. United States of America (USA)**

The United States of America legal instruments that regulate agreements and compensation for surrogation vary by state and individual depending on sexual orientation and marital status. For these two things, the intended parent and surrogate mother shall regulate legal representatives who fulfill the requirements to protect the rights of both parties during the surrogation process. There are two (2) steps that should be considered in legal proceedings relating to the surrogacy namely: 1) the implementation of surrogacy agreements in accordance with the

---

<sup>10</sup> Lahia, D. (2017). Aspek Hukum Terhadap Bayi Tabung dan Sewa Rahim Dari Perspektif Hukum Perdata. *Jurnal Lex Privatum*.5(4) p. 131.

<sup>11</sup> Thamrin, H. (2014). *Aspek Hukum Bayi Tabung dan Sewa Rahim (Perspektif Hukum Perdata dan Hukum Islam)*. Yogyakarta: Aswaja Pressindo. p. 56.

agreements intended parent and surrogate mother, and 2) the filing of a declaration or acknowledgment for intended parents to parent listed on the birth certificate.<sup>12</sup>

In Latin American countries, the laws of surrogacy are not uniform. Some states such as Mexico permits commercial surrogacy and altruistic. Brazil has 2 (two) resolutions which consider allowing altruistic surrogation. But in other parts of the United States, the legal status of the surrogation agreement has no certainty that is explicitly prohibited or permitted so that the agreement on surrogation in Latin America cannot be said to have clear legal certainty. Thus the validity of the surrogation agreement depends on the area where the surrogation agreement is based on judicial or local policy. On the other side, the judge can consider the surrogate mother agreement null and void due to the lack of a particular contract object or its legality. On the other side, if there are no restrictions or strict local regulations, the judicial court will be able to consider the surrogate mother agreement desired by the intended parent. It seems like in Argentina and Colombia, the judge has recognized the validity of the agreement refers to a surrogate mother with consideration of the best interests of the child principle.<sup>13</sup>

California is one of the states in the United States as the center of ongoing process of surrogacy and California court legalizing surrogacy agreement. This was confirmed by the consideration of the California Supreme Court stating that the surrogation agreement had legal force and determined the following matters:<sup>14</sup>

1. In the case of gestational surrogacy, problems regarding the rights of the child between the Intended Parent and the surrogate mother must be settled based on the surrogation agreement made between the two parties;
2. Position on parents of infants is determined also by surrogacy agreement;
3. The name of the parent intended to be included in the child's birth certificate without having to go through the procedure of adoption;
4. California state law arrangements provide a variety of procedures as far as the final ratification of a surrogation agreement. For example, the facilitator surrogacy as parents were accommodating and finance funds for the purposes of the surrogacy process is independent and deposit services that will be taken care of by a lawyer.

### 3.2.1.2. United Kingdom (UK)

UK is a country that legalized surrogation. Surrogacy arrangements in the UK is regulated by the United Kingdom's surrogacy act 1985 which include the rights and obligations intended parent and the surrogate mother as well as limits in accordance with English law related to the surrogacy agreement. The limit is as an example of

---

<sup>12</sup> The Surrogacy Experience. *Surrogacy Laws*. Available from: <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (Accessed 5th of May 2019).

<sup>13</sup> Hevia, M. (2018). Surrogacy, Privacy, And The American Convention On Human Rights. *Journal Of Law And The Biosciences*.5(2). 375-397. Doi: [10.1093/jlb/lisy013](https://doi.org/10.1093/jlb/lisy013), p.388.

<sup>14</sup> Judiasih, S.D., Dajaan, S.S., & Yuanitasari D. (2016). *Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia*. Bandung: PT Refika Aditama, p. 47.

the illegitimate surrogation agreement if the costs agreed upon by two parties are outside the details of the agreement. In other cases including violations of criminal law if a person advertises to find a surrogate mother or offer its services to become a surrogate mother. Although the law of surrogation in the UK is legal, the development of time and sophistication in medical technology entails that the implementation of such surrogation law in the UK must be considered. This is because there is an assumption that British law seems outdated and should be addressed. For example Surrogacy's Act in the UK does not support commercial surrogation agreements. As a result, the right of parents to the child of a surrogacy process when born and then given to the custody of surrogate mother.<sup>15</sup>

The biggest problem for the intended parent in the UK who want the surrogacy process is the difficulty of finding a surrogate mother. The reason is that a surrogate mother is paid a minimum for their long and tiring efforts. As for looking for a surrogate mother who fulfills quality, it takes years. In addition, the big costs incurred by the parent intended not only cover the medical costs of health but also compensation for the cost of the life of a surrogate mother during pregnancy surrogacy process continuity. Surrogacy's Act in the United Kingdom also regulates legal provisions that the surrogate mother can keep babies until intended parents get a court decision that is valid through a legal process, that intended parents are legitimate parents.

### 3.2.1.3. India

Before 2005, India had no regulations related to the field of fertility including surrogation. However, in its continuity, India is guided by the provisions contained in the Indian Council of Medical Research or ICMR. Then later in 2005, the ICMR made guidelines for surrogation clinics. This guideline aims to protect the interests of the intended parent. The existence of these guidelines has drawn criticism because they are considered to be contrary to the reproductive rights of the surrogate mother.

ICMR urges the Indian government to issue regulations that can protect the rights of all parties concerned with a surrogate agreement, especially the rights of the surrogate mother. Then as the development of surrogation practices in India was so rapid that it made the surrogation industries in India guided by the provisions contained in the Assisted Reproductive Technology Regulation Bill 2010. The provisions stated several things: <sup>16</sup>

1. The surrogation process can be carried out by single parents or married couples;
2. The intended parent must pay for all the processing costs used during pregnancy until after the birth of the baby;
3. Surrogate mothers are permitted to receive compensation, but do not include specific numbers;

---

<sup>15</sup> Sensible Surrogacy. Surrogacy In The UK. Available from: <https://www.sensible-surrogacy.com/surrogacy-uk/>, (Accessed 8 Mei 2019)

<sup>16</sup> Judiasih, S.D., Dajaan, S.S., & Yuanitasari D. (2016). *Op.cit*, p. 52.



4. The names listed on the child's birth certificate from the surrogation process are intended parent so that the intended parent is considered a legitimate parent.

#### 3.2.1.4. Canada<sup>17</sup>

The surrogation process in Canada is legal but is limited to the federal level. Canadian law only allows for an altruistic surrogation process which means the surrogate mother cannot be paid more than the details that should be and must be based on clear reasons such as the mother of the intended parent cannot contain or be barren due to a history of certain diseases. The existence of a surrogation agreement in Canada must respect the federal laws of the local area, depending on the area where the intended parent and surrogate mother lives. Canadian law is very explicit and regulated by Bill C-6, namely the Assisted Human Reproduction Act (AHR Act). AHR Act explicitly places restrictions on the surrogation agreement in Canada which includes:<sup>18</sup>

1. There are no other parties will consider another woman to be a surrogate mother, to bid and pay for it with the lure of wages or commercially accompanied by reasons that are not quite legitimate;
2. There is no woman who will receive consideration for the airport to become a surrogate mother by commercial or purely financial reward;
3. There is no party will consider, providing details, offers, or advertise to others to cooperate by promising commercial aiming to be involved in the process of surrogacy.

The rules governing surrogacy in Canada have a rather different implementation from countries that legalize other surrogates. Unlike the United States and Ukraine for example, in Canada surrogate mother has the right as a parent to the birth of a baby from the surrogation process. If during the surrogate mother's surrogation process the mind changes, the surrogate mother will have the right when the baby is born whether the contract is valid or not. This is because in Canada it does not have a kind of guideline on pre-surrogation contracts as in the states of the United States. In addition, there is no precedent about how the court will handle such cases. If the case occurs, then the intended parent must demand custody and the local court should examine the agreement of the surrogation agreement made between the intended parent and surrogate mother.

Federal Act in Canada allows the surrogate mother to request custody regardless of the implementation of the desired contract or not. In other words, a request for a surrogation is usually submitted and approved for several weeks which means that

---

<sup>17</sup> Sensible Surrogacy. *Legal Commercial Surrogacy in Canada Has Been Proposed In The Government*. Available from: <https://www.sensible-surrogacy.com/legal-commercial-surrogacy-in-canada-has-been-proposed-in-the-government/>, (Accessed 5th of May 2019).

<sup>18</sup> *Ibid.*

the legal process to obtain legitimacy in determining the pregnancy occurs after the birth of a baby surrogation.

#### 3.2.1.5. Israel<sup>19</sup>

The surrogation agreement in Israel should be approved by the designated state committee. The state committee has the role of evaluating the compatibility of all parties with the process and overseeing the agreement. Prior to the issuance of the approval for the surrogacy arrangement, the state committee must be convinced of the inability of the parent intended for pregnant mothers. This is to clarify the legitimate reasons for holding a surrogation agreement. In addition, state committees must also monitor the compatibility of all parties involved in the surrogation process, especially the intended parent and surrogate mother parties until they have received and know adequate counseling. In addition, there should be a mediator appointed to settle any dispute which is likely to arise as a result of their surrogacy agreement.

#### 3.2.1.6. Grece<sup>20</sup>

During its development, surrogacy agreement in Greece based on the authorization of the court before the agreement further processing. The court can only consider whether the legal conditions have been fulfilled and the intended parent and surrogate mother can process the surrogation agreements made for certain other matters as long as there are no restrictions on the surrogate mother's autonomy in ways that are unacceptable, both in the form of provisions to prevent the surrogate mother from making her own decisions about her body during the continuation of the investigation or relating to compensation for the surrogation agreement that is legally determined.

#### 3.2.1.7. South Africa<sup>21</sup>

In South Africa, the Children Act requires that the surrogation agreement be confirmed by the High Court which should state based on the available evidence that the intended parent and surrogate mother have made an agreement on an adequate surrogation agreement. This is intended to ensure that the surrogate mother's reasons are reasonable to be willing to carry out the financial investigation process only, and the court requires psychological and medical expert reports, payment specifications for surrogate mother and financial background reports for the prospective surrogate mother. With these methods either party intended parent or surrogate mother candidates to know clearly about their rights and an independent body to monitor the agreement itself and its implementation to ensure free consent and the exploitation of the surrogate mother.

---

<sup>19</sup> Judiasih, S.D., Dajaan, S.S., & Yuanitasari D. (2016). *Op.cit*, p. 43.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Loc.cit*.

In the case, the law recognizes the origin and natural adoption as two models of parent-child legal relations traditionally. Legal recognition of surrogacy puts a model change that parents based on the existence of an intention and agreement is possible on the basis that the legal relationship of parent and child. Thus, parents are no longer seen as merely biological facts, but socially constructed status comes from the agreement and intention to become parents.

The legal status of surrogacy varies in each country and region. Some countries completely prohibit commercial and altruistic surrogation, and some other countries only allow altruistic surrogation with notes accompanied by payment of reasonable medical expenses to the surrogate mother. But not a few also, there are countries that allow surrogacy both the altruistic and commercial. Thus it can be said that at present universally the legal status of surrogation is uncertain not explicitly prohibited or permitted.

#### **4. Conclusion**

The regulation of surrogate mother in Indonesia is still contradictory and its implementation in Indonesia is still carried out secretly. The practice of surrogate mother is only based on the agreement law which is guided by Code Civil of Indonesia. The government has banned the practice of surrogate mother as with the issuance of the Health Law which provides criminal sanctions for those who practice surrogation and are only limited to regulating the provisions for the implementation of IVF Thus all forms of surrogate mother agreements conducted in Indonesia or by a married couple or individual Indonesian citizens is null and void because it conflicts with the laws and regulations that exist in Indonesia.

The regulation of surrogation is a problem issue that always has been debated in various countries in the world. Problems with different legal perspectives and the increasing development of requests for surrogation by intended parents in each country, gave birth to thought to need to make an international legal instrument related to the regulation of surrogation. It should be noted for countries that legalize surveillance to do legal substance strengthening in the international conventions of each country. Strengthening the legal substance needs to be sought to avoid vulnerable problems arising from agreements on surrogate mother agreements with intended parents. Strengthening the legal substance, for example in the form of: rights and obligations and responsibilities of each party, surrogate mother autonomy in carrying out the process of survey, compensation agreement or costs arising from the surrogation process, for example health expenses related to pregnancy surrogation.

#### **REFERENCES**

##### **Book**

- Diantha, I. M. P. (2017). *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*. Jakarta: Prenada Media Group.
- Henin, M. H. (2008). *Surrogacy: Is There Room for a New Library Between the French Prohibitive Position and the English Ambivalence, Law and Bioethic*, United Kingdom: Oxford University Press.
- Irianto, K. (2014). *Panduan Lengkap Biologi Reproduksi Manusia*, Bandung: Alfabeta.
- Judiasih, S.D., Dajaan, S.S., & Yuanitasari D. (2016). *Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia*. Bandung: PT Refika Aditama.
- Laonso, H. dan Jamil M. (2005). *Hukum Islam Alternatif Solusi terhadap Masalah Fiqh Kontemporer*, Jakarta: Restu Ilahi.
- Luthfi, A & Syaukani. 1998. *Politik, HAM, dan Isu-Isu Teknologi Dalam Fikih Kontemporer*. Jakarta: Pustaka Hidayah.
- Norwitz, E. R. & Schorge. 2007. *At A Glance Obstetri dan Ginekologi (Alih Bahasa oleh Diba Artsiyanti)*. Surabaya: Erlangga.
- Ratman, D., (2012), *Surrogate Mother dalam Perspektif Etika dan Hukum : Bolehkan Sewa Rahim di Indonesia?*, Jakarta: PT Gramedia Indonesia.
- Thamrin, H. (2014). *Aspek Hukum Bayi Tabung dan Sewa Rahim (Perspektif Hukum Perdata dan Hukum Islam)*. Yogyakarta: Aswaja Pressindo.

### **Journal**

- Hevia, M. (2018). Surrogacy, Privacy, And The American Convention On Human Rights. *Journal Of Law And The Biosciences*.5(2). 375-397. Doi: [10.1093/jlb/lisy013](https://doi.org/10.1093/jlb/lisy013), p. 388.
- Lahia, D. (2017). Aspek Hukum Terhadap Bayi Tabung dan Sewa Rahim Dari Perspektif Hukum Perdata. *Jurnal Lex Privatum*.5(4) p. 131.
- Peng, L. (2013). Surrogate Mothers: An Exploration of the Empirical and the Normative." *American University Journal of Gender Social Policy and Law*,(21)3. 555-582.
- Mulyana, A. (2017). Resensi Buku (Book Review) Sonny Dewi Judiasih, Susilowati Suparto Dajaan, Dan Deviana Yuanitasari, Aspek Hukum Sewa Rahim Dalam Perspektif Hukum Indonesia, Bandung: Refika Aditama, *Mimbar Justitia Journal*,3(2). 249-255.
- Muntaha. (2013). Surrogate Mother Dalam Perspektif Hukum Pidana Indonesia. *Mimbar Hukum Journal*,(25)1. 76-86.

Sanjaya A. W. (2016). Aspek Hukum Sewa Rahim (Surrogate Mother) Dalam Perspektif Hukum Perdata dan Hukum Pidana. *Rechtens Journal*,5(2). 36-47.

Saxena, P., Mishra, A., & Malik, S. (2012). Surrogacy: Ethical and Legal Issues. *Indian Journal of Community Medicine*,(37)4. 211-213. doi:[10.4103/0970-0218.103466](https://doi.org/10.4103/0970-0218.103466).

### **National Law and Regulations of the Republic of Indonesia**

Act of the Indonesian Republic Number 36/2009 concerning Health

Act of the Indonesian Republic Number 12/2011 concerning of Legislation Forming

Civil Code of Indonesia (Kitab Undang-Undang Hukum Perdata).

Regulation of Health Minister Number 39/Menkes/SK/I/2010 concerning Organizing Artificial Reproduction Technology Services.

### **Other Legal Instruments**

Bill C-6-the Assisted Human Reproduction Act (Surrogation Legal Instrument of Canada)

Assisted Reproductive Technology Regulation Bill 2010 by Indian Council of Medical Research (Surrogation Legal Instrument of Canada)

### **Internet**

Sensible Surrogacy. *Legal Commercial Surrogacy in Canada Has Been Proposed In The Government*. Available from: <https://www.sensible-surrogacy.com/legal-commercial-surrogacy-in-canada-has-been-proposed-in-the-government/>, (Accessed 5th of May 2019).

Sensible Surrogacy. *Surrogacy In The UK*. Available from: <https://www.sensible-surrogacy.com/surrogacy-uk/>, (Accessed 8 Mei 2019).

The Surrogacy Experience. *Surrogacy Laws*. Available from: <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html>, (Accessed 5th of May 2019).